FOURTH DIVISION
September 8, 2016

No. 1-14-1010

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 20821
	)	
BRANDON SCARVER,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm defendant's conviction of home invasion over his contention that he was not proven guilty of the offense where the apartment was empty at the time of his entry.

¶ 2 Following a bench trial, defendant Brandon Scarver was convicted of armed robbery, home invasion and aggravated kidnapping, all with a firearm, and unlawful use of a weapon by a felon (UUWF). He was sentenced to 21-year terms of imprisonment on each of the first three convictions, and to a 7-year term of imprisonment on the UUWF conviction, all to be served concurrently. On appeal, defendant solely contends that his conviction for home invasion should be reversed as the apartment he entered was empty. We affirm.

¶ 3 Defendant was charged with multiple offenses, including home invasion. 720 ILCS 5/12-11(a)(3) (West 2010). The indictment charged that defendant committed home invasion when he knowingly and without authority entered the dwelling place of Chimire Flowers, knowing or having reason to know that one or more persons were present and, while armed with a firearm, used force or threatened the imminent use of force upon Deonte Warren within the dwelling place.

¶ 4 At trial, Deonte Warren testified that he took the bus to see his girlfriend Chimire Flowers shortly after midnight on November 15, 2011. He exited the bus at Homan Avenue and Douglas Boulevard in Chicago and saw a man sitting on a bench near the bus stop. Warren started walking to Flowers' apartment, which was located on the third floor of a three-story apartment building at 3402 Douglas Boulevard. The man who was at the bus stop followed him. When Warren arrived at the main entrance to the apartment building, he saw the same man directly behind him with a gun. The man pointed the gun at Warren's back and instructed him to open the door and walk up the stairs, which he did. The man followed Warren to Flowers' apartment and told him to open the apartment door. Warren complied and the man followed

Warren into the apartment. Nobody else was inside the apartment at the time. The man pointed his gun at Warren's face and took two cell phones and keys from him. Afraid he was going to be shot, Warren grabbed the man and reached for his gun. While they struggled, the barrel came out of the gun, bullets spilled onto the floor, and the gun itself fell on the floor. Warren was able to retrieve one of his phones and called 911. A copy of the recording of Warren's 911 call was admitted into evidence. The police arrived shortly thereafter. They secured the apartment, recovered the gun and bullets, and returned Warren's phones and keys. At the police station, Warren identified defendant, in a photo, as the attacker.

¶ 5 Officer Pratscher testified that he and his partner went to 3402 West Douglas Boulevard, apartment 3C, at approximately 12:15 a.m. on November 15, 2011, in response to a 911 call. He entered the apartment and saw Warren and defendant wrestling in the front room and the kitchen. A gun was on the floor a few feet from where they were wrestling and several bullets were on the ground in the kitchen area. Pratscher separated the two men and initially handcuffed both of them. Warren identified defendant as his attacker. At the scene, the police recovered a set of keys and a cell phone from defendant's person, a second cell phone on the living room floor, the gun, and nine bullets.

¶ 6 The State admitted into evidence a certified copy of defendant's prior felony conviction to satisfy the felony element of the UUWF charge. The State then rested and defendant did not present any evidence.

¶ 7 Following closing arguments, the trial court found defendant guilty beyond a reasonable doubt of home invasion, armed robbery, and aggravated kidnapping, each with a firearm, and UUWF.

¶ 8 On appeal, defendant solely maintains that his conviction for home invasion should be reversed because the trial evidence indisputably showed that no person was present within the apartment when he entered.

¶ 9 Typically, when a defendant challenges the sufficiency of the evidence to sustain a conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v. Bradford*, 2016 IL 118674, ¶ 12.

¶ 10 Relying on *People v. Smith*, 191 Ill. 2d 408, 411 (2000), however, defendant argues that *de novo* review should apply here because the facts in this case are not in dispute, *i.e.*, defendant and Warren entered an empty apartment. The State responds that defendant is, in fact, challenging the sufficiency of the evidence because the issue of whether defendant knew that the victim was present when he knowingly entered the dwelling place was a factual question that turned not only on the credibility of the witnesses, but also on the inferences to be drawn from all

of the evidence. See *People v. Kibayasi*, 2013 IL App (1st) 112291, ¶ 39 (distinguishing *Smith* and rejecting *de novo* review where the issue was whether the State proved an element of the offense, "a factual question that turn[ed] not only on the credibility of the witnesses, but also [on] inferences to be drawn from all of the evidence").

¶ 11 Despite the State's assertion that defendant is challenging the sufficiency of the evidence, we note that, in its brief on appeal, the State relied on *People v. McNeal*, 405 Ill. App. 3d 647, 677 (2010) and *People v. Thomas*, 384 Ill. App. 3d 895, 898 (2008), both of which applied *de novo* review to the issue of whether a home invasion occurred when a residence is unoccupied on entry. We need not resolve this conflict between the parties, however, because our determination is the same under either standard of review.

