

NOTICE

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2015 IL App (4th) 131002-U

NO. 4-13-1002

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 16, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
YESURE MURRIEL,)	No. 12CF1067
Defendant-Appellant.)	
)	Honorable
)	Scott D. Drazewski,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Pope and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part, vacated in part, and remanded for further proceedings, concluding (1) sufficient evidence existed to prove defendant possessed the requisite intent to commit residential burglary but (2) defendant is entitled to a new preliminary *Krankel* hearing without the State's adversarial participation.

¶ 2 In April 2013, a jury found defendant, Yesure Murriel, guilty of residential burglary after the evidence showed he entered the apartment of James St. Paul and was subsequently discovered with St. Paul's property in his possession. In June 2013, prior to sentencing, defendant alleged defense counsel provided ineffective assistance of counsel. Following a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), the court found insufficient evidence to warrant appointing new counsel or scheduling further proceedings. The court then sentenced defendant to 6½ years' imprisonment.

¶ 3 Defendant appeals, asserting (1) the State failed to prove he entered St. Paul's apartment with the intent to commit a theft, and (2) the trial court failed to conduct a proper preliminary inquiry into defendant's complaints against defense counsel pursuant to *Krankel*. We affirm in part, reverse in part, and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In October 2012, a McLean County grand jury returned a bill of indictment, alleging defendant, on June 1, 2012, committed the offense of residential burglary "in that he knowingly and without authority entered or knowingly and without authority remained within the dwelling place of James St. Paul, with the intent to commit therein a felony or theft." 720 ILCS 5/19-3(a) (West 2010).

¶ 6 A. Jury Trial

¶ 7 In April 2013, defendant's case proceeded to jury trial.

¶ 8 1. *St. Paul's Testimony*

¶ 9 St. Paul testified he was a full-time student at Illinois State University. On June 1, 2012, he was living in an apartment on West Phoenix Street with two roommates. One roommate, Jeremy Meciej, was away on a trip, while the other roommate, John Douglas, was asleep in his private bedroom. Around 5 a.m., St. Paul, whose bedroom was directly next to the back door of the apartment unit, was sleeping when he felt someone shaking his leg. St. Paul awoke and observed a man he had never seen before standing at the foot of the bed. St. Paul said he did not know the man, whom he later identified as defendant, nor did he give him permission to be inside the apartment. Defendant wore a black jacket with red lettering and a hat. St. Paul said he had a "good look" at the man for "about five seconds." He looked into the man's face for three to five seconds, and his view was unobstructed. According to St. Paul, he could see fairly

well because the sunrise brought light through the window. During this encounter, he admitted he was startled and scared.

¶ 10 After a few seconds, defendant fled the apartment. St. Paul jumped out of bed, dressed, and ran to the area of the apartment where he kept his car keys. He discovered his keys were missing. Upon looking out the door that led to the parking lot, St. Paul observed the headlights on his car flash and heard the horn honk twice. He ran outside but did not see anyone. Because the ground was wet from earlier rainfall, he returned to the house to put on his shoes, which took a matter of seconds. When he returned to the doorway, he noticed defendant standing just outside the parking lot. St. Paul said he recognized defendant both by his facial features and his clothing because defendant was standing only "a matter of feet" away

¶ 11 St. Paul asked defendant if he had just been in St. Paul's apartment, to which defendant replied it had been another person. St. Paul did not see anyone else in the immediate area. According to St. Paul, defendant then ran from the parking lot. St. Paul remained in the doorway of his apartment and observed defendant pull a set of keys from his pocket and throw them into a nearby ditch. Defendant then retrieved the keys and called out to St. Paul that he found them in the ditch and presumed the "other guy" must have thrown them there.

¶ 12 Defendant approached St. Paul and handed him the keys, after which St. Paul said they spoke for approximately one minute before defendant left. According to St. Paul, defendant told him about wanting to take a train to Chicago to see his girlfriend. St. Paul testified defendant was not very coherent and appeared intoxicated.

