2018 IL App (4th) 160677-U

NO. 4-16-0677

FILED
December 19, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
BRIAN L. MAYS,	)	No. 15CF1633
Defendant-Appellant.	)	
	)	Honorable
	)	Robert Charles Bollinger,
	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Turner and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State's evidence was sufficient to establish defendant guilty of the charged offenses beyond a reasonable doubt.

(2) The trial court did not abuse its discretion by denying defendant's motion to continue his jury trial.

(3) Defendant failed to establish that his trial counsel was ineffective for failing to subpoena two of defendant's codefendants as witnesses at defendant's trial.

(4) Defendant was not entitled to presentence custody monetary credit toward imposed fines because no fines were imposed by the trial court as part of defendant's sentence.

¶ 2 Defendant, Brian L. Mays, was convicted of attempt (home invasion) (720 ILCS 5/8-4(a), 19-6(a)(3) (West 2014)) and sentenced to 13 years in prison. On appeal, he (1) challenges the sufficiency of the evidence against him, (2) argues the trial court abused its discretion

by denying his pretrial motion to continue his jury trial, (3) argues his trial counsel was ineffective for failing to subpoena two codefendants as witnesses on his behalf, and (4) asserts he was entitled to $1095 in monetary credit toward his applicable fines. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 24, 2015, the State charged defendant with three counts of attempt—attempt (home invasion) (*Id.*) (count I), attempt (armed robbery) (*Id.* § 8-4(a), 18-2(a)(2)) (count II), and attempt (residential burglary) (*Id.* § 8-4(a), 19-3(a)) (count III)—and one count of unlawful possession of a weapon by a felon (*Id.* § 24-1.1(a)) (count IV). It alleged that, on or about December 16, 2015, defendant intended to commit the offenses of home invasion, armed robbery, and residential burglary and that he performed a substantial step toward the commission of those offenses. The State's theory of the case was that defendant and three codefendants—Mark Doolen, Joseph Blye, and Malachi Gordon—were involved in a plan to steal money from Donald O'Laughlin, whose residence was located at 1555 Wildwood Drive in Mt. Zion, Illinois. According to the State, the men drove to O'Laughlin's neighborhood and defendant, Blye, and Gordon armed themselves with firearms and approached O'Laughlin's residence with the intent to enter O'Laughlin's dwelling and take his property.

¶ 5 On May 10, 2016, defendant filed a motion to continue his jury trial, which was scheduled to begin the following day. He alleged that he had identified Blye and Gordon as potential witnesses in his case but that his counsel, Tiffany Senger, had been unable to interview them because Blye and Gordon also faced pending charges and were represented by counsel. However, according to defendant, both Blye and Gordon had recently pleaded guilty in their respective cases and were awaiting sentencing. Defendant maintained that when his codefendants'

cases were "fully resolved, [Senger] may have an opportunity to interview them."

¶ 6 The following day, the trial court heard argument on defendant's motion. On defendant's behalf, Senger reiterated that Blye and Gordon had both recently pleaded guilty and were awaiting sentencing. Further, she asserted that she had spoken with the attorneys for both potential witnesses and each attorney indicated that he would advise his client not to speak with Senger until his client's case was over. Senger acknowledged that Blye and Gordon previously made statements "denying the charges"; however, she asserted that since both had recently pleaded guilty, "they could potentially be positive witnesses for [defendant]." The State objected to the motion, noting that it was based on only "the chance" that Blye and Gordon would agree to speak with defendant's counsel and that they would say something different than what they had previously stated.

¶ 7 Upon inquiry by the trial court, Senger stated that she had reviewed the statements that Blye and Gordon had previously given to the police. She indicated that both individuals had "den[ied] the allegations" and she found the previous statements were "neither helpful nor hurtful" to defendant. Senger asserted she did not subpoena either Blye or Gordon because, based on conversations with their attorneys, she believed both would assert their fifth amendment privilege against self-incrimination on the witness stand. Further, she agreed that she did not know whether Blye or Gordon would provide testimony favorable to defendant or if they would even agree to an interview after being sentenced. According to the State, the plea agreements with Blye and Gordon involved "an agreed upon number of years" in prison; however, both codefendants intended to ask for boot camp at sentencing. The State asserted it intended to object to those requests and that "following sentencing, the litigation may not be at an end" as the code-

fendants could appeal their sentences.

¶ 8 Ultimately, the trial court stated it did not find that grounds existed to continue the matter. In so holding, it found no prejudice to the defendant on the basis that it was unknown whether either witness "would aid the defendant in any way at trial."

¶ 9 The matter then proceeded with defendant's trial on the three attempt charges. Count IV, charging defendant with unlawful possession of a weapon by a felon, was initially severed from the other charges and, later, dismissed with prejudice on the State's motion.

