IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Petition for Leave to Appeal
	)	from the Appellate Court of
	)	Illinois, Fifth Judicial District
Plaintiff-Petitioner,	)	No. 5-13-0085
	)	
	)	There on Appeal from the
v.	)	Circuit Court of the
	)	20th Judicial Circuit,
	)	St. Clair County, Illinois,
	)	No. 10 CF 1007
	)	
JAMES CHERRY,	)	The Honorable
	)	Michael N. Cook,
Defendant-Respondent.	)	Judge, Presiding.

PETITION FOR LEAVE TO APPEAL

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PRAYER FOR LEAVE TO APPEAL

Pursuant to Supreme Court Rules 315, 604(a), and 612(b), the People of the State of Illinois respectfully petition for leave to appeal from the judgment of the Appellate Court, Fifth District, vacating defendant's conviction for armed violence and remanding for sentencing on the remaining conviction for aggravated battery. The appellate court found that aggravated battery could not be a predicate for armed violence, even though the underlying battery charge was aggravated on the basis of having caused great bodily harm, and not the use of any dangerous weapon.

The court's reasoning has eliminated aggravated battery, 720 ILCS 5/12-4 (2010), as a possible predicate offense of armed violence, despite the fact that only 720 ILCS 5/12-4(b)(1) (2010), could not be used as the predicate offense. Therefore, when, pursuant to 720 ILCS 5/12-4(a), the People charged defendant with aggravated battery because he caused great bodily harm to the victim, the appellate court found error and vacated the conviction because the great bodily harm was caused by a firearm.

The Fifth District's ruling is error. The armed violence statute prohibits as a predicate offense "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." 720 ILCS 5/33A-2(b) (2010). The predicate offense in this case, aggravated battery based on great bodily harm, 720 ILCS 5/12-4(a), does not meet any of the above-stated exceptions. Finding that this subsection cannot be used as a predicate offense for armed violence, simply because another subsection of the statute, 720 ILCS 5/12-4(b)(1), and an entirely different statute, 720 ILCS

5/12-4.2, are excluded as predicates, has lead to an absurd result. Leave to appeal should be allowed.

STATEMENT REGARDING JUDGMENT AND REHEARING

The Appellate Court, Fifth District issued an opinion on December 10, 2014, vacating defendant's conviction for armed violence and remanding the cause for sentencing on defendant's remaining conviction for aggravated battery. *People v. Cherry*, 2014 IL App (5th) 130085, ¶ 1. No petition for rehearing was filed.

POINT RELIED UPON IN SEEKING REVIEW

The Fifth District's conclusion that armed violence predicated on aggravated battery causing great bodily harm cannot be a predicate offense of armed violence was error. The court eliminated the entire of the aggravated battery statute as a predicate offense for armed violence, even though only one subsection of the statute is prohibited. This strained and incorrect reading of the armed violence statute has led to an absurd result.

STATEMENT OF FACTS

Defendant, James Cherry, was involved in an altercation at a parking lot owned by Mr. Bey Miller-Bey, and his son, Mr. Larry Miller. Ms. Montrese Miller, Mr. Miller-Bey's daughter, also worked at the parking lot, as did Jarius Lacey, a family friend. On October 31, 2010, at approximately 2:00 a.m., defendant, a passenger in a vehicle, paid Montrese Miller for parking privileges. Defendant and his companion, the driver, walked to Club Illusion, an establishment adjacent to the parking lot. *People v. Cherry*, 2014 IL App (5th) 130085, ¶ 3.

At approximately 4:30 a.m., defendant returned to the parking lot, alone. Defendant began to argue with Larry Miller, and then pointed a gun with a laser sight at Mr. Miller. Defendant accused Mr. Miller of trying to steal his vehicle, and then shot him in the stomach. Witnesses heard between six and twelve gunshots. Larry Miller was shot multiple times and Montrese Miller was shot in the neck. *Cherry*, 2014 IL App (5th) 130085, ¶ 3. Ms. Miller flagged down a passing police officer, Ramon Carpenter, and Mr. Miller's girlfriend, Tonya Moore, arrived and took Mr. Miller to the hospital. *Cherry*, 2014 IL App (5th) 130085, ¶ 3.

Officer Ramon Carpenter testified that he heard the gunshots while on patrol. Both Jarius Lacey and Mr. Bey identified defendant as the shooter. Mr. Lacey testified that he heard defendant tell the officers that he "didn't mean to do it" and that he was a police officer. Officer Carpenter stated that when he approached defendant, defendant told him, "[T]hey're trying to kill me." *Cherry*, 2014 IL App (5th) 130085, ¶ 4. Defendant was placed under arrest. During an inventory of defendant's vehicle, a fully loaded handgun magazine was recovered from behind the driver's seat. A firearm was recovered from a wooded area behind the building in the parking lot. No other weapons were found in the area, and Officer Carpenter confirmed that the only discharged casings found at the scene were on the ground by defendant's vehicle. *Cherry*, 2014 IL App (5th) 130085, ¶ 4.

Crime scene investigator Michael Grist processed the scene. He collected eight discharged casings and a firearm, with a laser sight, from the woods. The gun was still loaded with several live rounds. Thomas Gamboe, a forensic scientist employed by the Illinois State Police, confirmed that the discharged casings were fired from the recovered handgun. *Cherry*, 2014 IL App (5th) 130085, ¶ 5.

