THIRD DIVISION
September 24, 2014

No. 1-13-1141

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. 11 CR 21359
	)	
KEITH GILMORE,	)	Honorable
	)	Ellen Beth Mandeltort,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's burglary conviction affirmed where the trial court could reasonably determine the testimony of a witness who drove defendant from the burglary site and admitted to having a substance abuse problem was credible and corroborated by the other evidence presented. Defendant's DNA analysis fee is vacated based on the assumption that due to a prior felony conviction, a DNA fee had already been assessed.

¶ 2 After a bench trial, the trial court found defendant, Keith Gilmore, guilty of residential burglary and sentenced him to 20 years in prison, ordering him to submit a DNA sample and pay a corresponding DNA analysis fee. Gilmore appeals, asserting (1) his conviction should be

reversed because the evidence at trial was insufficient to convict him, and (2) the DNA analysis fee should be vacated. For the following reasons, we affirm Gilmore's conviction and vacate the fee.

¶ 3 At trial, Robert Nishimoto testified that he and his family lived at 650 Schooner Lane in Elk Grove Village, Illinois. They left their home for the airport at around 9:15 a.m. on November 11, 2011. Nishimoto testified that he returned home after about an hour and a half to find his front door open and part of the lock on the porch. Inside his house, "stuff was thrown around" and books and doors were opened. Nishimoto also discovered a suitcase, jewelry, coins, money, and a video camera were missing. None of these items was ever recovered. Nishimoto never saw Gilmore in his home or neighborhood.

¶ 4 Susan Geraldi, who lives five houses east of Nishimoto, testified that she saw a red Cadillac parked in front of her home around 9:40 a.m. that morning. She heard quiet knocking at her door, but she did not answer. She then saw two men walk back to their car, get in, and leave. She continued looking out the window and noticed an older-model, burgundy-maroon Buick "that kept circling the block several times." A little later, Geraldi went through her garage to get her newspaper and "felt like someone was looking at" her. As she looked to her right, she saw the same burgundy car parked two houses away, across the street. Its headlights were on and two occupants, a man and a woman, were sitting in the front seat. She quickly went back into her house.

¶ 5 Geraldi's sister picked her up later that day and as they exited the subdivision, they passed the car, which was now parked on Geraldi's side of the street. They pulled behind the car so Geraldi could write down the license plate number (L677833) and saw a woman inside,

smoking and talking on her cell phone. Geraldi called the police and gave them the license plate number. Later, she met with a detective and identified the female she saw in the car from a group of photographs. The woman Geraldi identified was Ruby Sanders. Geraldi could not identify the male occupant in the car.

¶ 6 Dawn Bailey, who lives about seven houses east of Nishimoto, testified that when she backed out of her garage between 9:30 and 10 a.m. on November 11, she saw a maroon, older-model car about four houses west. When she returned to the subdivision, she pulled up behind the car and saw it was a Buick.

¶ 7 Ruby Sanders testified that she was currently on felony probation for a burglary conviction. She also had a 2009 misdemeanor theft conviction. On November 11, 2011, around 9:00 a.m., Sanders and Gilmore, who was her boyfriend, drove in a red, two-door Buick to a residential area in Elk Grove Village. Sanders could not recall if she or Gilmore was driving. They pulled over and saw an Asian family in a driveway down the street putting luggage into a car. After they put the suitcase in the car, the family left. Gilmore got out of the car and went "forward" in the direction of the Asian family's house. Sanders waited in the car, smoking a cigarette and listening to the radio. She then received a call from Gilmore on her cell phone telling her "[t]o come get him." Sanders drove down the street and backed into the driveway where she had seen the Asian family put the suitcase into the car.

¶ 8 According to Sanders, Gilmore told her he had been in the house and instructed her to drive on to the street. Before he got into the car, Gilmore did not open the trunk of the Buick or put anything in there. Sanders also did not see Gilmore carrying anything. The two drove back to Algonquin, Illinois.

¶ 9 About a week later, Sanders followed Gilmore in a black Suburban to a junkyard in Woodstock, Illinois. Gilmore was driving the same red Buick that she and Gilmore drove to Elk Grove Village. When they arrived, Gilmore went inside the auto parts store at the junkyard and when he came out, he took the plates off of the Buick, and got into the Suburban. The two then departed in the Suburban, leaving the Buick at the junkyard.

¶ 10 Sanders acknowledged she had "a drug problem" and smoked crack "[p]robably about two hours" before she and Gilmore drove to Elk Grove Village on November 11. She also used crack cocaine later that afternoon. Sanders acknowledged her drug use impaired her memory and described her recollection of the events of the day of the burglary as "[s]o-so." She did not seek treatment for her drug addiction in 2011 and admitted to smoking crack just a couple of weeks before trial. Sanders never went to the police to tell them about the burglary; rather, the police approached her.

