2012 IL App (4th) 110662-U

Filed 3/21/12

NO. 4-11-0662

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
MICHAEL L. SOMERS, JR.,	)	No. 10CF149
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice Steigmann concurred in the judgment.
Justice Pope concurred in part and dissented in part.

ORDER

¶ 1 *Held*: (1) Considering that, at the age of 19, defendant has developed an extensive criminal history and considering that he committed the present burglaries while he was on probation for burglary, the trial court did not abuse its discretion in sentencing him to concurrent terms of nine years' imprisonment for the counts of burglary.

(2) Because defendant stole a debit card out of a car he burglarized and because, in subsequently using the debit card, he had substantially the same criminal objective as when he burglarized the car—*i.e.*, taking property that did not belong to him—the burglary and the unlawful use of a debit card were related, rather than unrelated, courses of conduct, and extended-term sentences for the counts of unlawful use of a debit card were unauthorized by section 5-8-2(a) of the Unified Code of Corrections (730 ILCS 5/5-8-2(a) (West 2010)).

¶ 2 Defendant, Michael L. Somers, Jr., entered blind pleas of guilty to three counts of burglary (720 ILCS 5/19-1(a) (West 2010)) and two counts of unlawful use of a debit card (720 ILCS 250/8(i) (West 2010)). The trial court sentenced him to extended terms of imprisonment for all

counts: nine years for each of the counts of burglary and six years for each of the counts of unlawful use of a debit card. The court ordered that the terms run concurrently.

¶ 3 Defendant appeals on several grounds. He argues that (1) nine years' imprisonment for the counts of burglary is too severe a punishment, (2) the trial court lacked statutory authority to impose extended-term sentences for the counts of unlawful use of a debit card, and (3) some of the fines are higher than statutory law allows. Considering defendant's criminal history and especially considering that he committed the present burglaries while he was on probation for burglary, we find no abuse of discretion in nine years' imprisonment. We agree, however, with his remaining contentions. Therefore, we affirm the trial court's judgment as modified.

¶ 4 I. BACKGROUND

¶ 5 A. The Information

¶ 6 The information, filed on June 7, 2010, had five counts. Count I charged defendant with burglary (720 ILCS 5/19-1(a) (West 2010)), a Class 2 felony (720 ILCS 5/19-1(b) (West 2010)), in that on May 29 to 30, 2010, he entered Brian Dearth's automobile with the intent to commit therein a theft.

¶ 7 Count II charged defendant with unlawful use of a debit card, a Class 4 felony (720 ILCS 250/8(i) (West 2010)), in that on May 30, 2010, he used Dearth's debit card to make purchases at Casey's General Store.

¶ 8 Count III charged defendant with unlawful use of a debit card (720 ILCS 250/8(i) (West 2010)) in that on May 30, 2010, he used Dearth's debit card to make purchases at County Market.

¶ 9 Count IV charged defendant with burglary (720 ILCS 5/19-1(a) (West 2010)) in that

on June 3, 2010, he entered James Casson's automobile with the intent to commit therein a theft.

¶ 10 Count V charged defendant with burglary (720 ILCS 5/19-1(a) (West 2010)) in that on June 3, 2010, he entered Adam Casson's automobile with the intent to commit therein a theft.

¶ 11 B. The Guilty-Plea Hearing

¶ 12 On July 1, 2010, defense counsel appeared with defendant and told the trial court that defendant wished to waive the preliminary hearing scheduled for that day and to "enter a blind plea to all counts." Defense counsel further said he was prepared to waive an updated presentence investigation report and to proceed to sentencing immediately after the guilty plea.

¶ 13 The trial court reviewed the five counts of the information with defendant and admonished him that because of his prior convictions of burglary, he was eligible for extended terms of imprisonment: for burglary, he faced imprisonment for a minimum of 3 years and a maximum of 14 years plus two years of mandatory supervised release (MSR), and for unlawful use of a debit card, he faced imprisonment for a minimum of 1 year and a maximum of 6 years plus a year of MSR. Defendant said he understood, and he denied that anyone had promised him anything for pleading guilty.

¶ 14 The trial court requested a factual basis from the prosecutor. The prosecutor said that from the night of Saturday, May 29, 2010, to the morning of Sunday, May 30, 2010, defendant was in the company of another man, Adam O'Neal. Defendant and O'Neal broke into Brian Dearth's automobile and took, among other items, a debit card, which they used the next morning: first at Casey's General Store and then at County Market. Defendant himself did not use the debit card but instead "stood outside while Mr. O'Neal went in and attempted to buy items using the debit card." On June 3, 2010, defendant entered the motor vehicles of James Casson and Adam Casson "and stole

various items."

