2012 IL App (5th) 110082-U

NO. 5-11-0082

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 09-CF-250
	)	
ROBERT E. HODGE, JR.,	)	Honorable
	)	Kimberly G. Koester,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction is affirmed where the State presented sufficient evidence to prove beyond a reasonable doubt that the defendant entered his father's house without authority and with the intent to commit a theft, and his sentence is affirmed where the trial court did not err in considering that the defendant received proceeds from the burglary as a factor in aggravation, because the court considered that factor as relating to the extent and nature of the crime and not as "compensation" as defined in section 5-5-3.2 of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(a)(2) (West 2010)).

¶ 2 The defendant, Robert E. Hodge, Jr., appeals from his conviction for one count of residential burglary (720 ILCS 5/19-3(a) (West 2010)), after a jury found him guilty in the circuit court of Marion County. On appeal, the defendant argues (1) his conviction should be reversed, as the evidence was insufficient to support the finding of guilt beyond a reasonable doubt that he entered the residence of another without authority, or that if he did enter without authority, the evidence was insufficient to support the finding that he did so with the requisite intent to commit a theft, and (2) his sentence should be vacated, as the trial

court erred where it considered compensation as an aggravating factor, because compensation is a factor inherent in the residential-burglary offense. For the reasons that follow, we affirm.

¶ 3 The following evidence was adduced at the defendant's jury trial. We will set forth only those facts pertinent to our disposition of the specific issues on appeal.

¶ 4 John Ashby, a neighbor of the defendant's father, Robert Hodge, Sr. (Robert), testified that on the afternoon of June 30, 2009, he saw a green van pull up in front of Robert's home. Ashby stated that the van contained more than one person, and that he recognized the voice of one person in the van as his former neighbor, Kathryn Gregory. Ashby testified that a man exited the van and entered Robert's home, remaining for approximately five minutes. Ashby was suspicious of this activity and took down the license plate number of the van. Ashby stated that upon exiting the home, the man carried an object with an antenna, which appeared to be a scanner or radio. He did not see the man carrying a bag of clothes, but stated that the man had something small, perhaps food, in his other hand. Ashby saw the man depart in the van. Ashby testified that on July 1, 2009, he spoke with Robert about the previous day's events, noting that Robert had then gone inside and discovered the scanner was missing. Ashby gave Robert the license plate number he had written down, and also spoke to Nick Heath, a police officer with the Wamac police department, when he arrived in response to Robert's call.

¶ 5 Robert testified that he has worked from 5:30 a.m. to 4 p.m. every day for the last nine years, and that on June 30, 2009, he left for work at 5 a.m. and returned at approximately 4:10 p.m. He testified that when he left for work that day, there were not clothes on the front porch. In regards to the defendant's residence at the time of the incident, Robert stated that though his son, the defendant, lived with him "part-time" by occasionally staying in his home for periods at a time, the defendant had not resided with him for three weeks prior to June

30, 2009. Robert testified that his door had not been locked that day, as the lock had been broken for at least six months. He stated that the defendant was aware that the door's lock was broken. Robert agreed that if the defendant came and went from the house, he "wouldn't have said nothing," but that he had never specifically told the defendant that he was free to come and go from the house. He testified that no one, including the defendant, had permission to come into his house that day, and no one had permission to remove the scanner. However, Robert agreed that if mail were to be addressed to the defendant at his address, he would be able to get the mail to the defendant. He testified that after he discovered the scanner was missing, he called the police and reported the incident.

