

2017 IL App (1st) 143571-U  
No. 1-14-3571  
Order filed September 29, 2017

Fifth Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 1295
	)	
RICHARD RICHMOND,	)	Honorable
	)	Rosemary Grant Higgins,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE REYES delivered the judgment of the court.  
Justices Gordon and Hall concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant's convictions for attempted first-degree murder and home invasion are affirmed over his challenge to the sufficiency of the evidence to sustain his convictions. Defendant's convictions and sentences for aggravated battery and aggravated domestic battery are vacated under the one-act, one-crime rule.
- ¶ 2 Following a bench trial, defendant Richard Richmond was convicted of attempted first-degree murder, home invasion, aggravated battery, and aggravated domestic battery. He was sentenced, respectively, to consecutive terms of 31 and 21 years' imprisonment and concurrent

terms of 30 and 7 years' imprisonment. On appeal, defendant challenges the sufficiency of the evidence to sustain his convictions for attempted first-degree murder and home invasion. He also contends that his convictions for aggravated battery and aggravated domestic battery must be vacated under the one-act, one-crime rule because both convictions were based on the exact same physical act as his attempted first-degree murder conviction. We affirm in part and vacate in part.

¶ 3 Defendant was arrested on December 20, 2011, in connection with the October 4, 2011, shooting of his wife, Nicole Howard,<sup>1</sup> that occurred inside Nicole's apartment at 4242 South Prairie Avenue. The record sets forth that defendant entered the apartment through a back window and, after an altercation, shot Nicole in the head.

¶ 4 Defendant was charged, in relevant part, with: two counts of attempted first degree murder in that he shot Nicole while armed with a firearm, causing great bodily harm (count 4) and permanent disfigurement (count 6) (720 ILCS 5/8-4, 9-1(a)(1) (West 2010)); six counts of home invasion in that he entered Nicole's apartment while armed with a firearm and used force or threatened the imminent use of force (count 7), and personally discharged a firearm (count 9), which proximately caused great bodily harm (counts 11 and 14) and permanent disfigurement (counts 13 and 16) (720 ILCS 5/12-11(a)(3), (4) and (5) (West 2010)); one count of aggravated battery in that, while committing a battery, he discharged a firearm causing an injury (count 17) (720 ILCS 5/12-3.05(e)(1)<sup>2</sup>; and one count of aggravated domestic battery in that he caused great

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<sup>1</sup> Because there are two witnesses with the last name "Howard" we refer to all witnesses by their first names.

<sup>2</sup> Pub. Act. 96-1551 (eff. July 1, 2011) (renumbering and amending 720 ILCS 5/12-4 (West 2010) as § 12-3.05).

bodily harm to Nicole, who was a family or household member (count 18) (720 ILCS 5/12-3.3(a) (West 2010)).

¶ 5 As of September 2011, defendant and Nicole had been married for nine years. In 2008, the couple, and their daughter, Desiree Richmond, moved to a ground-level apartment at 4242 South Prairie Avenue. Defendant occasionally resided in the apartment and sometimes stayed at his sister's house at 44th Street and Shields Avenue. Dominic Sparkman, Nicole's son from a previous relationship, along with his partner, Nedje Liggins, and their two-year old daughter, Deanna Sparkman, also resided in the apartment. Michelle Howard, Nicole's niece, had resided in the apartment for about two or three years prior to September 2011. The lease agreement for the apartment listed Nicole as the sole leaseholder.

¶ 6 At trial, Nicole testified that, on September 25, 2011, Michelle told her that defendant had been "molesting" her for "a while." When defendant arrived at the apartment, Nicole asked him whether he had molested Michelle. Defendant responded that he had not and the couple commenced arguing. During the argument, defendant said, "let me explain." Nicole responded, "I don't want you to explain, I just want you to leave." Defendant then punched her in the face and left the apartment with his belongings, which Nicole had packed prior to their argument. Nicole stated that she did not inform defendant that he was allowed to return to the apartment.

¶ 7 Shortly after defendant left the apartment, Nicole and Michelle went to the police station to file a police report. Nicole subsequently obtained an order of protection against defendant and changed the locks on the doors to the apartment. Nicole stated that she did not provide defendant with a key because she was afraid he would return to the apartment and hurt her. Defendant never again resided at the Prairie Avenue apartment.

