2016 IL App (1st) 141121-U

FIFTH DIVISION
September 9, 2016

No. 1-14-1121

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 8232
	)	
JERRY CALVIN,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

O R D E R

¶ 1 *Held*: (1) We affirm defendant's conviction for burglary where he was found in possession of a radio adapter taken from a nearby vehicle with a broken window; (2) defendant's eight-year prison term is not excessive because the record establishes that the court considered all appropriate factors; and (3) defendant's DNA analysis fee is vacated.

¶ 2 Following a bench trial, defendant Jerry Calvin was convicted of burglary and sentenced to eight years' imprisonment as a Class X offender. On appeal, defendant contends that the State failed to prove his guilt beyond a reasonable doubt where the evidence established that he was found in possession of a radio adapter taken from a nearby vehicle with a broken window, but

did not demonstrate that he entered the vehicle or removed the adapter. Defendant also contends that his sentence constitutes an abuse of discretion in view of mitigating evidence, and further argues that the court erroneously imposed a $250 DNA analysis fee. We affirm defendant's conviction and sentence, and vacate the $250 DNA analysis fee.

¶ 3 At trial, Officer Howe testified that he was riding with his partner, Officer Enriquez, in an unmarked police vehicle in Chicago on the night of April 15, 2012. At 10:27 p.m., they received a radio dispatch stating that a "male black wearing a black hoody [was] attempting to break into a dark SUV" near 1301 Washington. Defense counsel objected to this testimony, arguing that "the call and information in the call" was hearsay. The court stated:

> "The objection will be noted for the record. The Court will also state that the matter is not being received for the truth of the matter asserted, certainly just to allow the officer to testify as to what he did next."

¶ 4 Howe testified that he arrived at the scene within two minutes and saw defendant standing on the sidewalk, a few feet from the rear of a dark Chevrolet SUV. Defendant wore a dark blue or black hooded sweatshirt and carried a reusable green bag. Howe exited the police vehicle and announced his office, at which point defendant dropped the bag and approached. Howe detained defendant and noticed that the SUV's rear passenger window was broken, with a concrete brick laying on the back seat. Enriquez recovered the bag, which contained a "Sirius portable adapter for a car," and found the identification of the vehicle's owner inside the SUV, later identified as Justin Diano. Enriquez contacted Diano, who met the officers at the scene.

¶ 5 On cross-examination, Howe stated that the radio dispatch did not specify the offender's height, weight, or clothing other than the "hoody." Howe did not know what time the brick went through the SUV's window and never saw defendant enter or exit the vehicle. Howe first noticed

the bag when it was in defendant's hands, but he did not see defendant remove the bag from the SUV and did not know when the bag was removed from the vehicle.

¶ 6 Diano, a Forest Park police officer, testified that he lived at West Washington Boulevard and was assigned a black Chevrolet Tahoe from his police department. He did not recall whether he went to work on April 15, 2012, but that evening around 10 pm while walking his dog he noticed the Tahoe parked in front of his residence. Diano did not see the vehicle between 10 p.m. and 10:30 p.m., when he was awoken by police officers ringing his doorbell. Diano went outside and saw that one of the Tahoe's back windows had been smashed. He identified the green bag and Sirius electronic device, which had been in the Tahoe's center console, as his property. He denied giving defendant permission to remove the items from the vehicle.

¶ 7 Defense counsel moved for a directed finding, arguing that defendant's possession of the radio adapter and bag could not sustain a conviction for burglary where no evidence established that he broke the vehicle's window or removed the items. The court denied the motion. Defendant indicated that he would testify. Before he did so, the court addressed the State's motion *in limine* to admit defendant's two prior convictions for burglary and a prior conviction for possession of a stolen motor vehicle. The court ruled that defendant's two prior convictions for burglary could be admitted to impeach his credibility.

