

NOTICE

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2012 IL App (5th) 100044

NO. 5-10-0044

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 09-CF-853
)	
FREDDIE DAVIS,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court, with opinion. Presiding Justice Donovan and Justice Wexstten concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Freddie Davis, appeals from his conviction for burglary after a jury trial (720 ILCS 5/19-1(a) (West 2008)). He argues on appeal (1) that he was not proven guilty of burglary beyond a reasonable doubt because the State failed to prove that he remained, hid, or secreted himself within the building, (2) that the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by improperly striking a potential juror, and (3) that the mittimus should be amended to a mandatory supervised release (MSR) period of two years rather than three years since he was convicted of a Class 2 felony (two-year term), even though due to prior convictions, he was sentenced as a Class X felon and, accordingly, ordered to serve three years of MSR. For the reasons stated below, we affirm.

¶ 2 **FACTS**

¶ 3 The law office of Weilmuenster & Wigginton at 3201 West Main Street in Belleville

(the law office) was the scene of the charged crime of burglary. Office hours were from 9 a.m. to 5 p.m. Present in the law office at the time of the charged offense were Jennifer Stone, a legal assistant, Karen Harriman, the receptionist, John Brian Manion, an attorney, and Steve Wigginton, a partner. Karen Ives was the office manager. All of these individuals testified at trial.

¶ 4 Jennifer Stone testified her office window faced the front door of the law office, so she could see anybody entering. Stone saw defendant enter on July 29, 2009, at about 4:30 p.m. Harriman was preparing to leave around that time, so her purse was on her desk. Stone went to check and saw defendant "on the wrong side of [the] reception counter." Stone asked defendant if she could help him and saw defendant "knee deep in [Harriman's] purse." Stone told defendant he could not take the wallet. Defendant then "darted out of the door." Defendant said, "I'm just here for my wallet." Stone saw Harriman's wallet tucked inside defendant's sling. Defendant turned and threw the wallet back at Stone.

¶ 5 A partner and one of the associates of the law office chased defendant after Stone told them that he had just stolen Harriman's wallet. Stone then called 9-1-1. The police brought defendant back to the law office, and Stone identified defendant.

¶ 6 Harriman testified she worked from 8 a.m. to 4 p.m. Meetings with attorneys were by appointment only. On July 29, 2009, at around 4:30 p.m., Harriman got her purse and the mail, and she placed them on her desk. Her boss, Steve Wigginton, asked her to get a file, and she went back in to get it for him. Harriman heard Stone say, "Stop him, he's stealing [Harriman's] wallet." Harriman saw defendant fleeing from the office. Defendant did not ask for help when he entered the office.

¶ 7 Harriman had seen defendant on Monday, July 27, 2009, around 4:30 p.m. Karen Ives had spoken with defendant outside the law office door. Defendant had not entered the law office. Defendant's arm was covered in a dark blue sling. On July 29, 2009, defendant took

Harriman's wallet from her purse, but threw it back into the law office from outside. Harriman identified defendant through the window from inside the law office.

¶ 8 Manion was in Wigginton's office discussing a case. He was walking into the reception area when he heard Stone say, "He took her wallet." Wigginton yelled, "Chase him." Manion and Wigginton both went outside. Manion turned the corner and saw a man, defendant, running from the law office. Manion lost sight of defendant between the two buildings. Manion and Wigginton split up at an alley. Manion asked an individual whether he had seen someone run by and was told "yes." Around an apartment building, he saw defendant by a dumpster and yelled at him to stop. Defendant started running to the right and Manion ran after defendant. A vehicle pulled up. Wigginton got out of the vehicle and held up a prosecutor's badge. Wigginton tripped defendant and held him. The man driving the vehicle called 9-1-1. Defendant told Manion that he did not have the wallet. Defendant also stated that he had not been in the law office.

