2014 IL App (4th) 121090-U

NO. 4-12-1090

FILED
August 27, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
RYAN PAUL HOLT,	)	No. 12CF115
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Despite defendant's numerous contentions of error, defendant has failed to show the State's evidence was insufficient to find him guilty beyond a reasonable doubt and he was denied effective assistance of counsel and a fair trial.

¶ 2 In February 2012, a grand jury indicted defendant, Ryan Paul Holt, with one count of home invasion (720 ILCS 5/12-11(a)(2) (West 2010) (text of section effective July 1, 2011)), one count of mob action (720 ILCS 5/25-1(a)(1) (West 2010)), and one count of criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2010)). After a June 2012 trial, a jury found defendant guilty of all three charges. In July 2012, defendant filed a posttrial motion. In August 2012, the court denied defendant's posttrial motion and sentenced him to nine years' imprisonment for home invasion to run concurrent with a sentence in a separate case. Defendant then filed a motion to reconsider his sentence. After a November 2012 hearing, the court denied defendant's motion to reconsider his sentence.

¶ 3 Defendant appeals, arguing (1) the State's evidence was insufficient to prove him guilty beyond a reasonable doubt, (2) the trial court's denial of a continuance to present a witness's testimony denied him a fair trial, (3) the court erred by refusing to answer a jury's question, (4) he was denied effective assistance of counsel, (5) the court erred by denying a motion for a mistrial, (6) the admission of a 9-1-1 recording constituted plain error, (7) the court's statements it was going on vacation on Friday hastened the jury's verdict, (8) the absence of a limiting instruction regarding events at a party was plain error, and (9) the cumulative effect of some or all of the errors in this case denied defendant a fair trial. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On January 21, 2012, Mark Schiewe, Martin Teresi, Jacob Cousin, and Samuel Dickie all resided at 606 Church Street, Apartment 6, in Normal, Illinois (hereinafter Apartment 6). Schiewe's and Cousin's bedrooms were in the basement of the three-level apartment, and Teresi's and Dickie's bedrooms were on the second floor. Late that night, the four roommates had a party on the main level of the apartment. Craig Wissmiller's sons, Corey and Caleb Wissmiller, attended the party. At some point, Schiewe's iPod went missing, and the roommates decided to prevent guests from leaving until the iPod was found. While searching for the missing iPod, a fight broke out, which involved Corey. The roommates then decided to allow people to leave. Caleb exited the apartment out the front door, and Corey exited from the back door. After his exit, Corey attempted to reenter the apartment to look for Caleb, but the roommates would not let him. Corey then punched out the back light fixture of Apartment 6 and a neighbor's window. The police came to Apartment 6 and talked with the roommates. After the police left, Teresi and Cousin left Apartment 6.

¶ 6 Corey met up with his girlfriend, Ashley Miller, and had her drive him to where

Craig, his father, was playing cards with defendant and others. Corey told Craig he and Caleb had been "jumped," and he could not find Caleb. Defendant, Corey, Craig, and an unknown male who had been playing cards got into Miller's car to search for Caleb. After driving around looking for Caleb for some time, the group went to Apartment 6. Miller remained in the car while the four men went to the front door of Apartment 6.

¶ 7 According to Dickie, the four men entered Apartment 6 without invitation at about the same time Dickie reached the main level of the apartment. At some point, Craig told Dickie to get off his cellular telephone (cell phone), knocked the cell phone out of Dickie's hand, and kicked it away. Craig asked Dickie about Caleb's and Cousin's whereabouts. Dickie took the four men to the basement. While there, Schiewe's bedroom door was forcefully opened. Schiewe confronted defendant, and defendant punched Schiewe several times in the face. When defendant ceased punching Schiewe, Cousin could be heard coming home. The four men went upstairs to talk with Cousin, and when Cousin did not know Caleb's whereabouts, the four men left. Once the four men went upstairs, Dickie called 9-1-1. Officer Latz was one of the responding officers who talked with Dickie after the second incident.

¶ 8 The grand jury's February 8, 2012, home-invasion and criminal-trespass-to-a-residence indictments asserted defendant's entry into Apartment 6 was without authority. The mob-action charge alleged defendant committed that offense by acting with Craig and Corey to force entry into the Schiewe's residence and battering Schiewe. The same three charges brought against defendant were also brought against Craig (No. 12-CF-76) and Corey (No. 12-CF-80). In March 2012, the State filed a motion to consolidate the three cases, which the trial court granted without objection. The last order addressing subpoenas for the consolidated trial had a certificate of mailing that listed only the following members of the Normal police department:

Darren Wolters and Jacob Zabukovec.

