2017 IL App (1st) 150219-U

No. 1-15-0219

December 29, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 17318
	)	
VINCENT JACKSON,	)	Honorable
	)	Arthur F. Hill Jr.,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for home invasion is affirmed over his contention that the State failed to present sufficient evidence to prove beyond a reasonable doubt that the apartment he entered was "the dwelling place of another." Defendant's 12-year sentence is affirmed because the trial court did not consider an improper aggravating factor. We modify defendant's mittimus to reflect the correct number of days he spent in presentence custody.

¶ 2 Following a bench trial, defendant was convicted of home invasion (720 ILCS 5/19-6(a)(2) (West Supp. 2013)) and sentenced to 12 years' imprisonment. Defendant appeals,

arguing that: (1) the State failed to prove beyond a reasonable doubt that the apartment he entered was "the dwelling place of another;" (2) this court should remand the case for a new sentencing hearing because the trial court considered an improper factor in aggravation; and (3) his mittimus should be amended to reflect the correct number of days he spent in presentence custody. For the reasons set forth herein, we affirm defendant's conviction and sentence and correct the mittimus.

¶ 3 Defendant was charged by indictment with multiple counts of home invasion (720 ILCS 5/19-6(a)(2) (West Supp. 2013)), residential burglary (720 ILCS 5/19-3(a) (West 2012)), aggravated battery (720 ILCS 5/12-3.05(b)(2) (West 2012)), violation of an order of protection (720 ILCS5/12-3.4(a) (West 2012)) and domestic battery (720 ILCS 5/12-3.2(a)(1), (2) (West 2012)). On October 6, 2014, defendant waived his right to a jury trial, and the case proceeded to a bench trial.

¶ 4 Chiquita Burton testified that, on August 17, 2013, she lived in apartment 2S at 4921 South Calumet Avenue with defendant, and her three children; 15 year-old Aliyah Wilson, 12 year-old Darcel Wilson, and five year-old D-Marion Burton. On that date, at 5:30 p.m., she and Darcel were in the apartment, and she heard someone banging on the door. Burton stated that she was too short to look through the peephole on the door, but assumed it was defendant on the other side of the door. She testified that she did not hear defendant's voice on the other side of the door and heard a group of teenagers laughing in the hallway. The door suddenly "flew" open and three boys came into her apartment. She testified that she did not recognize the boys because she had consumed "around a pint" of tequila and was intoxicated. Defendant entered the apartment directly after the boys, and the boys started "jumping on him." Burton then called the

police. The three boys eventually left the apartment, and defendant "was laid out on the ground." When police arrived, she gave the officers descriptions of the boys. The officers then took defendant into custody because he violated a "no contact" order of protection, even though she allowed him to live in the apartment.

¶ 5 Burton was confronted with her four-page written statement that was taken by assistant State's Attorney Glendon Runk. She testified that she did not "know what [the statement] was saying" but acknowledged that her signature was on each page. Burton also signed below pictures of herself and defendant, which were attached to the statement. Burton testified that Runk typed the statement after talking to her, and read it out loud to her, but did not ask her to suggest corrections to the statement. Burton denied that she provided Runk with the contents of the statement, which stated, *inter alia*, that defendant broke down the door of her apartment, struck her in the leg with a chair, threw a television down the hallway, and punched Darcel in the mouth with a closed fist. Burton testified that she did not comprehend English well, and that she signed the statement because the officers threatened to take her children away.

¶ 6 On cross-examination, Burton identified a picture of defendant, in which he had a swollen eye. She testified that the boys who came into her apartment caused the swollen eye.

¶ 7 Darcel testified that, in August of 2013, defendant was living in the apartment. On August 17, 2013, Darcel was in his room playing video games with the volume up. At some point during the evening, he left his room and saw three boys that he did not know jumping on defendant, who he identified as his stepfather. When police arrived at the apartment, he told the officers about the three boys, and the officers arrested defendant. Darcel testified that no one told him what to say in court, and that he had not spoken with defendant since he was arrested.

¶ 8 Officer David Wilson testified that, on August 17, 2013, he and his partner responded to 4921 South Calumet Avenue, apartment 2S. There, he observed that the front door frame was broken and that defendant was in the bathroom tending to an eye injury. Wilson described Burton as "hysterical," and she demanded that defendant leave the apartment. Wilson took defendant into custody. As defendant was leaving the apartment, he threatened to "kill [Burton] and kill everybody else that lived in the apartment." Wilson identified photographs of the apartment, which depicted the broken door frame, broken furniture, and a broken closet door. Burton told Wilson that she threw dishes at defendant and that defendant's eye was injured by furniture she had thrown at defendant to defend herself. Burton did not tell Wilson that three boys had broken into the apartment.