¶ 8 The State introduced into evidence the order of protection Nicole obtained against defendant. The order, which granted Nicole exclusive possession of the Prairie Avenue apartment and prohibited defendant from entering, was issued on September 29, 2011, and expired on October 19, 2011. The order lists defendant's address as 4454 South Shields Avenue.

¶ 9 Nicole testified that, shortly after midnight, on October 4, 2011, while she was inside the apartment with Dominic, Deesire, Nedje, and Deanna, and she heard window-blinds ruffling in the back of the apartment. Nicole looked in the direction of the window, which had been locked, and noticed defendant, with a firearm in his hand, entering the apartment through the window. Nicole ran toward defendant, and tried to grab the handgun and push him out of the window. Defendant pushed his way inside the apartment and the pair fell onto crates near the back door. Nicole stated that, as she struggled with defendant on the floor, he was holding the "trigger and the bottom part" of the weapon, and she was trying to prevent him from shooting her. Nicole yelled for Dominic and told Nedje to call 911.

¶ 10 Dominic then began to struggle with defendant and eventually gained possession of the firearm. After doing so, he stood between Nicole and defendant. Nicole stated that defendant repeatedly told her that he just wanted to talk. Nicole responded, "I don't want to talk to you, I just want you out of my house." She then tried to call 911, but defendant knocked the phone out of her hand. Shortly thereafter, Deesire came into the room and said, "[T]hey're here," which Nicole understood to mean that the police had arrived. Defendant then "snatched" the handgun from Dominic and said, "Well, I'm just going to leave."

¶ 11 Nicole testified that she thought defendant was going to leave because he "was going away." She stated that "the next thing [she] remember[ed] [was] a gun on [her] face — it was something cold on [her] face[.]" She saw defendant holding the gun and heard a loud ringing.

She then felt a burning in her neck and fell to the floor. As she was lying on the floor, she observed defendant place the weapon in his pocket and exit the apartment through the patio door. Nicole felt blood in her mouth and spat out a tooth. After police arrived, Nicole told them that defendant, her husband, shot her.

¶ 12 Nicole described her injuries as, “an opening to [her] left cheek and a wound to the back of [her] neck on her right side.” After Nicole arrived at the emergency room of Stronger Hospital, she was informed that she had a nicked carotid artery and that a piece of a gland from her thigh would have to be used to surgically repair the artery. After her surgery, Nicole was placed in a medically induced coma and had 60 to 70 stitches in her thigh and 22 stitches in her neck. Nicole explained that, as a result of her injury, she has an increased risk of stroke, and will have to take blood thinning medication and visit a specialist every month for the rest of her life.

¶ 13 On cross-examination, Nicole testified that after she obtained the order of protection against defendant, she called him and told him not to return to the apartment. She acknowledged that, prior to the date of the shooting, she did not inform defendant that she had obtained the order. She stated that she did not do so “for fear of retaliation.” Nicole acknowledged that, during the time that defendant resided at the apartment, he contributed to household bills and other expenses. Nicole stated that defendant is about 5 feet 5 inches tall and Dominic is about 6 feet 3 inches tall.

¶ 14 On redirect-examination, Nicole testified that after defendant punched her in the face, he left her a voicemail demanding that she allow him to come back into the apartment. In the voicemail, defendant said that he would kill himself if she did not allow him to return. Nicole also testified that defendant had other children and that she did not know where he resided when he was not at the apartment.

¶ 15 Dominic testified that defendant moved out of the apartment on September 25, 2011. Prior to September 25, 2011, defendant resided in the apartment about “50 percent” of the time, and, when defendant was not at the apartment, he would stay at his sister’s house at 44th Street and Shields Avenue.

¶ 16 On the night of the shooting, Dominic was watching television on the couch in the living room, which was near the front door of the apartment. He did not hear a knock on the door or the doorbell ring. Sometime after midnight, as he was falling asleep, Dominic heard his mother calling his name. He went to the hallway, and saw defendant and Nicole “tussling, like wrestling” near a window. Dominic saw that defendant had a firearm in his hand and heard Nicole say that defendant’s finger was on the trigger. Dominic then started to wrestle with defendant. As the pair did so, they entered Nicole’s bedroom. Dominic eventually gained possession of the handgun.

