2013 IL App (4th) 110848-U

NO. 4-11-0848

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 19, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
RAYMOND L. HOLLGARTH, SR.,	)	No. 08CF1108
Defendant-Appellant.	)	
	)	Honorable
	)	Lisa Holder White,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State's evidence proved defendant guilty of burglary and theft beyond a reasonable doubt, (2) we decline to reach the merits of defendant's claim of ineffective assistance of counsel on the issue of the introduction of certain evidence, (3) we decline to reach the merits of the issue pertaining to the silent witness theory, and (4) we reduce the restitution award and remand for an amended sentencing judgment.

¶ 2 In June 2011, the trial court found defendant, Raymond L. Hollgarth, Sr., guilty of five counts of burglary and one count of theft. In August 2011, the court sentenced him to probation and ordered him to pay restitution.

¶ 3 On appeal, defendant argues (1) the State failed to prove him guilty of burglary and theft, (2) trial counsel was ineffective, (3) witness testimony violated the silent witness theory of admissibility, and (4) the restitution order must be vacated or reduced. We affirm as modified and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In August 2008, the State charged defendant and Michael Stanley with five counts of burglary (720 ILCS 5/19-1(a) (West 2008)), alleging they, without authority, knowingly entered Menard's in Forsyth with the intent to commit a theft therein on five separate occasions. The State also charged both men with one count of theft of property having a value in excess of $300 (720 ILCS 5/16-1(a)(1)(A) (West 2008)), alleging they knowingly exerted unauthorized control over property of Menards, being building materials having a total value in excess of $300, with the intent to deprive Menards permanently of the use of the property. Defendant pleaded not guilty.

¶ 6 In June 2011, defendant's bench trial commenced. Michael Maguet testified he is the general manager at Menards in Forsyth. He stated the store includes a lumberyard. If a customer wanted to make a purchase of lumber or other materials in the yard, he would get an invoice at the service desk inside, have the invoice validated upon purchase, proceed to the guard shack on the outside of the building, and then have the invoice scanned by the guard to proceed into the yard. Maguet stated a contractor may have a Menards account with a card allowing them immediate access to the yard to load what he wants. Prior to leaving the lumberyard, the customer or contractor stops at the guard shack, and the guard uses a hand scanner to verify the materials match those on the invoice. The guard inputs his designated number into the scanner thereby identifying himself. Maguet stated the guards at the shack are not Menards employees but are supplied by Securitas.

¶ 7 During the summer of 2008, Maguet was informed about possible thefts at the store allegedly committed by Michael Stanley. Maguet conducted an investigation, which

involved pulling up Stanley's transactions on the computer and watching video surveillance. Maguet stated the video images have a date and time stamp that are synchronized with the cash registers inside the store and the guard shack near the lumberyard.

¶ 8 Maguet testified to the State's exhibit No. 1, a receipt of a transaction on June 23, 2008. He stated it was a record kept in the ordinary course of Menards' business and was generated through the computer system. The receipt indicated 35-year shingles were purchased. Exhibit No. 2, a summary report of the transaction, showed nine bundles of shingles were sold, identified the guard at the shack as "Ray," noted the date and time the materials were picked up, and recorded the license plate of the vehicle. Maguet stated his review of the security tapes revealed Stanley took out 56 bundles of shingles. Maguet testified to exhibit Nos. 3 and 4, which were screen shots of the transaction occurring inside the store and the vehicle at the guard shack, respectively. He also stated the videos were accurate as to date and time.

¶ 9 Maguet testified to exhibit No. 6, a transaction record from June 25, 2008, showing the return of nine bundles of shingles and the purchase of six bundles of shingles. Exhibit No. 7, a "Merchandise Return Slip," showed Mike Stanley returned the nine bundles. Exhibit No. 9 showed the quantity sold and the guard name as "Ray." The handwritten notation on exhibit No. 9 listed three "rolls of felt" and nine "bundles."

¶ 10 Maguet testified exhibit No. 11 showed the purchase of two tubes of roof cement and six bundles of shingles on June 30, 2008. Exhibit No. 12 showed the guard print out, listing the guard as Ray. The report indicated Stanley had purchased 6 bundles, but Maguet's investigation indicated Stanley had actually taken 36 bundles. Exhibit No. 12 also had a notation next to the "License Plate" stating "SPEEDCHECK." Maguet stated a guard is allowed to skip the

notation of a vehicle's license plate if the yard is busy and there is a need to keep the traffic flowing. Maguet testified a screen shot of the guard shack in exhibit No. 14 showed more than six bundles on the trailer towed behind a vehicle.

