2018 IL App (1st) 163373-U

No. 1-16-3373

Order filed July 20, 2018

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 16 CR 2468
	)	
JAMES BEASLEY,	)	Honorable
	)	James N. Karahalios,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for theft over his contention that there was insufficient evidence that an offense was committed and that he was the person who committed it. Defendant's claim of ineffective assistance of counsel fails as he cannot establish that absent counsel's alleged errors, there is a reasonable probability that the outcome of his trial would have been different. The court did not abuse its discretion when it sentenced defendant to a Class X sentence of 25 years in prison after considering defendant's criminal background and the circumstances of the offense.

¶ 2 Following a jury trial, defendant James Beasley was found guilty of theft of property with a value between $10,000 and $100,000, a Class 2 felony. Because of his criminal background, the court imposed a Class X sentence of 25 years in prison. On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt because the State failed to establish either that a theft actually occurred or that he committed it. He further contends that he was denied the effective assistance of counsel when counsel stipulated to the admission of a certain surveillance video, failed to strike a juror with limited English comprehension skills, elicited incriminating statements from a witness, and failed to present defendant's mother as an alibi witness. Defendant finally contends that the trial court abused its discretion when it sentenced him to 25 years in prison because the court improperly considered the value of the items taken as an aggravating factor. We affirm.

¶ 3 Defendant was arrested and charged by indictment with theft following a January 2016 incident during which two skids of copper were allegedly removed from a manufacturing facility. The matter proceeded to a jury trial.

¶ 4 During *voir dire,* prospective juror Rolando Galino indicated that he was a painter in a body shop and lived in Melrose Park. When the court asked if there was a reason that Galino could not be fair and impartial, he answered that he "just don't speak full English, just like 60 percent." The court asked Galino if he understood everything that had been said "so far" and he answered yes. Galino further stated that there were "just some words that I just don't understand." The court next asked Galino how long he had lived in Melrose Park, and Galino answered 10 years. The court then asked where Galino lived "before that" and he answered Chicago. The court stated that if something "comes up" during trial that Galino did not

understand, Galino was to let the court know so that proceedings could be stopped and the issue explained. The court asked if that was "fair" and Galino answered yes. Galino was ultimately chosen as a juror.

¶ 5 At trial, Luis Badillo testified that he was the plant manager at IMS Buhrke-Olsen, a metal stamping company that uses different types of raw materials including copper. Copper is the most expensive material that the company uses. The company's campus includes five buildings, three on the east side and two on the west side. The raw materials building is on the west side of the campus, near a Motel 6. Badillo explained that the company's "private drive" begins near the Motel 6. The company is open 24 hours a day and has three shifts of workers.

¶ 6 Defendant, who had prior experience driving a forklift, was hired through a staffing agency in December 2015 as a material handler. A material handler drives a forklift and delivers materials. Material handlers are given walkie-talkies and garage door openers which open all of the company's buildings. Defendant was assigned to the second shift and his work hours were 3:00 p.m. to 11:30 p.m. Defendant was terminated before January 12, 2016. When defendant was terminated, the staffing agency was contacted and told that the company no longer needed his services. As of January 12, 2016, the radio and walkie-talkie assigned to defendant had not been returned to the company.

¶ 7 At some point during the evening of January 11 into the early morning hours of January 12, 2016, Badillo was contacted by third shift supervisor Raphael Arellanos and told that Arellanos believed that the company had been "robbed." Badillo then went to the company. When he arrived, he observed a forklift near the Motel 6. Forklifts are not permitted off company property. Badillo described this forklift as one that could lift 12,000 pounds. After the forklift

was discovered, a physical inventory was conducted. Two skids of copper were missing. Badillo identified a September 30, 2015 purchase order in the amount of $11,310 for one missing skid of 3000 pounds of copper. He next identified an October 5, 2015 purchase order in the amount of $25,920 for another missing skid of 6400 pounds of copper. These materials were never found.