¶ 9 Assistant State's Attorney Glendon Runk testified that, on August 18, 2013, he and detective Mike Herman interviewed Burton about the incident that occurred on the previous day. He testified that Burton was not intoxicated and was not reluctant to speak to them. After Runk interviewed Burton, he memorialized her statement and showed it to her. Runk verified that Burton could understand and speak English by having her read the first paragraph of the statement out loud. Runk then read the remainder of the statement to Burton, allowing her to make changes to it and had her sign each page after he was finished reading it. Burton told Runk that the police treated her well and that no one had made any threats or promises to her. The contents of the statement were published in open court.

¶ 10 In the statement, Burton stated that she had lived in the apartment at 4921 South Calumet Avenue with her three children for approximately one year. She had previously dated defendant for one year, but broke up with him two years before the incident because he abused her. In

2011, Burton obtained a "no contact" restraining order against defendant which was effective until October 2013. In the months leading up to the incident, defendant left Burton numerous voicemails in which he threatened to kill her. On August 17, 2013, Burton was at home with her son when defendant began banging on the front door. She stated that she could see him through the peephole. She told defendant to go away, and called the police. Defendant eventually kicked down the door and pushed his way into the apartment. As defendant approached her, Burton grabbed a butcher knife to defend herself. Defendant "went crazy" and started throwing her kitchen chairs. One of the chairs struck Burton in the leg. Defendant then went to Burton's daughter's room and threw a television into the hallway. Burton started throwing bowls at defendant, and he fell backwards and broke her closet doors. Darcel came out of his bedroom and told defendant to leave, and defendant punched him in the mouth with a closed fist.

¶ 11 On cross-examination, Runk acknowledged that Burton was not placed under oath before the interview.

¶ 12 The parties stipulated to the foundation for a recording of a 911 call from August 17, 2013, which was played in open court. Burton identified her voice from the recording. In the recording, Burton tells the operator that defendant was attempting to kick her door in. She told the operator that defendant was an ex-boyfriend and that she had "a restraining order out on him." She explained that "he's in the hallway on my door," that he did not have any "business by [her] door," and that defendant was "kicking [her] s*** in." As the recording continues, a loud sound can be heard, as well as a verbal altercation between Burton and a man. During the altercation, Burton and the man yell at each other, and intermittent crashes and shattering noises can be heard.

¶ 13 The parties also stipulated to the order of protection that Burton had obtained against defendant, which was issued on October 17, 2011 and was in effect until October 14, 2013. The order mandated that defendant not contact Burton by any means, granted Burton exclusive possession of the residence located at 6537 South Drexel Avenue, and prohibited defendant from entering that residence. The parties further stipulated to defendant's 2007 conviction for domestic battery.

¶ 14 The trial court granted defendant's motion for a directed finding for one count of home invasion, one count of aggravated battery, and two counts of domestic battery, all of which named Darcel as the victim.

¶ 15 Defendant testified that, in August of 2013, he lived with Burton, her children, and her stepfather at 4921 South Calumet Avenue. On August 17, 2013, defendant was coming back from a picnic at Washington Park when Burton called him and told him that "the gate jumpers" were threatening to break into the apartment. He testified that two of the "gate jumpers" were their downstairs neighbors. When defendant arrived in the hallway outside of the apartment, the boys started to attack him. He threw one of the boys through the door, and the rest of the combatants entered the apartment. Burton started yelling because she was intoxicated and did not know what was going on. During the fight, the boys ran out of the apartment, and defendant went to the bathroom to check on the injury to his eye. He denied striking Burton with a chair or punching Darcel. He testified that he knew that Burton had previously obtained an order of protection against him, but believed that the order only applied to 6537 South Drexel, and was not in effect at 4921 South Calumet.

¶ 16 On cross-examination, defendant acknowledged that he had been arrested "two or three times before while me and Chiquita Burton were staying in our house." He stated that he and Burton had an agreement to ignore the order of protection. Defendant testified that he told the arresting officers that he had keys to the apartment at 4921 South Calumet, and that he gave those keys to Burton. He also told the officers about fighting the three boys and that two of the boys lived in the unit below them.

