

No. 1-08-3658

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 05 CR 01259
	)	
DARRYL CONWAY,	)	
	)	Honorable
Defendant-Appellant.	)	Thomas V. Gainer,
	)	Judge Presiding.

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**ORDER**

JUSTICE SALONE delivered the judgment of the court.  
Presiding Justice Steele and Justice Murphy concurred in the judgment.

*HELD:* Motions to quash and suppress properly denied when entry by police based on community caretaking and common authority; no fitness hearing was required when no *bona fide* doubt of defendant's fitness was raised; trial court properly addressed defendant's posttrial *pro se* allegations of ineffective assistance of counsel.

¶ 1 Following a bench trial, defendant Darryl Conway was convicted of first degree murder and sentenced to a 40-year prison term. On appeal, defendant contends that: 1) the trial

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court erred in denying his motions to quash his arrest and suppress statements and physical evidence; 2) the trial court erred by failing to conduct a fitness hearing after raising a *bona fide* doubt of defendant's fitness to stand trial; and 3) the trial court erred by failing to inquire into defendant's *pro se* claims of ineffective assistance of counsel. For the following reasons, we affirm.

## ¶ 2 BACKGROUND

¶ 3 Defendant was charged with two counts of armed robbery and 10 counts of first degree murder in the death of his grandmother, Edris Gilead. However, the State subsequently *nolle prossed* both armed robbery counts and six of the first degree murder counts.

¶ 4 Prior to trial, defendant filed a motion to quash his arrest and to suppress evidence and statements based on the warrantless, non-consensual entry into the apartment he shared with his grandmother. A separate motion to suppress physical evidence was also filed based on lack of probable cause.

¶ 5 Prior to the hearings on defendant's motions, defense counsel requested a fitness examination, and the result was that he was fit.

¶ 6 At the joint hearing on defendant's motions to quash his arrest and suppress physical evidence, Chicago police officer Mark Brzezicki testified that on December 15, 2004, he and his partner, Officer Gerald Daley, went to the victim's apartment at 6254 South Western Avenue in Chicago at approximately 9:42 p.m. in response to a well-being and premises check. Brzezicki stated that June Gilead let them into the apartment. Gilead, who was the victim's daughter, did not live in the apartment but had keys to the apartment. There was no search or arrest warrant

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when the officers entered the apartment. Upon entering the apartment, the officers saw defendant exiting a bedroom. Brzezicki stated that although defendant did not give them permission to enter the apartment, he did not withhold permission either. The officers spoke with defendant, however, he became agitated and refused to provide identification. Defendant was subsequently restrained and his wallet was recovered, which contained his identification as well as various debit and credit cards. A set of keys was later recovered from defendant's pocket after his arrest.

¶ 7 On cross-examination, Brzezicki stated that the well-being check was for the victim and that Gilead met them in the hallway. Gilead told them that she had no contact with her mother in a few days nor had she gone to work in a few days, which was unusual behavior. Gilead also stated that she had been in her mother's apartment earlier that day and saw defendant leaving her mother's bedroom. Her mother's bedroom was generally kept locked and defendant was not allowed inside. Additionally, Gilead stated that the apartment was in disarray, which was also unusual because her mother was very neat. Gilead then unlocked the door to the apartment with her key and let them inside. Brzezicki stated that the apartment was in complete disarray and subsequently identified defendant in court as the person he saw exiting the victim's bedroom.

¶ 8 He and Gilead walked around the apartment, looking for the victim, noting that her purse was there. Defendant was asked to sit on the couch and smoke a cigarette while the officers questioned him. When defendant sat down, Brzezicki noticed a red stain on the ceiling right above the couch and a second stain on the curtain, both of which appeared to be blood.

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Defendant told the officers that he was in the process of removing some of his grandmother's things from the apartment and putting them into a dumpster. The dumpster was subsequently located by other officers and contained numerous household items. At this juncture, Brzezicki asked defendant for identification and defendant responded by becoming agitated and making belligerent comments of a sexual nature to a female officer. Defendant subsequently grew more belligerent, swinging his arms and indicating that he was not going to stay in the apartment. After making physical contact with Brzezicki, defendant was handcuffed and asked to sit down again. Gilead found defendant's wallet in the victim's bedroom, which contained his identification as well as credit and debit cards belonging to the victim, and she gave it to one of the officers present. Brzezicki subsequently advised defendant of his rights and defendant was formally arrested at approximately 10:20 p.m. after the victim's body was found.

¶ 9 On re-direct, Brzezicki testified that a set of keys was recovered from defendant's pants pocket after he was taken into custody. He further stated that he was aware that defendant lived with the victim and that Gilead did not live there. The trial court inquired as to when Brzezicki learned that Gilead did not live in the apartment. He responded that Gilead told them before they entered the apartment, indicating that she frequently checked on the victim, they were very close and that the victim gave her keys to the apartment. Brzezicki stated that a consent to search form was not presented to defendant.

