2012 IL App (2d) 101179-U
No. 2-10-1179
Order filed March 27, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PAUL T. CLARK, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 07-CF-642 Honorable Thomas E. Mueller, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: (1) Defendant was not entitled to an instruction on criminal trespass to real property, as a lesser included offense of burglary (although the trial court's basis for denying the instruction was erroneous): because the facts did not support a reasonable inference that defendant entered for a reason other than to commit a felony or theft, the jury could not have acquitted defendant of burglary but convicted him of criminal trespass; (2) although the trial court erred in denying defendant sentencing credit for his time on electronic home monitoring without inquiring as to whether the monitoring was custodial, the error was harmless, as defendant's repeated travels out of range demonstrated that the monitoring was not custodial; (3) we vacated defendant's trauma-center-fund fine, as his offense did not subject him to that fine.

¶ 1 Defendant, Paul T. Clark, was indicted for burglary (720 ILCS 5/19-1(a) (West 2006)).[1] At his jury trial, defendant asked the court to instruct the jury on criminal trespass to real property (720 ILCS 5/21-3(a)(1) (West 2006)). The trial court denied this request, a jury found defendant guilty of burglary, and defendant was sentenced to nine years' imprisonment. In fashioning the sentence, the court imposed a $100 Trauma Center Fund fine and did not give defendant credit against his sentence for the presentencing time he served on electronic home monitoring (EHM). At issue in this appeal is whether (1) the jury should have been instructed on criminal trespass to real property; (2) the trial court erred when, in denying defendant credit against his sentence for the time he served on EHM, the court failed to inquire into whether defendant's time on EHM was "custodial"; and (3) the $100 Trauma Center Fund fine imposed against defendant must be vacated. We conclude that (1) no error arose when the trial court refused to instruct the jury on criminal trespass to real property; (2) although the trial court erred in failing to inquire into whether defendant's time on EHM was "custodial," the court's failure to do so was harmless, as the record clearly reflected that it was not; and (3) defendant's $100 Trauma Center Fund fine must be vacated.

¶ 2 On March 9, 2007, defendant was arrested after he entered upon Tavarez's land and broke into Tavarez's trailer.[2] Defendant posted bond, and, as a condition of his bond, a judge other than the one who presided over defendant's trial placed defendant on EHM on June 18, 2007. The terms

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[1]The indictment provided, as relevant here, that "defendant[,] without authority, knowingly entered a building of Raymondo Tavarez *** with the intent to commit therein a theft."

[2]Although the indictment used the term "building," courts have concluded that "building" for purposes of the burglary statute encompasses structures that store and shelter personal property. See *People v. Ruiz*, 133 Ill. App. 3d 1065, 1068-69 (1985).

of defendant's EHM were later modified by yet another judge to allow defendant to be in his home or within 25 feet of it so that he could repair it. From July 20, 2007, until August 5, 2007, defendant violated the conditions of his EHM 13 times. Although, on one of these occasions, defendant was out of range of his EHM for only 14 minutes, on many other occasions he was out of range for an hour or two. Most of the violations occurred early in the morning or late at night. Because of these infractions, the State sought to increase defendant's bail. Defendant remained on EHM from June 18, 2007, to August 25, 2007, when he was arrested for another offense. At that time defendant was placed in jail.[3]

¶ 3 Thereafter, a jury was impaneled to decide whether defendant was guilty of burglary. The relevant evidence presented at that trial revealed the following. On March 8, 2007, at about 9:30 or 9:45 a.m., Tavarez went to his property to check on his truck and trailer. Pictures of the area presented at trial revealed that the area is residential and that the homes in the area are not very far away from each other. Tavarez used to have a home on his property, but it burned down. Tavarez lives a short distance away from the property, but he continues to store on his property his truck and trailer that he uses for his landscaping business. On March 8, 2007, Tavarez's truck and trailer were parked at the back of the property, near a high wooden privacy fence that runs along the property

[3]The common-law record reflects that defendant was again placed on EHM on March 14, 2008, and remained on EHM for some time thereafter. In his brief, defendant claims that he was on EHM for a total 76 days. How defendant arrived at this figure is unknown. Because the record does not clearly indicate how many days defendant remained on EHM, and because the State does not take issue with the claim that it was 76 days, we will accept defendant's assertion that he remained on EHM for 76 days.

line. When Tavarez checked on his truck and trailer that morning, he saw that the trailer was closed and that the locks on the trailer were locked.