¶ 11 Sergeant Daniel Burke, an Elk Grove Village police officer, testified that he assisted with a residential burglary investigation on November 17, 2011. At that time, Burke conducted surveillance of a red, 1987 Buick Regal registered to Gilmore. The Buick bore license plate number L677833. Burke saw Gilmore get into the car in Algonquin, Illinois. Gilmore then drove the Buick to a "wrecker/salvage place" in Woodstock, Illinois, with Ruby Sanders following behind in Gilmore's black Suburban. Gilmore went inside the auto parts store and when he returned, he got into the Suburban with Sanders and they left going back toward Algonquin, leaving the Buick at the salvage yard.

¶ 12 The State entered into evidence a certified copy of the Buick's registration, which showed the vehicle belonged to Gilmore, and rested. Gilmore moved for a directed verdict, arguing that

because Sanders was a drug addict and co-conspirator, her testimony lacked credibility and was insufficient to convict him. The trial court denied Gilmore's motion.

¶ 13 Gilmore presented no evidence and the trial court found him guilty of residential burglary. The court stated that although it was "certainly" cognizant of Sanders' ongoing substance abuse problem and her use of crack cocaine on November 11, 2011, she testified credibly and clearly. The court also noted that on the day of the burglary, Sanders was able to drive and find Gilmore, and Sanders was able to accurately describe the Nishimotos' home. Further, the court stated that because "everything else that she testified to was corroborated by other people," it found credible Sanders' testimony implicating Gilmore. In particular, the court cited as corroborating evidence the descriptions of Nishimoto (who corroborated his family's departure from the home after loading luggage in their car), Geraldi and Bailey (who both corroborated the presence of Gilmore's Buick in the neighborhood that day as well as, in the case of Geraldi, Sanders' presence in the neighborhood), and Burke's police work.

¶ 14 Gilmore filed a motion for a new trial. At a later hearing, the trial court denied the motion and sentenced Gilmore to 20 years in prison. The court also ordered Gilmore to submit a sample for DNA indexing. Gilmore's fines and fees orders indicate he was assessed a $250 "State DNA ID System" fee. Gilmore timely appealed.

¶ 15 On appeal, Gilmore challenges the sufficiency of the evidence to prove him guilty beyond a reasonable doubt. In support of his contention, he asserts the only evidence to convict him came from Sanders, his drug-addicted accomplice, which was insufficient to support his residential burglary conviction. Gilmore further argues the trial court made an unreasonable inference when it found Sanders' testimony was corroborated and therefore credible, claiming the

court glossed over or ignored instances in which Sanders' testimony conflicted with other evidence in the case.

¶ 16 We review a challenge to the sufficiency of the evidence by determining " '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. De Filippo*, 235 Ill. 2d 377, 384-85 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In doing so, we will not substitute our judgment for that of the trier of fact on issues involving the credibility of witnesses. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). Rather, our duty is to carefully examine the evidence while bearing in mind that it was the fact finder who saw and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). We will reverse a conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory" as to create a reasonable doubt regarding defendant's guilt. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007). The same standard applies regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 17 The testimony of a single witness, if positive and credible, is sufficient to support a conviction. *Siguenza-Brito*, 235 Ill. 2d at 228. Although an accomplice's testimony should be accepted with caution and suspicion, it may nevertheless be sufficient to sustain a criminal conviction even if it is uncorroborated. *People v. Tenney*, 205 Ill. 2d 411, 429 (2002). Likewise, while the testimony of a drug addict must be viewed with caution, that testimony may be enough to sustain a conviction if it is credible in view of the surrounding circumstances. *People v. Steidl*, 142 Ill. 2d 204, 227 (1991).

¶ 18 A person commits residential burglary when he knowingly and without authority enters or remains within the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft. 720 ILCS 5/19-3(a) (West 2010). Viewing the evidence in the light most favorable to the prosecution, a reasonable trier of fact could have found Gilmore guilty of residential burglary. We recognize that Sanders (1) was on probation at the time of trial for a prior burglary and did not go to the police on her own accord, (2) drove Gilmore from the burglary site, (3) had a drug problem, (4) smoked crack before and after the burglary and shortly before trial, and (5) described her recollection of the events of the burglary as "[s]o-so." However, the trial court, having heard Sanders testify, was aware of these facts. Indeed, the court explicitly noted its cognizance of Sanders' drug addiction and her use of crack cocaine on the day of the burglary. The court nevertheless found Sanders to be credible, noting she was able to drive and find Gilmore that day and was able to describe the Nishimotos' home. We will not substitute our judgment for that of the trier of fact on questions involving the credibility of witnesses. *Siguenza-Brito*, 235 Ill. 2d at 224-25. Most notably, it is well established that a trier of fact can accept or reject any portion of a witness' testimony as it chooses. *People v. Rouse*, 2014 IL App (1st) 121462, ¶ 46; *People v. Logan*, 352 Ill. App. 3d 73, 80-81 (2004).

