FIRST DIVISION
July 20, 2015

Nos. 1-13-1875, 1-13-3537
(CONSOLIDATED)



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 CR 18287 |
| | ) | |
| MILLER HAYMER, | ) | Honorable |
| | ) | Evelyn B. Clay, |
| Defendant-Appellant. | ) | Judge Presiding. |

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PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

**ORDER**

¶ 1 ***Held:*** The State laid a proper foundation for the building security guard's testimony that defendant did not have the authority to enter the building, and the trial court did not abuse its discretion in limiting the scope of defendant's cross-examination of the security guard on the building's visitor policies. The State presented sufficient evidence that defendant burglarized a condominium building because his lack of authority to enter the building and intent to commit a theft inside could be inferred from his actions, his possession of two knives, and his possession of a multi-use tool.

¶ 2 After a bench trial, defendant Miller Haymer was found guilty of burglary and sentenced as a Class X offender to eight years in prison. On appeal, defendant contends that: (1) the State

failed to lay a proper foundation for the condominium building security guard's testimony that defendant lacked the authority to enter the building; (2) the trial court improperly limited his scope of cross-examination of the security guard; (3) the State failed to prove both that he lacked the authority to enter the building and he intended to commit a theft inside to sustain his burglary conviction; and (4) his mittimus should be corrected to reflect his proper presentence custody credit. For the reasons that follow, we affirm the judgment below and order the clerk of the circuit court to correct defendant's mittimus to reflect 560 days of presentence custody credit.

¶ 3 Naser Beganovic, a security guard at Library Tower condominium, testified that at approximately 9:25 p.m. on October 6, 2011, he was sitting at the front entrance of the condominium building, which also had a rear entrance. A security guard monitored the front entrance 24 hours a day and checked in any visitors. The rear entrance was locked 24 hours a day and residents had to use a key fob to enter.

¶ 4 While monitoring the rear entrance via a security camera, Beganovic noticed defendant dressed in black wearing a backpack. Defendant pulled "something out" and began "forcefully trying to open the back door." Defendant never attempted to use a key fob. Eventually defendant opened the door and entered the building. Beganovic then ran to the rear entrance to investigate the situation, but he did not see defendant.

¶ 5 Beganovic returned to the front entrance. Approximately 10 minutes later, he saw defendant on a security camera in the second floor of the building garage. The garage was only accessible to residents either using their key fob or a key from the inside, or a garage door opener from the outside. Beganovic then called the police. He did not see defendant again until about 20 to 30 minutes later when police officers had detained him. Beganovic did not recognize

defendant as a resident. He also stated, over defense counsel's unsuccessful objection for a lack of foundation, that defendant did not have permission to enter the building.

¶ 6 The State published the security camera recording, which showed defendant with his back to the camera at the rear entrance at approximately 8:55 p.m. Defendant used an unknown object already in his hand to open the back door. The door then shut behind defendant briefly until he re-opened the back door from the inside and walked out of the security camera's line of sight. A few seconds later, Beganovic opened the back door from the inside, but then promptly retreated inside the building. The security camera recording from the garage showed at approximately 9:05 p.m., defendant opened a door, peered inside the garage, looked around for a couple of seconds and then walked out of the security camera's line of sight.

¶ 7 On cross-examination, Beganovic stated there were approximately 238 residents living in Library Tower, but he did not know about 70 of them. He also acknowledged he would have no way of knowing whether or not any resident knew defendant. When defense counsel asked Beganovic about the condominium's visitor policies, the State objected based on relevance and the trial court sustained the objection. Finally, Beganovic admitted aside from what was published to the court from the security camera recording, he did not see defendant do anything else that night.

¶ 8 Officer Rosciani of the Chicago Police Department testified that at approximately 9:25 p.m. on October 6, 2011, he received a call about a possible burglary in progress at Library Tower. Rosciani obtained a physical description of the suspected burglar and proceeded to Library Tower's garage in search of the individual. He searched the first two levels of the garage, but he did not see anyone. When he searched the third level of the garage, he saw defendant "peek[]" his head out a door leading to a stairwell. When defendant saw Rosciani, defendant

"slammed the door shut" and fled. Rosciani followed defendant down the stairwell and through a backdoor leading to an alley where he saw defendant in the custody of Officer Matoska.