¶ 10 At trial, the State presented the testimony of several law enforcement officers, O'Laughlin, codefendant Doolen, and two Illinois State Police (ISP) forensic scientists. Its evidence showed that at approximately 4:30 a.m. on December 16, 2015, the police responded to a call of a suspicious vehicle or person near O'Laughlin's residence located at 1555 Wildwood Drive. Police officers arriving on the scene observed a red or maroon car parked on the road. Officer Craig Reed testified he was the first officer on the scene and saw that the vehicle had no lights on and was not running. Reed observed Doolen inside the vehicle, made contact with him, and searched him. During the search, Reed located a shirt sleeve with cut out eyeholes, a pair of rubber gloves, and a piece of paper with street names and the number 1555 written on it. Reed testified that he and another officer, Matthew Travis, detained Doolen and placed him in the back of Reed's squad car. Travis testified 1555 Wildwood Drive was in close proximity to where Doolen and the red or maroon vehicle were positioned, stating that address was "directly to the east [and] on the corner."

¶ 11 On cross-examination, Reed testified that Doolen initially told him that he was in the area with his three buddies to meet up with some girls. When Reed asked Doolen where his

friends went, Doolen pointed in a direction that was away from O'Laughlin's house. Reed testified that Travis spoke with Doolen after Doolen was searched and detained in Reed's squad car. When speaking with Travis, Doolen provided information regarding a possible robbery.

¶ 12 After obtaining information from Doolen, Travis and Reed "set up" their vehicles nearby to wait for backup when they noticed two black males, one wearing a red shirt and one wearing a black shirt, walking between houses in the neighborhood and "beginning to walk up the street on Briarwood Drive." According to Reed, Doolen reported that the two men had been with him. Based on that information, the officers approached and detained the men. Travis identified defendant as the male he observed in the red shirt and codefendant Gordon as the male in the black shirt. He also learned that defendant was Gordon's uncle. Travis testified he searched defendant but did not locate any gloves or guns.

¶ 13 Travis testified he next went to the residence located at 1555 Wildwood Drive to check on the welfare of its occupants, whom he identified as O'Laughlin, O'Laughlin's wife and nine-year-old daughter, and two women whose names Travis could not remember. Everyone at the residence was "okay" and Travis observed no signs of forced entry or damage to the home. Travis testified he also assisted in a "show-up" identification, during which O'Laughlin identified Doolen.

¶ 14 During the police investigation of the incident, two canine (K-9) units were used to locate a fourth suspect and other evidence. One of the K-9 units located codefendant Blye hiding "in a shrub line" behind a residence located at 1515 Wildwood Drive, which was directly next door to O'Laughlin's residence. A K-9 unit also discovered clear latex gloves that were "wadded up" and wrapped around a small firearm in the shrubs. Officer Jeremy McLean testified

he took photographs of the firearm and collected it for evidence. He described it as "a North American Arms .22 long rifle mini-revolver" and testified the cylinder had been loaded with five live .22 long rifle rounds.

¶ 15 A K-9 unit also located two firearms underneath a piece of siding in the backyard of a residence located at 1430 Briarwood Drive. McLean "packaged," or "tagged," those firearms at the police department. He described them as "a nine millimeter TEC-9" and "a Rough Rider .22 long rifle revolver." McLean testified that the revolver had one live round in the cylinder. Evidence showed the TEC-9 was found next to a magazine that was loaded with 15 rounds. The firearms were approximately 35 yards, or two to three houses, away from the suspects' vehicle, where the police found Doolen. In the same backyard, law enforcement officers found a bandana and an empty Crown Royal bag on top of a shed and a pair of rubber gloves on the ground. Travis testified that 1430 Briarwood Drive was located approximately 40 yards away from where defendant and Gordon were stopped by the police.

¶ 16 The State presented evidence that each of the three firearms found by the police were subjected to forensic testing. Swabs taken from each firearm were found to contain deoxyribonucleic acid (DNA) from at least one person; however, each DNA profile was found to be potentially incomplete and not suitable for comparison with known standards. ISP forensic scientist Jennifer Aper testified that a person could touch an item and leave no detectable level of DNA. Therefore, it was not unusual to not have enough DNA for a complete profile when dealing with "touch DNA."

¶ 17 The State's evidence further showed that swabs of the rubber gloves that were wrapped around the North American revolver contained a mixture of DNA from two people, one

of whom contributed more DNA than the other and was described as the "major DNA profile." According to Aper, that major DNA profile matched Blye's DNA profile. Additionally, swabs of the inside of one of the rubber gloves found near the TEC-9 and the revolver contained DNA from at least two individuals, one of which was identified as a major contributor. Codefendant Gordon could not be excluded as a major contributor, meaning he was "included as being a possible contributor of the major male DNA profile." Swabs from the inside and outside of the second glove found near the two firearms contained a major DNA profile that matched Gordon's DNA profile. Finally, Gordon could not be excluded as a contributor to DNA found in swabs of the bandana found at the scene.

¶ 18 Officer Reed testified that a search warrant was obtained for the suspects' vehicle. During a search of the vehicle the police discovered a black case under the front passenger seat, a bag of cannabis, a blue nylon bag with 9-millimeter ammunition and Gordon's wallet inside, .22 caliber ammunition, a digital scale, cell phones, and a Crown Royal bag.

