2011 IL App (4th) 080244-U

Filed 7/28/11

NO. 4–08–0244

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
JOHN E. JOHNSON,	)	No. 07CF199
Defendant-Appellant.	)	
	)	Honorable
	)	Scott Drazewski,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The State presented sufficient evidence for a rational trier of fact to find defendant guilty of residential burglary. Defendant's theft by possession convictions were not lesser-included offenses of his residential burglary conviction. The trial court erred in ordering defendant to pay restitution for damage done to a victim's locks and door when defendant was not convicted of any crime that could have proximately caused that damage. The trial court did not err in sentencing defendant to a three-year term of mandatory supervised release.

¶ 2 After a November 2007 bench trial, the trial court convicted defendant, John E. Johnson, of five counts of theft by possession (720 ILCS 5/16–1(a)(4) (West 2006)) and one count of residential burglary (720 ILCS 5/19–3(a) (West 2006)). In January 2008, the court sentenced defendant to 3-year terms of imprisonment on each of the theft-by-possession convictions and a 24-year term of imprisonment on the residential-burglary conviction, all prison terms to run concurrently. The court also ordered defendant to pay restitution of $375.80 to

Deborah Moore and $3,610.29 to State Farm Insurance. Defendant appealed, arguing the following: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) two of his convictions for theft must be vacated because they are lesser-included offenses of his residential-burglary conviction; (3) the court erred in ordering defendant to pay an unproved amount of restitution for crimes for which he was acquitted; and (4) the court erred in sentencing defendant to serve three years' mandatory supervised release (MSR) because he was only convicted of a Class 1 felony. We affirmed in part, vacated in part, and remanded with directions.

¶ 3 The Supreme Court of Illinois denied defendant's petition for leave to appeal but issued a supervisory order (*People v. Johnson*, 238 Ill. 2d 664, 938 N.E.2d 517 (2010) (nonprecedential supervisory order on denial of petition for leave to appeal)) directing this court to vacate our prior judgment and reconsider our decision in light of *People v. Miller*, 238 Ill. 2d 161, 938 N.E.2d 498 (2010). In accordance with the supreme court's direction, we vacate our prior judgment and reconsider in light of *Miller* to determine whether a different result is warranted. Because *Miller* does not change the result in this case, we again affirm in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 Between February 12 and February 16, 2007, several burglaries occurred in Bloomington-Normal. On February 12, 2007, Janet Jo Auer came home at 6:15 p.m. to find the door to her residence ajar and her house in disarray. Some of her jewelry was missing, including, but not limited to, a wedding-ring set, an engagement ring, and a Masonic ring.

¶ 6 On February 15, 2007, Brian Stufflebeam and Michael Jagosh's residence was broken into and ransacked. The following property was taken from the residence: a cell phone, a

digital camcorder, a class ring, and several necklaces. The ring and the camcorder were found at Monster Pawn, which was close to their residence. Stufflebeam's name was inscribed on the ring, and Jagosh recognized images on the camcorder's hard drive.

¶ 7 On February 16, 2007, someone pried open a window, kicked in a side door, and ransacked the residence of Daniel Terkla and Stacey Shimidu. The following items were taken from the residence: a laptop computer, two digital cameras, a blue gym bag, two rings, and a large amount of loose change. That same day, someone broke the glass out of the door to Deborah Moore's residence and ransacked her home. Moore was missing a National City Visa debit card.

¶ 8 Late in February 2007, the grand jury indicted defendant for the following offenses: felony theft by possession of Shimidu's Apple notebook computer (count I) and Shimidu's Panasonic digital camera (count II); theft by possession - subsequent offense felony (720 ILCS 5/16–1(a)(4) (West 2006)) of Shimidu's computer (count III), Moore's National City Visa debit card (count IV), Jagosh's cell phone and JVC camcorder (count V), Stufflebeam's class ring (count VI), and Auer's jewelry (count VIII); and residential burglary of Jagosh's dwelling (count VII), Auer's dwelling (count IX), Moore's dwelling (count X), and Shimidu's dwelling (count XI). The State dismissed counts I and II and went to trial on the remaining counts.

