SIXTH DIVISION
September 30, 2016

No. 1-14-1356

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. 11 CR 18103
	)	
MELICOR HAZZARD,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm defendant's conviction because the State proved each element of burglary beyond a reasonable doubt and the trial court did not abuse its discretion in imposing sentence. Mittimus corrected.

¶ 2 Following a jury trial, defendant Melicor Hazzard was convicted of one count of burglary (720 ILCS 5/19-1(a) (West 2010)) and sentenced to 15 years' imprisonment. On appeal, defendant argues the evidence was insufficient to prove him guilty beyond a reasonable doubt, the trial court abused its discretion in sentencing him, and that the mittimus should be corrected

to reflect the proper prison term imposed and correct credit for time spent in presentence custody. We affirm defendant's conviction and sentence and order his mittimus corrected.

¶ 3 Defendant was charged by indictment with one count of burglary based upon his October 18, 2011 entry into Curtis Savage's truck with the intent to commit a theft therein. At trial, Savage testified that he is the owner of a 17-foot truck that he uses part time to move furniture. On October 17, 2011, Savage parked his truck behind a residential complex located at 11 North Waller Avenue in Chicago, just off the alley. He had a television, tools, and "maybe a few paintings" in the back of the truck, which he locked with a padlock.

¶ 4 At 4:00 a.m., Savage was awakened by a police officer calling to tell him that his truck had been broken into. He noticed that the padlock had been broken off, and while he had paintings in his truck, he did not notice if anything was missing at that point. Savage did not notice if a painting was missing because he "transfer[s] items all the time." He stated that he did not know defendant and that he never gave anyone permission to be inside his truck.

¶ 5 Chicago police officer Michael Walsh testified he was working in the early morning hours of October 18, 2011, assigned to the 15th District "robbery-burglary tac team." Walsh's duties included working on a directed burglary mission because of an increase in overnight and morning burglaries. During his patrol with Officer Kevin Quinn, Walsh arrived in the alley adjoining 11 North Waller Avenue and observed what he thought to be a possible burglary of a truck. Walsh proceeded to get closer to the truck, and when he was about 10 to 15 feet away, he observed a black man pulling a large television out of the back of the truck. The man, identified by Walsh in court as defendant, was not wearing anything covering his face, and the alley was illuminated by orange streetlights.

¶ 6 Defendant looked in Walsh's direction, pushed the television back into the truck, and ran toward a white, older-model station wagon parked in the alley close to Savage's truck. Walsh saw his face unobstructed for a "matter of seconds." Defendant then fled northbound through the alley in the station wagon.

¶ 7 Walsh then sent out a flash message that a black male was fleeing a burglary scene northbound from his location in a white, older-model station wagon. Walsh did not provide any further detail regarding the suspect or the vehicle. He sent the message out about 15 seconds after defendant fled. Two to three minutes later, he received a message from Officer Mendez that a vehicle matching this description had been stopped.

¶ 8 Walsh then returned to the back of the truck and observed a padlock that had been cut lying on the truck's back bumper. Walsh then went to the police station and about 15 minutes after he had first observed defendant, he identified him as the man he saw in the truck pulling the television. Walsh further identified the white station wagon, which contained a handcutting instrument, a flashlight on the front bench seat, and a painting on the back seat.

¶ 9 Officer Quinn testified consistently with Walsh as to the events on October 18, 2011.

¶ 10 Officer Mendez testified that he received a dispatch that a black male in a white "old" station wagon was fleeing the area of a burglary. Less than a minute later, Mendez observed a vehicle matching that description seven blocks from the burglary scene. He stopped the vehicle and transported the driver to the police station. About five minutes passed between the flash message and when he arrived at the station. Mendez identified defendant in court as the driver of the station wagon.

¶ 11 Defendant presented no evidence.

¶ 12 The jury found defendant guilty of one count of burglary. The trial court denied defendant's written motions for a new trial and proceeded to sentencing.

