2015 IL App (1st) 131323-U

THIRD DIVISION
May 27, 2015

No. 1-13-1323

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. 12 CR 15251
	)	
CHARLES DIXON,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: The judgment of the trial court is affirmed where evidence sufficiently established defendant's intent to commit a theft during an unlawful break-in; defendant's conviction for possession of burglary tools is reversed; and the fines and fees order is modified where defendant's fines and fees were improperly assessed by the trial court.

¶ 2 Following a bench trial, defendant, Charles Dixon, was found guilty of burglary and possession of burglary tools and sentenced to concurrent terms of nine years' imprisonment for burglary and four years for possession of burglary tools. On appeal, defendant challenges the sufficiency of the evidence to convict him of burglary and possession of burglary tools, contends

his convictions violate the one-act one-crime rule because they are part of the same act, and asserts the fees assessed by the trial court were improper. We affirm defendant's conviction for burglary, reverse his conviction for possession of burglary tools, and modify the trial court's fines and fees order.

¶ 3 The evidence at trial showed that on July 20, 2012, at approximately 11:40 a.m., Chicago police officer John Dowling and his partner arrived at the home of Mary Brandon to respond to a burglary in progress. The burglary took place in the detached garage that is located at the back of Ms. Brandon's property. The garage had two entrances including a side door on the east side of the building and a larger garage door that faced south.

¶ 4 Officer Dowling testified that he and his partner arrived at Ms. Brandon's property, driving an unmarked police car and wearing plain clothes, but their badges were visible. Upon approaching the garage, the officers observed visible damage to the door frame of the side entrance as if it had been forced open and found defendant underneath the open hood of a car parked in the garage. When Dowling asked defendant what he was doing, defendant stated he was attempting to remove the catalytic converter from Ms. Brandon's vehicle "to make a little money." Dowling observed a flashlight and hacksaw underneath the hood on top of the engine compartment and a pair of pliers and a socket wrench on the ground in front of the vehicle next to defendant's feet. The officers immediately took defendant into custody. He was not given a chance to videotape his statement or sign a written statement. The officers ran the license plate of the vehicle parked in the garage and confirmed it was registered to Ms. Brandon.

¶ 5 Ms. Brandon's son, John Brandon, testified that at the time of the offense the residence was vacant because his mother lived full-time in a nursing home. He took care of the property in his mother's absence and was the only person with access to it. When he was last at the residence

one week prior to the offense, both the garage door and side entrance were locked and there was no damage to the side door. The side entrance to the garage locked with a key that only he had access to and he did not give permission to anyone to enter the garage or to touch the vehicle parked inside. He stated his mother also could not have given permission for anyone to enter the property because she had Alzheimer's disease. Brandon was not present at the time of the offense, but was notified of the break-in by a next-door neighbor. Besides nails, no tools were kept in the garage.

¶ 6 Defendant, a 48-year-old neighborhood mechanic, testified that he was on his way to a friend's house to borrow a rodder when he saw Ms. Brandon's garage door was open and went to check on it because they were friends and he knew she was no longer living there. Defendant wanted to notify his sister-in-law, who rented property from Ms. Brandon and lived across the street, of the break-in. He stated that when he entered the garage, the tools were already present and the hood to Ms. Brandon's vehicle was open with several items missing from it including the wheels, radiator, battery, and air conditioner condenser. Defendant also stated he did not tell Officer Dowling that he was removing the catalytic converter because he knew he was a police officer.

¶ 7 On cross-examination, defendant admitted the only way to remove the catalytic converter would be with a saw which was present in the garage, but testified that the converter must be removed from underneath the vehicle, not near the hood where defendant was standing. Defendant also admitted that although he saw the police drive by when he was still inside the garage, he did not attempt to stop them or flag them down.

¶ 8 After hearing all the evidence, the trial court found defendant guilty of burglary and possession of burglary tools. A mandatory Class X sentence was imposed on the burglary

conviction because of defendant's prior convictions. The trial court sentenced defendant to concurrent terms of nine and four years' imprisonment.

¶ 9 Defendant first contends the State failed to prove him guilty of burglary beyond a reasonable doubt where the State did not produce evidence sufficient to establish that defendant intended to commit a theft once inside the garage because no one saw him remove anything from the garage and nothing was found on his person, there were already items missing from the garage and no one had been there to check on it in about one week, defendant did not attempt to flee when the police arrived, and his alleged statement made to the police was unreliable and not memorialized. Accordingly, he requests this court reduce his burglary conviction to criminal trespass.

