2011 IL App (4th) 100492-U

Filed 12/15/11

NO. 4-10-0492

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
AARON D. HORTON,	)	No. 10CF50
Defendant-Appellant.	)	
	)	Honorable
	)	Scott H. Walden,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices McCullough and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Just because the evidence had some discrepancies and just because the State's witness lied to the police before recanting her lie and implicating herself and the defendant, it does not follow that a rational jury would have had to disbelieve this witness.

(2) In its instructions to the jury on home invasion, the trial court did not commit plain error by omitting to inform the jury, *sua sponte*, that a pellet gun is not a "firearm," considering that (1) the court told the jury the elements of home invasion and (2) in its ordinary meaning, a "firearm" is a weapon from which shot is discharged by exploding gunpowder.

(3) Convicting the defendant of both home invasion and residential burglary did not violate the one-act, one-crime rule.

¶ 2 A jury found defendant, Aaron D. Horton, guilty of counts I and VII of the second amended information. Count I charged him with home invasion (720 ILCS 5/12-11(a)(3) (West 2010)), for which the trial court sentenced him to 22 years' imprisonment, and count VII charged

him with residential burglary (720 ILCS 5/19-3(a) (West 2010)), for which the court sentenced him to a concurrent term of 10 years' imprisonment.

¶ 3 Defendant appeals on three grounds. First, he challenges the sufficiency of the evidence. Under our deferential standard of review, however, the questions he raises about bias, credibility, and discrepancies in the evidence would not justify overturning the verdicts.

¶ 4 Second, defendant argues that, on its own initiative, the trial court should have instructed the jury that a "firearm," for purposes of home invasion, did not include a pellet gun. He maintains that the court's failure to so instruct the jury was plain error. On the contrary, we find no plain error in this respect, considering that the ordinary meaning of "firearm" excludes a pellet gun.

¶ 5 Third, defendant contends that the one-act, one-crime rule obliges us to vacate his conviction of residential burglary. We disagree, because the convictions of home invasion and residential burglary were not carved from precisely the same physical act and because residential burglary is not a lesser included offense of home invasion.

¶ 6 Therefore, we affirm the trial court's judgment.

¶ 7 I. BACKGROUND

¶ 8 A. The State's Case in Chief

¶ 9 1. *The Testimony of Gregory Freels*

¶ 10 a. Josh Turnbaugh's Attempt to Break Into Freels's House in October 2009

¶ 11 Freels testified he used and sold cannabis while residing at 1220 Koetters Lane in Quincy and that Josh Turnbaugh was one of his customers. One day, in October 2009, Turnbaugh approached Freels and offered to trade methamphetamine for cannabis. Freels refused to trade, because he wanted cash.

¶ 12 Later that evening, Jeremy Hinkamper, who also lived at 1220 Koetters Lane, came home and found Turnbaugh knocking on the front door. Hinkamper told Turnbaugh that no one was home and that he, Hinkamper, had no key. Turnbaugh then sprayed pepper spray on Hinkamper and tried, without success, to kick in the door.

¶ 13 b. The Burglary in January 2010

¶ 14 In the early morning hours of January 26, 2010, Freels was asleep on the couch in his living room, at 1220 Koetters Lane, and his girlfriend, Jocelyn Reid, who also resided there, was asleep in a bedroom. On a coffee table, next to the couch, were some debris of cannabis, but not enough to smoke. Freels was awakened by a blow to his head: a man was standing over him, hitting him on the head with a pistol. This man, whom Freels did not know, was African-American and was wearing black clothing with a hoodie and some kind of stocking cap. Despite Freels's efforts to cover his head, the man hit him on the head with the pistol six times. Freels testified that the pistol "could have been a pellet gun that looked like a real gun or something, but it was definitely a gun."

¶ 15 Reid emerged from the bedroom and began trying to push the intruder toward the front door. Freels recovered his faculties and helped Reid push the man outside and close and lock the door. Then Freels ran to the bathroom to see if he had been wounded.

¶ 16 Freels had no idea why the man had come into the house. At no point did the man say anything to them or look around for anything.

¶ 17 The police showed some photographic arrays to Freels, but he could not identify any of the pictured men as being the intruder. He estimated the intruder was about his own size: 5 feet 10 inches tall and 165 pounds. He told the police the only person he could think of who might know something about the burglary was Josh Turnbaugh.

¶ 18 At some point, the police became aware of the scales, clipped-off corners of Baggies, and cannabis in Freels's house. He never was charged, however, with delivering or intending to deliver cannabis. Instead, in return for the dismissal of a charge of possessing cannabis, he pleaded guilty to possessing drug paraphernalia. He was sentenced to a fine and costs.

¶ 19 2. *The Testimony of Jocelyn Reid*

¶ 20 Reid testified that during the night of January 25 to 26, 2010, she was awakened by the sound of scuffling in the living room. She was aware that Freels used cannabis and sold it out of the house. When she came out of the bedroom and into the living room, she saw Freels struggling with a man, who was beating Freels with a pistol. She ran over and shoved the man away from Freels.

¶ 21 The living room was illuminated with floor lamps, enabling Reid to see the intruder. She did not recognize him but estimated he was about 5 feet 9 inches or 5 feet 10 inches tall—about Freels's height—and that he weighed between 160 and 175 pounds (she had told the police 150 to 160 pounds). He wore black jeans, a black jacket, and a stocking cap. The man did not speak at all while he was in the house.