¶ 19 The State's evidence further showed that the suspects' cell phones were searched. Reed testified that a digital photograph on Gordon's phone depicted a firearm that looked similar to the .22 revolver that was found by the police. Information obtained from the cell phones also showed multiple telephone calls between Doolen and Blye from December 15, 2015, and into the early morning hours of December 16, 2015.

¶ 20 O'Laughlin testified that the police came to his door around 4:30 a.m. on December 16, 2015, and informed him that "somebody was trying to break into [his] home." Approximately 30 minutes later, the police showed him three suspects. O'Laughlin testified that he recognized one of the suspects as Doolen, an individual he met the weekend before at a bachelor

party for O'Laughlin's brother. According to O'Laughlin, they went "bar hopping" during the bachelor party and, at some point, the group stopped at O'Laughlin's house so that he could obtain money from his safe. O'Laughlin testified Doolen was standing in the door when he opened his safe and observed its contents, which consisted of about $13,000 in cash. He agreed that there had been drugs at the bachelor party, stating "Doolen had a little bit of cocaine" and "a couple people were smoking pot." O'Laughlin further acknowledged that the police searched his residence and he had a small amount of cannabis in his home.

¶ 21 Police officer Brett Etnier testified he assisted in the investigation of the December 16, 2015, incident and helped "book" defendant on his charges. While booking defendant, Etnier searched him and found a pair of clear plastic gloves in a pocket of defendant's pants. Etnier described how the gloves appeared when they were found, stating as follows: "The gloves appear[ed] to be turned inside out so when you take them off, one is put in the other and then turned inside out." On cross-examination, Etnier testified that prior to booking defendant into jail, he assisted in transporting the suspects to the jail. He recalled that he rode with Sergeant Jim Stevens and they transported two subjects, one of whom was defendant. On redirect, he testified that the suspects were handcuffed while being transported and that, although he remembered walking defendant to the booking area, he did not remember which of the subjects actually rode in his vehicle.

¶ 22 Doolen testified he was 29 years old and had prior convictions for theft and aggravated burglary in 2012, aggravated assault in 2010, and attempted burglary in 2008. He also had charges pending against him in connection with the December 16, 2015, incident. Doolen testified that, with respect to his pending charges, he agreed with the State that he would plead

guilty, testify truthfully against his codefendants, and serve a four-year sentence of imprisonment.

¶ 23 Doolen testified that on Saturday, December 12, 2015, he went to a bachelor party with a friend and met O'Laughlin. At some point, the individuals attending the party stopped at O'Laughlin's house so that O'Laughlin could retrieve some money. According to Doolen, O'Laughlin reported that he had $30,000 at his house and intended to pay for "everybody's way to get in" to a strip club. Doolen testified that, at O'Laughlin's house, he observed O'Laughlin remove a box from a closet that had cash inside of it. Doolen asserted that people were using drugs while at O'Laughlin's house, including cocaine, alcohol, "weed," and lysergic acid diethylamide (LSD).

¶ 24 On Tuesday, December 15, 2015, Doolen called Blye, his cousin who lived in Tennessee, and told him about the bachelor party, the drugs, and the money. They spoke on the phone five or six times on December 15. Doolen denied that Blye seemed "excited" about the information he provided. However, at some point, Blye informed Doolen that Blye was "on [his] way up there" and that he was bringing Gordon. Doolen stated he believed Blye was "coming *** just to kick it for a few days" since they had not seen each other in five or six years, but he acknowledged that he thought it was odd that Blye and Gordon were coming to visit in the middle of the week.

¶ 25 Doolen testified that Blye arrived at his residence in Niantic, Illinois, around 2:30 or 3 a.m. on December 16, 2015. Blye was driving a maroon vehicle and was accompanied by Gordon and defendant. Doolen stated he got in the vehicle and gave Blye directions to a motel. However, Blye began "pressuring" him about "the guy that had all the money and drugs," want-

ing to know where the man lived. Doolen testified Blye asked him "over and over and then the other two joined in." Doolen directed Blye to O'Laughlin's subdivision but tried "to avoid exactly where [O'Laughlin] lived." He stated that once the other men began pressuring him about where O'Laughlin lived, he "figured" that they intended to "rob[] somebody." Doolen testified that he got the impression that Blye, Gordon, and defendant intended to rob someone from "their demeanor and their body language" and from having known Blye and "dealing with" Blye in Tennessee. He testified all three men were aggressive in their demeanor. They drove around O'Laughlin's neighborhood for 1 1/2 to 2 hours. Ultimately, Doolen pointed out O'Laughlin's residence. He testified Gordon was driving at that time and he drove around the corner from O'Laughlin's residence and parked the car.

¶ 26 According to Doolen, the three men put on gloves and then armed themselves with firearms. He stated Gordon had a TEC-9 that was retrieved from a black box underneath the front passenger seat of the vehicle. According to Doolen, Gordon touched the TEC-9 before putting on his gloves but then wiped the gun down with his shirt sleeve. He testified Blye had what looked like a semi-automatic pistol. Doolen testified defendant had a long revolver that had been wrapped up in a red shirt. After getting their guns out, the three men exited the car and told Doolen that he "better not go nowhere." Doolen observed the men go down the street in the direction of O'Laughlin's house.