¶ 10 At the close of the hearing, the trial court found that the officers' entry into the apartment was with the consent of someone who had authority to give consent. Additionally, the court found, as part of the well-being check, the officers had the right to enter the apartment. The

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court noted that the wallet was recovered by a civilian and handed over to the officers, so it was not the product of an illegal search. The court further noted that there was no testimony presented of any search conducted by the officers and that defendant was handcuffed because of his belligerence and arrested only after the victim's body was found. The court concluded that the officers acted proper with regard to entry into the apartment and the recovery of the items and denied the motion.

¶ 11 At the subsequent hearing on defendant's motion to suppress statements, defendant was sworn to the truth of the statements contained in the motion.

¶ 12 Officer Brzezicki testified consistently with his testimony at the prior hearing on the motion to quash arrest and suppress physical evidence. He stated that prior to speaking with defendant during his investigation, he advised defendant of his *Miranda* rights using the preprinted copy in his fraternal order of police (FOP) book. According to Brzezicki, defendant answered each question affirmatively and appeared to understand. Defendant subsequently made a statement to Brzezicki, which prompted Brzezicki to contact detectives. Two detectives, Detectives Vovos and Kienzle, arrived approximately 10 minutes later, and Brzezicki gave them a summary of defendant's statement and told them that defendant had been advised of his rights. The detectives asked defendant whether he had been advised of his rights and whether he understood them. Defendant replied affirmatively to both questions. When defendant was subsequently arrested at 10:20 p.m., Brzezicki saw Detective Kienzle advise defendant of his rights by reading from the preprinted form in the FOP book. Defendant responded affirmatively that he understood. Officer Brzezicki testified that he never threatened or physically hurt

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defendant although he did handcuff defendant. Moreover, no one threatened or harmed defendant in his presence.

¶ 13 On cross-examination, Officer Brzezicki indicated that he Mirandized defendant prior to questioning him to make it official questioning. Brzezicki clarified that defendant was handcuffed because of his belligerent behavior and he was not under arrest at that point. Defendant never said he was taking the "Fifth" or refuse to speak to Officer Brzezicki.

¶ 14 On redirect examination, Officer Brzezicki reiterated that defendant was handcuffed because of his belligerent behavior and that he had physically struck Brzezicki.

¶ 15 On re-cross examination, Brzezicki was asked whether defendant pushed him while indicating that he wanted Brzezicki to "get out of his house," to which he responded that defendant never said he wanted the officers to leave.

¶ 16 Detective John Murray testified that in the early morning hours of December 16, 2004, he was assigned to assist Detectives Vovos and Kienzle on a homicide investigation and consequently met with defendant at approximately 2 a.m. Murray and his partner, Detective Brogan, introduced themselves and explained *Miranda* rights to defendant from memory. Defendant responded that he understood his rights and they conversed for between 10 and 15 minutes. During that conversation, defendant made an inculpatory statement. Detective Murray next spoke with defendant at approximately 6 a.m., along with Assistant State's Attorneys (ASA) Guy Lisuzzo and Jeremy Unruh. ASA Lisuzzo advised defendant of his *Miranda* rights from memory and defendant indicated that he understood them. The three of them then had a conversation with defendant. Later that afternoon, at approximately 12:45 p.m., Detective

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Murray and ASA Unruh had another conversation with defendant. ASA Unruh advised defendant of his rights again, after asking if defendant recalled hearing his rights earlier. Defendant agreed to speak after hearing his rights and at the end of that conversation, ASA Unruh asked Detective Murray to leave the room. Murray stated that he never physically or mentally coerced defendant during any interview, nor did anyone else do so in his presence.

¶ 17 On cross-examination, Murray stated that defendant was never handcuffed during any of their conversations and all of the conversations took place in the same room. He further testified that he and ASA Unruh had another conversation with defendant at approximately 3:50 p.m. on December 16, 2004, this time for the purposes of taking a videotaped statement from defendant. ASA Unruh again gave defendant his *Miranda* rights, however, at that time, defendant indicated that he did not want to continue and requested an attorney. The conversation was then terminated.

¶ 18 On redirect examination, Detective Murray clarified that during the video, defendant was asked how many times he had heard his rights before and he indicated once at the house and one time at the station.

¶ 19 The court questioned Detective Murray regarding whether defendant at any time appeared to be hallucinating, delusional or out of touch with reality and he responded "absolutely not, sir." The court also asked whether he was advised that defendant was taking or had been prescribed medication for any psychiatric or psychological condition, to which Detective Murray responded in the negative.

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¶ 20 Former ASA Unruh<sup>1</sup> testified that on December 16, 2004, he was employed by the Cook County State's Attorney's office and was assigned to the felony review unit. At approximately 4:30 a.m. he was assigned to go to area one headquarters to speak to an individual who had been accused of beating his grandmother to death. When he arrived at the station, he located the detectives who had requested his presence and spoke to them about the case. After speaking with the detectives, he reviewed the documentation that the detectives prepared concerning the case. At approximately 6 a.m., he met with defendant, whom he identified in court. Also present at that time was Detective Murray and ASA Lisuzzo. Everyone introduced themselves to defendant, and both ASAs told defendant that they were lawyers but not his lawyer.