¶ 13 After ending the conversation with defendant and returning to his apartment, St. Paul called the police, and officers arrived within 30 to 40 seconds because the police department was next door. Police immediately apprehended defendant in the parking lot and St. Paul

identified him as the person who entered his apartment. St. Paul also identified defendant in open court as the man he saw standing at the foot of his bed.

¶ 14 After police arrested defendant, officers asked St. Paul to indicate whether any items discovered on defendant's person at the time of his arrest belonged to St. Paul. He identified a Sharper Image iPod dock/speaker as belonging to him after he discovered the item missing from his kitchen counter.

¶ 15 *2. Meciej's Testimony*

¶ 16 Meciej, one of St. Paul's roommates, testified he was out of town on June 1, 2012, and he did not know defendant, give defendant permission to enter the apartment, or give defendant permission to take any items from the apartment.

¶ 17 *3. Officer Wiggs' Testimony*

¶ 18 Tyler Wiggs, an officer with the Normal police department, testified he responded to St. Paul's call on June 1, 2012. At the time, Officer Wiggs was in field training, as he had just graduated from the police academy in March 2012. Upon arrival, Officer Wiggs observed defendant walking through the parking lot along the west side of St. Paul's apartment building. He was wearing a black jacket with red lettering and a hat. Officer Wiggs testified defendant was carrying a black Sharper Image case that contained an iPod speaker. Initially, defendant told police the speaker belonged to him. Upon further questioning, defendant said he found the speaker on the ground outside the apartment complex. When Officer Wiggs asked follow-up questions, defendant said he got it from a friend.

¶ 19 When Officer Wiggs questioned defendant about the residential burglary, defendant initially told Officer Wiggs he had not been in St. Paul's apartment. He claimed he had been dropped off by a friend and intended to urinate behind the building. He said he did not

know any residents of the building. Later, defendant told police his friend gave him the iPod speaker, and stated the same friend gave him permission to enter the apartment building.

Defendant never identified this "friend" or told police where he lived. Eventually, defendant once again denied entering or knowing anyone in the building. According to Officer Wiggs, defendant's speech was slightly slurred and his balance unsteady. Defendant also had the odor of an alcoholic beverage on his breath. Overall, Officer Wiggs stated defendant told him five versions of events, all inconsistent with one another.

¶ 20 After St. Paul positively identified defendant as the person from his apartment, Officer Wiggs arrested defendant. Defendant then denied being inside the apartment and continued to ask why he was being arrested. After being told of his arrest for residential burglary, defendant said he would not have stolen anything because he could not get probation for stealing.

¶ 21 *4. Closing Arguments*

¶ 22 Following the State's presentation of evidence, defendant moved for a directed verdict, which the trial court denied. During closing arguments, defense counsel's theory of the case was that the State failed to prove defendant possessed the requisite intent to commit the crime of residential burglary. Rather, defense counsel asserted defendant, in his drunken state, stumbled into St. Paul's apartment by mistake, but left immediately after realizing he was in the wrong place.

¶ 23 After deliberations, the jury returned a guilty verdict.

¶ 24 *B. Posttrial Proceedings*

¶ 25 *1. Preliminary Krankel Hearing*

¶ 26 In June 2013, defendant's sentencing hearing commenced. In the written statement included with his presentence-investigation report, defendant alleged defense counsel (1) refused to offer proof of defendant's innocence because to do so would require defense counsel to subpoena bank records demonstrating defendant was using an automatic teller machine (ATM) in Bloomington around the time of the offense; (2) advised him not to testify because he was going to win the case; and (3) failed to subpoena his probation officer to testify. The trial court asked defense counsel to respond to defendant's allegations. Defense counsel explained he reviewed defendant's ATM receipt to determine whether it provided defendant with an alibi, but he determined the defense lacked merit. Moreover, defense counsel noted his defense was not that defendant was elsewhere during the commission of the residential burglary, but that defendant did not commit a residential burglary. Defense counsel did not recall defendant asking to subpoena his probation officer and was unaware what, if any, insight that would have provided to the defense.

