2017 IL App (1st) 143056-U

FOURTH DIVISION
March 9, 2017

No. 1-14-3056

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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. 13 CR 19332
	)	
ANTOINE HOWARD,	)	Honorable
	)	Bridget Jane Hughes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of burglary. The trial court did not abuse its discretion in imposing a sentence of 12 years' imprisonment for burglary, when defendant was subject to a Class X sentencing range due to his criminal history. The DNA analysis fee is vacated and the fines, fees, and costs order is modified accordingly.

¶ 2 Following a jury trial, defendant Antoine Howard was found guilty of burglary and, based on his criminal history, sentenced to a Class X term of 12 years in prison. On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he committed the offense of burglary, that his sentence is excessive, and that the trial court erred in assessing a DNA analysis fee.

¶ 3 For the reasons below, we affirm defendant's conviction and sentence, and we vacate the DNA analysis fee.

¶ 4 Defendant's conviction arose from events that took place on July 6, 2013, at Pete Miller's Prime Steakhouse in Wheeling, Illinois. At trial, Kevin Boudreau, the assistant general manager of Pete Miller's Steakhouse, testified that he was assigned to close the restaurant on the morning of July 6, 2013. The restaurant had two levels. The main restaurant, kitchen, and banquet room were located on the first level. The manager's office, owner's office, and the liquor, maintenance, and storage rooms were located on the second level. Because the owner's office was located inside the manager's office, the entrance to the owner's office was inside the manager's office Each office had separate keys, and only the managers on duty had keys.

¶ 5 On the day in question, Boudreau followed his normal routine to close the restaurant. After the kitchen closed, he closed and locked all doors used by the guests. When the last guest left, he made sure all the locks were locked and all the windows were closed and secured. After the restaurant staff left, Boudreau completed his paperwork in the manager's office. He put the money left over from the day and the cash registers in the safe, which was located in the owner's office. He locked the safe and then closed the door to the owner's office. The doors on the second floor had automatic locks, so when he closed the owner's door, it was already locked. He

closed the manager's office door and then went to the first level to print out a report. He left the restaurant between 2:30 a.m. and 2:45 a.m. and was the last person to leave. He used the back door to exit, which was already locked and was the door the employees were required to use. When he left, he made sure the door locked behind him.

¶ 6 Flavio Medina, a kitchen manager and "cleaning guy" at Pete Miller's Steakhouse, came to the restaurant at about 2:00 p.m. on July 6, 2013. When he first arrived, he cleaned and swept the bar area. Before he started mopping, he went to a storage room located on the second floor to get a new mop. While on the second floor, he noticed that the manager's office and liquor room doors, which were normally closed, were open and that papers were on the floor in the hallway and in the manager's office. Medina also noticed that the owner's office door was open, that the lock was smashed, and that the safe was not there. He called Kevin Boudreau and Marcus Moony.

¶ 7 Marcus Mooney managed maintenance and security at Pete Miller's Steakhouse. He testified that when he arrived at the restaurant on the subject day, he saw that the manager's office had been broken into, that the owner's office door was damaged, and that the safe was missing. Mooney also observed that the liquor room door, which was always kept locked, was open and that a significant amount of liquor was missing. The State showed Mooney photographs of the owner's office. Mooney testified that one photograph showed damage to the dead bolt and to the handle of the owner's door and that the door looked like it had been "beaten in," and another photograph showed that the safe was gone. Mooney also testified about photographs of the liquor room. One photograph showed boxes of liquor sitting in the middle of the floor, which was not normal, as they should have been stacked on the shelves. Another

photograph showed that a large amount of liquor had been taken off the shelves, and another showed that multiple shelves were missing liquor bottles. The manager and owner's offices and the liquor room were always kept locked and only the managers had keys.

¶ 8 Mooney testified that Pete Miller's Steakhouse had a surveillance security system that included 12 infrared cameras connected to a DVR box. The cameras were located in various locations around the restaurant, including inside the owner's office, outside the office, outside the back door, and in the employee area. Mooney was familiar with the system because he was trained on it and was the main contact person for training. Mooney testified that the system was functioning properly on July 6, 2013.

¶ 9 On July 6, 2013, Mooney viewed video footage of the incident with Medina and a police officer. The video footage showed unusual activity from the camera located in the office and from the cameras facing the office, the back door, and the employee area. Mooney preserved the footage by saving it on a flash drive. He gave the flash drive to the police officers on site. The State published the video to the jury.