¶ 8 Badillo further testified that on January 11 and 12, 2016, the company had a video surveillance system outside, and that the system was in working order. There were no surveillance cameras inside the buildings. He then identified a DVD recording which showed the scrap yard between certain company buildings and testified that this video accurately depicted the area as in appeared in January 2016. The DVD was entered into evidence without objection and published to the jury.

¶ 9 The video shows the scrap yard, as well as men and forklifts crossing it. The video begins with a man in a hood and a scarf crossing the frame. Then a man with glasses wearing an apron crosses the frame. Next, a forklift drives across the yard and turns left out of the frame. A man with an apron then moves across the frame in the opposite direction. A forklift comes back into frame and the driver's face cannot be seen. Men wearing aprons next cross the frame. Then, a larger forklift crosses the bottom of the frame. After a few minutes, another forklift crosses the frame; the viewer cannot see the driver's face or which way the forklift turns as it exits the frame. Finally, another forklift crosses the bottom of the frame.

¶ 10 During cross-examination, Badillo testified that he did not see defendant take copper from the company. He met defendant a "couple" of times while defendant worked for the company. After reviewing the surveillance video, he identified defendant. Badillo told the police that he was able to identify defendant on the video by defendant's "gait." In other words,

defendant had a distinctive walk; no other employee walked that way. Badillo acknowledged that every material handler was issued a radio and walkie-talkie and that those items are not returned at the end of shift. Rather, each material handler kept those items when he left work. Inventory or "cycle counts" are "done every week on different materials."

¶ 11 Sergio Guerrero, a material handler, testified that he worked the third shift, 11 p.m. to 7:30 a.m., on January 11-12, 2016. He saw defendant between 1:10 and 1:20 a.m., inside the building where material handlers went to retrieve materials. Guerrero recognized defendant as a material handler who worked the second shift and had seen him "like" three or four times before, but did not know his name. Defendant was driving one of the "big" forklifts. Guerrero, who was also driving a forklift, waited for 5 to 10 minutes until defendant was finished "getting material." Defendant drove directly by Guerrero, and Guerrero saw his face. He did "[n]ot really" think it was unusual that defendant was there, he thought defendant was working overtime. Guerrero did not see defendant drive a forklift to the Motel 6 and did not know that defendant no longer worked for the company.

¶ 12 Raphael Arellanos, the third shift supervisor, testified that around 1:30 a.m. on January 12, 2016, he observed one of the company's forklifts in the Motel 6 parking lot. Defendant was not scheduled to work that night and he did not see defendant driving a forklift. Defendant presented no evidence.

¶ 13 The jury found defendant guilty of theft. Defendant then filed a motion for a new trial, alleging, *inter alia*, newly discovered evidence of an alibi witness. Attached to the motion in support was the affidavit of defendant's mother, Ida Butkus, who averred that defendant came home around 11:30 p.m. on January 11, 2016 and went to bed, and that she did not observe him

leave his bedroom between that time and when she went to bed at 2 a.m. Butkus further averred that when she awoke around 6:30 a.m. on January 12, 2016, defendant was asleep. The circuit court denied the motion for a new trial, and the matter proceeded to sentencing.

¶ 14 In aggravation, the State argued that defendant had an "extensive" criminal history, which included seven armed robberies and two attempted armed robberies for which he was sentenced in 2004. Defendant received concurrent prison sentences of 20 years for the robberies and 10 years for the attempted armed robberies. Defendant also had a prior conviction for forgery and two prior convictions for burglary. Due to defendant's criminal background, he was subject to a Class X sentence. The defense responded that since his release from prison in 2014, defendant had completed his parole, been employed as a forklift driver, helped to support his mother, and "was successful in actually getting his life back on track after being out of society for so long."

¶ 15 The trial court stated that the offense at issue "required a forklift to carry it off" and that the items at issue were worth more than $37,000. The court also noted that this offense occurred shortly after defendant completed his parole. The State then clarified that defendant completed his parole six days prior to the incident. The court next stated that defendant's criminal history dated from 1993, and that he had convictions for forgery, burglary, theft, and possession of cannabis, as well as the 2004 armed robbery and attempted armed robbery case. The court was "moved to dismay in light of all of these things," and, given defendant's background and the "magnitude" of the theft, sentenced defendant to a Class X sentence of 25 years in prison. Defendant filed a motion to reconsider sentence, which the court denied.

