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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of De Kalb County.
Plaintiff-Appellee,)	
)	
v.)	Nos. 10-CF-482
)	10-CF-483
ANTHONY S. McCLAIN and)	
FRANSHAWN A. WITTENBURG,)	Honorable
)	Robbin J. Stuckert,
Defendants-Appellants.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient to convict the defendants of attempted residential burglary. The defendants' trial attorneys were not ineffective in failing to file a motion to sever their trials. The defendant Wittenburg was not denied the effective assistance of counsel where trial counsel allegedly failed to advise him that he was subject to mandatory Class X sentencing.

¶ 2 Following a joint jury trial, the defendants, Anthony McClain and Franshawn Wittenburg, were convicted of attempted residential burglary (720 ILCS 5/8-4(a), 19-3(a) (West 2008)). On appeal, the defendants argue that (1) the evidence was not sufficient to prove them guilty beyond a

reasonable doubt; (2) both defendants' trial attorneys rendered ineffective assistance of counsel when they failed to move to sever the defendants' trials; and (3) Wittenburg's trial counsel rendered ineffective assistance in failing to advise Wittenburg, during plea negotiations, that he was subject to mandatory Class X sentencing. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On August 3, 2010, the defendants were charged by criminal complaint with attempted residential burglary (720 ILCS 5/8-4(a) (West 2008)). The complaints alleged that on August 2, 2010, McClain waited in a car outside a residence, 8442 Rich Road in De Kalb, while Wittenburg went to the front door of the residence and attempted to enter the house. The complaints further alleged that the defendants acted with the intent to commit a theft. On September 24, 2010, the State filed superseding indictments, also charging the defendants with one count of attempted residential burglary. The indictments alleged that on August 2, 2010, the defendants approached the front door of the subject residence, rang the doorbell numerous times, opened the screen door and rattled the doorknob of the front door to the residence with the intent to commit a theft therein.

¶ 5 On September 30, 2010, Wittenburg was arraigned. At the arraignment hearing, the trial court admonished Wittenburg that attempted residential burglary was a Class 2 felony that carried a potential penalty, if convicted, of three to seven years' imprisonment. The trial court noted that there was a possibility of an extended term of up to 14 years' imprisonment and that probation was also a possible punishment.

¶ 6 On October 18, 2010, prior to jury selection, the trial court admonished Wittenburg that, based on his prior criminal history, he was subject to mandatory Class X sentencing if he were to be convicted at trial. The trial court explained that a Class X sentence would range from a minimum

of 6 years up to a maximum term of 30 years' imprisonment. The trial court further noted that the maximum sentence could be 30 to 60 years if there were factors in aggravation or a prior criminal history that warranted extended sentencing. Wittenburg was also admonished that, under Class X sentencing, probation was not an option and that he would be subject to a three year period of mandatory supervised release. The trial court then asked Wittenburg whether he understood Class X sentencing. Wittenburg responded that he understood.

¶ 7 The defendants were tried together before a jury, beginning on October 19, 2010. Holly Kuhn, who lived at 8442 Rich Road in De Kalb, testified that she was married and had a six-year old daughter and a four-year old son. Her driveway had an alarm system. If a car entered the driveway far enough, an alarm buzzed in the house. Her house was surrounded by corn and bean fields and her closest neighbor was about a mile away. De Kalb was about four miles away. The Northern Illinois University (NIU) towers were visible from her house. Annie Glidden Road, which was about a mile away, could also be seen from her house.

¶ 8 Kuhn further testified that, on August 2, 2010, around 9:20 a.m., she was in her kitchen. Her children were in the family room watching television. The driveway alarm activated and she assumed it was her children's grandparents coming to visit. She then heard the alarm activate again, which indicated to her that the car had turned around in the driveway. She went into the family room, looked out a window, and saw a white car with a black man inside. She did not know who it was so she decided that she would not answer the door. The doorbell then started to ring. She did not answer the door, and the bell kept ringing and ringing. It rang for five minutes. She then started to hear the door knob jiggling or rattling as if it was being turned. She then heard a really loud bang and heard the french doors, between her dining room and living room, shuddering. The french doors

normally made this shuddering noise when the front door was opened because of the resultant change in air pressure. She was scared because she did not know if someone entered the house. She then yelled “stay out” and dialed 911.

¶ 9 The 911 dispatcher told her to secure herself and her children in a locked room. As she looked out the window she saw someone on the sidewalk and believed it would be safe for her and her children to go upstairs to lock themselves in the bedroom. To get upstairs, she had to pass the front door, which was closed. From her bedroom window she was able to see the person that was at the front door. She identified that person in court as Wittenburg. On the day of the alleged attempted entry into her home, Wittenburg was wearing tan plaid shorts and a light-colored shirt. The person waiting in the car had on a white T-shirt. She only saw a profile view of him, but identified the driver in court as McClain. Kuhn further testified that Wittenburg slowly walked along the sidewalk back to the car and stood there for a minute talking on a cell phone. After he entered the car, the defendants stayed in the driveway for about another 20 seconds. They then drove out of her driveway and headed west on Rich Road. She remained in her bedroom with her children until the police arrived. Kuhn identified in court the tan plaid shorts that Wittenburg was wearing on the day of the alleged incident. On cross-examination, Kuhn acknowledged that from where the defendants’ car was parked on her driveway, one could not see Annie Glidden Road or the NIU skyline. Finally, the evidence indicated that in order for Wittenburg to reach Kuhn’s front porch door, he would have had to walk past the family room windows. Kuhn testified that the blinds in the family room were closed on that day.

