No. 3--09--0730

Order filed March 31, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois
Plaintiff-Appellee,	)	No. 08--CF--1532
v.	)	
RONALD PERRY,	)	Honorable Stephen D. White
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LYTTON delivered the judgment of the court.

Presiding Justice Carter and Justice Schmidt concurred in the judgment.

ORDER

Held: (1) Circumstantial evidence was sufficient to support defendant's burglary conviction where testimony established that he was with Stanley Cochran, who pled guilty to the burglary, when the crime was committed and was seen splitting money with Cochran; (2) the trial court did not err in admitting the testimony of Officer Ellingham to impeach Cochran's testimony that he performed the burglary alone since Ellingham's testimony was damaging to the State's case; and (3) the trial court did not err in instructing the jury to continue deliberating based

on the law they had already received, including the pattern jury instruction for burglary, in response to jury questions.

Defendant, Ronald Perry was charged with two counts of burglary (720 ILCS 5/19--1(a) (West 2008)) for burglarizing a department store and a recreation club. A jury found him guilty of burglarizing the recreation club. The trial court sentenced defendant to 23 years in prison. Defendant appeals, arguing that (1) the evidence was insufficient to support his conviction, (2) the trial court erred in admitting certain testimony, and (3) the trial court improperly responded to jury questions. We affirm.

Defendant, Stanley Cochran and Chad Ferguson were charged with burglarizing Braidwood Recreation Club and Whitmore Ace Hardware in June 2008. Defendant was tried before a jury.

At defendant's trial, Bradley Frankenfield, the assistant manager of Whitmore Ace Hardware, testified that when he arrived at work on June 20, 2008, he saw that the door to the store's office was off of its hinges and had been moved. In the office, desk drawers were open. The safe located in the office was missing hinge pin caps, had a bent handle and had chip marks. When he saw this, he called the police.

While Frankenfield waited for the police to arrive, he walked around the store to see if there was any other damage. He saw that the cash register drawers had been pried open. He

looked around but could not tell if any items in the store were missing. Later, Frankenfield received a call from the Braidwood police, telling him that some items had been found at Braidwood Recreation Club. After receiving a description of the items and their UPC numbers, Frankenfield determined that two garden mattocks and two crowbars had been taken from the store. When the items were returned to Frankenfield, he saw that they were chipped, worn and had obviously been used.

Les Savage runs the concession stand at Braidwood Recreation Club. A safe is kept in the back storage area of the concession stand. Four hundred dollars in cash and a cell phone are locked in the safe every night. When Savage went to the concession stand on June 20, 2008, he found the safe on the ground in a cement area in front of the concession stand. There were crowbars, coins and the cell phone lying near the safe. The safe was damaged. There was also damage to the door to the concession stand.

Mary Beth Davis, the assistant secretary treasurer of the Braidwood Recreation Club, testified that the club has two security cameras. On June 20, 2008, soon after she arrived at work, she went to her office to view the security tapes from the night before. On the videotapes, she saw two individuals walking outside the fence of the club. One of the individuals laid down

next to the fence and was then inside the fence. From the other camera, she saw one individual walking back from the concession stand about 20 minutes later. The tapes were shown to the jury.

Stanley Cochran testified that he pled guilty to burglarizing Braidwood Recreational Club and Whitmore Ace Hardware during the late hours of June 19, 2008 and/or early hours of June 20, 2008. He testified that he removed the hinges from the back door of Whitmore Ace Hardware and looked for pry bars in the store so that he could open the store's safe. He was unable to open the safe because it was too big. He took four tools from the store and left. He then went to Braidwood Recreation Club.

He went under the fence to gain access to the club. Once inside, he went directly to the concession area, where he knew there would be money. He pried open the door to the concession stand with one of the pry bars he took from the hardware store. He found a safe and took it outside. He then used two different tools to open the safe. He found over $300 in the safe. He took the money and went back under the fence to exit the club. After that, he went home. At the time, he was living with his mother, his brother, Chad Ferguson, and Ferguson's girlfriend, Megan Drake.

Cochran testified that he knows defendant and considers him

a friend. Defendant was at Cochran's house on June 19, 2008, but defendant left before Cochran went to commit the burglaries. Cochran testified that he committed the burglaries alone. He did not recall telling anyone from the Will County Sheriff's Department that defendant went with him to Whitmore Ace Hardware or Braidwood Recreation Club.

After Cochran's testimony, the State sought to introduce testimony that Cochran told a detective from the Will County Sheriff's Department that defendant committed the burglaries with him. Defendant objected. The trial court ruled that the testimony was admissible.

