2017 IL App (2d) 160761-U
No. 2-16-0761
Order filed September 19, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	No. 16-CM-362
v.	)	
EDGAR MORENO REBOLLAR,	)	Honorable Bruce R. Kelsey,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The State proved defendant guilty beyond a reasonable doubt of theft: given the location and condition of the property that defendant took, the trial court could reject defendant's theory that he deemed the property abandoned and find that he acted with guilty knowledge; (2) the trial court did not abuse its discretion in sentencing defendant to conditional discharge rather than imposing supervision, as conditional discharge was justified by the nature of the offense and defendant's failure to assume responsibility for it.

¶ 2 After a bench trial, defendant, Edgar Moreno Rebollar, was convicted of theft of property with a value not exceeding $500 (720 ILCS 5/16-1(a), (b)(1) (West 2016)) and sentenced to 12

months' conditional discharge. On appeal, he contends that (1) he was not proved guilty beyond a reasonable doubt; and (2) his sentence is excessive. We affirm.

¶ 3 At trial, the State first called Terrence Doyle. He testified on direct examination as follows. He was president of Doyle Signs, Inc. On Saturday, January 9, 2016, as he walked up to the front door of the company's main building, he saw a red pickup truck at the west end of the company's property. The truck was "backed up to the yard." A man loaded a large stainless-steel bin onto the truck. The bin had been on company property, right in front of the yard where trucks were parked and old equipment was stored. The yard was in between the company's main building and a small building at the west end and covered about 75 feet. There was fencing "into the yard."

¶ 4 Doyle testified that he entered the main building and ascertained from his brother, the company's operations manager, that nobody was scheduled to pick anything up or drop anything off. Doyle exited and saw the man load the bin onto the truck and drive away.

¶ 5 Doyle testified on cross-examination as follows. The west end of the property fronted on Interstate Road for about 300 feet. The bin was outside the fenced area of the property and was close to a garbage dumpster. When Doyle saw the man, he did not call out to him; the man was already driving off, although not very fast. On redirect examination, Doyle testified that the truck had walls around the truck bed, extending about three feet above the bed.

¶ 6 Mark Schneider, a maintenance mechanic for Doyle Signs, testified as follows. On January 9, 2016, he got a call from the main office informing him that someone had just driven off with the company's mill tub. Schneider drove to a nearby scrap yard, where he saw defendant driving a red pickup truck off the premises. When Schneider returned to Doyle Signs, he saw the truck's license plate on the ground. He called the police.

¶ 7 Salvo DiFatta, an Addison police officer, testified as follows. He responded to Schneider's report and spoke with Schneider at Doyle Signs. Schneider pointed out the area from which the bin had been taken; it was in front of the smaller building, outside the fenced area, and next to a dumpster. DiFatta ran a check on the license plate; it came back to defendant. Schneider told DiFatta that he had recovered the bin from C&J Scrap Metal in Addison, about two blocks away. Schneider said that Doyle had told him that the bin had been taken by a man in a red pickup truck; Doyle then told DiFatta the same thing and added that the incident had occurred at about 8:50 a.m. They did not say that they had told defendant not to take the bin. DiFatta drove off and located defendant, who had sold the bin to the owner of C&J.

¶ 8 DiFatta testified that, on February 2, 2016, he was present as another officer spoke to defendant, who had gone voluntarily to the police station. Defendant admitted that he had removed the bin from Doyle Signs on January 9, 2016, believing at the time that it was garbage. He did not ask anyone there whether he could take the bin. He said that he sold the bin to C&J.

¶ 9 The State rested. Defendant testified on direct examination as follows. He was married, had three children, and worked full time. On January 9, 2016, at approximately 8:50 a.m., he was driving around looking for metal that he could sell to C&J, which he had been doing regularly for about four months. He arrived at Doyle Signs. "[B]ecause there [was] this other container there next to the garbage bin," he thought that the container was garbage, so he loaded it onto his truck. While he was there, nobody spoke to him. There was a fence, but it was not around the bin; it was about 20 feet away.