¶ 4 At a later point that morning, defendant's girlfriend, Cynthia Balderas, was driving her father's truck when it stalled near Tavarez's property. A passerby saw Balderas and helped her push the truck onto Tavarez's property. Photographs taken of the truck on the property show that the truck was parked several yards away from the street, near Tavarez's truck and trailer. Balderas left the truck there and walked to her father's home, which was not far away. Balderas called defendant and asked him to recover the truck and meet her at her father's house.

¶ 5 At around 10:30 a.m., Tavarez returned to his property. He saw an unfamiliar truck, the truck that Balderas was driving, parked on his property. He also saw that his trailer was open and that the lock on the door on one side of the trailer was broken. Tavarez entered the trailer and saw defendant. Defendant was holding a trimmer. Tavarez asked defendant what he was doing, and defendant responded that the owner had sent him to the trailer to get some machinery. When Tavarez informed defendant that he was the owner, defendant swore at Tavarez and told Tavarez that he was going to kill him with the trimmer. Tavarez closed the door to the trailer, latched the door, and called his wife to tell her to call the police.

¶ 6 Defendant soon broke through the door and began running. Tavarez chased defendant, observing that, at one point, defendant made a call on a cell phone. A police officer arrived with his lights flashing and siren on and saw defendant attempting to pull himself into a truck that had pulled up to the area. Defendant fell from that truck and continued running for about another 20 yards. At that point, defendant was apprehended.

¶ 7 Later, the police surveyed the crime scene and collected evidence. Bolt cutters were recovered from the trailer and the truck Tavarez saw parked on his property. Lying on the ground outside the trailer was the lock Tavarez used to secure the trailer. The mechanism that would secure the lock to the latch on the trailer had been removed.

¶ 8 After the jury heard all the evidence, a jury instructions conference was held. During that conference, defendant asked the trial court to give the jury an instruction on criminal trespass to real property. Although the trial court originally indicated that it would so instruct the jury, the court reassessed after the parties advised the court that the instruction provided that, prior to an entry, the defendant must have received notice that the entry is forbidden. See Illinois Pattern Jury Instructions, Criminal, No. 16.12 (4th ed. 2000) (IPI Criminal 4th 16.12). Given that additional requirement of notice, the State argued that criminal trespass to real property is not a lesser included offense of burglary. Recognizing that the relevant provision of the statute governing criminal trespass to real property does not contain a notice requirement (see 720 ILCS 5/21-3(a)(1) (West 2006)), the court nevertheless refused to give the jury an instruction on criminal trespass to real property without the pattern instruction's verbiage concerning notice. In the court's view, it was "bound by the [erroneous] I.P.I." instructions.

¶ 9 The jury found defendant guilty. Defendant moved for a new trial, arguing that the trial court should have given the jury an instruction on criminal trespass to real property. Defendant also filed a *pro se* motion asking for credit for the time he served on EHM. The trial court denied both motions. In denying defendant's request for sentencing credit, the court simply said, in response to defendant's claim that his time on EHM was a kind of incarceration, "[a]nd the Court does not

believe that [EHM] is, so that [will] be denied." Thereafter, defendant was sentenced, never taking issue with the $100 Trauma Center Fund fine. This timely appeal followed.

¶ 10 Defendant raises three issues in this appeal. Specifically, he claims that (1) the trial court erred when it refused to instruct the jury on criminal trespass to real property; (2) the court was required to inquire into whether the time defendant remained on EHM was "custodial"; and (3) his $100 Trauma Center Fund fine must be vacated. We address each issue in turn.

