2011 IL App (2d) 100403-U
No. 2-10-0403
Order filed November 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 07-CF-3323
WILLIAM KROLIK,	)	Honorable Blanche Hill Fawell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Bowman and Schostok concurred in the judgment.

ORDER

Held: (1) Defendant was guilty of attempted home invasion by accountability when the principal entered the victim's yard armed with a hammer; (2) the mittimus is modified to reflect the corrected custody date and days of presentence credit; (3) defendant is entitled to full credit against his fine for the drug court/mental health court, to reflect the 856 days he spent in presentencing custody; (4) we vacate defendant's successive (and thus unauthorized) DNA analysis fee; and (5) we remand for the clerk to recalculate his collections fee.

¶ 1 Following a jury trial, defendant, William Krolik, was found guilty, under an accountability theory (720 ILCS 5/5-2(c) (West 2006)), of one count of attempted home invasion (720 ILCS 5/8-4(a), 12-11(a)(1) (West 2006)) and two counts of attempted armed robbery (720 ILCS 5/8-4(a),

18–2(a) (West 2006)). The trial court merged the attempted armed robbery convictions with the attempted home invasion conviction and sentenced defendant to 28 years in prison. Defendant timely appealed and now argues: (1) he was not proved guilty beyond a reasonable doubt of attempted home invasion under an accountability theory; (2) he is entitled to credit for certain days spent in presentencing custody; (3) he is entitled to monetary credit against his drug court/mental health court fee; (4) his DNA analysis fee must be vacated; and (5) the case should be remanded for recalculation of his collections fee. For the reasons that follow, we (1) affirm defendant's conviction, (2) correct the mittimus to reflect proper credit for time spent in custody, (3) award him credit against his drug court/mental health court fee, (4) vacate his DNA analysis fee, and (5) vacate the collections fee. We remand for recalculation of the collections fee.

¶ 2 I. BACKGROUND

¶ 3 The following facts were revealed at defendant's jury trial. On the morning of December 4, 2007, defendant and his friend, Louis Demeo, were out drinking, when they devised a plan to steal money and jewelry from the home of defendant's step-sister, Ruth Steffens. The plan called for Demeo to enter Steffens' home and "bag and gag" her so that she could not see. Defendant would then enter the home to retrieve money and jewelry, since he knew where it was kept. Defendant told Demeo that it would take him about 10 minutes to do what he needed to do. After drinking about 12 beers each, defendant and Demeo went to Demeo's house to get money to buy more beer.

¶ 4 The men left Demeo's house and drove toward Steffens' house. They drove past the house, so that defendant could point out the house to Demeo. They saw Steffens' vehicle in the driveway and thought that she might be home. Defendant dropped Demeo off about three or four houses away from Steffen's house. Defendant gave Demeo a hammer, which he had taken from Demeo's home, and told him to use it to scare Steffens. Demeo tucked the hammer into his pants. Demeo jumped

over a wooden fence at the back of Steffens' yard. He walked down the driveway toward the door, which was located on the side of the house.

¶ 5 As Demeo was walking down the driveway, Steffens came outside. According to Steffens, she first saw Demeo through her window, when he was climbing over the gate in her backyard. She went outside and demanded to know his name. Demeo was startled when he saw Steffens, and he threw the hammer to the ground. Steffens picked up the hammer and threw it into her neighbor's yard. Demeo pushed Steffens to the ground and began to kick and to hit her. He asked her where the money was. Steffens got up and ran into her house. She locked the door behind her and called 911. Demeo followed her, and he kicked at the door. Demeo saw defendant drive by in his truck, and he chased after the truck. He was apprehended by the police and later identified by Steffens. Defendant was also arrested and provided a videotaped confession, which was played to the jury.

¶ 6 The jury found defendant guilty, under a theory of accountability, of one count of attempted home invasion (720 ILCS 5/8-4(a), 12-11(a)(1) (West 2006)) and two counts of attempted armed robbery (720 ILCS 5/8-4(a), 18-2(a) (West 2006)). The trial court merged the attempted armed robbery convictions with the attempted home invasion conviction and sentenced defendant to 28 years in prison. Defendant timely appealed.

¶ 7 II. ANALYSIS

¶ 8 A. Sufficiency of the Evidence

¶ 9 Defendant argues that the State failed to prove beyond a reasonable doubt that Demeo took a substantial step toward the commission of the offense of home invasion such that defendant could be found guilty of attempted home invasion under an accountability theory. We disagree.

¶ 10 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v.*

Collins, 106 Ill. 2d 237, 261 (1985). On 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.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 11 A person commits attempt when, with the intent to commit a specific offense, he does any act that constitutes a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2006). As charged here, a person commits home invasion when he, without authority, enters the dwelling place of another, when he knows or has reason to know that one or more persons is present, and while armed with a dangerous weapon threatens the imminent use of force upon any person or persons. 720 ILCS 5/12-11(a)(1) (West 2006). A defendant is guilty of an offense under the theory of accountability where, "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission," he aids, abets, or agrees in the planning or commission of the offense. 720 ILCS 5/5-2(c) (West 2006).

