No. 2—09—0112
Order filed January 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08—CF—0768
	)	
RONALD R. MOORE,	)	Honorable
	)	Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: The failure to ascertain the nature of defense counsel's conflict or otherwise obtain a waiver of any conflict before the court allowed counsel to represent defendant during a joinder motion, when counsel previously had raised a potential conflict and had been discharged by the court, violated defendant's constitutional right to conflict-free counsel; the double jeopardy clause does not preclude a retrial of the offense of theft of property exceeding $10,000, a Class 2 felony, because the evidence was sufficient to sustain the conviction that the wire stolen was worth more than $10,000.

In the direct appeal of his theft conviction, defendant argues that: (1) the trial court erred by allowing defense counsel, who was discharged after raising a potential conflict of interest, to represent defendant at the pretrial hearing on the State's motion for joinder without first ascertaining whether the risk of conflict was too remote to warrant separate counsel or obtaining a waiver of any

conflict from defendant, and (2) the evidence was insufficient to sustain his conviction, as the State failed to prove beyond a reasonable doubt that the copper wire stolen was worth more than $10,000. We reverse and remand the cause for a new trial.

I. BACKGROUND

On April 21, 2008, defendant and codefendants, Ronnie Sistrunk, Javan Brown, and Joseph Lewis, were charged by indictment with theft of copper wire belonging to Commonwealth Edison (ComEd) in violation of section 16—1 of the Criminal Code of 1961 (Code) (720 ILCS 5/16—1 (West 2008)). Prior to trial, the State filed a motion to join the defendants, as the witnesses necessary to try each defendant would be identical, with the exception of additional witnesses against defendant Sistrunk, who gave voluntary pre- and post- *Miranda* statements.

On May 30, 2008, all the defendants and their counsel were present for the hearing on the joinder motion. Defendant was represented by Vicky Busot, an assistant public defender. Walter Werderich, who also is an assistant public defender, appeared for codefendant Brown. Greg Brown, an assistant from the Multiple Defendant Division, appeared for codefendant Sistrunk. John Paul Carroll appeared for codefendant Lewis.

Prior to the hearing on the State's motion to join, defendant's counsel, assistant Public Defender Busot, advised the trial court that, after speaking with her supervisor, it had been determined that she had "a conflict." The court asked, "Because of Mr. Werderich being on one?" Busot replied "Yes." The judge acknowledged a conflict, stating: "Okay. So, we have a conflict. I would allow Ms. Busot to withdraw."[1]

[1]The nature of the conflict was not revealed or fully explained on the record. However, it appears from the trial court's query that the conflict was based on assistant Public Defender

The judge then appointed assistant Ron Haskell from the Multiple Defendant Division to act as conflict counsel to represent defendant. However, because Haskell was on vacation, the judge observed that defendant would not be represented and the State would not be able to go forward with the joinder motion.

In response to the judge's remark, assistant State's Attorney Jamie Mosser suggested that they go ahead and not hear defendant's case at that time and wait until he was represented. Mosser stated that she could present the State's arguments on joinder with regard to the other three defendants and, based on the decision, "we'll either have a decision or we'll have another argument when Mr. Haskell is back from vacation." The following exchange then took place:

"THE COURT: Okay. [Defendant] has a question.

DEFENDANT: I would rather be tried here, Your Honor, with the other defendants.

THE COURT: So, you would waive having a lawyer with you today?

DEFENDANT: No.

THE COURT: Well, let me finish for a second. Mr. Sistrunk and Mr. Brown and Mr. Lewis are gonna go forward with the motion to join their cases together. Mr. Brown is scheduled for jury trial on June 16th. You're telling me that you would not object to a joinder if I joined them together? You look confused.

DEFENDANT: Right. I want to be - -

THE COURT: You want to be with them?

DEFENDANT: Yes.

Werderich's representation of codefendant Brown.

THE COURT: I'm gonna hear, because their lawyers are here, I'm gonna possibly join their case together so they'll all go as a group. And you're telling me that you'd like to do that as well?