¶ 27 Defendant then told the trial court he asked defense counsel to subpoena his probation officer for the purpose of demonstrating, in May 2012, defendant desired to visit his ailing child in Chicago, and that he planned to leave on June 1, 2012. As to the ATM receipt, defendant stated he had a receipt showing he visited an ATM in Bloomington at 5:20 a.m. on June 1, 2012, so he could not have been in St. Paul's apartment at 5 a.m., the time St. Paul alleged the residential burglary occurred. Rather, he asserted, he arrived in the area around 6 a.m., when police immediately arrested him. The State and defense counsel recalled St. Paul testifying the offense occurred at 6 a.m., so they argued the ATM receipt failed to provide defendant with an alibi.

¶ 28 Despite the dispute over the time at which the residential burglary occurred, the trial court found St. Paul identified defendant, who was thereafter arrested on the premises immediately following the incident and had St. Paul's property in his possession. The court also found defendant knowingly and voluntarily waived his right to testify in open court; thus, his contention that defense counsel allegedly made misrepresentations was meritless. The court therefore determined it was not necessary to appoint new counsel for defendant for the purpose of conducting a *Krankel* hearing because defendant failed to demonstrate any neglect. Specifically, the court found defendant's allegations pertained to matters of trial strategy.

¶ 29 *2. Sentencing*

¶ 30 The trial court thereafter sentenced defendant to 6½ years' imprisonment. In July 2013, defendant filed a *pro se* motion to reduce his sentence, which the court denied in December 2013.

¶ 31 This appeal followed.

¶ 32 **II. ANALYSIS**

¶ 33 On appeal, defendant argues (1) the State failed to prove he entered St. Paul's apartment with the intent to commit a theft, and (2) the trial court failed to conduct a proper preliminary *Krankel* inquiry into defendant's complaints against defense counsel. We address these arguments in turn.

¶ 34 **A. Evidence of Intent**

¶ 35 Defendant first argues the State failed to provide sufficient evidence of his intent to commit a theft or other felony at the time he entered St. Paul's apartment. We disagree.

¶ 36 In a jury trial, the State bears the burden of proving the defendant guilty of every element of the offense beyond a reasonable doubt. *People v. Maggette*, 195 Ill. 2d 336, 353, 747

N.E.2d 339, 349 (2001). "A reviewing court will not set aside a criminal conviction on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *Id.* In other words, where a jury finds a defendant guilty, our inquiry is whether, in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004). In evaluating the jury's verdict, we must consider the jury's ability to observe the witnesses and weigh their credibility. See *People v. Singleton*, 367 Ill. App. 3d 182, 189, 854 N.E.2d 326, 333 (2006).

¶ 37 To establish the offense of residential burglary, the State must establish the defendant had the intent to commit a theft when entering the residence. See *Maggette*, 195 Ill. 2d at 354, 747 N.E.2d at 350. Whether the defendant possessed the requisite intent can be inferred from the surrounding circumstances. *Id.* at 354, 747 N.E.2d at 349. These circumstances include the time, place, and manner of entry, the defendant's activities within the premises, and any alternative explanations offered for his presence. *Id.*

¶ 38 Defendant first argues his actions of waking St. Paul and failing to flee the scene were actions inconsistent with the intent to commit a theft. Accordingly, defendant argues a reasonable alternative explanation for his presence, at 5 a.m., in St. Paul's residence can be attributed to his intoxication. We are not persuaded. Defendant concedes he was intoxicated at the time of the offense. Though waking St. Paul and failing to flee the scene after being discovered increased defendant's chances of being apprehended, his intoxication could have led him to make such decisions. Indeed, upon being located by Officer Wiggs, defendant attempted

to talk his way out of the situation by offering five different versions of events to explain how he came to be inside St. Paul's apartment and in possession of St. Paul's property.

