FIRST DIVISION
April 7, 2014

No. 1-12-3030

**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

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 C6 61078 |
| | ) | |
| BERNARD FOSTER, | ) | Honorable |
| | ) | Frank G. Zelezinski, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

**ORDER**

¶ 1 ***Held*:** We hold that the evidence was sufficient to find that defendant committed burglary, and that the eight-year sentence was not excessive.

¶ 2 Following a bench trial, defendant Bernard Foster was convicted of burglary and sentenced to eight years in prison as a Class X offender. On appeal, defendant contends the evidence was insufficient to prove he burglarized the victim's home and that his sentence is excessive in light of certain mitigating factors. We affirm.

¶ 3 The record reveals that following a burglary at 134 Algonquin Street in Park Forest, a vanity was missing from a bathroom. At trial, Casmira Evans, who lived next door, testified that

on August 29, 2011 at approximately 10 p.m., her front door was open and she was in her living room watching television. Evans heard a knocking or banging noise coming from outside and looked out her window, but did not see anything on the street. When the noise stopped, Evans looked outside again and observed that the lights at the house next door were turned on and then off. From her door, Evans made eye contact with a man looking out from the door of the house next door, but she could only see the upper part of the man's face. Evans called 9-1-1 and explained there was a "black individual" who was not the owner inside the house next door.

¶ 4 When Evans looked outside again, she observed defendant going down the driveway of the house next door with a dolly that contained a large, dark object that she believed was a countertop. Eventually, defendant reached the middle of the street, where a streetlight was on, and looked back, allowing Evans to get a good look at defendant's face. Evans immediately recognized defendant as her neighbor from across the street. Upon arriving at his home, defendant pulled the dolly inside and turned off the light.

¶ 5 Officer Kathryn Singer, who responded to the scene and spoke with Evans, testified that she observed that the rear doors of 134 Algonquin Street were shattered and a brick was lying in the shattered glass. Officer Singer further observed that a fireplace had been removed from a wall, a stove had been removed from the wall in the kitchen, and a refrigerator was in the hallway. In the bathroom, the vanity was missing and there was damage to the wall where the vanity had been. Officer Singer then went to a house across the street, where defendant came to the door. In plain view in the living room, Officer Singer observed a vanity that was not hooked up to anything and had remains of a wall on its rear. After defendant's girlfriend gave consent to search the residence, officers also recovered a wrench from the couch and saw a dolly in the laundry room. The vanity was taken to 134 Algonquin Street, where it remained. Using photographs introduced by the State, Officer Singer identified the vanity that was found in

defendant's house and the damage she observed on the bathroom wall at 134 Algonquin Street. On cross-examination, Officer Singer acknowledged that the vanity she saw in defendant's house was mostly white and appeared speckled on the top.

¶ 6 Raymond Doogan, the owner of 134 Algonquin Street, testified that no one was living in the house at the time. On the evening of August 29, police notified him to go to his house, where he observed that the back door window was broken, the refrigerator had been moved into the living room, and a bathroom sink and vanity had been removed. Doogan testified that he had not given anyone permission or authority to enter the property or take anything from inside. Additionally, Doogan testified that the vanity was recovered and eventually reinstalled in its original location.

¶ 7 In closing, defendant contended that the State failed to prove he had ever entered Doogan's home and that he intended to commit a theft. Defendant noted that Evans did not see defendant enter or exit Doogan's house. Further, defendant asserted there was an insufficient connection between the vanity found in defendant's house and the missing vanity from Doogan's house because Doogan did not identify a particular vanity or testify that a particular vanity was reinstalled. Additionally, defendant noted the discrepancy between Evans's description of the object she saw and the vanity's white color.

¶ 8 In response, the State contended that it proved the vanity in defendant's house came from Doogan's house through Doogan's testimony that a vanity was removed, the officer's testimony that the vanity was brought back, and Doogan's further testimony that the vanity was reinstalled. As to the discrepancy between Evans's description of the object she saw and the vanity's white color, the State asserted that because it was 10 p.m. when she was making her observations, it was reasonable that the object appeared dark to her and further, the top part of the vanity was a mix of light and dark colors.

¶ 9 In finding defendant guilty of burglary, the court stated that although defendant was not found within Doogan's house, he was found immediately leaving the house after Evans heard various noises. The court further stated that the only vanity that existed in the case was found in defendant's house and subsequently removed, received by Doogan, and reinstalled. The court also compared the picture of the vanity that was recovered with the picture of Doogan's bathroom with the vanity missing The court noted there was a "bit of drywall" attached to the back of the vanity's sink, while portions of the drywall in Doogan's bathroom had been torn off. The court noted a "very close, if not identical" match between the pieces of drywall attached to the vanity and the missing drywall in the bathroom, which indicated that the recovered vanity was ripped off the wall of Doogan's bathroom.