¶ 9 Bobbi Jo Dunlap testified she was approached on February 16, 2007, by defendant near a broken Coinstar machine while she was working at Kroger. Defendant had a duffle bag with him and asked Dunlap where he could find another Coinstar machine.

¶ 10 Officer Timothy Marvel testified he investigated the burglary at Jagosh and

Stufflebeam's residence on February 15, 2007. Marvel testified that on February 16, 2007, he received word defendant was at the Kroger store. Marvel testified he made contact with defendant at Kroger. According to Marvel's testimony, defendant was standing within three to four feet from a duffel bag. Marvel and another officer took defendant outside the store to talk. Defendant left the duffel bag in the store. Officer Marvel testified defendant told Marvel that he had recently pawned some items at Monster Pawn, which defendant claimed he purchased from a friend to sell for profit.

¶ 11 Officer Marvel testified he arrested defendant. Marvel testified he searched the duffel bag after arresting defendant. Inside the duffel bag, Marvel found a large amount of loose change, a laptop computer, and at least one camera. Marvel also testified he found a digital camera defendant was wearing around his neck, a diamond ring in defendant's pocket, and two telephones on defendant, one of which belonged to Michael Jagosh. Marvel further testified he found Deborah Moore's debit card in defendant's wallet.

¶ 12 Officer Marvel testified he took defendant to the police station in his squad car. According to Marvel's testimony, he found a large screwdriver shoved up under the backrest of the seat after transporting defendant. Marvel believed the screwdriver must have been over-looked during the search of defendant's person.

¶ 13 Officer Marvel interviewed defendant and then transported him to the McLean County jail. According to Marvel's testimony, defendant told Marvel during the drive to the jail that he was present when another individual burglarized Jagosh and Stufflebeam's residence. Defendant told Marvel he did not go inside or take anything, but he sold a camcorder and ring taken from Jagosh and Stufflebeam's residence to Monster Pawn.

¶ 14 Detective James Merica of the Normal police department testified he interviewed defendant two times. Merica conducted the first interview on February 22, 2007, at the McLean County sheriff's department. During the interview, defendant stated that someone had given him the stolen items. Merica stated defendant told him he suspected the items were stolen because "Jake" told him he had received the items from "crack heads."

¶ 15 The parties stipulated that Tommy O'Donnel would testify he worked at Monster Pawn and could identify defendant as the individual who sold four rings and a camcorder between February 14 and 15, 2007.

¶ 16 The trial court granted defendant's motion for directed verdict as to the counts that charged defendant with the residential burglary of the dwelling places of Deborah Moore (count X) and Stacy Shimidu (count XI), respectively. The court found defendant not guilty of the residential burglary of the dwelling place of Janet Auer (count IX). However, the court found defendant guilty of five counts of theft by possession (counts III, IV, V, VI, and VIII) and the residential burglary of Michael Jagosh's home (count VII).

¶ 17 The trial court sentenced defendant as a Class X offender pursuant to section 5–5–3(c)(8) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5–5–3(c)(8) (West Supp. 2007)) to concurrent terms of imprisonment of 24 years for residential burglary and 3 years for each theft-by-possession conviction. The court also ordered defendant to pay restitution to (1) Deborah Moore and (2) State Farm Insurance (State Farm) on behalf of Janet Auer.

¶ 18 In February 2008, defendant filed a motion to reconsider sentence, arguing his sentence was excessive. In March 2008, the trial court denied the motion.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Defendant appeals, arguing the following: (1) the State failed to prove beyond a reasonable doubt he was guilty of the residential burglary of Michael Jagosh's residence; (2) this court must order the vacation of two of his convictions for theft because they are lesser-included offenses of his residential-burglary conviction; (3) the court erred in ordering defendant to pay an unproved amount of restitution for crimes for which he was acquitted; and (4) the court erred in sentencing defendant to serve three years' MSR because he was only convicted of a Class 1 felony.

