

No. 1-13-0054

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 19199
)	
JERMAINE VILLAMIL,)	Honorable
)	William T. O'Brien,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Rochford concurred in the judgment.
Justice Hall concurred in part and dissented in part.

O R D E R

¶ 1 *Held:* Defendant was proven guilty beyond a reasonable doubt of residential burglary where he was found within an apartment, tools had been taken, and he had earlier been seen around the property. A vacant apartment constituted a residence where a specified occupant planned to move in following renovations. No initial inquiry into the effectiveness of counsel was required where defendant failed to bring *pro se* motion to the attention of the trial court. Defendant's 10-year sentence was not an abuse of discretion where trial court considered all mitigating factors and the sentence fell within the statutory range.

¶ 2 Following a bench trial, defendant Jermaine Villamil, was convicted of residential burglary and sentenced to 10 years in prison. On appeal defendant contends that the evidence was insufficient to prove beyond a reasonable doubt that he intended to commit theft or that the vacant apartment was a dwelling. Defendant also contends that the trial court erred when it failed to hold an initial inquiry into his claims of ineffective assistance of counsel under *People v. Krankel*, 102 Ill. 2d 181 (1984), and *People v. Moore*, 207 Ill. 2d 68 (2003). Defendant finally contends that his sentence is excessive. We affirm.

¶ 3 Defendant was charged with one count of residential burglary. The charge arose from defendant's presence in a vacant apartment owned by Maria Delgado in the early morning of October 13, 2011. In attempting to flee, defendant began to fight with Maria's son, Jose Bahena. Police arrived shortly thereafter and arrested defendant.

¶ 4 At trial, the State first called Blanca Delgado, Maria's sister. Blanca testified that she lived in the basement apartment of her sister's two-flat building at 6224 North Artesian Avenue in Chicago. Maria lived with their mother, two daughters and Bahena in the first floor apartment. The second floor apartment was vacant.

¶ 5 Blanca's boyfriend dropped off her car keys shortly after 5 a.m. on October 13, 2011. As Blanca walked him out, she found defendant standing in the vestibule by the building's indoor mailboxes. Defendant told the couple that he was looking for his girlfriend, Lisa Cuevas, who lived on the second floor. Blanca responded that no one by that name lived there and that the second floor was empty. Defendant then left and Blanca returned to her apartment. Twenty minutes later, Blanca left the building with her children. Once she got into her car, she saw

defendant walking in front of the house. Blanca called her mother and drove away. Shortly after leaving, Blanca called 911 and described defendant to the dispatcher.

¶ 6 The second floor apartment had been vacant for about a month and was being renovated so it could be rented again. Blanca planned to move into the apartment, but at the time it was empty except for some tools.

¶ 7 Jose Bahena testified that his grandmother woke him early in the morning on October 13, 2011. She had heard footsteps in the vacant apartment above and asked Bahena to turn off the ceiling fan. With the fan off, Bahena could also hear footsteps. He dressed and woke his mother, Maria. He grabbed a BB gun and she grabbed a hammer. Arriving upstairs, they found the door to the second floor apartment slightly ajar, so Bahena began to shout "Who's here?" He swung the door open and began to scream. Maria told him that someone had run out the back door which led to an outdoor staircase. Bahena turned the lights on and found defendant sitting on a radiator with his shoes off. Bahena asked defendant why he was there. Bahena testified that he "couldn't remember real good, but [defendant] said he wanted to relax, something like that, chill." Defendant stood up, put on his shoes and ran towards the front door. Bahena pointed the BB gun and told defendant, "Get on the floor. The cops are coming." Defendant ran for the front door, but Bahena grabbed him and they began "scuffling" down the interior stairs. As they reached the bottom of the stairs, police officers arrived at the locked stairwell door. Maria let the officers into the building and Bahena then fainted.

¶ 8 The State called Maria Delgado. She testified consistently with Bahena's account. She heard a noise that morning but did not get up until Bahena knocked on her door. When they arrived at the second floor apartment she saw a man run out the open back door. The previous

night, she had locked the back door when Mike Luciano, the man renovating the apartment, left. The lock had been forced open damaging the wall. At the time, Maria was on pain medication following a surgery.