¶ 9 The consolidated jury trial commenced on Monday, June 18, 2012, with selection of part of the jury. Jury selection resumed on Tuesday, June 19, 2012, and the presentation of evidence commenced on that day as well. The State presented the testimony of all four residents of Apartment 6; Megan Waiflein, a neighbor of the roommates; and Officer Wolters, who interviewed defendant. Defendant presented the testimony of Miller, and Craig testified on his own behalf. The evidence relevant to the issues on appeal is set forth below.

¶ 10 Teresi testified Corey threatened to come back and kill them when they denied him reentry to Apartment 6. Schiewe also testified Corey threatened to come back. At around 3 a.m. on January 22, 2012, Dickie was talking to his girlfriend on his cell phone in his bedroom when he heard a regular knock on the front door. He heard it about three times. Dickie took his time getting to the door. As Dickie reached the base of the stairs, the four men entered Apartment 6. According to Dickie, he was four or five feet from the front door. He denied touching the door in any way before it opened. Dickie also testified he did not gesture in any way that would indicate he was welcoming someone into the apartment or say anything that would indicate they were allowed to enter. Dickie stated the front door was not locked, and he described the door opening as if "someone turned the knob and then walked in as they opened the door." Schiewe testified he heard a "loud commotion," followed by yelling and stomping.

¶ 11 Dickie further testified the four men came in "very fast" and were immediately within arm's reach of him. Craig told him to get off the cell phone, and Dickie did not know what to do. Craig then grabbed the cell phone from Dickie, threw it down on the ground, stomped on it several times, and kicked it into the kitchen. Craig wanted to know where Caleb was. When Dickie indicated he did not know, they asked where Cousin was. Dickie stated he

did not know and Cousin was not at home. They then asked where Cousin's room was. During the questioning, they were shouting and cursing at Dickie.

¶ 12 Dickie picked up his cell phone and took the four men to the basement. Dickie knocked on Schiewe's door twice, and when Schiewe did not answer, defendant kicked the door open. Schiewe also testified his door was kicked in. According to Dickie, Schiewe got out of bed and said something to defendant, and defendant punched Schiewe. Schiewe testified that, after his door was kicked in, the four men entered his bedroom, and Craig started questioning him about Cousin's and Caleb's whereabouts. Schiewe stated he was not sure where they were. Schiewe then got in defendant's face and told him to get out. Defendant responded by closed-fist punching Schiewe continuously on the left side of Schiewe's face and did not stop until Dickie yelled at defendant to stop punching Schiewe. Schiewe denied punching or shoving defendant first. The State presented photographs depicting a bad cut above Schiewe's left eyebrow and a black, swollen left eye. Schiewe also testified defendant had shoved him and threaten to kick Schiewe's butt before Schiewe told him to get out. The others had also threatened harm if Schiewe did not tell them where Caleb was. Dickie shouted for them to stop and leave, and defendant stopped punching Schiewe.

¶ 13 Dickie heard Cousin come home, and the four men ran upstairs to meet him. Dickie checked on Schiewe, and then called 9-1-1. The State sought to play the 9-1-1 recording for the jury, and the trial court asked each of the defendant's counsel if they had an objection, and defendant's counsel responded, "No." The State also provided a transcript of the recording, but it is not included in the appellate record for this case. The State proceeded to play the recording for the jury. During cross-examination, Dickie denied telling Officer Latz one of the men grabbed him and knocked him down. Dickie did admit he told Officer Latz he was only three-

fourths of the way down the stairs when the men entered and that, while he felt threatened, none of the men actually threatened him.

¶ 14 After Dickie's testimony, which took place on Wednesday, June 20, 2012, defendant's counsel and Craig's counsel noted they were trying to obtain the appearance of Officer Latz, who was not under a subpoena, to provide impeachment testimony. Defendant's counsel explained as follows the testimony Officer Latz would address:

> "By way of proffer in terms of what we're talking about here, Mr. Dickie indicated two separate things that can be used for impeachment here.
>
> One is the inclusion of an act that he denied having occurred during his testimony and denied making a statement to Officer Latz that he was knocked down on the floor when entry was made into his apartment building.
>
> Additionally, we will be able to show that Mr. Dickie, during that conversation that he had with Latz, who was one of the first responding officers after the 911 call, omitted any mention of any damage being done to his cell phone or any actions being taken to that. ***"

Counsel argued the testimony was important in terms of the believability of a key State witness. Craig's counsel also explained an arrangement existed with the police department to secure its officer's testimony without a subpoena. The court stated it would allow defendant and his codefendants to present the testimony of Officer Latz the next morning. The defense attorneys later learned Officer Latz was on his honeymoon, and the State refused to stipulate to the admission of

Officer Latz's police report.