Defendant indicated that he understood, and ASA Lisuzzo recited *Miranda* rights to defendant. After defendant indicated that he understood each right, a conversation took place, during which defendant made an inculpatory statement. Unruh indicated that no one physically coerced, physically assaulted, mentally or psychologically coerced, or made material representations to defendant in his presence.

¶ 21 Unruh further testified that he met with defendant again at approximately 12:45 p.m. that afternoon, along with Detective Murray. He reintroduced himself to defendant, asked if defendant recalled the *Miranda* rights he had received earlier, and then readvised defendant of his *Miranda* rights. Defendant indicated that he understood his rights and agreed to speak to Unruh. After speaking with defendant, Unruh explained that the statement would be

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<sup>1</sup>Unruh was no longer employed by the Cook County State's Attorney at the time of the hearing on defendant's motion to suppress; he had since become employed by a law firm.

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memorialized and presented the four options available to defendant; videotape, handwritten statement, court reported statement or via the ASA's notes. Defendant chose to have his statement videotaped, and he, Unruh and Detective Murray signed a consent to videotape form. No one promised defendant that he could leave if he signed the form and participated in the videotaped statement.

¶ 22 Once the form was signed, Unruh had another conversation with defendant in Detective Murray's presence. After the conversation, Unruh asked Murray to leave so that he could speak with Defendant privately for the purposes of determining how the police treated him, whether he had received any threats, whether he had eaten and been allowed to go to the bathroom. At approximately 3:50 p.m., a videotape was generated that depicted an entire conversation Unruh had with defendant.

¶ 23 On cross-examination, Unruh indicated that none of his interactions with defendant were recorded prior to the late afternoon videotape, nor was he ever told that defendant refused to talk to any of the detectives.

¶ 24 Defendant testified on his own behalf. He indicated that he lived with his grandmother until he left home as a teenager and had just returned in 2003. Defendant stated that while he was home on December 15, 2004, at approximately 10:30 p.m., between six and eight police officers came to the house. According to defendant, his aunt June let them in the front door, and they started "ransacking" the house, looking for stuff. He testified that when he heard the key in the lock, he stood in front of the door. Defendant explained that he was not home between December 12 and December 15, and when he returned, the apartment was in disarray. The

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police told him to sit down, and he responded "Like what I got to sit down in my house for and who is you to tell me I can't sit here." A female officer instructed him to sit down, and he told her to be easy, he was "fittin' to stretch." Defendant testified that he was handcuffed after he finished stretching. A short while later, while defendant sat with his feet propped on top of the television, Officer "Brunelli" told him to take his feet down and when defendant questioned how the officer was "going to tell [him] to get [his] feet off [his] furniture," the officer picked him up and slammed him on the floor. According to defendant, the officer then began asking him questions and threatening him. Defendant further testified that he had no access to the fuse room and that the police gained access by breaking the door down. After the officers searched the fuse room, defendant was taken to the fuse room and shown a body. Defendant was then taken back to the apartment and was told that he was "going down" because drugs were found in the apartment. Detectives arrived and defendant indicated that he was read his rights but he "guess" he cut them off.

¶ 25 Defendant was then taken to the police station, where he was put in an interrogation room. However, defendant could not remember how long he was in the interrogation room or how many conversations he had because he lost track of time. Defendant also testified that he was placed in a holding cell between the conversations with the detectives and the state's attorneys. According to defendant, he told Detective Murray several times that he had no answers and was pleading the fifth, that the things he told ASA Unruh never made it into the typed statement, and that everyone must have had a grudge because he called them by their first names. Further, defendant stated that the first time anyone mentioned to him about getting an

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attorney was when the videotape began.

¶ 26 On cross-examination, defendant indicated that parts of the motion were wrong, even though he swore at the beginning of the hearing to its accuracy. Defendant gave contradictory answers as to whether he was in a bedroom he was not typically allowed to be in when the officers and his aunt arrived. He denied that he made comments of a sexual nature to the female officer, although he did admit to calling her "shortie." Defendant admitted that Officer Brzezicki advised him of his rights in the apartment, but clarified that it was done only partially because the officer was interrupted. Defendant mentioned something about the officer reading him his rights from a book, then later indicated that the officer recited the rights from memory. Defendant further testified that Detective Murray hit him one of the times that he refused to answer questions, and that he never made any incriminating statements.

¶ 27 The trial court concluded that defendant clearly was aware of his rights, as evidenced by his own testimony that he was "taking the Fifth," which was an exercise of his rights. The court noted that defendant's testimony at the hearing was very inconsistent and that it was clear from defendant's own testimony that "he was doing pretty much what he wanted to do from start to finish in this police investigation culminating in his performance on the videotape." The court found that the State met its burden of establishing a knowing, intelligent, voluntary and rational waiver of defendant's constitutional rights. The court further found no credible evidence established that there was any physical or psychological coercion, nor any evidence from defendant's appearance in court or the videotape that defendant was in any state other than normal. The trial court concluded that the first time defendant exercised his right and wanted to

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have an attorney present was in the videotape, at which time the questioning ceased. The court then denied defendant's motion after finding that the State met its burden by a preponderance of the evidence.