¶ 10 Mooney testified that he knew defendant, and he identified him in court. Mooney testified that when he viewed the video on July 6, 2013, he identified defendant as one of the three individuals in the video. Mooney recognized defendant right away. He first identified defendant when the video showed two individuals taking the safe down the stairs and he described defendant as the "taller, heavier-set" individual. Mooney stated, "I recognized him just because there was a couple of areas where he was back and forth. Just from facial recognition of him and his size, I recognized him right away." The State showed Mooney still images taken from the video, which were included in People's Group Exhibit 19. Mooney testified that the

photographs showed defendant entering into various places of the restaurant and that People's Group Exhibits 19J and 19K were photographs showing where he initially recognized defendant in the video. Mooney testified that the photographs truly and accurately depicted what appeared in the video.

¶ 11 Mooney knew defendant because defendant had worked as a valet attendant at Pete Miller's Steakhouse from October 9, 2012 to May 30, 2013, when defendant's employment was terminated. Mooney would see defendant two to three times per week by the valet booth, when Mooney checked the booth's cleanliness and organization. When Mooney saw defendant, defendant was in his work uniform, and their conversations lasted about 30 seconds or 1 minute. Mooney would see defendant in the employee area at the restaurant but had never seen him in the back area or liquor room and had never seen him move a safe or lift heavy objects. The last time Mooney saw defendant prior to July 6, 2013, was the end of May 2013.

¶ 12 Medina also viewed a video of the burglary on July 6, 2013, and saw the footage taken from the camera located in the owner's office. He recognized defendant as the person in the video. Medina watched the video for about 5 to 10 minutes and testified that he recognized defendant in the video "as soon as he saw it," but that it took "a while." The State showed Medina People's Group Exhibits 19O through 19T, which were still images taken from the video. Medina testified that these photographs showed defendant in the owner's office and that he saw these images in the video that he viewed with the police on July 6, 2013. Medina identified defendant in court as the person who he identified in the photographs. Medina knew defendant because defendant was his co-worker for about six to eight months. During this period, they came into contact with each other about four times a week.

¶ 13 The State called Officer Richardson, a patrol officer from the Wheeling Police Department, as a witness, and on cross-examination, he testified that he never observed defendant in possession of a safe or cash. The State also called Detective Musolf from the Wheeling Police Department as a witness. On cross-examination, he testified that he never obtained a search warrant for, or recovered physical evidence from, defendant's residence, and that he never observed defendant in possession of any items stolen from the restaurant. Detective Musolf did not interview any individuals who personally observed defendant in possession of liquor bottles, cash, or a safe.

¶ 14 After closing argument and jury deliberations, the jury found defendant guilty of burglary. The trial court denied defendant's motion for a new trial.

¶ 15 At sentencing, the trial court noted that it reviewed the presentence investigation (PSI) report. In aggravation, the State noted that burglary was a Class 2 offense but that, based on defendant's background, he was eligible for the Class X sentencing range. The State indicated that defendant had three separate Class 2 or higher felony convictions, including residential burglary, robbery, and delivery of a controlled substance, which was accompanied with a Class 4 aggravated unlawful use of a weapon. Based on defendant's background, the State argued that he should not receive the minimum sentence and noted that his last sentence for burglary was six years. The State asked for a sentence of at least 10 years. The trial court asked defense counsel if he disputed the background provided by the State, and defense counsel informed the trial court that he "can't argue with the background the State recited."

¶ 16 In mitigation, defense counsel presented letters written on behalf of defendant. The trial court noted that it read all the letters. Defense counsel discussed the content of some of the letters

and argued that the letters showed more about defendant than his criminal history, including "specific instances where people observed him acting out, trying tos how [*sic*] his heart towards strangers. You know give a homeless guy a shirt and some sandals." Defense counsel further argued that the letters discussed defendant's daughter and showed that he was an involved father, present, emotionally invested, and lived with his child.

¶ 17 Defense counsel also advised the trial court about defendant's childhood: that he was raised in the Cabrini Green Housing Project, that he grew up without a father, that his mother had a drug addiction, that he was raised by his grandmother, and that there was a history of abuse. Defense counsel advised the trial court that defendant went to Loyola Academy for three years on a partial scholarship. Because defendant's family could not pay for the tuition his senior year, he transferred to, and graduated from, Glenbrook South High School. Defense counsel pointed out that the burglary offense was not a violent act and asked the trial court to consider how defendant conducted himself during the trial. Defense counsel requested that the trial court sentence defendant to six years, noting "[h]e has an education and he has a history of employment. And he made some mistakes. But it does look like he has support from his friends and family, his community when he is released he will- - he will be on the making of going down the right path."