Jack Ellingham, a detective from the Will County Sheriff's Department, testified that he interviewed Cochran on June 26, 2008. Cochran told him that he and defendant entered Whitmore Ace Hardware together. They tried to open the safe but were unsuccessful, so they took tools and went to Braidwood Recreation Club. Cochran told Ellingham that he and defendant both entered Braidwood Recreation Club, removed a safe and took money from inside it. Cochran provided Ellingham a written statement on June 26, 2008, about the burglaries. The statement made no mention of defendant.

Chad Ferguson, Cochran's brother, testified that he was at home on the evening of June 19, 2008. Defendant and Cochran were

there too. Cochran was wearing dark pants, a dark hooded sweatshirt and black gloves. Defendant was wearing blue jeans, a dark hooded sweatshirt and dark brown gloves. Cochran and defendant left together at about 11:00 p.m. They came back three to four hours later. When they came back, they went into Cochran's room, placed money on the floor, counted it and divided it. Ferguson admitted that the State gave him a deal in exchange for his testimony.

Megan Drake, Ferguson's ex-girlfriend who lived with Ferguson and Cochran in June 2008, testified that she woke up sometime after midnight on June 20, 2008. She saw Cochran and defendant in the computer room. Cochran was wearing all black. Defendant was wearing a dark sweatshirt and jeans.

The State and defendant stipulated that partial fingerprints were found at the Braidwood Recreation Club crime scene, but the prints were not suitable for comparison.

Prior to deliberations, the jury was given several instructions. One instruction advised jurors of the definition of burglary: "A person commits the offense of burglary when he, without authority, knowingly enters a building or any part thereof with the intent to commit therein the offense of theft." Illinois Pattern Jury Instructions, Criminal, No. 14.07 (4th ed. 2000) (IPI Criminal 4th No. 14.07). Another instruction directed

jurors to consider prior inconsistent statements "for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom." Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000) (IPI Criminal 4th No. 3.11).

Approximately 40 minutes into deliberations, the jury provided a note to the trial court, which contained the following question: "Did he have to enter the business to be charged[?]" The trial court proposed the following response: "You have heard the evidence in this case and you should use your collective memories as to that evidence. You should apply the law to the evidence in arriving at your verdict." The trial court asked both the State and defendant if they objected, and they both said they did not. The court's proposed response was provided to the jury.

Over two hours later, the jury came back with another question: "Is outside the fence considered a "building or part thereof[?]" Again, the trial court proposed the following response: "You have heard the evidence in this case and you should use your collective memories as to that evidence. You should apply the law to the evidence in arriving at your verdict." The trial court asked if this response was acceptable to defendant. Defense counsel responded, "Yes, all right." The

response was given to the jurors.

Thereafter, the jury returned its verdict, finding defendant not guilty of burglary to Whitmore Ace Hardware but guilty of burglary to Braidwood Recreation Club. The trial court sentenced defendant to 23 years in prison. Defendant filed a motion for a new trial and a motion to reconsider sentence. The trial court denied both motions.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt of burglary because there was no physical evidence that he entered the concession stand at Braidwood Recreation Club.

"A person commits burglary when without authority he knowingly enters or without authority remains within a building *** or any part thereof, with intent to commit therein a felony or theft." 720 ILCS 5/19--1(a) (West 2008).

When considering the sufficiency of the evidence supporting a conviction, "our function is not to retry the defendant." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Rather, we must determine 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. *People v. Cunningham*, 212 Ill. 2d 274, 279-80

(2004).

A valid conviction may be based entirely on circumstantial evidence. *People v. Weaver*, 92 Ill. 2d 545, 555 (1982). The crime of burglary must often be proved by circumstantial evidence. *People v. Richardson*, 104 Ill. 2d 8, 13 (1984). A lack of physical evidence does not justify reversal of a burglary conviction. See *Id.* at 13-14; *People v. Wheeler*, 401 Ill. App. 3d 304, 312 (2010); *People v. Scales*, 307 Ill. App. 3d 356, 359 (1999).

Here, there was no physical evidence that conclusively linked defendant to the burglary of the Braidwood Recreation Club concession stand. However, there was circumstantial evidence that he actively participated in the burglary. First, there were two sets of tools found at the club. If Cochran had acted alone, as he claimed, there would be no need for two sets of tools. Additionally, both Ferguson and Drake testified that Cochran and defendant were together on the night of the burglaries wearing dark colored clothing and gloves. Ferguson testified that defendant and Cochran left together and returned to Cochran's home several hours later with money. A videotape showed both defendant and Cochran outside the fence of the Braidwood Recreation Club. Almost immediately thereafter, someone was crawling under the fence. Minutes later, someone was walking

away from the concession stand.