¶ 9 Officer Matoska of the Chicago Police Department testified that at approximately 9:25 p.m. on October 6, 2011, he responded to a call of a suspected burglary in progress at Library Tower. Matoska's supervisor instructed him to watch the side exit in an alley behind the building. While watching the side exit, defendant opened one of the doors and Matoska detained him. Matoska performed a search of defendant and found two knives and a "multi-use tool" in his backpack.

¶ 10 Defendant moved for a directed verdict, but the trial court denied the motion. He did not present any evidence.

¶ 11 The trial court found defendant guilty of burglary and stated "clearly the defendant was not a resident [at Library Tower]" and "forced his way through the rear door." The court also noted that upon arrest, defendant possessed "burglary tools" which established his intent to commit a theft. The trial court sentenced defendant, based on his criminal background as a Class X offender, to eight years in prison.

¶ 12 On appeal, defendant first contends that the trial court committed reversible error when it allowed Beganovic to testify that defendant did not have the authority to enter Library Tower because the State did not lay a proper foundation for Beganovic's testimony. The court overruled defense counsel's foundation objection in the following colloquy during the State's direct examination of Beganovic:

> "Q. Did the defendant have permission to enter through the back door?
>
> A. No.

> MR. SHELTON [defense attorney]: Objection to that Judge. Judge, foundation. He works as a security officer there. He cannot speak for all the residents in that building as to whether or not he had permission to come into that building, so I ask that the proper foundation be laid.
>
> THE COURT: Your response to that objection.
>
> MS. RIVERA [State's attorney]: Judge, I asked the witness questions about who he worked for that night, which security company he worked for, what his duties were as a security guard in that building. And he specifically testified about residents only having access to that building. And I just asked him if the defendant was a resident and he said no. So I'm merely asking him if the defendant had permission to enter that building as his job as a security officer.
>
> THE COURT: I agree with the State. There is agency here. Overruled."

¶ 13 Both parties agree, as do we, that defendant has forfeited this contention for review. However, defendant argues that we may review his contention under the first prong of the plain-error doctrine.

¶ 14 The plain-error doctrine allows review of unpreserved claims of error under certain circumstances. *People v. Averett*, 237 Ill. 2d 1, 18 (2010). The first prong of the doctrine applies when "a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of

the error." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The burden of persuasion belongs to the defendant. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). In analyzing a claim made for plain error, the first step is to determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 15 Defendant argues the standard of review for determining whether the proper foundation has been laid for proffered evidence is *de novo*. The State disagrees and asserts the proper standard of review is for an abuse of discretion. We agree with the State. The admissibility of evidence at trial, including whether the proper foundation has been laid, lies within the sound discretion of the trial court, and we will not reverse its decision absent an abuse of discretion. See *People v. Watkins*, 2015 IL App (3d) 120882, ¶ 38; *People v. Montes*, 2013 IL App (2d) 111132, ¶ 61. Under the abuse-of-discretion standard, the threshold for finding a trial court abused its discretion is high, and we will not reverse unless the trial court ruled arbitrarily, fancifully or unreasonably, or that "no reasonable person would have taken the view adopted by the trial court." *Watkins*, 2015 IL App (3d) 120882, ¶ 35.

¶ 16 The preliminary questioning of Beganovic laid the requisite foundation for his testimony that defendant did not have authority to enter the building. The State asked Beganovic how long he had worked at Library Tower, what his duties were as a security guard, how he monitored both the front and rear entrances and how someone would enter the building from either entrance. Then, Beganovic testified as to defendant's specific actions on the night in question, that he "forcefully" opened the back door with an unknown object and that he was later seen on security camera peering into the garage. Accordingly, Beganovic could testify to the best of his knowledge whether defendant had the authority to enter Library Tower.

¶ 17 While defendant argues Beganovic did not know all 238 residents or speak to every resident to determine if any of them had authorized defendant to enter Library Tower, this issue concerns the weight the trial court should afford Beganovic's testimony rather than its admissibility. Therefore, we cannot say that no reasonable person would take the view adopted by the trial court that a proper foundation was laid for Beganovic's testimony (see *id.*), and we do not find the trial court abused its discretion.