¶ 6 Kathryn Gregory, an acquaintance of the defendant, testified that on June 30, 2009, she gave a ride to the defendant and his friend, Crabtree, as a favor to her friend Denise. At that time, Gregory was driving a green Dodge Caravan. She testified that Denise requested she take the defendant and Crabtree to "[the defendant's] friend's house." The defendant directed Gregory to Robert's residence. Gregory testified that the defendant would not give her a reason for the ride, but he told her he needed to go get something at his friend's house. She stated that the defendant entered the residence and remained for 5 to 10 minutes while she and Crabtree waited in the van. Gregory testified that the defendant brought a black box with an antenna out of the residence. She did not recall seeing the defendant pick anything up off the front porch. Gregory stated that upon returning to the van, the defendant had a conversation with Crabtree concerning the potential amount he could get for the item at a pawn shop. After departing the residence, the defendant requested that Gregory take him to a pawn shop, but Gregory refused because she wanted to get back to her child. Gregory testified that she dropped the defendant and Crabtree off at Denise's house. However, Gregory was again contacted by Denise later that day and asked to pawn an item on behalf of the defendant. Gregory stated that this was requested of her because she had photo

identification and the defendant did not, and such identification is required in order to pawn at Top Dollar Pawn. Gregory testified that she and the defendant went to Top Dollar Pawn, where she exchanged the scanner for $20 and handed the proceeds to the defendant.

¶ 7 On July 8, 2009, Gregory was again giving the defendant a ride when she was pulled over by Heath. Heath placed the defendant under arrest. Gregory stated that she told Heath that she had not known the scanner was stolen at the time of the incident. Gregory said that she later spoke with the State Attorney's office and agreed to share her knowledge of the June 30 events and retrieve the scanner from Top Dollar Pawn in exchange for avoiding any potential criminal charges for her involvement. Gregory testified that she later returned to Top Dollar Pawn and paid to retrieve the scanner, which she turned over to the Wamac police department.

¶ 8 Police officer Nick Heath testified that on either June 30 or July 1, 2009, he was contacted by Robert regarding a theft from his home. Heath testified that Robert told him that he believed his son, the defendant, had taken a police scanner from his home. Heath stated that Robert also said that no one had permission to be in his home that day. Heath then obtained the license plate number from Ashby and found Kathryn Gregory to be the owner of the van. Heath testified that on July 8, 2009, he stopped Gregory's vehicle and arrested the defendant. Heath stated that the defendant told him that on the date of the incident, he went to Robert's house to pick up some clothes from the front porch, and that he never entered the house, but only "stuck his head inside" to see if his father was home. The defendant denied taking anything from inside the house. Heath testified that on August 28, 2009, Gregory came to the police department with a police scanner, indicating it was the same scanner she assisted the defendant in pawning. Heath testified that he later showed it to Robert, who identified the scanner as the one that was taken from his residence.

¶ 9 Troy Daugherty, the owner of Top Dollar Pawn, testified that on June 30, 2009,

Gregory pawned a police scanner in exchange for $20. Daugherty explained that a pawn is essentially a loan; the pawner receives a pawn ticket in exchange for money, and the pawner has 30 days in which he or she may return and purchase back the pawned item at the shop's purchase price, plus an additional fee. The pawner can extend this loan for up to 90 days, for an additional fee. Daugherty noted that in order to retrieve a previously pawned item, one must have both the particular pawn ticket and photo identification. If no one returns for the item or extends the loan, the shop may sell the item as its own property after 30 days. Daugherty testified that on August 28, 2009, Gregory paid $24 to retrieve the scanner from Top Dollar Pawn.

¶ 10 On March 30, 2010, a jury found the defendant guilty of theft and residential burglary. Judgment was entered only on the residential burglary offense, as the theft conviction was found to be a lesser-included offense of the burglary conviction. On May 24, 2010, the defendant was sentenced as a Class X offender pursuant to section 5-5-3(c)(8) of the Unified Code of Corrections (730 ILCS 5/5-5-3(c)(8) (West 2008)), which required a minimum six-year sentence based on his prior criminal history. As a factor in mitigation, the court considered the fact that the defendant did not threaten or cause physical harm to another. As factors in aggravation, the trial court stated:

> "One, that the defendant received compensation for committing this offense. Another factor in aggravation is that the defendant has a history of prior delinquency or criminal activity, and seven [*sic*], that the sentence is necessary to deter others from committing the same crime."