¶ 17 After he gained possession of the weapon, Dominic stood between defendant and Nicole. The trio was no longer making physical contact. Defendant slapped Nicole’s hand causing her to drop her phone. He then “snatched” the firearm from Dominic’s hand and walked towards the hallway of the apartment. Defendant faced Nicole and tried to talk with her. Deesire entered the bedroom and told them that the police had arrived. After she did so, defendant said, “I’m gone,” and walked towards the patio. Defendant stopped, turned around, and said “Baby, you know what?” He then reached over Dominic and shot Nicole. When asked to describe how defendant reached over him, Dominic responded, “[I]like a shoulder, like he put his arm over — it was like — yeah, like he reached over — like he put his arm over my shoulder.” At the time, Nicole was about “an arm length” behind Dominic and defendant was also an arm length from Dominic. After Dominic heard the gunshot, he saw defendant holding the handgun, and watched as

defendant “took off” through the back sliding door of the apartment. Dominic told police at the scene that defendant shot his mother. Dominic testified he did not give defendant permission to be in the apartment on the date of the shooting.

¶ 18 On cross-examination, Dominic stated that when defendant snatched the weapon from him, he was standing between Nicole and defendant “at an angle.” Dominic explained that his left side was towards his mother and his right side was towards defendant. When defendant turned around, prior to shooting Nicole, defendant was about an arm’s length from Dominic, who, in turn, was about an arm’s length from Nicole. When defense counsel asked, “Then you weren’t at arm’s length from each other?” Dominic responded:

“It was arm’s length because I was at an angle and he was — he came back, he was like right here, and my mom was behind me. I was turned sideways at an angle, and he had to come over my shoulder because they’re both the same height, he had to come over my shoulder and he fired the gun.”

¶ 19 Michelle testified that she moved into the apartment with Nicole and defendant when she was in 8th grade. Michelle stated that, after she turned 15, defendant, over the course of the three years that she resided in the apartment, sexually assaulted her “close to 100 times.” Prior to September 25, 2011, Michelle had moved out of the apartment. On that date, Michelle went to the apartment and told Nicole that defendant had sexually assaulted her. After Nicole confronted defendant about the sexual assaults and defendant left the apartment, Michelle and Nicole went to the police station to file police reports.

¶ 20 On the date of the shooting, Michelle was at her grandmother’s house and received a voicemail message from defendant at 12:29 a.m. Michelle identified defendant’s voice and the message was entered into evidence. In the voicemail, defendant says:

“—You shouldn’t have lied on me and put my name in s\*\*\*, Michelle. Your [not clear]<sup>3</sup> shouldn’t have put me out of my own house. My wife should have sat down and listened to me. Now I shot her in the head. I am going to shoot myself. It’s your fault. Thank yourself for it. Bye.”

¶ 21 On cross-examination, Michelle testified that defendant had stopped sexually assaulting her in 2009, and acknowledged that she did not report the abuse to anyone until September 25, 2011.

¶ 22 Chicago police officer Brian DeVan, an evidence technician, testified that he processed the scene of the shooting. In doing so, he examined the back window of the apartment, and observed “pry marks” on the window jam. In the back bedroom, on the floor near the open sliding door, he noticed two live .38 caliber rounds. He also noticed what appeared to be a tooth on the floor and some blood on the bathroom floor. In the gangway outside the apartment, he found a flathead screwdriver and observed marks on the outside of the window.

¶ 23 The parties stipulated that, if called, Dr. Christopher Lim would testify that, on the date in question, he was working at Stronger Hospital and examined Nicole in the emergency room. The bullet entered Nicole’s left cheek, traveled through the hard pallet of her mouth, knocked out a tooth, went through her tongue, through her right neck, struck her right internal carotid artery and exited out of the right side of her neck. After having vascular surgery, Nicole was placed in a drug-induced coma for two days. Due to the nature and severity of her injuries, Nicole was at an

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<sup>3</sup> The parties dispute whether defendant says “mother.” Defendant’s recitation of the facts indicates that it is “not clear” and he testified that he said “brother.” The State asserts that defendant says “mother.” After listening to the recording, we cannot determine whether defendant says “mother” or “brother.”

increased risk of stroke and would need life-long Coumadin treatment and monthly visits to a Coumadin clinic.

¶ 24 The State rested and defendant moved for a directed finding, which the court denied.