¶ 9 Wigginton testified that on July 29, 2009, around 4:30 p.m., he was preparing for a meeting in Alton and asked Harriman to get a file for him. Wigginton heard a commotion and stepped into the reception area. Stone was screaming and yelled, "Stop him, stop him." Stone said defendant had Harriman's purse or wallet. Wigginton saw defendant fleeing from the law office. Wigginton stated that he and Manion chased defendant. Manion went left in the chase, and he went right, around a house. Wigginton stated he lost sight of defendant. He stated he got into a car with an older gentleman and he saw defendant running down the street. Wigginton testified that he jumped out of the car and caught defendant. Wigginton then showed his badge as an assistant prosecutor in Madison County and held defendant down until the police arrived.

¶ 10 Belleville police detective Mark Heffernan went to the 3200 block of Martha Street where he saw Manion and Wigginton detaining defendant. There was a blue sling

underneath defendant. Heffernan's police report reflected Harriman said she did not witness the incident. Harriman also stated that she "did not get a good look at the subject."

¶ 11 Belleville police officer William Cook saw defendant in the 200 block of North 32nd Street. Cook was told defendant entered the law office, took a wallet, and then fled. Cook took defendant back to the law office. At the law office, Cook spoke with Harriman and Stone. Harriman positively identified defendant.

¶ 12 After defendant's motion for a directed verdict was denied, he presented the following witnesses. Dr. Benjamin Laux was a chiropractor. His office was at 3200 West Main Street, Belleville. Laux saw defendant for a job-related injury. Laux stated that he first saw defendant on July 15, 2009, and treated him on Mondays, Wednesdays, and Fridays. Laux told defendant to consult an attorney. Laux also saw defendant on Monday, July 27, 2009, and Wednesday, July 29, 2009. Laux never referred defendant to the law office where the incident took place.

¶ 13 Karen Ives had seen defendant at the law office on July 27, 2009. Defendant asked, "Is there an attorney here that I can speak to?" Ives told defendant there were no attorneys present and he would have to come back tomorrow. Ives closed the law office's door and locked it. Ives was not present on July 29, 2009.

¶ 14 On July 30, 2009, defendant was charged in a two-count information with burglary. Count I alleged that defendant knowingly and without authority entered the law office with the intent to commit therein a theft. Count II alleged that defendant remained within the law office with the intent to commit a theft.

¶ 15 During jury selection, defense counsel raised a *Batson v. Kentucky* challenge to the State's exercise of a peremptory challenge to juror 185, Jeshon Green. When questioned by the circuit court as to the reason for the strike, the prosecutor indicated she was concerned about the juror's prior criminal history, because "she did not come forth with a misdemeanor

disorderly that she had," and she was single and had a "toddler son." The circuit court noted the State had not questioned Green about the conviction, and it rejected this explanation as a valid concern by the State. The prosecutor continued to claim the strike was based on Green being single and having a "toddler son." The circuit court denied the *Batson* challenge without further comment. The jury found defendant not guilty of burglary by unauthorized entry and guilty of burglary by remaining within a building. Defendant was sentenced on December 18, 2009, to nine years' imprisonment with three years of MSR. Defendant has timely appealed.

¶ 16

ANALYSIS

¶ 17 The first issue we address is the first issue posed by defendant on appeal, whether he was proven guilty of burglary beyond a reasonable doubt. Defendant argues that the State failed to prove the burglary charge in that it failed to prove that he remained within the law office with the intent to commit a theft, essentially arguing that the burglary statute requires that a person secrete or hide himself in the building. Specifically, defendant argues that the State failed to prove he remained within the law office without authority and with the intent to commit a theft. The burglary statute states in relevant part:

"A person commits burglary when without authority he 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 2008).

Defendant argues that the State failed to prove the requirement of "remains within." The State argues that while defendant may have had authorization to enter the law office, the intent to commit the theft was formed after entry and was committed in an area in which defendant was not allowed to be present. Accordingly, pursuant to the State's argument, the requirements of the burglary statute were met. We agree with the State.

¶ 18 Two cases are the basis of our resolution of this issue. In *People v. Glover*, 276 Ill.