¶ 39 Defendant also contends he lacked the requisite intent upon entering St. Paul's apartment because nothing in the record suggests forced entry, nor did he possess burglary tools. The fact defendant gained access to the residence without "breaking and entering" and sans burglary tools does not negate the logical inference that may be drawn when one enters the home of another without authority. The jury could have reasonably determined, after evaluating all of the evidence, that the State met its burden as to the requisite intent. Reaching such a conclusion can hardly be described as improbable or unsatisfactory.

¶ 40 Additionally, defendant asserts we should consider alternative explanations for his entry into St. Paul's home. For example, defendant argues, in his intoxicated state, he might have entered St. Paul's residence for the purpose of using the restroom. Nothing in the evidence suggests defendant used a restroom at St. Paul's residence. To the contrary, defendant told Officer Wiggs he intended to urinate behind the apartment building. Defendant's argument is premised on the jury's acceptance of such alternative explanations for his presence in St. Paul's apartment. The jury had the opportunity to hear defendant's myriad explanations through the witnesses' testimony and clearly found those reasons lacked credibility. Defendant's only plausible excuse for being within the apartment building, as included in his laundry list of contradictory statements, was that he knew one of the residents, but he was unable to identify the friend who allegedly lived within the building or the apartment in which this friend allegedly resided. Thus, defendant's alternative explanation is insufficient for us to find the jury's verdict was so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt.

¶ 41 Defendant asserts this case is akin to *People v. Boose*, 139 Ill. App. 3d 471, 487 N.E.2d 1088 (1985). In *Boose*, the intoxicated defendant entered into a retail establishment, where he wandered around for several hours until the store closed. *Id.* at 472, 487 N.E.2d at 1089. The defendant fell asleep in the storeroom, where guards discovered him the following morning, wearing clothing with price tags still attached and carrying unpurchased merchandise in his pockets. *Id.* at 471-72, 487 N.E.2d at 1089. The appellate court vacated Boose's burglary conviction, concluding the evidence did not support the finding the defendant entered the store with the intent to commit a theft. *Id.* at 474, 487 N.E.2d at 1091. Rather, the opposite was true—the evidence supported the finding the defendant formulated the intent to commit a theft after the store closed. *Id.*

¶ 42 The present case is distinguishable from *Boose*. Though both *Boose* and the present case revolve around intoxicated defendants, the similarities end there. The defendant in *Boose* lawfully entered into a retail establishment and wandered around for several hours without incident before discovering the store had closed. It was not until the store closed, hours later, that the defendant engaged in unlawful behavior. Here, defendant had no lawful reason to enter St. Paul's residence, as he had not been given any authority to do so, nor did he have any lawful reason for taking possession of St. Paul's property. Additionally, unlike *Boose*, defendant provided Officer Wiggs with a myriad of contradictory statements, from which the jury could find his credibility lacking.

¶ 43 Defendant also relies on *People v. Ehrich*, 165 Ill. App. 3d 1060, 519 N.E.2d 1137 (1988). In *Ehrich*, the defendant, who was intoxicated, wandered into a residence and woke the family's daughter. *Id.* at 1063, 519 N.E.2d at 1138. The father subsequently awoke to the sounds of his daughter crying and detained the defendant until police arrived. *Id.* at 1063,

¶ 47 Defendant next asserts the trial court erred by failing to conduct an appropriate preliminary *Krankel* inquiry into his claims for ineffective assistance of counsel because the court allowed the State to participate in an adversarial manner.