¶ 22 Like Freels, Reid had looked at photographic arrays without seeing anyone who resembled the intruder. According to Reid, however, defendant—the only black man in the courtroom—looked "very similar" to the intruder.

¶ 23 Reid described the intruder's gun as a black pistol, which he held by the barrel, using it as a club. It seemed to her he was holding the pistol as "a sort of prop," not as if he really intended to use it. Unknowledgeable about guns, she had no idea what the make or model of the pistol was. She had no doubt, though, that it was a handgun; it looked like a real gun to her.

¶ 24 As the man beat Freels with the pistol, Reid pushed the man toward the open door that was six to eight feet away. The man made eye contact with her and hit her once in the back of the head with the butt of the pistol. She muscled him into the doorway and hit him with the door. Freels helped her push the door completely shut—in so doing, pushing the man outside.

¶ 25 After the intruder was ejected from the house, Reid heard voices outside. It sounded like two men doing an after-action review in the front yard. The conversation went on for a minute or two (she told the police five minutes). She heard no car leaving. After checking on Freels, she dialed 9-1-1.

¶ 26 Both Reid and Freels suspected that Turnbaugh was somehow involved in the burglary. The frame of the front door had sustained damage when Turnbaugh tried to kick the door down in October 2009. Obviously, though, Turnbaugh was not the actual intruder on this occasion, because Turnbaugh was white and the intruder was black.

¶ 27 3. *The Testimony of Ruth Kipping*

¶ 28 A deputy sheriff, Ruth Kipping, testified she was dispatched to 1220 Koetters Lane at 1:55 a.m. on January 26, 2010. Reid, who was about 5 feet 7 inches tall, described the intruder as a black man about 5 feet 10 inches tall and weighing about 160 pounds, armed with a black handgun. Freels stated his belief that Josh Turnbaugh might have been involved in the burglary. The front door of the house was damaged from a prior attempted break-in. At that time, the police did not search the house, and they discovered no cannabis.

¶ 29 4. *The Testimony of Josh Turnbaugh*

¶ 30 The State called Josh Turnbaugh. He testified he was awaiting trial on a charge of attempt (residential burglary) because of his attempt to break into Freels's residence in October

2009.

¶ 31 Turnbaugh testified that at 1:26 a.m. on January 26, 2010, Tiffany Robinson called him on his cell phone. He had known her ever since they were children. (Turnbaugh denied knowing either defendant or another man, Termass Pleasant.) Robinson asked him if he knew where she could obtain some cannabis. Turnbaugh replied that Freels might have some. Robinson knew where Freels lived.

¶ 32 The afternoon of January 26, 2010, Turnbaugh received a visit from the police, who accused him of breaking into Freels's house the previous night. Turnbaugh denied any involvement, and he gave the police Robinson's name. Further, to clear himself of suspicion, he agreed to go to Robinson's house that day and talk with her while wearing a wire. He carried out this agreement. He went to her house and talked with her about the burglary of Freels's house that occurred the previous night.

¶ 33 5. *The Testimony of Sam Smith*

¶ 34 An investigator with the sheriff's department, Sam Smith, coordinated the investigation of the burglary. As far as he knew, nothing had been stolen from Freels's house.

¶ 35 After the police was given the name of Josh Turnbaugh, they spoke with Turnbaugh, and he gave them the name of Garth Myers—which turned out to be false information.

¶ 36 When Reid complained to the police that Turnbaugh was calling her and asking her if she knew who might have been involved in the burglary, the police brought Turnbaugh back to the police station and questioned him further. This time, Turnbaugh divulged that Robinson called him the night of the burglary and asked him where she might buy some cannabis. The police asked Turnbaugh to talk with Robinson at her house while wearing a wire. He agreed to do so. The police

obtained an overhear order, and they recorded Turnbaugh's conversation with her.

¶ 37 On the basis of this recorded conversation, the police arrested Robinson around midnight on January 26 to 27, 2010, and questioned her. At first, she denied any involvement in the burglary. The police told her they did not believe her. After she changed her story two or three times, the police revealed to her that they had recorded her conversation with Turnbaugh. She then told the police what she had told Turnbaugh: that defendant was the one who entered Freels's residence during the early morning of January 26, 2010. Her statement was videotaped. She explained that she initially lied out of fear that defendant would beat her up.

¶ 38 The police went looking for defendant and Termass Pleasant. They found the two men at the residence of Bridget Gholston, 727 Kentucky Street, and arrested them. Gholston was Pleasant's girlfriend and the mother of one of his children.

¶ 39 At the time of the arrest, defendant was dressed all in black, and Pleasant was wearing pajama pants and a gray T-shirt. People's exhibit No. 4 was the clothing that defendant was wearing: a black T-shirt, black sweat pants, shoes, and a gray jacket that was black when turned inside out.

¶ 40 No one corroborated Robinson's statement that defendant and Pleasant were with her around 1:30 a.m. on January 26, 2010. Gholston told the police, however, that defendant and Pleasant were at her residence when she went to bed at 10 p.m. on January 25, 2010.

