2017 IL App (1st) 151256-U

No. 1-15-1256

September 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 21191
	)	
ANTHONY JONES,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: We affirm defendant's conviction for armed robbery over his contention that the evidence was insufficient to prove beyond a reasonable doubt that he possessed a dangerous weapon. Counsel was not ineffective where defendant failed to demonstrate prejudice from counsel's cross-examination of the victim. Defendant's sentence for armed robbery affirmed over his contention it is excessive. We remand for the trial court to conduct a proper preliminary *Krankel* hearing without the State's adversarial participation.

¶ 2 Following a bench trial, defendant Anthony Jones was convicted of armed robbery with use of a dangerous weapon other than a firearm (720 ILCS 5/18-2(a)(1) (West 2012)), and

aggravated criminal sexual abuse (720 ILCS 5/11-1.60(a)(1) (West 2012)), and sentenced to concurrent sentences of 22 and 14 years' imprisonment. On appeal, defendant contends that (1) the State failed to prove beyond a reasonable doubt that he committed armed robbery where the evidence was insufficient to show he possessed a dangerous weapon; (2) defense counsel rendered ineffective assistance by opening the door during cross-examination for the State to introduce a recording of the victim's 911 call; (3) the trial court erroneously allowed the State to participate in an adversarial manner in a *People v. Krankel*, 102 Ill. 2d 181 (1984), preliminary inquiry into defendant's *pro se* ineffective assistance of counsel claims; and (4) the trial court abused its discretion by imposing an excessive sentence of 22 years' imprisonment for his nonviolent armed robbery conviction. For the following reasons, we affirm and remand.

¶ 3 Defendant was charged with armed robbery, aggravated criminal sexual abuse with use of a dangerous weapon, aggravated criminal sexual abuse during the course of a robbery, and aggravated unlawful restraint. At trial, the victim, J.P., testified that, on October 16, 2013, at approximately 9:30 p.m., he left his home in Logan Square to walk to a nearby liquor store. While J.P. was walking, defendant, whom he identified in open court, approached him and asked for a cigarette. Defendant had been walking with his pit bull on the same side of the street, but in the opposite direction of J.P. J.P. gave defendant a cigarette. Defendant asked how long J.P. had lived in the neighborhood and stated that J.P. "must not have been a contributing member of the neighborhood" since defendant had never seen him before. Defendant told J.P. his name and asked for J.P.'s name.

¶ 4 As J.P. continued walking, defendant changed his direction and walked alongside J.P. Although their conversation was initially cordial, J.P. gave "short" responses and assumed

defendant could tell that he was not interested in talking. Defendant asked J.P. if he remembered his name, and when J.P. did not, defendant responded, "I don't like that" in an angry tone. J.P. noticed that defendant was holding a crowbar and had clanked it on the ground when he became angry. The crowbar was approximately three feet in length and made the sound of metal hitting the cement. When defendant hit the crowbar on the ground, J.P. was "terrified," but did not want defendant to know how scared he was.

¶ 5 J.P. continued walking to the liquor store, and defendant walked beside him, asking questions as though "everything was normal." Defendant asked J.P.'s age and Zodiac sign. J.P. answered defendant's questions in an attempt to conceal how scared he was. Defendant told J.P. that his birthday was coming up and showed J.P. his identification. J.P. "made sure" to memorize defendant's name because he did not want defendant to become angry again. He also memorized defendant's birth date.

¶ 6 When defendant asked J.P. to see his identification, J.P. stated that he did not have it with him. Defendant called J.P. a liar and grabbed J.P.'s arm to turn him around. The two were in front of a house near an alley. Defendant turned J.P. so his back was against the front of defendant's body. Defendant's pit bull was still nearby, but not on a leash, and the crowbar was propped against a fence. Defendant pulled J.P.'s body against his so that they were touching. Defendant put both hands into J.P.'s front pockets, where he had approximately $26, and began to "thrust" his penis against J.P.'s buttocks approximately 10 times. While he was thrusting, defendant was "making sexual grunts." He pulled one hand out of J.P.'s pocket and J.P.'s money fell to the ground. Defendant placed the money in his coat and then put his hand on J.P.'s penis and grabbed and fondled him.