¶ 10 Defendant filed a motion for a new trial, which the trial court denied. The court acknowledged it had compared pictures of the vanity and bathroom wall to reach its conclusion, noting "it is common sense in looking at the evidence that was before the [c]ourt." Additionally, the court found there was "no question" that the vanity recovered from defendant's house was the same vanity removed from Doogan's bathroom. The court also stated that Evans, as a lay person, might not know the exact name for a vanity or sink.

¶ 11 A presentence investigation report (PSI) revealed that 37-year old defendant's background included 19 prior convictions since the age of 16. These prior convictions included theft, vehicle trespass, battery, residential burglary, driving with a revoked license, and criminal damage to property. Defendant had previously been a Gangster Disciple and left the gang when he was 24 years old.

¶ 12 Defendant reported a good relationship with his parents and four siblings. Additionally, defendant had a 2-year old son whom he did not see often and a 14-year-old son who lived with defendant's mother. Defendant further reported that he completed three years of high school and

received a G.E.D. while incarcerated at age 19. In the summer of 2011, defendant was briefly employed cutting lawns and had previously installed cable for a subcontractor and held restaurant jobs.

¶ 13 At the sentencing hearing, the State asserted that defendant had 19 convictions dating back to 1989, including seven prior felony convictions. Further, at the time of this offense, defendant was on parole for criminal damage to property. Defendant had three prior convictions for either residential burglary or burglary. The State described defendant as a "career criminal who has been doing this since he was a juvenile." The State also acknowledged that due to his background, defendant had to be sentenced as a Class X offender.

¶ 14 In mitigation, defendant presented the testimony of different family members. Patricia Wright, defendant's sister, testified that defendant was a good person, a very good father, and a "pretty good example" to his 14-year-old son. Wright further testified that defendant "definitely needs to be there" to help raise his son, who missed defendant.

¶ 15 Ella Mae Foster, defendant's mother, testified that defendant was a "beautiful person" and good to her. Defendant would help Foster cut grass, paint, and clean the house, and she needed defendant to return home.

¶ 16 Defense counsel also read into evidence a letter from defendant's 14-year-old son, which stated that defendant was a good person, father, and friend. Defendant's son further wrote that he needed his father and had not known him to be violent or hurtful.

¶ 17 Defense counsel then argued for the minimum six-year sentence, noting defendant's family connections and asserting that despite his criminal record, he was a good person and paid attention to his son. Defendant had a good relationship with his parents, had been employed, and had completed the requirements for his G.E.D. Defendant further asserted that the offense was a

property crime where no one was hurt, no one was living in the house, and its owner had been made whole.

¶ 18 In allocution, defendant stated that he did not blame anyone and that he "[doesn't] always do the right thing." Defendant further stated although he knew he "can't just walk away free for my actions," he would like to return home soon.

¶ 19 In announcing defendant's sentence, the court stated as follows:

> "Well, the [c]ourt heard the evidence in the case, and the [c]ourt has heard all matters in aggravation and mitigation, particularly the testimony in mitigation, as well as the [c]ourt has reviewed the [PSI], and the arguments of the lawyers, and [defendant's] allocution presented to the [c]ourt.
>
> Certainly there are a number of matters which cut both ways in aggravation and mitigation.
>
> In mitigation [defendant] certainly has a family life and people who care for him, his family, as indicated by the testimony I have heard and the statement of his son.
>
> In aggravation his record speaks for itself. It is extensive, and without elaborating into it, he's got numerous felony convictions.
>
> By the nature of his felony convictions, this is a Class X case of which the minimum would be [6] to [30] years for purposes of sentencing.
>
> Considering all factors I have before the [c]ourt, noting particularly the nature of the offense in which no one was actually

> hurt physically, I am going to sentence [defendant] to serve eight years in the Illinois Department of Corrections.***"

¶ 20 After the sentence was imposed, the court denied defendant's motion to reconsider, which contended that the sentence was excessive in light of the ample mitigation evidence presented.

¶ 21 On appeal, defendant contends the evidence was insufficient to prove he committed the burglary. Defendant asserts that his guilt was primarily based on Evans's identification of him as the person she saw leaving Doogan's house. According to defendant, Evans's testimony was unreliable and inadequate because Evans did not see defendant enter or exit Doogan's house and she could not identify him as the person inside the house. Defendant further argues the evidence was insufficient because Doogan never identified the vanity found in defendant's house as belonging to him and the object Evans described on the dolly did not match the description of anything removed from Doogan's house.