¶ 41 6. *The Testimony of Tiffany Robinson*

¶ 42 The State called Tiffany Robinson. She testified she had pleaded guilty to attempt (burglary). The basis of that charge was her participation in Turnbaugh's attempt to break into Freels's house in October 2009. On that occasion, she drove Turnbaugh to Freels's house, knowing

he intended to break in and steal cannabis and electronic items. The plan was for Turnbaugh to steal a Playstation system and a laptop for himself and a television for Robinson. When she and Turnbaugh got out of the car, they found that the door of Freels's house was locked. Freels's roommate, Hinkamper, came onto the scene, and Turnbaugh sprayed him with Mace.

¶ 43 Also, in response to what happened at Freels's house the early morning of January 26, 2010, the State charged Robinson with home invasion, a Class X felony carrying a mandatory minimum prison sentence of six years. She had been allowed, however, to plead guilty to burglary, a Class 2 felony, and this opened up the possibility that she could receive probation instead of a prison sentence. But there was no agreement as to a specific sentence. The benefit of the bargain, for her, was being allowed to plead guilty to the lesser offense, burglary, in lieu of being convicted of home invasion. Her part of the agreement was to testify truthfully against her two codefendants, defendant and Pleasant.

¶ 44 Robinson admitted that when the police arrested her, she initially lied to them, denying she had anything to do with the burglary. She lied because she was afraid that members of defendant's family would beat her up. Then the police revealed to her that the conversation she had with Turnbaugh, in the apparent privacy of her bedroom, had been recorded. That prompted her to level with the police. She testified: "I'm thinking that I was pretty much going to get in trouble, that I was caught." She told the police what she had told Turnbaugh: that defendant was the one who actually went into Freels's house.

¶ 45 Robinson testified that the night of January 25 to 26, 2010, she was driving her car around. Her ex-boyfriend, defendant, was with her, as was Termass Pleasant, the father of her two-year-old son. Defendant was wearing "a black hoodie" and "dark sweatpants," and he had on "a

wave cap," something in between a stocking cap and a skull cap. She never saw defendant carrying a gun that night, and she did not know, one way or the other, whether he had a gun on him. She estimated that her other passenger, Pleasant, was 5 feet 6 inches or 5 feet 7 inches tall and that he weighed 125 to 130 pounds. She could not remember what Pleasant was wearing, but he probably was wearing sweatpants, because he always wore sweatpants.

¶ 46 Robinson had picked up defendant and Pleasant around 10 p.m. or 10:30 p.m. on January 25, 2010, from Bridget Gholston's house. (Pleasant, who recently had been released from jail, was in a relationship with Gholston at the time.) The three of them—Robinson, defendant, and Pleasant—were smoking cannabis in her car (she did not know where the cannabis had come from), and they wanted to buy more cannabis.

¶ 47 So, Robinson telephoned Turnbaugh and asked him if he knew where she might obtain some cannabis. He replied that Freels would have some. She passed this information on to her two passengers. The prosecutor asked her:

> "Q. What then, Ms. Robinson, does Aaron Horton say in the car there with you and Termass Pleasant about what he intends to do?
>
> A. He tells me that was a lick and that he would do it."

Robinson explained the phrase "that was a lick." It meant that defendant would run inside Freels's house and steal the cannabis.

¶ 48 The prosecutor asked Robinson:

> "Q. Was there any question from the conversation inside the car after you shared that information with them about what that intent was?

A. Well, I was going to show them the house, and they was supposed to do it by themselves, but he—Well, go ahead.

Q. That's all right. I didn't mean to interrupt you.

A. But he decided he was going to go ahead and do it that night."

¶ 49 Robinson drove to 1220 Koetters Lane and pulled into the driveway. Defendant and Pleasant were in the car with her. Defendant got out, and Pleasant remained in the car. Defendant walked over to a window of the house, and then he checked the front door; it was unlocked. He came back to the car and told Robinson the door was unlocked and that he was going to enter the house. Robinson pulled out of the driveway of 1220 Koetters Lane and "kind of into another little driveway next door," about 20 feet away from Freels's house. Pleasant stayed in the car with her. Defendant headed back toward the house and picked up a two-by-four about three feet long. Robinson testified: "I know he grabbed [the board]. I'm not sure if he took it into the house with him or what he did with it."

¶ 50 Defendant had been out of Robinson's sight for about two minutes when Pleasant called out to him, from inside the car, " 'Come on, Aaron,' " or " 'Let's go, Aaron.' " Defendant returned to the car, and he appeared to be angry. The prosecutor asked Robinson:

"Q. In that regard, what does he say when he gets back to the car?

A. That he didn't find any weed, they didn't have any, and he says that he had hit the white girl and the white boy.

Q. Let me stop you there. He was specific to describe at least

to the extent of the sex and the race of two people, right?

A. Right.

Q. 'White girl,' right?

A. Right.

Q. 'White boy' were the words he used.

A. Yes.

Q. What did he say that he did to the white boy?

A. He said that he was laying on the couch and he hit him, and then the white girl came from the hallway and he had struck her also.

Q. What did he have to say or what did he—When he comes back, you know, what kind of fight either of them put up?

A. He said the white girl had more heart than the boy did.

Q. Those were the words that he used?

A. Yes, meaning that the white girl gave more of a fight than the boy did."

¶ 51 After defendant got back in the car, Robinson drove Pleasant back to Gholston's house and dropped defendant off at a house at Fifth and Cedar Streets.