¶ 12 As relevant to this appeal, section 12-11(a)(3) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-11(a)(3) (West 2010)) defines the offense of home invasion as follows:

> "A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present *** and
>
> * * *
>
> *** [w]hile armed with a firearm uses force or threatens the imminent use of force upon any person or persons within the dwelling place whether or not injury occurs ***." 720 ILCS 5/12-11(a)(3) (West 2010), now codified as 720 ILCS 5/19-6(a)(3) (West 2014).

Citing *People v. Pettit*, 101 Ill. 2d 309 (1984), defendant argues his entry into the apartment did not qualify as a home invasion as the apartment was unoccupied and he did not "know or [have]

reason to know that one or more persons [was] present" in the residence as stated in section 12-11(a)(3) of the Code.

¶ 13 In *Pettit*, the defendants were involved in a drug deal and forced the sellers at gunpoint to go with them to the supplier's residence, which was a first-floor apartment inside a two-story house. *Pettit*, 101 Ill. 2d at 311. The house was divided into two separate apartments, but the defendants thought the supplier lived there alone and were not aware that different people lived upstairs. *Id*. at 311, 314. The defendants forced their way into the first-floor apartment of the supplier, who was not home. *Id*. at 311. However, an upstairs neighbor was in the apartment, babysitting the supplier's son. *Id*. When she screamed, her boyfriend came downstairs from their apartment and was ordered to lie face down on the floor. *Id*. A few hours later, one of the defendants went upstairs to see if anyone was inside the second-floor apartment. *Id*. He saw that the apartment was deserted and ordered everyone upstairs into that apartment. *Id*. The defendants were ultimately charged and convicted of home invasion of the second-floor apartment. *Id*. at 310, 312.

¶ 14 We reversed the defendants' home invasion convictions and our supreme court affirmed our decision. It first held that constructive presence does not satisfy the terms of the statute, as "[t]he statute requires the physical presence of one or more persons in the dwelling to constitute a home invasion." *Id*. at 313 (overruling *People v. Pavic*, 104 Ill. App. 3d 436 (1982) (in which court held that basement of apartment building was part of a victim's "dwelling place," where the defendant entered victim's empty apartment while she was in the basement of the building and raped her on her return)). The court then considered whether the victims were present in the

dwelling at the time of the invasion. It concluded that, although there had been an invasion of the first-floor apartment, there was insufficient evidence to show that the defendants committed a home invasion of the second-floor apartment. *Id*. at 314. As the defendants did not know that there were two apartments occupied by different people, the evidence did not show that the defendants knew they were entering the "dwelling place of another" when they entered the second-floor apartment. *Id*.

¶ 15 As defendant acknowledges, appellate court decisions have distinguished *Pettit* and affirmed convictions for home invasion where the dwelling was unoccupied when the offender entered. See *McNeal*, 405 Ill. App. 3d at 679 (home invasion established where the victim entered the apartment before the defendant, who forced her into the apartment with a knife); *Thomas*, 384 Ill. App. 3d at 900 ("simultaneous forced entry alongside the victim is sufficient to satisfy the home invasion statute"); *People v. Dall*, 207 Ill. App. 3d 508, 523-24 (1991) (forcing a victim into her home and following her into the residence without authority establishes home invasion). Defendant maintains, however, that the above appellate court opinions are in "direct conflict" with our supreme court decision in *Pettit*, and thus we are bound to follow the precedent of the Illinois Supreme Court in *Pettit*, and not the appellate court opinions.

¶ 16 We disagree that our decisions are in direct conflict with *Pettit*. The crux of *Pettit* was that there was no evidence that the defendants knew they were entering the dwelling place of another when they entered the "deserted" second-floor apartment. *Pettit*, 101 Ill. 2d at 314. In contrast, the defendants in *McNeal*, *Thomas*, and *Dall* knew they were entering the dwelling place of another when they entered the residences behind or alongside the victims. *McNeal*, 405

Ill. App. 3d at 679; *Thomas*, 384 Ill. App. 3d at 899-900; *Dall*, 207 Ill. App. 3d at 523-24. Therefore, *McNeal*, *Thomas* and *Dall* distinguished *Pettit*, and did not conflict with it.

¶ 17 The case at bar is analogous to *McNeal*, *Thomas*, and *Dall* and similarly distinguishable from *Pettit*, as defendant's knowledge that he was entering the dwelling place of another is uncontested. Warren's uncontradicted testimony showed that he entered the apartment moments before defendant, who forced Warren inside at gunpoint. Therefore, defendant knew Warren was present inside the home when he entered without lawful authority.

¶ 18 This case does not turn on the precise timing of when Warren and defendant entered the apartment. Following *McNeal*, *Thomas*, and *Dall*, even if both men entered the apartment together, the evidence was sufficient to establish home invasion.

¶ 19 A defendant commits home invasion when he "knowingly enters the dwelling place of another when he *** knows or has reason to know that one or more persons is present." 720 ILCS 5/12-11(a)(3) (West 2010). This language excludes liability "where the defendant has no reason to know that a dwelling is occupied; for example, where the defendant enters a deserted residence in which a trespasser happens to be present." *People v. Mata*, 316 Ill. App. 3d 849, 851 (2000). Here, defendant had every reason to know someone was present in the dwelling as he had forced Warren into that dwelling at gunpoint.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 21 Affirmed.