¶ 15 Craig testified that, in the early morning hours of January 22, 2012, he was playing cards at Carl King's home with King, King's wife, and defendant. Halfway through the card playing, an unknown acquaintance of King's arrived. While Craig was at King's home, Corey showed up and was upset. Corey told Craig he could not locate Caleb. Craig, Corey, defendant and the unknown man got into Miller's car to look for Caleb. After driving around awhile looking for Caleb, they went to Apartment 6. Craig knocked on the door of Apartment 6 for several minutes and eventually heard the dead bolt turn, and Dickie, who was on his cell phone, opened the door. Craig explained who he was and that he was looking for Caleb. He also mentioned Cousin because Corey noted Cousin had been nice to Corey and Caleb at the party. Dickie waved them into Apartment 6. The four men waited for Dickie to finish his call. When Dickie finished the call, he began to lead them to the basement. Dickie's cell phone rang, and Craig admitted knocking it out of Dickie's hand and kicking it into the kitchen. Craig also testified it was Dickie who opened the door to Schiewe's room by forcefully shaking the door handle, and that Schiewe was the one who started the altercation with defendant.

¶ 16 During cross-examination, the State questioned Craig about the identity of the unknown man. The following exchange then took place:

> "Q. Is Carl King a member of the outlaw motorcycle club?
>
> A. I mean, I guess. I don't know what his status is at this time.
>
> Q. Do you know whether or not he previously was at any time a member of the outlaw motorcycle club?
>
> A. I think he was at one time.

Q. Was it represented to you that this fourth man was also interested in or affiliated with the outlaw motorcycle club?

A. I don't know. I didn't know what his relationship was."

Defendant's counsel did not object to the aforementioned testimony. However, at the close of the State's rebuttal evidence, defendant's counsel moved for a mistrial, asserting the State failed to perfect its impeachment of Craig by presenting evidence the unknown man was affiliated with the motorcycle club. The State asserted the testimony was not impeachment of a prior inconsistent statement but was to show Craig's knowledge of King and King's association with the unknown man. The court denied the motion for a mistrial but directed the State not to mention the motorcycle club during closing arguments.

¶ 17 Miller testified she remained in her car in front of Apartment 6 while the four men were on the apartment's porch. She saw a man wave the four men into the apartment. She did not see the four men kick in the front door or force entry into Apartment 6.

¶ 18 Officer Wolters also testified that, during his interview of defendant, defendant stated the men entered Apartment 6 after a resident answered the door.

¶ 19 The next morning (Thursday, June 21, 2012), after all of the other witnesses had testified, defendant and Craig moved to continue the trial to obtain Officer Latz's testimony, and the State objected. Defendant's counsel asked for leave to provide the trial court with a copy of Officer Latz's police report. The court stated counsel could supplement the record with the police report, but it did not need the report to rule on the motion. The record on appeal does not contain a copy of Officer Latz's police report. The court denied the motion, noting if a short delay was possible, it would be appropriate to grant it. However, a short delay was not possible because Officer Latz could not appear the rest of the week and the court was on vacation the next

week. The court noted it was looking at a minimum of a 10-day delay in the trial. The court also stated it did not believe the inability to perfect the impeachment of Dickie's testimony would deprive defendant and his codefendants of a fair trial. After the motion to continue was denied, defendant's counsel moved for a mistrial, which the court also denied.

¶ 20 During the jury instruction conference, Craig's counsel requested the following instruction:

> "The defendant's entry into a dwelling of another is 'without authority' if, at the time of entry into the dwelling, the defendant has an intent to commit a criminal act within the dwelling regardless of whether the defendant was initially invited into or received consent to enter the dwelling.
>
> However, the defendant's entry into the dwelling is 'with authority' if the defendant enters the dwelling without criminal intent and was initially invited into or received consent to enter the dwelling, regardless of what the defendant does after he enters." Illinois Pattern Jury Instructions, Criminal No. 11.53A (4th ed. 2000).

The trial court asked the State if it had an objection to the instruction. The State argued the instruction was based on the limited-authority doctrine set forth in *People v. Bush*, 157 Ill. 2d 248, 253-54, 623 N.E.2d 1361, 1364 (1993), and neither side had argued this was a limited-authority case. Craig's counsel explained that, under Craig's theory, the group entered with authority and that authority was not then retroactively made without authority because of something that took place later that was not intended or part of a common design. The court reserved ruling on the

instruction, noting it wanted to read *Bush*. The next day, the court offered all of the attorneys an opportunity to argue the issue, and all of them declined. The court recognized this was not a case of trickery or deceit but found it was possible the jury could believe part of one witness's testimony and part of another's. Thus, it concluded sufficient evidence was presented for giving the instruction over the State's objection.

