

his guilt and (2) the State failed to prove him guilty of burglary beyond a reasonable doubt.

¶ 4 We affirm in part, reverse in part, and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 In May 2010, the State charged defendant with unlawful possession of a controlled substance (alprazolam) (720 ILCS 570/402(c) (West 2010)) and burglary (720 ILCS 5/19-1(a) (West 2010)). Defendant waived his right to a jury trial and his bench trial commenced in January 2011.

¶ 7 The following evidence was presented at defendant's bench trial. Pontiac police officer Jim Roberts testified that at 3:57 a.m. on May 4, 2010, he was dispatched to a residential burglary complaint at 701 Boulder Drive, in the Illini subdivision located in the northeast portion of Pontiac, Illinois. Roberts observed a maroon sport utility vehicle (SUV) pull out of Illini subdivision and head west on Indiana Avenue. Roberts ran a check on the license plate and found out the SUV was registered to Robert Sullivan of Odell, Illinois. Roberts requested a Livingston County deputy be dispatched to Sullivan's residence to stop the SUV.

¶ 8 Jason Draper, a Livingston County deputy, testified he was patrolling in Forrest, Illinois, when he heard Officer Roberts calling out plate numbers. After hearing the SUV was registered to Sean Sullivan (defendant's father) from Odell, Draper drove to Sean's residence to see if the SUV was there. It was not, so Draper parked his patrol car down the street and waited for a couple hours to see if the SUV would return. Draper's shift ended at 6 a.m., so he started driving south on old Route 66 toward Pontiac. As he was approaching the north edge of Pontiac, he saw the maroon SUV registered to Sean heading north on old Route 66.

¶ 9 Draper pulled the SUV over. Defendant was driving and Jimmy Sawatzki was in

the front passenger seat. Draper advised defendant he was being detained because the Pontiac police wanted to talk to him about possible crimes committed earlier that morning. Defendant consented to a search of his person and Draper recovered Salina Hodgson's prescription pill bottle containing alprazolam from defendant's left front pocket of his hooded sweatshirt. Draper asked defendant where he got the pill bottle and defendant replied he found it on the ground.

¶ 10 Pontiac police officer Christina Halt testified she also responded to the burglary complaint on the morning of May 4, 2010. Halt searched the Illini subdivision area and noticed some vehicles that had been "entered." She contacted the owners of those vehicles. Shortly after Draper stopped defendant, Halt arrived at the scene. She advised defendant of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) as he was seated in Draper's squad car. Defendant acknowledged he understood his rights and advised Halt he would speak to her without an attorney present. Halt asked defendant where he had been earlier that morning. Defendant responded he was at a buddy's house. Halt asked defendant who his buddy was but all he would say was "buddy." Defendant then stated, "[W]ell, why don't I ask you some questions? Why am I being stopped by three cop cars?" Halt informed defendant they were investigating burglaries and defendant's vehicle was seen leaving the area where the burglaries occurred. Halt stated defendant did not respond to her answer, but she ended the conversation because Sergeant Roberts asked her to contact him.

¶ 11 After receiving consent from Sean Sullivan, defendant's father and the vehicle's registered owner, the officers searched the SUV. The search yielded multiple pairs of gloves, a yellow flashlight, a can koozie, a case containing multipurpose tools, a case containing maps and historical markers, a wallet containing \$475, a Nintendo DS, a global positioning system (GPS),

and a "trip device."

¶ 12 Salina Hodgson testified she was on her way to work on the morning of May 4, 2010, when she noticed her purse was missing from her car. Her car had been parked in the driveway of her home on North Mill Street in Pontiac. Hodgson did not remember whether she had locked her car, but even if she had, someone could still have entered her car because one of its windows slid down. After realizing her purse was not in the car, she continued on to work because she was running late, but she had someone check the house to see if it was there; it was not. A few days later, Hodgson's boyfriend, Tim Young, found her purse in the creek behind her house. Several items were missing from her purse when she got it back, including a prescription pill bottle containing alprazolam (generic Xanax), two credit cards, an extra cell phone battery, and an inhaler.