Viewing the evidence in the light most favorable to the prosecution, as we must, we cannot conclude that no rational trier of fact could have found defendant guilty of burglary.

II. ELLINGHAM'S TESTIMONY

Defendant argues that Ellingham's testimony that Cochran told him he committed the burglaries with defendant was inadmissible and unduly prejudicial to defendant. Defendant further argues that his counsel was ineffective for not requesting that the jury be instructed that Ellingham's testimony was only to be considered as impeachment, not substantive evidence, when Ellingham testified.

A. Admissibility

Under Illinois Supreme Court Rule 238(a), the credibility of a witness can be attacked by any party, including the party calling the witness. Ill. S. Ct. R. 238(a) (eff. April 11, 2001). Such an attack may be accomplished by impeaching the witness with evidence of a prior inconsistent statement. *People v. Cruz*, 162 Ill. 2d 314, 358 (1994). A witness may be impeached by prior inconsistent statements only if his testimony has damaged, rather than failed to support, the position of the impeaching party. *Weaver*, 92 Ill. 2d at 563. Damage occurs when the testimony gives positive aid to an adversary's case. *Cruz*,

162 Ill. 2d at 360.

When a witness' testimony exculpates the defendant, it is damaging to the State's case. See *People v. Chapman*, 262 Ill. App. 3d 439, 453 (1992); *People v. Amato*, 128 Ill. App. 3d 985, 987 (1984). Thus, the State may impeach such a witness with a prior inconsistent statement that inculpates the defendant. *Chapman*, 262 Ill. App. 3d at 453; *Amato*, 128 Ill. App. 3d at 987.

Here, Cochran testified at trial that he committed the burglaries alone and denied that defendant was present with him. Such testimony, exculpating defendant, damaged the State's case. See *Chapman*, 262 Ill. App. 3d at 453; *Amato*, 128 Ill. App. 3d at 987. Thus, the trial court properly allowed the State to impeach Cochran's trial testimony with his prior inconsistent statements made to Ellingham that inculpated defendant in the burglaries.

B. Prejudicial Impact

Prior inconsistent statements may be offered solely for impeachment value and may not be considered as substantive evidence by the trier of fact. *People v. Koch*, 248 Ill. App. 3d 584, 590 (1993). A jury should be cautioned and properly instructed regarding the limitations upon the use of a prior inconsistent statement so that they do not consider them to be substantive evidence. *People v. White*, 181 Ill. App. 3d 798, 805 (1989).

A defendant is entitled to provide the jury with IPI Criminal 4th No. 3.11 to ensure that the jury gives no substantive weight to the prior inconsistent statement. *Koch*, 248 Ill. App. 3d at 590. IPI Criminal 4th No. 3.11 provides in pertinent part:

> "The believability of a witness may be challenged by the evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom." IPI Criminal 4th No. 3.11.

This instruction is "sufficient to guide the jury in its deliberation and provide an adequate safeguard that the jury would not give substantive character to the impeachment testimony." *People v. Bradford*, 106 Ill. 2d 492, 502 (1985).

The committee comments to IPI Criminal 4th No. 3.11 recommend that the instruction be given at the time the inconsistent statement is offered and, again, in the final, written instructions to the jury. IPI Criminal 4th No. 3.11, Committee Comments. However, committee comments to jury instructions are merely advisory. *People v. Sims*, 285 Ill. App. 3d 598, 611 (1996). A trial court is allowed to deviate from the

suggested instructions contained in the committee comments. *Id.* It is permissible for a trial court to give IPI Criminal 4th No. 3.11 only at the close of evidence and not at the time of the impeaching testimony. See *People v. Miller*, 363 Ill. App. 3d 67, 76-77 (2005); *White*, 181 Ill. App.3d at 805; *People v. Chrisos*, 151 Ill. App. 3d 142, 151-52 (1986).

A trial court's failure to give a cautionary jury instruction is reviewed under an abuse of discretion standard. *Miller*, 363 Ill. App. 3d at 76. In reviewing the adequacy of instructions, a court of review must consider all of the instructions as a unit to determine if they fully and fairly cover the law. *People v. Luckett*, 273 Ill. App. 3d 1023, 1034 (1995). Where a trial court provides instructions that correctly and sufficiently cover the law, there is no abuse of discretion. See *People v. Cannon*, 150 Ill. App. 3d 1009, 1019-20 (1986).

Here, the jury was properly instructed, at the close of evidence, to consider prior inconsistent statements "only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom." It was permissible for the trial court to give the instruction only one time. See *Miller*, 363 Ill. App. 3d at 76-77. Because the jury was properly instructed regarding the limited purpose for which they should consider Ellingham's testimony, the testimony was not

unduly prejudicial.