¶ 10 Rudi Ziegler testified that he worked part-time as a police officer for the Village of Malta. On August 2, 2010, he was on patrol in a marked squad car. He heard a dispatch of a possible

residential burglary in progress at 8000 Rich Road. From where he was at, he drove eastbound on Schafer Road to Rich Road. He then turned south on Lucas Road. When he reached Twombly Road, he noticed a white four-door vehicle driving west. He turned west on Twombly and pursued the vehicle. He caught up to the vehicle on Schafer Road. He stopped the vehicle.

¶ 11 When Ziegler approached the driver's side door of the vehicle, he asked the driver for his license and proof of insurance. Ziegler identified McClain in court as the driver of the vehicle. At the time of the stop, McClain was wearing a white T-shirt. McClain indicated that he did not have his license with him. Ziegler asked if the vehicle belonged to him. McClain told him that the vehicle belonged to his girlfriend. McClain told Ziegler his girlfriend's name and produced her insurance card. McClain told Ziegler he and the passenger were lost and that they were trying to find University Village, an apartment complex off of Annie Glidden Road in De Kalb. Ziegler asked McClain if they had stopped at a house. McClain said they had stopped at a house to ask for directions. Ziegler identified Wittenburg in court as the passenger in the vehicle. Wittenburg was wearing a sleeveless brown shirt and shorts. Ziegler told the defendants that they had been stopped because of a reported burglary in progress.

¶ 12 Brad Carls testified that he was an investigator for the De Kalb County sheriff's office. On August 2, 2010, at 9:30 a.m. he was called to Schafer Road just north of Route 38 for an investigation of an attempted residential burglary. When he arrived at the scene, there was a Malta police officer and two county patrol units. The driver of the stopped vehicle was detained in the back seat of one of the county units and the passenger was sitting in a grassy area alongside the car. Carls identified McClain, in court, as the driver of the vehicle. He read McClain his *Miranda*

warning and asked him what “was going on today.” McClain stated that he and the passenger were going to Walmart to get a car battery and that they got lost.

¶ 13 Carls then went over to speak with the passenger sitting in the grassy area. The passenger was wearing a dark-colored T-shirt and tan plaid shorts. Carls identified Wittenburg, in court, as the passenger. Carls asked the passenger what was going on. The passenger said they were lost. Carls then asked one of the patrol units to transport the defendants to the sheriff’s office. Carls then went to the subject residence on Rich Road. He spoke with Kuhn about the incident that led to her calling 911. Carls had an opportunity to look around the outside of the home. Carls testified that looking south down the driveway to the backyard was the skyline of NIU. He testified that Kuhn’s home was about two miles from NIU. He then proceeded to the sheriff’s office to speak with the defendants again.

¶ 14 At the sheriff’s office, he again asked McClain what they were doing. McClain stated that he and his brother were out driving around. He was showing his brother the area. They were headed to Walmart to pick up a car battery. Carls asked McClain what they were looking for in the middle of cornfields, but McClain did not have an answer. McClain was unsure how they had reached Kuhn’s house, the only thing he remembered was that they had turned left in Kuhn’s driveway. After that, they drove to the back of the property and turned around. They stopped at the end of the driveway because they were lost and needed directions. McClain told Carls that Wittenburg had gone up to the door and when he returned to the vehicle he felt unusual because he had seen people in the house but no one answered the door.

¶ 15 Carls then went to speak with Wittenburg. He read Wittenburg his *Miranda* warnings. Carls asked Wittenburg what he and McClain were doing at the time of the incident. Wittenburg stated

that they were headed to Walmart for a car battery that they had dropped off the day before. Wittenburg also stated that they were out looking at cars for sale. Wittenburg indicated that they had stopped and looked at a white pick up truck and a couple of cars. Wittenburg stated that he could not remember the exact locations of where they had stopped because he was not familiar with the area. He remembered passing a large school, which was under construction, and thought they had been looking for Bethany Road. Carls testified that De Kalb High School, on Dresser Road east of Annie Glidden Road, was under construction. Wittenburg stated that after they pulled into Kuhn's driveway, he got out of the car, went to the front door, and rang the doorbell. He was going to get directions on how to get back to De Kalb. Wittenburg stated that the only thing he did was ring the doorbell. He then returned to the vehicle and told McClain that nobody was home and they left.

¶ 16 Carls then returned to speak with McClain because "the stories weren't matching up." Carls asked McClain if he had seen Wittenburg ring the doorbell. McClain stated that he had. Carls asked if Wittenburg did anything else. McClain stated that Wittenburg had opened the storm door and knocked on the door. When Wittenburg returned to the car, McClain told Wittenburg that he had seen people moving around in the house but that they must be afraid to answer the door because McClain and Wittenburg were black. Carls asked McClain if he and Wittenburg had stopped anywhere or looked at anything prior to getting lost and ending up in the Kuhns' driveway. McClain responded "no."