¶ 11 Maguet testified exhibit No. 16 showed the purchase of a box of nails, 6 bundles of shingles, and 20 pieces of roof edge for a total of $230.67 on July 2, 2008. Exhibit No. 17 showed the guard print out, listing the guard as Ray. Maguet stated Stanley paid for 6 bundles of shingles but actually picked up 35 bundles. Maguet stated Stanley did not pick up his roof edge. Exhibit No. 19 showed a screen shot of the materials at the guard shack.

¶ 12 Maguet testified exhibit No. 20 showed the purchase of three bundles of shingles totaling $61.24 on July 10, 2008. Exhibit No. 21 showed the guard print out, listing the guard as Ray. Maguet stated a review of the videotape showed Stanley left with nine bundles of shingles. Exhibit No. 23 showed a screen shot of the materials at the guard shack. Maguet stated this instance was a "speed check" as well.

¶ 13 The State played exhibit No. 25, the security videos pertaining to the dates at issue. Maguet stated defendant never notified him that Stanley was stealing items. Defendant also never complained that he was being threatened by anyone. He stated the total amount of merchandise stolen was $2,998.

¶ 14 On cross-examination, Maguet testified the videos did not show what type of merchandise, if any, came into the lumberyard on Stanley's trailer. None of the images showed any of the materials being loaded onto the trailer by any Menards employees. Maguet did not know Stanley but a contractor manager identified the man in the videos as Stanley.

¶ 15 Macon County sheriff's sergeant Lou Ann Hollon testified she was dispatched to

Menards on July 17, 2008, to investigate an alleged burglary and theft. Maguet provided her with documents, receipts, and copies of video surveillance. A license plate number written on a guard gate receipt did not come back as registered to Stanley.

¶ 16 Maguet informed Sergeant Hollon that defendant was the guard on duty at the time of the theft. She made contact with defendant, and he agreed to make a statement. Defendant stated Stanley approached him on June 18 while he was in training with Securitas. Stanley told the person training defendant to get away, and the individual complied. Stanley then walked over to defendant and said when he returned the next day, defendant "better not give me any problems or he would hurt him." The next day, defendant was working the guard gate. When he attempted to inspect Stanley's vehicle, Stanley told him he was "not checking anything." Defendant stated Stanley threatened him with harm if he did not hurry and scan his materials and let him through the gate. Defendant admitted to Sergeant Hollon that he had gotten the license plate wrong on Stanley's vehicle. Defendant stated he was afraid of Stanley, who had threatened him harm, and stated "it wasn't worth his life." Hollon testified defendant provided a written statement, labeled as exhibit No. 26, which stated as follows:

> "I was working *** at Menards in Forsyth. When I was getting trained, Mike Stanley came through the guard shack myself and the guy that was training me was standing there he told the other guard to take his ass to the other side so he did. Then he told me that if I fucked with him he would bust my head. Then he left. Then a couple days later he come [*sic*] back. He had a picking list so I let him go through and then he would be in back for awhile he

would come out he would tell me if I ever say anything he would bust my head. One time he came into the yard with a picking list for shingles and when he pulled up he told me to scan thing [*sic*] and hurry the fuck up he had to fucking leave. One time he came through and when he was leaving he smacked me up side the head. When he was leaving I noticed that there was more on the trailer. When he was leaving. When he would get checkout I would notice that they [*sic*] was more there then [*sic*] was supposed to. But he had threaten [*sic*] me and I did not think my life was worth that. My brother worked for him that's how I know him said that he was a UFC fighter and he never lost he is very dangerous. I told Securatas [*sic*] that I wanted away from there that I couldn't handle it. I feared for my life when I was there. I never got messed with by anyone else out there."

¶ 17 The State rested its case. Defendant exercised his right not to testify, and defense counsel did not present any evidence. Following closing arguments, the trial court found defendant guilty on all six counts. In July 2011, defendant filed a posttrial motion, which the court denied in August 2011. Thereafter, the court placed defendant on 24 months' probation and ordered him to pay $2,998.34 in restitution. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 A. Sufficiency of the Evidence—Burglary Convictions

¶ 20 Defendant argues his burglary convictions must be vacated because the State

failed to establish he was guilty, principally or by accountability, of those offenses. We disagree.