¶ 11 The court went on to note that the main factor in aggravation was deterrence. The trial court sentenced the defendant to eight years in the Illinois Department of Corrections. The defendant filed a motion for a new trial and/or to reduce sentence on June 23, 2010. The motion was denied on its merits at a hearing held April 25, 2011. The defendant appeals.

¶ 12 The defendant first argues that the State presented insufficient evidence to support the jury's finding of guilt, and therefore his conviction should be reversed. Specifically, the defendant asserts the State did not prove beyond a reasonable doubt that he entered Robert's house without authority, or, even if he entered without authority, the State did not prove beyond a reasonable doubt that he entered the house with the requisite intent to commit a theft.

¶ 13 In reviewing a challenge to the sufficiency of the evidence, the reviewing court 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. Smith*, 185 Ill. 2d 532, 541 (1999). A conviction may be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Id.* However, a reviewing court will not "retry the defendant" by substituting its judgment for that of the trier of fact on issues of the weight of the evidence or credibility of the witnesses. *Id.*; *People v. Phelps*, 211 Ill. 2d 1, 7 (2004). To obtain a conviction for residential burglary, the State must have proven beyond a reasonable doubt that the defendant knowingly entered the dwelling of another without authority and with an intent to commit a theft therein. 720 ILCS 5/19-3(a) (West 2010).

¶ 14 The defendant first argues that he did not enter the dwelling of another without authority. The defendant asserts that he was a co-resident in Robert's home on June 30, 2009, and, while Robert had never given the defendant explicit permission to be in his home that day, Robert had also never withdrawn a continuing implied permission to come and go from his home. However, at trial, the State presented evidence that conflicts with the defendant's contention. Robert's testimony indicated that the defendant was not living with Robert on the date of the incident, and had not been living in Robert's home for three weeks. Additionally, though Robert agreed that he "wouldn't have said nothing" to the defendant

regarding permission to regularly come and go from his home, other testimony from Robert and Heath indicated that Robert had never given any sort of permission to be in his home that day. Viewing the evidence in the light most favorable to the prosecution, this court believes a rational trier of fact could have found beyond a reasonable doubt that the defendant was not a resident of his father's home on the date of the incident, nor did he have express or implied permission to be there.

¶ 15 However, even assuming *arguendo* that the State did not meet its burden of proof regarding the defendant's authority to enter the home, this court nevertheless agrees with the State that the defendant would have forfeited such authority under the "limited authority" doctrine. See *People v. Wilson*, 155 Ill. 2d 374, 376 (1993); *People v. Scott*, 337 Ill. App. 3d 951, 956 (2003) (no individual who is granted access to a dwelling can be said to be an authorized entrant if he intends to commit criminal acts therein, because if the owner knew of the entrant's intentions, the owner would have barred the entrant from the premises *ab initio*). The determination of whether an entry is unauthorized depends upon whether the defendant possessed the intent to perform a criminal act therein at the time entry was granted; consent is vitiated where the true purpose for the entry exceeds the limited authorization granted. *Scott*, 337 Ill. App. 3d at 395. Thus, even if the jury concluded that the defendant did have authority to enter Robert's home, the relevant inquiry then became whether the defendant had intent to perform a criminal act at the time entry was granted. As discussed below, this court finds that a rational trier of fact could conclude beyond a reasonable doubt that the defendant intended to commit a theft in Robert's home that day, vitiating any potential consent from Robert for an authorized entry.

¶ 16 The defendant next argues that even if he entered without authority, he did not enter with the intent to commit a theft. To commit theft, one must intend to deprive the owner permanently of the use or benefit of his property. See 720 ILCS 5/16-1(a) (West 2010).

Though the defendant admits in his brief that he intended to pawn the scanner,[1] he argues that the act of pawning does not constitute an intent to permanently deprive, as the item offered as collateral at a pawn shop is retrievable for a certain amount of time.