¶ 16 On appeal, defendant first contends that the evidence at trial did not support of finding of guilt because the State failed to prove either that a theft was actually committed, or that defendant committed it.

¶ 17 When reviewing a challenge to the sufficiency of the evidence, the relevant question 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 crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Bradford*, 2016 IL 118674, ¶ 12. A reviewing court will not substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *Id*. This court reverses a defendant's conviction only where the evidence is so unreasonable, improbable or unsatisfactory that a reasonable doubt of his guilt remains. *Id*.

¶ 18 A person commits the offense of theft when he knowingly obtains or exerts unauthorized control over an owner's property and intends to deprive the owner permanently of the use or benefit of that property. 720 ILCS 5/16-1(a)(1)(A) (West 2014).

¶ 19 Here, taking the evidence in the light most favorable to the State (*Brown*, 2013 IL 114196, ¶ 48), there was evidence from which a rational trier of fact could have found that defendant committed the offense of theft, as the evidence at trial established that after defendant was terminated, a company employee observed him operating a forklift and removing copper from the materials building.

¶ 20 Defendant, however, contends that the State failed to establish the *corpus delicti* of the offense by failing to establish that the copper was actually in the company's possession when the

"only evidence" that the copper existed was the purchase orders "from months before." Defendant also contends that even if *corpus delicti* was established there was insufficient evidence that he was the offender.

¶ 21 Proof a criminal offense can be separated into two parts: (1) the *corpus delicti* and (2) that the defendant was the offender. *People v. Furby*, 138 Ill. 2d 434, 445-46 (1990). To establish *corpus delicti* "requires both proof of injury or loss and proof of criminal agency." *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 41.

¶ 22 Here, defendant argues that the evidence at trial did not demonstrate *corpus delicti*, specifically, that nothing established that property was actually taken from the company. To the extent that defendant argues that there was "no proof" that the "copper was actually in existence on the premises" that night, we disagree. The testimony at trial was that defendant, who had been terminated, was observed loading and removing copper from the materials building. A subsequent "cycle count" revealed that two skids of copper were unaccounted for and Badillo indentified the purchase orders related to those skids. Moreover, the missing copper was never found. While defendant is correct that the purchase orders for the missing skids were from September and October 2015, and the offense occurred in January 2016, we cannot agree with his speculative conclusion the copper might have been used in the ordinary course of business rather than being removed by defendant. The fact that the purchase orders were several months old was not fatal to the State's case; rather, it went to the weight afforded that evidence by the trier of fact. See *Bradford*, 2016 IL 118674, ¶ 12. Therefore, *corpus delicti* was established.

¶ 23 The evidence at trial also established, through Guerrero's testimony, that defendant was in the materials building loading copper onto a forklift and driving out of the building. See

People v. Siguenza-Brito, 235 Ill. 2d 213, 228 (2009) (the testimony of one witness, if credible and positive is sufficient to convict, even if contradicted by the defendant). Additionally, the evidence at trial established that defendant could drive a forklift and knew where the copper was located due to his position as a material handler, as well as the fact that as of January 12, the walkie-talkie and garage door opener issued to defendant had not been returned to the company following defendant's termination. Thus, contrary to defendant's augment, there was evidence from which a rational trier of fact could conclude that defendant used a forklift to remove copper from the materials building. A trier of fact is not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with a defendant's innocence and raise them to a level of reasonable doubt. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. This court reverses a defendant's conviction only when the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt (*Bradford*, 2016 IL 118674, ¶ 12); this is not one of those cases.

¶ 24 In his reply brief, defendant challenges, for the first time, the admission of a surveillance video. As defendant did not challenge the admission of this evidence in his opening brief, he has forfeited that argument on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued [in the opening brief] are forfeited and shall not be raised in the reply brief * * *.").

¶ 25 Accordingly, we affirm defendant's conviction for theft.