¶ 11 First, we consider whether the trial court should have instructed the jury on criminal trespass to real property. In addressing that issue, we observe that the trial court believed that it could not instruct the jury on criminal trespass to real property because, even though the applicable portion of the criminal trespass statute does not require that a defendant enter a building after having been given notice that entry is prohibited, the IPI has such a requirement. Compare 720 ILCS 5/21-3(a)(1) (West 2006) (a person commits criminal trespass to real property when, among other things, he "knowingly and without lawful authority enters or remains within or on a building") with IPI Criminal 4th No. 16.12 ("To sustain a charge of criminal trespass to real property, the State must prove *** [t]hat the defendant *** entered *** a building other than a residence *** and *** [t]hat prior to the entry, the defendant received notice *** that such entry is forbidden"). Accordingly, because the IPI does not accurately state the law, the court rightfully refused to give it to the jury.

¶ 12 The problem is that, even though the IPI does not accurately state the law, the court was not prohibited from giving an instruction for criminal trespass to real property. Rather, when a court finds that the IPI does not accurately state the law, the court may modify it so that the jury instruction conforms with the law. See Ill. S. Ct. R. 451(a) (eff. July 1, 2006) (noting that IPI should be given "*unless the court determines that it does not accurately state the law*" (emphasis added.)); *People*

v. Clarke, 391 Ill. App. 3d 596, 626 (2009) (court may modify IPI if it does not accurately state the law). Here, if the court would have modified the IPI for criminal trespass to real property by excising the verbiage concerning notice, the jury would have been properly instructed on the elements needed to find defendant guilty of that offense.

¶ 13 That said, the court should not have given even a proper instruction for criminal trespass to real property. Generally, a defendant may not be convicted of an offense with which he was not charged. *People v. Washington*, 375 Ill. App. 3d 243, 248 (2007). However, a defendant may be convicted of an uncharged offense where: (1) the uncharged offense is identified by the charging instrument as a lesser included offense of the one charged; and (2) the evidence adduced at trial rationally supports a conviction of the lesser included offense. *Id.* "The second-tier issue is whether the evidence would permit a fact finder to rationally find the defendant guilty of the lesser-included offense, but acquit the defendant of the greater offense." *People v. Reynolds*, 359 Ill. App. 3d 207, 219 (2005). Whether a charged offense encompasses an included offense is a question of law that we review *de novo*. *Id.* at 218.

¶ 14 Here, even assuming that the charging instrument describes criminal trespass to real property, the evidence presented at trial did not rationally support a conviction of criminal trespass to real property and an acquittal of burglary. An "[i]ncluded offense" is one "established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 2006). A person commits burglary when "without authority he knowingly enters or without authority remains within a building *** with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2006). One commits criminal trespass to real property when he "knowingly and without lawful authority

enters or remains within or on a building." 720 ILCS 5/21-3(a)(1) (West 2006). Thus, the difference between criminal trespass and burglary is that the latter offense additionally requires that the defendant intend to commit a felony or theft.

¶ 15 Defendant claims that an inference that he did not enter Tavarez's trailer to commit a felony or theft could be drawn from the evidence. Specifically, defendant claims that "a rational jury could have inferred that he was looking for a tool to assist him [in fixing the truck Balderas was driving]" and not that he entered the trailer to commit a theft. The evidence presented at trial belies this position.

¶ 16 " '[I]ntent may be inferred by surrounding circumstances and may be proved by circumstantial evidence.' " *People v. Thomas*, 374 Ill. App. 3d 319, 326 (2007) (quoting *People v. Taylor*, 344 Ill. App. 3d 929, 936 (2003)). Here, the circumstantial evidence and the rational inferences drawn from the surrounding circumstances indicate that defendant entered the trailer to commit a theft.

¶ 17 Specifically, the evidence revealed that, an hour before Tavarez discovered defendant in his trailer, Tavarez's trailer, which was parked at the end of his property and close to a high wooden privacy fence, was locked up. When Tavarez returned to his property, he saw that his trailer had been broken into. Lying on the ground outside of his trailer was the lock Tavarez used to secure his trailer. The lock had been broken. When the police searched the area, they found bolt cutters in the truck that defendant was allegedly attempting to fix.