¶ 17 After argument, the trial court found defendant guilty of the remaining home invasion, residential burglary, violation of an order of protection and domestic battery counts. The court denied defendant's motion for a new trial and arrest of judgment, which argued that the State failed to prove that he did not live in the apartment. The case proceeded to sentencing.

¶ 18 At sentencing, the court heard arguments in aggravation and mitigation. In aggravation, the State argued that the case was a crime of violence and that defendant defied an order of protection to injure Burton. It also noted that defendant had five felonies in his criminal background, including a 2004 conviction for aggravated battery and a 1995 conviction for child abduction. The State also pointed out that in his criminal background defendant had misdemeanor DUIs, cannabis charges, and domestic batteries. The State noted that an arrest report from February 7, 2013, detailed how defendant attempted to gain entry into Burton's home. The State recommended a "serious and lengthy" sentence.

¶ 19 In mitigation, defense counsel noted that defendant's 2004 aggravated battery conviction was his last conviction, and that it was based on contact of a "provoking nature" and not "great bodily harm." Counsel argued that that defendant's background was nonviolent, and that he had been given boot camp on the child abduction conviction. Counsel asked for a minimum sentence.

¶ 20 Burton stated that she was still in a relationship with defendant, that she was not afraid of him, and that she wanted him to come back home to live with her. She stated that she was aware of her right to file a victim impact statement with the court, but that she "wasn't touched that day at all" and was not affected by the incident.

¶ 21 In allocution, defendant stated that he had lived in the apartment for four years. He asked for a lenient sentence because he wanted to get back to his children and family.

¶ 22 Before announcing sentence, the trial court stated:

> THE COURT: I've heard the testimony during the course of the trial. Of course, I've heard things that were said here today, including from Ms. Burton, and I've heard from the lawyers. A few comments then I'm going to pas[s] sentence here.
>
> This court has been as an attorney and as a judge involved in the criminal justice system since 1978, and has seen lots, and lots of domestic violence issues. When I was a young prosecutor assigned to the branch courts back in '79, 1980, domestic violence as a term wasn't really used. It was something that that those kinds of cases were the ones where the victim comes to court, I still love him, and motion State SOL, and everybody went home. A lot of times those same people came back. I know about the issues of domestic violence.
>
> And I say that as a backdrop because during the course of this trial we had the unique experience of having Ms. Burton, who was the complaining witness in this case, get on the witness stand, actually, it's not so unique, it's not unique at all, and get on the stand and say he [did not] do it. He didn't hit me. He didn't attack me, okay. But you play back the 911 [tape] where she called to police during the course of, at the very beginning

> of the home invasion. And the 911 tape is rolling as the defendant bursts through the door. And you hear Ms. Burton screaming and upset and mad and afraid. You hear that in direct contradiction to what she testified to here in open court under oath. She lied. She lied. What's worse her 13 year[] old got on the witness stand and he tried to back mommy. He didn't tell the truth here in court.
>
> This is based on the history of the case the Court knows about the case is a cycle that's got [to] stop.
>
> This is a case about control, about power, about dominance, and it is a sad, sad day. This is a sad and sorry situation. I have listened to all of the things that have been said. I know the facts of this case. I know about the defendant's history, which is extensive. Having taken into consideration all of the issues regarding aggravation and mitigation, the first thing I'm going to do is this. Counts 3, 5, 6, 7, 8 and 10 all merge into Count 1. The sentence will be on Count 1.
>
> The sentence will be 12 years Illinois Department of Corrections."

The court gave defendant credit for 488 days of presentence custody and denied his oral motion to reconsider sentence. Defendant filed a timely notice of appeal.

¶ 23 On appeal, defendant first challenges the sufficiency of the evidence to sustain his conviction for home invasion. He contends that the State failed to prove beyond a reasonable doubt that the 4921 South Calumet apartment was "the dwelling place for another" where there was no evidence presented that he did not reside in the apartment.