¶ 18 Accordingly, because we find the trial court did not commit any error, we do not need to address defendant's argument asking us to review this unpreserved claim of error for plain error. See *Thompson*, 238 Ill. 2d at 613. Likewise, we do not need to entertain defendant's alternative argument concerning his trial counsel's ineffective assistance for failing to include his argument about Beganovic's testimony in his motion for a new trial. Because trial counsel is not required to perform a "futile act" (see *People v. Goodloe*, 263 Ill. App. 3d 1060, 1073 (1994)), we will not entertain an ineffective assistance of counsel contention for failure to preserve a claim of error for review where the trial court did not commit error.

¶ 19 Defendant next contends that the trial court erred in limiting the scope of his cross-examination of Beganovic when it sustained the State's relevance objection to defendant's question about Library Tower's procedures for visitors. The court sustained the State's objection in the following colloquy during defense counsel's cross-examination of Beganovic:

> "Q. Now, it is certainly possible that a resident could have given [defendant] permission to come visit him or her and not complied with the guidelines that were in place in terms of informing you; isn't that correct?
>
> A. No.

MS. RIVERA [State's attorney]: Objection to the form of the question.

THE COURT: Sustained.

Q. [Defense attorney]: What were the guidelines in place at the time for residents at that building to have a visitor?

MS. RIVERA: Objection, relevance.

MR. SHELTON [Defense attorney]: Judge, *** [o]ne of the State's burden is that they have to establish lack of consent *** I am simply exploring that.

THE COURT: Sustained, counsel."

¶ 20 Both parties again agree, as do we, that defendant has forfeited this contention for review. However, defendant argues that we may review his argument under either prong of the plain-error doctrine.

¶ 21 In addition to the first prong of the plain-error doctrine that allows review when "a clear or obvious error occurred and the evidence is so closely balanced," the second prong of the doctrine allows review when "a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565. Our first step again is to determine whether any error occurred. *Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 22 A defendant has a fundamental right to conduct a reasonable cross-examination. *People v. Coleman*, 206 Ill. 2d 261, 278 (2002). However, this right is not absolute. *People v. Price*, 404 Ill. App. 3d 324, 330 (2010). The trial court has wide latitude to limit cross-examination in order to prevent testimony of limited relevance. *People v. Klepper*, 234 Ill. 2d 337, 355 (2009). The

limits placed on a cross-examination are within the sound discretion of the trial court. *People v. Stevens*, 2014 IL 116300, ¶ 16. We will only interfere with the trial court's decision when the court has abused its discretion resulting in "manifest prejudice to the defendant." *Id.* We must review the entire record not just the instance of the alleged error. *People v. Harris*, 123 Ill. 2d 113, 144 (1988).

¶ 23 In finding defendant lacked authority to enter Library Tower, the trial court deemed relevant that defendant was "not a resident [at Library Tower]," which defendant does not dispute, that he "forced his way through the rear door" and that his actions were "caught on camera." The court allowed defendant to cross-examine Beganovic, *inter alia*, on the number of residents at Library Tower and whether or not he knew all of them. Assuming, *arguendo*, that defendant could have questioned Beganovic on Library Tower's visitor policies and further established it was possible defendant was a guest of a resident unbeknownst to Beganovic, there is no indication the trial court's finding would have been any different. At best, Library Tower's visitor policies were of limited relevance – an evidentiary matter over which the trial court may properly exercise its control. See *Klepper*, 234 Ill. 2d at 355. As such, there is no indication that when the trial court limited the scope of defendant's cross-examination of Beganovic, it resulted in "manifest prejudice" to defendant. See *Stevens*, 2014 IL 116300, ¶ 16.

¶ 24 Accordingly, because we find the trial court did not commit any error, we do not need to address defendant's argument asking us to review this unpreserved claim of error for plain error. See *Thompson*, 238 Ill. 2d at 613. Likewise, we do not need to entertain defendant's alternative argument concerning his trial counsel's ineffective assistance for failing to include his argument about an improperly limited cross-examination in his motion for a new trial. Because trial counsel is not required to perform a "futile act" (see *Goodloe*, 263 Ill. App. 3d at 1073), we will

not entertain an ineffective assistance of counsel contention for failure to preserve a claim of error for review where the trial court did not commit error. However, even if we were to find that the trial court abused its discretion, we would have found that defendant suffered no prejudice as a result of the trial court limiting defendant's cross-examination of Beganovic. See *People v. Henderson*, 2013 IL 114040, ¶ 11 (stating to succeed on a claim for ineffective assistance of counsel, the defendant must show "the result of the proceeding would have been different").