¶ 27 Doolen testified he waited in the car and smoked a cigarette. Approximately three to five minutes after Blye, Gordon, and defendant exited the vehicle, a police officer arrived on the scene and made contact with Doolen. Doolen acknowledged that, initially, he lied to the officer about what he was doing, stating the car belonged to his friends, who "went to go meet

some females." Ultimately, however, he reported to the police that there was a plan to rob a drug dealer's house and he pointed out O'Laughlin's residence.

¶ 28 Doolen acknowledged that the police found items on his person, including gloves, a shirt sleeve with eyeholes cut out, and a piece of paper with the number 1555 written on it. He asserted that he had the paper with the number written down because he was attempting to make it appear to the other men like he was trying to remember O'Laughlin's address. Doolen testified the gloves came from inside the car, and the shirt sleeve was a "hood" that he made for working in cold weather.

¶ 29 On cross-examination, Doolen testified that he was interviewed at the police station on December 16, 2015. He acknowledged telling the police officers who interviewed him that defendant had been "pretty quiet" while he was being pressured for O'Laughlin's address and that the only thing Doolen heard defendant say was to ask for a cigarette.

¶ 30 Doolen recalled that in March 2016, he was interviewed by the police a second time. He acknowledged that during that interview, he reported that O'Laughlin was a drug dealer and that O'Laughlin offered Doolen "a job dealing for him." Further, Doolen agreed that he first reported that defendant's gun was wrapped in a red shirt during his March 2016 interview with the police. He also acknowledged that during his initial interview in December 2015, he reported that he never saw his codefendants with gloves during the incident at issue. However, in March 2016, he reported that his codefendants were each wearing gloves.

¶ 31 On redirect, Doolen testified that his first contact with the police was on December 16, 2015, at approximately 4:30 a.m. His interview at the police department occurred "right away" at approximately 8 or 9 a.m. Doolen testified he was tired and nervous when he met with

the police. He testified that defendant was quiet during the car ride on December 16, except when he asked Doolen for a cigarette and "when they started pressuring [Doolen]." Doolen asserted that while defendant was initially quiet, later in the car ride, he also pressured Doolen about providing O'Laughlin's address. He further testified that during his March 2016 interview, he was told that "the most important thing" was to "[b]e as truthful as possible." He explained that the difference in his previous statements regarding the presence of gloves was due to taking "some time to realize what was going on" and having "time to calm down." Doolen testified that during the March 2016 interview he was well-rested and less nervous.

¶ 32 On his own behalf, defendant presented the testimony of two law enforcement officers. James Stevens testified he was a sergeant with the Mt. Zion Police Department. He testified that, following the police interviews with the suspects in the case, he assisted in transporting the suspects to the Macon County jail. Stevens testified that, according to his report, he transported Doolen and Blye. Stevens stated defendant was in a car with another officer.

¶ 33 Michael Foster testified he was a lieutenant with the Mt. Zion Police Department. He interviewed Doolen on December 16, 2015. During that interview, Doolen reported that Gordon, Blye, and defendant all had guns. Specifically, Gordon had a TEC-9, Blye had a semi-automatic, and defendant had a revolver. According to Foster, Doolen "didn't specifically say" from what location defendant retrieved his gun. Also, he stated that he did not know where Blye got his gun. Foster recalled that Doolen "didn't know if the other guys had *** gloves" and that he stated he did not see them with gloves.

¶ 34 On March 21, 2016, Foster interviewed Doolen a second time. Also present during the interview was the prosecutor in defendant's case and Doolen's attorney. During the inter-

view, Doolen reported that defendant had his gun rolled up in a red shirt at his side, wore gloves, unrolled the revolver from the red shirt, and put the red shirt on. Doolen further stated that Blye retrieved his gun from a box. On cross-examination, Foster stated he did not think that he specifically asked Doolen where defendant's gun came from at the time of their December 16, 2015, interview. On redirect, Foster testified Doolen had also previously indicated that it was Gordon and Blye who pressured him for O'Laughlin's address while defendant was quiet and smoked a cigarette.

¶ 35 Ultimately, the jury found defendant guilty of all three attempt charges. On June 9, 2015, defendant filed a motion for a new trial or, in the alternative, judgment notwithstanding the verdicts. He argued the trial court erred in denying his motion to continue his trial for additional time to investigate Blye and Gordon as potential witnesses and the State presented insufficient evidence of his guilt. On July 22, 2016, the trial court denied defendant's posttrial motion and conducted defendant's sentencing hearing. Finding counts II and III merged with count I (charging defendant with attempt (home invasion)), the trial court entered a conviction as to only that count and sentenced defendant to 13 years in prison. On July 26, 2016, defendant filed a motion to reconsider his sentence, which the trial court denied.

¶ 36 This appeal followed.

¶ 37 II. ANALYSIS

¶ 38 A. Sufficiency of the Evidence

¶ 39 On appeal, defendant first challenges the sufficiency of the State's evidence against him. He contends that the State failed to prove he intended to commit any of the charged offenses or that he performed a substantial step toward the commission of any of the offenses of

home invasion, armed robbery, or residential burglary.