¶ 9 Mike Luciano testified that he finished working on the second floor apartment around 6 p.m. on October 12, 2011. He was repairing damage left by previous tenants when they moved out. When he left the building, Maria locked the door. He left his tools in a closet in the apartment. When Luciano returned the next day the lock had been "kicked in or pried in". Several of Luciano's hand tools were missing from the closet, including drills and sawzalls. His tools were never recovered.

¶ 10 Chicago police officer Jason Arroyo testified he was on patrol the morning of October 13, 2011. He and his partner responded to a report of a suspicious person at the apartment building. When the officers arrived at the building, they could see two men fighting through the second floor window. The officers entered the building's vestibule, but could not open the interior door. They heard the sound of men fighting on the stairs and then the door opened. Arroyo and his partner separated defendant from Bahena. Defendant matched the description given in the 911 call so the officers handcuffed him. Arroyo noticed Bahena's BB gun and told him to put it down. Bahena began to hyperventilate and Arroyo called for an ambulance. The officers did not recover any tools from defendant.

¶ 11 At the close of the State's evidence, the trial court denied defendant's motion for a directed finding. Defendant presented no witnesses and did not testify.

¶ 12 The trial court found defendant guilty of residential burglary.

¶ 13 Prior to defendant's sentencing hearing, defendant's counsel argued a motion for a new trial and the trial court denied it. The record contains a *pro se* motion alleging ineffective assistance of counsel. The document is stamped "filed" on the day of the sentencing hearing. Defendant states within the body of the document that a copy "will be hand delivered" on the morning of the hearing. However the trial court did not mention the document during the hearing and the report of proceedings for the hearing does not mention defendant giving or attempting to give anything to the court.

¶ 14 At the hearing, the State noted that defendant was on mandatory supervised release during the offense and was subject to Class X sentencing based on several prior criminal convictions. The defendant stated he had a difficult childhood, had worked when he was able, has minimal drug use and is not an active gang member. Defendant wrote a letter to the court expressing a desire for rehabilitation and to be a presence in his son's life. Defendant also spoke on his own behalf repeating much of what was written in his letter as well as apologizing for entering the apartment, but denying stealing anything. The trial court sentenced defendant to 10 years' imprisonment. Defendant appeals.

¶ 15 Defendant first argues that the State failed to prove beyond a reasonable doubt that he committed residential burglary. Specifically, defendant contends there was insufficient proof that he had the intent to commit theft inside the apartment as well as insufficient proof that the apartment was a residence. Defendant notes that he was found sitting without shoes on, with no burglary tools and no stolen items. No witness saw defendant move or take any items and he only attempted to flee once threatened with a gun. The apartment was vacant and un-rented. Defendant requests that we reduce his conviction to criminal trespass to real property.

¶ 16 The State argues that there was sufficient evidence to prove defendant guilty beyond a reasonable doubt. The State notes defendant's earlier attempt to gain access to the apartment, his entry through a door with a broken lock, the stolen tools, and defendant's attempted flight as circumstantial evidence of intent.

¶ 17 Due process requires the State to prove each element of a criminal offense beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004), citing *In re Winship*, 397 U.S. 358, 364 (1970). When reviewing the sufficiency of evidence, a reviewing court must decide "whether, viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Cunningham*, 212 Ill. 2d at 278. A reviewing court will not overturn a guilty verdict unless the evidence is "so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 18 In Illinois, residential burglary is defined as (1) knowingly and without authority entering or remaining in (2) the "dwelling place of another" (3) with the intent to commit a theft. 720 ILCS 5/19-3 (West 2010). Intent may be proven by circumstantial evidence. *People v. Maggette*, 195 Ill. 2d 336, 354 (2001). In a burglary trial, such circumstantial evidence includes the time, place, and manner of entry into the dwelling as well as alternative explanations for the defendant's entry. *Id.* Proof of unlawful entry into a building containing personal property, absent inconsistent circumstances, creates an inference of intent to steal. *People v. Rossi*, 112 Ill. App. 2d 208, 212 (2012). Whether the requisite intent existed is a question of fact for the trier of fact,

whose determination will not be disturbed on appeal unless the evidence is so improbable as to cast a reasonable doubt on the defendant's guilt. *People v. Cabrera*, 116 Ill. 2d 474, 493 (1987).