¶ 28 After the finding, defendant asked whether he could speak, and the trial court admonished

him that his attorney would speak for him. Defendant continued to address the court, and the court ordered that defendant be taken back to lockup due to his behavior. A date for jury trial was then set by agreement.

¶ 29 Subsequently, a Rule 402 (Ill. S. Ct. Rule 402 (eff. Jul. 1, 1997) conference was held. However, before the conference reached the point where the court could make a recommendation to the parties, the court concluded the conference and noted that defense counsel and the State's attorney indicated some things that led the court to believe that defendant needed to be re-evaluated by the 10th floor. Subsequently, at a later court date, defendant addressed the court regarding his relationship with his attorney. The court explained the notion of attorney-client privilege to defendant and stated that it was not going to remove defense counsel from the case.

¶ 30 At a subsequent court date on April 22, 2008, the trial court noted that defendant sent two letters that were turned over to defense counsel. Defense counsel noted that defendant was evaluated twice, and the State's attorney noted that a previous oral report given to the court indicated that defendant was fit. The trial court then asked if there was any reason to believe that defendant should be reevaluated, and there was no response. The matter was then set for trial.

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¶ 31 At trial, June Gilead testified for the State that her nephew, defendant, lived in an apartment with her mother, the victim. She testified that the victim took care of defendant for a long time, that their relationship was initially good but turned abusive. Gilead stated that defendant lived with her mother off and on from childhood to adulthood. She stated that the victim lived in the same apartment since approximately 1978. Gilead testified that the victim was a meticulous housekeeper and that she was a regular visitor to the apartment. She and the victim were very close and Gilead had her own keys to the victim's apartment. The last time she saw the victim alive was on December 12, 2004, when she picked her son up from the victim's apartment. Gilead stated that over the next few days, she received a call from her sister, defendant's mother, who lived in Atlanta. Gilead's sister indicated that she had not heard from the victim in a few days and asked Gilead to go check on her. On December 15, 2004, Gilead and her son went to the victim's apartment after the victim failed to appear for a field trip at approximately 9:30 p.m. She left her son in the car while she went up to the apartment. When Gilead opened the door to the apartment, she saw that it was in disarray. She also saw defendant coming from the victim's bedroom, which was normally locked with a padlock and off-limits to defendant. Gilead asked defendant where the victim was, and he said she was at work. When Gilead asked defendant what happened, defendant responded that was how the victim left the apartment. Gilead left the apartment and called the police.

¶ 32 The police arrives shortly thereafter, and Gilead took them to the victim's apartment after telling them what was going on. Gilead let the officers into the apartment, and the officers started talking to defendant, asking him where the victim was. When they entered the apartment

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the second time, defendant was again leaving from the victim's bedroom. While the officers spoke with defendant in the living room, Gilead went to the victim's bedroom to see what was going on and to find her. She noticed that there was a plate of food on the floor, the heater was on, music was blasting, the TV was loud and the window was open. Gilead then noticed the victim's identification in defendant's wallet and as she looked through the wallet, she found the victim's cash station card and credit cards, and other things that defendant should not have had. Gilead gave the wallet to the police, then went outside through the back door with two other officers. Gilead stated that there were approximately eight officers in the apartment after she found the wallet. Gilead indicated that she went downstairs to see if she could find the victim, and went downstairs to the dumpster. When she opened the dumpster, she saw the victim's clothing, linen, bills and personal items inside. Gilead and the officers then returned to the apartment. Defendant was sitting down, talking with the officers, but he stood up and made vulgar comments to a female officer and pushed an officer. Defendant was then handcuffed and forced to sit down again. Gilead then noticed a stain on the floor which she believed to be blood, and she was asked to leave the apartment by police. She was later asked to go to the police station to be interviewed. While she waited, she saw some officers carrying a crate with a body bag over it. To her knowledge, no one had keys to the apartment besides herself, the victim and defendant.

¶ 33 Officer Brzezicki testified consistently with his previous testimony at the pre-trial hearings.

¶ 34 Detective Kienzle testified that he and his partner, Detective Vovos, received a call to go

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to 6254 South Western on December 15, 2004. The call was originally labeled as a missing person investigation. When they arrived at the scene, defendant was handcuffed and sitting on a couch. After introducing himself, he Mirandized defendant. Defendant then made a statement that God killed his grandma. Defendant also stated that she was in heaven, which was the room with the fuse boxes. The detectives and three of the officers forcibly opened the fuse room and saw feet sticking out of a 30-gallon blue storage bin. The crime lab was contacted and after the arrival of an evidence technician, items were removed from the room and the victim's body was found face down inside the storage bin. The victim was extremely bloody and severely injured. After finding the body, Kienzle went back to speak with defendant, notifying him that the victim's body was found. Defendant then stated that his grandmother was asleep and he struck her in the head five or six times with a baseball bat, which knocked her out of bed and onto the floor. At that time, the victim was still alive, so approximately five minutes later, defendant went back to her with a metal pipe and he struck her again in the head several times. Defendant indicated that those events occurred two days prior. Defendant was then taken into custody, and a custodial search yielded a keychain containing a key to the fuse box room. An envelope was also recovered with the victim's body, with the words "the devil was wrought, RAH" written on it. Although defendant disclosed the location of the weapons he used to beat the victim, they were not recovered because the dumpster had been emptied.