DEFENDANT: Yes.

THE COURT: Okay. Miss Busot, do you feel that you have conflict on this issue?

MS. BUSOT [Assistant Public Defender]: Your Honor, my client does not object to joinder.

THE COURT: Okay. Would you remain and represent him on the joinder issue? Keep her with you on this issue."

That day, the trial court entered an order, which contains the following: "PD Busot has a conflict — MDD Haskell app'd."

The trial court next heard argument on the State's motion for joinder and found that defendant and codefendants Brown and Lewis should be tried simultaneously before two juries, one jury for defendant and the other jury for codefendants Brown and Lewis. The court further ruled that codefendant Sistrunk would be tried separately from the other defendants.

The joint trials began on August 19, 2008. Evidence at trial revealed that police were called to investigate suspicious activity at a ComEd substation in Gilberts, Illinois. They found strips of copper cable piled outside the locked gate. It was reported that defendants were seen leaving the substation in a station wagon. Following a vehicle chase, defendants ran from the station wagon and a foot chase ensued until defendants were apprehended.

Police found the station wagon and a conversion van parked near each other at an office complex near the substation. Located in the station wagon were 11 additional strips of cable, each

approximately 10 feet long. The police determined that the station wagon belonged to a relative of defendant Sistrunk.

Richard Jump, a ComEd operations coordinator, was called to the substation. He saw three piles of cable and determined that they had been cut from spools of cable that had been delivered to the substation earlier in the week. He testified that he counted 16 strips of 500 KCMIL cable and 46 strips of 1,500 KCMIL cable. Jump estimated that the piles contained approximately 200 feet of 500 KCMIL cable and about 550 feet of 1,500 KCMIL cable. Michael Thompson, a "parts specialist" for ComEd, testified that, as of the date of the theft, 1,500 KCMIL wire sold for $33.93 per foot and 500 KCMIL wire sold for $12.98 per foot. He calculated that the total worth of the wire amounted to $25,948.91.

The jury found defendant guilty of theft of property valued at more than $10,000, a Class 2 felony. See 720 ILCS 5/16—1(a), (b)(5) (West 2008). Subsequently, the trial court sentenced defendant to 7 years' imprisonment. Defendant timely appeals.

II. ANALYSIS

We first address defendant's argument that the trial court erred by allowing assistant Public Defender Busot to represent him at the hearing on the State's motion for joinder without inquiring into the status of the conflict underlying the initial appointment of conflict counsel or obtaining a waiver of any conflict from defendant of Busot's representation.

A criminal defendant's right to effective assistance of trial counsel arises from the sixth amendment and includes the right to conflict-free representation. *People v. Hardin*, 217 Ill. 2d 289, 299 (2005). The supreme court has created a framework for analyzing conflict of interest cases. *Hardin*, 217 Ill. 2d at 301, citing *People v. Spreitzer*, 123 Ill. 2d 1, 16–17 (1988). A dichotomy exists between *per se* conflicts, which are conflicts created by defense counsel's prior or current

association with either the prosecution or the victim, and a second class of alleged conflicts. *Spreitzer*, 123 Ill. 2d at 16–17. If the defendant shows a *per se* conflict of interest, he need not show prejudice resulting from that conflict in order to obtain relief. *Spreitzer*, 123 Ill. 2d at 15. If the defendant does not show a *per se* conflict of interest, the analysis depends upon when he raised the issue.

Another dichotomy arises if counsel brings the potential conflict to the attention of the trial court at an early stage. In that case, a duty devolves upon the trial court to either appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel. *Spreitzer*, 123 Ill. 2d at 18, citing *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978). If these steps are not taken, a " '*potential* or *possible* conflict may deprive the defendant of the guaranteed assistance of counsel.' " (Emphasis in original). *Spreitzer*, 123 Ill. 2d at 18, quoting *People v. Jones*, 121 Ill. 2d 21, 28 (1988).