¶ 10 When a defendant challenges the sufficiency of the evidence to sustain a burglary conviction on the grounds that the evidence did not prove his intent to commit a theft therein, the relevant question on review is not whether any possible innocent explanation exists, but rather, whether the evidence was sufficient to allow a rational fact finder to reasonably infer that defendant intended to commit a theft upon his entrance. See *People v. Richardson*, 104 Ill. 2d 8, 13 (1984). A conviction will only be overturned where the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). In a bench trial, the trial court is responsible for determining the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 11 The offense of burglary is committed when a person knowingly enters or remains within a building or motor vehicle, or any part thereof, with the intent to commit a felony or theft therein. 720 ILCS 5/19-1 (West 2012). Burglary is accomplished the moment an unauthorized

entry with the requisite intent occurs regardless of whether the theft (or felony) is ever actually committed. *People v. Poe*, 385 Ill. App. 3d 763, 766 (2008). Absent direct evidence, intent must be proven circumstantially, and the conviction may be sustained on circumstantial evidence alone. *People v. Johnson*, 28 Ill. 2d 441, 443 (1963); *Richardson*, 104 Ill. 2d at 13 (citing *People v. Palmer*, 31 Ill. 2d 58, 66 (1964)).

¶ 12 Applying this law to our facts 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. Here, defendant does not dispute that he entered the Brandon garage without permission. Moreover, the police officers found defendant underneath the hood of Ms. Brandon's vehicle with several tools within his reach that could be used to break into the garage and/or remove parts from the vehicle therein. There was also damage to the side door of the garage where someone opened the door by force and the only person who had access to the garage did not leave the property in this state when he left it one week prior. Defendant also testified that he was friends with Ms. Brandon so he was aware the residence was vacant. Even without defendant's admission to the police officer that he was attempting to remove the catalytic converter, the circumstantial evidence was sufficient for the trial court to reasonably infer that defendant forcibly opened the side door and entered the Brandon garage with the intent to remove items from the Brandon vehicle including, but not limited to, the catalytic converter.

¶ 13 Defendant argues that the evidence, including his absence of flight from the police, the other items he testified were missing from the vehicle, the lack of fingerprints taken from the vehicle and tools, the absence of property found on defendant's person, and the fact that no one saw defendant take anything from the garage, proves that defendant did not intend to commit a theft. While this evidence arguably supports defendant's position, it is not the reviewing court's

job to reweigh the evidence and we decline to do so in the instant case. See *People v. Hendricks*, 325 Ill. App. 3d 1097, 1114-15 (2001).

¶ 14 Moreover, although the failure to memorialize defendant's admission and the fact that the catalytic converter is located near the exhaust system certainly affects the weight and credibility of the admission testimony, the trial court certainly found the police officer testified credibly, and credibility determinations are the province of the trier of fact. *Singuenza-Brito*, 235 Ill. 2d 213 at 228 (in a bench trial, the trial court is responsible for determining the credibility of witnesses and the weight to be given their testimony). Accordingly, we affirm defendant's conviction for burglary.

¶ 15 Defendant next contends that the evidence was insufficient to find him guilty of possession of burglary tools where the State failed to produce evidence sufficient to link the tools found in the garage to its break-in, in other words, failed to produce evidence that these tools were used to break open the side entrance.

¶ 16 Due process requires that a charging instrument adequately notify a defendant of the offense charged with sufficient particularity to enable him to prepare a proper defense. *People v. Baldwin*, 199 Ill. 2d 1, 12 (2002). It is necessary to examine both the elements of the offense with which defendant was charged as well as the evidence adduced at trial to support the elements of the offense. *People v. Jones*, 175 Ill. 2d 126, 138 (1997). A person commits the offense of possession of burglary tools when he possesses any tool, key, instrument, device, *etc.* suitable for use in breaking into a building, motor vehicle, or any place designed for the safekeeping of property, or any part of the same, with the intent to enter that place and commit a theft (or felony) therein. 720 ILCS 5/19-2(a) (West 2012). The State must show that defendant

possessed tools suitable for breaking and entering by the accused with knowledge of their character. *People v. Roberto,* 81 Ill. App. 3d 636, 640 (1980).

¶ 17 In the instant case, the indictment charged defendant with possession of burglary tools suitable for breaking and entering into the garage. We agree with defendant, however, that the State failed to connect defendant's possession of burglary tools to the breaking and entering of the garage. At best, the circumstantial evidence the State adduced at trial demonstrated the tools were suitable for breaking into an automobile where defendant was found underneath the hood of the vehicle with several tools in his reach. This is especially true in light of the fact that the State elicited testimony from its own witness that proved the door to the garage appeared to be forced or kicked rather than pried open by tools.

¶ 18 Furthermore, because defendant was under the hood of the vehicle, he could technically be considered to have broken "into" the vehicle for purposes of the burglary tools statute. However, it would be unfair to allow the State to change its theory of the case between the charging instrument and the proof at trial without amending the indictment because it prevented defendant from properly preparing a defense with regards to possession of the tools in conjunction with the breaking and entering of the vehicle, and fails to protect him from further prosecution for the same conduct. See 720 ILCS 5/19-2(a) (West 2012); see also *People v. Woods*, 151 Ill. App. 3d 687 (1986) (upholding conviction for burglary where the defendant opened the hood of a vehicle and stole the car battery); *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 67 ("For a variance between the charging instrument and the proof at trial to be fatal, the difference must be 'material and be of such a character as may mislead the defendant in making his or her defense, or expose the defendant to double jeopardy.' ") quoting *People v. Maggette,* 195 Ill. 2d 336, 351 (2001).

