



and cash. The victim believed the intruder was in his home for hours, raiding the refrigerator and smoking crack, in addition to taking his belongings. At some point, the intruder also knocked out the screen to the kitchen window and cut the phone lines. The victim further testified that when he left for work that morning, his house was neat and orderly and all of the windows were locked.

¶ 4 An individual who was working in the yard next door to the victim's home saw a man repeatedly peeking his head in and out of the rear door of the victim's house. The police were notified that there was a problem at the victim's house. At approximately 11 a.m., a police officer, traveling down the victim's block, observed defendant walking from in between two houses carrying a clothes basket filled with electronics. The basket contained the victim's property. The victim testified that he saw some of his property in a car which was parked four houses down from his house. He further noticed, outside the car, a hamper full of his property. It appeared to the victim that someone was making trips back and forth from his home to the car.

¶ 5 The police found a footprint on the exterior of the back door of the victim's house and on a door to an entertainment center inside the house. The State's forensic scientist, an expert in footwear impression examination analysis, determined that the footwear impressions lifted from the burglary scene had a similar outsole pattern size and design as those of the boots worn by defendant at the time he was apprehended. A fingerprint expert testified that a fingerprint lifted from the window screen found outside the kitchen window matched that of defendant.

¶ 6 Defendant denied breaking into the victim's house. He admitted he had entered an abandoned house next door to the victim's house to remove copper plumbing. As he passed the victim's home, however, he noticed a laundry basket containing electronic equipment sitting under the kitchen window. He removed the kitchen screen covering the laundry

basket full of items and took the basket to his car. The jury found defendant guilty of residential burglary.

¶ 7 Defendant first argues on appeal that he was denied a fair trial because the court erred in refusing to tender to the jury instructions on the lesser offense of theft. During the jury instruction conference, defense counsel argued that defendant's testimony indicated that a theft had occurred but that he did not enter the victim's home. Counsel further asserted that the crime of theft was inherent to the State's case for residential burglary which required the State to prove that defendant entered the dwelling with the intent to commit a theft. The court denied defendant's tendered instruction without comment.

¶ 8 Defendant concedes on appeal that there was little doubt he committed theft. He admitted on the stand that he took a laundry basket filled with the victim's belongings. He also admitted that he was in the abandoned house next door removing copper. He maintained throughout, however, that he never entered the victim's house. He claimed he found the victim's belongings in the laundry basket sitting outside the victim's kitchen window. The jury could have believed him that he did not enter the house even though he took the items sitting outside of the house. Defendant contends, therefore, that the court should not have refused to submit his instruction on theft given that theft is a lesser offense of residential burglary. Defendant believes that by not so instructing the jury, the jury was forced to choose between finding him not guilty of any crime or finding him guilty of residential burglary.

¶ 9 A defendant is entitled to have the jury instructed on a less serious offense if that offense is included in the charged offense. *People v. Hamilton*, 179 Ill. 2d 319, 323, 688 N.E.2d 1166, 1169 (1997). In determining whether a particular offense is included in a charged offense, the proper approach is to first examine the charging instrument and then the evidence adduced at trial. *People v. Echols*, 382 Ill. App. 3d 309, 313, 887 N.E.2d 793, 798 (2008). Here, defendant was charged with committing the offense of residential burglary.

To be convicted of the charge of residential burglary, the trier of fact had to find, beyond a reasonable doubt, that defendant knowingly entered the dwelling place of another, without authority to do so, and did so with the intent to commit the offense of theft therein. 720 ILCS 5/19-3 (West 2010). A person commits theft when he or she knowingly obtains or exerts unauthorized control over the property of another and intends to deprive that owner permanently of the use or benefit of the property. 720 ILCS 5/16-1(a) (West 2010). As charged, theft was a lesser-included offense of residential burglary in this instance. The giving of a lesser-included offense instruction to the jury is a matter resting within the sound discretion of the trial court. *People v. Castillo*, 188 Ill. 2d 536, 540, 723 N.E.2d 274, 276 (1999). Abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person could take the view adopted by the court. *People v. Ortega*, 209 Ill. 2d 354, 359, 808 N.E.2d 496, 500-01 (2004). We find it was an abuse of discretion not to have given the lesser-included instruction, under the circumstances presented here.

¶ 10 This does not end the matter, however. Defendant waived his right to raise the instruction issue by failing to bring his claim of error to the attention of the court in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129-30 (1988). Error that has not been preserved may still be considered if the evidence is close or if the error is so serious that it affected the fairness of the defendant's trial. See *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479-80 (2005). In this case, we do not believe the factors for plain error exist. As the State points out, by finding defendant guilty of residential burglary, the jury specifically found, as instructed, that defendant entered the victim's home. Had the jury not found that defendant entered the victim's house, it would have found him not guilty and acquitted him. In both opening and closing arguments, defense counsel argued that the State had not met its burden of proof beyond a reasonable doubt because it could not

prove that defendant entered the victim's house. Again, had the jury accepted that argument, it would not have found defendant guilty. Because the jury found defendant guilty, the jury necessarily found that defendant entered the victim's dwelling without authority. Not including theft in the jury instructions therefore was not so serious of an error that it affected the overall fairness of defendant's trial. Accordingly, we affirm defendant's conviction for residential burglary.