¶ 19 Moreover, we reject Gilmore's contention that the trial court made an unreasonable inference when it stated that because everything else Sanders testified to was corroborated, it believed Sanders' uncorroborated statements that implicated him. Gilmore asserts the court's inference was unreasonable because Sanders' testimony was contradicted by other witnesses in several instances. For example, Sanders said she did not see anything in Gilmore's hands when she picked him up, but Nishimoto testified a suitcase was missing from his home. But

Nishimoto also testified that jewelry, coins, and money were missing and these small items could easily have been concealed by Gilmore. Further, despite any inconsistencies, the court could reasonably find Sanders' testimony about the burglary credible based on the fact that much of her other testimony was corroborated. Specifically, as we have noted, Nishimoto corroborated Sanders' testimony that she saw an Asian family putting luggage into a car. Geraldi corroborated Sanders' testimony that she was in Nishimoto's neighborhood in an older-model, burgundy-maroon Buick on the day and time of the burglary. Burke corroborated Sanders' statements that nearly a week after the burglary, she followed Gilmore in a black Suburban to a junkyard where Gilmore disposed of his Buick, transferring the license plates to the Suburban.

¶ 20 Gilmore also speculates that other possible offenders existed such as two men Geraldi saw in a red Cadillac in the neighborhood or "any other human being." But while Gilmore was certainly entitled to argue such alternative theories, it was not the State's burden to disprove them nor the trial court's obligation to accept them. Gilmore advocates a reasonable-hypothesis-of-innocence standard, which our supreme court rejected over 25 years ago in *People v. Pintos*, 133 Ill. 2d 286, 291 (1989). The State is not required to exclude every reasonable hypothesis of innocence, and a trier of fact need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances. *People v. Larson*, 379 Ill. App. 3d 642, 654 (2008). "Proof of guilt beyond a reasonable doubt does not require proof beyond any possibility of a doubt." *Id.* In addition, when the determination of a defendant's guilt or innocence depends upon the credibility of witnesses and the weight to be given their testimony, it is for the trier of fact to resolve any conflicts in the evidence. *Id.*

¶ 21 Because it is distinguishable, we are not persuaded by Gilmore's citation to *People v. Wilson*, 66 Ill. 2d 346 (1977). There, the court found the evidence was insufficient to sustain the defendant's armed robbery conviction because (1) the accomplice who identified the defendant as the robber had been promised immunity, (2) the other witnesses' testimony did not aid in establishing who committed the robbery, and (3) the victim identified a man other than the defendant three times in a line-up and provided a physical description of the robber that did not match the defendant's. *Id.* at 349-50. These facts are not present in this case. In addition, although the police came to Sanders to discuss the burglary, the record does not establish Sanders was promised immunity for her testimony. Gilmore argues Sanders had the motive and means to falsely implicate him in part because the police told Sanders to say she was with him on the day of the burglary. But the trial court sustained an objection to the following question asked by defense counsel on cross-examination: "And when they talked to you, they told you they didn't care about you, they just wanted you to tell them that [defendant] was with you that day; is that correct?" Accordingly, the record does not support Gilmore's assertion that the police told Sanders to implicate him. Finally, we disagree with Gilmore that his case is analogous to *People v. Smith*, 185 Ill. 2d 532 (1999). Unlike Sanders, the witness in *Smith* was repeatedly impeached by a signed statement she made before trial. *Smith*, 185 Ill. 2d at 544. Based on these distinctions, we see no reason to substitute our judgment for the trial court's as to Sanders' credibility.

¶ 22 In sum, viewing the evidence in the light most favorable to the prosecution, we conclude the evidence is not "so unreasonable, improbable, or unsatisfactory" as to create a reasonable doubt regarding Gilmore's guilt.

¶ 23 Gilmore next contends he is entitled to a $200 reduction in the fees imposed by the trial court because the court ordered him to submit a DNA sample and pay a DNA analysis fee but he was already required to submit a DNA sample following his 2000 felony conviction. The State concedes Gilmore is entitled to a fee reduction.

¶ 24 A person convicted of a felony is required to submit a specimen of blood, saliva, or tissue to the Illinois Department of State Police for DNA testing and pay a corresponding analysis fee. 730 ILCS 5/5-4-3(a), 5-4-3(j) (West Supp. 2011). However, a trial court may only order a defendant to submit a DNA sample and pay the analysis fee where the defendant is not already registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). The DNA requirement was added by a 1997 amendment to the Unified Code of Corrections, which went into effect on January 1, 1998. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38 (citing Public Act 90-130 (eff. Jan. 1, 1998)). Thus, we may assume that where a defendant has been convicted of a felony after January 1, 1998, he has been ordered to submit a DNA sample and pay the corresponding fee. *Leach*, 2011 IL App (1st) 090339, ¶ 38.

¶ 25 Here, the record demonstrates Gilmore was convicted in 2000 of residential burglary. Accordingly, we presume he has already been ordered to submit a DNA sample and pay the corresponding fee. Thus, we must vacate the DNA analysis fee imposed here. We note that the statute in effect at the time of Gilmore's trial authorized a $200 fee. 730 ILCS 5/5-4-3(j) (West Supp. 2011). Although the State and Gilmore agree that he is entitled to a $200 reduction, our review of Gilmore's fines and fees order reveals he was assessed a $250 DNA analysis fee. Therefore, we reduce Gilmore's assessments by $250.

¶ 26 For the reasons stated, we affirm the trial court's judgment and vacate the $250 DNA analysis fee.

¶ 27 Affirmed; fee vacated.