¶ 52 B. Defendant's Case

¶ 53 1. *The Testimony of Shane Williams*

¶ 54 The defense called Shane Williams, who had two felony convictions. He testified that in January 2010, he and Heaven Schuette were defendant's roommates in an apartment at 537

Grant Street. Although Williams could not remember any specific dates, he testified that defendant most likely was home by 9 p.m. on January 25, 2010, playing video games, drinking, and smoking cannabis, because those generally were his activities every evening.

¶ 55 2. *The Testimony of Kamilah Hawkins*

¶ 56 Kamilah Hawkins testified she had been defendant's girlfriend for about two years and that he was with her on January 25, 2010, until about 6 p.m., when she went to work. Hawkins further testified that according to her cell phone records, she received a call at 10:09 p.m. while she was at work. The call was from Termass Pleasant, who was using Bridget Gholston's cell phone. Hawkins told Pleasant he was "crazy" and that she did not know where defendant was.

¶ 57 3. *The Testimony of Chandra Bridget Gholston*

¶ 58 Chandra Bridget Gholston testified she knew defendant through Pleasant, who was the father of one of her children. According to Gholston, defendant and Pleasant were in her residence at 10 p.m. or 10:30 p.m. on January 25, 2010, when she went to bed. As far as she knew, they did not leave while she was asleep. At 6:15 a.m. on January 26, 2010, she left for work, and when passing through the living room, she saw Pleasant asleep on a bed and defendant asleep on a couch.

¶ 59 4. *Defendant's Testimony*

¶ 60 Defendant testified he was between 6 feet 1 inch and 6 feet 2 inches tall and that he weighed 180 pounds. Pleasant, by contrast, was 5 feet 6 inches or 5 feet 7 inches tall, and he weighed 150 pounds.

¶ 61 Defendant knew who Gregory Freels was, but he did not know Jocelyn Reid. He was puzzled that Turnbaugh denied knowing him, considering that he and Turnbaugh had been in some

of the same classes together in high school.

¶ 62 Defendant denied riding around with Robinson and Pleasant in the late evening of January 25, 2010. He also denied going inside Freels's house in the early morning of January 26, 2010.

¶ 63 In January 2010, defendant was living with Shane Williams and Heaven Schuette. Around 4 p.m. on January 25, 2010, he went to Bridget Gholston's house to visit his younger brother, Anthony, who was living there. At that time, defendant was wearing a green hoodie, blue jeans, and white tennis shoes. Pleasant also was at Gholston's house, and defendant drank, smoked, and looked up rap beats on the computer.

¶ 64 Around 8 p.m. on January 25, 2010, Pleasant left with Robinson in her car. (Pleasant was the father of Robinson's child.) Defendant did not know where Robinson and Pleasant went, and he did not see them again the rest of that evening. After Pleasant left, defendant remained at Gholston's house for less than a half-hour. He telephoned Schuette to come pick him up and take him home.

¶ 65 Pleasant telephoned defendant the next day, January 26, 2010, around 11 a.m. or noon, and defendant went back over to Gholston's house. He and Pleasant got on the computer again, but defendant left when Pleasant and Gholston began arguing.

¶ 66 Later, in the evening of January 26, 2010, Pleasant telephoned defendant again, and defendant went back over to Gholston's to watch a movie. Defendant liked the movie enough to watch it twice. Once again, Robinson arrived and picked up Pleasant, leaving defendant there at Gholston's. Defendant fell asleep at Gholston's and returned to his apartment at 10 p.m.

¶ 67 When the police arrested him, defendant was wearing the clothing subsequently

seized by the police: black sweatpants, a black T-shirt, red and clear Nike shoes, and a gray jacket. The inside of the jacket, where the label was located, was black with gray trim. Defendant denied ever wearing the jacket inside out.

¶ 68 Defendant remembered he was arrested in Gholston's house, but he did not recall what time it was when he was arrested. He thought he was arrested in the late evening of January 27, 2010, rather than in the early morning of that day.

¶ 69 C. The State's Case in Rebuttal

¶ 70 In its case in rebuttal, the State called Smith, who testified that defendant was arrested at 2:59 a.m. on January 27, 2010, about 26 hours after the burglary of 1220 Koetters Lane.

¶ 71 D. Inquiry from the Jury During Deliberations

¶ 72 During deliberations, the jury asked for an explanation of accountability. The jury also asked, "If we feel that someone other than Mr. Horton went into the house with a gun, and Mr. Horton remained in the car, would he still be 'guilty by association' of Home Invasion even if he was unaware of the gun?"

¶ 73 In response to these questions, the trial court simply referred the jury to the evidence adduced at trial and to the instructions the court already had given. One of those instructions was as follows:

> "A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of an offense.

The word 'conduct' includes any criminal act done in furtherance of the planned and intended act."

¶ 74 E. The Verdicts

¶ 75 The jury acquitted defendant of one count of home invasion (the count alleging injury to Reid) but convicted him of the other count of home invasion (the count alleging injury to Freels) and also of residential burglary.