¶ 8 Defendant testified that on the evening of April 15, 2012, he was washing automobiles for change on Michigan Avenue, wearing a "blue hoody" and black pants. Afterwards, he walked down the 1300 block of Washington, although he usually walked home on Madison. He noticed a green bag on the sidewalk, about 15 feet from a vehicle. He neither walked by the SUV nor saw whether the windows were shattered, and denied entering, opening, or breaking the window of any vehicle to remove the bag. He picked up the bag, looked inside, and walked to the

intersection of Throop and Washington. Police officers stopped him, inquired if he was subject to any warrants, and requested the bag. Defendant handed the bag to the officers, who placed him in custody.

¶ 9 In rebuttal, the State introduced certified copies of defendant's two prior burglary convictions.

¶ 10 The court found defendant guilty of burglary based on the witnesses' testimony, "their relative credibility," and "the timeline in this matter," and denied defendant's motion for new trial.

¶ 11 At sentencing, the State observed that defendant had multiple felony convictions, including five prior convictions for burglary. The State argued that defendant had been repeatedly sentenced to prison but persisted in committing similar offenses, and requested the court to impose a sentence "commensurate with [defendant's] background." In mitigation, defense counsel submitted that defendant had rehabilitative potential and that a lifelong struggle with drug addiction had contributed to his previous incarceration. Counsel noted that defendant had participated in a mental health recovery program while incarcerated and was willing "to make some strides to help him through his addictions *** and sometimes the negative behaviors that go along with [them]."

¶ 12 The presentence investigation report (PSI) indicated that defendant, age 50 at sentencing, had prior convictions for unlawful use of a weapon (2010), possession of a stolen motor vehicle (2007, 1997), burglary (2006, 2003, 2002, 1994, 1993 1980), possession of a controlled substance (2001), theft (1992, 1989), violation of bail bond (1989), attempted arson (1987), and possession of cannabis (1984). Defendant was the youngest of nine children and grew up in an area of Chicago "infested" with gangs and drugs. He was expelled from high school during his

senior year due to a confrontation with a teacher, but earned a GED in 1982. He has two adult children and worked as a laborer from 1989 to 2011. Defendant began using heroin at age 25, attended inpatient rehabilitation in 2005 and 2006, and believed that he would benefit from further treatment. In 2007, he was diagnosed with depression and prescribed antipsychotic and antidepressant medications. In allocution, he asked the court to impose "mental health probation."

¶ 13 The court sentenced defendant to eight years' imprisonment as a Class X offender, stating:

> "I appreciate the fact that you recognize that you may have mental health issues and that you've completed a mental health recovery program in Cook County Jail, and I certainly will take that into consideration in fashioning your sentence.
>
> I have reviewed my notes from the trial, [and] I have also reviewed the pre-sentence investigation. And as the State and the Defense attorney [have] acknowledged, you have a lengthy criminal history. As I counted, there appears to be one, two, three, four, five, six prior burglaries with a host of other convictions added in."

The court further stated that defendant "certainly [was] old enough to be tired of engaging in this type of behavior." The court recommended defendant to be incarcerated in a facility offering mental health and drug counseling, and denied his motion to reconsider sentence.

¶ 14 Defendant raises three issues on appeal. First, defendant contends that he was not proven guilty of burglary beyond a reasonable doubt where the evidence only demonstrated that he was found in possession of a radio adapter taken from a nearby vehicle with a broken window, but did not establish that he entered the vehicle or removed the adapter. Defendant observes that the State did not proffer evidence that his fingerprints were in the vehicle or that fragments of glass

were on his clothes. Moreover, as the dispatch call describing a burglary in progress was hearsay, defendant claims that no evidence demonstrated that the vehicle had been burglarized immediately prior to his arrest. To the contrary, because Diano did not indicate whether the window was broken when he last noticed the vehicle at 10 p.m., defendant argues that the period of time during which the vehicle may have been burglarized cannot be determined.