¶ 15 The prosecutor described the evidence as consisting of defendant's admissions, his codefendants' statements, and video footage. The prosecutor said:

> "The Defendant admitted each of the incidents and was implicated by Mr. O'Neal in Counts 1, 2 and 3, the burglary of Brian Dearth's motor vehicle and the use of a debit card. He was also on video at Casey's General Store and at County Market and was identified as being the individual on the video, and he was implicated by co-defendant Andy DeVault in the burglaries of James Casson and Adam Casson's motor vehicles."

Defense counsel said he had no objection to this factual basis.

¶ 16 Defendant then pleaded guilty to each of the five counts of the information. The trial court found the guilty pleas to be knowing and voluntary and accepted them.

¶ 17 C. The Sentencing Hearing

¶ 18 1. *The Presentence Investigation Report*

¶ 19 After the trial court accepted the guilty pleas, the attorneys confirmed that they were ready to proceed immediately to sentencing. They had no objections or modifications to make to the presentence investigation report filed on June 18, 2010. The report, written by a probation officer, Heidi J. Pollard, revealed the following.

¶ 20 a. Defendant's Version of What Happened

¶ 21 Defendant told Pollard "[h]e had been drinking with some friends and that they wanted some money for cigarettes." They walked around town, trying the door handles of parked

motor vehicles. If a door was unlocked, they entered the vehicle and took "cigarettes, money, and other items of value."

¶ 22 b. Summary of the Police Report

¶ 23 On August 19, 2009, at 2:25 a.m., the Pontiac police department responded to a call regarding three suspects who had been entering parked motor vehicles and who now were heading west from Wright's Furniture. A police officer, Sergeant Roberts, apprehended the three suspects: they were Josh Krolack, Randy Shearer, and defendant.

¶ 24 Roberts asked Krolack to empty his pockets. Krolack did so: he took out three packs of different brands of cigarettes, as well as a Nextar global positioning system (GPS). Krolack claimed a family member had given him the GPS as a gift. He was unable to describe, however, what a GPS was or how it was used. Soon afterward, Krolack admitted he had stolen the cigarettes and GPS from unlocked cars.

¶ 25 Roberts found nothing on Shearer's person, but he arrested him for unlawful consumption of alcohol. Shearer had a blood alcohol content of 0.67. Krolack had a blood alcohol content of .092.

¶ 26 Defendant likewise had been drinking; his blood alcohol content was .086. He also had quite a lot of miscellaneous stuff on his person—more than Krolack. The presentence investigation report says:

> "Officer Cook ran a check and determined Michael Somers was on parole and could be searched. Located within Mr. Somers backpack were the following items: CB radio and mic, black car charger for cell phone, black Memorex diskman, black Bushnell binoculars,

> several burnt CD's, silver Motorola 'Razr' cell phone, 'PNY' zip drive, black Winchester knife, large amount of loose change, large amount of hard candy, red & black gloves, CVS prescription bottle containing Desmorpessin pills prescribed to Nathan Bokamp. Located on Mr. Somer's person were cash money, a wallet, a USB cable, an air pressure gauge, and a lighter. Located in his back left pocket was a wallet belonging to Jeffery Zapp."

¶ 27 One of the police officers, Corporal Bohm, asked defendant why he had someone else's wallet. Defendant answered it was his uncle's wallet and that he merely was returning it to him. Bohm, however, happened to know Zapp and his wife, Sharon Zapp, and their photo was in the wallet. Bohm asked defendant to identify the people in the photo. Defendant answered, " 'That's my uncle Dan and his girlfriend Pam.' " When Bohm responded that was the wrong answer because he knew the people in the photo, defendant changed his story: he said he had found the wallet in an alley by Water Street.

¶ 28 Krolack, though, came clean. He agreed to walk with Roberts and point out to him all the vehicles they had burglarized. As a result, the police were able to meet with the victims and return all the stolen items to them.

¶ 29 c. Defendant's Criminal History

¶ 30 (1) *As a Juvenile*

¶ 31 All of defendant's convictions, both as a juvenile and as an adult, have been in Livingston County. He has the following juvenile record:

Date of Offense	Case No.	Offense and Disposition

April 13, 2001	01-JD-43	Retail theft. On July 10, 2001, he was sentenced to two years' probation, to be served concurrently with the sentences in case Nos. 01-JD-44 and 01-JD-45. On May 13, 2003, probation was revoked, and he was resentenced to a new two-year term of probation, to run concurrently with the sentences in case Nos. 01-JD-44, 01-JD-45, and 01-JD-118.
April 26, 2001	01-JD-44	Theft under $300. On July 10, 2001, he was sentenced to two years' probation, to run concurrently with the sentences in case Nos. 01-JD-43 and 01-JD-45. On May 13, 2003, probation was revoked, and he was resentenced to a new two-year term of probation, to run concurrently with the sentences in case Nos. 01-JD-43, 01-JD-45, and 01-JD-118.
May 16, 2001	01-JD-45	Aggravated battery. On July 10, 2001, he was sentenced to two years' probation, to run concurrently with the sentences in case Nos. 01-JD-43 and 01-JD-44. On May 13, 2001, probation was revoked, and defendant was resentenced to a new two-year term of probation, to run concurrently with the sentences in case Nos. 01-JD-43, 01-JD-44, and 01-JD-118.
August 22, 2001	01-JD-118	Possession of drug paraphernalia. On January 15 (year unspecified), he was sentenced to a term of probation that was to end at the same time as the probation in case Nos. 01-JD-43, 01-JD-44, and 01-JD-45. On May 13, 2003, probation was revoked, and defendant was resentenced to a new two-year term of probation, to run concurrently with the sentences in case Nos. 01-JD-43, 01-JD-44, and 01-JD-45.
June 16, 2003	03-JD-33	Theft over $300, violation of curfew, violation of probation, and criminal damage to property. On August 26, 2003, he was sentenced to a two-year term of probation and detention for two weekends.
December 25, 2003	03-JD-73	Burglary (nine counts), criminal trespass to property (two counts), and criminal trespass to a vehicle. On March 2, 2004, he was sentenced to five years' probation. On May 30, 2006, probation was modified so as to include case No. 06-JD-16. On October 31, 2006, probation was revoked, and he was resentenced to full commitment to the Illinois Department of Juvenile Justice (Juvenile DOC). The sentence was concurrent with that in case No. 06-JD-50.

March 19, 2006	06-JD-16	Theft of a motor vehicle, theft, runaway, and violation of curfew. On May 30, 2006, the probation order in case No. 03-JD-73 was modified to include this matter. On May 22, 2007, probation ended unsuccessfully because of his commitment to Juvenile DOC.
September 4, 2006	06-JD-50	Criminal defacement of property (15 counts). On October 3, 2006, defendant admitted the petition. On October 31, 2006, he was sentenced to full commitment to Juvenile DOC. The sentence was concurrent with that in case No. 03-JD-73.
July 12, 2007	07-JD-48	Unlawful consumption of alcohol. On September 11, 2007, defendant admitted the petition. On October 30, 2007, he was sentenced to one year of probation. On February 5, 2008, the probation ended unsuccessfully because of his return to Juvenile DOC as a result of probation violations.

(2) *As an Adult*

¶ 32 Defendant had the following prior convictions as an adult:

Date of Offense	Case No.	Offense and Disposition
Unknown	09-CF-213	Five counts of burglary, for which he received probation.
June 27, 2008	08-CM-402	Possession of cannabis (less than 2.5 grams) and possession of drug paraphernalia. On February 26, 2009, the trial court sentenced him to 24 months of court supervision and ordered him to undergo substance-abuse evaluation and treatment and to pay fines and costs. The sentence was concurrent with that in case No. 08-CM-431. On October 8, 2009, defendant admitted a petition to revoke probation. Court supervision was revoked.
June 27, 2008	08-CM-431	Possession of drug paraphernalia. On February 26, 2009, the trial court sentenced defendant to 24 months' court supervision, ordering him to undergo substance-abuse evaluation and treatment and to pay fines and costs. The sentence was concurrent with that in case No. 08-CM-402. On October 8, 2009, defendant admitted a petition to revoke probation. Court supervision was revoked.
June 23, 2009	09-CM-333	Unlawful consumption of alcohol. On October 8, 2009, he was

		sentenced to confinement in jail for 90 days and payment of fines and costs.
December 21, 2009	09-CM-645	Unlawful consumption of alcohol. On January 7, 2010, he was sentenced to conditional discharge for 24 months and fines.

¶ 33 d. Personal History

¶ 34 Defendant was born on November 30, 1990. When he was nine years old, his mother suffered a severe head trauma in a car accident. Around that time, he began misbehaving at school and using alcohol and cannabis. Both of his parents were heavy drinkers. When defendant was 10, the circuit court appointed the Department of Children and Family Services (DCFS) to be his guardian, and the court placed him on his first term of probation, for two counts of theft and one count of aggravated battery.

¶ 35 In 2003, when defendant was 12 years old, the circuit court again sentenced him to probation, this time for theft, criminal damage to property, and possession of drug paraphernalia. In April of that year, he was placed in an early-intervention program for substance abuse. After completing that program in August 2003, he repeatedly tested positive for cannabis. He then was placed in a more intensive teen group, and all his drug screens came back negative until he was expelled from the program in December 2003, shortly after his thirteenth birthday, for missing his final appointment.