¶ 17 On cross-examination, Carls acknowledged that both defendants said they were lost and were trying to find Walmart. Carls acknowledged that Walmart was not part of the NIU skyline and it was not in the downtown De Kalb area. Carls had followed up with Walmart and confirmed that the defendants had dropped off a car battery the day before. Carls testified that if someone was

driving on Annie Glidden Road and was looking for Walmart, they might be looking for Bethany Road. If they passed Dresser Road, they would see De Kalb High School, which was under construction. Further, if they passed Bethany, they would reach Rich Road. Carls acknowledged that if the defendants had parked their vehicle behind the house near the garage, it would have been difficult to see their car from the road. Carls also acknowledged that a document prepared as part of the investigation indicated that Wittenburg lived in Chicago.

¶ 18 Craig Parnow testified that he was a patrol deputy for the De Kalb County sheriff's office. On August 2, 2010, Parnow responded to a report of a prowler at 9:30 a.m. at a residence on Rich Road. At the residence, he spoke with Kuhn. Kuhn told him someone had come to her front door. Kuhn described a loud noise that she heard, that she believed came from her closet doors adjacent to her front door. Kuhn described the noise as a "shuddering" and stated that it usually happened when the front door opened. Parnow testified that, based on his discussion with Kuhn, he interpreted her statement to mean that the shuddering occurred when the screen door opened and that is what he wrote in his report. On cross-examination, Parnow acknowledged that Kuhn never stated that the storm door caused the shuddering. That was just his interpretation of what she told him.

¶ 19 Erica Holly testified that on August 2, 2010, she owned a white 2002 Ford Grand Mercury. McClain was driving her vehicle that day. Her vehicle had a broken fan and frequently overheated. McClain was her son's father. She had known him for eight years. She lived in an apartment in De Kalb. She had lived in De Kalb for nine years. Her son was four years old. She was dating McClain and had been dating him for seven years. She was aware that McClain had her car on August 2, 2010, because he was staying with her. Her apartment was about a block away from Annie Glidden Road.

¶ 20 Thereafter, the parties made closing arguments. In closing, the prosecutors did not argue that the defendants' statements were unbelievable because they were contradictory. The jury was instructed, pursuant to Illinois Pattern Jury Instruction, Criminal, No. 3.08 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.08), that they were not to use one defendant's statements as evidence of the other defendant's guilt. Following deliberation, the jury found the defendants guilty of attempted residential burglary. On November 18, 2010, the defendants filed a motion for a new trial and a motion for judgment notwithstanding the verdict. On February 17, 2011, the trial court denied the motions. On that same day, following a sentencing hearing, the trial court sentenced McClain to three years' imprisonment. Thereafter, McClain filed a timely notice of appeal, docketed in this court as Case No. 2-11-0267.

¶ 21 On November 15, 2010, Wittenburg filed a *pro se* motion alleging ineffective assistance of counsel. On January 28, 2011, at a hearing, Wittenburg's trial counsel was discharged. Wittenburg indicated that he wished to represent himself *pro se* on the ineffectiveness claim. The trial court continued the cause for a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). On March 4, 2011, at a hearing, Wittenburg indicated that he desired that counsel be appointed to assist him with his posttrial motions. New counsel was appointed. On April 28, 2011, a *Krankel* hearing was held on Wittenburg's *pro se* motion alleging ineffective assistance of counsel. Newly-appointed defense counsel indicated that Wittenburg would explain his *pro se* motion to the court. One of the issues raised by Wittenburg was that trial counsel failed to inform him that he would be subject to mandatory Class X sentencing if he was convicted of the charged offense. Wittenburg stated that the first time he found out about the mandatory Class X sentencing was the day of trial. Wittenburg indicated that the State had offered him a plea bargain that would have resulted in one year

imprisonment. Wittenburg stated that he would never have gone to trial had he known that, if convicted, he was subject to a Class X sentence.

¶ 22 Trial counsel responded to Wittenburg's allegations. Trial counsel explained that the first time he met with Wittenburg at the DeKalb County jail he discussed the fact that Wittenburg had just been released from prison after serving a sentence for another residential burglary. Wittenburg was on mandatory supervised release (MSR). Trial counsel stated that he "remember[ed] specifically pointing out to [Wittenburg] at that time that that would or could lead to the possibility of extended-term sentencing in this case." Trial counsel further stated that he remembered numerous discussions prior to trial, sometimes when counsel for the State was present, "about the fact that Mr. Wittenburg faced Class X sentencing possibilities if he were convicted at trial." Trial counsel also believed that Wittenburg had been told about the possibility of Class X sentencing at his arraignment. In response to other issues raised by Wittenburg, trial counsel recalled that a 911 tape had been played for the jury and that McClain had testified at trial. When Wittenburg pointed out that neither of those things had happened, trial counsel admitted that he could be mistaken as to those issues.

¶ 23 The State indicated that, based on its conversations with trial counsel, it had the impression that the defendant was adamant about going to trial. The State confirmed that it had offered Wittenburg a plea bargain for one year of imprisonment. The State noted that it remembered having a discussion with trial counsel that the plea offer was a good disposition for Wittenburg considering he was facing mandatory Class X sentencing. Finally, the State noted that the defendant had been admonished prior to the start of trial that he was facing Class X sentencing.