¶ 18 In allocation, defendant stated as follows:

> "I am not a perfect man and I haven't lived a perfect life. But I could promise you if I had a chance to do it again I would do it different.
>
> No matter what happens here today, no matter when I come from underneath, when I come home, I promise that I will continue to strive and be a better man, a better

person. More importantly then anything, a better father. My daughter is the most important thing in my life.

I am asking for the opportunity to get back to my family as soon as possible."

The trial court sentenced defendant to 12 years in prison. In doing so, the trial court stated as follows:

"I have reviewed the presentence investigation report and listen [*sic*] to the arguments of counsels. I have considered all of the factors in both aggravation and mitigation."

¶ 19 Defendant's first contention on appeal is that the State did not prove beyond a reasonable doubt that he committed the offense of burglary. He contends that the only evidence the State presented to connect him to the burglary was surveillance footage that is of such poor quality that the people in the video cannot be credibly identified and that no reasonable person could make an identification with enough certainty to prove him guilty beyond a reasonable doubt. Defendant argues that no distinctive or unique personal features can be seen on the person in the footage and that the video does not show any specific mannerisms that can be connected to him. Defendant further argues that the State did not present any other evidence to link him to the burglary, such as DNA evidence, evidence that items taken from the restaurant were recovered from him, eyewitnesses who saw defendant in possession of those items, or any incriminating statements made by defendant.

¶ 20 When reviewing the sufficiency of the evidence, the question is 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). When the evidence supporting a criminal conviction is challenged on appeal, a reviewing court does not retry the defendant. *People v. Kent*, 2016 IL App (2d) 140340, ¶ 18. Rather, it is the fact finder's responsibility to determine the credibility of the witnesses and draw reasonable inferences from the evidence. *People v. Robinson*, 167 Ill. 2d 397, 413 (1995). On review, all reasonable inferences from the record must be drawn in favor of the prosecution (*People v. Saxon*, 374 Ill. App. 3d 409, 416 (2007)) and we will only reverse a conviction if the evidence is "so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt" (*People v. Green*, 256 Ill. App. 3d 496, 500 (1993)).

¶ 21 The offense of burglary, as charged in this case, is defined by statute as follows: "A person commits burglary when without authority he or she knowingly enters or without authority remains within a building *** with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2012).

¶ 22 We find that the evidence was sufficient to support defendant's conviction. Defendant does not challenge that a burglary was committed at Pete Miller's Steakhouse on July 6, 2013. Rather, defendant argues that the State did not prove beyond a reasonable doubt that he was the individual who committed the offense. We disagree. Here, the evidence indicates that defendant worked at Pete Miller's Steakhouse as a valet attendant from October 9, 2012, to May 30, 2013, when his employment was terminated. The State published to the jury the video footage from the burglary and presented still images taken from the video. Mooney and Medina, Pete Miller's Steakhouse employees at the time of the incident, testified that they identified defendant in the video when they viewed the footage on the day the burglary occurred, and they both identified

defendant in the still images. The video footage and still images showed the person whom Mooney and Medina identified as defendant numerous times from various angles. Mooney testified that when he viewed the video on the day of the burglary, he recognized defendant right away based on his face and size. Similarly, Medina testified that he recognized defendant in the video "as soon as he saw it."

¶ 23 Both Mooney and Medina testified about how they knew defendant and the extent of their interactions with him. Mooney knew defendant because defendant had previously worked as a valet at Pete Miller's Steakhouse, and would see him two to three times per week when Mooney checked the valet booth for cleanliness and organization. Medina knew defendant because they were co-workers for about six to eight months and came into contact with each other about four times a week. Given Mooney's and Medina's familiarity with defendant, we cannot agree that their identification of him in the video footage is incredible.

¶ 24 Viewed as a whole and in the light most favorable to the prosecution, we find that the identification evidence was sufficient to support defendant's conviction.