¶ 21 During deliberations, the jury first asked to listen to the 9-1-1 recording again, and no one objected to that request. The jury also asked a question about accountability, and the trial court referred the jury to its instructions. The jury later requested "a legal definition of the words: solicit [and] abet." The trial court asked for the attorneys' input, and defendant's counsel suggested the court should refer the jury to their instructions and not define the words. The court proposed the following language for its answer: "There is no legal definition of the terms you have referred to. Please rely on the instructions you have been provided." Defendant's counsel stated he found that language "acceptable," and the court provided the jury with the aforementioned answer.

¶ 22 At the conclusion of the deliberations, the jury found defendant guilty of all three charges. In July 2012, defendant filed a posttrial motion, contending (1) the State failed to prove him guilty of the charged offenses beyond a reasonable doubt, (2) the trial court erred by denying his motion to continue the trial to secure Officer Latz's testimony, (3) the court erred by denying his motion for a mistrial based on the denial of the aforementioned motion, and (4) the court hurried the jury's deliberations by making them aware of his vacation plans. At a joint August 2012 hearing, the court denied defendant's posttrial motion and sentenced him to nine years' imprisonment for home invasion to run concurrent with his sentence in McLean County case No. 09-CF-197. The court did not sentence defendant on the other two charges in this case because it

found those charges merged with the home-invasion charge. Defendant filed a motion to reconsider his sentence. After a November 1, 2012, hearing, the court denied defendant's motion.

¶ 23 On November 30, 2012, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009), and thus this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 24 II. ANALYSIS

¶ 25 A. Sufficiency of the Evidence

¶ 26 When presented with a challenge to the sufficiency of the evidence, a reviewing court's function is not to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). Rather, we consider " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43, 906 N.E.2d 545, 553 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under that standard, a reviewing court must draw all reasonable inferences from the record in the prosecution's favor. *Davison*, 233 Ill. 2d at 43, 906 N.E.2d at 553. Further, we note a reviewing court will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Givens*, 237 Ill. 2d at 334, 934 N.E.2d at 484.

¶ 27 In this case, the State had to prove the following elements for the jury to find defendant guilty of home invasion: (1) defendant was not a police officer acting in the line of duty, (2) defendant knowingly made an unauthorized entry into the dwelling of another, (3) defendant knew or had reason to know that one or more persons were present therein, and (4) defendant intentionally caused injury to a person in the dwelling place. See 720 ILCS 5/12-11(a)(2) (West

2010) (text of section effective July 1, 2011)). Defendant asserts (1) the State failed to prove his entry was unauthorized, (2) his entry was without criminal intent, and (3) his departure was an affirmative defense to home invasion.

¶ 28 1. *Unauthorized Entry*

¶ 29 Defendant reiterates the facts presented at trial and insists his entry was authorized. We note the trier of fact bears the responsibility to determine the witnesses' credibility and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259, 752 N.E.2d 410, 425 (2001). On such matters, this court will not substitute its judgment for that of the trier of fact. *Ortiz*, 196 Ill. 2d at 259, 752 N.E.2d at 425.

¶ 30 Dickie testified he was talking to his girlfriend on his cell phone in his bedroom around 3 a.m., when he heard a regular knock on the front door. Dickie heard it about three times and took his time getting to the door. As Dickie reached the base of the stairs, four men, including defendant, entered Apartment 6. According to Dickie, he was four or five feet from the front door. He denied touching the door in any way before it opened. Dickie also testified he did not gesture in any way that would indicate he was welcoming someone into the apartment or say anything that would indicate the men were allowed to enter. Dickie stated the front door was not locked, and he described the door opening as if "someone turned the knob and then walked in as they opened the door." According to Dickie's testimony, he did nothing to give defendant and the other three men the authority to enter Apartment 6. The men simply entered through the unlocked door at 3 a.m.

¶ 31 Defendant notes Teresi testified he locked the front door when he exited. As stated, it was the trier of fact's responsibility to determine that conflict of evidence. Moreover, de-

fendant asserts that, if the door was unlocked, he reasonably thought he had permission to enter. However, Dickie denied doing anything or saying anything that would give defendant implicit permission to enter the apartment. A reasonable person would not believe an unlocked door at 3 a.m. is permission to enter an apartment of another. Moreover, the four men's knocking only shows they sought permission, not that they obtained it before entering.