¶ 24 The defendant stated that he was not admonished at his arraignment that he would be subject to Class X sentencing. He acknowledged, however, that the trial court advised him of the mandatory Class X sentencing just prior to the start of trial. Conflict counsel was given an opportunity to argue the defendant's claims; she rested on the defendant's motion. The trial court found that "it may be correct" that trial counsel did not tell the defendant that he was subject to mandatory Class X sentencing. However, the court further noted that Wittenburg did not object or refuse to proceed when he learned of it on the first day of trial. The trial court also noted that at Wittenburg's bond call, the first time he was in court, the first words out of Wittenburg's mouth were "I demand trial immediately." The trial court inferred that, from the very beginning, Wittenburg wanted a trial and wanted it quickly. The trial court found that the defendant had not presented evidence to show that trial counsel was ineffective.

¶ 25 On May 17, 2011, Wittenburg filed a new *pro se* motion for a new trial. In that motion, Wittenburg argued that the evidence was insufficient to prove him guilty beyond a reasonable doubt. On May 31, 2011, a hearing was held on the motion. Although conflict counsel was present, Wittenburg argued the motion *pro se*. The trial court denied the motion. That same day, the trial court sentenced Wittenburg to seven years' imprisonment. Thereafter, Wittenburg filed a timely notice of appeal, docketed in this court as Case No. 2-11-0543. On the defendants' motions, their cases have been consolidated for purposes of this appeal.

¶ 26

II. ANALYSIS

¶ 27 The defendants' first contention on appeal is that their convictions should be reversed because no reasonable trier of fact could have found, from the evidence presented, that either defendant acted with the intent to commit a theft. Evidence is sufficient when a rational trier of fact,

after viewing the evidence in a light most favorable to the State, could find that the essential elements of the offense were proven beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). A reviewing court will not substitute its judgment for that of the trier of fact on questions involving the sufficiency of the evidence and will not reverse a criminal conviction unless the evidence is so contrary to the verdict or unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt as to the defendant's guilt. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

¶ 28 The crime of residential burglary is defined as follows: "A person commits residential burglary who knowingly and without authority enters *** the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft." 720 ILCS 5/19-3 (West 2008). A person is guilty of the inchoate offense of attempt when "with intent to commit a specific offense, he or she does any act which constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2008). Accordingly, to obtain a conviction for attempted residential burglary in this case, the State had to prove that the defendants intended to burglarize Kuhn's home and that the defendants took a "substantial step" toward the commission of that crime. The defendants argue only that the State failed to prove that they intended to burglarize Kuhn's home.

¶ 29 Intent is rarely susceptible of direct proof and is, therefore, generally proved circumstantially. *People v. Jiles*, 364 Ill. App. 3d 320, 332 (2006). Where there are no inconsistent circumstances, attempted unlawful entry into a person's home gives rise to an inference of an intent to commit theft. *In re P.A.G.*, 193 Ill. App. 3d 601, 603 (1990). The question is not whether any possible innocent explanation exists, but rather, the question is whether the evidence was sufficient to allow a rational jury to reasonably infer that the defendant intended to commit a theft. *People v. Richardson*, 104 Ill.2d 8, 13 (1984).

¶ 30 In the present case, there was sufficient evidence for a rational juror to infer that the defendants intended to burglarize Kuhn's home. Kuhn testified that after Wittenburg rang the doorbell incessantly and the door knob rattled, she heard a shuddering sound, from pocket doors inside the house, that she only heard when the front door opened. We acknowledge that Parnow testified that when Kuhn indicated that a shuddering sound occurred when the door opened, he interpreted that to mean the storm door. However, on cross-examination he acknowledged that that was only his interpretation and that Kuhn never stated specifically that the shuddering sound was due to the storm door opening. The trier of fact is charged with judging the credibility of the witnesses. *Jiles*, 364 Ill. App. 3d at 332. Accordingly, a rational juror could have credited Kuhn's testimony and inferred that Wittenburg opened the front door to her house with the intent to enter and commit theft, but was scared off when Kuhn shouted to "stay out."

¶ 31 The surrounding circumstances are not inconsistent with this determination. According to Kuhn, Wittenburg began to repeatedly ring the doorbell for an abnormally long period of time and then she heard the rattling of the door knob and the shuddering sound of her pocket doors. Incessantly ringing the doorbell and then attempting to enter the home is not consistent with someone who is lost and merely wants to ask directions. Although the defendants claimed they were lost and needed directions, there was evidence contrary to that claim. The defendants had a cell phone that could have been used to call for directions. They told Officer Ziegler they were lost and looking for University Village, even though the NIU towers could be seen from Kuhn's property. Furthermore, Holly testified that she had lived in De Kalb for nine years, had been dating McClain for eight years and that they had a four-year old son. It could be reasonably inferred that McClain was familiar with the De Kalb area. There were also inconsistencies between Kuhn's testimony and

the defendants' statements. Kuhn testified that she heard the door knob rattling and her french doors shuddering, as if someone had opened the door to enter the house. Wittenburg told Carls that he only rang the doorbell. McClain told Carls that Wittenburg opened the storm door and knocked on the front door. False exculpatory statements are admissible evidence of a defendant's consciousness of guilt. *P.A.G.*, 193 Ill. App. 3d at 604.

¶ 32 The defendants argue that the following circumstances are inconsistent with an attempt to commit theft: Wittenburg walked slowly away from the house; the defendants sat in the car for a minute before driving slowly away; they did not possess any burglary tools or disguises; they parked in full view in front of the house rather than hidden in the back, which was possible; they consistently stated that they were lost and stopped for directions; the incessant ringing showed that Wittenburg was trying to attract attention; and the front door was still closed when Kuhn went past with her children to go upstairs.