¶ 13 In aggravation, the State argued defendant should be sentenced as a Class X offender due to his background. Defendant had a Class 1 felony conviction for manufacture or delivery of a controlled substance, for which he had received two years' probation. He subsequently violated that probation. Defendant had a prior murder conviction, for which he was sentenced to 20 years' imprisonment. The State pointed out that defendant committed the murder while on probation for the delivery charge. Defendant also had various convictions for misdemeanor possession of cannabis. Defense counsel argued that defendant had pleaded guilty to his prior convictions and that, in the pending burglary offense, no one was hurt. Defendant then allocuted, acknowledged his criminal past, but claimed that he "didn't do it this time."

¶ 14 The trial court sentenced defendant to 17 years' imprisonment. The trial court denied defendant's written motion to reconsider sentence, and defendant filed a notice of appeal.

¶ 15 Defendant then timely filed a supplemental written motion to reconsider sentence. The trial court granted this motion and reduced defendant's prior sentence of 17 years' imprisonment to 15 years. Our supreme court issued a supervisory order directing this court to allow defendant leave to file a late notice of appeal.

¶ 16 Defendant first argues that the evidence is insufficient to prove him guilty because Officer Walsh's and Quinn's identifications of him were unreliable. The standard of review when challenging the sufficiency of the evidence is 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 offense proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. "A reviewing court will not substitute its judgment for that of the trier of fact on issues involving the

weight of evidence or the credibility of witnesses." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). A conviction will not be reversed unless "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 17 In order to sustain the conviction for burglary, the State had to prove beyond a reasonable doubt that defendant, without authority, knowingly entered or remained within Savage's truck with intent to commit therein a felony or theft. 720 ILCS 5/19-1(a) (West 2010). A burglary is complete upon entering a vehicle with the requisite intent, regardless of whether the felony or theft is accomplished. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 18 The positive testimony of a single credible witness is sufficient to convict a defendant. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). When assessing the reliability of a witness's identification, we consider (1) the opportunity of the witness to view the offender during the crime, (2) the witness's degree of attention at the time of the offense, (3) the accuracy of the witness's prior description of the offender, (4) the level of certainty exhibited by the witness at the subsequent identification, (5) the length of time between the offense and the identification. *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). Moreover,

> "[i]t has consistently been held that a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification. Instead, a witness'[s] positive identification can be sufficient even though the witness gives only a general description based on the total impression the accused's appearance made." *Id.* at 308-09.

¶ 19 Here, we find a reasonable jury could find defendant guilty of burglary. Savage testified that he was the owner of a truck containing "maybe a few paintings," the truck had been broken into, and he did not give anyone permission to enter the truck. Officer Walsh testified he saw defendant pulling a large television out of the back of a moving truck subsequently identified as Savage's truck. This testimony established that defendant, without authority, entered Savage's truck with the intent to commit a theft of the television.

¶ 20 Walsh's identification of defendant was sufficient to prove defendant guilty beyond a reasonable doubt. "A single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *Slim*, 127 Ill. 2d at 307. Here, Walsh was a police officer specifically working on a "robbery-burglary tac team" and thus, particularly attentive to any potential burglary. He testified he viewed defendant's uncovered face, unobstructed, from a distance of 10 to 15 feet for "a matter of seconds" before defendant fled from the alley in the white older-model station wagon. This alley also was illuminated by orange streetlights and Walsh testified he saw defendant "face on." Fifteen minutes after observing defendant's face, Walsh positively identified defendant at the police station as the man he saw pulling the television out of the truck. He also identified the station wagon in which defendant was found as the vehicle that man used to flee. At trial, he again identified defendant with certainty as the man pulling the television from the truck. These circumstances were sufficient for him to identify defendant as the man taking the television from Savage's truck. Quinn further corroborated this testimony.