¶ 36 That same month, December 2003, defendant's parents divorced. Later in the month, he was charged as a juvenile with criminal trespass to a vehicle and multiple counts of burglary and criminal trespass to property.

¶ 37 In 2004, defendant's father began a romantic relationship with Rebecca Patterson. Defendant went to live with them in August 2004, after being released from a behavior-modification

program. In September 2004, when defendant was 13 years old, Patterson was charged with battering him. He was placed with foster parents, and he lived with them until May 2005. His father and Patterson married in April 2005. On January 19, 2005, Patterson was acquitted of the battery charges. The next day, January 20, 2005, defendant's mother died. While he was in foster care, from 2004 to 2005, he went to counseling and was diagnosed with depression, for which he took Prozac. When DCFS's guardianship was terminated, he discontinued counseling and medication.

¶ 38 Defendant returned to live with his father and Patterson, but he and Patterson still did not get along. In May 2006, guardianship of defendant was awarded to Virginia Asper, who was related to Patterson by marriage. Even though Asper was unrelated to defendant, the two of them were close.

¶ 39 In the fall of 2006, defendant, who was 15 years old, was arrested for 15 counts of criminal defacement of property, and shortly afterward, he was sentenced to confinement in the Juvenile DOC. He was paroled in March 2007, after which he lived with various friends. In November 2007, he was returned to Juvenile DOC on a parole violation.

¶ 40 In March 2008, defendant was paroled again. From October 2008 through January 2009, he participated in a residential treatment program for cannabis dependence and alcohol abuse, and he successfully completed the program. But he failed to attend any after-care group.

¶ 41 In February 2009, the trial court sentenced defendant to 24 months of court supervision after he was convicted as an adult for possessing drug paraphernalia and cannabis (in an amount less than 2.5 grams).

¶ 42 In case No. 09-CF-213, defendant pleaded guilty to five counts of burglary, *i.e.*, entering unlocked cars with the intent to commit theft, and in October 2009, the trial court sentenced

him to two years' probation. At the time of his arrest in case No. 09-CF-213, he had been smoking cannabis every day. He admitted having used various prescription medications in the past, including Vicodin, Xanax, Flexural, and Zanaflex.

¶ 43 Members of defendant's family likewise had adult or juvenile convictions. Defendant's father had received probation for reckless driving and domestic battery. Defendant's brother, Brandan, had a juvenile conviction for theft and an adult conviction for delivery of cannabis. Defendant's sisters, Amanda and Shartia, each had either a juvenile conviction or an adult conviction for battery. Defendant's half-brother, TJ, was sentenced to imprisonment for delivery of a controlled substance.

¶ 44 e. Education

¶ 45 Defendant earned a general equivalency diploma (GED) in 2007, while confined in Juvenile DOC. He has not attended any further educational courses since then, but he told Pollard he wanted to go to college.

¶ 46 2. *The Sentence and the Trial Court's Rationale*

¶ 47 For the offenses in the present case, the prosecutor recommended imprisonment for six years, to run concurrently with the sentences in case Nos. 09-CF-213 and 10-CF-149. Defense counsel stated he had no objection to the prosecutor's recommendation, but he requested the trial court to consider impact incarceration.

¶ 48 Defendant made the following statement in allocution: "I understand that I've had a lot of chances in this courtroom. I don't know. That's it."

¶ 49 The trial court agreed with defendant that he had been given plenty of chances. While acknowledging the hardships and disadvantages that defendant had encountered in his life, the court

did not think he had met the probation department halfway in overcoming those hardships and disadvantages. The court told him:

> "And so I understand when Miss Pollard puts in her report all of the things and efforts that have been made by the probation department in order to help you overcome some of the obstacles that have come up in your life or the things that have made your life maybe a little bit more difficult than the next person. But every time those efforts were made you chose to not take advantage of them."

¶ 50 The trial court was especially troubled that defendant was back in court for precisely the same type of misconduct for which the court had been lenient with him the last time. The court told him:

> "Honestly, I really cut you some slack when I gave you probation the first time you broke into these cars; and to do it again, I mean, that disappoints me more than anything that you would break into cars again after getting put on probation for breaking into cars. That shows that you have no respect not only for other people's authority but for what goes on in this courtroom.
>
> So you do have an extensive prior record. Deterrence is a huge factor in my mind. There is such an ongoing problem in this community with kids breaking into cars. Number one, I don't know why anybody would leave their car unlocked or their wallet in the car when it's unlocked knowing that all these burglaries are going on, but

> for some reason people are doing that. And kids, I call you a kid. You are 20 years old, and you are now facing adult sentencing. But kids keep breaking into these cars, and a message needs to be sent that it's not acceptable especially when I give you a chance not to do it."