¶ 11 Defendant also argues on appeal that the court erred in failing to conduct an adequate inquiry into his written allegations that defense counsel was ineffective. During the course of the proceedings, defendant made numerous complaints about his attorney. On March 21, 2011, for example, defendant sent a letter to trial counsel and to the court complaining that his attorney refused to discuss trial strategy or his defense with him and did not communicate in general. He further complained that counsel failed to act professionally, lied to him about motions he wanted filed, and refused to allow him to review discovery. He also asserted that his right to a speedy trial had been violated by counsel continuing court dates without his knowledge or approval.

¶ 12 Subsequently, in May of 2011, after the jury rendered a guilty verdict, defendant sent another letter to the court and to defense counsel expressing his objections as to how the trial had been handled. Defendant claimed that counsel did not answer his questions sufficiently so that he could make an informed decision as to what type of trial he wanted. He also objected to defense counsel's failure to argue a certain motion *in limine*, to introduce evidence that he had not been picked out of a photo line-up, and to object to the State's introduction of his prior criminal record. He again argued that his speedy trial rights had been violated and that he did not give permission to toll them. Ten days later, the court received another letter from defendant requesting leniency at his sentencing hearing because he was denied a fair trial and a proper defense. He noted once more that his speedy trial

rights had been violated.

¶ 13 At defendant's sentencing hearing, the court made note of the letters, but concluded that defendant had been tried within the statutory requirement of 120 days. The court further commented that defense counsel had specifically asked for a speedy trial after negotiations with the State had broken down. No other concerns were brought up at the hearing. The court subsequently sentenced defendant to 10 years' imprisonment. Defendant complains on appeal that the court did not conduct an adequate inquiry into the factual basis of his multiple claims, and therefore, did not consider whether to appoint independent counsel to evaluate his claims. He believes that his case should be remanded in order to allow the court the opportunity to conduct an adequate inquiry into his *pro se* allegations of ineffective assistance of counsel.

¶ 14 In assessing allegations of ineffective assistance of counsel, the court has three ways to address such claims. The court can ask counsel about the circumstances surrounding defendant's claims. The court also can ask the defendant about his claims, or the court can base its determination on its personal knowledge of counsel's performance at trial and on the facial insufficiency of the defendant's allegations. See *People v. Moore*, 207 Ill. 2d 68, 78-79, 797 N.E.2d 631, 638 (2003). If the court's inquiry reveals that the defendant had no legitimate complaint against his trial counsel, then the court can properly reject the allegations of ineffective assistance. See *People v. Jackson*, 131 Ill. App. 3d 128, 139, 474 N.E.2d 466, 474-75 (1985). If, on the other hand, the factual matters presented show possible neglect of the case by trial counsel, then the court must appoint new counsel to independently evaluate a defendant's claims. *People v. Nitz*, 143 Ill. 2d 82, 134-35, 572 N.E.2d 895, 919 (1991). The operative concern for us, as a reviewing court, is whether the trial court conducted an adequate inquiry into the *pro se* allegations of ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638.

¶ 15 Here, defendant brought his concerns regarding ineffective assistance of counsel through several letters he wrote to the court. During his posttrial motion hearing, the court conducted an inquiry into the allegations of ineffective assistance of counsel raised by defendant, and questioned defendant about the letters. Defendant responded by asking about his speedy trial rights. After the court determined that defendant's speedy trial rights had been maintained, the court again asked defendant if he wanted to address his other allegations against defense counsel. Defendant responded in the negative. Defendant was the one who chose not to pursue his claims of ineffective assistance of counsel once given a chance. Given that the court questioned defendant about the allegations of ineffective assistance, there is no need to remand this cause to conduct the inquiry again.

¶ 16 Defendant also complains that defense counsel allowed the victim to testify using nonresponsive answers which introduced highly prejudicial evidence of prior bad acts that were otherwise not admissible at trial. During his testimony at trial, the victim stated that someone had been in his house for hours, smoking crack, the morning of the robbery. Defendant believes such testimony was highly prejudicial in that the only purpose for such testimony was to suggest that defendant has a propensity for committing criminal acts. As he points out, whether he engaged in illegal drug use is not relevant to whether he entered the victim's house with the intent to commit theft. We find no error. First, no one ever identified defendant directly as being the one who had been smoking crack in the victim's house. More importantly, the testimony was not used by the State in the evidence presented against defendant, and it was never mentioned by either defense counsel or the State at any other point in the trial. The spontaneous response by the victim was one that defense counsel chose not to address as the best strategy to deal with such an unexpected response. Counsel's strategy was unchallengeable in this instance and does not provide a basis on which to bring an ineffective assistance of counsel claim. See *People v. Manning*, 241 Ill. 2d 319, 333, 335,

948 N.E.2d 542, 550, 552 (2011). In assessing ineffective assistance of trial counsel, a defendant must show that defense counsel's representation fell below an objective standard of reasonableness and that, absent counsel's unprofessional errors, the result of the proceeding would probably have been different. *Manning*, 241 Ill. 2d at 326, 948 N.E.2d at 546-47. Any deficient performance on the part of counsel here did not rise to the level such that the result of the proceeding probably would have been different or that the prejudiced suffered by defendant was sufficient to justify reversal. See *Echols*, 382 Ill. App. 3d at 312-13, 887 N.E.2d at 797.

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County.

¶ 18 Affirmed.