¶ 26 Defendant next contends that he was denied effective assistance of counsel because counsel stipulated to the admission of the surveillance video, failed to challenge a juror with limited English skills, brought out an incriminating statement during cross-examination, and failed to present the testimony of an alibi witness.

¶ 27 "To show ineffective assistance of counsel, a defendant must demonstrate that 'his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.' " *People v. Simpson*, 2015 IL 116512, ¶ 35 (quoting *People v. Patterson*, 192 Ill. 2d 93, 107 (2000)). A reasonable probability is defined as " 'a probability sufficient to undermine confidence in the outcome.' " *Id*. (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). A defendant must satisfy both prongs of *Strickland* test, and a failure to satisfy either prong is fatal to a claim of ineffective assistance of counsel. *Id*.

¶ 28 Although defendant argues that he was denied the effective assistance of counsel when counsel stipulated to the admission of the surveillance video and when counsel failed to challenge the suitability of Galino as a juror, defendant cites no legal authority in support of these arguments. They are therefore forfeited on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (the argument section of the appellant's brief "shall contain the contentions of the appellant *** with citation of the authorities *** relied on"); *People v. Macias*, 2015 IL App (1st) 132039, ¶ 88 (a reviewing court is entitled to have the issues clearly defined with pertinent authority cited and a cohesive legal argument presented). Even if we were to address the merits of these issues, however, defendant has not established that the complained of actions deprived him of effective assistance of counsel.

¶ 29 First, defendant contends that he was denied the effective assistance of counsel when counsel stipulated to the admission of the surveillance video. However, the record contains no such stipulation and reveals that the surveillance video was admitted without objection. Moreover, based upon the record before this court, we are not convinced that such an objection,

if made, would have been successful because Badillo testified that at the time of the offense the company had a video surveillance system, that the system was in working order and that the surveillance video accurately depicted the scrap yard as it appeared in January 2016. See *People Taylor*, 2011 IL 110067, ¶¶ 32-35 (noting that video evidence may be admitted under the "silent witness" theory, under which "a witness need not testify to the accuracy of the image depicted in the photographic or videotape evidence if the accuracy of the process that produced the evidence is established with an adequate foundation" and determining that every case must be evaluated on its own and that the "dispositive issue in every case is the accuracy and reliability of the process that produced the recording").

¶ 30 Second, with regard to juror Galino, defendant contends that he was denied the effective assistance of counsel by counsel's failure to strike Galino who was not "proficient" in English. However, the record reveals that although Galino told the court that he did not "speak full English, just like 60 percent," he also told the court that he understood everything that had been said with the exception of a "few words." The record also indicates that the court told Galino that if he did not understand something to tell the court so that it could be explained and Galino agreed to do so. Defendant points to nothing in the record to support his conclusion that Galino did not understand the questions posed during *voir dire.* See *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶¶ 25-27 (counsel not ineffective for failing to strike prospective jurors who expressed concern with their lack of proficiency in English, but who understood questions posed to them in *voir dire*).

¶ 31 Defendant next contends that he was denied the effective assistance counsel when counsel elicited on cross-examination that Badillo identified defendant on the surveillance video.

Defendant argues that because Badillo did not identify defendant as being depicted on the video during direct examination, trial counsel's question created a "linkage" between defendant and the video that the State did not.

¶ 32 Allegations of ineffective assistance of counsel based on counsel's conduct during cross-examination are not generally subject to review, as they fall within the purview of trial strategy. *People v. Harris*, 123 Ill. 2d 113, 157 (1988); see also *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 34 (the decision as to when and how to cross-examine a witness is generally a matter of trial strategy that will not support an ineffective assistance of counsel claim). However, even if this court were to accept defendant's contention that trial counsel's question to Badillo as to whether he identified defendant on the surveillance video was objectively unreasonable, defendant's claim of ineffective assistance must fail because he cannot establish prejudice.