¶ 7 Defendant's other hand was still in J.P.'s front pocket and defendant continued to thrust and make grunting noises. This continued for approximately 30 to 45 seconds. J.P. stated, "I told you I don't have my I.D., stop." Defendant continued to thrust until his dog ran after another dog walking nearby. When defendant let him go, J.P. hastily walked toward the liquor store. After a few seconds, defendant reappeared and grabbed J.P.'s arm with one hand and placed his other hand on J.P.'s throat. Defendant then told J.P. he could teach him "how to deep throat really good." J.P. pulled away, and defendant told him to get a bottle of alcohol from the liquor store so they "could head back to [J.P.'s] place and [defendant] would give [J.P.] a sunny side up." J.P. did not give any indication that he was interested in having contact with defendant.

¶ 8 At this point, J.P. and defendant were at the door of the liquor store. Defendant asked J.P. to purchase a bottle of alcohol, and J.P. responded that he could not purchase anything because defendant took his money. J.P. entered the liquor store and went directly to the cash register. Angi Lombardi and Caroline Alfaro were working at the liquor store. J.P. knew both of them because he frequented the store. Defendant followed J.P. into the store and purchased a bottle of vodka with J.P.'s money. While defendant stood next to J.P. at the register, J.P. was "still paralyzed in fear" and was unable to speak when either Lombardi or Alfaro attempted to talk to him.

¶ 9 Defendant subsequently walked into a bar that adjoined the liquor store, and J.P. told Lombardi and Alfaro about the incident with defendant. They gave J.P. a cell phone and instructed him to go to the back storage room to call 911. J.P. called 911 and told the operator what occurred and provided defendant's name and birth date that he memorized from defendant's identification.

¶ 10 Subsequently, the police arrived and detained defendant. J.P. spoke with Officers Blasz and Mallek and identified defendant. The officers and J.P. then walked down the street to search for the crowbar, which they did not find. J.P. did not know what defendant did with the crowbar after he propped it against the fence.

¶ 11 J.P. narrated a surveillance video captured inside the liquor store. The video depicted J.P. standing at the front counter with defendant standing next to him. It further showed defendant walking away and J.P. explaining what previously occurred to Alfaro and Lombardi. Next, Alfaro and Lombardi gave J.P. a phone to call the police, and J.P. was "so frazzled" that he walked away without taking the phone. J.P. identified himself, defendant, Alfaro, and Lombardi in the video.

¶ 12 On cross-examination, J.P. testified that he spoke with Detective Hart on October 17, 2013, and told him that defendant held the crowbar like a cane, but clarified that defendant was not using the crowbar as a cane. J.P. acknowledged that defendant did not threaten him with the crowbar. He described the crowbar to Hart, but "suppose[d]" that he did not tell him that the crowbar was leaning against the fence while defendant searched his pockets. When defense counsel asked if J.P. agreed that he failed to tell Hart that he had memorized defendant's name and birth date, J.P. responded, "It's on the 911 call." J.P. acknowledged that he did not say anything to the person walking the dog that defendant's pit bull chased during the incident. His first thought was to get to a public place to ensure his safety. J.P. did not see the person walking the dog again, and acknowledged that he did not mention that person to the police.

¶ 13 On redirect, J.P. testified that he told police officers that the incident occurred while defendant was in possession of a crowbar. When defendant starting hitting the crowbar on the

ground, J.P. felt threatened. He also felt threatened while defendant was touching his genitals because the crowbar was within defendant's reach. He continued to answer defendant's questions because he was scared. J.P. told the 911 operator defendant's name and birth date and told Hart that defendant showed J.P. his identification. He also described defendant's clothing and his location.

¶ 14 The State then sought to introduce into evidence the recording of J.P.'s 911 call. Defense counsel objected, arguing that its contents would be cumulative. The State responded that defense counsel had insinuated that J.P. did not tell police about the crowbar and that he did not provide defendant's name and birth date. The trial court admitted the 911 recording over the objection, finding that defense counsel's questions on cross-examination suggested that the information J.P. gave to the police might have been fabricated.

¶ 15 The State subsequently published the 911 recording. J.P. testified that, on the recording, he informed the 911 operator that defendant showed J.P. his identification; he provided defendant's name, birth date, and a description of defendant; he mentioned defendant possessed a crowbar; and his tone was "terrified." He further described defendant taking his money. Although defendant did not return his money, J.P. later received $19 back from Hart.