¶ 25 Defendant testified that, although the Prairie Avenue apartment was not in his name, he paid rent and all the bills associated with the apartment. He stated that, while he was residing at the Prairie Avenue apartment, he “never really lived nowhere else.” On September 25, 2011, when Nicole asked him to leave the apartment, defendant took with him some of his belongings, including his keys to the apartment.

¶ 26 Defendant stated that prior to the shooting he was in the hospital for 5 or 6 days. After he was released from the hospital, he went to Walgreens and then to his sister’s house at 4454 South Shields. Later that night, defendant went “home” to the Prairie Avenue apartment and saw that the lights were on in the apartment. Defendant stated that, because his key did not fit into the lock of the front door, he knocked on the door and rang the doorbell. When nobody answered the front door, he tried using his key to unlock the back door, but was unsuccessful. He then retrieved a screwdriver from his van and entered the apartment through a window.

¶ 27 As defendant entered through the window, a handgun fell out of his pocket and onto the floor in the hallway. Defendant picked up the weapon and held it by his right side. He then asked Nicole, who was in the hallway, if they could talk. Nicole responded that she did not want to talk with him and reached for the firearm in his hand. Defendant pulled his hand away. Dominic approached defendant and tried to grab the handgun. Defendant “snatched away from him,” said “stop,” and then gave the weapon to Dominic. Deesire entered the hallway and Nicole told her to call the police. Dominic and Nicole then went into the bedroom and defendant went to the bathroom.

¶ 28 When he exited the bathroom, Nicole and Dominic were “wrestling like tussling, struggling or whatever.” Deesire ran into the bedroom and said, “daddy, the police is on their way in.” Defendant then walked to where Dominic and Nicole were wrestling. Dominic, who had the gun up in the air in his left hand, was standing between him and Nicole. Defendant “reached up and said give me the gun, I don’t want you to get into no trouble[.]” As defendant reached for the handgun, “it went off.” Defendant explained that when he reached for the firearm, he hit Dominic’s hand and the gun fired. Dominic released the gun and defendant grabbed it. As defendant did so, shells fell out of the open cylinder of the weapon. After defendant heard Deesire say “yeah, the police are on their way now,” defendant ran out of the apartment through the back door. Defendant stated that he fled because he thought the police would kill him if they saw him with the handgun. About two or three months after the shooting, defendant learned that the police were looking for him and surrendered.

¶ 29 Defendant stated that, on the day of the shooting, he did not have reason to think that he could not be in the apartment. He did not receive an order of protection in the mail or from a sheriff, and neither Dominic, Deesire, nor Nicole gave him the protective order or informed him of it. On the date of the shooting, defendant had the firearm on his person because it was the handgun he had in his apartment for protection. He took the weapon with him when Nicole asked him to leave “for a couple of days.” On the night of the shooting, he brought the handgun with him to the apartment for protection because “it’s rough around there,” and because his sister had told him that the firearm could no longer be in her house. Defendant denied that he intended to kill Nicole when he went to the apartment or when Dominic and Nicole struggled for the weapon.

¶ 30 On cross-examination, defendant acknowledged that Nicole was the leaseholder on the Prairie Avenue apartment. He denied that he became angry when Nicole confronted him about Michelle's allegations. He also denied that he punched Nicole on September 25, 2011. When defendant left the apartment in September, he went to his sister's house at 4454 South Shields. Defendant stated that he only brought his loaded handgun to his sister's house and that the weapon remained there when he went to the hospital.

¶ 31 Defendant admitted that, on the night of the shooting, after he learned that the locks had been changed, he used a screwdriver to pry open the window to the apartment. After the shooting, defendant ran away and threw the gun in a garbage can. He then called Dominic, who told him not to come back. Defendant never paid another bill associated with the apartment. Defendant acknowledged that, after the shooting, he called Michelle and left her a voicemail message. Defendant admitted that it was his voice on the recording and acknowledged that he said "Nicole had put [him] out of the house." Defendant stated that, in the voicemail, he said Michelle's "brother" should not have put him out of the house. Defendant also admitted that, in the recording, he stated that he shot Nicole in the head, but stated that "it didn't go like that though." Defendant turned himself in on December 20, 2011, after he learned that the police were looking for him. Defendant could not recall telling Detective Bryant, who processed him, that his home address was 4454 South Shields Avenue.