> "While this rule is not *per se* (since it is the attorney's contemporaneous allegations of a conflict and not the mere presence of multiple representation which gives rise to the trial court's duty), reversal of a conviction under this rule does not require a showing that the attorney's actual performance was in any way affected by the purported conflict. In this sense, reversal for the trial court's failure to alleviate possible or potential conflicts does not require a showing of 'specific prejudice.' " *Spreitzer*, 123 Ill. 2d at 18, citing *Holloway*, 435 U.S. at 487.

The trial court must take adequate steps, *i.e.*, conduct "a case-by-case inquiry" to determine whether the risk of a conflict colored the defendant's representation, but only when the potential conflict is brought to the court's attention. *Hardin, 217* Ill. 2d at 302.

If the trial court is not apprised of the potential conflict, then reversal of the conviction will only be had upon a showing that "an actual conflict of interest adversely affected" counsel's performance. *Spreitzer*, 123 Ill. 2d at 19, quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). The question of whether a defendant was denied conflict-free counsel is reviewed *de novo*. *Hardin*, 217 Ill. 2d at 299.

Defendant and the State argue over whether the conflict acknowledged by assistant Public Defender Busot prior to the hearing on the motion for joinder was an actual conflict of interest. Defendant maintains that the trial court determined that an actual conflict of interest existed when Busot informed the trial court before the hearing on the motion for joinder began. Defendant argues that, because the trial court determined that an actual conflict of interest existed, the trial court's permission to allow Busot to represent defendant at the hearing on the joinder motion, during a critical stage in the proceedings and without first obtaining a waiver of that conflict from defendant, denied defendant of his constitutional right to conflict-free counsel. Defendant argues that, because an actual conflict of interest existed which was brought to the court's attention, reversal of the conviction is required without a showing of prejudice.

The State does not contest that the joinder proceeding was a critical stage in which defendant was entitled to conflict-free counsel. See *People v. Vernon*, 396 Ill. App. 3d 145, 153 (2009) (the sixth amendment right to counsel applies to all "critical stages" of the prosecution, "including pretrial, trial, and sentencing"). Rather, the State disputes whether an actual conflict of interest existed. The State argues that the trial court failed to conduct the "case-by-case inquiry" required in cases involving a claimed conflict of interest by staff members of the same Public Defender's office when such a potential conflict is brought to the trial court's attention. The State proposes that the trial court's ruling of a conflict was "due to a standing policy of the Kane County Defender's

Office and not due to an actual conflict." The State further argues that any error that may have occurred regarding the conflict issue was "invited error" upon which defendant is estopped from asserting on appeal because defendant specifically requested that his case be joined with his codefendants. Finally, the State contends that defendant has forfeited the conflict issue because his conflict counsel, assistant Public Defender Haskell, did not raise the issue in the posttrial motion.

The parties' argument over whether an actual conflict existed is irrelevant. In this case, the trial court was advised by defendant's counsel of a potential conflict early in the proceedings. Once alerted by counsel to a potential problem, the trial court must take adequate steps to deal with it. If adequate steps are not taken, the fact of a potential or possible conflict may deprive the defendant of the guaranteed assistance of counsel. Rather than taking the adequate steps to question whether the risk of conflict was too remote to warrant separate counsel, the trial court appointed conflict-free counsel to represent defendant for the remainder of the proceedings, including representation of defendant for the joinder motion. See *Spreitzer*, 123 Ill. 2d at 18.

However, notwithstanding the recognition of the potential conflict of interest and subsequent appointment of conflict counsel, the trial court permitted assistant Public Defender Busot to represent defendant at the hearing on the joinder motion without an adequate inquiry into the status of Busot's conflict. The trial court's permission to allow Busot to represent defendant at the joinder hearing should have proceeded only if the trial court conducted an inquiry of the potential conflict to ensure that it no longer existed or obtained a waiver of the potential conflict from defendant. See *Hardin*, 217 Ill. 2d at 301-02; *Spreitzer*, 123 Ill. 2d at 18. The trial court did neither.