¶ 21 " 'When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when 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. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102 (2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81, 903 N.E.2d 388, 406 (2009). "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,] or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008). This standard of review applies regardless of whether the defendant received a bench or a jury trial. *People v. Howery*, 178 Ill. 2d 1, 38, 687 N.E.2d 836, 854 (1997). This standard also applies when reviewing the sufficiency of evidence in all criminal cases, including cases based on direct or circumstantial evidence. *People v. Pollock*, 202 Ill. 2d 189, 217, 780 N.E.2d 669, 685 (2002). "Circumstantial evidence alone is sufficient to sustain a conviction where it satisfies proof beyond a reasonable doubt of the elements of the crime charged." *Pollock*, 202 Ill. 2d at 217, 780 N.E.2d at 685.

¶ 22 1. *Burglary*

¶ 23 In the case *sub judice*, the State charged defendant and Stanley with five counts of burglary, alleging they, without authority, knowingly entered Menards with the intent to commit a theft therein. 720 ILCS 5/19-1(a) (West 2008). Appellate counsel points out the charges

against Stanley were *nolle prossed*, and the State pursued its case solely against defendant.

¶ 24 "Illinois law is well settled that a building open to the public can be the subject of a burglary." *People v. Durham*, 252 Ill. App. 3d 88, 91, 623 N.E.2d 1010, 1013 (1993).

> "While a common-law breaking is no longer an essential element of the crime of burglary [citations,] the statute requires an entry which is both without authority and with intent to commit a felony or theft. [Citation.] A criminal intent formulated after a lawful entry will not satisfy the statute. But authority to enter a business building, or other building open to the public, extends only to those who enter with a purpose consistent with the reason the building is open." *People v. Weaver*, 41 Ill. 2d 434, 438-39, 243 N.E.2d 245, 248 (1968).

See also *People v. Blair*, 52 Ill. 2d 371, 374, 288 N.E.2d 443, 445 (1972); *Durham*, 252 Ill. App. 3d at 92, 623 N.E.2d at 1013; *People v. Perruquet*, 173 Ill. App. 3d 1054, 1060, 527 N.E.2d 1334, 1338 (1988) (finding an authorized entry does not extend "to one who enters a business both to transact business and to steal"); *People v. Stager*, 168 Ill. App. 3d 457, 459, 522 N.E.2d 812, 814 (1988) ("an entry with intent to commit a theft cannot be said to be within the authority granted patrons of a business building"). The affirmance of a burglary conviction, however, "rests upon whether the evidence is sufficient to show an intent to commit a felony or theft at the time of entry onto the premises of the business establishment." *People v. Smith*, 264 Ill. App. 3d 82, 87, 637 N.E.2d 1128, 1131 (1994).

¶ 25 Here, the evidence is sufficient to show Stanley formulated the intent to commit a

theft prior to his entry into Menards. According to defendant's oral and written statements, Stanley, whom defendant had been told "was a UFC fighter and he never lost [and] is very dangerous," approached him during defendant's employee training, told the trainer to leave, and threatened defendant with harm if he gave him any problems when he returned. The evidence thus shows Stanley formulated a criminal scheme to steal goods from Menards by enlisting defendant to let him through the gate without paying for the goods and the scheme was hatched prior to the first theft. Thereafter, Stanley left the lumberyard with more merchandise than he paid for on five occasions.

¶ 26 Based on the evidence presented, the trial court could infer that Stanley had the intent to commit theft in Menards prior to the first burglary on June 23. The court could also infer he had the intent on each of the other four charged dates thereafter based on the evidence, his initial and repeated conversations with defendant, and his commission of each prior theft pursuant to that scheme. Thus, the State presented sufficient evidence that five separate burglaries were committed by Stanley.

¶ 27 For the first time in his reply brief, defendant states that if a theft occurred, which he does not concede, it was a theft from the lumberyard, citing *In re E.S.*, 93 Ill. App. 3d 171, 174, 416 N.E.2d 1233, 1235 (1981). However, "[i]ssues or arguments that a party fails to raise in its initial brief cannot later be raised in a reply brief." *People v. Sparks*, 315 Ill. App. 3d 786, 790, 734 N.E.2d 216, 220 (2000); Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief."). As defendant did not raise the argument in his initial brief, we find it forfeited.