¶ 19 Defendant entered the apartment building in the early morning when most of its inhabitants were still sleeping. When Blanca Delgado found defendant in the building, he said he was there to see his girlfriend. After being told that the apartment was vacant, he remained in the area around the building. When he was found in the apartment, he attempted to flee by fighting his way through Jose Bahena. Additionally, the back door to the apartment had been forced open to the point where the lock was ripped off. According to Bahena, defendant's only explanation for his presence was that he wanted to "chill." The evidence supports the reasonable conclusion that defendant knowingly entered the apartment with an unlawful intent to commit a theft.

¶ 20 Furthermore, Luciano's handheld tools were taken from the apartment. The tools were all small enough to be carried. Defendant had opportunity to steal the tools. Delgado saw defendant in the vestibule at 5:15 a.m. Some time later, she left the apartment through the front door and saw the defendant suddenly walking in front of the building. The police received her call at about 5:45 a.m. and responded shortly after. Therefore taking the evidence in the light most favorable to the prosecution, defendant had nearly 30 minutes during which he was largely undisturbed. Given the fact that defendant clearly knew he should not be in the apartment, the tools were taken, and defendant had sufficient time to remove and hide the tools, we find that a rational fact-finder could find beyond a reasonable doubt that defendant intended to commit theft when he entered or remained in the second floor apartment.

¶ 21 Defendant relies on the fact that his shoes were off and he was just sitting when Bahena and Maria entered the apartment to show that he lacked the intent to commit a theft. Yet as the

State argued in closing, the defendant could have heard Bahena and Maria coming up the stairs and attempted to "play possum." Viewing the record in the light most favorable to the prosecution, the presence of the unidentified man does not create a reasonable doubt either. The fact-finder is not required to search out all possible explanations and "raise them to a level of reasonable doubt." *People v. Hall*, 194 Ill. 2d 305, 332 (2000). There is ample circumstantial evidence of defendant's intent to commit theft whether or not the trial court believed there was a second offender. Accordingly, we find that a rational fact-finder taking the evidence in the light most favorable to the State could have found beyond a reasonable doubt that defendant intended to commit theft when he entered the apartment. As we find the evidence of intent sufficient on a principal theory, we do not address whether the State may now argue an accountability theory.

¶ 22 We now turn to defendant's contention that the State failed to prove beyond a reasonable doubt that the apartment constituted a dwelling. In the context of residential burglary, a "dwelling" is "a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside." 720 ILCS 5/2-6(b) (West 2010).

¶ 23 An uninhabited and boarded-up home was found to be a dwelling place where the owners kept their personal property there, secured the building, and checked on it daily. *People v. McGee*, 398 Ill. App. 3d 789, 793-94 (2010). Likewise, a fire-damaged mobile home was a dwelling where the owners left due to the fire, locked the door, and left their personal possessions. *People v. Torres*, 327 Ill. App. 3d 1106, 1111-12 (2002). The pertinent question is whether an occupant intends to reside in the building within a reasonable amount of time. See *McGee*, 398 Ill. App. 3d at 794; *Torres*, 327 Ill. App. 3d at 1112.

¶ 24 Both Bahena and Blanca testified that Blanca planned to move into the vacant apartment. There was no specific timeframe given for Blanca's move, but neither the prior case law nor the statute itself require an exact amount of time, rather the amount must be *reasonable*. 720 ILCS 5/2-6(b) (West 2010). We believe the amount of time necessary to renovate an apartment for it to be rentable is not unreasonable. This case is similar to *McGee* where the indefinite time spent repairing the fire-damaged building was reasonable. See *McGee*, 398 Ill. App. 3d at 793. Therefore, taking the evidence in the light most favorable to the State, a rational fact-finder could have found beyond a reasonable doubt that the apartment was a dwelling within the meaning of the residential burglary statute.