¶ 32 This case is distinguishable from the cases cited by defendant. In *People v. Scott*, 108 Ill. App. 3d 607, 609, 439 N.E.2d 130, 132 (1982), the victim unchained the door and let the two men into his room. In *People v. Henderson*, 142 Ill. 2d 258, 299, 568 N.E.2d 1234, 1252 (1990), *declined to follow on other grounds*, *People v. Terry*, 183 Ill. 2d 298, 700 N.E.2d 992 (1998), our supreme court found the police officer's belief the defendant's mother consented to their entry was reasonable where the defendant's mother said the defendant was in the apartment, stepped back from the open door, and pointed toward the defendant's bedroom. In this case, Dickie denied making any nonverbal movement such as those in *Scott* and *Henderson* that would have indicated Dickie's consent to defendant's entry *before* he entered. Moreover, defendant cites no legal authority for his assertion a person can acquiesce to another person's entry after it has been made without authority. Regardless, a reasonable trier of fact could have found Dickie did not acquiesce, despite his failure to verbally object to the men's presence in his apartment. Dickie testified he was terrified and intimidated. According to Dickie, the four men came in "very fast" and were immediately within arm's reach of him. When Dickie did not immediately get off his cell phone as requested by Craig, Craig grabbed the cell phone from Dickie, threw it down on the ground, stomped on it several times, and kicked it into the kitchen. During their questioning, the four men were shouting and cursing at Dickie.

¶ 33 Accordingly, for the aforementioned reasons, we find the State's evidence was

sufficient for the jury to find beyond a reasonable doubt defendant's entry into Apartment 6 was unauthorized.

¶ 34 2. *Criminal Intent*

¶ 35 Defendant next asserts the State failed to prove him guilty beyond a reasonable doubt because his entry into Apartment 6 was without criminal intent. In support of his argument that home invasion requires an unlawful intent at the time of entry, defendant relies on *People v. Medreno*, 99 Ill. App. 3d 449, 455, 425 N.E.2d 588, 593 (1981), and argues that case stands for the proposition home invasion requires "an unauthorized entry of a dwelling for the purpose of threatening or using force." In *People v. Gilyard*, 237 Ill. App. 3d 8, 21-22, 602 N.E.2d 1335, 1345 (1992), the reviewing court noted the aforementioned language in *Medreno* was *dicta* and disagreed with the defendant's assertion that the language required proof the defendant must have the intent to harm at the time he entered the dwelling. The *Gilyard* court found the home-invasion statute required "proof of the use or threatened use of force while armed with a deadly weapon or the intentional causing of injury separate and apart from proof of an unauthorized entry." *Gilyard*, 237 Ill. App. 3d at 22, 602 N.E.2d at 1345. We agree with the *Gilyard* court's interpretation of the home-invasion statute. The plain language of the home-invasion statute sets forth no such requirement of intent to harm at the time of entry. Thus, we do not address the merits of defendant's argument that the State failed to prove beyond a reasonable doubt defendant entered the apartment with the intent to harm Schiewe.

¶ 36 Defendant also argues defendant never intentionally caused an injury to Schiewe. However, Schiewe testified he got in defendant's face and told him to get out. Defendant, who was wearing a bandana over part of his face, responded by closed-fist punching Schiewe continuously on the left side of Schiewe's face and did not stop until Dickie yelled at defendant to stop

punching Schiewe. Schiewe denied punching or shoving defendant first. Schiewe suffered a "bad cut" above his left eyebrow and a black, swollen left eye. Schiewe also testified defendant had shoved him and threatened to kick Schiewe's butt before Schiewe told him to get out. Dickie testified defendant punched Schiewe in the face. We find the State's aforementioned evidence was sufficient for a jury to find beyond a reasonable doubt defendant intended to cause injury to Schiewe.

¶ 37 3. *Affirmative Defense*

¶ 38 Defendant last argues the circumstances of his departure are an affirmative defense to home invasion. Section 12-11(b) of the Criminal Code of 1961 (720 ILCS 5/12-11(b) (West 2010) (text of section effective July 1, 2011)) provides the following:

> "It is an affirmative defense to a charge of home invasion that the accused who 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 either immediately leaves such premises or surrenders to the person or persons lawfully present therein without either attempting to cause or causing serious bodily injury to any person present therein."

In this case, the evidence is unrefuted defendant did not immediately leave Apartment 6 when he first encountered Dickie. Accordingly, the circumstances of defendant's departure are not an affirmative defense to home invasion under section 12-11(b).

¶ 39 B. Motion to Continue

¶ 40 Defendant next asserts the trial court erred by denying his motion to continue his trial to allow him to subpoena Officer Latz. We have already found no error occurred by the

court's denial of the continuance in Craig's appeal. See *People v. Wissmiller*, 2014 IL App (4th) 121028-U, ¶ 24. We continue to find no error in the court's denial of the continuance.