¶ 24 The due process clause of the fourteenth amendment protects defendants against conviction in state courts except upon proof beyond a reasonable doubt of every fact necessary to

constitute the charged crime. *People v. Brown*, 2013 IL 114196, ¶ 48; *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). When a court reviews the sufficiency of evidence, it must determine " 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.' " *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *Jackson*, 443 U.S. at 318). A reviewing court must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Lloyd*, 2013 IL 113510, ¶ 42. This means that we must draw all reasonable inferences from the record in favor of the prosecution, and that " '[w]e will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *Id.* (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)). " 'Circumstantial evidence is sufficient to sustain a criminal conviction, provided that such evidence satisfies proof beyond a reasonable doubt of the elements of the crime charged.' " *People v. Grant*, 2014 IL App (1st) 100174-B, ¶ 24 (quoting *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 25 As relevant here, a person commits the offense of home invasion when, without authority, he knowingly enters the dwelling place of another when he knows or has reason to know that one or more persons is present in the dwelling and intentionally causes any injury to any person or persons therein. 720 ILCS 5/19-6(a)(2) (West Supp. 2013). For the purposes of the home invasion statute, "dwelling place of another" includes a dwelling place where the defendant maintains a tenancy interest but from which the defendant has been barred by a divorce decree, judgment of dissolution of marriage, order of protection, or other court order. 720 ILCS 5/19-6(d) (West. Supp. 2013).

¶ 26 In this court, defendant does not dispute that the State presented evidence sufficient to prove that he entered the Calumet apartment "without authority," and that he intentionally caused injury to Burton, whom he knew was inside the house. Rather, he argues that the State failed to prove beyond a reasonable doubt that he entered "the dwelling place of another," because the testimony at trial showed that he, in fact, lived in the apartment.

¶ 27 After viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have concluded that defendant entered the dwelling place of another and, thus, was guilty of home invasion beyond a reasonable doubt. The record shows that, in her written statement, Burton stated that she resided in the apartment at 4921 South Calumet with her three children. In the statement, Burton did not mention that defendant resided in the apartment. Rather, she stated that she had dated defendant, but had broken up with him two years prior to the incident in question. In the statement, Burton also detailed that, in the weeks leading up to the incident, defendant left her threatening voicemails. The record also shows that, in 2011, Burton had obtained an order of protection against defendant. The order, which was in effect at the time of the incident in question, mandated that defendant not contact Burton "by any means" and granted Burton exclusive possession of the residence located at 6537 South Drexel Avenue. Moreover, in the recording of the 911 call, Burton tells the operator that defendant was attempting to kick her door in, that she had a restraining order "out on him," and that he did not have any "business by [her] door." When police arrived at the scene, Burton told the officers that defendant kicked her door in. This evidence, and the reasonable inferences therefrom, was sufficient to allow a rational trier of fact to conclude that defendant knowingly entered the "dwelling place of another" and was guilty of home invasion beyond a reasonable doubt.

¶ 28 In reaching this conclusion, we are not persuaded by defendant's argument that the State failed to prove that he lacked a tenancy or possessory interest in the Calumet apartment because the State did not introduce documentation, such as a lease agreement, showing whether he "or anyone else, had a fee, leasehold, or other property interest in the apartment." Here, the State was not required to produce such documentation where the evidence presented, and reasonable inferences therefrom, was sufficient to establish that defendant entered the dwelling place of another. As mentioned, in her written statement, Burton stated that she resided in the apartment with her three children. The parties stipulated to the order of protection, which prohibited defendant from contacting Burton by any means. Although the order did not grant exclusive possession of the Calumet apartment to Burton, as it did the Drexel apartment, it supports the conclusion that defendant was not a tenant of the apartment. This conclusion is further supported by the circumstances surrounding the offense and the fact that defendant had to kick through the door to enter the apartment. Moreover, in the 911 recording, Burton informed the operator that she had a restraining order against defendant and that he did not have any "business by [her] door."

¶ 29 Although Burton, Darcel, and defendant all testified that defendant was residing in the apartment in December 2013, the trial court determined that their testimony was incredible. See *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 30 (determinations of the credibility of witnesses are the responsibility of the trier of fact); *People v. Rudell*, 2017 IL App (1st) 152772, ¶ 24 (a reviewing court will not substitute its judgment for that of the trier of fact on questions of the credibility of witnesses). As mentioned, we will not reverse a conviction unless the evidence

is so improbable, unsatisfactory or inconclusive that it creates a reasonable doubt of defendant's guilt. *Lloyd*, 2013 IL 113510, ¶ 42. This is not one of those cases.

¶ 30 Defendant next contends that the trial court improperly considered Burton's and Darcel's perjury as an aggravating factor for the purposes of sentencing where there was no evidence that he intended for them to commit perjury.