¶ 40 "The State has the burden of proving beyond a reasonable doubt each element of an offense." *People v. Gray*, 2017 IL 120958, ¶ 35, 91 N.E.3d 876. When presented with a challenge to the sufficiency of the evidence, a reviewing court's inquiry "is 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." (Internal quotation marks omitted.) *People v. Hardman*, 2017 IL 121453, ¶ 37, 104 N.E.3d 372. "All reasonable inferences from the evidence must be drawn in favor of the prosecution." *Id.* Further, a reviewing court should "not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses." *Gray*, 2017 IL 120958, ¶ 35. On review, "[a] criminal conviction will not be reversed for insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *Id.*

¶ 41 Here, defendant was found guilty of all three attempt charges, and a conviction was entered as to count I, charging him with attempt (home invasion) (720 ILCS 5/8-4(a), 19-6(a)(3) (West 2014)). "A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense." *Id.* § 8-4(a). A person commits the offense of home invasion "when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present" and, "[w]hile armed with a firearm[,] uses force or threatens the imminent use of force upon any person or persons within the dwelling place whether or not injury occurs ***[.]" *Id.* § 19-6(a)(3). Additionally, a person commits

armed robbery when he or she knowingly takes property from a person or in the presence of another by the use of force or threatening the imminent use of force while "he or she carries on or about his or her person or is otherwise armed with a firearm." *Id.* § 18-2(a)(2). Finally, "[a] person commits residential burglary when he or she knowingly and without authority enters or knowingly and without authority remains within the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft." *Id.* § 19-3(a).

¶ 42 Thus, to prove defendant guilty of attempted home invasion, armed robbery, or residential burglary, the State had to establish that defendant intended to commit a home invasion, armed robbery, or residential burglary, and that he made a substantial step toward the commission of those offenses. "The intent to commit a criminal offense need not be expressed, but may be inferred from the conduct of the defendant and the surrounding circumstances." *People v. Terrell*, 99 Ill. 2d 427, 431-32, 459 N.E.2d 1337, 1340 (1984). Further, "[p]recisely what is a substantial step must be determined by evaluating the facts and circumstances of each particular case." *People v. Smith*, 148 Ill. 2d 454, 459, 593 N.E.2d 533, 535 (1992). Although it is unnecessary for a defendant to "complete the last proximate act" to be convicted of attempt, "mere preparation" is not enough. *Id.* "A substantial step should put the accused in a dangerous proximity to success." (Internal quotation marks omitted.) *People v. Hawkins*, 311 Ill. App. 3d 418, 423, 723 N.E.2d 1222, 1226 (2000).

¶ 43 Here, we find the State's evidence was sufficient to prove defendant guilty of each of the charged offenses beyond a reasonable doubt. Specifically, the State's evidence showed that Doolen and O'Laughlin met shortly before the December 16, 2015, incident and that Doolen had the opportunity to observe O'Laughlin with a large amount of cash in his home.

Doolen testified for the State that he relayed what he observed to Blye on December 15, 2016. The same day, Blye traveled to Illinois from Tennessee with Gordon and defendant. Upon their arrival in the early morning hours of December 16, 2015, the three men went to Doolen's residence and then immediately to O'Laughlin's neighborhood. According to Doolen, the men "pressured" him about where O'Laughlin lived and, ultimately, he pointed out O'Laughlin's residence. Doolen testified that Gordon parked the vehicle around the corner from O'Laughlin's residence. Blye, Gordon, and defendant each put on gloves, armed themselves with three firearms, exited the vehicle, and walked in the direction of O'Laughlin's home.

¶ 44 The State's evidence also showed that police responded to O'Laughlin's neighborhood at approximately 4:30 a.m. on December 16, 2015, after receiving a report of a suspicious vehicle. Upon their arrival, the police observed Doolen inside a vehicle that was parked a short distance away from O'Laughlin's residence. The police found defendant and Gordon walking between houses in the neighborhood, and Blye was discovered hiding in some shrubbery next door to O'Laughlin's home. Significantly, three firearms and two sets of rubber gloves were found in the vicinity of where Gordon, defendant, and Blye were located by the police. Following forensic testing, DNA was found on the rubber gloves that matched the DNA profiles of Gordon and Blye. Further, the police found rubber gloves on both Doolen and defendant.

¶ 45 From the evidence presented, the jury could reasonably infer that defendant and his codefendants had the specific intent to commit the charged offenses, in that they traveled to Illinois after learning that O'Laughlin kept a large amount of cash in his home, sought out and drove to O'Laughlin's residence, donned gloves, armed themselves with firearms, and walked in the direction of O'Laughlin's home. From the same evidence, the jury could also find that de-

fendant and his codefendants committed a substantial step toward the commission of the charged offenses.

¶ 46 On appeal, defendant challenges Doolen's testimony on the basis that he lacked credibility. He maintains that Doolen was impeached by Foster, who testified regarding the inconsistencies in Doolen's descriptions of events during his two police interviews. In particular, defendant asserts that according to Foster, Doolen indicated during his first police interview that defendant was a "passive bystander" during the incident at issue and Doolen "could not say with accuracy whether [defendant] had a gun."