¶ 13 Tim Young testified Hodgson was looking for her purse on the morning of May 4, 2010. Young stated, "[W]e looked in the house, couldn't find it. She said, ["]maybe it's in the car.["] Looked in the car. It was not there. Went back in the house. Looked in the house and it's not there." He further testified Hodgson's car was in disarray and looked disheveled, not its normal condition.

¶ 14 Defendant testified at about 9 or 10 p.m. on May 3, 2010, he drove his maroon SUV to 1108 North Walnut Street where his "buddy" Thomas Lewis lived with Lewis's mother, sister, and the sister's baby. Sawatzki was with defendant. Lewis's residence was approximately three to four blocks from North Mill Street. Defendant parked his car on the side of the street. As he got out of his car, he saw a prescription pill bottle lying in the grass between the curb and sidewalk. He picked the bottle up and placed it in his pocket. Defendant acknowledged he did

not call the number listed on the prescription bottle or the pharmacy, stating, "If anything, I was going to later or earlier—well, not earlier, but the next day, and, you know, could contact somebody."

¶ 15 Defendant stated he and Sawatzki spent the entire evening at Lewis's house playing video games and hanging out. Defendant testified he left Lewis's house a few times during the night to get cigarettes, soda, or chips. Defendant and Sawatzki drove around Pontiac a few times to smoke because smoking was not permitted in Lewis's house. They left Lewis's house sometime before 6 a.m. to return home.

¶ 16 Defendant denied entering Hodgson's vehicle and removing anything or being present while someone else did.

¶ 17 On this evidence, the trial court found defendant guilty of unlawful possession of a controlled substance and burglary. In finding defendant guilty, the court recognized the evidence placing defendant at the scene of the burglary was circumstantial but noted "there's strong circumstantial evidence that the defendant is there in the area of the burglaries at approximately the time of the burglaries, which is not a time you would expect high traffic in the area." Further, the court noted defendant was found with the pills in his possession, pills the court opined were removed from the vehicle during a burglary. Thus, the court found the State's case was circumstantially "strong beyond a reasonable doubt." The court did not find defendant credible, and stated it thought defendant was baited by defense counsel and was saying what he thought would sound good by responding he was going to call the pharmacy the next morning regarding the prescription pill bottle. The court did not believe defendant picked up the prescription pill bottle from the ground. It opined not only was defendant's story not credible, but

he also had a reason to lie because he had been in prison before.

¶ 18 The trial court continued as follows:

"So, I do think the [S]tate has proven its case beyond a reasonable doubt based upon the strong circumstantial evidence which includes the defendant's vehicle being seen right at the time of the alleged burglaries, and then the pills being found on the defendant approximately at that time, and *it's odd that you could come in and actually tell us that you were at this Lewis's house, but you wouldn't tell the police that on the night when they pulled you over. If you're fully cooperating with them and you have nothing to hide, you're going to tell them that.* So I think the [S]tate has proved its case beyond a reasonable doubt and I do find the defendant guilty.

And in terms of the pills, I guess I will point out, I mean, in order to believe the defendant's story, somebody had to have stolen those, run around, and the somehow dropped them right by that spot around 9:00 or 10:00 at night, it just doesn't add up. It doesn't add up the pills were in her purse which were in her car, they don't just end up on the curb at 9:00 or 10:00 or 11:00, you weren't even sure what time it was, it was early in the evening, and I don't think, it just doesn't add up. So, the [S]tate has met its burden, I find the defendant guilty [on both counts]." (Emphases added.)

¶ 19 In February 2011, defendant filed a motion for a new trial, asserting in part that the trial court improperly considered defendant's failure to advise the police of where he had been prior to his arrest. In April 2011, the trial court denied defendant's motion for a new trial and sentenced him as stated.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues (1) the trial court improperly considered his partial exculpatory statement and invocation of his right to remain silent as supporting an inference of his guilt and (2) the State failed to prove him guilty of burglary beyond a reasonable doubt.