¶ 51 In his brief, defendant points out that he actually was 19 at the time. Nevertheless, the trial court sentenced him to extended terms of nine years' imprisonment for each of the three counts of burglary and extended terms of six years' imprisonment for each of the two counts of unlawful use of a debit card. The court ordered that these prison terms run concurrently with each other and also concurrently with the sentence in case No. 09-CF-213.

¶ 52 The trial court also imposed a $200 fee to reimburse the public defender, an assessment of $20 for the Children's Advocacy Center, and an assessment of $20 for the Violent Crime Victims Assistance Fund.

¶ 53 D. Defendant's Motion To Reduce the Sentence

¶ 54 On August 2, 2010, defendant filed a motion to reduce the sentence. The motion gave two reasons for a lesser sentence: (1) defendant was only 19 years old, and the nine-year prison term would "have a crucial impact on his life"; and (2) defendant had a one-year-old son, Michael A. Somers, and the sentence would "prevent Defendant from being a part of his son's life for at least 4 1/2 years during a very crucial period of his son's life."

¶ 55 On September 30, 2010, in the hearing on the motion to reduce the sentence, defense counsel brought a letter by Megan Davis, the mother of Michael A. Somers. The prosecutor had no objection to the trial court's considering the letter. In her letter, Davis wrote that defendant had

visited with their son every weekend and that he was a good father. Davis believed that the sentence would be unhelpful to defendant because he needed to learn to live without drugs while outside of prison. She said he would live with her again once he was released, and she assured the court that he would make his check-ins with his parole officer and that he also would make his court payments. She requested the court to reduce the prison sentence.

¶ 56 Defense counsel reiterated the importance of having a father available to Michael A. Somers "during these formative years," and he noted that the sentence the trial court imposed "was beyond the recommendations of either attorney. The State had recommended six years on all cases, all matters to run concurrent."

¶ 57 The prosecutor, however, did not stick with that recommendation. Instead, he now argued that because of defendant's criminal history and because defendant had committed the new offenses while serving a period of probation, "the sentence was correct given the factors in aggravation and mitigation."

¶ 58 The trial court adhered to its decision that nine years' imprisonment was the right sentence, especially considering that defendant committed more burglaries while on probation for the same offense, burglary. "When you do it once, you get a break," the court remarked. "If you do it again, then there needs to be consequences." Therefore, the court denied the motion to reduce the sentence.

¶ 59 E. Remand for Compliance With Rule 604(d)

¶ 60 On April 5, 2011, we issued an order remanding the case because defense counsel had failed to file a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Somers*, No. 4-10-0868 (April 5, 2011) (unpublished order under Supreme Court Rule 23). At the

end of our order, we directed the trial court to "afford defendant his $5-per-day credit against the Children's Advocacy Center charge for time served and review the propriety of imposing the VCVA fine under section 10(c), rather than 10(b), of the Violent Crime Victims Assistance Act (725 ILCS 240/10(c), (b) (West 2008)) and adjust the fine if appropriate." *Somers*, slip order at 3. We also vacated the trial court's judgment and remanded the case for appointment of counsel, the opportunity to file a new postplea motion, a new hearing on the motion, and strict compliance with Rule 604(d). *Id.*

¶ 61 On July 25, 2011, on remand, defense counsel filed a Rule 604(d) certificate. In a hearing on that date, defense counsel proffered testimony that defendant had been attempting to get into school while in prison but that he had been unable to do so. Also, defense counsel presented testimony that Michael A. Somers and his mother had moved back to Pontiac, Illinois, from Kentucky so that defendant could more easily raise his son if his sentence was reduced and he was released from prison. Defense counsel requested the trial court to reduce the sentence from nine years' to six years' imprisonment. The court declined to do so, citing the reasons it had given in previous hearings.

¶ 62 This appeal followed.

¶ 63 II. ANALYSIS

¶ 64 A. The Severity of the Sentence for Burglary

¶ 65 Defendant contends that nine years' imprisonment for the three counts of burglary is too severe a sentence, considering that (1) the burglaries "neither caused nor threatened serious physical harm to another" (730 ILCS 5/5-5-3.1(a)(1) (West 2010)); (2) he did not contemplate that the burglaries would do so (see 730 ILCS 5/5-5-3.1(a)(2) (West 2010)); (3) he was only 19 years old

when he committed the burglaries (see *People v. Clark*, 374 Ill. App. 3d 50, 75 (2007)); (4) he promptly pleaded guilty, without any concessions by the State (see *People v. Bailey*, 364 Ill. App. 3d 404, 409 (2006)); (5) even though his prior criminal record was extensive, it consisted of nonviolent offenses, except for a single aggravated battery he committed when he was 10 years old (see *People v. Sole*, 357 Ill. App. 3d 988, 994 (2005)); (6) he suffered, as a child, from a "general lack of parental support" and was exposed to alcohol and cannabis early on (see 730 ILCS 5/5-5-3.1(a)(4) (West 2010)); and (7) "his criminal conduct was clearly facilitated by someone other than himself" (see 730 ILCS 5/5-5-3.1(a)(5) (West 2010)).