¶ 76 II. ANALYSIS

¶ 77 A. The Sufficiency of the Evidence

¶ 78 According to defendant, we should vacate his convictions "because they were based on the incredible testimony of Tiffany Robinson, who gave impeached testimony that was inconsistent with that of the other witnesses, and who had a motive to falsely implicate [defendant]." In making this argument, defendant relies heavily on the supreme court's decision in *People v. Smith*, 185 Ill. 2d 532 (1999). *Smith*, however, was a different case, with different facts. We are unconvinced that the insufficiency of the evidence in *Smith* makes the evidence in the present case insufficient. Just because a rational trier of fact could not have believed Debrah Caraway's testimony in *Smith* (*Smith*, 185 Ill. 2d at 545), it does not follow that a rational trier of fact would have to disbelieve Robinson's factually different testimony, which she gave in a different evidentiary context.

¶ 79 So, instead of trying to compare the incomparable, we must treat this case as what it is—a factually unique case. We must look at the unique evidence in this case. More precisely, we should look at all the evidence in a light most favorable to the prosecution and ask whether any rational trier of fact could have found the elements of home invasion and residential burglary to be

proved beyond a reasonable doubt. See *People v. Davison*, 233 Ill. 2d 30, 43 (2009). The answer to that question is not to be found in *Smith*. Rather, it is to be found solely in the record of this case, and that is where we will look.

¶ 80 Defendant contends that Robinson's testimony was incredible for the following reasons:

¶ 81 1. *Discrepancies as to the Intruder's Height and Weight*

¶ 82 One reason why defendant characterizes Robinson's testimony as incredible is that the height and weight of the intruder, as estimated by Freels and Reid, did not match defendant's height and weight. Freels testified that the intruder was approximately his own size: 5 feet 10 inches tall and 165 pounds. Reid testified that the intruder was 5 feet 9 inches or 5 feet 10 inches tall and that he weighed 160 to 175 pounds (she told the police 150 to 160 pounds). Defendant, on the other hand, testified he was 6 feet 1 inch or 6 feet 2 inches tall and that he weighed 180 pounds. His testimony, in that respect, was unrebutted and undisputed.

¶83 Nevertheless, these discrepancies as to height and weight are not dispositive, because few persons can make accurate estimates of another's height and weight. See *People v. Slayton*, 363 Ill. App. 3d 27, 31 (2006). Of course, the difficulty of doing so is compounded when the individual whose height and weight are to be estimated was in violent motion with oneself or, even less ideally, was pounding one on the head with the butt of a pistol. Given the tumultuous circumstances in which Freels and Reid had an opportunity to see the intruder's physical dimensions, it was for the jury to decide what significance, if any, to attach to the discrepancies in height and weight. See *People v. Crawford*, 90 Ill. App. 3d 888, 891 (1980).

¶ 84 2. *The Lack of Any Attempt, By the Intruder, To Find Cannabis in the House*

¶ 85 Defendant maintains that Robinson's testimony was unbelievable because, according to her, the whole point of storming into Freels's residence was to steal cannabis, but according to the testimony of both Freels and Reid, the intruder said nothing to them, and he made no attempt to find any cannabis in the house—even though some cannabis was "in plain sight" on the coffee table, beside the couch on which Freels was reclining.

¶ 86 Arguably, though, this asserted discrepancy is explainable. If the intruder were operating under the assumption that subduing the occupants of 1220 Koetters Lane—shocking and awing them into submission—was a necessary prelude to trying to take any cannabis from them, his actions are somewhat understandable. A command to hand over the cannabis would have been pointless unless the power to enforce the command had been convincingly established, and—probably to the intruder's surprise—using the pistol as a club did not do the trick. While the cannabis debris on the coffee table (if the intruder saw it) may have been a tantalizing clue that more cannabis might be somewhere in the house. But the occupants did not leave him any leisure to look for the stash. They were not as submissive as he apparently thought they would be, and he found himself outside, in the cold, when his mission had scarcely begun.

¶ 87 True, according to Robinson's testimony, defendant told her and Pleasant that he had looked for cannabis in the house and that the man and woman, whom he had hit, did not have any. That story was easier on his dignity than saying he had been ejected from the premises.

¶ 88 3. *The Two-By-Four as Opposed to the Pistol*

¶ 89 According to Robinson's testimony, she never saw defendant with a gun the night of the burglary, and she could not say, one way or the other, whether he had a gun in his possession that night. She testified she only saw him pick up a two-by-four about three feet long as he headed

back toward the house. Defendant argues that Robinson's testimony about his arming himself with a two-by-four creates another discrepancy, considering that Freels and Reid testified that the intruder bludgeoned them with a pistol—and, obviously, a board three feet long looks nothing like a pistol.

¶ 90 Robinson testified, however, that she never saw defendant carry the board with him into the house. She said: "I know he grabbed [the board]. I'm not sure if he took it into the house with him or what he did with it." The jury could have inferred that, at some point, defendant dropped the board and took a pistol out of his pocket. We are supposed to allow all reasonable inferences in favor of the prosecution (*People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)), and we see nothing unreasonable about this inference.

¶ 91 Granted, the record appears to contain no evidence that any board subsequently was found outside Freels's residence. By the same token, however, the record appears to contain no evidence that anyone looked for the board. Perhaps Freels and Reid did not know that defendant picked up a board while he was outside. The record does not reveal whether the police ever tried to find the board.