¶ 25 Defendant's reliance on *People v. Roberts*, 2013 IL App (2d) 110524, and *People v. Moore*, 2014 IL App (1st) 112592-B, is misplaced. In both cases, the reviewing courts found the evidence insufficient to support a finding that the burglarized location was a dwelling; however, both courts focused on the fact that there was not a *specified* future occupant. *Roberts*, 2013 IL App (2d) 110524 at ¶ 5 ("There is simply no language indicating that an owner's intent that some *unidentified* person reside in the premises at some unknown date in the future is sufficient to confer the status of "dwelling.")(Emphasis added.); *Moore*, 2014 IL App (1st) 112592-B at ¶ 33 ("no evidence showed that tenants or buyers intended to occupy [owner's] units as of May 2009"). In the present case there was evidence of a specific individual, Blanca Delgado, with the intent to occupy the apartment in a reasonable amount of time and thus *Roberts* and *Moore* are distinguishable.

¶ 26 Defendant does not challenge the trial court's finding that he entered the apartment and we find that the State sufficiently proved both intent to commit theft and that the apartment was a dwelling beyond a reasonable doubt. Therefore, we affirm defendant's conviction.

¶ 27 Defendant next argues that the trial court erred when it failed to perform a limited initial inquiry into his claims of ineffective assistance of counsel as required by *People v. Krankel*, 102 Ill. 2d 181, 189 (1984), and *People v. Moore*, 207 Ill. 2d 68, 78 (2003). Defendant notes that he filed a written, *pro se* motion to the trial court alleging, *inter alia*, that his trial attorney failed to use favorable evidence and coerced his waiver of a jury trial. The trial court made no mention of or inquiry into defendant's claims. Defendant states that the trial court not only failed to acknowledge the motion, but also refused to allow defendant to ask about it. The hand-written motion bears a file stamp dated the same day as defendant's sentencing hearing.

¶ 28 The State argues in response that a *Krankel* inquiry was not required because defendant failed to bring his allegations to the attention of the trial court. The State notes that the report of proceedings contains no reference to the motion by defendant or the trial court. In the alternative, the State argues that defendant's claim that defense counsel failed to use favorable evidence is insufficient to trigger an initial inquiry. Finally, the State argues that the trial court's failure to inquire into defendant's claim of coercion fails under harmless error analysis.

¶ 29 When a defendant makes post-trial allegations complaining about the effectiveness of his trial attorney, the trial court is required "to conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* post-trial claim." *People v. Moore*, 207 Ill. 2d at 79. The trial court may base this inquiry on a discussion with the defendant, on the trial counsel's answer and explanations, and on the insufficiency of defendant's complaints. *Id.* at 78–79. The

court may not ignore a defendant's claims. *People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011).

When a trial court fails to make such an inquiry into the factual matters underlying the defendant's claim, the reviewing court should remand the case to the trial court to conduct an initial inquiry. See *Moore*, 207 Ill. 2d at 79. Defendant needs only to bring his claim to the attention of the trial court. *Id.* Yet, that claim must be an express claim that his counsel was ineffective. See *People v. Taylor*, 237 Ill. 2d 68, 76 (2010) (Finding that an "implicit claim of ineffective assistance of counsel" did not trigger an initial inquiry.) When the trial court does not respond to defendant's claim on the merits, review is *de novo*. *People v. Tolefree*, 2011 IL App (1st) 100689 at ¶ 23.

¶ 30 A "filed" stamp is *prima facie* evidence that a document was filed with the officer at the time noted. See *Riley v. Jones Brothers Construction Co.*, 198 Ill. App. 3d 822, 829 (1990). However, a party filing a document has the responsibility to bring that document to the attention of the court. *People v. Kelley*, 237 Ill. App. 3d 829, 831 (1992). Furthermore, this court has previously ruled that where a defendant files a motion claiming ineffective assistance of counsel the trial court is not required to hold an initial inquiry unless a defendant brings the filing to the attention of the trial court. *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2004). In *Rucker*, the defendant filed a *pro se* motion to reduce sentence which alleged that he did not receive "adequate representation by counsel." *Id.* at 883. This court found the facts in *Rucker* distinguishable from *Moore* because the *Rucker* defendant failed to bring his filed motion to the trial court's attention. *Id.* at 885.