¶ 66 Section 5-5-3.1(a) of the Unified Code of Corrections (730 ILCS 5/5-5-3.1(a) (West 2010)) lists the factors in mitigation that a court should consider when determining a sentence, and the fifth factor in the list is that "[t]he defendant's criminal conduct was induced or facilitated by someone other than the defendant" (730 ILCS 5/5-5-3.1(a)(5) (West 2010)). We do not see any evidence in the record that Krolack or Shearer induced defendant to burglarize unlocked motor vehicles. Krolack had stolen property on his person, and defendant had even more stolen property on his person—suggesting that, instead of being a reluctant victim of peer pressure, defendant was the most zealous burglar.

¶ 67 Otherwise, the factors in mitigation that defendant identifies are valid. Given the factors in aggravation, however, we disagree that the mitigating side of the equation demands a sentence of less than nine years' imprisonment for the burglaries. We should reverse the sentence only if it is an abuse of discretion. See *People v. Newbill*, 374 Ill. App. 3d 847, 854 (2007). Abuse of discretion is the most deferential standard of review. *People v. Jackson*, 2012 IL App (1st) 100398, ¶ 28. A trial court's decision is an abuse of discretion only if it is "arbitrary, fanciful or

unreasonable" or only if "no reasonable [person] would take the view adopted by the trial court." (Internal quotation marks omitted.) *Id.* We are unconvinced it would be *impossible* for a reasonable person (using reasonable judgment) to take the view that while the mitigating factors should push the prison term considerably below the maximum of 14 years (see 730 ILCS 5/5-4.5-35(a), 5-5-3.2(b)(1), 5-8-2(a) (West 2010)), the aggravating factors should push the prison term 6 years above the minimum of 3 years. One aggravating factor is that defendant "has a history of prior delinquency or criminal activity" (730 ILCS 5/5-5-3.2(a)(3) (West 2010)), and although the history is mostly nonviolent, it is an extensive history. What is more, that defendant burglarized motor vehicles while on probation for precisely the same offense, burglarizing motor vehicles, tends to suggest that the punishments he previously received were inadequate. Such impudence suggests a lawless character, which the court could reasonably take into account. See *People v. Crete*, 113 Ill. 2d 156, 164-65 (1986). The court also felt the need to impose a severe enough sentence to deter others from burglarizing motor vehicles. See 730 ILCS 5/5-5-3.2(a)(7) (West 2010). Although the hardships and misfortunes of defendant's childhood no doubt have contributed to his misbehavior as a young adult, the court also had to think of the community. See *Crete*, 113 Ill. 2d at 164-65. Consequently, we disagree with defendant's argument that nine years' imprisonment is an abuse of discretion.

¶ 68 B. Extended-Term Sentences for Unlawful Use of a Debit Card

¶ 69 If a trier of fact convicts the defendant of multiple offenses of differing classes, section 5-8-2(a) of the Unified Code of Corrections (730 ILCS 5/5-8-2(a) (West 2010)) authorizes the trial court to impose an extended-term sentence only on the offense within the most serious class, assuming the aggravating factors in section 5-5-3.2 (730 ILCS 5/5-5-3.2 (West 2010)) or section 5-8-1(a)(1)(b) (West 2010)) are present. The supreme court has interpreted section 5-8-2(a) as allowing

a single exception to that rule: a court may impose extended-term sentences "on separately charged, differing class offenses that arise from *unrelated courses of conduct* regardless of whether the cases are separately prosecuted or consolidated." (Emphasis added.) *People v. Coleman*, 166 Ill. 2d 247, 257 (1995). Courses of conduct are unrelated if "there was a substantial change in the nature of the defendant's criminal objective." *People v. Bell*, 196 Ill. 2d 343, 354 (2001). The State does not dispute defendant's contention that the standard of review is *de novo* on this issue. See *People v. Thompson*, 209 Ill. 2d 19, 22 (2004).

¶ 70 Defendant's objective in burglarizing the motor vehicles was to take property that did not belong to him. That property included a debit card. When using the debit card or attempting to use it, he had the same objective as before, *i.e.*, taking property that did not belong to him. Therefore, it would be inaccurate to characterize these courses of conduct as "unrelated."