¶ 32 On redirect-examination, defendant testified that the South Shields address was his sister's address.

¶ 33 In rebuttal, Chicago police detective Sandra Bryant testified that on December 20, 2011, she processed defendant at the police station and defendant informed her that his address was 4454 South Shields Avenue.

¶ 34 The State recalled Nicole, who testified that when defendant resided with her in the apartment, he had some belongings in the bedroom and bathroom. She was shown photographs of the bedroom and bathroom, taken after the shooting, and testified that none of the items in the photographs belonged to defendant.

¶ 35 Based on this evidence, the court found defendant guilty of the charged offenses. In doing so, the court stated that the witnesses for the State were “exceedingly credible” and noted that the only credible portion of defendant’s testimony “was what was on that tape when he admitted that he had a motive to shoot the victim and not only that [but] admitted that the victim had put him out of the house.” In finding defendant guilty of attempted first-degree murder, the court stated that defendant was walking toward the patio door when he turned around and pointed the gun at Nicole. Thus, the court found, “without question,” that the struggle was over when defendant pointed the gun at Nicole’s cheek. The court determined that defendant possessed the requisite intent to kill Nicole and that she suffered great bodily harm.

¶ 36 In finding defendant guilty of home invasion, the court stated that defendant lacked any tenancy or possessory interest in the Prairie Avenue apartment as evidenced by his expression of anger, in the voicemail, about being “put out” of the apartment. In recounting the voicemail and corroborating testimony, the trial court noted that:

“The defendant not only had no possessory interest based on the testimony of all the witnesses including himself but all corroborating evidence indicates that he forcibly entered the dwelling place of the complaining witness, that it was her dwelling place, that any possessory interest had been withdrawn when she told him to pack his things, put everything into the bag and had him leave on September 25th of 2011. He — admits she put him out and that he was living at

his sister's home. There was not interest. There's clearly a home invasion without question.”

The court also found defendant guilty of aggravated battery and aggravated domestic battery.

¶ 37 The court denied defendant's motion for a new trial and then held a sentencing hearing.

¶ 38 At the October 23, 2014, sentencing hearing, the court merged the two counts of attempted first-degree murder (counts 4 and 6), and sentenced defendant to a total of 31 years' imprisonment based on count 4. Defendant's sentence included a 25-year enhancement for personally discharging a firearm and causing great bodily harm to Nicole. The court also merged the six counts of home invasion (counts 7, 9, 11, 13, 14 and 16) and sentenced defendant to a consecutive total term of 21 years' imprisonment based on count 7. Defendant's sentence for home invasion included a 15-year enhancement for possession of a firearm. The court also imposed a 30-year term for aggravated battery on count 17 and a 7-year term for aggravated domestic battery on count 18, to be served concurrently with each other and with defendant's sentences for attempted first-degree murder and home invasion. On the same date, the court denied defendant's motion to reconsider sentence and defendant filed a notice of appeal.

¶ 39 On October 29, 2014, the court *sua sponte* vacated defendant's convictions and sentences for aggravated battery and aggravated domestic battery (counts 17 and 18) and issued a mittimus “*nunc pro tunc*,” merging these counts into defendant's attempted first-degree murder conviction. The court also awarded 1041 days of presentence custody credit to defendant.

¶ 40 On appeal, defendant first argues that he was not proved guilty of attempted first-degree murder beyond a reasonable doubt because the evidence was insufficient to prove that he had the specific intent to kill. Where, as here, a defendant challenges the sufficiency of the State's evidence, we must determine whether, after viewing the evidence in the light most favorable to

the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009). We may not overturn a conviction based on insufficient evidence unless the proof is so unreasonable, improbable or unsatisfactory that there exists a reasonable doubt as to the defendant's guilt. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 41 A defendant commits attempted murder where he (1) performs an act constituting a "substantial step" toward the commission of murder, and (2) he intends to kill the victim. *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39. As a state of mind, intent is rarely proved by direct evidence. *People v. Teague*, 2013 IL App (1st) 110349, ¶ 24. Rather, intent to kill is usually established by inference from the surrounding circumstances such as, "the character of the assault, the use of a deadly weapon, and the nature and extent of the victim's injuries." Further, "[t]he very fact of firing a gun at a person supports the conclusion that the person doing so acted with an intent to kill." (Internal quotation marks omitted.) *Id.* ¶ 26 (quoting *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001)). Whether a defendant possessed the requisite intent to kill is a question best resolved by the trier of fact. *People v. Garcia*, 407 Ill. App. 3d 195, 201 (2011).