¶ 22 A. Residential Burglary

¶ 23 Defendant argues the State failed to prove beyond a reasonable doubt that he was guilty of residential burglary, count VII. When reviewing a sufficiency-of-the-evidence argument, we determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We will not substitute our judgment for the trier of fact's judgment on questions of witness credibility and the weight given to witness testimony. *People v. Nicholls*, 44 Ill. 2d 533, 540, 256 N.E.2d 818, 822-23 (1970).

¶ 24 Defendant cites *People v. Willingham*, 89 Ill. 2d 352, 360-61, 432 N.E.2d 861, 865 (1982), for the proposition that where the defendant's admission is part of the proof of the *corpus delicti*, the State must provide corroborating evidence independent of the confession. Defendant argues the State did not provide any independent evidence to corroborate his confession. Defendant also argues his mere possession of items taken from Jagosh's residence cannot support his conviction for residential burglary.

¶ 25 However, we do not view defendant's confession and his possession of the items separately. We view them as a whole. Defendant's possession of the items taken from the Jagosh residence corroborates his confession, and his confession explains why he possessed the items. After viewing the evidence in the light most favorable to the State, we find a rational trier of fact could properly have found the essential elements of the crime beyond a reasonable doubt.

¶ 26 B. Included Offenses

¶ 27 Defendant argues that two of his convictions for theft by possession relating to items (Jagosh's cell phone and camcorder (count V) and Stufflebeam's class ring (count VI)) taken during the course of the residential burglary of which he was convicted must be vacated as lesser included offenses of the residential-burglary conviction. Defendant argues courts should look to the charging instrument in determining whether one offense is a lesser included offense of another.

¶ 28 Relying on *People v. Baldwin*, 199 Ill. 2d 1, 764 N.E.2d 1126 (2002), defendant argues:

> " 'The lesser offense need only relate to the greater offense to the extent that the charging instrument describes the lesser.' [*Baldwin*, 199 Ill. 2d at 7, 764 N.E.2d at 1130.] Further, the charging instrument does not need to expressly allege all of the elements of the crime where those elements can be inferred. [*Baldwin*, 199 Ill. 2d at 7, 764 N.E.2d at 1130.]"

¶ 29 Our supreme court recently addressed this issue in *Miller*, 238 Ill. 2d at 162, 938 N.E.2d at 500. The supreme court stated:

> "In *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 845 (1977), this court held that when the State charges a defendant with multiple offenses that arise 'from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses[,]' multiple convictions and sentences can be entered. The question we must decide *** is whether, in determining when one offense is a lesser-included offense of another under *King*, a court should employ the 'charging instrument' approach or the 'abstract elements' approach. For the reasons that follow, we hold that the abstract elements approach is the proper analysis to employ." *Miller*, 238 Ill. 2d at 162-63, 938 N.E.2d at 500.

The abstract-elements approach calls on courts to compare the statutory elements of the two offenses. *Miller*, 238 Ill. 2d at 166, 938 N.E.2d at 502. "If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second." *Miller*, 238 Ill. 2d at 166, 938 N.E.2d at 502.

¶ 30 The portion of the theft-by-possession statute defendant was charged under states "[a] person commits theft when he knowingly *** [o]btains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen." 720 ILCS 5/16–1(a)(4) (West 2006). The portion of the residential burglary statute defendant was charged under states:

> "A person commits residential burglary who knowingly and

> without authority enters or knowingly and without authority remains within the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft. This offense includes the offense of burglary as defined in Section 19–1." 720 ILCS 5/19–3(a) (West 2006).

Not all of the elements of theft by possession are included in the offense of residential burglary, and theft by possession contains elements that are not included in residential burglary. Theft by possession requires "control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen" (720 ILCS 5/16–1(a)(4) (West 2006)), whereas residential burglary does not require control over any stolen property. It is possible to commit residential burglary without committing theft by possession. As a result, theft by possession is not a lesser-included offense of residential burglary.