¶ 71 The State contends, nonetheless, that "a voluntary guilty plea waives all non-jurisdictional errors or irregularities." That is true—if the nonjurisdictional error or irregularity occurred *before* the guilty plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). A defendant cannot "waive" an error that does not yet exist. Obviously, the error of imposing extended-term sentences for the offenses of unlawful use of a debit card did not exist when defendant pleaded guilty; that error occurred afterward, during sentencing. Hence, the guilty pleas did not "waive" that error. Besides, when a court imposes an extended-term sentence unauthorized by statute, the extended-term portion of the sentence is void (*Thompson*, 209 Ill. 2d at 24-25), and "[a]n argument that an order or judgment is void is not subject to waiver" (*id.* at 27).

¶ 72 The extended-term portion of the sentences for unlawful use of a debit card are void. See *Thompson*, 209 Ill. 2d at 24-25. Therefore, we reduce the sentences on counts II and III to the

maximum non-extended term for a Class 4 felony: three years. See *id.* at 29; 720 ILCS 250/8(i) (West 2010); 730 ILCS 5/5-4.5-45(a) (West 2010); Ill. S. Ct. R. 615(b)(4) (eff. Aug. 27, 1999) ("On appeal the reviewing court may *** reduce the punishment imposed by the trial court ***.").

¶ 73 C. The Public Defender's Fee

¶ 74 After sentencing defendant to imprisonment, the trial court said: "I am going to impose a $200 PD [(public defender)] assessment on 10-CF-149." The court made no inquiry regarding defendant's ability to pay this $200 reimbursement for the public defender. Defendant argues that before a court can order him to reimburse the county or state for the services of appointed defense counsel, the court must hold a hearing into his financial resources and find that he has the ability to pay. See 725 ILCS 5/113-3.1(a) (West 2010); *People v. Love*, 177 Ill. 2d 550, 563 (1997). The State agrees, and so do we. Consequently, we vacate the portion of the trial court's order requiring defendant to pay a $200 public-defender fee, and we remand for a hearing pursuant to section 113-3.1, preceded, of course, by an adequate notice (see *People v. Johnson*, 297 Ill. App. 3d 163, 165 (1998)).

¶ 75 D. Other Assessments

¶ 76 In the previous appeal, we remanded the case because defense counsel had failed to file a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *Somers*, slip order at 3. In addition, we ordered the trial court, on remand, to (1) allow defendant a credit of $5 per day, against the children's advocacy center charge, for the time he had spent in presentence custody and (2) decide whether it would be appropriate to impose a violent crime victims assistance fine under section 10(c), instead of section 10(b), of the Violent Crime Victims Assistance Act (725 ILCS 240/10(b), 10(c) (West 2010)) and adjust the fine, if necessary. *Somers*, slip order at 3.

Defendant observes that although defense counsel filed a Rule 604(d) certificate on remand, the trial court apparently overlooked (1) and (2).

¶ 77 The State agrees with defendant that because he was in presentence custody from June 4, 2010, to July 1, 2010, the $5 per day credit under section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)) should entirely offset the children's advocacy center assessment of $20. The State further agrees with defendant that because the children's advocacy center assessment is a fine (*People v. Folks*, 406 Ill. App. 3d 300, 305 (2010)), section 10(b) of the Violent Crime Victims Assistance Act (725 ILCS 240/10(b) (West 2010)) authorizes an additional fine of only $4, not $20. These concessions are correct.

¶ 78 III. CONCLUSION

¶ 79 For the foregoing reasons, we affirm the trial court's judgment as modified. We modify the judgment by reducing the prison terms on counts II and III from six years to three years, by eliminating the $20 children's advocacy center fine (since it is entirely offset by the monetary credit), and by reducing the violent crime victims assistance fine from $20 to $4. We remand this case with directions to issue an amended sentencing order reflecting these changes.

¶ 80 Affirmed as modified; cause remanded with directions.

¶ 81 JUSTICE POPE, specially concurring in part and dissenting in part:

¶ 82 I concur in part and respectfully dissent in part. For the following reasons, I respectfully dissent from the portion of the order reversing the extended-term sentence for unlawful use of the debit card.