¶ 47 Initially, we note that "[t]he trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses." *People v. Wheeler*, 226 Ill. 2d 92, 114-15, 871 N.E.2d 728, 740 (2007). "Accordingly, a jury's findings concerning credibility are entitled to great weight." *Id.* at 115. "[E]ven contradictory testimony does not necessarily destroy the credibility of a witness, and it is the task of the trier of fact to determine when, if at all, [the witness] testified truthfully." *Gray*, 2017 IL 120958, ¶ 47. "Minor discrepancies in testimony affect only its weight and will not render it unworthy of belief." *Id.*

¶ 48 Here, although evidence was presented regarding inconsistencies in Doolen's reported version of events, such inconsistencies were not so significant as to render his trial testimony entirely unworthy of belief. First, the evidence indicates that certain variations in Doolen's statements were attributable to him providing a more detailed account of the underlying events during his second interview with the police and while testifying at trial than he did on December 16, 2015, immediately after the incident at issue. Specifically, although Foster testified Doolen

initially "didn't disclose" from what location defendant retrieved the gun he possessed, Doolen later reported that the gun had been rolled up in a red shirt. Thus, Doolen provided an additional detail rather than one that contradicted his previous account.

¶ 49 Second, we find defendant has mischaracterized a portion of Foster's testimony. Contrary to defendant's assertions, Foster never testified that "Doolen could not say with accuracy whether [defendant] had a gun." Rather, on examination by defense counsel, Foster clearly testified as follows: "[Doolen] told me [defendant] had gun, but he didn't specifically say where [defendant] got it from on the 16th." On examination by the State, Foster further testified that during both of his interviews with Doolen, Doolen reported that defendant "had a revolver." Accordingly, Foster's testimony showed Doolen consistently reported that defendant was in possession of a gun at the time of the alleged offense.

¶ 50 Third, the more detailed statement of events that Doolen provided during his second interview with the police and during the trial was corroborated by other evidence in the case. Initially, Doolen reported to the police that he did not see any of his codefendants with gloves; however, he later reported that each man had a pair of gloves and wore gloves while handling the firearms. Although these statements were inconsistent, the use of gloves by the suspects was corroborated by evidence that the police found rubber gloves on both Doolen and defendant. They also found rubber gloves at the scene that were forensically linked to both Blye and Gordon.

¶ 51 Here, the jury could have reasonably accepted Doolen's testimony in finding defendant guilty of the charged offenses. Despite minor inconsistencies in Doolen's statements to the police, Doolen's testimony was not "so unreasonable, improbable, or unsatisfactory that it

justifies a reasonable doubt of the defendant's guilt." *Gray*, 2017 IL 120958, ¶ 35.

¶ 52 On appeal, defendant further relies heavily on the supreme court's decision in *Smith*, 148 Ill. 2d 454, to support his contention that the State failed to prove that he took a substantial step toward the commission of any of the underlying offenses—home invasion, armed robbery, or residential burglary. In that case, the defendant traveled by train from Chicago to Waukegan and then entered a taxi cab. *Id*. at 456. The defendant directed the cab driver to a particular street and reported that he was looking for a jewelry store. *Id.* The cab driver pointed out a jewelry store but the defendant responded that it was " 'not the one' " and asked to be driven back to the train station. *Id.* at 456-57. Upon arriving at the train station, the defendant drew a gun, demanded money, told the cab driver to get out of the car, and drove off in the cab. *Id.* at 457. Shortly thereafter, the police found the stolen cab and spotted the defendant, who started running and dropped a gun, some money, and a blue pillowcase. *Id.* Following his arrest, the defendant "admitted that he intended to rob an unidentified jewelry store" that was located on the street where he directed the cab driver and then to use the stolen cab as a getaway vehicle. *Id.*

¶ 53 On review, the supreme court determined the defendant had not committed a substantial step toward armed robbery of a jewelry store "by arming himself, traveling to Waukegan, searching for the jewelry store, and driving a stolen cab that he intended to use as a getaway car ***." (Internal quotation marks omitted.) *Id.* at 462. In so holding, it noted that no evidence had been presented as to the location of the jewelry store, how close the defendant came to the jewelry store, or the jewelry store's name. *Id.* at 462-63. As a result, the State was essentially "charging [the] defendant with attempted armed robbery of an unnamed, undetermined jewelry store." *Id.* at 463. It determined that, under such circumstances, it would be improper to conclude that

the defendant came "within a dangerous proximity to success." (Internal quotation marks omitted.) *Id.*

¶ 54 In reaching its decision, the supreme court distinguished cases where the defendants had been found in close proximity to named and identified targets and were determined to have committed substantial steps toward the commission of their intended offenses. *Id.* at 462. In particular, the court discussed its previous decision in *Terrell*, 99 Ill. 2d 427, describing it as follows:

> "In *Terrell*, the police observed the defendant hiding in weeds approximately 20 to 30 feet behind a service station, carrying a revolver and a black nylon stocking with a knot at the end. The service station was near two other buildings, a construction company and a tool company. After the defendant and an accomplice were apprehended, the defendant claimed that he was going to the service station to buy cigarettes, but he had no money on his person." *Smith*, 148 Ill. 2d at 459.