¶ 17 However, Illinois defines "permanently deprive" as:

> "(b) [to] [d]eprive the owner permanently of the beneficial use of the property; or,
>
> ***
>
> (d) [to] [s]ell, give, pledge, or otherwise transfer any interest in the property or subject it to the claim of a person other than the owner." 720 ILCS 5/15-3(b), (d) (West 2010).

¶ 18 A pawn is defined as "an item of personal property deposited as security for a debt;

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[1]An intent to permanently deprive may ordinarily be inferred by the trier of fact when a person takes the property of another, or may be proved circumstantially by inferences reasonably drawn from the circumstances of the defendant's conduct. *People v. Veasey*, 251 Ill. App. 3d 589, 591-92 (1993); *People v. Johnson*, 28 Ill. 2d 441, 443 (1963). Even if the defendant had not essentially admitted this point, the evidence presented at trial clearly raises an inference that the defendant intended to deprive Robert of the scanner. Testimony from Ashby, Robert, and Gregory stated that the defendant entered Robert's home, left with Robert's scanner, and almost immediately went to Top Dollar Pawn to exchange it for $20. This inference is bolstered by several circumstances: Gregory's testimony regarding the defendant's refusal to tell Gregory the reason for the visit; his discussion with Crabtree about how much they could get for the item; and by Heath's testimony regarding the defendant's statements about picking up clothing from his father's house, which conflicted with the witness's trial testimony and therefore indicates that the defendant felt the need to lie to the police about the reason for his visit that day.

a pledge or guarantee." Black's Law Dictionary 1164 (8th ed. 2004). In other words, pawning an item falls squarely within subsection (d) of Illinois's definition of "permanently deprive." The defendant, through Gregory, pledged a possessory interest in Robert's scanner to Top Dollar Pawn in exchange for $20; Top Dollar Pawn retained a superior property interest in the scanner until Gregory purchased it back within the retrieval window. Under the words of the statute, by intending to pawn the scanner, the defendant intended to permanently deprive Robert of the beneficial use of his property.

¶ 19 Based on the foregoing, when viewed in the light most favorable to the State, we conclude that a rational trier of fact could find that all the requisite elements of residential burglary were proven beyond a reasonable doubt.

¶ 20 Lastly, the defendant asks that his sentence be vacated. We begin by noting that a reviewing court may not alter a sentence imposed by the trial court absent an abuse of discretion by the lower court. *People v. Ward*, 113 Ill. 2d 516 (1986). The defendant contends that the trial court erred by considering the defendant's compensation as an aggravating factor, because compensation is a factor inherent in the offense of residential burglary.

¶ 21 To preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required. 730 ILCS 5/5-4.5-50(d) (West 2010); *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). The defendant failed to present this claim in his motion to reconsider his sentence, and he admits in his brief that his counsel failed to preserve this issue for review. Thus, under the general rule, the claim is forfeited.

¶ 22 Nevertheless, the defendant argues that the error should be considered as a matter of plain error because the evidence was closely balanced and the error was prejudicial. Alternatively, he argues that his counsel's failure to preserve this sentencing error for review constitutes ineffective assistance of counsel. A reviewing court may consider an otherwise

forfeited issue for plain error under Illinois Supreme Court Rule 615(a) (eff. Aug. 27, 2009), which permits review of unpreserved errors when (1) a clear or obvious error occurred and the evidence at the sentencing hearing was 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 occurred and that error was so egregious as to deny the defendant a fair sentencing hearing, regardless of the closeness of the evidence. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). Plain error review begins by determining whether a clear or obvious error occurred. *Id.* If error did occur, the court considers whether either of the two prongs of the doctrine has been satisfied. *Id.* at 189-90. The defendant has the burden of persuasion under both prongs of the plain-error doctrine. *Id.* at 190.