¶ 41 Whether to grant or deny a continuance rests within the trial court's sound discretion, and "a reviewing court will not interfere with that decision absent a clear abuse of discretion." *People v. Walker*, 232 Ill. 2d 113, 125, 902 N.E.2d 691, 697 (2009). "A trial court abuses its discretion when its decision is 'fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it.' " *People v. Kladis*, 2011 IL 110920, ¶ 23, 960 N.E.2d 1104 (quoting *People v. Ortega*, 209 Ill. 2d 354, 359, 808 N.E.2d 496, 500-01 (2004)). "However, '[w]here it appears that the refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights, a resulting conviction will be reversed.' " *Walker*, 232 Ill. 2d at 125, 902 N.E.2d at 697 (quoting *People v. Lewis*, 165 Ill. 2d 305, 327, 651 N.E.2d 72, 82 (1995)).

¶ 42 Initially, we note section 114-4(f) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/114-4(f) (West 2012)) provides that, "[a]fter trial has begun a reasonably brief continuance may be granted to either side in the interests of justice." Further, in determining whether an abuse of discretion occurred, reviewing courts must consider the case's facts and circumstances, and " '[t]here is no mechanical test *** for determining the point at which the denial of a continuance in order to accelerate the judicial proceedings violates the substantive right of the accused to properly defend.' " *Walker*, 232 Ill. 2d at 125, 902 N.E.2d at 697 (quoting *People v. Lott*, 66 Ill. 2d 290, 297, 362 N.E.2d 312, 315 (1977)). Our supreme court has set forth the following factors a court may consider in determining whether to grant a continuance request by a defendant in a criminal case: "the movant's diligence, the defendant's right to a speedy, fair and impartial trial and the interests of justice." *Walker*, 232 Ill. 2d at 125, 902

N.E.2d at 697. Other relevant factors include (1) whether counsel for defendant was unable to prepare for trial because he or she had been held to trial in another cause, (2) the case's history, (3) the matter's complexity, (4) the seriousness of the charges, (5) docket management, (6) judicial economy, and (7) inconvenience to the parties and witnesses. *Walker*, 232 Ill. 2d at 125-26, 902 N.E.2d at 697.

¶ 43 Here, the trial court was willing to grant "a reasonably brief continuance" as provided in section 114-4(f) of the Procedure Code, but the circumstances of Officer Latz's honeymoon and the court's upcoming vacation did not allow for a brief continuance. Thus, the court's denial of the continuance was in accordance with section 114-4(f). Similarly, a minimum 10-day delay in defendant's jury trial would have been harmful to the court's docket management and judicial economy, as well as being inconvenient to everyone involved in the proceedings. Moreover, such a significant delay near the end of a jury trial would impact the jury's recall of the testimony presented earlier and be more likely to deny defendant a fair trial than the minor impeachment evidence defendant sought to introduce, which we will now discuss.

¶ 44 According to defendant's attorney, Officer Latz's police report stated Dickie told the officer Dickie was knocked to the floor when entry was made into the apartment, and the report failed to mention any actions taken against Dickie's cell phone. (The record on appeal lacks the police report, but under the facts of this case, the lack of the report does not prohibit our review of the issue as counsel's representation of the report does not warrant reversal.) However, Dickie denied telling the officer he was knocked down, and Craig admitted knocking Dickie's cell phone down to the ground and kicking it. Additionally, Dickie's statements during his 9-1-1 call were consistent with his trial testimony. During the call, he mentioned his cell phone getting knocked to the ground and made no mention of himself getting knocked to the ground. Thus, the

alleged inconsistencies have little impeachment value considering the already consistent testimony of Dickie and codefendant Craig on what was knocked down after the four men entered Apartment 6. The inconsistencies between Dickie's testimony and Officer Latz's report appear to be a misunderstanding of what was knocked to the ground. While we recognize Dickie's testimony was key in establishing defendant's unauthorized entry into Apartment 6, the lack of Officer Latz's testimony did not deny defendant a fair and impartial trial or harm the interests of justice. Additionally, we note defendant's home-invasion charge was serious, but the impeachment matter was not complex. Moreover, even assuming, *arguendo*, the defense attorneys were diligent in trying to obtain Officer Latz's testimony, that diligence did not outweigh all of the other factors supporting the denial of a lengthy delay in defendant's jury trial. Accordingly, we find the trial court did not abuse its discretion by denying defendant's motion to continue.

¶ 45 C. Jury Question

¶ 46 As to the jury's request for the legal definitions of "solicit" and "abet," defendant argues the trial court committed plain error by refusing to provide the jury with the definitions of those words. The State asserts defendant has forfeited this issue for numerous reasons. Since our supreme court has instructed us to begin our review of a case by determining whether any issues have been forfeited (see *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008)), we begin by addressing the State's forfeiture argument.

¶ 47 Under the doctrine of invited error, a defendant cannot request to proceed in one manner and then later argue on appeal that the agreed-to course of action was in error. *People v. Carter*, 208 Ill. 2d 309, 319, 802 N.E.2d 1185, 1190 (2003). More specifically, "[w]hen a defendant acquiesces in the trial court's answer to a question from the jury, the defendant cannot later complain that the trial court's answer was an abuse of discretion." *People v. Averett*, 237 Ill.