¶ 19 Therefore, because defendant was not charged with possession of burglary tools for breaking and entering into the victim's vehicle, and the State failed to adduce evidence at trial that connected the use or suitability of use of such tools in connection with breaking and entering into the garage, we reverse his conviction for possession of burglary tools.

¶ 20 Because defendant's conviction for burglary tools is reversed, we need not discuss whether his multiple convictions violate the one-act, one-crime doctrine according to *People v. King*, 66 Ill. 2d 551, 566 (1977).

¶ 21 Defendant also contends his fines and fees were improperly assessed by the trial court. Accordingly, defendant requests that we remand his case for a new fines and fees order.

¶ 22 "The propriety of court-ordered fines and fees presents a question of statutory interpretation, which we review *de novo*." *People v. Elcock*, 396 Ill. App. 3d 524, 538 (2009). On appeal, the reviewing court may modify the fines and fees order without remanding the case back to the circuit court. Ill. S. Ct. R 615(b)(1) (eff. Aug. 27, 1999) ("[o]n appeal the reviewing court may *** modify the judgment or order from which the appeal is taken"); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("[r]emandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections").

¶ 23 The trial court assessed fines and fees against defendant in the amount of $595 including a $50 Court System assessment, a $5 Electronic Citation fee, and a $20 Violent Crime Victim Assistance (VCVA) Fund fine. Defendant asserts these fines and fees should be reduced to $520 because the court improperly imposed the $5 Electronic Citation fee and the $20 VCVA Fund fine, and the court failed to give defendant his allotted $5 per day pre-sentence incarceration credit toward the $50 Court System assessment. The State concedes that the $5 Electronic

Citation fee was improperly imposed and that defendant should receive pre-sentence incarceration credit toward the $50 Court System assessment. We agree.

¶ 24 The State maintains, however, that the $20 VCVA Fund fine should be increased by $80 by this court to reflect the correct $100 statutory fine and defendant's total fines and fees order increased to $620. In contrast, defendant argues that we should vacate the $20 VCVA Fund fine imposed by the trial court pursuant to section 10(c)(2) of the Violent Crimes Victim Assistance Act, which provides that that fine may only be assessed when no other fine has been imposed against defendant. 725 ILCS 240/10(c)(2) (West 2010) (repealed by Pub. Act 97-816, § 10 (eff. July 16, 2012)).

¶ 25 We agree with the State.

¶ 26 The provision defendant relies upon to argue this fine should be vacated no longer exists under the amended statute. See 725 ILCS 240/10 *et seq.* (West 2012). As amended, the VCVA Fund (725 ILCS 240/10(b)(1) (West 2012)) provides that the court must impose a $100 fine when any person is convicted of a felony in Illinois on or after July 1, 2012. In the instant case, the offense occurred on July 20, 2012, so the amended statute controls and defendant's fines and fees order should be increased by $80 to reflect the proper VCVA Fund fine.

¶ 27 Furthermore, section 10(c) of the current statute provides: "[t]he change imposed by subsection (b) shall not be subject to the provisions of section 110-14 of the Code of Criminal Procedure of 1963 [725 ILCS 5/110-14]." 725 ILCS 240/10(c) (West 2012). Section 110-14 of the Code of Criminal Procedure of 1963 provides for a $5 credit for each day any person is incarcerated on a bailable offense who does not supply bail and against whom a fine is levied once convicted. 725 ILCS 5/110-14(a) (West 2012). Therefore, defendant is not entitled to a credit against the VCVA Fund fine for pre-sentence incarceration time served.

¶ 28 Finally, defendant, citing no authority, argues that the State cannot "unilaterally invoke this $100 fine," and reiterates his request to vacate it.

¶ 29 When a fine imposed is less than the statutory requirement, the fine is void. See *People v. Montiel*, 365 Ill. App. 3d 601, 605-06 (2006); See also *People v. Breeden*, 2014 IL App (4th) 121049, ¶ 56. " 'It is a well-settled principle of law that a void order may be attacked at any time or in any court, either directly or collaterally.' " *People v. Ackerman*, 2014 IL App (3rd) 120585, ¶ 25 quoting *People v. Thompson*, 209 Ill. 2d 19, 25 (2004). Moreover, "courts have an independent duty to vacate void orders and may *sua sponte* declare an order void." *Thompson*, 209 Ill. 2d at 27.

¶ 30 Because this court has the authority to vacate void orders of its own accord and may amend defendant's fines and fees without remandment, we hereby vacate the $5 Electronic Citation fee, increase the $20 VCVA Fund fine to $100 in accordance with the amended statute, and credit the defendant's pre-sentence incarceration time against the $50 Court System assessment, for a total amended fines and fees order of $620.

¶ 31 For the foregoing reasons, the judgment of the trial court is affirmed as to burglary; reversed as to possession of burglary tools; and the fines and fees order is modified.

¶ 32 Affirmed in part; reversed in part; fines and fees order modified.