¶ 92 4. *The Closed Car*

¶ 93 Reid testified that after she and Freels pushed the intruder out the door and got the door closed, she "heard two voices outside having a conversation about whatever was going on." It sounded like two men, and she thought they were in the front yard.

¶ 94 Defendant claims that this testimony by Reid calls into doubt the veracity and credibility of Robinson, who testified that Pleasant remained in the car with her at all times, 20 feet away from Freels's house, with the windows rolled up (since it was cold), and that defendant had his conversation with her about the "white boy" and "white girl" after getting back inside the car.

Defendant points out that Reid, who was inside the house, could not possibly have overheard a conversation between Robinson and defendant that supposedly took place 20 feet away, inside a closed car.

¶ 95 Admittedly, this appears to be a discrepancy, but it is a minor discrepancy, and we are unpersuaded that it should be fatal to the convictions. See *People v. Brown*, 29 Ill. 2d 375, 378 (1963). On redirect examination, Robinson admitted that Pleasant would have had to roll down the car window before calling out to defendant, "Come on, Aaron!" Maybe Pleasant spoke further with defendant, through the open car window, after defendant was pushed out of the house, and Robinson just did not remember the conversation. Maybe this was the conversation that Reid overheard.

¶ 96 5. *Robinson's Admitted Lies to the Police*

¶ 97 Defendant argues that Robinson's admitted lies to the police disqualify her from being believed at trial. On the contrary, just because a witness lied on one occasion, it does not necessarily follow that what the witness said on another occasion must be disbelieved. See *e.g.*, *People v. Hogan*, 388 Ill. App. 3d 885, 896-97 (2009); *People v. Pursley*, 284 Ill. App. 3d 597, 609 (1996); *People v. Chatmon*, 236 Ill. App. 3d 913, 926 (1992); *People v. Caplinger*, 162 Ill. App. 3d 74, 77-78 (1987). At first, Robinson denied involvement in the burglary, and then, when the police divulged to her that her conversation with Turnbaugh had been recorded, she told the police what she had told Turnbaugh. When she came clean to the police, she implicated not only defendant but also herself. Generally, people do not falsely incriminate themselves. Lies usually are self-serving—for example, "I know nothing about it" or "I didn't do it" or "he alone did it." By contrast, it is difficult to see the self-serving aspect of "defendant, Pleasant, and I did it."

¶ 98 Defendant insists, however, that Robinson's incrimination of him was self-serving

because she was trying to please the State, which then, she hoped, would reciprocate by recommending probation instead of a prison sentence in her case. But the record appears to contain no evidence that she engaged in any plea negotiations with the State before giving her videotaped statement. Instead, it appears that when the police revealed to her that her conversation with Turnbaugh had been recorded, she said, in so many words, "You've got me," and told the police what she had told Turnbaugh. And, besides, Robinson could not have had the motive of ingratiating herself to the State when speaking with Turnbaugh.

¶ 99 In short, while we recognize that, as in *Smith*, implausibilities and discrepancies can be so extreme as to justify a reviewing court in rejecting a jury's assessment of credibility, we are unconvinced that we have reached that impasse in the present case. Looking at the evidence in a light most favorable to the prosecution, we are unconvinced that it would be impossible for any rational trier of fact to find the elements of home invasion and residential burglary to be proved beyond a reasonable doubt. See *Davison*, 233 Ill. 2d at 43.

¶ 100 B. Omission of an Instruction on the Meaning of "Firearm"

¶ 101 At trial, the prosecutor asked Freels:

> "Q. Any question in your mind as to what it was you saw this person holding in his hand?
>
> A. No. I—
>
> Q. What was it?
>
> A. It was a gun. It could have been like a pellet gun that looked like a real gun or something, but it was definitely a gun."

¶ 102 Defendant contends that because Freels mentioned the possibility that the pistol could

have been a "a pellet gun that looked like a real gun," the trial court should have given Illinois Pattern Jury Instructions, Criminal, No. 18.35(G) (4th ed. 2000) (IPI Criminal 4th, No. 18.35(G)), which would have informed the jury that the term "firearm," for purposes of the offense of home invasion, did not include "any pneumatic gun" (430 ILCS 65/1.1 (West 2010).

¶ 103 In the jury instruction conference, though, defense counsel never tendered an instruction on the meaning of the term "firearm." If a party never requested the trial court to give an instruction, the party is considered to have forfeited the contention that the instruction should have been given, unless the omission of the instruction amounts to plain error. *People v. Anderson*, 325 Ill. App. 3d 624, 635-36 (2001).

¶ 104 Defendant claims that the omission of IPI Criminal 4th, No. 18.35(G) was plain error because the supreme court has held that a failure to correctly inform the jury of the elements of the crime charged is an "error so grave and fundamental that the waiver rule should not apply." *People v. Ogunsola*, 87 Ill. 2d 216, 222 (1981). By "waiver," the supreme court meant, in this context, a "procedural forfeiture" (see *People v. Blair*, 215 Ill. 2d 427, 443 (2005)): a defendant cannot forfeit an error so serious as failing to inform the jury of the elements of the charged offense.