¶ 25 Defendant next contends that the State failed to sufficiently prove both that he lacked the authority to enter Library Tower and that he had the intent to commit a theft inside.

¶ 26 When assessing the sufficiency of the evidence in a criminal case, we must view the evidence in the light most favorable to the State and then decide if any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. All reasonable inferences must be allowed in favor of the State. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). We will not overturn a conviction unless the evidence is "so improbable or unsatisfactory that it creates" reasonable doubt of guilt. *Id.* Finally, while we must carefully examine the evidence before us, we must give the proper deference to the trial court who saw the witnesses testify (*People v. Smith*, 185 Ill. 2d 532, 541 (1999)), because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 27 An individual commits "burglary when without authority he or she knowingly enters or without authority remains within a building *** with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2010). Both a defendant's lack of authority to be inside a building and his intent to commit a theft therein may be proved with circumstantial evidence. *People v. Smith*,

2014 IL App (1st) 123094, ¶ 13; *People v. Escalante*, 256 Ill. App. 3d 239, 244 (1994). Circumstantial evidence of the intent to commit a theft includes the "time, place, and manner of entry into the premises; the defendant's activity within the premises; and any alternative explanations offered for his presence." *People v. Maggette*, 195 Ill. 2d 336, 354 (2001). Whether a defendant possessed the requisite intent is a question for the trier of fact. *Id.*

¶ 28 Defendant first argues that the State failed to prove he lacked the authority to enter Library Tower because the owner of the building did not testify and Beganovic could not have known if a resident gave defendant permission to enter the building. The State responds, arguing that defendant's actions that night circumstantially prove his lack of authority to enter the building.

¶ 29 We note the State presented direct evidence that defendant lacked the authority to enter Library Tower through Beganovic's testimony. However, to the extent that Beganovic cannot speak for all 238 residents, there was ample circumstantial evidence demonstrating defendant's lack of authority. First, defendant's manner of entry into the building was indicative of his lack of authority. He entered through the rear door at night wearing all black. Furthermore, to gain entry into the building, he used an unknown object to "forcefully" open the door. See *People v. Tobin*, 2 Ill. App. 3d 538, 541 (1971) (finding sufficient evidence to prove a defendant was in a building without authority when he "had to break open a door to gain admission" at 11 p.m. and was found hiding in the basement). Second, defendant only stayed inside the rear entrance of the building for a brief period of time. Shortly after defendant left, the security camera recording showed Beganovic open the door. A reasonable inference can be drawn that defendant left the building when he heard Beganovic coming toward him. Third, defendant was later seen on security camera recording peeking in the second floor of the garage before entering. See *In*

*Interest of G.L.*, 73 Ill. App. 3d 467, 469 (1979) (stating "[l]ack of authority can be established *** by evidence of a surreptitious method of entry"). Finally, when defendant saw Rosciani, he slammed a door shut and fled from the officer. Another reasonable inference can be drawn from defendant's flight that he entered the building without authority. See *People v. Velez*, 2012 IL App (1st) 101325, ¶ 36 (stating a trier of fact may infer "consciousness of guilt" from a defendant's flight).

¶ 30 Defendant also argues that the knives and "multi-use tool" found in his possession upon arrest could have been used for innocent purposes and not for breaking into Library Tower. However, defendant's arguments about the tools' possible innocuous purpose was presented to and implicitly rejected by the trial court. See *People v. Baugh*, 358 Ill. App. 3d 718, 737 (2005) (finding a defendant's sufficiency of the evidence claim unpersuasive where his arguments on appeal about the weaknesses of the State's evidence were presented to and rejected by the trier of fact). Moreover, to the extent that defendant asks us to consider evidence outside the record, we respectfully decline to consider it. See *People v. Wigman*, 2012 IL App (2d) 100736, ¶ 36 (stating reviewing courts will not take cognizance of arguments in parties' briefs that are not properly supported by the record).

¶ 31 Accordingly, when all of the evidence is viewed in the light most favorable to the State, we cannot say that no rational trier of fact could find that defendant lacked the authority to enter Library Tower.