¶ 28 2. *Accountability Theory*

¶ 29 In the alternative, defendant argues that, if the burglaries did occur, his convictions must be reversed because the State failed to establish he was accountable for Stanley's conduct. Pursuant to section 5-2(c) of the Criminal Code of 1961 (720 ILCS 5/5-2(c) (West 2008)), a person is legally accountable for the conduct of another when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." "To prove that the defendant possessed the intent to promote or facilitate the crime, the State must present evidence which establishes beyond a reasonable doubt that either: (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design." *People v. Perez*, 189 Ill. 2d 254, 266, 725 N.E.2d 1258, 1264-65 (2000).

> "As the supreme court explained in *Perez*, when two or more persons engage in a common criminal design, any acts committed by one party to further the common design are attributable to all parties to the common design, rendering each party individually responsible for the consequences of the others' acts. [Citation.] A defendant need not affirmatively act when a common criminal plan or purpose exists. [Citation.] 'A common criminal plan or design can be inferred from the circumstances, and a defendant need not express "[w]ords of agreement" to be held accountable for a codefendant's criminal acts.' [Citations.]" *People v. Grimes*, 386 Ill. App. 3d 448, 452, 898 N.E.2d 768, 772 (2008).

¶ 30 "Accountability may be established through a person's knowledge of and

participation in the criminal scheme, even though there is no evidence that he directly participated in the criminal act itself." *Perez*, 189 Ill. 2d at 267, 725 N.E.2d at 1265. Factors to consider in determining a defendant's legal accountability include his presence during the commission of the crime without opposing or disapproving of it, the failure to report the crime, and his continued association with the perpetrator after the criminal act. *People v. Turner*, 282 Ill. App. 3d 770, 778, 668 N.E.2d 1058, 1064 (1996).

¶ 31 In this case, the State charged defendant and Stanley with committing burglary in that, without authority, they knowingly entered Menards with intent to commit a theft therein. While intent to commit a theft is an element of the offense, the completed theft is not. See *People v. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 323 (2011) ("A burglary is complete upon entering with the requisite intent, irrespective of whether the intended felony or theft is accomplished."). To have aided and abetted Stanley before or during the commission of the burglaries, defendant had to have aided or abetted him in conduct that is an element of the offense of burglary. Defendant thus had to have aided or abetted Stanley in knowingly entering Menards with the intent to commit a theft therein.

¶ 32 The evidence showed defendant repeatedly facilitated Stanley's theft of goods from Menards by allowing him through the guard gate with what defendant knew were items Stanley had not paid for. Defendant not only allowed Stanley to leave the lumberyard with those goods, but he also scanned and approved the invoices enabling Stanley to commit the thefts. Stanley could not have committed the thefts and could not have continued to commit them without defendant's participation in the common criminal design.

¶ 33 Each successive theft demonstrated the success of the criminal design and assured

Stanley that defendant, without whom he could not commit the thefts, would continue to participate in the execution of the thefts. Moreover, defendant did not report Stanley's conduct to Securitas, Menards, or the police. See *Perez*, 189 Ill. 2d at 267, 725 N.E.2d at 1265 (failure to report a crime is a factor the trier of fact may consider in determining accountability). Defendant aided and abetted Stanley in committing the thefts Stanley intended to commit upon entering Menards. He thus aided and abetted Stanley in knowingly entering Menards with intent to commit theft therein, and he was therefore guilty of burglary by accountability.

¶ 34 B. Sufficiency of the Evidence—Theft Conviction

¶ 35 Defendant argues the State failed to prove a theft occurred because it did not demonstrate any merchandise was actually stolen from Menards. A person commits the offense of theft when he knowingly obtains or exerts unauthorized control over an owner's property, intends to permanently deprive the owner of the use or benefit of the property, and the property has a value over $300. 720 ILCS 5/16-1(a)(1)(A), (b)(4) (West 2008). Defendant contends the State failed to present (1) evidence that the goods in the video of the trailer leaving the lumber-yard were not already on the trailer when it entered the yard and (2) store records to demonstrate any inventory was missing.

¶ 36 In this case, Maguet testified he pulled Stanley's transactions and compared the invoices and receipts for the goods he paid for with the security videos of the goods he actually took from the yard. The invoices, receipts with Maguet's notation of those amounts, and screen shots from the videos were admitted into evidence. Also, in his written statement, defendant stated he let Stanley through the gate without inspecting his trailer and he saw there was more on the trailer than Stanley was supposed to have. Based on the testimony and other evidence, the

trial court could reasonably infer that Stanley took merchandise from the lumberyard that was more or different from what he had purchased.