¶ 10 Defendant testified that, once he put the bin into his truck, he took it to C&J. Two hours later, he received a call from C&J telling him that the owners had picked up the bin. Defendant drove back to the scrap yard to return the money. He then went home.

¶ 11 Defendant testified on cross-examination as follows. When he went to Doyle Signs, he drove onto the property. He did not "[d]rive up a driveway." The bin was "next to the street," so he "just pulled up" about five feet. He did not speak to anyone about entering onto the company's property or about whether he could take the bin off the property. The day after he spoke to DiFatta, he went to Doyle Signs and apologized.

¶ 12 The defense rested. In rebuttal, Doyle testified as follows. Doyle Signs' property consists of a building of about 22,000 square feet at 232 Interstate Road; a small garage of about 1,500 square feet at 248 Interstate Road; and an area in between, which is used to park trucks and store equipment and materials. The bin was taken from this in-between area. Asked how far the location of the bin was from the street, Doyle gave a "guess" of 50 feet, admitting that it "could be 40, could be 60." There was a 10-foot right-of-way that belonged to the municipality. "[F]rom there to the building," vehicles were parked. This distance was at least another 30 feet. Between the street and the location of the bin, there was a large driveway. The bin had been located by a dumpster, and a person could drive right in from the street to where the dumpster was.

¶ 13 During closing argument, defendant contended that the evidence created a reasonable inference that he had believed that the bin was "garbage," so that he had taken it without knowing that it was still Doyle Signs' property. The following colloquy ensued:

> "THE COURT: [Doyle] saw somebody drive on his property 30 to 40 feet, load a bin next to a garbage thing and take it away and sell it for scrap.
>
> MR. BIRD [Defendant's attorney]: Right, it was next to a garbage dump.
>
> THE COURT: 30 to 40 feet onto the property.
>
> MR. BIRD: Judge, in an unfenced area.

THE COURT: 50 feet onto somebody else's property, whether it's fenced or not fenced, tell me how *** does that consist of garbage?

MR. BIRD: Judge, it's next to a dumpster.

THE COURT: Okay. So what? What has that got to do with anything *** if it's not out to be taken away by garbage trucks?

MR. BIRD: Well, Judge—

THE COURT: Even if it's garbage, it's not his garbage. Tell me how it's his property if it's on somebody else's property, 40 feet, 50 feet from the street, whether it's next to a garbage bin or not? And tell me how he can go in there and claim that it's his."

¶ 14 The judge went on to note again that, although the bin had been next to the dumpster, it had also been 40 or 50 feet from the street. The bin had not been set out by the curb on garbage day. The colloquy concluded:

"THE COURT: I don't know if it's garbage or not. He certainly doesn't know if it's garbage or not.

MR. BIRD: Judge, if you don't know if it's garbage or not, how have they proven, beyond reasonable doubt, that it isn't?

THE COURT: It isn't their job to prove. It's your job to tell me it's garbage if that's what you're telling me. What I have heard clearly is that [Doyle] had a bin out by his garbage dump and it was taken by [defendant] and sold for scrap. That tells me it's [Doyle's] property, and [defendant] took it and sold it for scrap."

The judge found defendant guilty.

¶ 15 The cause proceeded directly to sentencing. The State recommended one year of conditional discharge. Defendant requested a disposition of supervision, noting his minimal

prior record, his candor with the police, and his apology to Doyle Signs. The State noted that defendant had one matter on his record, having been found guilty in 2011 of cannabis possession and being given supervision. The judge noted that defendant's guilt was "obvious" because his defense, that he thought the bin had been garbage, was unsound. "Whether this, in fact, was going to end up in the garbage bin is certainly debateable [*sic*], but it wasn't garbage at that point in time, until it's placed out for pick up by a garbage company." The judge sentenced defendant to a year of conditional discharge.