2d 1, 23-24, 927 N.E.2d 1191, 1204 (2010). In the trial court, defendant did not want the court to define the two terms and later noted his agreement with the court's proposed answer. Moreover, we decline to address defendant's plain-error claim because he invited any error caused by the court's failure to define the two terms. See *People v. Patrick*, 233 Ill. 2d 62, 77, 908 N.E.2d 1, 10 (2009).

¶ 48 D. Ineffective Assistance of Counsel

¶ 49 Defendant further asserts he was denied effective assistance of counsel when counsel failed to object or limit his codefendant Craig's limited-authority instruction. This court analyzes ineffective-assistance-of-counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163.

¶ 50 To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. The *Strickland* Court noted that, when a case is more easily decided on the ground of lack of sufficient prejudice rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697.

¶ 51 Defendant has not shown prejudice in this case. First, the second half of the instruction quoted in our background section is consistent with defendant's theory he and the other men entered Apartment 6 with Dickie's permission and is particularly beneficial to defendant, who was the one that punched Schiewe. Thus, we disagree with him this instruction impacted his defense the group had authority to enter Apartment 6. As to the first part of the instruction, defendant has asserted continuously no evidence was presented he entered the apartment with criminal intent. Thus, if defendant's assertion is true, the first half of the instruction would not have impacted defendant. Moreover, in the section of the State's closing argument quoted by defendant, the State expressly stated it was not suggesting the jury found the men had a secret intention. The State was simply addressing its concern stated during the instruction conference that Craig's instruction did not make it clear the men's entry could be "without authority" because they were never invited in or received consent to enter. Further, we fail to see how the instruction impacted defendant's self-defense argument. Even if defendant entered the apartment with the intent to do violence, self-defense was still a defense to the element of home invasion that defendant intentionally caused injury to Schiewe.

¶ 52 Accordingly, we find defendant was not denied effective assistance of counsel.

¶ 53 E. Motion for a Mistrial

¶ 54 Defendant also asserts the trial court erred by denying his motion for a mistrial after the State presented testimony of King's affiliation with an outlaw motorcycle club. The State asserts defendant has forfeited the issue by failing to include it in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). Defendant responds the error constitutes plain error. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). We agree with the State that defendant failed to include the issue in his posttrial motion as the mistrial argument in that

motion related to the denial of the motion to continue and not the motorcycle club. Accordingly, we will review the issue for plain error.

¶ 55 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

> "(1) 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, or (2) 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." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

We begin our plain-error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059.

¶ 56 A mistrial is appropriate when "an error of such gravity has occurred that the defendant has been denied fundamental fairness such that continuation of the proceedings would defeat the ends of justice." *People v. Nelson*, 235 Ill. 2d 386, 435, 922 N.E.2d 1056, 1083 (2009). The trial court has broad discretion to determine the propriety of granting a defendant's motion for a mistrial. *People v. Hall*, 194 Ill. 2d 305, 341, 743 N.E.2d 521, 542 (2000). A reviewing court will not disturb a trial court's denial of a defendant's motion for a mistrial absent a

clear abuse of that discretion. *Nelson*, 235 Ill. 2d at 435, 922 N.E.2d at 1083.

¶ 57 The State argues the trial court did not abuse its discretion because a mistrial is drastic remedy and the motorcycle references were fleeting. We agree with the State. Defendant's trial was two days long with eight witnesses, and the motorcycle club references were a total of four questions relating primarily to the identity of the unknown man. Further, defense counsel did not even object when the few motorcycle questions were asked. The court addressed the situation by telling the prosecutor not to reference the motorcycle club in his closing arguments. Contrary to defendant's assertion, the prosecutor did comply with the court's admonition. Defendant fails to cite any statements by the prosecutor mentioning a motorcycle club and provides no explanation of how the term "posse" is a reference to a motorcycle club. Further, telling the jury not to be fooled into accepting a witness as nice is not a reference to the motorcycle club. Accordingly, we find the four motorcycle-related questions did not deny defendant a fair trial, and thus the trial court did not abuse its discretion by denying defendant's motion for a mistrial. Since we have found no error, we do not address plain error.

¶ 58 F. Admission of the 9-1-1 Recording

¶ 59 Defendant next contends the trial court's admission of the 9-1-1 recording constituted plain error. However, defendant has forfeited the issue and is estopped from raising it on appeal.

¶ 60 During the trial, the trial court expressly asked defendant's counsel if he had an objection to the playing of the 9-1-1 recording and the providing of a transcript of the recording to the jury, and defendant's counsel replied in the negative. During closing arguments, defendant's counsel pointed out Dickie sounded "calm and dispassionate" during the 9-1-1 call and no background noise could be heard. Later, when the jury asked to hearing the recording again, de-

fendant's counsel did not object.