¶ 35 Former ASA Unruh testified consistent with his testimony at the pre-trial hearings, indicating that defendant made inculpatory statements at 6 a.m. and 12:45 p.m. the following day. Specifically, defendant stated that while his younger cousin visited, he gave him a piece of

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pie while his grandmother was asleep, and she became angry. Defendant and his grandmother then argued the rest of the day and into the evening after his cousin left. Defendant then decided that it was time for his grandmother to go and he waited until she was asleep and beat his grandmother in the head with a baseball bat. Defendant told Unruh that he wanted to make the apartment a single's pad, so his grandmother had to go. At some point, after being struck five or six times, the victim asked defendant for some water, which he provided to her before striking her in the head again, this time with a steel pipe. Defendant stated that he did not initially plan to kill his grandmother by striking her; he intended to knock her out and then kill her with knock out gas. Defendant then attempted to dispose of the body inside of a suitcase, but it would not fit, so he located a blue storage bin and put her inside, face down. After he pulled her shirt over her head so he would not have to look at her head or face, he dragged the blue bin to a utility room and put a note inside with his body. According to defendant, the note was from a Bible passage. Defendant then returned to the apartment, cleaned up some of the blood and threw away some of his grandmother's belongings. Defendant also indicated where he disposed of the weapons, and that he did not know what he was going to say if the police ever came. After the second conversation, Unruh told defendant that his statement was going to be memorialized and presented the options to him. Defendant chose to have his statement videotaped. The videographer arrived at approximately 3:50 p.m., however, during the course of Unruh giving *Miranda* rights, defendant stated that he wanted to speak with a lawyer, and the interview was terminated.

¶ 36 The State moved to admit evidence, and the parties entered into several stipulations

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before the State rested.

¶ 37 Defendant moved for a directed finding, which was denied. At the start of defendant's case-in-chief, defendant indicated to the court that he had a question. When asked by the trial court whether he wished to testify, the following exchange took place:

"THE DEFENDANT: I mean right now I have something to say and I wrote it down so that's the only way I will be able to express what I have to say I have it right here so if you allow me to read what I wrote on record I feel a lot better.

THE COURT: I can't do it like that, Mr. Conway, it violates the rules of evidence. And I have to strictly enforce the rules of evidence when I'm trying a case. You cannot simply make a statement.

THE DEFENDANT: It not really a statement it is a question and it is basically my decision and why I am make my decision and I want to put that on record why I'm making this decision. It is not a statement.

THE COURT: Oh, so you want to say something to me that doesn't have anything to do with the facts of the case?

THE DEFENDANT: Something like that.

THE COURT: Well, say whatever you want.

THE DEFENDANT: I mean it will only take thirty seconds, I

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wasn't trying to do this here it could take all day thirty seconds is all I'm asking for.

THE COURT: Here is what I'll do, I will listen to what you have to say if it is inappropriate I'll strike it. If it is a question that you have for me that will help you reach some decision about whether or not to testify - -

THE DEFENDANT: Basically just my decision I mean I couldn't really put it towards her the way I wanted because any time I got back on deck I couldn't make phone calls or none of that stuff so I wrote it down the best way I knew how.

THE COURT: Does it have to do with the facts of the case?

THE DEFENDANT: Meaning?

THE COURT: Are you going to be offering me a defense to what I've already heard?

THE DEFENDANT: No. None of this stuff that I'm going to say has been brought up at any point in time during this trial.

THE COURT: Does it have anything to do with the facts of the case?

THE DEFENDANT: Something like that.

THE COURT: Okay, well I can't really do that then, that would be inappropriate. If you

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want to testify you have to testify from the witness stand under oath and be subject to cross-examination by the prosecuting attorney.

THE DEFENDANT: Well it is really not testimony or anything like that, so.

THE COURT: I don't know what to tell you but I am not going to let you make a statement.

THE DEFENDANT: I am not making a statement because I am not implicating myself or anything like that, it is nothing like that."

¶ 38 The trial court inquired of defense counsel whether she knew what defendant wanted to say, which she did not. The trial court then admonished defendant that he should tell his attorney what he wanted to say so that she could address the court. Defense counsel read defendant's note and informed the court that it concerned the motion to suppress statements, which defendant denied. The trial court then told defendant that if he wanted to testify, he had the right to do so. Defendant indicated that he understood that and said that the State's whole argument was "argumentative." The trial court again admonished defendant that it would not allow him to make a statement about the facts of the case, but that if he wanted to testify he could take the witness stand and be sworn in. After several exchanges, defendant finally stated that he would not testify and the defense rested.