¶ 16 Angi Lombardi testified that she worked at Danny's Buy Low, a liquor store attached to a bar. Lombardi knew J.P. because he was a regular customer at the liquor store. Although J.P. was normally friendly when he visited the liquor store, on October 16, 2013, he came in around 9:40 p.m., and was "very silent" and appeared "shaken." That day, Lombardi was working behind the counter with Caroline Alfaro. Defendant entered the store a few seconds after J.P. and stood directly next to J.P. at the counter. J.P. did not respond to any questions and appeared "frozen"

when Lombardi attempted to talk to him. J.P. motioned with his head and eyes toward defendant when Lombardi asked him if something was wrong.

¶ 17 Defendant purchased a bottle of liquor and walked toward the bar. When defendant left, J.P. told Lombardi and Alfaro what had occurred. As J.P. spoke, he was shaking and his voice was cracking. Lombardi instructed J.P. to call the police, but he walked away without taking the phone that Alfaro handed him. Eventually, J.P. went to the back of the store with Alfaro. Lombardi stayed behind the counter, and defendant returned to the liquor store. Lombardi characterized defendant's statements to her as "offensive," and stated that defendant made unsolicited "minor sexual advances" to her. Defendant said "[t]hat it didn't matter, a man or woman, he could satisfy and that he was really strong and he could go all night long." He continued, "[I]f [he] could have one night, there is no telling what he could do," and "with all that [Lombardi has] back there, [defendant] could have a lot of fun." Lombardi rang up defendant's purchase and ignored his comments.

¶ 18 Lombardi spoke with police officers when they arrived. She narrated the surveillance video for the court, and identified herself, Alfaro, J.P., and defendant in the video.

¶ 19 On cross-examination, Lombardi acknowledged that she did not see any surveillance footage from outside, but stated that the store cameras do not capture the street. She further acknowledged that she did not see any footage of the camera that captured the door.

¶ 20 Caroline Alfaro testified that she worked at the liquor store and knew J.P. because he was a regular customer. Alfaro also knew defendant from "around the neighborhood and the [liquor] store." On October 16, 2013, at 9:40 p.m., Alfaro was working with Lombardi and observed J.P. enter the store with defendant. J.P. was very quiet and appeared "frightened" when he entered the

store, although he was usually very happy. Alfaro corroborated Lombardi's testimony about J.P.'s frightened demeanor and that J.P. did not speak until defendant walked away. Alfaro went to the back of the store with J.P. and when she returned to the counter, defendant had reappeared. The police detained defendant upon their arrival to the liquor store.

¶ 21 On cross-examination, Alfaro testified that defendant's pit bull was not in the store. Alfaro acknowledged that she spoke with Chicago police officer Mallek, but denied telling Mallek that defendant acted belligerent in the store with his dog. She also clarified that she knew defendant from "around" the store, not "in" the store.

¶ 22 Officer Scott Blasz testified that on October 16, 2013, he was on duty as a Chicago police officer. At around 9:50 p.m., he responded with his partner, Officer Mallek, to a call of an assault in progress by a black man wearing a University of Michigan hat. They were in uniform in a marked police car. When the officers arrived at the liquor store, Blasz recognized defendant because he was wearing a University of Michigan hat. He observed a pit bull standing at the door of the liquor store. Two women were pointing at defendant, and Blasz told defendant to come with him.

¶ 23 Officer Mallek remained outside to handle the pit bull, which he put in the police car because it was unleashed. Defendant yelled, "What the f*** are you doing with my dog?" and charged at Mallek. The officers eventually detained defendant and returned inside the store to talk to J.P. J.P. reported that defendant had a crowbar and the pit bull with him. Defendant made sexually suggestive comments to J.P. and began to thrust on him before reaching into J.P.'s pocket to take his money. J.P. was "visibly shaken" and indicated he was nervous that defendant would be released.

¶ 24 Blasz also interviewed Lombardi and Alfaro, who identified defendant, and told their observations of what had occurred in the store. Blasz learned from the two women that there were surveillance cameras inside the store. He thereafter placed defendant under arrest and searched for the crowbar with Mallek and J.P. They searched the area approximately 35 to 40 feet from the liquor store, but never recovered the crowbar.