¶ 42 Here, the record establishes that defendant, following an argument with Nicole and after being "put out" of the apartment by her, returned to the apartment two weeks later with a loaded weapon. Sometime after midnight, he pried open a back window with a screwdriver, entered the apartment through the window, and shot Nicole in the head. Although defendant testified that he just wanted to talk with Nicole, the evidence establishes that, after their initial struggle, Dominic, who managed to disarm defendant and stand between him and Nicole, separated the pair. Shortly thereafter, defendant "snatched" the handgun from Dominic and walked toward the patio. Before exiting the apartment, defendant turned around and said, "Baby, you know what?" He then

placed the firearm against Nicole's cheek and shot her in the head. Defendant fled through the back door and later disposed of the weapon in a garbage can. Defendant then called Michelle and left her a voicemail, in which he admitted that he "shot [Nicole] in the head" and blamed Michelle for the shooting because she "lied on him." In the voicemail, defendant complained about being "put out" of his house and said, "[his] wife should have sat down and listened to [him]." After examining the evidence in the light most favorable to the State, we conclude that there was sufficient evidence for a rational trier of fact to find defendant had the specific intent to kill Nicole and that he was guilty of attempted first-degree murder beyond a reasonable doubt.

¶ 43 Defendant nevertheless maintains that the State failed to prove him guilty because the accounts of the shooting provided by Dominic and Nicole were unbelievable and unreliable. Specifically, defendant argues that Dominic's description of the shooting was contrary to human experience when taken in combination with Nicole's testimony that she felt a gun on her face. Defendant also argues that Nicole's recollection of the shooting was too vague and unreliable to support his guilt. He points out that after defendant took the firearm from Dominic and started leaving, the next thing she remembered was feeling the gun on her face and the shot. Thus, he argues she had no knowledge of how the weapon ended up against her cheek. Defendant further argues that the State failed to prove that he had the intent to kill where he could have brought the handgun intending to kill himself, and not Nicole.

¶ 44 Defendant's contentions are essentially asking this court to reweigh the evidence presented at trial and substitute our judgment for that of the trial court. This we cannot do. The "determination of the weight to be given to witnesses' testimony, their credibility, and the reasonable inferences to be drawn from the evidence are the responsibility of the fact finder," which heard the testimony and observed the witnesses. See *People v. Steidl*, 142 Ill. 2d 204, 226

(1991). Moreover, discrepancies in testimony are questions for the trier of fact (*People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67), which may “accept or reject as much or as little of a witness’s testimony as it pleases” (*People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22). Here, based on the court’s verdict and oral pronouncements, it resolved these alleged inconsistencies in favor of the State’s “exceedingly credible” witnesses. In doing so, the court was not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with a defendant’s innocence and raise them to a level of reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). As mentioned, this court will reverse a defendant’s conviction only when the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant’s guilt. *Wheeler*, 226 Ill. 2d at 115. This is not one of those cases.

¶ 45 Next, defendant contends that this court should reverse his conviction for home invasion because the State failed to prove beyond a reasonable doubt that he knowingly entered “the dwelling place of another.” In setting forth this argument, defendant acknowledges that this court reviews a challenge to the sufficiency of the evidence under the deferential reasonable doubt standard of review. Defendant, however, requests that we apply a *de novo* standard in this case because the issue here involves statutory interpretation *i.e.* whether “the established facts fall within the scope of the home invasion statute” and its requirement that defendant entered “the dwelling place of another.” See 720 ILCS 5/12-11(a) (West 2010).

¶ 46 We decline defendant’s invitation to engage in statutory interpretation where, as here, defendant is specifically challenging the sufficiency of the evidence to establish an element of the offense of home invasion. As mentioned, when a defendant challenges the sufficiency of the State’s evidence, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the

offense beyond a reasonable doubt. *Cardamone*, 232 Ill. 2d at 511. We will not overturn a conviction based on insufficient evidence unless the proof is so unreasonable, improbable or unsatisfactory that there exists a reasonable doubt as to the defendant's guilt. *Wheeler*, 226 Ill. 2d at 115.