¶ 22 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 prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Our function is not to retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Rather, in a bench trial, the trial judge, sitting as the trier of fact, determines the credibility of witnesses, weighs and draws reasonable inferences from the evidence, and resolves any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). A conviction can be sustained upon circumstantial and direct evidence, and to prove guilt beyond a reasonable doubt does not mean that the trier of fact must disregard the inferences that flow normally from the evidence before it. *People v. Patterson*, 217 Ill. 2d 407,

435 (2005). We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 23 A person commits burglary when, without authority, he knowingly enters or remains within a building with intent to commit therein a felony or theft. 720 ILCS 5/19-1(a) (West 2010). Defendant primarily argues that Evans's identification of defendant as the offender was inadequate to prove he was the intruder because Evans did not see him enter or exit the burgled house and could not describe or identify the person who was inside the house. Defendant then considers the factors generally used to determine the reliability of an identification as articulated in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972): (1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. The State, however, correctly observes that this test does not apply to the facts of this case.

¶ 24 First, there is no authority to support defendant's claim that a witness must see the entrance or exit of the offender to sustain a conviction for burglary. Like any other criminal conviction, a conviction for burglary is considered under the well-established standards that apply to a challenge to the sufficiency of the evidence. Here, Evans's testimony about observing a person in Doogan's house was only a fraction of the evidence presented at trial.

¶ 25 Most notably, Evans positively identified defendant, whom she recognized as her neighbor, using a dolly to roll an object down Doogan's driveway after she had heard a knocking or banging noise and saw a man inside Doogan's house. Evans further testified that she observed defendant pull the dolly inside his house. Upon her arrival at the scene, Officer Singer

observed that the rear doors to Doogan's house were shattered and that there was damage to Doogan's bathroom wall where a vanity had been. Additionally, Doogan testified that his bathroom was missing a vanity. In plain view in defendant's living room, Officer Singer observed a vanity with drywall material attached to its rear. Officer Singer also found a dolly and a wrench in defendant's house. Officer Singer testified that the vanity found in defendant's living room was taken to 134 Algonquin Street and remained there, and according to Doogan, his missing vanity was recovered and reinstalled in his house. This evidence was more than sufficient to prove defendant's guilt. Further, defendant's arguments that Doogan did not identify a particular vanity and that Evans's description of the item on the dolly did not match the vanity are unpersuasive where these alleged weaknesses in the evidence were all presented to, and rejected by, the trier of fact. See *People v. Baugh*, 358 Ill. App. 3d 718, 737 (2005). Any purported omissions or flaws in Evans's identification of defendant or other evidence is overwhelmingly overcome by the totality of the evidence, both direct and circumstantial, and the reasonable inferences therefrom.

¶ 26 Next, defendant contends his sentence was excessive in light of the nature of the offense and certain mitigating evidence. Defendant argues that the offense was a mere property offense in which the property was returned to its owner and no weapons or violence were involved. Defendant further asserts that the trial court did not properly weigh the evidence of his strong family ties, education, and employability.

¶ 27 The trial court has broad discretionary powers in imposing a sentence and the trial court's sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial court is generally in a better position than the reviewing court to determine the appropriate sentence, a process that involves balancing all factors in mitigation and aggravation, including the defendant's age, demeanor, habits, mentality, credibility, criminal history, general

moral character, social environment, and education, as well as the nature and circumstances of the crime and the defendant's role in the commission of it. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). In reviewing a claim that a sentence within statutory limits is excessive, the court must determine whether, given the particular facts of the case, the sentence is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 55-56 (1999). We presume that the court considered all mitigating factors and rehabilitative potential before it, and the burden is on the defendant to affirmatively show the contrary. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). We cannot substitute our judgment for that of the trial court merely because we may have balanced the appropriate factors differently. *Quintana*, 332 Ill. App. 3d at 110. Further, we will not alter a sentence within the statutory limits unless the trial court abused its discretion. *People v. Hayes*, 409 Ill. App. 3d 612, 630 (2011).

¶ 28 Because of defendant's status as a Class X offender, the sentencing range for his offense was 6 to 30 years in prison. 730 ILCS 5/5-4.5-95(b) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). Here, defendant has not shown that the court failed to consider the mitigating evidence presented. During the sentencing proceeding, the court stated it had heard all of the matters in aggravation and mitigation, "particularly the testimony in mitigation," and referenced defendant's family life and the testimony elicited from his family members. The trial court also stated that it considered "particularly the nature of the offense in which no one was actually hurt physically." Although the trial court may not disregard evidence in mitigation, the trial court may determine the weight to attribute to it. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993). Here, the trial court's comments suggest that it indeed considered mitigating evidence when it imposed a sentence that was just two years over the minimum. Under these circumstances, and in light of defendant's extensive recidivism, which included seven prior

felony convictions, the trial court did not abuse its discretion and defendant's sentence was not excessive.

¶ 29 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 30 Affirmed.