¶ 15 The standard of review on a challenge to the sufficiency of the evidence is whether, after reviewing all 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. *People v. Brown*, 2013 IL 114196, ¶ 48. Circumstantial evidence is sufficient to sustain a conviction. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). Additionally, the trier of fact is not required to disregard inferences that flow normally from the evidence or to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). The reviewing court will not retry the defendant (*People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011)), or substitute its judgment for that of the trier of fact on questions involving the credibility of witnesses or the weight of the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). A conviction will be reversed only if the evidence "is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *Id*. at 225.

¶ 16 A person commits burglary when, without authority, he or she knowingly enters or remains within a motor vehicle or any part of a motor vehicle with intent to commit therein a felony or theft. 720 ILCS 5/19-1(a) (West 2010). Circumstantial evidence is often required to prove the elements of burglary. *People v. Richardson*, 104 Ill. 2d 8, 13 (1984). However, whether the trier of fact is a judge or jury, "it is improper to presume that a defendant committed burglary merely because he was in possession of stolen property taken from a burglary." *People*

v. Natal, 368 Ill. App. 3d 262, 270 (2006). Thus, in *People v. Housby*, 84 Ill. 2d 415 (1981), our supreme court held that jury instructions permitting an inference of guilt based on the exclusive possession of recently stolen property violate due process unless (1) there was a rational connection between the defendant's recent possession of stolen property and his participation in the burglary; (2) the defendant's guilt of the burglary more likely than not flowed from his recent, unexplained and exclusive possession of the proceeds; and (3) there was corroborating evidence of the defendant's guilt. *Id*. at 424. Notably, the same evidence will satisfy all three *Housby* factors. *People v. Caban*, 251 Ill. App. 3d 1030, 1033 (1993).

¶ 17 Our supreme court, in *Richardson*, observed that *Housby* "applies only to instructions which advise a jury of inferences it may draw." *Richardson*, 104 Ill. 2d at 12. In *Richardson*, the defendant was convicted of burglary and appealed on the theory that, contrary to *Housby*, the jury improperly inferred the element of intent from the fact that he had illegally entered the premises containing movable property. *Richardson*, 104 Ill. 2d at 11. Unlike in *Housby*, the defendant had not challenged any jury instructions. *Id*. at 12. The issue on appeal was simply "whether the evidence was sufficient to infer an intent to commit theft." *Id*. at 13. *Richardson* recognized that the *Housby* factors evaluate the propriety of jury instructions regarding inferences, and that, where the jury is not instructed as to inferences it may draw, the appropriateness of an inference depends on the sufficiency of the evidence supporting it. *Id*. at 12-13. *Richardson* does not, however, preclude a fact finder from using the *Housby* factors to review the sufficiency of the evidence. As this court has noted, the *Housby* factors are useful for that purpose, even in cases where the propriety of jury instructions are not at issue. See, *e.g.*, *People v. Smith*, 2014 IL App (1st) 123094, ¶¶ 14-17; *People v. McGee*, 373 Ill. App. 3d 824, 832-34 (2007); *Natal*, 368 Ill. App. 3d at 270; *People v. Gonzalez*, 292 Ill. App. 3d 280, 288-90

(1997); *Caban*, 251 Ill. App. 3d at 1032-34; *People v. Carter*, 197 Ill. App. 3d 1043, 1046 (1990); *People v. Mata*, 178 Ill. App. 3d 155, 163 (1988). As we explained in *Natal*:

> "*Housby* dealt with the formulation of a three-part test for determining whether an instruction, which advised the jury in a burglary case that the defendant's guilt could be inferred from his exclusive and unexplained possession of recently stolen property, violated the due process clause of the United States Constitution. However, the same (or a similar) test can be used by any fact finder to determine the ultimate facts beyond a reasonable doubt. Regardless of which test or rationale a trial court uses to determine guilt or innocence, it must consist of more than the exclusive possession of the property in close proximity to the burglary." *Id*. at 270.