¶ 83 In *People v. Collins*, 366 Ill. App. 3d 885, 900-01, 853 N.E.2d 10, 23 (2006), the appellate court applied the *Bell* test to determine whether imposition of extended-term sentences on the defendant's convictions for attempt (robbery) and possession of a stolen vehicle was appropriate. In *Collins*, the victim, Harrington, was driving a van to collect mail from various companies. *Collins*, 366 Ill. App. 3d at 888, 853 N.E.2d at 13. Harrington momentarily stepped away from the van, leaving the engine running. *Collins*, 366 Ill. App. 3d at 888, 853 N.E.2d at 13. The defendant entered the van through the driver's side door and began driving away. *Collins*, 366 Ill. App. 3d at 888, 853 N.E.2d at 13. Harrington pursued the van on foot and caught up with it when the van got stuck in traffic. *Collins*, 366 Ill. App. 3d at 888, 853 N.E.2d at 13. Harrington entered the van and told the defendant the van was his and told the defendant to pull over. *Collins*, 366 Ill. App. 3d at 888, 853 N.E.2d at 13. Instead, the defendant demanded money from Harrington. *Collins*, 366 Ill. App. 3d at 888, 853 N.E.2d at 13. As Harrington reached over the defendant to grab the keys from the ignition, the defendant swung and hit Harrington. *Collins*, 366 Ill. App. 3d at 888-89, 853 N.E.2d at 13. A struggle ensued, and both men fell out of the driver's side door. *Collins*, 366 Ill. App. 3d at 889, 853 N.E.2d at 13-14. The court determined the "defendant's first offense was one he sought to commit without violence; his goal was to enter the van without being seen and drive off in it." *Collins*, 366 Ill. App. 3d at 902, 853 N.E.2d at 24. However, when Harrington was able to catch up with the van and get in it, "defendant's goal changed from avoiding detection to violently

confronting the victim to obtain his money." *Collins*, 366 Ill. App. 3d at 902, 853 N.E.2d at 24. Therefore, the court found defendant's offenses "arose from an unrelated course of conduct, making the extended-term sentence for his attempted robbery conviction proper." *Collins*, 366 Ill. App. 3d at 902, 853 N.E.2d 24-25.

¶ 84 In *People v. Hummel*, 352 Ill. App. 3d 269, 270, 815 N.E.2d 1172, 1173 (2004), the defendant and two accomplices stole items from various grocery and drug stores. The accomplices went inside to steal the items, and the defendant acted as the getaway driver. *Hummel*, 352 Ill. App. 3d at 270, 815 N.E.2d at 1173. During the last attempt of the day, as the accomplices exited the store with the stolen items, the store's security system sounded. *Hummel*, 352 Ill. App. 3d at 270, 815 N.E.2d at 1173. The two accomplices jumped into the waiting vehicle. Two employees of the store chased the accomplices out the door, and one employee was able to step in front of the vehicle before the defendant drove away. *Hummel*, 352 Ill. App. 3d at 270, 815 N.E.2d at 1173. The defendant shouted at the employee to get out of his way, but, when she did not move, the defendant accelerated slowly toward her and she ended up on top of the hood of the vehicle. *Hummel*, 352 Ill. App. 3d at 270, 815 N.E.2d at 1173. She grabbed onto the hood, and the defendant swerved back and forth until the employee was eventually dislodged and hit her head on the pavement. *Hummel*, 352 Ill. App. 3d at 270, 815 N.E.2d at 1173. The defendant pleaded guilty to burglary and, after trial, was convicted of aggravated battery. *Hummel*, 352 Ill. App. 3d at 270, 815 N.E.2d at 1173. The trial court found that the two offenses were not part of a single course of conduct and sentenced the defendant to an extended-term sentence on the lesser offense of aggravated battery. *Hummel*, 352 Ill. App. 3d at 271, 815 N.E.2d at 1173. The reviewing court upheld imposition of the extended-term sentence on the lesser offense, finding that although the defendant's original plan was to "stealthily

obtain items of merchandise from the store, without the need for confrontation or violence," once the store employees gave chase, his "objective changed from merely avoiding detection to avoiding apprehension." *Hummel*, 352 Ill. App. 3d at 273, 815 N.E.2d at 1175-76.

¶ 85 In this case, defendant's use of the debit card the next day (a Class 4 felony) is unrelated to defendant's original objective in committing a burglary of the car (a Class 2 felony). See *People v. Coleman*, 166 Ill. 2d 247, 257, 652 N.E.2d 322, 327 (1995) (a trial court may impose multiple extended-term sentences if the separately charged offenses of differing classes arise from unrelated courses of conduct). The evidence presented in this case supports finding a substantial change in defendant's criminal objective. Defendant's original plan was to break into the vehicle and steal items therein. One of the items happened to be the victim's debit card. The burglary was complete when defendant entered the victim's car with the intent of stealing. If the defendant had been charged with theft of the debit card and other items, I would agree an extended term could not be imposed on that lesser offense. However, here defendant was charged with unlawful *use* of the debit card (not theft of the card). I do not see how defendant's acts the following day can be considered part of a single course of conduct during which time no substantial change occurred in the nature of defendant's original criminal objective, *i.e.*, the burglary of the vehicle. Thus, I conclude the unlawful use of the debit card was part of a different course of conduct involving a substantial change in defendant's criminal objective. Consequently, I would find the trial court did not err in imposing an extended term on that offense. I otherwise concur with the majority's decision.