The court noted that, unlike the defendant in the case before it, the defendant "in *Terrell* was only 25 to 30 feet from his intended target—the service station" and that he clearly "possesse[d] the materials necessary to carry out the crime, at or near the place contemplated for its commission." (Internal quotation marks omitted). *Id.* at 462.

¶ 55 We find the circumstances of the present case are more similar to *Terrell* than *Smith*. Here, the State presented evidence of a named, intended target of the charged offenses—O'Laughlin's residence. Additionally, defendant and his codefendants were found by the police in O'Laughlin's neighborhood and near his home. The State's evidence also supported a finding that they had the materials necessary to carry out the charged offenses, in that they armed them-

selves with firearms and wore gloves as they walked toward O'Laughlin's home. Under these circumstances, it was not improper for the jury to find that defendant and his codefendants were engaged in more than just mere preparation and, instead, came "within a dangerous proximity to success." (Internal quotation marks omitted.) *Id*. at 463.

¶ 56 B. Motion to Continue

¶ 57 Defendant next argues the trial court abused its discretion by denying his motion to continue his jury trial so that his counsel could investigate Blye and Gordon as potential defense witnesses. Although he agrees that the value of testimony from either individual was "totally speculative," he maintains that Blye and Gordon "could have testified that [defendant] was unaware that they were planning an armed robbery or home invasion."

¶ 58 Whether to grant or deny a motion to continue "is within the sound discretion of the trial court, and its ruling will not be reversed on appeal in the absence of a clear abuse of that discretion." *People v. Ward*, 154 Ill. 2d 272, 307, 609 N.E.2d 252, 266 (1992). In reviewing the denial of a request for a continuance sought to secure the presence of a witness, the factors to be considered are: (1) whether defendant was diligent; (2) whether defendant has shown that the testimony was material and might have affected the jury's verdict; and (3) whether defendant was prejudiced. *Id.* "The denial of a motion for continuance is not an abuse of discretion where there is no reasonable expectation that the witness will be available in the foreseeable future." *People v. Bramlett*, 276 Ill. App. 3d 201, 205, 658 N.E.2d 510, 513 (1995). Additionally, where the importance of a witness is speculative, the defendant cannot demonstrate prejudice from the denial of a continuance. *People v. Arbuckle*, 75 Ill. App. 3d 826, 832, 393 N.E.2d 1296, 1301 (1979) (stating that since both the prosecution and defense "appeared unsure as to whether they

would call [a witness] to testify, [the witness's] importance to the case [was] a matter of speculation at best and it [could] not be said that the denial of the continuance hampered the defendant's case or prejudiced the defendant's rights").

¶ 59 Here, we find defendant has failed to demonstrate that the trial court abused its discretion in denying his motion to continue. The record shows Senger sought a continuance on defendant's behalf to further investigate Blye and Gordon as possible witnesses for the defense. According to Senger, both individuals had previously given statements to the police that were neither helpful nor harmful to defendant's case. Both Blye and Gordon were also represented by counsel, and their attorneys advised them not to speak with Senger. Nevertheless, Senger argued that both Blye and Gordon had recently pleaded guilty. On that basis, she believed "they could potentially be positive witnesses for [defendant]."

¶ 60 First, as defendant acknowledges on appeal, the substance of any possible testimony from Blye or Gordon is a matter of speculation. There is no indication from the record that either witness would testify favorably for defendant or in any way that might affect the jury's verdicts. The record shows the only statement given by either witness was neither helpful nor harmful to defendant's case and thus not material. As a result, defendant cannot establish prejudice from the trial court's denial of his motion.

¶ 61 Additionally, there is no indication that either Blye or Gordon would be available to defendant in the foreseeable future. Both individuals had pending criminal cases that arose out of the same underlying factual situation as defendant's case. Although Blye and Gordon had pleaded guilty shortly before defendant's trial was set to begin, both were awaiting sentencing. As noted at the hearing on the motion to continue, both Blye and Gordon could have opted to

appeal, prolonging their cases. As both had been advised by counsel not to speak with Senger until their respective cases were over, further litigation could have also prolonged Senger's ability to investigate their value as witnesses.

¶ 62 C. Ineffective Assistance of Counsel

¶ 63 On appeal, defendant next argues that Senger was ineffective for failing to subpoena either Blye or Gordon for trial. He contends the record reflects Senger failed to subpoena either witness because she believed each would invoke his fifth amendment rights. Defendant asserts, however, that Senger incorrectly assumed that Blye and Gordon could "successfully" assert such rights. He maintains that it is the trial court that must determine whether a real danger of self-incrimination existed. Thus, Senger's actions were based on a mistake of law and not a sound trial strategy. Defendant further contends that he was prejudiced by counsel's errors because there was "a reasonable probability that [Blye's and Gordon's] testimony would have refuted *** Doolen's testimony alleging [defendant] was part of a plan to rob [O'Laughlin]."