App. 3d 934, 659 N.E.2d 78 (1995), the defendant, while permitted to enter a church, was instructed to stay at a door. The defendant and another person had entered the church, explained that they had car trouble, and asked if they could use a telephone. A member of the church instructed them to wait at the door while she got the pastor. While she was gone, the defendant and his companion found a storage area and stole vacuum cleaners.

¶ 19 The defendant, on appeal, argued that his case was controlled by *People v. Vallero*, 61 Ill. App. 3d 413, 378 N.E.2d 549 (1978), in which the defendant properly entered an office and, without entering any other part of the building, stole payroll checks. The *Vallero* court reversed his conviction for burglary, finding that he had not exceeded the scope of his authority to be in the building, as he remained seated at the desk where he was told to stay. In *Glover*, however, the defendant, without authority, entered another part of the building. The court found as follows:

"[W]e conclude that the trial court could have reasonably viewed defendant's conduct in moving, without authority, to another part of the building to constitute the act of unlawfully remaining within a building he had previously been permitted to enter. The evidence supported a finding that any original authority to enter the building was legally terminated by defendant's unauthorized movements therein. His then-continued presence at another location in the church for the purpose of committing a theft would constitute the act of 'remaining.'" *Glover*, 276 Ill. App. 3d at 939, 659 N.E.2d at 81.

In the instant case, the record indicates that defendant was in the "wrong" part of the reception area in the law office.

¶ 20 The recent case of *People v. Richardson*, 2011 IL App (5th) 090663, 956 N.E.2d 979, further supports defendant's conviction. In *Richardson*, the defendant entered the liquor store during business hours and stole cash and lottery tickets from an area in the store that was

restricted to employees only. The *Richardson* court, after noting that "[a] criminal intent formed after a lawful entry will satisfy the offense of burglary by unlawfully remaining' (*People v. Boone*, 217 Ill. App. 3d 532, 533 (1991))," found the *Glover* conclusion that authority to enter a building could be terminated by unauthorized movements during which the individual committed a theft. *Richardson*, 2011 IL App (5th) 090663, ¶¶ 15-17, 956 N.E.2d at 854-55. The court then found:

"Here, we find *Glover* analogous and controlling. Because the State conceded that the defendant entered Route 3 Liquors with authority, it was required to prove that he subsequently remained there without authority and with the intent to commit a theft. To that end, the evidence that the defendant entered the clearly marked employees-only office area where he stole the lottery tickets and money was more than sufficient to prove that, with the intent to commit a theft, he moved to a part of the store where he was not authorized to be. As the State notes on appeal, the implied authority to be in a store during business hours does not extend to areas designated as private or employees only. [Citation.] We also note that the defendant made a stealthful entry into the office area and was essentially hiding while he was back there." *Richardson*, 2011 IL App (5th) 090663, ¶ 17, 956 N.E.2d at 855.

¶ 21 In the instant case, the record reflects that defendant was on the wrong side of the reception area with his hands inside the purse. The jury had a basis to conclude that while defendant may have had authorization to enter the law office, he terminated that authority in his attempt to commit a theft while in the law office.

¶ 22 The second issue brought by defendant is whether the State improperly struck a potential juror and accordingly violated *Batson*. As stated above, the prosecutor indicated she was going to use a peremptory challenge to strike a potential juror. Defendant objected to the State's exercise of this peremptory challenge based on *Batson*.

¶ 23 The prosecutor stated two bases for exercising the challenge. The circuit court noted the State had not questioned Green about her prior misdemeanor conviction and accordingly rejected that argument. The prosecutor then restated her argument as to the toddler son and that there was concern that Green might be distracted with regard to child care. After hearing this argument, the circuit judge denied the *Batson* challenge but granted the State's peremptory challenge, and the potential juror was removed.