¶ 39 Following closing arguments, the trial court found that defendant set in motion a course of conduct that involved the beating death of his grandmother which once he entered into, he felt

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compelled to continue. The court concluded that there was overwhelming evidence of defendant's guilt and convicted defendant of murder. Defendant asked when he could put in the motion for a retrial, which the trial court ignored and addressed defense counsel concerning setting a date for post-trial motions.

¶ 40 At the hearing on defendant's post-trial motions, the court acknowledged receipt of a letter from defendant approximately one week following trial, which essentially requested a new trial. The court noted that while defendant's letter was very unspecific, just that he believes he was poorly represented and if he were allowed to represent himself, he could prove his innocence. The court treated the letter as a request for an attorney other than the public defender and a motion for new trial based on ineffective assistance of defense counsel. After a brief exchange, the trial court allowed defendant to file his *pro se* motion, and set a hearing for both defendant and defense counsel to argue their motions for new trial.

¶ 41 Defendant's arguments on his *pro se* motion for new trial essentially centered on issues raised and determined during the suppression hearings and what he considered to be perjured testimony by Gilead and Officer Brzezicki. The trial court found that most of the actions or inactions defendant complained of regarding defense counsel amounted to trial strategy and not ineffectiveness. Defendant's *pro se* motion was denied, and defense counsel's motion for new trial was also denied.

¶ 42 After hearing evidence in aggravation and mitigation, the trial court sentenced defendant to a 40-year prison term. At the post-sentencing hearing, the court noted that defendant had written four letters since the sentencing hearing. Defendant's motion to reconsider sentence was

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denied and this timely appeal followed.

¶ 43 DISCUSSION

¶ 44 On appeal, defendant contends that: 1) the trial court erred in denying his motions to quash his arrest and suppress evidence and to suppress statements; 2) the trial court erred by failing to conduct a fitness hearing after raising a *bona fide* doubt of defendant's fitness to stand trial; and 3) the trial court erred by failing to inquire into defendant's *pro se* claims of ineffective assistance of counsel.

¶ 45 Motions to Quash and Suppress

¶ 46 Defendant first contends that the trial court erred in denying his motions to quash and suppress because no exception to the warrant requirement existed that would permit the officers' entry into the apartment. Specifically, he argues that the officers were not acting in a community-caretaking capacity; no probable cause or exigent circumstances existed; and Gilead lacked authority to consent to the warrantless entry into the apartment.

¶ 47 The United States and Illinois Constitutions guarantee the right of an individual to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art I, §6; *People v. Jones*, 214 Ill. App. 3d 256, 258 (1991). It has been long held that evidence obtained as a result of an unlawful entry and arrest cannot be admitted into evidence in court. *People v. Hand*, 408 Ill. App. 3d 695, 699 (2011). In reviewing a circuit court's ruling on a motion to quash arrest and suppress evidence, this court applies a two-part standard of review. *People v. Hopkins*, 235 Ill. 2d 453, 471 (2009). Great deference is accorded to the trial court's factual findings and they will be reversed only if they are against the manifest weight of the evidence,

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however, the trial court's ultimate ruling on a motion to suppress is reviewed *de novo*. *Hopkins*, 235 Ill. 2d at 471.

¶ 48 Defendant first contends that the officers were not acting in a community-caretaking capacity. We disagree.

¶ 49 According to our supreme court, "community caretaking refers to a capacity in which the police act when they are performing some task unrelated to the investigation of crime." *People v. McDonough*, 239 Ill. 2d 260, 269 (2010). Courts use the term "community caretaking" to uphold searches or seizures as reasonable under the fourth amendment when police are performing some function other than investigating the violation of a criminal statute. *McDonough*, 239 Ill. 2d at 269. The community caretaking doctrine is " 'analytically distinct from consensual encounters and is invoked to validate a search or seizure as reasonable under the fourth amendment.' " *McDonough*, 239 Ill. 2d at 270.

¶ 50 There are two general criteria that a court must find to determine whether the community caretaking exception applies; first, law enforcement officers must be performing some function other than the investigation of a crime; and second, the search or seizure must be reasonable because it was undertaken to protect the safety of the general public. *McDonough*, 239 Ill. 2d at 272. The court must balance a citizen's interest in going about his or her business free from police interference against the public's interest in having police officers perform services in addition to strictly law enforcement. *McDonough*, 239 Ill. 2d at 272.

¶ 51 Here, the evidence presented at the hearings established that police first arrived at the victim's apartment on a missing person's assignment after a call by the victim's daughter and

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defendant's aunt, Gilead. Upon arrival, the police gained entry to the apartment from Gilead, who had her own set of keys to the apartment, and they proceeded to question defendant concerning the victim's whereabouts. At that time, the police were not conducting a criminal investigation but simply investigating a possible missing person. This entry falls squarely within our supreme court's definition of community caretaking and the suppression of evidence was not warranted on that basis.