¶ 48 When a defendant, *pro se*, makes allegations that defense counsel provided ineffective assistance of counsel, the trial court may engage in a preliminary inquiry regarding the nature of the defendant's claims. *People v. Nitz*, 143 Ill. 2d 82, 134, 572 N.E.2d 895, 919 (1991). Only if the defendant's allegations demonstrate defense counsel may have neglected his case must the court appoint new counsel to represent the defendant in an evidentiary hearing. *Id.*

¶ 49 During the preliminary-inquiry phase, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *People v. Moore*, 207 Ill. 2d 68, 78, 797 N.E.2d 631, 638. In other words, the court may (1) discuss the allegations with the defendant, (2) briefly question defense counsel regarding the allegations, and (3) base its evaluation of the defendant's allegations on its personal knowledge of defense counsel's performance at trial. *Id.* at 78-79, 797 N.E.2d at 638. A preliminary *Krankel* hearing "should operate as a neutral and nonadversarial proceeding." *People v. Jolly*, 2014 IL 117142, ¶ 38, 25 N.E.3d 1127, *modified on denial of reh'g* (Jan. 28, 2015). Because the defendant is essentially acting *pro se* for purposes of the preliminary proceedings, "it is critical that the State's participation at that proceeding, if any, be *de minimis*." *Id.* "Certainly, the State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary *Krankel* inquiry." *Id.* We review *de novo* whether the court properly conducted the preliminary *Krankel* inquiry. *Id.* ¶ 28, 25 N.E.3d 1127.

¶ 50 In this case, defendant asserts the State's participation in the preliminary *Krankel* proceedings created an adversarial proceeding requiring reversal under *Jolly*. We agree. While reviewing defendant's presentence-investigation-report statement, the trial court determined defendant's complaints of ineffective assistance of counsel necessitated a preliminary *Krankel* inquiry. The trial court subsequently asked defendant to expound on his allegations and then sought a response from defense counsel.

¶ 51 In discussing the relevance of defendant's bank records, which purportedly showed he used an ATM across town around the time of the alleged residential burglary, defense counsel and the court attempted to recall the time the residential burglary occurred. The State then offered: "Your Honor, I believe it was just after 6 a.m." When defendant disputed the time, arguing St. Paul alleged the offense occurred at 5 a.m., the court collected its notes of the trial to refresh its recollection. When the court's notes provided no clarification, defense counsel recounted St. Paul's testimony: "My recollection is that he would have testified that he was awakened around 6:00." The State then spoke up with, "Your Honor. May I just add a little more to that, Your Honor?" The State then argued:

"That even aside from the timeline, the Court heard testimony from the witnesses that Mr. St. Paul indentified the defendant as being in his apartment. Also the geography of the scene was that his apartment was across the street from the Normal [p]olice [d]epartment, and immediately after receiving the call, they walked out of the backdoor and made contact with the defendant outside of that residence. Essentially, I mean, exact time whether it was 5:50 or 6:10 is irrelevant, based on the surrounding factors.

Additionally, the officers testified that the defendant had the iPod speakers in his pocket and they were identified as belonging to the victim. And the victim indicated that he spoke with the defendant outside of his residence, and that he had his keys—the defendant had the victim's keys."

¶ 52 The State asserts its *de minimis* participation in the proceedings distinguishes this case from *Jolly*, where the State was permitted to call witnesses and make arguments before the trial court. *Id.* ¶¶ 19-22, 25 N.E.3d 1127. Although the State did not participate to the extent present in *Jolly*, the State argued its position by contending defendant's claims were not supported by the record. In arguing its position, the State advanced an argument relying on facts in the record that had not been raised or relied upon by defense counsel. In other words, the State advocated for the trial court to accept defense counsel's position regarding defendant's ATM receipts. By advocating against defendant, the State turned the preliminary *Krankel* inquiry into an adversarial proceeding requiring reversal under *Jolly*. As the State's participation at the preliminary *Krankel* hearing frustrated defendant's opportunity for a neutral trier of fact to evaluate his claims, we remand this case for a new preliminary *Krankel* proceeding before a different judge, without the State's adversarial participation.

¶ 53 III. CONCLUSION

¶ 54 For the foregoing reasons, we affirm the trial court's judgment in part, vacate in part, and remand this case for further proceedings. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 55 Affirmed in part and vacated in part; cause remanded with directions.