¶ 24 In *People v. Munson*, 171 Ill. 2d 158, 662 N.E.2d 1265 (1996), our supreme court detailed the issues in *Batson*:

"*Batson* provides a three-step process for the evaluation of racial discrimination claims in jury selection. The objecting defendant must first make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. If the defendant satisfies that initial burden, the burden then shifts to the prosecutor to articulate a race-neutral explanation for excluding the venire member in question. Third, and finally, the trial court must determine whether the defendant has met his burden of proving purposeful discrimination. [Citations.]

A race-neutral explanation is one based upon something other than the race of the juror. In assessing an explanation, the focus of the court's inquiry is on the *facial* validity of the prosecutor's explanation. [Citation.] There is no requirement that the explanation be persuasive, or even plausible. A "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection.' [Citation.] Absent an inherent discriminatory intent in the prosecutor's explanation, the reason offered will be deemed race neutral. [Citation.]

Finally, the trial court's finding with respect to discriminatory intent is a matter of fact, turning largely on questions of credibility. Therefore, on review the court's findings are afforded great deference. [Citation.] Unless the court's finding is clearly

erroneous, reversal is not required. [Citations.]" (Emphasis in original.) *Munson*, 171 Ill. 2d at 174-75, 662 N.E.2d at 1272.

¶ 25 We cannot say, based on the record before us, that the circuit court's denial of the *Batson* challenge was clearly erroneous.

¶ 26 The final issue posed by defendant deals with the period of MSR he received as part of his sentence. That period of MSR which the court imposed, three years, was part of the explicit sentence pursuant to statute (730 ILCS 5/5-8-1(d)(1) (West 2008)), as the legislature directed that an individual with a prior history of two or more felonies of a certain grade was to be treated as a Class X offender. The MSR period for a Class X felon is three years. Defendant argues that based on the reasoning of *People v. Pullen*, 192 Ill. 2d 36, 733 N.E.2d 1235 (2000), his MSR should be two years rather than three. The State, on the other hand, argues that because by statute the sentencing treatment of defendant must be as one who has committed a Class X felony, a three-year MSR term is appropriate and that the other districts of the appellate court, since *Pullen*, have so ruled for various reasons. After our consideration of *Pullen* and post-*Pullen* cases from our colleagues, we agree with the State.

¶ 27 In *Pullen*, an individual who had sufficient prior felony convictions and pled guilty to five counts of burglary, the same offense for which the instant defendant was convicted, was sentenced as a Class X offender under the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3(c)(8) (West 1994)). The defendant in *Pullen* was sentenced to 15 years for one count and 15 years consecutively for the other counts. The supreme court determined that because the underlying conviction, burglary as a Class 2 felony, had a maximum sentence of 14 years, the aggregate of the consecutive sentences could not exceed 28 years. The supreme court reasoned that the treatment of *Pullen* as a Class X offender did not change the classification of the underlying felonies for which *Pullen* was convicted. Our supreme court noted that "[t]he character and classification of the felonies a defendant has committed

remain unchanged notwithstanding that he is subject to sentence enhancement under section 5-5-3(c)(8) of the Code." *Pullen*, 192 Ill. 2d at 46, 733 N.E.2d at 1240. Defendant argues, based on the reasoning of *Pullen*, that the nature of the underlying conviction remains unchanged by the aforementioned section would of necessity include the MSR attached to the class of the underlying felony and, accordingly, defendant's mittimus should be amended to a two-year MSR term.

¶ 28 The State disagrees, arguing that the clear legislative intent is that a multiple offender, such as defendant, be treated as a Class X felon, and it cites a number of cases from our colleagues in other districts to that effect. We examine the post-*Pullen* authorities in turn.