¶ 31 In setting forth this argument, defendant acknowledges that he failed to preserve this issue for appeal by not objecting to the court's oral pronouncements or including the issue in his motion to reconsider sentence. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). Nonetheless, he argues that we may review this issue under the plain error doctrine.

¶ 32 To establish plain error in the context of sentencing, a defendant must show that a clear or obvious error occurred and "that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Id.* A reviewing court conducting plain error analysis must first determine whether an error occurred, as "[w]ithout reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). Here, we find no error.

¶ 33 The parties agree that whether the trial court considered an improper factor in aggravation at sentencing is reviewed for an abuse of discretion. See *Harmon*, 2015 IL App (1st) 122345, ¶ 122. " 'Consideration of an improper factor in aggravation affects a defendant's fundamental right to liberty, and therefore, is an abuse of discretion.' " *People v. Cotton*, 393 Ill.

App. 3d 237, 265 (2009) (quoting *People v. McAfee*, 332 Ill. App. 3d 1091, 1096 (2002)). When a court reviews a sentence, it "should not focus on a few words or statements made by the trial court, but must consider the record as a whole." *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010).

¶ 34 After reviewing the record as a whole, we find that the trial court did not consider an improper aggravating factor when it sentenced defendant to 12 years' imprisonment for home invasion. The trial court's comments regarding the alleged perjury on the part of Burton and 13-year-old Darcel were made in the context of the court's overarching commentary regarding the cycle of domestic violence, in which victims often come to their abuser's defense despite the emotional and physical abuse that they have suffered. The court noted that the sad nature of this cycle "[had to] stop." In making these comments, the trial court made no indication that defendant had any hand in bringing about the alleged perjury, or that it was imposing the sentence based on the perjury.

¶ 35 That said, even if we were to determine that the trial court improperly considered the witnesses' perjury as an aggravating factor, we would not find remand necessary. "Where a trial court considers an improper factor in aggravation, we must order resentencing if we cannot determine the weight that the trial court gave to the aggravating factor." *People v. Minter*, 2015 IL App (1st) 120958, ¶ 152. However, where the trial court appears to place minimal emphasis upon an improper factor, a new sentencing hearing is not required. *Id*. In determining whether trial courts have afforded significant weight to improper factors, reviewing courts may consider: (1) whether the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor; and (2) whether the sentence received was substantially less

than the maximum sentence permissible by statute. *People v. Dowding*, 388 Ill. App. 3d 936, 945 (2009).

¶ 36 Home invasion is a Class X offense, which carries a sentencing range of 6 to 30 years' imprisonment. 720 ILCS 5/19-6(c) (West Supp. 2013); 730 ILCS 5/5-4.5-25(a) (West 2012). Defendant's 12-year sentence is substantially below the maximum sentence of 30-years, and 6 years above the minimum sentence of 6-years. Moreover, the record indicates that the trial court based its sentence on defendant's criminal background, which it characterized as "extensive." See *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) (Criminal history alone can warrant a sentence "substantially above the minimum").

¶ 37 Viewing the record as a whole, we find that the trial court did not place emphasis on the alleged improper factor in sentencing defendant to 12 years' imprisonment for home invasion. Accordingly, we find no error, and therefore, no plain error here. See *McGee*, 398 Ill. App. 3d at 794 ("[w]ithout reversible error, there can be no plain error"). As such, defendant's contention that the trial court relied on an improper aggravating factor during sentencing is forfeited.

¶ 38 Finally, defendant argues, the State concedes, and we agree that his mittimus should be corrected to reflect credit for 489 days of presentence custody. Whether a mittimus should be corrected is a question of law we review *de novo*. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 35. A defendant is entitled to credit for any part of any day he spends in presentence custody, excluding the day of sentencing. 730 ILCS 5/5-4.5-100 (West 2012); *People v. Williams*, 239 Ill. 2d 503, 509 (2011). Here, defendant was arrested on August 17, 2013, was sentenced on December 19, 2014, and defendant spent 489 days in presentence custody. Defendant's mittimus reflects that he spent 488 days in presentence custody. We find the

mittimus was incorrect. We may correct the mittimus without remanding the cause to the trial court. *People v. Smith*, 2016 IL App (1st) 140039, ¶ 19. Therefore, we direct the clerk of the circuit court to correct the mittmus to credit defendant with 489 days of presentence custody.

¶ 39 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and correct the mittimus.

¶ 40 Affirmed as modified.