¶ 61 A party forfeits the right to complain of an error when to do so is inconsistent with the party's position in an earlier court proceeding. *People v. Johnson*, 334 Ill. App. 3d 666, 680, 778 N.E.2d 772, 784 (2002). Thus, a defendant is estopped from raising an argument on appeal that is inconsistent with the defendant's strategy pursued at trial. *Johnson*, 334 Ill. App. 3d at 680, 778 N.E.2d at 784. Here, the trial court provided defendant's counsel with an opportunity to object to the admission of the 9-1-1 recording, and counsel declined to do so. Defendant's counsel then asserted the recording supported its theory of the case and later expressly allowed the jury to hear the recording again. Clearly, part of defendant's counsel's strategy was to have the jury hear the 9-1-1 recording. Thus, defendant cannot raise the error now.

¶ 62 Moreover, when " 'a party acquiesces in proceeding in a given manner, he is not in a position to claim he was prejudiced thereby.' " *People v. Villarreal*, 198 Ill. 2d 209, 227, 761 N.E.2d 1175, 1184 (2001) (quoting *People v. Schmitt*, 131 Ill. 2d 128, 137, 545 N.E.2d 665, 668 (1989)). "Active participation in the direction of proceedings, as in this case, goes beyond mere waiver." *Villarreal*, 198 Ill. 2d at 227, 761 N.E.2d at 1184. Again, as stated, defendant's counsel was asked by the trial court if he had an objection to the recording, and he replied, "No." Here, counsel did not simply fail to raise an objection but rather, expressly declined to raise an objection when given an opportunity to do so. Thus, defendant cannot now raise this issue on appeal.

¶ 63 G. Trial Court's Vacation

¶ 64 Defendant further argues the trial court's communication to the jury he was leaving for South Carolina on Friday hastened the jury's verdict on Thursday. First, defendant has forfeited this issue by failing to object at trial. See *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d at 1130.

The issue was ripe when the case was ready to go to the jury for deliberations on Thursday, and defendant's counsel could have asked the jury to be admonished they had no time limitations on their deliberations. Regardless, defendant has not shown any error because he fails to even establish the jurors that deliberated his case were present in the courtroom when the trial court made its statements regarding the vacation. Our court is not a depository into which defendant may dump his burden of argument and research. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 401 Ill. App. 3d 868, 882, 929 N.E.2d 641, 653 (2010). Moreover, even if they were all present, the trial court's statements did not suggest the trial could not continue past Thursday. Further still, if the statements could be construed to suggest the trial court needed to leave on Friday, the two statements were isolated, one on each day of *voir dire*, and before the jury had heard any of the evidence in this case. The jury asked several questions of the court during their deliberations, indicating they were not rushing to judgment. Based on the facts of this case, the trial court's two isolated statements three and four days before the jury's deliberations did not hasten the jury's verdict.

¶ 65 H. Limiting Instruction

¶ 66 Defendant also argues the trial court committed plain error by failing to give a *sua sponte* limiting instruction that the jury should not consider the birthday party details against defendant. Defendant again fails to establish a specific error. It appears he is suggesting all of the evidence related to the party was inadmissible against him. However, when a defendant is not involved in a collateral incident, the admissibility of that other incident is judged under ordinary principles of relevance. *People v. Pikes*, 2013 IL 115171, ¶ 20, 998 N.E.2d 1247. Defendant fails to provide this court with any relevancy analysis. He also fails to cite any authority a trial court *must* give *sua sponte* a limiting instruction in the given situation. We recognize defendant

makes random references to Corey's hearsay statements at the party, which are clearly a separate matter from general eyewitness testimony about the party. However, defendant does not really differentiate the two types of evidence and fails to do a separate analysis. We are entitled to have the issues clearly defined and with pertinent authority cited (*Palm*, 401 Ill. App. 3d at 882, 929 N.E.2d at 653), which defendant fails to do here. As stated, we will not make defendant's arguments for him. See *Palm*, 401 Ill. App. 3d at 882, 929 N.E.2d at 653. Accordingly, we find defendant has failed to show any error related to a *sua sponte* limiting instruction.

¶ 67 I. Cumulative Errors

¶ 68 Last, since we have found no errors, we do not address defendant's argument the cumulative effect of all of the errors in his case denied him a fair trial.

¶ 69 III. CONCLUSION

¶ 70 For the reasons stated, we affirm the McLean County circuit court's judgment. As part of our judgment, we grant the State's request that defendant be assessed $75 as costs for this appeal.

¶ 71 Affirmed.