¶ 32 Defendant next argues that the State failed to prove he had the intent to commit a theft inside Library Tower when the trial court exclusively found defendant's intent based on his possession of two knives and a "multi-use tool." The State responds, arguing that defendant's actions that night circumstantially prove his intent to commit a theft.

¶ 33 While the trial court may have articulated that it found defendant's intent to commit a theft inside Library Tower based on the items found in his backpack, we do not have to rely on the trial court's reasoning in determining whether its decision was ultimately correct. See *People v. Rajagopal*, 381 Ill. App. 3d 326, 329 (2008) (stating reviewing courts "review the judgment of the trial court, not its reasoning"). As such, in reaching our decision, we may use any basis supported by the record. *Id.*

¶ 34 First, we note that defendant's possession of these tools do offer circumstantial evidence that he intended to commit a theft inside the building, especially when coupled with his "forceful[]" entry into the building using an unknown object. See *People v. Moreira*, 378 Ill. App. 3d 120, 129 (2007) (stating "[t]he inference is grounded in human experience which justifies the assumption that the unlawful entry was not purposeless, and in the absence of other proof, indicates theft as the most likely purpose") (internal quotation marks omitted); see also *People v. Toolate*, 101 Ill. 2d 301, 308 (1984) (stating "[i]n the absence of inconsistent circumstances, *** proof of unlawful breaking and entering is sufficient to infer the intent to commit theft"). Second, defendant was seen on security camera recording peering in the second floor garage, of which a reasonable inference can be made that defendant was attempting to enter surreptitiously. See *People v. Bridgewater*, 388 Ill. App. 3d 787, 795 (2009) (stating the typical burglary involves "entry by stealth"). Finally, defendant fled when he saw Rosciani. See *People v. Patterson*, 1 Ill. App. 3d 724, 727 (1971) (stating sufficient evidence existed to find a defendant had the intent to commit a theft inside a building when he made "forcible entry" and fled from the building).

¶ 35 Defendant also argues that he "was in the parking garage for 30 minutes" and therefore had ample time to act on his alleged intent to commit a theft, but there was no evidence that a

theft was ever attempted. However, the intent to commit a theft inside a building when entering is entirely independent from the outcome of such entry. See *People v. Poe*, 385 Ill. App. 3d 763, 766 (2008) (stating that in a burglary case, one can have the requisite intent to commit a theft inside a building regardless of whether a subsequent theft is ever committed). Therefore, despite no evidence of an attempted theft, this fact is inconsequential in a burglary analysis. Finally, defendant suggests that he could have been granted permission to be at the building by one of the residents that Beganovic did not know. However, if defendant was invited to Library Tower by a resident, it defies logic that he would spend 30 minutes in the building's garage.

¶ 36 When all of the evidence is viewed together in the light most favorable to the State, we cannot say that no rational trier of fact could find that the State sufficiently proved defendant intended to commit a theft inside Library Tower. Accordingly, we find that the State presented sufficient evidence on both elements of burglary to sustain defendant's conviction. See 720 ILCS 5/19-1(a) (West 2010).

¶ 37 Finally, defendant contends that his mittimus should be corrected to reflect that he is entitled to an additional three days of presentence custody credit. Defendant argues, the State concedes, and we agree, that his mittimus must be corrected to accurately reflect his presentence custody credit from 557 days to 560 days.

¶ 38 A defendant held in custody for any part of a day should be given credit against his sentence for that day (*People v. Williams*, 2013 IL App (2d) 120094, ¶ 37; see 730 ILCS 5/5–4.5–100(b) (West 2010)), excluding his day of sentencing. *People v. Harris*, 2012 IL App (1st) 092251, ¶ 37.

¶ 39 Defendant was arrested on October 6, 2011, and sentenced on April 18, 2013, which totaled 560 days in custody prior to his date of sentencing. His mittimus reflected credit for only

557 days in custody prior to his date of sentencing. Therefore, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), and our ability to correct a mittimus without remand (see *People v. Hill*, 408 Ill. App. 3d 23, 31 (2011)), we order the clerk of the circuit court to correct defendant's mittimus to reflect 560 days of presentence custody credit. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 40 Affirmed; mittimus corrected.