C. Ineffective Assistance

To establish a claim of ineffective assistance of counsel, the defendant must show that his attorney's performance fell below an objective standard of reasonableness and that a reasonable probability exists that the defendant was prejudiced by the performance. *People v. Billups*, 318 Ill. App. 3d 948, 955 (2001), citing *Strickland v. Washington*, 466 U.S. 668 (1984). Prejudice is assessed in light of the likelihood of success at trial. *Billups*, 318 Ill. App. 3d at 955. If prejudice has not been demonstrated, we need not consider whether counsel's performance was deficient. *Id.*

Failure to request a particular jury instruction may be grounds for finding ineffective assistance of counsel only if the instruction was so "'critical'" to the defense that its omission "den[ied] the right of the accused to a fair trial." *People v. Johnson*, 385 Ill. App. 3d 585, 599 (2008), quoting *People v. Pegram*, 124 Ill. 2d 166, 174 (1988). The omission of a particular instruction must be judged in light of the other instructions given. *Johnson*, 385 Ill. App. 3d at 599. Jury instructions are evaluated in their entirety to determine if they fairly, fully and comprehensively informed the jury of the relevant law. *Id.* Where a jury is fully instructed as to the

law, the defendant cannot establish an ineffective assistance of counsel claim because there is no prejudice to the defendant. See *Johnson*, 385 Ill. App. 3d at 600; *Billups*, 318 Ill. App. 3d at 956.

Here, as explained above, the jury was provided IPI Criminal 4th No. 3.11 at the close of evidence. Because the jury was instructed about the use of prior inconsistent statements, defense counsel's failure to request that the instruction be given more than once did not prejudice defendant. Since defendant cannot establish prejudice, his ineffective assistance claim fails.

III. COURT'S RESPONSES TO JURY QUESTIONS

Defendant argues that the trial court erred by not providing the jury with a definition of "building" in response to its questions. He further argues that his counsel was ineffective for failing to object to the trial court's responses.

A. Propriety of Responses

The trial court has discretion in determining how best to respond to a jury question. *People v. Sanders*, 368 Ill. App. 3d 533, 537 (2006). We review a trial court's response for an abuse of discretion. *Id.*

When a defendant acquiesces in the trial court's answer to a question from the jury, the defendant cannot later complain that

the trial court's answer was an abuse of discretion. *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010). Here, defense counsel never objected to the trial court's responses to the jury. Thus, defendant waived this claim. Waiver, aside, we find that the trial court did not abuse its discretion by failing to define "building" for the jury.

Generally, a trial court must provide instruction when the jury has posed an explicit question or asked for clarification on a point of law arising from facts showing doubt or confusion. *Averett*, 237 Ill. 2d at 24. A trial court may, however, exercise its discretion to decline answering a question from the jury under appropriate circumstances. *Id.* Appropriate circumstances include (1) when the jury instructions are readily understandable and sufficiently explain the relevant law, (2) when additional instructions would serve no useful purpose or may potentially mislead the jury, (3) when the jury's request involves a question of fact, (4) or when giving an answer would cause the trial court to express an opinion likely directing a verdict one way or the other. *Id.*

When words used in a jury instruction have a commonly understood meaning, the court need not define them. *People v. Sanchez*, 388 Ill. App. 3d 467, 477-78 (2009); *People v. Manning*, 334 Ill. App. 3d 882, 890 (2002), This is particularly true

where the pattern jury instructions do not provide that an additional definition is necessary. *Sanchez*, 388 Ill. App. 3d at 477-78; *Manning*, 334 Ill. App. 3d at 890.

Here, the trial court provided the jurors with IPI Criminal 4th No. 14.07, which defines the offense of burglary. The committee notes make no mention of defining the term "building" nor do they refer to any instruction that defines the term "building." There is no indication that an additional definition of "building" is needed when IPI 14.07 is used. Thus, the trial court did not err in refusing to define "building" for the jury.

B. Ineffective Assistance

An ineffective assistance claim requires a showing that counsel's performance was objectively unreasonable. *Averett*, 237 Ill. 2d at 24. Defense counsel is not objectively unreasonable for failing to object to a trial court's proper response to a jury's question. *Id.* at 25.

As explained above, the trial court's responses to the jury's questions were proper. Thus, defense counsel's failure to object to the court's responses was not unreasonable. Defendant cannot prove his ineffective assistance claim.

VI. CONCLUSION

The order of the Will County circuit court is affirmed.

Affirmed.