¶ 29 In *People v. Watkins*, 387 Ill. App. 3d 764, 901 N.E.2d 964 (2009), the Third District considered sections 5-5-3(c)(8) and 5-8-1(d) of the Unified Code (730 ILCS 5/5-5-3(c)(8), 5-8-1(d) (West 2004)), indicating that an MSR term attaches to a Class X sentence "as though written therein" as being three years. The court determined that the trial court had appropriately imposed a three-year MSR sentence, citing *People v. Anderson*, 272 Ill. App. 3d 537, 650 N.E.2d 648 (1995), and *People v. Smart*, 311 Ill. App. 3d 415, 723 N.E.2d 1246 (2000). *Watkins*, 387 Ill. App. 3d at 766-67, 901 N.E.2d at 966. The court reasoned, "In our view, it makes little sense for a Class 1 offender to be eligible for an enhanced term of imprisonment as a Class X offender but ineligible for an enhanced MSR term." *Watkins*, 387 Ill. App. 3d at 767, 901 N.E.2d at 966.

¶ 30 The Fourth District, in *People v. Lee*, 397 Ill. App. 3d 1067, 926 N.E.2d 402 (2010), similarly imposed a three-year MSR term and, accordingly, initially addressed the question of underlying sentencing for the particular defendant. Lee had been found guilty of burglary, a Class 2 felony for which the maximum term of imprisonment was 7 years, but based on his prior criminal history, he was sentenced under section 5-5-3(c)(8) of the Unified Code as a Class X felon to 13 years' imprisonment with 3 years of MSR. The court noted the apparent

conflict of these two sections of the statutes, determined that it had before it an issue of statutory interpretation to be reviewed *de novo*, and ultimately determined:

"The supreme court has stated the General Assembly's purpose in enacting section 5-5-3(c)(8) of the Unified Code was to 'punish recidivists more severely' than first-time offenders. [Citation.] Recidivism 'is a traditional, if not the most traditional, basis for *** increasing an offender's sentence.'" [Citation.] *Lee*, 397 Ill. App. 3d at 1070, 926 N.E.2d at 405.

The court determined again, citing our supreme court:

"As stated earlier, our supreme court has made clear the intent of the legislature was to punish recidivist criminals more harshly than first-time offenders." *Lee*, 397 Ill. App. 3d at 1071, 926 N.E.2d at 406 (citing *People v. Thomas*, 171 Ill. 2d 207, 228, 664 N.E.2d 76, 87 (1996)).

On that basis, the court resolved the enhanced sentencing question before it.

¶ 31 Reaching the question of a two-year versus a three-year MSR term, the court determined, on the basis of section 5-5-3(c)(8), that since *Lee* qualified for sentencing as a Class X offender and since section 5-8-1(d) of the Unified Code stated "every sentence shall include as though written therein a term in addition to the term of imprisonment" (730 ILCS 5/5-8-1(d) (West 2006)), the three-year MSR term was appropriate. It determined explicitly that the supreme court's holding in *Pullen* was distinguishable. The court specifically noted that its holding was in accord with various pre-*Pullen* cases and *People v. Watkins* discussed above.

¶ 32 In *People v. McKinney*, 399 Ill. App. 3d 77, 927 N.E.2d 116 (2010), the Second District came to a similar conclusion as to MSR sentencing under these circumstances. In *McKinney*, the defendant was found guilty of robbery, a Class 2 felony, and qualified for sentencing as a Class X offender due to his prior criminal history. Again, the underlying

offense carried a two-year MSR term, while the prior history indicated Class X status and a three-year MSR term. After declining to follow the other districts' specific reasoning for imposing a three-year MSR term, the *McKinney* court held:

"In our view, the plain language of the applicable statutes dictates that defendants sentenced as Class X offenders shall receive the same three-year MSR term imposed on defendants convicted of Class X felonies." *McKinney*, 399 Ill. App. 3d at 82, 927 N.E.2d at 120.