The State's contention that the court did not have any information to make a finding that an actual conflict of interest existed is nonsensical. The reason the record does not establish whether an actual conflict existed is because the court did not make the required inquiry to determine the

reason for the conflict. The record reflects that the court asked only a single question about assistant Public Defender Busot's potential conflict before discharging her and thereafter permitting her to represent defendant at the joinder hearing. This abbreviated discussion does not satisfy the trial court's duty to ascertain whether the conflict no longer existed. While it is true that defendant requested to be joined with the other defendants at the joinder hearing, it is equally true that he did not give up his right to be represented by conflict-free counsel. At the very least, the court should have established the nature of the conflict, as required by *Spreitzer,* before making a decision regarding Busot's representation of defendant at the hearing.

Defendant acknowledges that the conflict of interest issue was not properly preserved but urges us to consider it, as it would be manifestly unfair to find the issue forfeited. Under the plain error rule, issues not properly preserved may be considered by a reviewing court where the alleged error is so substantial that it affected the fundamental fairness of the proceeding, and remedying the error is necessary to preserve the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Our research has not revealed a factually analogous case. However, under the principles for analyzing conflict-of-interest cases articulated by our supreme court, we cannot conclude that defendant was provided his constitutional right to the reasonable assistance of counsel where the trial court failed to conduct an inquiry during a critical stage in the proceedings to ensure that a potential conflict no longer existed. The fact remains that the trial court had a duty to ascertain whether the risk of conflict was too remote to allow Busot to represent defendant at the joinder hearing. Because the trial court failed to conduct the required inquiry, defendant need not prove prejudice. Accordingly, we find that the trial court erred in denying defendant conflict-free counsel, and we reverse his conviction.

Although we reverse defendant's conviction, we conclude that double jeopardy principles do not preclude the State from retrying defendant for a Class 2 felony for theft of copper wire valued at more than $10,000, pursuant to section 16—1(a)(1), (b)(5) (720 ILCS 5/16—1(a)(1), (b)(5) (West 2008)).

Both the federal and state constitutions provide that no person shall be put in jeopardy twice for the same criminal offense. *People v. Pinkonsly*, 207 Ill. 2d 555, 564-65 (2003), citing U.S. Const., amends. V, XIV; Ill. Const.1970, art. I, §10. "The double jeopardy clause protects a defendant from: (1) a second prosecution after an acquittal; (2) a second prosecution after a conviction; and (3) multiple punishments for the same offense." *People v. Whitfield*, 228 Ill. 2d 502, 516 (2007), citing *People v. Gray*, 214 Ill. 2d 1, 6 (2005).

Double jeopardy principles are implicated when a judgment of conviction is reversed because the reversal might amount to an acquittal. "A reversal for trial error is a determination that the defendant has been convicted by means of a judicial process defective in some fundamental respect, whereas reversal for evidentiary insufficiency occurs when the prosecution has failed to prove its case, and the only proper remedy is a judgment of acquittal." *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). The double jeopardy clause precludes the State from retrying a defendant after a reviewing court has determined that the evidence introduced at trial was legally insufficient to convict, but the double jeopardy clause does not preclude retrial of a defendant whose conviction has been set aside because of an error in the proceedings leading to the conviction. *Olivera*, 164 Ill. 2d at 393.

In this case, we find the State introduced sufficient evidence to prove its case that defendant committed a Class 2 felony in violation of section 16—1(a)(1), (b)(5). A person commits theft under section 16—1(a)(1) when he knowingly obtains or exerts unauthorized control over property of the

owner. Theft of property from the owner exceeding $10,000 and not exceeding $100,000 in value is a Class 2 felony. See 720 ILCS 5/16—1(b)(5) (West 2008).