¶ 23 Factors that may be considered in aggravation in sentencing a defendant are listed in section 5-5-3.2(a) of the Unified Code of Corrections. One such factor is that the defendant received compensation for committing the offense. 730 ILCS 5/5-5-3.2(a)(2) (West 2010). In *People v. Conover*, the supreme court distinguished receiving the proceeds of a crime from a payment made to commit a crime and subsequently held that section 5-5-3.2(a) was an applicable factor in aggravation only in the latter instance. *People v. Conover*, 84 Ill. 2d 400, 404-05 (1981). The defendant cites *Conover* in support of his argument, and, as pawning the scanner resulted in the defendant receiving proceeds of a burglary as opposed to receiving payment for committing a burglary, we agree that this statutory factor does not apply to the defendant's case.

¶ 24 However, while proceeds of a crime are not a statutory aggravating factor under section 5-5-3.2(a)(2), it can be a proper consideration at sentencing when the proceeds relate to things such as the extent and nature of a defendant's involvement in a particular criminal enterprise, a defendant's underlying motivation for committing the offense, the likelihood of the defendant's commission of similar offenses in the future, and the need to deter others

from committing similar crimes. *People v. Rios*, 2011 IL App (4th) 100461, ¶ 15. In *Rios*, the defendant pled guilty to unlawful delivery of a controlled substance. *Id.* ¶ 5. The reviewing court concluded that the trial court did not err when it noted compensation as a statutory aggravating factor, because the trial court's discussion of the facts–that there was no financial pressure involved to sell, that the defendant was making $400 per day selling heroin and had been selling for a long time, and that she had five or six people buying from her–indicated that the trial court's focus was on the extent and nature of the defendant's involvement in selling drugs, her substantial sales as underlying motivation, and the nature of the offense of daily selling heroin. *Id.* ¶ 17-18.

¶ 25 Likewise, we believe the record reflects that the trial court, while improperly listing compensation as a statutory aggravating factor, was considering the defendant's proceeds for his crime under a proper paradigm–that is, as relating to the extent and nature of the defendant's involvement in the burglary, his motivation in taking the scanner, the likelihood of the defendant's future commission of similar offenses, and the need to deter others from committing similar offenses. Indeed, while the trial court began its discussion of factors in aggravation by reading from a list of statutory factors, the court went on to say:

> "[T]he mere fact that you broke into your father's residence and removed property that belonged to your father, and that you sold that property, that in relation to all the other charges that you have had make this court realize that a longer sentence is necessary. *** [T]he main factor is to deter others from committing these types of offenses, and any lesser sentence would certainly take away from the crime that you have committed here today."

¶ 26 We believe that the court's discussion indicates that compensation was considered as the defendant's proceeds from his crime as they related to the nature of the burglary, which was all the more offensive because he stole from his father; the likelihood of the defendant's

future commission of similar offenses, as the defendant had numerous past criminal charges; and the need to deter others from committing similar offenses. Nothing in the record indicates that the defendant's sentence was prejudiced by the trial court's listing of compensation as a statutory aggravating factor, and accordingly we find this to be a mistake of characterization, not a mistake in consideration. Therefore, though the trial court improperly listed compensation as a statutory aggravating factor, the trial court committed no error.

¶ 27 Finally, the defendant contends that his counsel's failure to preserve this claim constitutes ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was so seriously deficient as to fall below an objective standard of reasonableness under prevailing professional norms and (2) the deficient performance so prejudiced the defendant as to deny him a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). For the same reasons given in response to the defendant's argument for plain error, we find the defendant has not demonstrated the prejudice required to meet his burden for ineffective assistance of counsel.

¶ 28 In sum, the trial court misstated the manner in which it was considering the defendant's proceeds for the crime by referring to "compensation" under the statutory language, but this court finds upon reviewing the record that the trial court properly considered this factor in relation to the nature of the defendant's crime, his motivation, the likelihood of committing similar offenses in the future, and the need for deterrence. The defendant was not prejudiced by this consideration and thus can demonstrate neither that the trial court committed plain error nor that he received ineffective assistance of counsel.

¶ 29 For all of the foregoing reasons, the judgment of the trial court is affirmed.

¶ 30 Affirmed.