¶ 33 Nonetheless, a rational trier of fact could have made inferences consistent with theft from most of these circumstances. It could be inferred that the defendants slowly left the house to cover up their true intentions and that they parked in front of the house so McClain could act as a "look-out" and so that they would have a quick get-away if it became necessary. Although they consistently stated that they were lost, they had a cell phone to call for directions and the NIU towers could be seen from Kuhn's property. The incessant ringing could be seen as a method for Wittenburg to discover whether anyone was at home. Although Kuhn testified that the front door was not open when she went past to go upstairs, Wittenburg could have simply closed the front door after he opened it and Kuhn shouted. Finally, the fact that the defendants did not possess burglary tools or disguises, one of many circumstances to consider, is not enough to conclude that no

reasonable trier of fact could have found that the defendants had the requisite intent to commit residential burglary.

¶ 34 The defendants rely on *People v. Purnell*, 154 Ill. App. 3d 220 (1987), and *People v. Boguszewski*, 220 Ill. App. 3d 85 (1991), for the proposition that the surrounding circumstances in this case are inconsistent with an intent to commit a theft. In *Purnell*, the defendant opened the door to an apartment right after the renter's daughter entered the apartment. *Purnell*, 154 Ill. App. 3d at 221. The defendant was charged and convicted of attempted burglary. *Id.* at 220-21. The reviewing court reversed that conviction, holding that none of the evidence affirmatively showed the defendant's intent. *Id.* at 224. The reviewing court further noted that it was unlikely that the defendant, who under the State's theory had seen the daughter enter the apartment, would immediately thereafter attempt to enter the apartment to commit a theft. *Id.*

¶ 35 In *Boguszewski*, the defendant entered the lunchroom of her former boyfriend's place of employment, calling "hello" numerous times until a night watchman entered the room. *Boguszewski*, 220 Ill. App. 3d at 86. The defendant asked the watchman's permission to leave a note with her former boyfriend's timecard, but the watchman refused and asked her to leave the premises. *Id.* The defendant was convicted of burglary based on her entry into the building to commit a theft. *Id.* The reviewing court reversed the defendant's conviction, holding that the evidence failed to establish that she entered the building with the intent to commit a theft. *Id.* at 88. The reviewing court noted that the defendant repeatedly calling "hello" was inconsistent with an intent to commit a theft and more consistent with the defendant's testimony that she entered with the intent to leave a note on her former boyfriend's timecard. *Id.*

¶ 36 *Purnell* and *Boguszewski* are distinguishable from the present case. In both of those cases there were facts showing that there was no intent to commit a theft. In *Purnell*, the defendant had seen someone enter the apartment, and in *Boguszewski*, the defendant repeatedly called “hello” when inside the premises and had a reasonable explanation for her presence. In the present case, there is no similar type of evidence. Wittenburg repeatedly rang Kuhn’s doorbell, rattled her door knob and, based on the shuddering of the french doors, opened the front door to her house. This was inconsistent with the defendants’ statements that they were merely lost and needed directions. Moreover, Wittenburg had a cell phone which could easily have been used to call and ask someone for directions and the NIU skyline was visible from Kuhn’s property.

¶ 37 The defendants argue that reversal is warranted because, in *Purnell* and *Boguszewski*, the defendants exhibited consciousness of guilt, but their convictions were still reversed. Specifically, in *Purnell*, the defendant fought with the police when he was apprehended and claimed that he was never at the apartment in question. In *Boguszewski*, the defendant was actually convicted of theft because she left the premises with her former boyfriend’s timecard. In this case, the defendants point out that there was no consciousness of guilt—they drove slowly away from Kuhn’s home and never denied being there. The defendants argue, therefore, that if there was no intent in *Purnell* and *Boguszewski*, there can be no intent to commit theft in this case. We find this argument unpersuasive. The *Purnell* and *Boguszewski* defendants’ alleged consciousness of guilt were not factors that the reviewing courts considered in determining whether those defendants had the intent to commit theft. Accordingly, using those cases as persuasive authority that there was no intent in this case, because there was no consciousness of guilt, would be improper. Moreover, as stated above, the defendants’ false exculpatory statements provided consciousness of guilt. See *P.A.G.*,

193 Ill. App. 3d at 604. Although Kuhn testified that Wittenburg rattled her doorknob and that she heard noises consistent with the front door being opened, Wittenburg stated that he only rang the doorbell and McClain stated that Wittenburg only knocked on the front door.

¶ 38 The defendants' next contention is that each defendant's trial counsel was ineffective in failing to file a motion to sever their trials. The defendants argue that the primary evidence relied on by the State to prove their alleged intent to commit theft was their statements to Investigator Carls. The defendants concede that the State only argued that the defendants' statements were internally inconsistent and implausible. Nonetheless, the defendants argue that their statements to Investigator Carls were inconsistent and that the jury's consideration of these inconsistencies was prejudicial and a violation of the United States Supreme Court's ruling in *Bruton v. United States*, 391 U.S. 123 (1968).