¶ 18 Tavarez looked inside his trailer and saw defendant standing there. When Tavarez asked defendant what he was doing, defendant did not claim that he was looking for a tool to fix the truck. Rather, defendant, who was holding a trimmer that Tavarez stored in the trailer, told Tavarez that the owner had asked him to retrieve some machinery. When Tavarez confronted defendant about this

lie by informing defendant that he was the owner, defendant did not question Tavarez's assertion or admit that he had lied and suggest that he was actually looking for a tool to fix the truck. Instead, defendant threatened to kill him.

¶ 19 At that point, Tavarez closed defendant in the trailer. Defendant soon broke through the trailer, began running from the trailer, and attempted to leave the scene by jumping into a truck that pulled up in the area soon after defendant made a call on his cell phone. Defendant's flight from the scene certainly tends to show that defendant did not enter the trailer to borrow a tool. See *People v. Peete*, 318 Ill. App. 3d 961, 966 (2001) (noting that evidence of flight is admissible as a circumstance tending to show a consciousness of guilt).

¶ 20 Added to this is the fact that defendant had many other avenues to pursue, other than breaking into Tavarez's trailer, if he was seeking to repair the truck. As noted, the area where defendant broke into the trailer is residential, with several homes located within close proximity to Tavarez's property. If defendant in fact needed a tool to fix the truck, it seems implausible that he would have opted to break into Tavarez's trailer rather than going to one of the many neighboring homes to see whether a resident had the tool he needed. Moreover, Tavarez testified that defendant had a cell phone with him, which Tavarez saw defendant use while Tavarez was chasing him. Given that defendant had this phone, he certainly could have used it to call a friend or relative who would have been willing to bring defendant the needed tool, or defendant could have phoned a mechanic or called a tow truck. Additionally, the evidence established that Balderas's father lived nearby. Defendant easily could have walked over to his house, as Balderas had done earlier, and borrowed the tool he needed or asked one of the neighbors there for the tool. Given all of this evidence, we determine that a fact finder could not have rationally found defendant guilty of criminal trespass to

real property and acquitted him of burglary. Thus, even though the trial court was incorrect in thinking that it could not modify the criminal trespass IPI, that error was harmless.

¶ 21 The next issue we consider is whether the trial court erred when it did not inquire into whether defendant's time on EHM was "custodial" for purposes of awarding defendant credit against his sentence. Defendant claims that the court was required to make such an inquiry and that because the court did not, his case must be remanded for a hearing to determine whether his EHM time was "custodial." In making this argument, defendant recognizes that under section 5-8-7(b) of the Unified Code of Corrections (Corrections Code) (730 ILCS 5/5-8-7(b) (West 2006)) the court has the discretion to grant credit for the time a defendant remained on EHM. However, defendant argues that, because section 5-8-7(b) of the Corrections Code provides that the discretion to grant credit rests on whether the court believes that the time a defendant spent on EHM was "custodial," the court's failure to even inquire into whether the term of EHM was "custodial" necessarily amounts to error.

¶ 22 The relevant portion of section 5-8-7(b) of the Corrections Code provides:

> "The offender *shall* be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for time spent in custody as a result of the offense for which the sentence was imposed, at the rate specified in Section 3-6-3 of this Code. Except when prohibited by subsection (d), the trial court *may* give credit to the defendant for time spent *in home detention* *** if the court finds that the detention *** was *custodial*." (Emphases added.) *Id.*