¶ 16 Defendant filed a posttrial motion and a motion to reconsider his sentence. At the combined hearing on the motions, the judge addressed defendant's contention that he had shifted the burden of proof by requiring defendant to prove that the bin was in fact garbage. The judge explained that he did not, and had not intended to, require defendant "to prove or otherwise prove or disprove any particular fact," which had not been his burden. The point that the judge had relied on was that, although the bin had been located next to a garbage container, it had not been placed by the side of the road so that someone could assume that it was garbage and take it away. The bin had been located on Doyle Signs' property, 30 to 50 feet inside the property line, "not lined up on the parkway as one would assume if it was garbage day the day before or the next day," and defendant had backed up his truck several feet onto the property in order to take it.

¶ 17 The judge also explained that he would not give defendant supervision instead of conditional discharge. He reasoned that, although a defendant's remorse or admission of responsibility is a proper consideration in deciding whether to grant supervision, defendant's statements that he took the bin because he thought that it was garbage did not admit

responsibility or the commission of an illegal act. After his motions were denied, defendant timely appealed.

¶ 18 On appeal, defendant contends first that he was not proved guilty beyond a reasonable doubt of theft, which required the State to prove that he "*knowingly* *** [o]btain[ed] or exert[ed] unauthorized control over property of the owner." (Emphasis added.) 720 ILCS 5/16-1(a)(1) (West 2016). Defendant limits his argument to the emphasized element. He contends that the evidence did not allow a finding beyond a reasonable doubt that, when he removed the bin, he knew that it was Doyle Signs' property. He notes the evidence that, at the time, he believed that Doyle Signs had abandoned the bin. This evidence included (1) his testimony that he believed that the bin was discarded; (2) the location of the bin, outside the fenced area and next to a dumpster; (3) the openness of his conduct: he took the bin in daylight and drove away in a normal fashion; (4) the lack of objection by anyone at Doyle Signs to his action; and (5) his cooperation and candor after he learned that Doyle Signs had recovered the bin.

¶ 19 We hold that, although the foregoing evidence was probative in defendant's favor, it did not require the trial court to entertain a reasonable doubt of his guilty knowledge.

¶ 20 When considering a challenge to the sufficiency of the evidence, we ask only whether, after viewing all of the evidence in the light most favorable to the State, any rational fact finder could have found the elements of the offense proved beyond a reasonable doubt. *People v. Ward*, 154 Ill. 2d 272, 326 (1992). The fact finder is responsible for determining the witnesses' credibility, weighing their testimony, and deciding on the reasonable inferences to be drawn from the evidence. *People v. Hill*, 272 Ill. App. 3d 597, 603-04 (1995). It is not our function to retry the defendant. *People v. Lamon*, 346 Ill. App. 3d 1082, 1089 (2004).

¶ 21 In finding that defendant knew that the bin was not discarded, the trial judge credited Doyle's description of the scene of the incident over defendant's description. Defendant argued that the bin was positioned as one would expect of an item that the owner has discarded in anticipation of the garbage truck. However, although noting that the bin had been located outside the fenced area and near a garbage dumpster, the judge noted as well that it had been located more than 30 feet from the curb, well behind Doyle Signs' property line, and in an area where trucks were parked and equipment was stored. Defendant did not testify that he believed that January 9, 2016, or the day after, was garbage pickup day.

¶ 22 We also note that the judge could consider that, although the bin was placed *near* the garbage dumpster, it was not *in* the garbage dumpster or on top of it. Further, the judge could infer that nothing in the appearance of the bin itself inspired a belief that Doyle Signs had decided that it was no longer worth keeping and that anyone would be welcome to walk away with it free of charge. Thus, the judge could infer that, when defendant drove onto Doyle Signs' property, backed up his truck, and saw a serviceable-looking bin sitting 30 to 50 feet inside the property line near trucks and other equipment, he knew that Doyle Signs had not abandoned or discarded the bin. At most, he might have believed that Doyle Signs would do so later.