¶ 25 Defendant relies on *People v. Sykes*, 2012 IL App (4th) 111110, to support his argument that we should reverse his conviction because the video footage was poor quality. However, *Sykes* is readily distinguishable. In *Sykes*, a loss prevention manager who did not have firsthand knowledge of the alleged theft testified about what he remembered observing in an original surveillance video recording that he viewed after the incident, including that the defendant removed cash out of a cash register. *Id.* ¶¶ 6, 9-10. However, the State did not play the original recording for the jury; rather, the State played a digital video recording (DVD) copy, which was of lower quality than the original video. *Id.* ¶¶ 9-10. The appellate court noted that the witness

did not just state his opinion about what he believed the DVD showed, but instead, he testified about what he saw, and gave his opinion, based on the original video, which was not played for the jury. *Id.* ¶ 41. The court also noted that the witness did more than "simply identify the defendant as the person depicted on the video," as he testified as to what he saw the person doing in the video. *Id.* ¶ 39. The court held that the witness' testimony was inadmissible lay opinion testimony, finding that, based on the DVD, the witness was not in a better position than the jury to determine whether the defendant had removed the cash from the register. *Id.* ¶¶ 34, 42. Accordingly, this court reversed defendant's conviction, holding that the only actual evidence to establish that a crime occurred was the DVD, the quality of which was "so poor this court was unable to ascertain whether defendant actually removed anything from the register, let alone $100." *Id.* ¶ 68.

¶ 26 Here, unlike the defendant in *Sykes* (see *id.* ¶¶ 65-66), defendant is not disputing that a crime occurred at Pete Miller's Steakhouse. Rather, the issue is whether defendant can be credibly identified as the person in the video, whom defendant agrees committed burglary. Mooney and Medina testified about their opinions of the person's identity, and unlike the witness in *Sykes*, they did not narrate the events of the video surveillance or base their testimonies on a video recording that was not published to the jury. In addition, unlike the defendant in *Sykes*, who argued that the State's only witness violated the "silent witness theory" (*id.* ¶ 33), defendant does not argue that Mooney and Medina's identification testimony was inadmissible. For all of these reasons, we do not find *Sykes* persuasive.

¶ 27 Defendant's second contention on appeal is that his sentence is excessive and does not reflect that the trial court adequately considered the mitigating factors. Defendant argues that

various factors from trial and the PSI report demonstrate that his sentence should be reduced, such as his strong ties to the community and family, consistent work history, academic successes, and information about his childhood and statements he made about how his young daughter "saved his life." Defendant further argues that the letters he provided discussed his strengths as a father, and that his family support, work history, educational background, and "pro-social attitudes" demonstrate his rehabilitative potential. Defendant contends that the burglary in this case was a non-violent property offense, which did not cause or threaten injury. Defendant also argues that the trial court abused its discretion because the 12-year sentence it imposed exceeded the 8-year sentence that the State offered him for a pretrial plea as well as the 10-year sentence that the State recommended at the sentencing hearing.

¶ 28 A reviewing court should give great deference to the trial court's sentencing decision because the trial court is in a better position to consider the relevant sentencing factors, including the particular circumstances of the case and the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). To determine an appropriate sentence, other relevant sentencing factors "include the nature of the crime, the protection of the public, deterrence and punishment, as well as the defendant's rehabilitative prospects." *People v. Bryant,* 2016 IL App (1st) 140421, ¶ 14. The trial court is in the best position to find an appropriate balance between protecting society and rehabilitating the defendant. *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). The reviewing court "must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently." *Fern*, 189 Ill. 2d at 53.

¶ 29 The trial court is given great discretion to determine an appropriate sentence within the statutory limits (*Fern*, 189 Ill. 2d at 53), and on review, we will not alter a sentencing decision absent an abuse of discretion (*People v. Jones*, 265 Ill. App. 3d 627, 639 (1994)). A trial court abuses its discretion when no reasonable person could agree with the trial court's position. *People v. Sven*, 365 Ill. App. 3d 226, 241 (2006). "A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54.