¶ 31 Despite defendant's contention that the trial court refused to allow him to ask about his motion, there is no mention of the motion in the record of the sentencing hearing. Defendant did

ask to have a letter read on his behalf and spoke on his own behalf at some length. Neither the letter nor defendant's allocution mention the motion. The trial court only refused to allow defendant to speak once, after the defendant asked, "Could I say one more thing," during the trial court's explanation of defendant's sentence. Defendant spoke again at the end of the hearing and again made no mention of his trial attorney's performance or his *pro se* motion. As the defendant did not bring his motion to the attention of the trial court at any point, we find the trial court had no obligation to conduct an initial inquiry under *Krankel* and *Moore*.

¶ 32 Finally, defendant contends that his sentence of 10 years' imprisonment is excessive and fails to reflect the mitigating evidence, defendant's rehabilitative potential, and constitutional directives. He further argues that the trial court "gave up on [defendant] as someone with rehabilitative potential." Defendant notes that he was thrown out of an abusive home at 12 years old and "raised by the streets." Defendant worked when he could, has a non-violent criminal record, and was found sitting calmly in the second floor apartment. Defendant notes that he apologized for trespassing, expressed a wish to raise his son and stated a willingness to enter mental health treatment.

¶ 33 The state argues that the trial court considered all proper aggravating and mitigating factors before imposing a sentence, and that the sentence was proper given defendant's criminal background.

¶ 34 All sentences must reflect the seriousness of the offense committed and the objective of rehabilitating offenders to useful citizenship. *People v. Cooper*, 283 Ill. App. 3d 86, 95 (1996). The trial court must consider all factors of mitigation and aggravation. *People v. Quintana*, 332

Ill. App. 3d 96, 109 (2002). The sentencing court is not required to record or articulate its exact weighing and balancing of those factors. *Id.*

¶ 35 A reviewing court may only reduce a sentence when the record shows that the trial court has abused its discretion. *People v. Streit*, 142 Ill. 2d 13, 19 (1991); *People v. Martin*, 2012 IL App (1st) 093506, ¶ 47. When examining sentences imposed by lower courts, reviewing courts "should proceed with great caution and care." *Streit*, 142 Ill. 2d at 19. The reviewing court may not reverse the sentencing court just because it could have weighed the factors differently. *Id.*

¶ 36 Defendant, based on his criminal history, faced a minimum sentence of 6 years and a maximum sentence of 30 years. 730 ILCS 5/5-4.5-95(b) (West 2010). A sentencing decision that falls within the statutory range is entitled to great deference. *People v. Hill*, 408 Ill. App. 3d 23, 29 (2011).

¶ 37 Defendant's 10-year sentence was 4 years more than the minimum and a third of the maximum sentence. Defendant argues that the sentence does not reflect the mitigating factors. He notes that he was found sitting calmly in the apartment, arguing that his crime was non-violent. However, in attempting to flee defendant fought with Jose Bahena. Defendant notes that he apologized for trespassing, yet he was convicted of the more serious offense of residential burglary. Defendant also has 5 prior felony convictions and 16 prior misdemeanor convictions. At the time of the burglary, defendant was on mandatory supervised release.

¶ 38 In announcing its decision, the trial court explicitly stated that it considered all factors in mitigation and aggravation. It noted that both rehabilitation and punishment are purposes of sentencing before reiterating that it was taking all factors into consideration. Thus the trial court did not refuse or fail to consider the mitigating factors, but merely weighed them differently than

defendant does in his arguments on appeal. We find that the trial court did not abuse its discretion by sentencing defendant to 10 years' imprisonment.