¶ 21 Defendant argues that, because Walsh omitted "several striking details" from his flash message regarding the white, older-model station wagon in which defendant fled, the State's case is in "doubt." Specifically, Walsh failed to provide the make, model, license plate number

or that the station wagon had yellow temporary license plates and tinted windows. This argument is unpersuasive. Walsh gave an adequate description of the vehicle in which defendant fled. A white station wagon that is nearly 30 years old can satisfactorily be described as "older" and is significantly distinctive so as to not require further description. Further, Walsh positively identified defendant as the man he saw pulling the television from the truck before fleeing in that same white, older-model station wagon, which he also positively identified.

¶ 22 Defendant contends that, because there were no burglary proceeds in the white station wagon, no physical evidence connecting him to Savage's truck and no inculpatory statements made, the evidence is insufficient to find him guilty beyond a reasonable doubt. Burglary only requires entering with the intent to commit a felony or theft, not that it be necessarily be accomplished. See *Beauchamp*, 241 Ill. 2d at 8. Moreover, physical evidence is not required to prove a defendant guilty beyond a reasonable doubt. See *People v. Williams*, 182 Ill. 2d 171, 192 (1998) ("Proof of physical evidence connecting a defendant to a crime has never been required to establish guilt"). Given there was testimony sufficient to establish that defendant was taking the television from Savage's truck, no physical evidence connecting him to the offense was required.

¶ 23 Accordingly, based upon the testimony of the officers and the circumstances surrounding their positive identifications of defendant as the man pulling a television from Savage's truck before fleeing in a white, older-model station wagon, we find the State successfully proved defendant's guilt beyond a reasonable doubt. In reaching this conclusion, we reject defendant's notion that the length of the jury's two-hour deliberation indicated that the evidence was closely balanced.

¶ 24 Defendant next argues the court abused its discretion in sentencing him, contending that a 15-year sentence is excessive for burglarizing an unoccupied, parked truck. He argues the sentence is disproportionate to the offense, and that the court neither considered that a long sentence does not translate to greater rehabilitation nor took into account the financial impact of his incarceration on the State.

¶ 25 The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the range provided by statute, we do not alter it absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion occurs where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999)). Because of its personal observation of defendant and the proceedings, the trial court is in the superior position to determine an appropriate sentence. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). It must weigh the relevant sentencing factors, which include the defendant's demeanor, credibility, age, social environment, moral character and mentality. *Id.* at 213.

¶ 26 Defendant cites to several secondary materials including remarks by the President of the United States, remarks by an Associate Justice of the United States Supreme Court, and various scholarly articles to support his arguments regarding proportionality of the prison sentence imposed with the seriousness of the crime imposed. We decline to consider these secondary materials as they are not relevant authority on appeal. See *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994). Further, to the extent these materials seek to insert expert opinion testimony into the record which was not presented to the trial court, we likewise do not consider them. See *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993).

¶ 27 We find the trial court did not abuse its discretion in imposing a 15-year prison sentence. Burglary is a Class 2 felony. 720 ILCS 5/19-1(b) (West 2010). However, as a Class X offender, defendant faced a term of 6 to 30 years' imprisonment. See 720 ILCS 5/5-4.5-25(a) (West 2010). The 15-year sentence falls within this statutory range and we therefore presume it is proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 47.

¶ 28 The trial court specifically found that defendant's criminal history warranted a sentence over the minimum, telling defendant: "I'm considering your prior history of criminal activity. I believe the sentence is necessary to detour [*sic*] others." Based on his extensive criminal background, the court stated: "I do not believe the minimum is appropriate here, because it seems like the moment you [defendant] get out of jail for one thing, you pick up another arrest. I do not think the maximum is appropriate here either." Criminal history alone may warrant a sentence substantially above the minimum. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009). Moreover, the trial court noted that, when defendant was "given a chance by probation," he violated probation. A reduced sentence was not mandated where, as the court noted, defendant was not deterred by previous sentences. See *People v. Starnes*, 374 Ill. App. 3d 329, 337 (2007) (noting previous drug-related convictions showed defendant did not take advantage of rehabilitation opportunities).