¶ 39 In *Bruton*, the Court held that the admission of a statement, at a joint trial, by a nontestifying codefendant that expressly implicates the defendant in the crime violates the defendant's constitutional right to confront the witnesses against him. *Id.* at 137. The Court also determined that the prejudice from the admission of such statements is not cured by a limiting instruction, *i.e.*, instructing the jury that the statement should be disregarded in determining the guilt or innocence of the defendant, because such an instruction cannot replace the right to cross-examine. *Id.*

¶ 40 To determine whether a defendant was denied his right to effective assistance of counsel, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the two-prong *Strickland* test, "a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable

probability that the result of the proceeding would have been different.” *People v. Houston*, 226 Ill. 2d 135, 144 (2007). To establish deficient performance, a defendant must overcome a strong presumption that the challenged action or inaction was a matter of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). A decision not to seek a severance is considered a matter of trial strategy. *People v. Turner*, 36 Ill. App. 3d 77, 81 (1976).

¶ 41 Generally, defendants who are jointly indicted are to be jointly tried unless fairness to one of the defendants requires a separate trial to avoid prejudice. *People v. Lee*, 87 Ill. 2d 182, 187 (1981). Illinois courts recognize two grounds for severance. *People v. James*, 348 Ill. App. 3d 498, 507 (2004). First, a severance is necessary when a defendant is implicated by the hearsay admissions of a codefendant who does not testify, because the defendant’s sixth amendment right of confrontation can be violated. *Id.* The second ground for severance involves a situation where the defendants’ defenses are so antagonistic that one of the codefendants cannot receive a fair trial if tried jointly with the others. *Id.*

¶ 42 As stated above, the defendants argue that a severance was necessary based on the first ground—that the admission of their inconsistent out-of-court statements made to Investigator Carls were so prejudicial that it violated their sixth amendment right of confrontation. The defendants argue that it was impossible for the jury to ignore the inconsistencies in their statements to Carls and the implications of those discrepancies with respect to the defendants’ credibility and consciousness of guilt. This argument fails as a matter of law.

¶ 43 “Under *Bruton* and its progeny, the admission of a statement made by a non-testifying codefendant violates the Confrontation Clause when that statement facially, expressly, clearly, or powerfully implicates the defendant.” *United States v. Angwin*, 271 F. 3d 786, 796 (9th Cir. 2001),

reversed on other grounds as stated in *United States v. Lopez*, 484 F. 3d 1186, 1210-11 (9th Cir. 2007) (*en banc*). Codefendants' statements that do not expressly implicate each other, but rather are only incriminating when linked with other evidence introduced at trial, do not rise to the level of a *Bruton* violation. See *Angwin*, 271 F. 3d at 797 ("limiting *Bruton* to statements that are incriminating on their face or expressly incriminating since statements that only become incriminating when linked with other evidence are inherently less prejudicial" (citing *Richardson v. Marsh*, 481 U.S. 200 208 (1987))); see also *id.* ("noting that 'a codefendant's statement that does not incriminate the defendant unless linked with other evidence introduced at trial does not violate the defendant's Sixth Amendment rights'" (quoting *United States v. Hoac*, 990 F. 2d 1099, 1105 (9th Cir. 1993))). In the present case, the defendants' statements to Investigator Carls were not expressly incriminating. As argued by the defendants, their codefendants' statements were only incriminating when linked with other evidence at trial, namely their own statements to Investigator Carls. Accordingly, there is no *Bruton* violation because the defendants' sixth amendment rights were not compromised. *Id.*

¶ 44 Moreover, their defenses were not so antagonistic as to require a severance. "[A] severance is not mandated by the mere fact that a codefendant's statement is contradicted by evidence introduced at trial. *People v. Lumpkin*, 105 Ill. App. 3d 157, 166 (1982). In *Lumpkin*, two brothers were tried jointly for murder. *Id.* at 158. One brother's defense was that he and his brother had found the wounded decedent and had then gone to get help. *Id.* at 166. The other brother's post-arrest statement, admitted via the testimony of a police officer, was that he had not seen the decedent in the last two or three days. *Id.* The reviewing court found that the inconsistent statement and theory of defense were not sufficiently incriminating to require a severance. *Id.* In so ruling, the

Lumpkin court cited *People v. Holman*, 43 Ill. App. 3d 56 (1976), for the proposition that it is not error to deny a motion to sever even if the credibility of a codefendant's statement is attacked at trial as long as the statement does not implicate the other codefendant in commission of the offense. *Id.* In the present case, the defendants' post-arrest statements, although not entirely consistent, do not implicate each other in the commission of the charged offense. Accordingly, as there was no *Bruton* violation and the defendants' defenses were not antagonistic, trial counsel was not ineffective in failing to move to sever the defendants' trials because the failure to do so was not objectively unreasonable. See *id.* (trial counsel not ineffective where motion to sever would have been futile).

¶ 45 The final contention on appeal is that the trial court erred in denying Wittenburg's posttrial claim of ineffective assistance of counsel based on trial counsel's alleged failure to advise him that he was subject to mandatory Class X sentencing. Wittenburg argues that because his appointed counsel did not have the opportunity to properly litigate his claim pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), the case should be remanded for new proceedings on his posttrial motions.