¶ 31 C. Restitution

¶ 32 Defendant argues the trial court was without authority to order him to pay restitution of $375.80 to Moore for the cost of replacing her locks and broken glass and $3,610.29 to State Farm as reimbursement for an unspecified claim it paid to Auer because he was not found guilty of the residential burglaries of Deborah Moore's and Janet Auer's respective homes, counts X and IX respectively. As a result, defendant argues the restitution order must be vacated.

¶ 33 Defendant did not raise this issue at the sentencing hearing or in his motion to reconsider but argues plain error. According to defendant, "the trial court's failure to follow

statutorily mandated procedure for determining the proper amount of restitution implicated the integrity of the judicial process and infringed upon [defendant's] right to a fair sentencing hearing."

¶ 34 An appellate court is allowed to consider an unpreserved error under the plain-error doctrine in two circumstances:

> "(1) clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410 (2007).

Under the plain-error analysis, we must first determine whether an error occurred. *In re M.W.*, 232 Ill. 2d 408, 431, 905 N.E.2d 757, 773 (2009).

¶ 35 According to section 5–5–6(a) of the Unified Code (730 ILCS 5/5–5–6(a) (West 2006)):

> "At the sentencing hearing, the court shall determine whether the property may be restored in kind to the possession of the owner or the person entitled to possession thereof; or whether the defendant is possessed of sufficient skill to repair and restore property damaged; or whether the defendant should be required to make restitu-

> tion in cash, for out-of-pocket expenses, damages, losses, or injuries found to have been proximately caused by the conduct of the defendant or another for whom the defendant is legally accountable under the provisions of [a]rticle V of the Criminal Code of 1961." 730 ILCS 5/5–5–6(a) (West Supp. 2007).

This court recently stated:

> " 'It is well established that a court may not impose restitution for charges upon which a defendant is acquitted.' *People v. Owens*, 323 Ill. App. 3d 222, 234, 753 N.E.2d 513, 523 (2001). In addition, the trial court may not 'order restitution of sums extraneous to the charges before it.' *People v. Thompson*, 200 Ill. App. 3d 23, 26, 557 N.E.2d 1008, 1010 (1990). However, a defendant may be ordered to make restitution for injuries proximately caused by the same criminal conduct of defendant as that of which he was convicted." *People v. Clausell*, 385 Ill. App. 3d 1079, 1081, 904 N.E.2d 108, 110 (2008).

¶ 36 We first examine the order to pay $375.80 to Moore to compensate her for damage done to her locks and door as a result of the burglary to her home. We agree with defendant that the trial court clearly erred in ordering him to pay restitution in the amount of $375.80 to Moore because defendant was not convicted of any offense relating to the damage done to Moore's locks and door. We find this constitutes plain error as the record is clear the restitution payment was for damage done to Moore's locks and doors and defendant was not

convicted of any crime that could have proximately caused the damage. We vacate the order to pay restitution of $375.80 to Moore.

¶ 37 We next examine the order to pay $3,610.29 to State Farm. Defendant makes the following argument:

> "To the extent that the State Farm claim related to any damage done to Auer's home in the course of the burglary, [defendant] cannot be held liable for the damage where the trial court found he was not culpable for the break-in."

On this point, we agree with defendant for the reasons we stated previously, *i.e.*, defendant was not convicted of an offense that could have proximately caused any damage to Auer's home. However, the record does not reflect the restitution payment to State Farm was made for this purpose. Based on the record, the trial court could have ordered the restitution payment to reimburse State Farm for an insurance claim to compensate Auer for the loss of her wedding set and mother's engagement ring, that is, count VIII.

¶ 38 Defendant was convicted of theft by possession concerning jewelry taken from Auer's home. Auer testified that after her home was burglarized she discovered her wedding set, her mother's engagement ring, her husband's Masonic ring, and several other rings were missing. She testified the police were able to locate and she was able to identify a green emerald stone with diamonds around it, her husband's Masonic ring, and a plain gold ring. The record does not reflect the police or Auer were ever able to recover her wedding set or her mother's engagement ring. In fact, in a letter from Auer that was attached to the presentence investigation report (PSI) without any objection from defense counsel, Auer expressed her sadness in the loss of her

wedding set.