¶ 25 After the State rested, the defense called retired Chicago police detective Terrance Hart. Hart testified that on October 16, 2013, he was investigating a robbery that turned into a sexual assault. He interviewed J.P. on October 17, 2013, and took notes of what J.P. reported. Hart indicated that his report covered only "important details" of the interview and did not recite the entire conversation. He acknowledged that his report did not specifically state that defendant told J.P. he was not a contributing member of the neighborhood; however, it reflected that J.P. and defendant discussed living in the neighborhood. The report also indicated that defendant was in possession of a crowbar that he was using as a cane, but did not state that defendant became upset and hit the crowbar against the ground. Further, Hart acknowledged that the report did not state that defendant propped the crowbar against a fence during the incident with J.P., but noted that he learned during the course of the interview that defendant no longer had the crowbar in his hands when he was groping J.P. Hart additionally acknowledged that he could not recall J.P. reporting that defendant raised the crowbar as a "direct threat."

¶ 26 On cross-examination, Hart testified that J.P. reported that defendant was in possession of a crowbar, that defendant asked J.P. for a cigarette, and that the two had a general conversation. J.P. told him defendant became upset after J.P. forgot his name, made sexual comments to J.P., placed his hands around J.P.'s neck, and was going through his pockets and "grinding" on him.

Further, J.P. told Hart that defendant showed him his identification, groped his genitals, had a pit bull, and followed J.P. into the liquor store, where J.P. called the police.

¶ 27 Chicago police officer Mallek testified for the defense that he responded to an assault in progress at a liquor store on October 16, 2013. He arrested defendant at the liquor store and spoke with Alfaro. Although his written report was not verbatim, Mallek recalled Alfaro telling him that defendant came into the liquor store with an unleashed dog, and became belligerent and refused to leave the store with his dog.

¶ 28 Defendant testified that on October 16, 2013, he was raking leaves in his yard around 8:30 p.m., when J.P. approached him and asked him about graffiti in the neighborhood. He did not know J.P. but recognized him from around the neighborhood. They talked about graffiti, and J.P. asked defendant to show him a garage. As they were walking, defendant's neighbor, "Valerie," and her dog walked out of a nearby alley. Defendant's dog ran over to Valerie's dog, and defendant, J.P., and Valerie had a conversation about "the lights and the graffiti." In the middle of the conversation, J.P. interrupted and asked defendant to show him more graffiti. Defendant responded, "Man, what's up with you? *** Are you gay or something?" J.P. replied that he was gay and wanted to "kick it." Defendant showed J.P. a garage with graffiti and said, "I don't know what [*sic*] you're from. I don't get down like that. I'm a, you know what I'm saying, heterosexual. I like women. I don't get down like that." The two men went separate ways: J.P. continued walking and defendant retrieved money from his home and walked through an alley to go to the liquor store.

¶ 29 Defendant walked to the liquor store alone. He denied following J.P. Defendant then walked into the adjoining bar and returned to the liquor store when it was less crowded. He saw

J.P. inside and told him "not to approach him like that" and bought some liquor. Defendant denied having a crowbar with him. He also denied groping and robbing J.P.

¶ 30 On cross-examination, defendant testified that he had never talked to J.P. prior to October 16, 2013. He was finishing raking his leaves in the dark at 9:30 p.m. Defendant denied having a crowbar, and explained that J.P. was angry at him in the liquor store because defendant was "not complying with [J.P.'s] advances." While he acknowledged speaking to Lombardi about the cost of various liquors, defendant denied making sexual advances toward her.

¶ 31 Following closing arguments, the court found defendant guilty of armed robbery, aggravated criminal sexual abuse with use of a dangerous weapon, aggravated criminal sexual abuse during the course of a robbery, and aggravated unlawful restraint. The court found that "the credible evidence testimony" revealed that defendant took money from J.P. by "threatening imminent use of force" while in possession of a bludgeon in the form of a crowbar. Further, the court found that the testimony established defendant, for the purpose of sexual gratification, touched and grabbed J.P.'s penis and grinded on J.P. while threatening use of force with a crowbar. Finally, the court found the evidence established that defendant "fondl[ed] and grop[ed]" J.P.'s penis for sexual gratification while robbing J.P., and additionally unlawfully detained J.P. while in possession of a crowbar.