¶ 23 A. Trial Court's Consideration of Exculpatory Statement
and Invocation of Right to Remain Silent

¶ 24 When reviewing a bench trial on appeal, we presume a trial court considered only competent evidence unless affirmative evidence to the contrary appears in the record. *People v. Schmitt*, 131 Ill. 2d 128, 138-39, 545 N.E.2d 665, 669 (1989). However, we may review *de novo* whether the trial court's findings and rulings of law comport with the evidence actually presented, because " '[c]ourts have no more right than a jury to convict the accused on incompetent evidence,' nor have they the right to override rules of evidence in the trial of the facts." *People v. Stewart*, 130 Ill. App. 2d 623, 627, 264 N.E.2d 557, 559-60 (1970) (quoting *People v. Reichert*, 352 Ill. 358, 361, 185 N.E. 585, 586 (1933)). Due process guarantees a criminal defendant the right to a fair trial before an impartial finder of fact. U.S. Const., amend. VI, XIV; Ill. Const. 1970, art I, § 2; *People v. Dameron*, 196 Ill. 2d 156, 171-72, 751 N.E.2d 1111, 1120 (2001). A defendant does not waive this right because he elects a bench trial; the standards of fairness and

impartiality apply to both judge and jury. *People v. McDaniels*, 144 Ill. App. 3d 459, 462, 494 N.E.2d 1275, 1278 (1986).

¶ 25 The federal constitution's guarantee of due process prohibits comment on an accused's postarrest silence after *Miranda* warnings are given. *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976). The prohibition against the use of a defendant's postarrest silence is based on the unfairness of assuring a suspect he has the right to remain silent and then using that silence against him. *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993). Illinois courts have long recognized that if an accused invokes his right to remain silent during questioning, no matter the reason, his invocation of the right to remain silent cannot be used as an inference against him, and the trial court should not admit it into evidence. *People v. Pfanschmidt*, 262 Ill. 411, 449-50, 104 N.E. 804, 819 (1914). If a suspect "indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." *Miranda*, 384 U.S. at 445.

¶ 26 Defendant argues the trial court improperly considered his partial exculpatory statement, *i.e.*, being at a "buddy's" while refusing to identify who his "buddy" was, and the invocation of his right to remain silent by not responding after Officer Halt told him he was stopped because the police were investigating some burglaries, as supporting an inference of his guilt. The State responds that because defendant had waived his *Miranda* rights, the court did not violate due process by considering defendant's refusal to identify his "buddy" because defendant did not affirmatively invoke his right to silence. Our review of the record leads us to

conclude defendant never had the opportunity to invoke his right to remain silent or to provide the name of his "buddy" because Officer Halt terminated the conversation.

¶ 27 Initially, defendant waived his *Miranda* rights by telling Officer Halt he would answer her questions without an attorney. Halt then asked defendant where he had been earlier that morning. Defendant responded he was at a "buddy's" house but did not identify who his "buddy" was. Defendant then asked Halt why he was being stopped by three cop cars. Halt informed defendant they were investigating some burglaries and his vehicle had been seen in the area where the burglaries occurred. According to Halt, defendant did not comment on the reason for the stop and she ended the conversation because she had to contact Sergeant Roberts.

¶ 28 Based on Officer Halt's testimony, she was the one who terminated the questioning. We also note telling defendant he was stopped because his vehicle was seen leaving the area where several alleged burglaries had occurred is not a question that requires a response. Further, the record (1) shows Halt terminated her questioning directly after telling defendant why he was stopped by officers and (2) is devoid of any indication questioning of defendant was resumed at a later time. Based on these facts, we find the trial court committed error by relying on the assumption that if defendant had nothing to hide, he would have volunteered to the officers who his "buddy" was during questioning, rather than waiting until trial. According to the record before us, defendant was not afforded another opportunity to make a further exculpatory statement—during which he may have identified his "buddy"—because defendant was not questioned further. Thus, no potential *Doyle* violation occurred because insofar as this record shows, defendant never asserted his right to remain silent.