¶ 47 To prove defendant guilty of home invasion, the State had to establish that he, without authority, knowingly entered “the dwelling place of another” and remained in that dwelling until he knew or had reason to know that one or more persons were present. 720 ILCS 5/12-11(a) (West 2010). In addition, the State had to prove that defendant used or threatened the imminent use of force while armed with a firearm. 720 ILCS 5/12-11(a)(3) (West 2010). Defendant does not contest that the evidence established that he was armed with a firearm and used force or threatened the imminent use of force. Rather, he argues that the State failed to prove beyond a reasonable doubt that he knowingly entered the “dwelling place of another.”

¶ 48 After examining the evidence in a light most favorable to the State, we conclude that a rational trier of fact could find that defendant knowingly entered the dwelling place of another and was guilty of home invasion beyond a reasonable doubt. In reaching this conclusion we find, we find *People v. Howard*, 374 Ill. App. 3d 705, 712 (2007) instructive.

¶ 49 In *Howard*, the defendant, who was not on the lease of his former spouse's apartment and had voluntarily moved out before committing the offense, was found guilty of first-degree murder predicated on felony home invasion. *Howard*, 374 Ill. App. 3d at 706-07. On appeal, he challenged the home invasion statute with respect to its application in domestic disputes between married couples. *Id.* at 711. In affirming the defendant's conviction, this court reasoned that, “an estranged spouse cannot avoid prosecution for home invasion unless he has *both* a tenancy interest and a possessory interest.” (Emphasis in original.) *Id.* at 712. The court then concluded

that the defendant did not have a “tenancy interest because he had no legal title to the premises,” and did not have a “possessory interest because he had no legal title to the premises, and also because he was no longer living in the town house.” *Id.*

¶ 50 Here, as in *Howard*, defendant had neither a tenancy interest nor a possessory interest in the Praire Avenue apartment. Although defendant and Nicole were married, defendant’s name was not on the lease agreement for the Prairie Avenue apartment and he only resided in the apartment “50% of the time.” More importantly, defendant had not resided in the apartment since September 25, 2011, the date Nicole told him to “leave” and he involuntarily moved out. Nicole testified that, on that date, prior to asking defendant to leave the apartment, she had packed up all of his belongings, which he took with him when he left. Nicole then obtained a protective order, which granted her exclusive access to the apartment. She also changed the locks on the doors to the apartment and told defendant not to come back.

¶ 51 On the night of the shooting, defendant, armed with a handgun, arrived at the apartment after midnight to discover that his key did not unlock the front or back door. Defendant admitted that he then pried open the back window with a screwdriver and climbed into the apartment to confront Nicole, who tried to push him out of the window. At trial, Nicole testified that she told defendant that she “just want[ed] [him] out of [her] house.” After the shooting, defendant fled the scene and left a voicemail in which he acknowledged that Nicole had “put him out” of the apartment. Once he was arrested, defendant reported his address to Detective Bryant as 44th Street and Shields Avenue. This evidence, and the reasonable inferences therefrom, were sufficient for a rational trier of fact to conclude that the apartment was not defendant’s dwelling place and that he was guilty of home invasion beyond a reasonable doubt.

¶ 52 Anticipating our reliance on *Howard*, defendant argues that the case at bar is distinguishable because he, unlike the defendant in *Howard*, contributed to the rent when he lived in the apartment and did not move out of the apartment of his own volition. Defendant argues that although his name was not on the lease, he effectively had a tenancy interest as a month-to-month subtenant. In support of this argument, defendant cites *Seidelman v. Kouvavus*, 57 Ill. App. 3d 350 (1978) and *Strong v. Soodvoisky*, 141 Ill. App. 183, 185 (1908) for the propositions that “[o]ccupation and payment of monthly rent creates a tenancy from month to month[]” that cannot be terminated except by giving 30 days notice.