¶ 105 But the trial court in this case did inform the jury of the elements of home invasion. The court told the jury:

> "To sustain the charge of Home Invasion (Gregory Freels) the State must prove the following propositions:
>
> First: That the defendant, or one for whose conduct he is legally responsible, was not a police officer acting in the line of duty, and

> Second: That the defendant, or one for whose conduct he is legally responsible, knowingly and without authority entered the dwelling place of another, and
>
> Third: That when the defendant, or one for whose conduct he is legally responsible, entered the dwelling place he knew or had reason to know that one or more persons was present, and
>
> Fourth: That the defendant, or one for whose conduct he is legally responsible, was armed with a firearm, and
>
> Fifth: That, while armed with a firearm, the defendant, or one for whose conduct he is legally responsible, used force on Gregory Freels, a person within that dwelling place."

Those are the elements of home invasion as set forth in section 12-11(a) of the Criminal Code of 1961 (720 ILCS 5/12-11(a) (West 2010)). The court followed Illinois Pattern Jury Instructions, Criminal, No. 11.54 (4th ed. 2000)) by telling the jury those elements.

¶ 106 In *Ogunsola*, by contrast, the trial court did not instruct the jury on the *mens rea* required for the offense of deceptive practices (Ill. Rev. Stat. 1979, ch. 38, par. 17-1(B)(d)), namely, an intent to defraud. *Ogunsola*, 87 Ill. 2d at 220. The instructions in the present case do not suffer from such a substantial defect. The trial court informed the jury of all the elements of home invasion, including the *mens rea* of knowledge. To say that this case is like *Ogunsola* and that the court left out an element of home invasion is simply incorrect.

¶ 107 It is not that the trial court *left out an element* in its instructions on home invasion; rather, the court did not define a term within the elements; the court did not define "firearm." The

omission of that definition does not make this case comparable to *Ogunsola*. The distinguishing language is right there in *Ogunsola*. The supreme court said: "Jury instructions that incorrectly define the offense cause prejudice to a criminal defendant far more serious than instructions that do not include a definition of a term (*People v. Underwood* (1978), 72 Ill. 2d 124 (failure to define 'reasonably believes')) ***." *Ogunsola*, 87 Ill. 2d at 223.

¶ 108 In the case the supreme court cited, *Underwood*, the defendant claimed he had stabbed the victim in self-defense. *Underwood*, 72 Ill. 2d at 128. Accordingly, the trial court gave the jury a pattern instruction on self-defense, Illinois Pattern Jury Instructions, Criminal, No. 24.06 (1968), which discussed the concept of "reasonably believing" in the necessity of force under the circumstances. *Underwood*, 72 Ill. 2d at 128. The court, however, never gave the jury—and the defendant never requested—another pattern instruction, which defined "reasonable belief" as meaning that " 'the person concerned, acting as a reasonable man, believe[d] that the described facts exist[ed].' " *Id.* at 129 (quoting Illinois Pattern Jury Instructions, Criminal, No. 4.13 (1968)). On appeal, the defendant argued that the court should have given that additional instruction *sua sponte* because, according to him, the definition of "reasonable belief" was so basic to an instruction on self-defense that omitting the definition had made his trial unfair. *Id.* at 130-31. The supreme court disagreed that the lack of an instruction on the meaning of "reasonable belief" "constitute[d] a substantial defect which would [have] invoke[d] the limited exception to the waiver rule." *Id.* at 131.

¶ 109 Like "reasonable belief," "firearm" is a term that is within the popular lexicon. "Firearm" is a common word, and in its ordinary usage, it does not mean "pellet gun." Kids carrying around air rifles are not considered to be armed with firearms. That is because, in the ordinary sense

of the word, "firearm" means not a pneumatic gun but "a weapon from which a shot is discharged by gunpowder." Merriam-Webster's Collegiate Dictionary 437 (10th ed. 2000). Presumably, juries know the ordinary meanings of common words. See *People v. Nelson*, 73 Ill. App. 3d 593, 596 (1979); *People ex rel. Johnson v. Hampton*, 70 Ill. App. 3d 555, 561 (1979).

¶ 110 C. The One-Act, One-Crime Rule

¶ 111 Defendant contends that the simultaneous convictions of home invasion (720 ILCS 5/12-11(a)(3) (West 2010)) and residential burglary (720 ILCS 5/19-3(a) (West 2010)) violate the one-act, one-crime rule. See *People v. King*, 66 Ill. 2d 551, 566 (1977).

¶ 112 To determine whether simultaneous convictions violate the one-act, one-crime rule, we perform an analysis that has two steps. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, we determine whether the defendant's conduct, in committing the two offenses, consisted of multiple physical acts or, alternatively, a single physical act. *Id.* If it took multiple physical acts to commit the two offenses (not to prepare for their commission but to actually commit them), both convictions can stand, even if the acts were interrelated. *People v. Rodriguez*, 169 Ill. 2d 183, 188-89 (1996). "Multiple convictions are improper," though, "if they are based on *precisely the same physical act*." (Emphasis added.) *Miller*, 238 Ill. 2d at 165.