The court further stated:

"Defendant argues that *Pullen* stands for the proposition that 'Class X sentencing eligibility under section 5-5-3(c)(8) will not trump a sentencing statute written in terms of the felonies committed.' This argument overlooks a critical difference between the MSR statute at issue here and the consecutive sentencing provision considered in *Pullen*. The former specifies part of the sentence for a defendant's offense, while the latter delineates how separate sentences for separate crimes are served. 'It is a settled rule in this state that sentences which run consecutively to each other are not transmuted thereby into a single sentence.' *People v. Wagener*, 196 Ill. 2d 269, 286 (2001). As noted, the statutory mandate that defendant 'shall be sentenced as a Class X offender' (730 ILCS 5/5-5-3(c)(8) (West 2006)) means that defendant shall receive a sentence that one convicted of a Class X felony would receive, *i.e.*, a prison term ranging from 6 to 30 years followed by a 3-year term of MSR. *Pullen* is entirely consistent with this interpretation. The statute considered in *Pullen* does not specify what sentence a Class X offender receives. Rather, it merely limits the extent to which separate sentences for separate offenses may be served consecutively. See *Lee*, 397 Ill. App. 3d at 1073 ('since the MSR term is part of the sentence under section 5-8-1(d) of the Unified Code and the sentence

must be a Class X sentence under section 5-5-3(c)(8) of the Unified Code, a reading of the two provisions together requires a Class X MSR term,' and *Pullen* is distinguishable)." *McKinney*, 399 Ill. App. 3d at 83, 927 N.E.2d at 121.

¶ 33 The First District in *People v. Lampley*, 405 Ill. App. 3d 1, 939 N.E.2d 525 (2010), similarly upheld a three-year MSR term. As in the instant case, Lampley was found guilty of burglary and, based on his prior criminal history, was sentenced as a Class X offender to 14 years' imprisonment. Also, as in the instant case, Lampley on appeal argued *Pullen*. The court reasoned:

"Unlike in *Pullen*, this case does not involve the character and classification of the convictions. This case is in line with the decisions of this court on this issue. See *People v. Anderson*, 272 Ill. App. 3d 537 (1995); *People v. Smart*, 311 Ill. App. 3d 415 (2000); *People v. Watkins*, 387 Ill. App. 3d 764 (2009); *People v. Lee*, 397 Ill. App. 3d 1067 (2010). Each of these cases found that by the plain language of the statute, the MSR term is part of the sentence. In fact, the *Lee* court specifically rejected defendant's argument here that *Pullen* mandates a change in his MSR term. *Lee*, 397 Ill. App. 3d at 1072-73. Therefore, when subject to the enhancement, the MSR term for Class X offenses attaches to the sentence imposed." *Lampley*, 405 Ill. App. 3d at 14, 939 N.E.2d at 537.

¶ 34 We agree with our colleagues in the cases from the various districts discussed above. Our supreme court in *Pullen*, in reconciling conflicting sentencing statutes, determined that the upper limit of the imprisonment sentence would be limited by the class of the underlying offenses. The *Pullen* court and the appellate cases cited above recognize the clear intent of the legislature that certain repeat offenders be treated as Class X felons and accordingly be subject to the Class X duration of MSR. The cases further note that the applicable MSR statute considers a term of MSR and its duration to be part of the sentence as if specifically

part of the written sentencing order. We note that *Pullen* is authority limiting the upper limit of consecutive sentencing, and we further note that imposition of an MSR term is not the same as consecutive sentencing. As *Pullen* and the other cases discussed above agree, the clear legislative intent is to treat these multiple offenders as Class X offenders. We determine that it conforms both to our supreme court's mandate in *Pullen* and to the intent of the legislature clearly expressed that multiple offenders falling under the requirements of section 5-8-1 are subject to a limitation in their imprisonment sentence based on the class of the underlying felony for which they were convicted (*Pullen*), but pursuant to the legislature's intent will have as part of that sentence as though written in specifically an MSR term appropriate to a Class X conviction. We thus reconcile these apparently conflicting statutes and our supreme court's mandate in *Pullen*.

¶ 35 Accordingly, for the reasons stated above, we affirm the judgment of the circuit court of St. Clair County.

¶ 36 Affirmed

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FREDDIE DAVIS,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

Opinion Filed: September 5, 2012

Justices: Honorable Richard P. Goldenhersh, J.
Honorable James K. Donovan, P.J., and
Honorable James M. Wexstten, J.,
Concur

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