¶ 29 While no *Doyle* violation occurred, we find the trial court committed reversible

error. In finding defendant guilty, the court acknowledged the evidence against defendant was circumstantial and it relied on the following three factors in finding him guilty: (1) defendant's presence near the burglaries, (2) defendant's possession of Hodgson's prescription, and (3) defendant's failure to identify his "buddy" during police questioning. Because the court clearly relied on the fact defendant did not name his "buddy" as a factor in finding him guilty when the record is devoid of any evidence defendant was given an opportunity to identify his "buddy" after finding out he was a suspect in a burglary investigation as the officer cut off questioning to handle other responsibilities, and because the evidence of defendant's guilt on the burglary charge is not overwhelming or merely cumulative, we find the trial court's reliance on this factor is not harmless error. See *People v. Patterson*, 217 Ill. 2d 407, 428, 841 N.E.2d 889, 902 (2005) (in determining whether harmless error occurred, a reviewing court may (1) determine whether the error might have contributed to the defendant's conviction, (2) determine whether the other evidence presented overwhelmingly supports a defendant's conviction, and (3) determine whether the improper evidence is merely cumulative). Thus we reverse defendant's burglary conviction.

¶ 30 B. Sufficiency of the Evidence

¶ 31 Defendant also asserts the evidence presented by the State was insufficient to prove him guilty of burglary beyond a reasonable doubt. "Generally, a decision to remand a cause for a new trial alleviates the need to address other issues; however, the constitutional guarantee prohibiting double jeopardy requires that we consider defendant's challenge to the sufficiency of the evidence." *People v. Strong*, 316 Ill. App. 3d 807, 815, 737 N.E.2d 687, 693 (2000).

¶ 32 When the sufficiency of the evidence for a criminal conviction is in dispute, we

must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 322 (2011). A reviewing court must view all reasonable inferences from the record in favor of the prosecution. *Id.* at 8, 944 N.E.2d at 323. It is the function of the fact finder to assess the credibility of witnesses, weigh evidence presented, resolve conflicts in the evidence, and draw reasonable inferences from the evidence, and its determination is entitled to great deference. *People v. Moss*, 205 Ill. 2d 139, 164-65, 792 N.E.2d 1217, 1232 (2001). For a reviewing court to set aside a criminal conviction on grounds of insufficient evidence, the evidence submitted must be "so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 33 Under the statute, "[a] person commits burglary when without authority he knowingly enters or without authority remains within a *** motor vehicle *** with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2010). An entry does not require intrusion by a person's entire body; and intrusion by part of the body into the protected enclosure is sufficient, even if the intrusion is slight. *Beauchamp*, 241 Ill. 2d at 8-9, 944 N.E.2d at 323. A burglary conviction may be sustained on circumstantial evidence. *Id.* at 9, 944 N.E.2d at 323.

¶ 34 Here, Hodgson testified she noticed her purse was missing from her car while on her way to work the morning of May 4, 2010. Her car had been parked at her residence at 1207 North Mill Street the previous evening, as both she and her boyfriend were at the house. Her purse contained, among other things, a prescription pill bottle of alprazolam. Young testified Hodgson's car was disheveled and in disarray, not in its normal condition of "organized chaos."

Young found Hodgson's purse three days after it went missing in a creek behind their house. The prescription bottle of alprazolam was missing from its contents, as well as various other items. Officer Roberts observed defendant's vehicle leaving the Illini Subdivision at approximately 4 a.m. on May 4, 2010, when he was responding to a residential burglary call. Hodgson's house was located near this area. Officer Draper pulled defendant over at approximately 6 a.m. and Hodgson's prescription pill bottle was found on defendant's person. Although Hodgson told Officer Draper he found the pill bottle on the ground, and testified to the same, the trial court found defendant's testimony was not credible.

¶ 35 Viewing the evidence in the light most favorable to the prosecution, as we must, we conclude that a rational trier of fact could have found defendant guilty of burglary beyond a reasonable doubt. The evidence presented was also sufficient to find defendant guilty of unlawful possession of a controlled substance. These findings on the sufficiency of the evidence are not binding on the trier of fact on retrial but are made to permit retrial without the bar of double jeopardy. *People v. Wilson*, 2012 IL App (1st) 092910, ¶ 47, 965 N.E.2d 667, 680. Therefore, we remand for a new trial on the burglary charge.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we reverse defendant's conviction for burglary and remand for a new trial. We otherwise affirm defendant's conviction and sentence for unlawful possession of a controlled substance.

¶ 38 Affirmed in part and reversed in part; cause remanded with directions.