¶ 52 Next, defendant contends that the officers lacked probable cause to conduct a search without a warrant, and further that no exigent circumstances existed to justify the warrantless search.

¶ 53 We find such an analysis to be inappropriate under the facts of this case. This case is factually similar to a recent decision of this court, *People v. Hand*, 408 Ill. App. 3d 408 Ill. App. 3d 695 (2011). In that case, this court concluded that a police officer was justified under the community caretaking exception in making a warrantless entry into the defendant's apartment based on a reasonable concern for the welfare of defendant's children. *Hand*, 408 Ill. App. 3d at 703. The court noted that the community caretaking exception is necessary for the public's protection when a police officer objectively and reasonably believes there is a need to seek information about an individual's well-being. *Hand*, 408 Ill. App. 3d at 703. Additionally, the court noted that the exigent circumstances analysis based on probable cause did not apply because the officer was not attempting a warrantless entry into the defendant's home to arrest a criminal suspect, but instead was seeking to inquire as to the welfare of the children in the defendant's home. *Hand*, 408 Ill. App. 3d at 700.

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¶ 54 Similarly, in the case at bar, police did not enter the victim's apartment to arrest defendant, but merely upon inquiry as to the victim's whereabouts. As such, an exigent circumstances and probable cause analysis is inapplicable.

¶ 55 Finally, defendant contends that Gilead lacked the authority to consent to the warrantless entry of the apartment.

¶ 56 On appeal from the denial of a motion to suppress, the reviewing court is free to consider not only the record at the suppression hearing but also the trial evidence and to draw its own conclusions from the evidence. *People v. Burton*, 409 Ill. App. 3d 321, 327 (2011).

¶ 57 As previously stated, both the United States and Illinois Constitutions protect individuals from unreasonable searches, and searches without a warrant are presumptively unreasonable. *Burton*, 409 Ill. App. 3d at 328. An exception to the warrant requirement exists where law enforcement officers obtain consent to the search from either the person whose property is being searched or from a third party who possesses " 'common authority' " over the premises. *Burton*, 409 Ill. App. 3d at 328, quoting *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993 (1974). When a warrantless entry is justified by voluntary consent, that consent need not be given by defendant; it may be obtained from a third party who has control over the premises. *People v. Shaffer*, 111 Ill. App. 3d 1054, 1058 (1982); *Matlock*, 415 U.S. at 171, 94 S. Ct. at 993. Consent is determined by whether a reasonable person would have understood - by an individual's words, acts, or conduct - that consent had been granted. *Burton*, 409 Ill. App. 3d at 328. Common authority justifying a third-party consent to search is not implied from a property interest, but rests on mutual use of the property by persons generally having joint access or

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control. *People v. Kramer*, 204 Ill. App. 3d 1011, 1017 (1990). Common authority can be either actual or apparent. *Burton*, 409 Ill. App. 3d at 328. Under the apparent authority doctrine, a warrantless search does not violate the fourth amendment where the police receive consent from a third party whom the police reasonably believe possesses common authority, but who in fact, does not. *Burton*, 409 Ill. App. 3d at 328.

¶ 58 Here, the evidence presented at both the suppression hearing and trial clearly established that Gilead had common authority over the apartment. She had her own set of keys to the victim's apartment, and she opened the door for police. At trial, Gilead testified that she frequently used her keys for access to the victim's apartment when visiting. It is clear from the evidence presented that Gilead had both apparent and actual common authority to consent to the police's entry to the apartment, contrary to defendant's assertion.

¶ 59 In sum, the trial court properly denied defendant's motion to suppress.

#### ¶ 60 Defendant's Fitness for Trial

¶ 61 Next, defendant contends that the trial court erred in failing to conduct a fitness hearing after raising a *bona fide* doubt of his fitness to stand trial, which was amply supported by the record. Defendant argues that although the trial court sent him for a psychiatric evaluation, which determined for a third time that defendant was fit to stand trial, nevertheless the trial court erred because it did not analyze the doctor's findings. Defendant requests a new trial or alternatively, remand for a retrospective fitness hearing.

¶ 62 We first note that defendant did not object to the court's failure to conduct a fitness hearing or raise the issue in his posttrial motion. While such issues are generally deemed

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waived, an issue may be reviewed as plain error when it concerns a substantial right. *People v. Vernon*, 346 Ill. App. 3d 775, 777 (2004). The determination of a defendant's fitness to stand trial concerns a substantial right and plain error review is appropriate. *Vernon*, 346 Ill. App. 3d at 777.