¶ 46 Pursuant to *Krankel*, a trial court is required to conduct an adequate inquiry into a defendant's *pro se* posttrial claims of ineffective assistance of counsel. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). The trial court is required to examine the factual basis of the defendant's claim. *Id.* at 77-78. The trial court may deny the *pro se* motion if it lacks merit or pertains only to matters of trial strategy. *Id.* at 78. However, if the allegations indicate that trial counsel neglected the defendant's case, new counsel should be appointed to represent the defendant at a hearing on the *pro se* claims of ineffective assistance. *Id.* In conducting its inquiry, the trial court may consider (1) trial counsel's explanation as to the circumstances surrounding the allegations, (2) the defendant's explanation as to his *pro se* motion, and (3) trial counsel's performance at trial and the insufficiency of the

allegations on their face. *Id.* at 78-79. A trial court's determination as to the merits of a defendant's ineffective assistance of counsel claim will be reversed only if the trial court's action was manifestly erroneous. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. "‘Manifest error’ is error that is clearly plain, evident, and indisputable." *Id.*

¶ 47 In the present case, at a hearing on January 28, 2011, the trial court advised the defendant that he would receive a *Krankel* hearing on his posttrial claims of ineffective assistance of trial counsel. The trial court offered to appoint new counsel for the defendant, but the defendant indicated that he wished to represent himself. However, at a subsequent hearing the defendant accepted the trial court's offer and conflict counsel was appointed to represent the defendant. The matter was continued so conflict counsel could review the defendant's claims. Conflict counsel amended the defendant's posttrial motion to add the appropriate request for relief.

¶ 48 At the *Krankel* hearing, the defendant explained his allegations and trial counsel responded to the allegations. Conflict counsel was given the opportunity to address the defendant's claim, but rested on his motion. Based on our review of the record, we find no deficiencies in the defendant's *Krankel* hearing. Conflict counsel was appointed and amended the defendant's motion. The defendant, trial counsel, and conflict counsel had the opportunity to address the trial court. The trial court referred to her own notes and recollections of defendant's preliminary appearances and the trial. Accordingly, to the extent Wittenburg argues he is entitled to a new *Krankel* hearing, we find that argument to be without merit. See *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 47 (*Krankel* hearing adequate where trial court reviewed the defendant's allegations, gave defendant an opportunity to explain and support each allegation, and allowed defense counsel to respond to the allegations).

¶ 49 We next address whether or not the trial court erred in denying the defendant's posttrial claim of ineffective assistance. The defendant argues that trial counsel never informed him that he was subject to mandatory Class X sentencing. The defendant alleged in his posttrial motion that he had been offered a plea bargain for only one year imprisonment and would have accepted that offer had he known the sentencing range he faced if he was convicted at trial. The defendant argues that these circumstances entitle him to a new trial under our Supreme Court's holding in *People v. Curry*, 178 Ill. 2d 509 (1997).

¶ 50 In *Curry*, the defendant was charged with three offenses that were all subject to mandatory consecutive sentencing. *Id.* at 512. Prior to trial, the State offered to dismiss two of the charges if the defendant agreed to plead guilty to the third charge and accept a sentence of four and a half years' imprisonment. *Id.* The defendant rejected the offer and, following trial, was convicted of all three offenses. *Id.* The trial court sentenced the defendant to three consecutive terms of four years' imprisonment. *Id.* The defendant filed a posttrial motion alleging ineffective assistance of counsel in that defense counsel advised him he would face only concurrent sentences. *Id.* at 515-16. Following a hearing, the trial court denied the defendant's posttrial motion. *Id.* at 516. On appeal, the reviewing court affirmed the trial court's determination. *Id.* at 517. Our supreme court granted the defendant's petition for leave to appeal. *Id.* at 512.

¶ 51 On appeal to the supreme court, the defendant reasserted his claim for ineffective assistance of counsel during plea negotiations with the State. *Id.* at 517. The court noted that "a criminal defense attorney has the obligation to inform his or her client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is charged." *Id.* at 528. The court held that defense counsel's performance during plea negotiations was objectively unreasonable

because defense counsel had failed to advise the defendant that he faced a mandatory minimum 12-year prison term if convicted of all three offenses at trial. *Id.* The court further noted that, in order to establish prejudice, the defendant had to demonstrate that there was a reasonable probability that, absent defense counsel's deficient performance, he would have accepted the plea offer. *Id.* at 531. The court noted that the defendant's assertion, that he would have accepted the plea offer had he been told he was subject to mandatory consecutive sentencing, was not sufficient, standing alone, to establish prejudice. *Id.* However, the court found that the defendant's assertion, combined with other factors, was sufficient to establish prejudice. The other factors included: (1) defense counsel's affidavit which stated that the defendant's rejection of the State's plea offer was based on defense counsel's erroneous advice that he would receive close to the minimum sentence of four years' imprisonment; (2) the disparity between the 12-year sentence and the 4.5 year plea offer; and (3) admissions by the defendant that weakened his case. *Id.* at 533.

¶ 52 *Curry* is distinguishable from the present case. In *Curry*, none of the parties knew that the defendant was subject to mandatory consecutive sentencing until the sentencing hearing. *Id.* at 515. Furthermore, defense counsel in *Curry* admitted that he had provided erroneous advice to the defendant and that the defendant rejected the plea offer based on that bad advice. *Id.* at 523.