¶ 39 However, defendant argues even if the claim may have related to the stolen jewelry, the State did not prove the amount or character of the loss. Defendant's argument is flawed because he did not challenge the restitution figure or ask for any kind of clarification. Defense counsel did not object to the attachment of Auer's letter to the PSI and stated she did not have any additions, corrections, or modifications that needed to be made to the PSI. The PSI stated in part:

> "In a letter dated December 6, 2007, Andrea Arduini, Claim Representative at State Farm First and Casualty Company[,] indicated that State Farm Insurance paid out $3,610.29 to Janet Auer for the financial loss sustained by Ms. Auer due to [d]efendant's actions in the case before this [c]ourt. State Farm is requesting restitution in the amount of $3,610.29."

If defendant had challenged the restitution claimed by State Farm, the State could have submitted evidence supporting the claim. Because defendant failed to challenge the restitution figure, the record does not contain any indication the court's restitution award to State Farm constitutes clear or obvious error.

¶ 40 Defendant next argues his trial counsel was ineffective for failing to object to the allegedly inapplicable restitution. To establish an ineffective-assistance claim, a defendant must establish that his attorney's performance was deficient and he was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Based on the record in this case, defendant cannot show his attorney was ineffective for not challenging the restitution

payment to State Farm. Unlike the court's restitution order concerning the door locks and window, which the record clearly reflected was erroneously entered, the record does not clearly reflect the restitution order on behalf of State Farm was in error. As a result, we cannot say defendant's trial counsel was ineffective for failing to challenge that order.

¶ 41 D. MSR

¶ 42 Defendant next argues the trial court erred in sentencing him to a three-year term of MSR because he was only convicted of a Class 1 offense. According to defendant, a conviction for a Class 1 offense requires a two-year MSR term. Defendant argues this court should reduce his three-year MSR term to two years.

¶ 43 This court decided this issue in *People v. Smart*, 311 Ill. App. 3d 415, 723 N.E.2d 1246 (2000). Defendant argues this court's decision in *Smart* is contrary to the plain language of the statute. We disagree. This court stated in *Smart*:

> "Section 5–8–1(d) [of the Unified Code (730 ILCS 5/5–8–1(d) (West 1998))] provides that 'every sentence shall include as though written therein a term in addition to the term of imprisonment.' [Citation.] This language clearly makes the term of mandatory supervised release part of the entire sentence. Thus, when section 5–5–3(c)(8) states that a recidivist like defendant is to be 'sentenced as a Class X offender' (730 ILCS 5/5–5–3(c)(8) (West 1998)), it necessarily means that he must receive an enhanced term of imprisonment *and* an enhanced term of mandatory supervised release. 'In determining legislative intent, courts consider the

> reason and necessity for the statute, the evils to be remedied, and the objectives to be obtained. Courts avoid construing the statute so as to defeat its purpose or yield an absurd or unjust result.' [Citation.] It would make little sense for the legislature to provide that Class 2 offenders eligible under section 5–5–3(c)(8) of the [Unified] Code for an enhanced term of imprisonment are ineligible for an enhanced term of mandatory supervised release. As the [F]irst [D]istrict recognized in [*People v. Anderson*, 272 Ill. App. 3d 537, 650 N.E.2d 648 (1995)], conduct so offensive that it justifies a longer term of imprisonment surely justifies lengthier supervision after release." (Emphasis in original.) *Smart*, 311 Ill. App. 3d at 417-18, 723 N.E.2d at 1248.

We continue to adhere to this court's reasoning in *Smart*.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we vacate the order to pay $375.80 in restitution to Moore and otherwise affirm the trial court's judgment. We remand for issuance of an amended sentencing judgment so reflecting. Because the State has in part successfully defended a portion of the criminal judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985), citing *People v. Nicholls*, 71 Ill. 2d 166, 179, 374 N.E.2d 194, 199 (1978).

¶ 46 Affirmed in part, vacated in part, and cause remanded with directions.