¶ 32 During a hearing on posttrial motions, defendant told the court that he had a conflict of interest with his lawyer, stating, "[M]e and my lawyer aren't on the same page of what I'm trying to do for my freedom." The court asked defendant to elaborate on his claim. Defendant claimed he asked his attorney to subpoena "Mr. Scott," the owner of the liquor store to get surveillance tapes that depict the street outside of the liquor store, and that he asked his attorney

to call as a witness, Valerie Kupla, his neighbor who was walking her dog the night of the incident. In response, defense counsel stated that he sent an investigator to the liquor store to get any additional surveillance tapes, and the owner of the liquor store told the investigator that they did not have videos of defendant on that day, likely because the police were already in possession of the tapes. Counsel indicated that to his knowledge, the liquor store turned all relevant tapes over to the police. The State interjected,

> "I would indicate counsel did inquire of the State also about the video on multiple occasions and I did indicate to counsel the video was received by the detective. Provided him the supplemental report from the detective indicating the date and time which the video was received and that video in question that was received from Mr. Scott was in fact inventoried and had been tendered to the court. Showed counsel the inventoried receipt along with the video and that copy was made for counsel.
>
> Further, as relates to that video, you heard testimony from the two witnesses that were also store employees. The civilian witnesses would indicate that the video does not show any area outside, down Lyndale where this incident would have occurred. So even if in fact there were outside working cameras, they would not show any evidence of anything that occurred down the block on Lyndale.
>
> This was in-store video. She pointed out the five screens, said that's the view she has when she's working and the cameras on the outside just shows the area immediately outside the storefront."

¶ 33 Defense counsel additionally stated that his investigator could not find anyone named Valerie based on the information that defendant supplied. Counsel followed up on several other

names of potential witnesses that defendant previously provided, but was unable to obtain anything useful to defendant's defense. The court, concluding defendant's statements were without merit, found that there was no evidence that defense counsel was ineffective.

¶ 34 The court returned to defendant's motion for reconsideration or a new trial. Defendant alleged, among other things, that the recording of the 911 call was cumulative evidence and the State failed to prove him guilty beyond a reasonable doubt. Following arguments, the court denied defendant's motion, stating that it considered the surveillance tape, the witness testimony, and saw the witnesses' demeanors. Further, the court noted that defendant's testimony was "conniving" and not credible.

¶ 35 At the sentencing hearing, the State argued defendant's criminal history in aggravation, noting defendant had six felony convictions, including two prior sex offenses. In mitigation, defense counsel argued defendant's prior sex convictions were more than 20 years old, and defendant had only nonviolent convictions within the last 20 years. Defense counsel additionally emphasized defendant's relationship with his family, educational background, volunteer work around his neighborhood, and his participation in his church.

¶ 36 The court merged count 3, aggravated criminal sexual abuse during the course of a robbery, into count 2, aggravated criminal sexual abuse with use of a dangerous weapon, and count 4, aggravated unlawful restraint, into count 1, armed robbery with use of a dangerous weapon other than a firearm. The court explained,

> For purposes of sentencing, the Court has considered the evidence at trial, the gravity of the offense, the presentence investigation report, the financial impact of incarceration, all evidence, information and testimony in aggravation and mitigation, any

substance abuse issues and treatment, the potential for rehabilitation, the possible sentencing alternatives, the statement of defendant all hearsay deemed relevant and reliable."

¶ 37 The court then sentenced defendant to concurrent terms of 22 years' imprisonment for the Class X offense of armed robbery, and 14 years' imprisonment, as a Class X offender, for aggravated criminal sexual abuse, with 3 years of mandatory supervised release. The court also mandated that defendant register as a sex offender for life. Defense counsel filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 38 On appeal, defendant first contends that his conviction for armed robbery with a dangerous weapon should be reduced to simple robbery where the evidence was insufficient to prove beyond a reasonable doubt that he possessed a dangerous weapon.[1]

¶ 39 On a challenge to the sufficiency of the evidence, we inquire " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the State (*Davison*, 233 Ill. 2d at 43) and we do not retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The State must prove each element of the offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

[1] Although defendant's conviction for aggravated criminal sexual abuse was also based on his use of a dangerous weapon, on appeal defendant challenges only the sufficiency of the evidence regarding his use of a deadly weapon with respect to his conviction for armed robbery.

¶ 40 In order to sustain a conviction for armed robbery, the trial court was required to find that defendant, in committing a robbery, was armed with a dangerous weapon other than a firearm. 720 ILCS 5/18-2(a)(1) (West 2012). Defendant does not dispute the sufficiency of the evidence to prove robbery. Rather, defendant contends that the evidence was insufficient to show he had a crowbar, and that the crowbar was in fact a dangerous weapon. We address each contention in turn.