¶ 37 C. Ineffective Assistance of Counsel

¶ 38 Defendant argues his trial counsel was ineffective for failing to object to the introduction of store records allegedly documenting purchases made by Stanley as well as surveillance videotapes and the images taken from those videotapes. We decline to reach the merits of defendant's assertion because this claim is better pursued under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)).

¶ 39 To preserve a claim of error for review, defense counsel must object at trial and raise the issue in a posttrial motion. *People v. McLaurin*, 235 Ill. 2d 478, 485, 922 N.E.2d 344, 349 (2009). Here, defense counsel did not object to the lack of foundation as to documents, surveillance videos, or images admitted into evidence. Thus, the issue is forfeited. See *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 257 (2005) (noting the forfeiture "rule is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level"). However, defendant claims his attorney was ineffective for failing to object, and the alleged ineffectiveness thereby allows us to consider the issue.

¶ 40 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cathey*, 2012 IL 111746, ¶ 23, 965 N.E.2d 1109. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defen-

dant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 41 This court has noted "that claims of ineffective assistance of counsel are often better made in proceedings on a petition for postconviction relief, where a complete record can be made." *People v. Pelo*, 404 Ill. App. 3d 839, 870, 942 N.E.2d 463, 490 (2010). Here, the State argues the sufficiency of the foundation and the admissibility of the evidence were not in question. The State points out the prosecutor mentioned in his opening statement that there were receipts and a video that he believed would "be stipulated to." Further, the prosecutor stated "a lot of our evidence will be abridged because all of the facts are going to be agreed to." Defense counsel did not dispute those assertions and waived his opening statement. Defense counsel also did not object to a lack of foundation at trial and did not raise the issue in a posttrial motion. Thus, it is possible there was an agreement as to the foundation and admissibility of certain evidence. Moreover, we note defense counsel informed the State prior to trial that defendant would raise the defenses of necessity and compulsion, which would, in essence, focus not on the store records and videos but the alleged threats Stanley made against defendant. Because the

answer to whether defense counsel's decision was one of trial strategy is currently *de hors* the record, we decline to consider it as it would be better brought under the Act.

¶ 42 D. Silent Witness Theory

¶ 43 Defendant argues Maguet's testimony violated the silent witness theory of admissibility for the videotape. We decline to reach the merits of defendant's argument because the claim is better pursued in postconviction proceedings.

¶ 44 Here, defense counsel did not object to Maguet's testimony and did not raise the issue in a posttrial motion. Thus, the issue is forfeited. However, like the issue of the introduction of the store records and the images from videotapes, defense counsel may have had a reason in not objecting to the evidence considering the defense strategy. Without knowing more, any claim of error on this issue would be better developed in a postconviction petition.

¶ 45 E. Restitution Order

¶ 46 In the alternative, defendant argues the restitution order must be vacated or reduced. Defendant acknowledges the issue was forfeited in the absence of a postsentencing motion raising the error, but he argues defense counsel was ineffective for failing to challenge the restitution assessment. Unlike the foundation issue, the record is sufficient to decide the amount of restitution, and we need not defer the resolution of the issue to postconviction proceedings. In this case, Maguet testified the merchandise stolen was worth approximately $2,998, which was obtained by adding up the numbers on the invoices. The trial court ordered restitution in the amount of $2,988.34.

¶ 47 We find defendant has demonstrated his trial counsel was ineffective on this issue. Defense counsel did not cross-examine Maguet about the valuation of the property, did not object

to the amount at sentencing, and did not raise the issue in a posttrial motion. A review of the invoices and testimony indicates the amount of restitution was more than the amount of property stolen. In his testimony, Maguet determined the amount by adding the total cost of the property he determined to be stolen, but it does not appear he gave defendant credit for the material Stanley purchased. As determined by appellate counsel and as shown by the record, it appears the actual amount of property stolen was $2,106.01. The State does not contest the merits that the restitution amount should be offset by the amount Stanley paid.

¶ 48 Here, defendant was prejudiced by defense counsel's deficient performance, *i.e.*, his failure to object and cross-examine Maguet as to the actual amount stolen. Accordingly, because the record is sufficient to make this determination without deferring to postconviction proceedings, the restitution award must be reduced to $2,106.01. We remand for an amended sentencing judgment reducing the restitution award to this amount.

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we affirm as modified the trial court's judgment and remand for an amended sentencing judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 51 Affirmed as modified; cause remanded with directions.