Defendant admits that he committed theft of property. He maintains instead that the evidence submitted was insufficient to prove beyond a reasonable doubt that the value of the cable wire was worth more than $10,000. Defendant contends that the following evidence rendered it insufficient: (1) the cable involved in the offense had been returned to ComEd before trial, which destroyed it; (2) none of the witnesses measured the cable and their testimony concerning its length was based only on estimates; and (3) the photographs of the cable did not provide a sense of scale to determine the gauge and length of the cable. Because the evidence left a reasonable doubt as to whether the aggregate value of the wire exceeded $10,000, defendant argues that the degree of his conviction must be reduced to a Class 3 felony pursuant to section 16—1(b)(4) of the Code (720 ILCS 5/16—1(b)(4) (West 2008)). Defendant essentially raises the same arguments that were raised by codefendant Lewis in his appeal, wherein Lewis contended that the State failed to prove beyond a reasonable doubt that the cable was worth more than $10,000. *People v. Lewis*, No. 2—09– 0362 (2010) (unpublished order under Supreme Court Rule 23).

Where a defendant is charged with theft of property exceeding a specified value, the property's value is an element of the offense that the State must prove beyond a reasonable doubt. 720 ILCS 5/16—1(c) (West 2008). When challenging the sufficiency of the evidence, the question is whether, after viewing all the evidence in a light most favorable to the prosecution, a rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). All reasonable inferences from the record in favor of the prosecution must be allowed. The relative weight and credibility to be given the testimony of the various witnesses in the trial of a criminal case are questions within the exclusive jurisdiction of the

trier of fact. Because of this deference, a reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). The credible testimony of a single witness is sufficient to convict, even if the testimony is contradicted by the defendant (*People v. Deenadayalu*, 331 Ill. App. 3d 442, 450 (2007)), whether the evidence is circumstantial or direct (*People v. Cooper*, 194 Ill. 2d 419, 431 (2000)).

Here, there was evidence of the property's value sufficient to prove the State's case. We find that the jury reasonably could have credited Jump's testimony regarding the length of the cable wire related to the theft. He determined that one pile contained cut pieces of 500 KCMIL copper cable and the other two piles contained cut pieces of 1,500 KCMIL copper cable. He counted the pieces of cable and observed that one pile contained 16 strips of 500 KCMIL cable totaling about 200 feet in length and the other two piles contained a total of 46 strips of 1,500 KCMIL cable totaling about 550 feet in length. Thompson opined that this was consistent with the amount of copper cable missing from the reels displayed in the State's exhibits. In response to the question regarding his ability to estimate the length of cable without actually measuring it, Jump responded that he was able to do so based on his experience dealing with copper cable. Jump had worked as an operations manager for eight years and prior to that, he had worked in the field with this type of copper cable for nine years. In addition, Jump had been a cable fabricator for 15 years.

The police found an additional 11 strips of 1,500 KCMIL cable in the station wagon. Thompson, a parts specialist who was responsible for purchasing copper cable for ComEd, stated that on March 17, 2008, the 1,500 KCMIL wire was worth $23,345.91 and the 500 KCMIL wire was worth $2,596, for a total of $25,948.91, and defendant does not dispute these price quotations. We observed the following in codefendant Lewis' appeal.

> "While Jump's figures were not based on exact measurements, and were thus imprecise, the jury could reasonably conclude from them that the cable was worth more than $10,000. Jump would have to have been badly mistaken for the value to have been less than $10,000, and defendant points to no evidence to show that he was.
>
> Defendant focuses primarily on evidence that the State did not present. He contends that the State should not have allowed the cable to be destroyed, should have staged the photographs using a ruler or some other device to provide a sense of scale, allowing the jury to draw its owns conclusions about the lengths of the pieces, and should have measured at least some of the strips. While presenting such evidence might have made the State's case stronger, it does not follow that the failure to do so means that the evidence actually presented was insufficient. " *Lewis*, slip op. at 3.

We find these observations equally persuasive and applicable to defendant's appeal. Accordingly, we hold that the double jeopardy clause does not prevent the State from retrying defendant on a Class 2 felony violation of the offense because the evidence introduced at trial was legally sufficient to convict. The double jeopardy clause does not preclude retrial because the conviction has been set aside due to an error in the proceedings leading to the conviction. See *Olivera*, 164 Ill. 2d at 393.

The judgment of the circuit court of Kane County is reversed and the cause is remanded for a new trial.

Reversed and remanded.