¶ 30 Here, the record indicates that the trial court was well aware of the mitigating factors defendant has identified. The trial court expressly noted that it read the letters that defendant submitted and that it reviewed the PSI report, which included information regarding defendant's childhood, employment history, education, and family support. Defense counsel orally presented mitigating evidence about defendant's childhood, family, educational achievements, and community support. Defense counsel also requested the trial court consider the non-violent nature of the offense and defendant's conduct at trial. Prior to imposing its sentence, the trial court expressly stated that it listened to the attorneys' arguments and that it considered the factors in aggravation and mitigation. Therefore, we find that there is nothing in the record to show that the trial court did not consider the applicable mitigating factors. *People v. Dominguez*, 255 Ill. App. 3d 995, 1004 (1994) ("Where relevant mitigating evidence is before the court, it is presumed that the court considered it absent some indication in the record to the contrary other than the sentence itself."). Moreover, we note that, while the trial court did not specifically recite specific aggravating and mitigating factors when it imposed its sentence, as discussed above, it expressly stated that it considered the factors in aggravation and mitigation. The trial court was

not required to recite and assign value to each factor (*Bryant,* 2016 IL App (1st) 140421, ¶ 16) or to "articulate the process" it used to determine the appropriateness of defendant's sentence (*People v. Ramos*, 353 Ill. App. 3d 133, 137 (2004)).

¶ 31 In defendant's reply brief, he cites *People v. Juarez*, 278 Ill. App. 3d 286 (1996), to support his argument that the trial court "was required to provide some insight into what motivated its sentencing decision." Defendant argues that in *Juarez*, we found that the trial court abused it sentencing discretion when it made a "generic recitation" in imposing its sentence. We find *Juarez* distinguishable from this case. In *Juarez*, the defendant was charged with aggravated discharge of a firearm, a Class 1 felony, with a sentencing range of 4 to 15 years. *Id.* at 294. The trial court sentenced defendant to 14 years in prison. *Id.* On appeal, the defendant argued that his sentence was excessive. *Id.* at 293. In our ruling, we cited Section 5-4-1(c) of the Unified Code of Corrections, which states as follows: "[i]n imposing a sentence for a *violent crime* *** the trial judge shall specify on the record the particular evidence, information, factors in mitigation and aggravation or other reasons that led to his sentencing determination." (Emphasis added.) *Id.* at 294 (citing 730 ILCS 5/5-4-1 (West 2012)). We modified the defendant's sentence and noted that when the trial court imposed its sentence, "[n]one of the mitigating or aggravating factors [we]re specifically stated as required by law when sentencing a defendant for a violent crime." *Id.* at 295. Here, unlike *Juarez*, this case does not involve a violent crime. In fact, in arguing for a shorter sentence, defendant acknowledges that this case involves a non-violent property crime. Therefore, we are not persuaded by defendant's reliance on *Juarez*.

¶ 32 Burglary is a Class 2 felony offense with a sentencing range of three to seven years. 720 ILCS 5/19-1(b) (West 2012); 730 ILCS 5/5-4.5-35(a) (West 2012). As a result of defendant's

prior convictions, he was sentenced as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2012). Defendant does not dispute that he should have been sentenced in the Class X sentencing range. The trial court sentenced defendant to 12 years' imprisonment, a term well within the permissible statutory range of 6 to 30 years for a Class X offender. 730 ILCS 5/5-4.5-25(a) (West 2012). Nothing in the record indicates that the trial court did not consider the evidence in mitigation. Given the trial court's consideration of the PSI report, the oral arguments presented in aggravation and mitigation, and that the 12-year sentence is 18 years below the 30 year maximum sentence in the Class X sentencing range, we cannot find that defendant's sentence is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54. Accordingly, we find no abuse of discretion in the length of defendant's sentence.

¶ 33 Finally, defendant contends, and the State concedes, that this court must vacate the DNA analysis fee imposed by the trial court. Defendant acknowledges that he did not object to this fee in the trial court or include the issue in a postsentencing motion. However, on appeal, the reviewing court may modify the fines and fees order without remanding the case back to the circuit court. Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967). The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 34 Our supreme court has held that the DNA analysis fee may not be assessed on a defendant who has previously submitted a DNA sample based on a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 297, 301-02 (2011). Where a defendant has been convicted of prior felonies after January 1, 1998, the date the DNA requirement went into effect, we presume this mandatory requirement was imposed following at least one of the defendant's prior convictions.

People v. Leach, 2011 IL App (1st) 090339, ¶ 38. Here, defendant was convicted of felony offenses in 2004, 2005, and 2007. As such, we presume defendant has already submitted his DNA. Therefore, we vacate the $250 DNA analysis fee and order the clerk of the circuit court to modify the fines, fees, and order accordingly.

¶ 35 For the reasons explained above, we affirm defendant's conviction and sentence, vacate the $250 DNA analysis fee, and order modification of the fines, fees, and costs order.

¶ 36 Affirmed; fines, fees, and costs order modified.