¶ 113 If the criminal conduct involved multiple physical acts (and hence the first step of the analysis raises no interdiction), we proceed to the second step of the analysis, which is to ask whether an offense is a lesser included offense of the other offense. *Miller*, 238 Ill. 2d at 165. The one-act, one-crime rule forbids simultaneous convictions of the greater offense and the lesser included offense. *Id.* When deciding whether a *charged* offense is a lesser included offense of another *charged* offense, we use the abstract-elements approach. *Id.* at 172-73. (When deciding,

by contrast, whether an *uncharged* offense is a lesser included offense of a charged offense, we use the charging-instrument approach, to ensure that the defendant received notice of the possibility of being convicted of the lesser included offense. *Id.*)

¶ 114 Under the abstract-elements approach—which is the approach we will use in this case—we compare the statutory elements of the two offenses. *Miller*, 238 Ill. 2d at 166. If all the elements of one offense are included in the second offense and if the first offense contains no element that the second offense lacks, the first offense is a lesser included offense of the second. *Id.*

¶ 115 So, in our *de novo* review (*People v. Peacock*, 359 Ill. App. 3d 326, 331 (2005)), let us apply this two-step analysis to the offenses of home invasion and residential burglary. First, we ascertain whether the conduct by which defendant committed these two offenses consisted of "precisely the same physical act" as opposed to multiple physical acts. See *Miller*, 238 Ill. 2d at 165. To commit home invasion, as that offense is defined in section 12-11(a) (720 ILCS 5/12-11(a) (West 2010)), defendant had to do the following physical acts: (1) "enter[] the dwelling place of another" and (2) "use[] force" against someone in the dwelling place. To commit residential burglary, defendant had to perform only one physical act: enter a dwelling place. See 720 ILCS 5/19-3(a) (West 2010). Thus, the conduct comprising home invasion and residential burglary did not consist of precisely the same physical act; rather, the conduct consisted of multiple physical acts, *i.e.*, entering the dwelling place and using force against someone therein. See *People v. Price*, 2011 IL App (4th) 100311, ¶ 30. It follows that the first step of the analysis poses no obstacle to the simultaneous convictions of home invasion and residential burglary. *Id.*

¶ 116 We proceed then to the second step of the analysis, in which we ask whether

residential burglary is a lesser included offense of home invasion. It is not, and here is why. When we compare the statutory elements of the two offenses, the lesser offense, residential burglary, has an element that the greater offense, home invasion, lacks: namely, having, at the moment of the unauthorized entry (or the moment of the unauthorized remaining), an "intent to commit therein a felony or theft." 720 ILCS 5/19-3(a) (West 2010). Section 19-3(a) provides: "A person commits residential burglary who knowingly and without authority enters or knowingly and without authority remains within the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft." 720 ILCS 5/19-3(a) (West 2010).

¶ 117 By contrast, the statute defining home invasion contains no mention of entering or remaining in a dwelling place with the intent to commit a felony or theft. Section 12-11(a)(3) provides as follows:

> "(a) 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 or he or she knowingly enters the dwelling place of another and remains in such dwelling place until he or she knows or has reason to know that one or more persons is present or who falsely represents himself or herself, including but not limited to, falsely representing himself or herself to be a representative of any unit of government or a construction, telecommunications, or utility company, for the purpose of gaining entry to the dwelling place of another when he or she

knows or has reason to know that one or more persons are present and

* * *

(3) While armed with a firearm uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs ***." 720 ILCS 5/12-13(a)(3) (West 2010).

¶ 118 So, home invasion, in contrast to residential burglary, does not require that the defendant enter the dwelling place with the specific intent to commit a felony or theft inside the dwelling place. The only mental state that home invasion requires at the moment of entry is knowledge: the defendant knows he or she is entering the dwelling place, and the defendant knows or has reason to know that someone is present in the dwelling place. It follows that residential burglary is not a lesser included offense of home invasion, because residential burglary has an element that home invasion lacks, namely, entering the residence, or remaining in the residence, with the intent to commit a felony or theft therein. See *People v. Cunningham,* 365 Ill. App. 3d 991, 995 (2006).

¶ 119 In summary, the simultaneous convictions of home invasion and residential burglary do not violate the one-act, one-crime rule, because (1) the criminal conduct that was the basis of those offenses consisted of multiple physical acts instead of precisely the same physical act; and (2) under the abstract-elements approach, residential burglary is not a lesser included offense of home invasion.

¶ 120 In so holding, we acknowledge that in *People v. McLaurin*, 184 Ill. 2d 58, 106 (1998), the supreme court concluded that the offenses of home invasion and residential burglary were "carved from the same physical act of [the] defendant's entering the dwelling [place]" and that a conviction of residential burglary therefore had to be vacated pursuant to *King*. We believe, though, that if the supreme court had considered, in *McLaurin*, whether home invasion consisted not merely of one physical act but of multiple physical acts (see *Miller*, 238 Ill. 2d at 165), it would have come to the inevitable and indisputable conclusion that home invasion did indeed consist of multiple physical acts and that home invasion and residential burglary therefore were not carved from "precisely the same physical act" (*id.*). Because the supreme court did not consider that precise issue in its rather cursory discussion of the defendant's "twelfth contention of error" in *McLaurin*, we do not interpret *McLaurin* as foreclosing a determination that home invasion consists of multiple physical acts.

¶ 121 III. CONCLUSION

¶ 122 For the foregoing reasons, we affirm the trial court's judgment. We award the State $50 in costs against defendant.

¶ 123 Affirmed.