¶ 39 For the foregoing reasons, we find that the State sufficiently proved defendant guilty beyond a reasonable doubt of residential burglary, and that an initial *Krankel* inquiry was not required as the defendant failed to bring his motion the attention of the trial court. Finally, we conclude the trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment. Accordingly, the judgment of the circuit court is affirmed.

¶ 40 Affirmed.

¶ 41 JUSTICE HALL concurring in part and dissenting in part:

¶ 42 I agree that the defendant was not entitled to an initial inquiry under *Krankel*. I disagree with the majority's finding that the evidence was sufficient to convict the defendant of residential burglary. The testimony of the State's witnesses failed to establish beyond a reasonable doubt that the second floor apartment was a dwelling or that the defendant entered the second floor apartment with the intent to commit a theft.

¶ 43 In *Roberts*, the reviewing court pointed out that the statutory definition of a "dwelling" focuses on the intent of the owners or occupants " 'at the time of the alleged offense.' " *Roberts*, 2013 IL App (2d) 110524, ¶ 7 (quoting 720 ILCS 5/2-6(b) (West 2010)). The aim of the residential burglary statute is to protect the privacy and sanctity of the home. *Roberts*, 2013 IL App (2d) 110524, ¶ 7. There is no violation of the privacy and sanctity of the home if there is no one who considers the premises in question to be his or her home or future home. *Roberts*, 2013 IL App (2d) 110524, ¶ 7.

¶44 In *Roberts*, the owners of the burglarized residence had moved away, with no plans to return. The house was vacant and listed for sale. *Roberts*, 2013 IL App (2d) 110524, ¶¶ 1-2. In determining that the second floor apartment was a dwelling, the majority distinguishes *Roberts* on the grounds that there was no specified future occupant in that case. I disagree that *Roberts* is distinguishable on that basis. Blanca and Bahena testified that Blanca planned to move into the second floor apartment. However, Maria, the owner of the building, testified that she was trying to rent the vacant apartment. Moreover, the amount of time the dwelling is vacant must be reasonable, and the majority acknowledges that there was no specific timeframe for Blanca's move. 720 ILCS 2-6(b) (West 2010). In light of the fact that Blanca's plans to move into the second floor apartment were indefinite and the fact that Maria was attempting to rent the second floor apartment but as yet had no tenant or prospective tenant, in accordance with *Roberts*, the second floor apartment was not a dwelling for purposes of the residential burglary statute. See *Roberts*, 2013 IL App (2d) 110524, ¶ 5 (for purposes of the residential burglary statute, an owner's intent that an unidentified person reside in the premises at some unknown date in the future does not confer "dwelling" status on a building).

¶45 The evidence also failed to establish that the defendant entered the second floor apartment with the intent to commit a theft. According to her testimony, Blanca observed the defendant standing inside the building looking for his girlfriend whom he said lived on the second floor. Blanca told him the second floor was empty. The defendant was later discovered on the second floor sitting on a radiator with his shoes off. When asked by Bahena why he was there, the defendant indicated that he was "relaxing."

¶46 These facts leave reasonable doubt that the defendant entered the second floor apartment to commit a theft. The defendant had been told that the apartment was empty, an indication that there was nothing to steal. The defendant was found sitting on the radiator with his shoes off, and none of the missing tools was found in the defendant's possession. The argument that the defendant had time to remove the tools from the apartment is mere speculation. It is not supported by the evidence or a reasonable inference from the evidence. To draw the inference that the defendant removed the tools and then returned to the apartment to await apprehension by the owner, rather than make good his escape, is unreasonable. The reasonable inference from these facts is that the defendant entered the second floor apartment for shelter rather than to commit a theft.

¶47 The evidence does not establish beyond a reasonable doubt that the defendant committed the offense of residential burglary. Based on the evidence, I agree with the defendant that his conviction should be reduced to criminal trespass to real property, and the case remanded for resentencing. See *People v. Moore*, 2014 IL App (1st) 112592-B (where the evidence was insufficient to prove residential burglary but sufficient to prove burglary, the reviewing court modified the defendant's conviction to burglary).

¶48 For all the above reasons, I respectfully concur in part and dissent in part.