¶ 23 Although, under section 5-8-7(b) of the Corrections Code, a trial court *must* award credit if a defendant was "in custody," the same is not true for a defendant who was placed in home detention

while awaiting trial. *People v. Gonzales*, 314 Ill. App. 3d 993, 995 (2000). Indeed, "it is well settled that a home detainee is not 'in custody' regardless of the restrictions imposed upon his conditional pretrial release." *Id.* That is not to say, however, that a defendant placed in home detention will never be entitled to receive credit against his sentence for that time. *Id.* at 999. Rather, as long as another provision of section 5-8-7 of the Corrections Code does not prohibit awarding a defendant credit, a defendant is entitled to credit if the trial court finds that the time the defendant served in home detention was "custodial." *Id.* Accordingly, the trial court must consider the terms of a defendant's home detention and make a finding as to whether the defendant's home detention was "custodial." See *id.* (in determining that the trial court did not abuse its discretion in denying the defendant credit for the time he served in home detention, this court observed that the trial court noted that the defendant was allowed to leave his home " 'six days a week, 11 hours a day for employment,' " which qualified as a finding that the home detention was not " 'custodial' "). We review the decision whether to award credit under section 5-8-7(b) for an abuse of discretion. *Id.*

¶ 24 Here, it is clear that the trial court, which was not the same court that gave defendant EHM, did not consider the facts surrounding the terms of defendant's EHM in finding that the time defendant remained on EHM was not "custodial." As this court found in *Gonzales*, the court should have made such an inquiry, because, under section 5-8-7(b), the court should have granted defendant credit if it found that time "custodial."

¶ 25 That said, given the facts of this case, we determine that the court's failure to inquire was harmless. In *People v. Thompson*, 174 Ill. App. 3d 496, 498 (1988), the defendant, who was on EHM for 97 days, was out of range of EHM 18 times. On some of these occasions, the defendant was working or at his attorney's office, and on other occasions he was visiting his girlfriend, partying

with his friends, or shopping. *Id.* at 498-99. Because, given these infractions, it was clear that the defendant "was out of touch with the monitoring system and free to go where he chose," this court found that the defendant was not "in custody" when he was on EHM. *Id.* at 500. Thus, the defendant was not entitled to credit against his sentence for the time he remained on EHM. *Id.*

¶ 26 Here, although we must consider whether defendant's EHM time was "custodial" and not, to the extent that there is a difference, whether defendant was "in custody" while he was on EHM (see *People v. Beachman*, 229 Ill. 2d 237 (2008) (discussing at great length what "custody" means for purposes of section 5-8-7 of the Corrections Code and whether a defendant who is placed in the Sheriff's Day Reporting Center program is "in custody"), we must conclude that defendant's EHM time was not "custodial." Given the fact that defendant repeatedly violated the terms of his EHM for hours at a time, he, like the defendant in *Thompson*, was essentially free to go where he chose when he wanted. Thus, even though the trial court here should have inquired into whether defendant's time on EHM was "custodial," the court's failure to do was harmless, as the record reflects that, in line with *Thompson*, defendant was not entitled to credit against his sentence for the time he remained on EHM.

¶ 27 The last issue we consider is whether this court must vacate the $100 Trauma Center Fund fine imposed against defendant. In addressing this issue, we note that defendant never challenged this fine in the trial court. Thus, it could be argued that defendant forfeited his claim that the $100 Trauma Center Fund fine was improperly imposed. *People v. Hunter*, 358 Ill. App. 3d 1085, 1094 (2005). However, that is not the case. *Id.* If a court lacks the statutory authority to impose a fine, imposition of that fine is void *ab initio* and may be challenged at any time. *Id.* Thus, we will

consider whether imposition of the $100 Trauma Center Fund fine was proper. Because this is solely a question of law, our review is *de novo*. *People v. Guadarrama*, 2011 IL App (2d) 100072, ¶ 6.

¶ 28 By statute, this fine may be imposed only upon a violation of section 24-1.1, 24-1.2, or 24-1.5 of the Criminal Code of 1961 (720 ILCS 5/24-1.1, 24-1.2, 24-1.5 (West 2006)). 730 ILCS 5/5-9-1.10 (West 2006). Here, defendant was convicted of burglary (720 ILCS 5/19-1(a) (West 2006)), which is not one of these listed offenses. Accordingly, because defendant was not convicted of one of the specified offenses, his $100 Trauma Center Fund fine is void and must be vacated.

¶ 29 For these reasons, the judgment of the circuit court of Kane County is affirmed, except that we vacate the $100 Trauma Center Fund fine imposed against defendant.

¶ 30 Affirmed in part and vacated in part.