¶ 12 Defendant does not dispute that he and Demeo formed an intent to commit the offense of home invasion. Nor does he dispute that they took preparatory steps toward committing that offense, including planning the offense, driving to the area where Steffens lived, and bringing along a hammer. However, defendant maintains that Demeo did not perform a "substantial step" toward the commission of the act of home invasion. We disagree. What constitutes a substantial step is determined by the facts and circumstances of each particular case. *People v. Smith*, 148 Ill. 2d 454,

459 (1992). Although the accused need not have completed the last proximate act to actual commission of a crime, mere preparation is not enough. *People v. Terrell*, 99 Ill. 2d 427, 433 (1984). A substantial step should put the accused in dangerous proximity to success. *People v. Hawkins*, 311 Ill. App. 3d 418, 423-24 (2000).

¶ 13 Our courts have relied on the Model Penal Code for guidance in determining whether a defendant has taken a substantial step toward commission of an offense. See *Terrell*, 99 Ill. 2d at 435-36. Under the Model Penal Code, an attempt has occurred when a person, acting with the required intent, "purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Model Penal Code §5.01 (1)(c), at 296 (1985). The Model Penal Code lists types of conduct that shall not, as a matter of law, be held insufficient to support an attempt conviction, so long as the act is strongly corroborative of the defendant's criminal purpose. The list includes:

> "(a) lying in wait, searching for[,] or following the contemplated victim of the crime;
>
> ***
>
> (c) reconnoitering the place contemplated for the commission of the crime;
>
> (d) unlawful entry of a structure, vehicle[,] or enclosure in which it is contemplated that the crime will be committed." Model Penal Code § 5.01(2), at 296 (1985).

This list demonstrates the Model Penal Code's emphasis on the nature of steps taken, rather than on what remains to be done to commit a crime. *Hawkins*, 311 Ill. App. 3d at 424.

¶ 14 Here, the evidence established that defendant engaged Demeo to assist defendant in committing a home invasion. Defendant provided Demeo with a hammer to use to intimidate Steffens. Demeo planned to cover Steffens with a sheet so that defendant could also enter and then

remove money and jewelry from the home. Defendant drove Demeo to Steffens' home, where the men saw Steffens' vehicle in the driveway. Demeo exited defendant's vehicle and walked to Steffens' home. Demeo, while armed with a hammer, jumped the back fence and entered Steffens' yard. He walked down the driveway toward the side door. These steps are strongly corroborative of Demeo's criminal purpose and go beyond mere preparation. See *Terrell*, 99 Ill. 2d at 435 (evidence sufficient to support conviction of attempted armed robbery where the defendant was found hiding in the weeds 25 to 30 feet behind a service station and carrying a revolver and a black nylon sock with a knot at one end).

¶ 15 Defendant argues that Demeo was never in dangerous proximity to succeeding in the plan to commit a home invasion because Demeo abandoned the plan and abandoned the hammer before trying to enter Steffens' home. Defendant points to Steffens' testimony that, when she first saw Demeo, he was climbing over a gate in her backyard and was "coming out of the backyard." According to defendant, this testimony establishes that Demeo had abandoned his plan and was *leaving* the yard when Steffens confronted him. However, the record establishes that there were two fences in Steffens' backyard–an outer fence and an inner fence. Thus, the jury could have reasonably inferred that when Steffens said "backyard" she was referring to the space in between the two fences and that he was exiting the "backyard" to enter her main yard. In any event, Demeo himself testified that he jumped the fence into the yard and was walking down the driveway when he encountered Steffens. Thus, although Demeo abandoned the hammer, he had already gone beyond mere preparation to commit home invasion and taken substantial steps.

¶ 16 B. Credit for Time Spent in Presentencing Custody

¶ 17 Defendant was taken into custody on December 4, 2007, and sentenced on April 7, 2010. The parties agree that defendant is entitled to credit for time spent in custody beginning on

December 4, 2007, until he was sentenced on April 7, 2010. See *People v. Williams*, 239 Ill. 2d 503, 505 (2011) (a defendant is entitled to custodial credit for each day spent in presentencing custody). The parties agree that this totals 857 days and, indeed, the judgment directs that defendant be awarded 857 days' credit. However, in his reply brief, defendant acknowledges our supreme court's recent decision in *Williams*, which held that the date of the mittimus is the first day of the sentence and that a defendant should therefore not be credited with that day as presentencing credit. Defendant concedes that, under *Williams*, he is entitled to 856 days' credit.