¶ 41 Defendant argues that the evidence failed to establish that he possessed a crowbar where he had no time to dispose of the crowbar prior to being arrested and the police never recovered the crowbar that defendant allegedly left leaning against a fence near the liquor store, even with J.P.'s assistance immediately following his arrest. The State responds that, while the crowbar was never recovered, J.P. testified that defendant possessed a crowbar and described it, and several other witnesses corroborated that J.P. reported defendant had a crowbar.

¶ 42 We conclude that the evidence, viewed in the light most favorable to the State, was sufficient to prove defendant was armed with a crowbar. Although defendant makes much of the fact that the crowbar was never found, a weapon need not be recovered to be considered a dangerous weapon. See *e.g.*, *People v. Washington*, 2012 IL 107993, ¶¶ 35, 37 (finding the victim's testimony regarding the defendant's use of a gun sufficient to prove the defendant was armed with a deadly weapon, although the gun was never recovered). J.P. consistently testified that defendant possessed a crowbar during the attack and described its characteristics and how defendant used it. *People v. Smith*, 185 Ill. 2d 532, 541 (1999) ("The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict.") While defendant denied being in possession of a crowbar, it was the responsibility of the trial court to assess

witness credibility, resolve conflicts in the evidence, and draw reasonable inferences therefrom. See *Siguenza-Brito*, 235 Ill. 2d at 228. The trial court expressly found defendant's testimony to be "conniving" and not credible. Despite defendant's contention that J.P.'s testimony was "improbable," the court found J.P.'s testimony to be credible. See *Siguenza-Brito*, 235 Ill. 2d at 228 (a defendant's claim that a witness was not credible, standing alone, is insufficient to reverse a conviction). In light of the above, we find that a rational trier of fact could have that defendant was armed with a crowbar.

¶ 43 We next turn to whether the evidence was sufficient to show that the crowbar was a dangerous weapon. In his reply brief, defendant appears to argue that the testimony concerning the crowbar was insufficient to prove that it was a dangerous weapon because there was not an adequate description of the crowbar's dangerous characteristics and it was not used to threaten J.P.

¶ 44 As an initial matter, we note that defendant did not make this argument in his opening brief and, therefore, may not raise it for the first time in his reply brief. *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 29; Ill. S.Ct. R. 341(h)(7) (eff. Jan 1, 2016). Nevertheless, because defendant initially raised the sufficiency of the evidence regarding the weapon element, we will address his contention.

¶ 45 In analyzing whether an object constitutes a "dangerous weapon," Illinois courts have defined three categories of dangerous objects: (1) objects that are dangerous *per se*, such as loaded guns; (2) objects that are not necessarily dangerous, but were actually used in a dangerous manner during the offense; and (3) objects that are not necessarily dangerous, but may become dangerous when used in a dangerous manner. *People v. Ross*, 229 Ill. 2d 255, 275 (2008); *People*

v. McBride, 2012 IL App (1st) 100375, ¶ 42. In determining whether a defendant is armed with a dangerous weapon, the trier of fact may make an inference of dangerousness based upon the evidence. *Ross*, 229 Ill. 2d at 276.

¶ 46 Here, we find the evidence sufficient to show that the crowbar was not necessarily dangerous, but may have become dangerous when used in a dangerous manner. J.P. testified that defendant held a crowbar that he hit against the ground when he became angry. J.P. described the crowbar as three feet in length and making a sound of metal as it hit the ground, which "terrified" him. Further, as defendant groped J.P. and took his money, J.P. testified that the crowbar was propped against a nearby fence and was within defendant's reach. J.P.'s description of the crowbar's size and sound, along with his testimony regarding defendant's use of the crowbar, was sufficient for the trial court to infer that it was capable of being used a club or bludgeon. See *Ross*, 229 Ill. 2d at 276 (the trier of fact may make an inference of dangerousness if there is evidence that the object was "used or capable of being used as a club or bludgeon").