¶ 64 To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) his counsel's performance " 'fell below an objective standard of reasonableness' " and (2) that he was prejudiced as a result of his counsel's deficient performance. *People v. Valdez*, 2016 IL 119860, ¶ 14, 67 N.E.3d 233 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "A showing of prejudice requires proof of a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Id.* Additionally, a defendant's failure to satisfy either element—deficient performance or prejudice—precludes a finding of ineffective assistance of counsel. *People v. Peterson*, 2017 IL 120331, ¶ 79, 106 N.E.3d 944.

¶ 65 Here, defendant has first failed to establish that his counsel's performance was

deficient. The record reflects that, although defendant identified Blye and Gordon as potential witnesses in his case, both faced and pleaded guilty to charges arising out of the same underlying factual circumstances as defendant. Significantly, Senger had been unable to speak with Blye and Gordon, both of whom were represented by counsel and advised not to speak with her. The record contains no indication that any potential testimony they might have provided would have aided defendant's case in any way.

¶ 66 Further, "[t]he right to call a witness is not absolute, and it is not error for the trial court to prohibit calling a prospective witness who has indicated that he will invoke his fifth amendment rights." *People v. Vera*, 277 Ill. App. 3d 130, 137, 660 N.E.2d 9, 15 (1995). "Illinois courts have held that it is improper for a party to call a witness he has reason to believe will invoke the privilege before the jury ***[.]" *Id.*; see also *People v. Human*, 331 Ill. App. 3d 809, 819, 773 N.E.2d 4, 13 (2002) ("This court has repeatedly held that it is improper for a party to call a witness whom it has reason to believe will invoke his fifth amendment privilege before the jury[.]"). Additionally, the protection secured by the fifth amendment applies "where the witness has reasonable cause to believe he might subject himself to prosecution if he answers." *People v. Redd*, 135 Ill. 2d 252, 304, 553 N.E.2d 316, 339 (1990). "[A] defendant may raise the fifth amendment shield until his conviction has become final." *People v. Ousley*, 235 Ill. 2d 299, 306, 919 N.E.2d 875, 881 (2009). "[T]he mere fact that [a defendant] has pled guilty does not render his conviction final." *Id.* at 307.

¶ 67 Here, the record indicates that Blye and Gordon both were awaiting sentencing and neither had a final conviction. Moreover, legal counsel for both individuals represented to Senger that their clients would, in fact, invoke their fifth amendment privilege if called to testify.

Defendant's contention that it is unlikely Blye or Gordon could have successfully asserted their privilege against self-incrimination is unavailing as both individuals were involved in pending criminal cases arising out of precisely the same alleged criminal conduct as defendant.

¶ 68 Additionally, assuming Senger's representation of defendant was deficient, we also find that defendant cannot establish prejudice. As discussed, defendant merely speculates that Blye or Gordon would have provided testimony favorable to his case. It is just as likely that the witnesses would have provided testimony that had no influence at all or that would have been detrimental to defendant. There is simply no basis in the record on which to find that, but for Senger's alleged error, the result of defendant's trial would have been different. Accordingly, defendant has failed to establish that he received ineffective assistance of counsel.

¶ 69 D. Monetary Credit

¶ 70 Finally, on appeal defendant argues that he is entitled to a $1095 *per diem* credit toward eligible fines assessed against him. The State appears to concede this issue, stating it agreed "that, assuming eligible fines were imposed, defendant should be awarded" a monetary credit of $1095 toward those fines.

¶ 71 Under section 110-14(a) of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/110-14(a) (West 2014)), "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." Here, the record fails to reflect that the trial court imposed any fines when sentencing defendant. During sentencing, the court explicitly stated there would "be no discretionary fine" imposed. Addition-

ally, the court's written sentencing order fails to reflect the imposition of any fines. Accordingly, as the allowable credit may not exceed the amount of the fine and no fine was imposed as part of defendant's sentence, defendant is entitled to no monetary credit.

¶ 72 We note that, on appeal, defendant references assessments made by the Macon County Clerk, which he argues included the assessment of several fines. However, only the trial court may properly impose fines as part of a defendant's sentence, not the circuit clerk. See *People v. Strickland*, 2017 IL App (4th) 150714, ¶ 49, 92 N.E.3d 512 ("Although circuit clerks can have statutory authority to impose fees, they never have authority to impose fines; the imposition of a fine is exclusively a judicial act."). Defendant is not entitled to any monetary credit toward fines that were improperly assessed by the clerk rather than imposed by the court upon his conviction. Further, to the extent defendant challenges the fines improperly assessed by the circuit clerk in this appeal, we note that this court lacks jurisdiction to consider the issue. *People v. Vara*, 2018 IL 121823, ¶ 23.

¶ 73 Given the circumstances presented, we do not accept defendant's assertion, or the State's concession, that defendant is entitled to monetary credit under section 110-14(a). No fines were imposed by the trial court, and issues relating to the improper assessment of fines by the circuit clerk are not properly before this court.

¶ 74 III. CONCLUSION

¶ 75 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of $75 against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 76 Affirm.