¶ 18 The mittimus currently reflects that defendant is entitled to 857 days' credit. Further, defendant directs our attention to, and asks that we take judicial notice of, the Department of Corrections (DOC) website, which indicates that defendant was taken into custody on December 11, 2007. See *People v. Young*, 355 Ill. App. 3d 317, 321 n.1 (2005) (we may take judicial notice of information that the DOC has provided on its website). Accordingly, we modify the mittimus to state that defendant is entitled to 856 days' credit. For the benefit of the DOC, we further clarify that his custody date was December 4, 2007.

¶ 19 C. Various Fees and Fines

¶ 20 The record shows that defendant was assessed, *inter alia*, a $10 drug court/mental health court fee and a $200 DNA analysis fee. In addition, he was charged a $147 collections fee. Defendant argues: (1) the drug court/mental health court fee is a fine that must be offset for the time defendant served in custody before sentencing; (2) the DNA analysis fee may not be imposed because defendant already submitted a DNA sample for a previous conviction, but, alternatively, even if the DNA analysis fee may be imposed more than once, it is a fine that must be offset for the days defendant served in presentencing custody; and (3) if any of the assessments are vacated or

reduced, this court must remand the cause so that the circuit court clerk may determine the proper collections fee.

¶ 21 1. Drug Court/Mental Health Court Fee

¶ 22 The State agrees that defendant is entitled to a credit against his drug court/mental health court fee for the time he served in custody before sentencing. Under section 5-1101(d-5) of the Counties Code (55 ILCS 5/5-1101(d-5) (West 2008)), a county may, by ordinance or resolution, authorize the assessment, upon a conviction of a crime, of fees to fund the operation of drug courts and mental health courts. Section 110-14(a) of the Code of Criminal Procedure of 1963 (Code) provides:

> "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." 725 ILCS 5/110-14(a) (West 2008).

Whether a defendant is entitled to such credit is an issue that may be raised for the first time on appeal. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997). The question presented is one of law and is subject to *de novo* review. *People v. Andrews*, 365 Ill. App. 3d 696, 698 (2006).

¶ 23 Although statutorily designated as "fees," amounts assessed under section 5-1101(d-5) of the Counties Code to fund drug courts and mental health courts are considered fines. See *People v. Graves*, 235 Ill. 2d 244, 255 (2009) (drug court/mental health court "fee" is a fine). Thus, they may be offset for the time a defendant serves in custody before sentencing. Here, the parties agree that, based on the amount of time defendant spent in custody, he is entitled to credit under section 110-14(a) of the Code in an amount sufficient to satisfy the $10 drug court/mental health court fee.

¶ 24 2. DNA Analysis Fee

¶ 25 The State also agrees that the $200 DNA analysis fee should be vacated based on *People v. Marshall*, No. 110765, slip op. at 15 (Ill. May 19, 2011), which held that "section 5-4-3 [of the Code] authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA, and the payment of the analysis fee only where that defendant is not currently registered in the DNA database." Because the record establishes that the Illinois State Police collected a sample of defendant's DNA in June 2004, the fee was not authorized. Accordingly, we vacate the DNA analysis fee.

¶ 26 Because we are vacating the DNA analysis fee, we need not address defendant's alternative argument that the DNA analysis fee is a fine that is subject to credit under section 110-14(a) of the Code. Nevertheless, we note that, after the parties filed their briefs in this case, we held that the DNA analysis fee is actually a fee and not subject to the credit under section 110-14(a) of the Code. *People v. Guadarrama*, 2011 IL App (2d) 100072, ¶ 13.

¶ 27 3. Collections Fee

¶ 28 As a final matter, the parties agree that, if any of the assessments imposed against defendant are modified, the collections fee imposed against defendant must likewise be modified. See 705 ILCS 105/27.2(gg) (West 2010) ("the clerk of the court may add to any unpaid fees and costs under the Section a delinquency amount equal to 5% of the unpaid fees that remain unpaid after 30 days, 10% of the unpaid fees that remain unpaid after 60 days, and 15% of the unpaid fees that remain unpaid after 90 days"). Because we find that the drug court/mental health court fee must be fully offset for the time defendant served in custody before sentencing and that the $200 DNA analysis fee should not have been imposed, we remand this cause so that the circuit court clerk may recalculate the collections fee. We deem it necessary for the clerk, and not this court, to recalculate the collections fee because, among other things, we do not know what has transpired with regard to

the assessments since May 5, 2011, when the list of the assessments imposed against defendant was certified and made a part of the record on appeal.

¶ 29 III. CONCLUSION

¶ 30 In light of the foregoing, we affirm defendant's conviction; modify the mittimus to state that defendant is entitled to 856 days' credit, to clarify that defendant's custody date was December 4, 2007, to reflect a credit of $10 toward the drug court/mental health court fee; vacate the $200 DNA analysis fee; and remand this cause for further proceedings.

¶ 31 Affirmed as modified in part and vacated in part; cause remanded.