¶ 29 Further, the trial court is presumed to consider "all relevant factors and any mitigation evidence presented." *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48. It is the defendant who must make an affirmative showing that the court did not consider the relevant sentencing factors. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. The court here considered in mitigation that defendant's conduct did not cause or threaten serious physical harm and that the offense was not a crime of violence. It further considered defendant's social and family history

as reflected in the presentence investigation report and the fact that defendant was working trying to support his children and that he had taken college courses. The trial court also considered defendant's rehabilitation potential but gave it little weight, telling defendant: "I cannot say your conduct is unlikely to recur or that the character and attitude of [*sic*] you indicate you're unlikely to commit another crime."

¶ 30 As defendant points out, the court is required to consider the financial impact of defendant's incarceration on the State based on the financial impact statement filed by the Department of Corrections with the clerk of the court. 730 ILCS 5/5-4-1(a)(3) (West 2010). However, the court has no obligation to recite and assign a value to every factor that it considers (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)) and, absent evidence to the contrary, we presume the trial court considered the financial impact prior to sentencing defendant. *People v. Acevedo*, 275 Ill. App. 3d 420, 426 (1995).

¶ 31 Defendant also argues that the trial court relied on an improper aggravating factor when it twice noted defendant had fathered five children with three different women. However, the record indicates the trial judge did not consider this as a factor in aggravation. In fact, the court specifically stated that it found no factors in aggravation beyond defendant's prior criminal history. Instead, the Court considered the fact that defendant had five children with three women in mitigation when reviewing defendant's social history and again in the context of considering the financial hardship on defendant's dependents. This statement was not made as a rebuke of defendant's lifestyle, but rather was a comment on whether defendant's imprisonment caused an excessive hardship on his dependents, a factor in mitigation. See 730 ILCS 5/5-5-3.1(a)(11) (West 2010).

¶ 32 We note the court reduced defendant's initial 17-year sentence to 15 years, having granted defendant's supplemental motion to reconsider sentence. This demonstrates the care the trial court took in fashioning an appropriate sentence, reexamining its own findings and concluding it had improperly considered defense counsel's comments against defendant, requiring a lesser sentence. The trial court did not abuse its discretion in imposing sentence.

¶ 33 Defendant argues, and the State correctly concedes, his mittimus should be corrected to reflect a sentence of 15 years' imprisonment. The record shows that defendant was initially sentenced to 17 years' imprisonment as a Class X offender. However, the trial court subsequently granted defendant's supplemental motion to reconsider sentence and imposed a 15-year sentence. We review *de novo* the question of whether defendant's mittimus should be corrected as it is purely a legal issue. *People v. Lewis*, 2012 IL App (1st) 102089, ¶ 23. The oral pronouncement of the court is the court's judgment, and it controls over the mittimus. *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 62. Therefore, as the parties point out, the mittimus should reflect a sentence of 15 years' imprisonment.

¶ 34 Defendant also argues the mittimus should be further corrected to reflect credit for 770 days spent in presentence custody rather than 749 days. The State asserts that the mittimus should reflect 769 days, as the day of sentencing does not count towards presentence custody credit. Defendant replies that he is not counting the day of sentencing, but instead is counting the leap year day of February 29, 2012.

¶ 35 A defendant is entitled to credit for any part of a day spent in custody up to, but excluding, the day of sentencing. See 730 ILCS 5/5-4.5-100(b) (West 2014); *People v. Williams*, 239 Ill. 2d 503, 510 (2011). Here, the record reflects defendant was arrested on October 18, 2011, and was sentenced on November 26, 2013. Calculating the total amount of days,

excluding the day of sentencing but including the leap year day of February 29, 2012, we find defendant is entitled to credit of 770 days spent in presentence custody.

¶ 36 Accordingly, pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct defendant's mittimus to reflect a sentence of 15 years' imprisonment and credit for 770 days spent in presentence custody. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 37 Affirmed; mittimus corrected.