¶ 18 Turning to the present case, we find that the evidence was sufficient to sustain defendant's conviction for burglary whether we apply the *Housby* test (*Housby*, 84 Ill. 2d at 424) or the traditional standard of review for the sufficiency of the evidence (*Brown*, 2013 IL 114196, ¶ 48). First, a rational connection existed between defendant's possession of the bag and radio adapter and his role in burglarizing the SUV. Although the trial court did not admit the content of the radio dispatch for proof of the matter asserted, *i.e.*, that a burglary was underway or had recently occurred, Howe testified that he arrived at the scene no more than two minutes after receiving the dispatch and found defendant with the stolen property a few feet from Diano's vehicle. The court could reasonably infer from the short time span between the dispatch and the discovery of defendant with burglary proceeds near the vehicle established a rational connection between defendant's possession of the burglary proceeds and his participation in the burglary. See *Carter*, 197 Ill. App. 3d at 1045-46 ("[t]he short period of time" it took police officers to respond to a burglarized store, along with the fact that defendant was found in possession of

stolen goods in "close proximity" to the store, established a rational connection between possession and participation).

¶ 19 Second, under these circumstances, defendant's guilt more likely than not flowed from his unexplained and exclusive possession of the stolen goods a mere two minutes after the dispatch call. The court was not obliged to accept defendant's testimony that he found the bag on the street. *People v. Barney*, 176 Ill. 2d 69, 74 (1997) (defendant's testimony does not carry a presumption of veracity and is not entitled to greater deference than the testimony of any other witness). Examining defendant's explanation of events against the theory submitted by the State, in light of all the evidence, "we find it reasonable for the trial court to have concluded that it was more likely that defendant was a participant in the burglary as opposed to a mere subsequent possessor of the proceeds." *Caban*¸ 251 Ill. App. 3d at 1034.

¶ 20 Lastly, defendant's possession of the stolen goods was not the only evidence supporting his conviction. Howe found defendant holding the bag and radio adapter near the burglarized vehicle, and testified that defendant dropped the items when the officers identified themselves. Corroboration also exists where, as in the present case, the trier of fact could reasonably find that the defendant presented a false explanation for his possession of the stolen goods. *People v. Melton*, 232 Ill. App. 3d 858, 863-64 (1992) (citing *Housby*, 84 Ill. 2d at 430-31 ("Sufficient corroboration is also presented where the defendant himself presents an explanation of possession that the jury reasonably finds to be false.")). The court noted that it had considered the witnesses' "relative credibility," and had discretion to evaluate defendant's testimony in view of the two prior convictions admitted into evidence. See *People v. Atkinson*, 186 Ill. 2d 450, 461-62 (1999) (where defendant's testimony "made up his entire defense," prior convictions "were

crucial in measuring [his] credibility"). Consequently, all three factors of the *Housby* test were met and the evidence was sufficient to sustain defendant's conviction.

¶ 21 Defendant next contends that the trial court abused its discretion in sentencing him to eight years' imprisonment, given the nonviolent nature of the burglary, his nonviolent criminal history, his substance abuse and mental health problems, and the financial impact of incarceration. Defendant argues that his prison term is disproportionate to the severity of the offense and harms his chances of being restored to useful citizenship. Additionally, defendant introduces multiple studies and articles describing the uncertain benefits and social, financial, and human costs of lengthy incarceration.

¶ 22 The reviewing court considers a trial court's sentencing decision under an abuse-of-discretion standard of review. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *Id*.

¶ 23 A sentence should reflect both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. The trial court is presumed to consider all relevant factors and any mitigation evidence presented (*People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48), but has no obligation to recite and assign a value to each factor (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)). Rather, a defendant "must make an affirmative showing that the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. A

reviewing court will not substitute its judgment for that of the trial court merely because it would have weighed the factors differently. *Alexander*, 239 Ill. 2d at 213.