¶ 47 Further, we are unpersuaded by defendant's contention that the crowbar was not dangerous because J.P. acknowledged defendant did not directly threaten him with it. While J.P. did acknowledge that defendant never raised the crowbar as a direct threat, his testimony describing the crowbar and its being within defendant's reach during the attack was sufficient to show that it was capable of being used as a bludgeon. *Ross*, 229 Ill. 2d at 275 (finding that a trier of fact may find that an object, because of its size and weight, was dangerous because of its potential to be used as a weapon) (citing *People v. Skelton*, 83 Ill. 2d 58, 64-66 (1980)). Accordingly, we find that the evidence was sufficient to enable a rational trier of fact to find defendant guilty of armed robbery with use of a dangerous weapon beyond a reasonable doubt.

¶ 48 Defendant next asserts that his trial counsel was ineffective in his cross-examination of J.P. because it opened the door for the State to introduce a recording of J.P.'s 911 call, which was an inadmissible prior consistent statement that corroborated J.P.'s testimony that defendant used a crowbar. Defendant asserts that he was prejudiced by counsel's ineffectiveness because there was no other evidence that corroborated J.P.'s claim that defendant used a crowbar, and without the 911 call, the trial court likely would not have found defendant was armed with a dangerous weapon. The State maintains that counsel's cross-examination was a matter of trial strategy, and defendant cannot establish prejudice because the admission of the 911 call did not affect the outcome of the trial.

¶ 49 In order to prove ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficiency substantially prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 162 (2001). To show sufficient prejudice, a defendant must show that, but for the deficiency, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 50 Here, we need not address whether defense counsel's performance was deficient because we find that defendant cannot demonstrate he was prejudiced by the alleged error. *People v. Peeples*, 205 Ill. 2d 480, 532 (2002) (if ineffective-assistance claim can be disposed of because the defendant cannot demonstrate prejudice, a reviewing court need not determine whether counsel's performance was deficient). Contrary to defendant's claim that the 911 call was the

only evidence that corroborated J.P.'s testimony that defendant possessed a crowbar, the record indicates that both Officer Blasz and Detective Hart testified that J.P. reported defendant possessed a crowbar. Officer Blasz testified that he, J.P., and Officer Mallek searched the area surrounding the liquor store in an attempt to locate the crowbar. Detective Hart testified that J.P. reported that defendant had a crowbar that he was using like a cane. The 911 call showing J.P. told the 911 operator about the crowbar was cumulative evidence of what he told the officers. Thus, even without the 911 call's admission, there was testimonial evidence that J.P. reported immediately after the attack that defendant possessed a crowbar.

¶ 51 Furthermore, we find defendant cannot demonstrate prejudice in light of the overwhelming evidence against him. The testimonial evidence established that, as J.P. was walking, defendant approached him, hit a three-foot crowbar on the ground in anger when J.P. could not remember his name, and after showing J.P. his identification, repeatedly thrusted against J.P.'s buttocks while grabbing J.P.'s penis and taking his money. The two liquor store cashiers testified that J.P. was visibly shaken and wanted to call 911 as a result of defendant's actions. Officer Blasz testified that defendant matched the description of the perpetrator; J.P., Lombardi, and Alfaro identified defendant at the scene; and Blasz searched for the crowbar that defendant reportedly possessed. Further, the video surveillance corroborated J.P.'s, Lombardi's, and Alfaro's testimony regarding what occurred in the liquor store. Accordingly, in light of the overwhelming evidence against defendant, we find that he fails to establish prejudice from any alleged deficiency by defense counsel which resulted in the admission of the 911 call.

¶ 52 Next, defendant argues that the trial court erroneously allowed the State to participate in an adversarial manner in a preliminary *Krankel* inquiry into defendant's *pro se* ineffective

assistance of counsel claims. Defendant asserts that remand is warranted in order for the trial court to conduct a preliminary inquiry free from the State's adversarial participation. The State concedes this issue and agrees that remand for a proper preliminary *Krankel* inquiry is necessary.