¶ 53 We find *Kouvavus* and *Soodvoisky* readily distinguishable. First, neither case deals with the home invasion statute. Second, the evidence presented at trial does not support the conclusion that defendant was a month-to-month tenant where the record demonstrates that defendant intermittently occupied the apartment on unspecified dates and contributed unknown amounts of rent with unknown frequency. Moreover, although defendant testified that he contributed to the rent in the past and that he stayed at the apartment “all the time,” Nicole and Dominic testified that he only stayed at the apartment about “50 percent” of the time. As mentioned, the trier of fact was free to judge the credibility of the witnesses and weigh their testimony as it saw fit. Given the court’s findings, it resolved these alleged inconsistencies in favor of the State. We will not substitute our judgment for that of the trier of fact on these matters. See *Petermon*, 2014 IL App (1st) 113536, ¶ 38. This aside, even if defendant contributed to the rent, the record establishes that he had no possessory interest in the apartment after September 25, 2011, the date he involuntarily moved out. Accordingly, the evidence presented is not so unreasonable or improbable as to create a reasonable doubt of defendant’s guilt.

¶ 54 Finally, defendant contends, the State concedes, and we agree that his convictions for aggravated battery and aggravated domestic battery must be vacated under the one-act, one-crime rule because both convictions were based on the exact same physical act as his attempted first-degree murder conviction. Although defendant failed to raise this claim in the trial court, “an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process” and may thus be reviewed under the second prong of the plain error rule. See *People v. Harvey*, 211 Ill. 2d 368, 388-89 (2004).

¶ 55 In setting forth this argument, defendant acknowledges that the trial court ultimately issued a mittimus which correctly reflects his convictions for attempted first-degree murder and home invasion, but argues that the court was without jurisdiction to do so because he had already filed his notice of appeal. We review this issue *de novo*. *People v. Herrin*, 385 Ill. App. 3d 187, 190 (2008).

¶ 56 The record establishes that on October 23, 2014, the trial court sentenced defendant on attempted first-degree murder, home invasion, aggravated battery and aggravated domestic battery. On the same date, the court denied defendant’s motion to reconsider sentence, and he filed his notice of appeal. On October 29, 2014, the trial court, *sua sponte*, entered a *nunc pro tunc* order, attempting to correct two defects in its October 23, 2014, sentencing judgment. Specifically, the court vacated defendant’s sentences for aggravated battery and aggravated domestic battery and awarded defendant 1041 days of presentence custody credit, which had not yet been allocated.

¶ 57 In general, when a notice of appeal is properly filed, the appellate court’s jurisdiction attaches immediately and the trial court loses jurisdiction. *People v. Shukovsky*, 128 Ill. 2d 210, 227 (1988). An order issued without jurisdiction is void. *People v. Collins*, 202 Ill. 2d 59, 65

(2002). “Where the matter being appealed is independent of, and collateral to, the case before the trial court, however, the trial court may retain jurisdiction.” *People v. Richards*, 394 Ill. App. 3d 706, 708 (2009). *Nunc pro tunc* orders or judgments serve the limited purpose of incorporating into the record judicial actions actually taken by the court, which were inadvertently omitted due to a clerical error. *People v. Melchor*, 226 Ill. 2d 24, 32 (2007). Thus, a court may not use *nunc pro tunc* to supply a new judicial action or correct judicial errors. *Id.* Accordingly, we agree with defendant that the trial court’s order vacating the aggravated battery and aggravated domestic battery sentences is void for lack of jurisdiction (see *Collins*, 202 Ill. 2d at 65) and that the court could not use a *nunc pro tunc* order to correct a judicial error (*Melchor*, 226 Ill. 2d at 32).

¶ 58 While we find the trial court lacked jurisdiction to enter the October 29, 2014, *nunc pro tunc* order, it does not affect our ability to review the trial court’s original sentence. Multiple convictions based upon precisely the same act are improper. *People v. King*, 66 Ill. 2d 551, 566 (1977). In this case, defendant’s convictions for attempted first-degree murder (count 4), aggravated battery (count 17), and aggravated domestic battery (count 18) were all based on defendant’s act of shooting Nicole. As such, all but the most serious conviction must be vacated. See *People v. Lee*, 213 Ill. 2d 218, 227 (2004). Accordingly, we vacate defendant’s convictions and sentences for aggravated battery and aggravated domestic battery, and order the clerk of the circuit court to correct the mittimus to reflect this change. See *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008).

¶ 59 For the reasons stated, we affirm the judgment of the circuit court of Cook County in part, and vacate in part.

¶ 60 Affirmed in part and vacated in part; mittimus corrected.