¶ 53 In the present case, in response to Wittenburg's allegation that his counsel never told him that, if convicted, he would face Class X sentencing, counsel strongly disagreed. In his remarks to the court at the *Krankel* hearing, counsel stated:

“When we were here before you before the trial began, I believe it was October 15th on Friday, we had extensive discussions about possible dispositions in this case short of trial. During those conversations we talked on numerous occasions, sometimes when counsel for

the State was present about the fact *that Mr. Wittenburg faced Class X sentencing possibilities if he were convicted at trial.*”

The phrase “Class X sentencing possibilities,” in this context, could be interpreted to mean, that, if convicted, Wittenburg would face the full range of Class X sentencing possibilities; that is, from 6 to 30 years’ imprisonment. The “possibility” being whether, following a conviction, Wittenburg would receive the minimum of 6 years or a more severe sentence (up to 30 years). Under this interpretation, trial counsel properly advised Wittenburg of the mandatory Class X sentencing and counsel’s performance would not be deficient. Accordingly, Wittenburg’s claim for ineffective assistance of counsel would fail because Wittenburg could not satisfy the performance prong of the *Strickland* test.

¶ 54 The defendant argues that the phrase “Class X sentencing possibilities” indicates that trial counsel informed him only that there was a possibility of Class X sentencing, not that it was mandatory. We note that even the trial court made the supposition at the *Krankel* hearing that it “may be correct that [counsel] did not tell [Wittenburg]” of the mandatory Class X sentencing. Nonetheless, even assuming that trial counsel advised the defendant that Class X sentencing was “possible” rather than “mandatory,” we would still deny Wittenburg’s claim of ineffective assistance for failure to establish the prejudice prong of the *Strickland* test.

¶ 55 Unlike *Curry*, Wittenburg was admonished prior to trial, by the trial court, that he was subject to mandatory Class X sentencing. At the *Krankel* hearing, the trial court recalled that she clearly admonished defendant. “I explicitly told you before trial that you could be [*sic*] Class X sentencing based on your prior criminal history and certainly you could have raised that as an issue with the Court at the time you were advised.” The defendant never raised to the court that he was

surprised or previously unaware of his exposure to Class X sentencing, nor did he question the court about the sentence he faced. Instead, acknowledging the trial court's sentencing admonishments, the defendant opines that he had already rejected the plea offer and could not refuse to proceed to trial. However, the record simply does reflect any hindrance to defendant's ability to delay the trial or even ask to speak to his attorney after (allegedly) learning for the first time that he faced a minimum of 6 years' imprisonment. Not only do these circumstances further confirm that counsel had fully admonished defendant and the court's comments were a reiteration of what he already knew, they also indicate that the defendant was not prejudiced by trial counsel's alleged failure to properly advise him as to sentencing because the trial court so advised him prior to trial.

¶ 56 *Curry* is distinguishable in another way as well. In *Curry*, one of the bases for finding prejudice was the disparity between the 4.5 year plea offer and the 12-year mandatory minimum sentence the defendant faced. However, in *Curry*, the defendant erroneously believed the minimum sentence was four years. *Id.* at 516. Thus, the *Curry* defendant was rejecting a plea offer with a sentence that was greater than what he believed was the minimum sentence. Accordingly, the *Curry* defendant was in a position where he erroneously believed that even if he were convicted he could still receive a lower sentence than what the State offered in the plea agreement when, in fact, he could not.

¶ 57 In the present case, there is a disparity between the one-year plea offer and the six-year mandatory minimum sentence the defendant faced. However, when Wittenburg rejected the plea offer, assuming that he was not advised of mandatory Class X sentencing, he still would have believed the minimum term was either three years' imprisonment or seven years' imprisonment for

an extended term.¹ Accordingly, Wittenburg rejected a plea offer that was still far below these believed minimum sentences. Such circumstances make it far less probable that Wittenburg would have accepted the plea offer simply because he was subject to a mandatory minimum of six years rather than three or seven years. Rather, these circumstances indicate that Wittenburg rejected the plea offer because he believed he would not be convicted of the charged offense. Comments made by the trial court and the State at the *Krankel* hearing support this determination. Specifically, at the *Krankel* hearing, the trial court and the State indicated that Wittenburg had been eager to go to trial.

¶ 58 Finally, in *Curry*, the defendant had made admissions that weakened his case. By contrast, in the present case, the evidence against Wittenburg was circumstantial and not particularly strong. These circumstances indicate that Wittenburg was more likely than not to have rejected the plea offer regardless of whether Class X sentencing was possible or mandatory, and further supports a determination that he rejected the plea offer because he believed he would not be convicted of the charged offense. Accordingly, Wittenburg's reliance on *Curry* is unpersuasive. Even if trial counsel failed to advise Wittenburg of mandatory Class X sentencing, Wittenburg failed to establish that he

¹Wittenburg was not eligible for probation. 730 ILCS 5/5-5-3(c)(2)(F) (West 2008). Trial counsel advised Wittenburg that he was eligible for an extended term sentence because he had just been released from prison after serving a sentence for another residential burglary. There is no indication in the record that trial counsel ever advised Wittenburg that probation was possible. The trial court admonished Wittenburg at arraignment that probation was possible. However, at arraignment, a trial court is often not aware of someone's prior criminal history. Based on Wittenburg's prior criminal history, any argument that he believed probation was possible would be disingenuous.

suffered any prejudice. For these reasons, the trial court did not err in denying Wittenburg's posttrial claim of ineffective assistance of counsel.

¶ 59

III. CONCLUSION

¶ 60 For the reasons stated, we affirm the judgment of the circuit court of De Kalb County.

¶ 61 Affirmed.