¶ 33 The State established, through Guerrero's testimony, that defendant was in the materials building during the January 11-12, 2016 third shift driving a forklift and removing material from the building. Thus, the State established that defendant was present at the company and removed materials from the building. Although defendant is correct that absent counsel's question, no witness would have identified defendant as being depicted on the video, he ignores the fact that an eyewitness observed him inside the materials building operating a forklift and removing copper. Accordingly, we reject defendant's speculative assertion that the outcome of the trial would have been different had Badillo not testified that he was able to identify defendant by "gait" on the surveillance video. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) ("*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice").

¶ 34 Defendant also contends that he was denied the effective assistance of counsel when counsel failed to present the testimony of his mother, Ida Butkus, who would have testified that defendant was at home on the night of the offense.

¶ 35 "Whether to call certain witnesses and whether to present an alibi defense are matters of trial strategy, generally reserved to the discretion of trial counsel." *People v. Kidd*, 175 Ill. 2d 1, 45 (1996). "Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence." *People v. Enis*, 194 Ill. 2d 361, 378 (2000). Accordingly, they are "generally immune from claims of ineffective assistance of counsel." *Id.* Here, Butkus's affidavit was brought to the court in the context of newly discovered evidence, that is, there is no indication that either Butkus or defendant told trial counsel before or during trial that Butkus could potentially serve as an alibi witness. Without any indication that trial counsel was informed of Butkus's potential testimony prior to trial, defendant cannot establish how counsel's failure to present her testimony was objectively unreasonable.

¶ 36 Accordingly, as defendant has failed to establish how counsel's actions or inactions were unreasonable or prejudiced him, his claim of ineffective assistance of counsel must fail. See *Simpson*, 2015 IL 116512, ¶ 35.

¶ 37 Defendant finally contends that the trial court abused its discretion when it sentenced him to a Class X sentence of 25 years in prison. Specifically, defendant contends that the trial court improperly relied on the value of the copper, $37,000, as a factor in aggravation at sentencing. Defendant also argues that the trial court failed consider the nonviolent nature of the offense.

¶ 38 A reviewing court will not alter a defendant's sentence absent an abuse of discretion by the trial court. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). This broad discretion means that

we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *Id.* at 212-13. A trial court abuses its discretion in determining a sentence where the sentence is greatly at variance with the spirit and purpose of the law or if it is manifestly disproportionate to the nature of the offense. *Id*. at 212.

¶ 39 When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, *inter alia*, a defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). The court does not need to expressly outline its reasoning when crafting a sentence, and we presume that the court considered all mitigating factors absent some affirmative indication to the contrary other than the sentence itself. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Id.*

¶ 40 Due to his criminal background, the defendant was subject to a Class X sentence of between 6 and 30 years in prison. See 730 ILCS 5/5-4.5-25(a) (West 2014).

¶ 41 At sentencing, the trial court noted, in pertinent part, that defendant's criminal history dated back to 1993, that defendant had completed his parole shortly before the offense, that the offense required a forklift, and that the value of the items taken was approximately $37,000. Based on our review of the record, this court cannot say that a prison term of 25 years was an abuse of discretion. See *Alexander*, 239 Ill. 2d at 212.

¶ 42 Defendant responds that the trial court improperly focused on the value of the items taken in aggravation and failed to consider the nonviolent nature of the offense in mitigation. We disagree. A trial court may properly consider the nature and circumstances of the offense and the defendant's actions in the commission of that offense when sentencing him (*Raymond*, 404 Ill. App. 3d at 1069), and here, the court noted that a forklift was needed to complete the offense and the value of the goods. Moreover, a trial court is not required to explain the value it assigned to each factor in mitigation and aggravation; rather, it is presumed that the court properly considered the mitigating factors presented and it is the defendant's burden to show otherwise. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). Here, defendant cannot meet that burden, as he points to nothing in the record, other than his sentence, to indicate that the trial court did not consider the evidence in mitigation presented at sentencing. See *Jones*, 2014 IL App (1st) 120927, ¶ 55 (a reviewing court presumes that the trial court considered all mitigating factors absent some affirmative indication to the contrary other than the sentence itself).

¶ 43 We affirm the judgment of the circuit court of Cook County.

¶ 44 Affirmed.