¶ 53 When a defendant files a *pro se* posttrial motion for a new trial based on ineffective assistance of counsel, *Krankel* requires that the trial court inquire into the factual basis for the defendant's claim. *People v. McCarter*, 385 Ill. App. 3d 919, 940 (2008). If the defendant's claim indicates possible neglect, the trial court must appoint new counsel to argue the claim of ineffective assistance, pursuant to *Krankel*. *Id.* If, however, the defendant's claim lacks merit or strictly concerns matters of trial strategy, "then the court may deny the motion without appointing new counsel." *Id.* The issue of whether the trial court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo. People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 54 "[T]he goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a defendant's *pro se* claims of ineffective assistance of trial counsel and thereby potentially limit issues on appeal." *Id.* at ¶ 29. The trial court's method of inquiry during the initial hearing is flexible (*People v. Fields*, 2013 IL App (2d) 120945, ¶ 40) and it may include a discussion with the defendant as well as some interchange with trial counsel (*People v. Moore*, 207 Ill. 2d 68, 78 (2003)). However, because a defendant proceeds *pro se* during the court's preliminary investigation, the initial *Krankel* inquiry "should operate as a neutral and nonadversarial proceeding." *Jolly*, 2014 IL 117142, ¶ 38. If the State participates in the initial proceeding in a manner that is more than *de minimis*, then the potential exists that the inquiry becomes adversarial and circumvents the creation of an objective record for review. *Id.* at ¶¶ 38-39.

¶ 55 Here, the parties agree and the record reflects that the State participated in the initial *Krankel* inquiry, making it adversarial. During the inquiry, defendant argued, in part, that defense counsel was ineffective for failing to obtain video surveillance from outside the liquor store, which he claims would have supported his version of events. After defense counsel responded, the State argued that defense counsel inquired several times about the surveillance video and, in any event, the testimonial evidence established that outside surveillance would not have showed what defendant asserted. We find this is more than *de minimis* participation, and accordingly, remand for a nonadversarial preliminary *Krankel* inquiry.

¶ 56 Finally, defendant alleges that the trial court abused its discretion by imposing a sentence of 22 years' imprisonment for armed robbery. Defendant acknowledges that the sentence is within the statutory range, but contends that the sentence is excessive because it is more than three times the minimum and the offense was nonviolent. The State counters that the sentence is proper where it was within the statutory range and the trial court considered relevant sentencing factors.

¶ 57 We accord great deference to a trial court's sentence and will not reverse it absent an abuse of discretion. *People v. Butler*, 2013 IL App (1st) 120923, ¶ 30. A sentence which falls within the statutory range is presumed proper, unless it is "manifestly disproportionate to the nature of the offense." *People v. Arze*, 2016 IL App (1st) 131959, ¶ 121 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). In determining an appropriate sentence, the trial court considers such factors as "a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment." *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001). Because the trial court,

having observed the proceedings, is in the best position to weigh the relevant sentencing factors, (*Arze*, 2016 IL App (1st) 131959, ¶ 121) we do not substitute our judgment for that of the trial court simply because we would have balanced the appropriate sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010).

¶ 58 In this case, defendant was sentenced as a Class X offender to a term of 22 years for armed robbery, which falls within the sentencing range of 6 to 30 years provided for this class of offense. 730 ILCS 5/5-4.5-25(a) (West 2014). We therefore presume the sentence was proper, absent some indication that the court abused its discretion. *People v. Burton*, 2015 IL (1st) 131600, ¶ 36.

¶ 59 The record shows that in reaching its sentencing determination, the court specifically relied on the PSI, the factors in aggravation and mitigation, the facts of the case, and defendant's background, which were all proper sentencing considerations. See *Hernandez*, 319 Ill. App. 3d at 529. Given the trial court's explicit consideration of the relevant sentencing factors, we decline to reweigh those factors and independently conclude the sentence is excessive. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987) (noting that, where the trial court properly considered relevant sentencing factors, it is not the function of a reviewing court to rebalance those factors on appeal). Although the 22-year sentence is near the higher end of the range of sentences that could have been imposed under Class X sentencing (730 ILCS 5/5-4.5-25(a) (West 2014)), the sentence was not disproportionate to the instant offense, which was defendant's third sex offense and seventh felony conviction overall. See *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 47 (affirming sentence where the defendant had eight prior drug convictions and had been sentenced to prison five times). Criminal history alone may warrant a sentence substantially above the

minimum (*People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009)), and nonviolence does not mandate a sentence reduction. *People v. Hill*, 408 Ill. App. 3d 23, 29-30 (2011). Further, defendant was not deterred by his previous, more lenient sentences, seven terms of imprisonment ranging from one to six years. Accordingly, we find no abuse of discretion and therefore have no basis to disturb defendant's 22-year sentence.

¶ 60 Based on the foregoing, we affirm the judgment of the circuit court of Cook County, but we remand for a nonadversarial preliminary *Krankel* inquiry.

¶ 61 Affirmed; remanded with directions.