¶ 24 A sentence within the statutory range is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. Burglary is a Class 2 felony with a sentencing range of three to seven years. 720 ILCS 5/19-1(b) (West 2010); 730 ILCS 5/5-4.5-35(a) (West 2010). Where, as here, prior felony convictions require the defendant to be sentenced as a Class X offender, a Class X sentence ranges from 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2010); 730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 25 We find no abuse of discretion in defendant's sentence. The eight-year prison term is presumed proper, as it falls well within the Class X statutory sentencing range and is not disproportionate to defendant's seventh burglary conviction. See *People v. Ramos*, 353 Ill. App. 3d 133, 138 (2004) (where defendant had multiple convictions for burglary, "a lighter sentence was not warranted based on the recidivistic nature of the defendant's crimes"). While the present offense was nonviolent, the trial court noted that defendant's criminal history was "lengthy" and involved "a host of other convictions," including unlawful use of a weapon, possession of a stolen motor vehicle, and attempted arson. See *People v. Storms*, 254 Ill. App. 3d 139, 142-44 (1993) (although defendant was convicted of a nonviolent burglary, trial court found that "an extended period of incarceration was necessary" in view of prior burglary convictions). The court specifically noted defendant's mental health issues and efforts to seek treatment, and recommended that defendant be incarcerated in a facility that offers both mental health and drug counseling. Moreover, the court was not required to give defendant's mental illness and drug addiction greater weight than his criminal record and the seriousness of the present offense. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123 (mitigating factors not entitled to greater

weight than seriousness of offense); *People v. Anderson*, 211 Ill. App. 3d 140, 144-45 (1991) ("The trial court did not abuse its discretion in giving the defendant's mental *** health and substance-abuse problems little weight in comparison to her extensive criminal record."). Thus, the record establishes that the trial court did not abuse its discretion in sentencing defendant.

¶ 26 Defendant also contends that the trial court failed to give adequate consideration to the financial costs of his incarceration. However, a trial court is not required to specify on the record the reasons for a defendant's sentence, and, given the lack of evidence to the contrary, we will presume that the trial court performed its obligations and considered the financial impact before sentencing defendant. *People v. Decatur*, 2015 IL App (1st) 130231, ¶ 17 (presuming the court considered the financial impact).

¶ 27 We note that defendant improperly attempts to rely on studies and articles to show that his sentence hinders his chances for rehabilitation. These sources do not qualify as relevant authority on appeal and will not be considered because they were not presented to the court below and were not part of the record on appeal. See, *e.g.*, *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983); *People v. Magee*, 374 Ill. App. 3d 1024, 1029-30 (2007); *People v. Heaton*, 266 Ill. App. 3d 469, 476-77 (1994); *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993).

¶ 28 Finally, defendant contends, and the State correctly concedes, that the $250 state DNA identification system fee was improperly assessed and should be vacated. Defendant did not contest this fee in the trial court, but the parties contend that an unauthorized fine is void and may be challenged at any time. See, *e.g.*, *People v. Rigsby*, 405 Ill. App. 3d 916, 920 (2010). This rule no longer applies in view of *People v. Castleberry*, 2015 IL 116916, ¶ 19 (abolishing the void sentence rule). However, on appeal we may modify the fines and fees order without

remanding the case back to the trial court. Ill. S. Ct. R 615(b) (eff. Aug. 27, 1999) ("[o]n appeal the reviewing court may * * * modify the judgment or order from which the appeal is taken"); *People v. McGee*, 2015 IL App (1st) 130367, ¶ 82 (ordering clerk of circuit court to correct fines and fees order).

¶ 29 The DNA identification system fee is authorized only where a defendant is not currently registered in the state DNA database. 730 ILCS 5/5-4-3(j) (West Supp. 2011); *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). To vacate the DNA charge, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. In this case, the record on appeal shows that defendant was convicted of burglary in 2003. Accordingly, we vacate defendant's $250 state DNA identification system fee and order the clerk of the circuit court to correct the fines and fees order accordingly.

¶ 30 For all the foregoing reasons, we affirm defendant's conviction and sentence for burglary and vacate his $250 DNA analysis fee.

¶ 31 Affirmed; fines and fees order corrected.