¶ 63 A defendant is presumed fit to stand trial and bears the burden of proving there is *bona fide* doubt of fitness. *People v. Hanson*, 212 Ill. 2d 212, 221-22 (2004). A defendant is entitled to a fitness hearing when there is a *bona fide* doubt as to his fitness to stand trial because it is a violation of the defendant's due process rights to convict him if he is not fit for trial. *People v. Moore*, 408 Ill. App. 3d 706, 710 (2011). The inquiry into whether a *bona fide* doubt exists focuses on whether a defendant is able to assist in his defense and whether he can understand the nature and purpose of the proceedings. *Moore*, 408 Ill. App. 3d at 710. "The mere act of granting a defendant's motion for a fitness examination cannot, by itself, be construed as a definitive showing that the trial court found a *bona fide* doubt of the defendant's fitness." *Hanson*, 212 Ill. 2d at 222. Section 104-11(b) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/104-11(b) (West 2008)) specifically contemplates the appointment of an expert for the purpose of determining whether a *bona fide* doubt of the defendant's fitness will be raised. Appointment under this section cannot be considered a conclusion, implicit or otherwise, concerning a *bona fide* doubt of the defendant's fitness. *Vernon*, 346 Ill. App. 3d at 779.

¶ 64 Additionally, our supreme court has set forth several factors to consider when determining whether a *bona fide* doubt of the defendant's fitness exists, including: (1) the defendant's irrational behavior, (2) the defendant's demeanor at trial, and (3) any prior medical

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opinions on the defendant's competence. *Vernon*, 346 Ill. App. 3d at 779. The question of whether a *bona fide* doubt exists is generally a matter within the discretion of the trial court. *Vernon*, 346 Ill. App. 3d at 777-78.

¶ 65 After a careful review of the record, we conclude that there is no support in the record for defendant's contention that the trial court found a *bona fide* doubt of his fitness to stand trial. The record reveals that defendant initially received a psychological evaluation due to his mental history, and was found fit for trial. A subsequent examination also found defendant fit for trial. A third psychological evaluation was ordered after a Rule 402 conference was halted by the trial court based on statements from the State's Attorney and defense counsel. This third examination, which is the one defendant refers to on appeal, indicated that defendant was fit for trial, just as the two previous ones. It is clear that the trial court's decision to allow a psychological evaluation does not indicate the need for a fitness hearing. See *Hanson*, 212 Ill. 2d at 222; *Vernon*, 346 Ill. App. 3d at 779. Moreover, we find that the independent factors set forth by the supreme court are not apparent on the face of the record. To the contrary, the record indicates that defendant's courtroom demeanor, although combative at times, was appropriate and defendant fully participated in his defense. It is true that defendant wrote several letters to the trial court during the course of proceedings, however, there is no indication that they contained any irrational statements as defendant now claims on appeal. Finally, although defendant's medical history contains indicia of mental illness, there was no showing that defendant's past mental health problems affected his fitness to stand trial. As such, defendant has not met his burden of proving that there was a *bona fide* doubt of his fitness. Accordingly,

the trial court did not abuse its discretion by not conducting a fitness hearing.

¶ 66 Defendant's *Pro Se* Posttrial Motion

¶ 67 Finally, defendant contends that the trial court erred by failing to inquire into his *pro se* allegations of ineffective assistance of counsel and instead, ignored the claims or failed to inquire into the factual basis of the claims.

¶ 68 Typically, a court cannot consider *pro se* motions filed by a criminal defendant while he is represented by counsel. *People v. Milton*, 354 Ill. App. 3d 283, 292 (2004). There is an exception to this rule: represented defendants are allowed to raise *pro se* claims of ineffective assistance of counsel so long as they include supporting facts and specific claims. *Milton*, 354 Ill. App. 3d at 292, citing *People v. Rucker*, 346 Ill. App. 3d 873, 883 (2004).

¶ 69 When a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *Moore*, 207 Ill. 2d at 78. However, if the allegations show possible neglect of the case, new counsel should be appointed. *Moore*, 207 Ill. 2d at 78.

¶ 70 In order to resolve a *pro se* posttrial ineffective assistance of counsel motion, the trial court could conduct a brief discussion with trial counsel or defendant to determine the potential merit of defendant's allegations, or the trial court could resolve the defendant's *pro se* allegations based on its knowledge of defense counsel's performance at trial and the insufficiency of the allegations on their face. *People v. Johnson*, 372 Ill. App. 3d 772, 775 (2007). However, the

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trial court is not required to perform all of the above actions to determine whether there is ineffective assistance of counsel, but can base its decision on either action. *Johnson*, 372 Ill. App. 3d at 775.

¶ 71 Here, we find that the record on its face does not support defendant's contentions. To the contrary, the record clearly shows that the trial court not only allowed defendant to verbalize his concerns at the close of trial, but also added additional court hearings to allow defendant to file a written *pro se* motion containing all of his arguments pertaining to ineffectiveness of trial counsel, and allowed defendant the opportunity to argue his *pro se* motion in court. The trial court subsequently determined that defendant's contentions were without merit on their face or were the result of trial strategy by defense counsel. Thus, it is clear from the record that the trial court properly disposed of defendant's *pro se* posttrial motion for ineffectiveness of counsel and that defendant's contentions on appeal are without merit.

#### ¶ 72 CONCLUSION

¶ 73 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 74 Affirmed.