¶ 23 The other evidence defendant cites did not defeat this reasonable inference. Defendant did not sneak around in the night, but he arrived early in the morning and loaded the bin onto the truck, which had walls high enough to hide it. Even had he not been so careful in his planning, the judge could infer that his conduct was the result of carelessness or foolish risk-taking. Moreover, defendant's conduct *after* his act was discovered was not greatly probative of his mental state at the time of the act. His candor and apologies, while commendable, did not require a reasonable doubt as to whether his initial intent was innocent. After he was caught,

defendant had no sensible alternative to cooperating with the police and trying to make amends. His conduct later was not inconsistent with guilty knowledge earlier, and certainly not so inconsistent as to require the judge to reject that inference.

¶ 24 Defendant contends that the trial judge improperly shifted the burden of proof by requiring him to prove that the bin was in fact abandoned property. Defendant cites the passage from closing argument that we quoted at some length earlier. We have read and considered the judge's remarks, including those at the hearing on defendant's posttrial motion, and we have set them out so that the remarks on which defendant focuses may be considered in context. We are satisfied that, taken as a whole, these comments establish that, ultimately, the judge did not shift the burden but instead relied on all the evidence to find that the *State* had met its burden to prove beyond a reasonable doubt that (1) Doyle Signs had not abandoned the property; and (2) defendant *knew* that Doyle Signs had not abandoned the property.

¶ 25 We hold that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt, and we affirm his conviction.

¶ 26 We turn to defendant's second argument on appeal: that his sentence of conditional discharge is excessive and that he should have received supervision. After entering a finding of guilt, a court may order supervision after considering the circumstances of the offense and the history, character, and condition of the defendant, if the court is of the opinion that (1) he is not likely to commit further crimes; (2) he and the public would best be served if he were not to receive a criminal record; and (3) in the best interests of justice, supervision is more appropriate than a sentence otherwise permitted. 730 ILCS 5/5-6-1(c) (West 2016).

¶ 27 Defendant argues that the trial judge provided little explanation for imposing a sentence instead of deferring further proceedings and giving defendant the chance to have the charge

dismissed without an adjudication of guilt (see 730 ILCS 5/5-6-3.1(e), (f) (West 2016)). Defendant points to his minimal record, his history of full-time employment to support his family, and his expressions of remorse. He also asserts that conditional discharge threatens to burden both him and the public by making it more difficult for him to keep and find employment and avoid being a public charge.

¶ 28 Although we grant the reasonableness of defendant's arguments in favor of supervision, we cannot say that the court acted unreasonably in imposing a year of conditional discharge.

¶ 29 A reviewing court may not alter a sentence unless the trial court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence is an abuse of discretion only if it 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 (2000). The reviewing court pays the trial court's sentencing decision great deference, as the trial judge, having been able to observe the defendant and the proceedings, was far better able than is the court of review to apply the pertinent sentencing factors. *Alexander*, 239 Ill. 2d at 212-13. As the supervision statute makes clear, the defendant's eligibility for supervision does not mean that he is entitled to it. *People v. Hall*, 251 Ill. App. 3d 935, 941 (1993).

¶ 30 We cannot say that the one year of conditional discharge that the trial court ordered is greatly at variance with the spirit of the law or manifestly disproportionate to the nature of defendant's offense. The offense was a Class A misdemeanor (720 ILCS 5/16-1(b)(1) (West 2016)) and thus carried a maximum sentence of 364 days' imprisonment (730 ILCS 5/5-4.5-55(a) (West 2016)). Also, defendant was eligible to receive conditional discharge for as much as two years. 730 ILCS 5/5-4.5-55(d) (West 2016).

¶ 31 Defendant's sentence was well within these guidelines; he did not receive imprisonment and was given only half the maximum term of conditional discharge. The judge was not altogether convinced that defendant had shown remorse for the offense, which, although a misdemeanor, was not insubstantial. The judge was in a better position than is this court to decide which disposition was appropriate under all the circumstances. Although a more thorough explanation of the sentencing decision would have been welcome, we cannot find an abuse of discretion here.

¶ 32 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 33 Affirmed.