A jury found defendant guilty of armed violence predicated on aggravated battery by causing great bodily harm, in that defendant had committed the offense while armed with a dangerous weapon, and had personally discharged the handgun. (C. 35). The jury also found defendant guilty of aggravated battery, in that he had committed a battery by knowingly discharging a firearm and causing injury to Larry Miller by shooting him in the leg. (C. 36). *Cherry*, 2014 IL App (5th) 130085, ¶ 6. The jury specifically found for each count that defendant had committed the offense while using a firearm equipped with a laser sight attached to it. (C. 152-53).

Defendant's post-trial motion for a new trial was denied and he was sentenced to 25 years in the Department of Corrections on the armed violence conviction; the aggravated battery conviction merged into the armed violence conviction. (C. 176; R. 237-43). Defendant's motion to reconsider sentence was denied. (C. 50-51, 246). Defendant filed a *pro se* letter alleging the ineffective assistance of trial counsel. (C. 172-75). A hearing was held on defendant's motion on January 16, 2013, (C. 257-62), and it was denied on that same date. (C. 256, 262-64). Defendant filed a notice of appeal on February 15, 2013, (C. 267), and an amended notice of appeal on March 11, 2013. (C. 285-93).

In its published opinion, the Fifth District vacated defendant's conviction for armed violence and remanded for sentencing on the remaining conviction for aggravated battery. The appellate court held that the entire aggravated battery statute could not serve as a predicate for armed violence regardless of which subsection of the statute was used as the predicate offense. *Cherry*, 2014 IL App (5th) 130085, ¶ 19.

ARGUMENT

THE APPELLATE COURT ERRED IN HOLDING THAT ARMED VIOLENCE CANNOT BE PREDICATED ON ANY SUBSECTION OF THE AGGRAVATED BATTERY STATUTE.

Whether aggravated battery can serve as the predicate offense for armed violence is a question of law that is reviewed *de novo*. *People v. Lucas*, 231 Ill.2d 169, 173-74 (2008). In this cause, the Fifth District erred in finding that no subsection of the aggravated battery statute could serve as the predicate offense for armed violence merely because one subsection, 720 ILCS 5/12-4(b)(1) (2010), is excluded as a predicate. Since the armed violence charge in this cause was predicated on a different subsection, 720 ILCS 5/12-4(a) (2010), the appellate court's ruling was error.

Although *People v. Hines*, 257 Ill.App.3d 238, 242-43(1st Dist. 1993), *People v. Drakeford*, 139 Ill.2d 206, 215 (1990), *People v. Floyd*, 262 Ill.App.3d 49, 59-60 (2d Dist. 1994), and *People v. Decker*, 126 Ill.App.3d 428, 431 (4th Dist. 1984), held that 720 ILCS 5/12-4(a) was a proper predicate for armed violence, because the presence or use of a weapon was not an element of that section of the aggravated battery statute, the Fifth District found these cases inapplicable here. The appellate court reasoned that because these cases pre-date the 2000 enactment of P.A. 91-404, which created the 15-20-25-life sentencing scheme and amended the armed violence statute, they could not be applied to any case post-dating the amendment. But the purpose of P.A. 91-404 was "to specifically exclude 10 newly enhanced offenses in order to avoid punishing identical conduct more severely[,]" thereby avoiding a violation of the proportionate penalties clause. *Cherry*, 2014 IL App (5th) 130085, ¶ 18.

Therefore, P.A. 91-404 did not invalidate these prior decisions allowing portions of the aggregated battery statute to be predicates for armed violence.

The appellate court concluded that with the 2007 amendment to the armed violence statute, which added the "umbrella 'any felony' clause[,]" *Hines*, *Drakeford*, *Floyd*, and *Decker* were inapplicable, because the "plain language of the current statute prohibits predicating armed violence on any part of the aggravated battery statute, including [720 ILCS 5/12-4(a).]" *Cherry*, 2014 IL App (5th) 130085, ¶ ¶ 18-19. The court reasoned that the use of the words "any offense" precluded the use of all subsections of an offense, regardless of whether a particular subsection mentions a deadly weapon. This conclusion has led to an absurd result.

The Fifth District has disregarded the fact that no proportionate penalties violation was alleged in this cause. *Cherry*, 2014 IL App (5th) 130085, ¶ 18. Accordingly, the fact that *Hines*, *Drakeford*, *Floyd*, and *Decker* predated the 2000 and 2007 amendments to the armed violence statute is irrelevant. Moreover, *Hines*, *Drakeford*, *Floyd*, and *Decker* remain viable as precedent; they have not been overruled.

This Court explained that the purpose behind the armed violence statute was:

> "to respond emphatically to the growing incidence of violent crime[,]" and "to deter the proscribed conduct, i.e., carrying a weapon while committing a felony. [*People v. Alejos*, 97 Ill.2d 502, 509 (1983)." *People v. Lucas*, 231 Ill.2d 169, 176 (2008). (Emphasis added).

However, by eliminating the entire aggravated battery statute as a predicate for armed violence, the Fifth District has undermined the purpose behind the armed violence statute: deterrence of the proscribed conduct, that is, a deterrence to an individual inclined to carry a weapon. *Alejos*, 97 Ill.2d at 509; *Lucas*, 231 Ill.2d at 176.

Consider the following example of the absurd result that could occur if the Fifth District's reasoning is left to stand. A defendant who knowingly, and without legal justification by any means, causes bodily harm to an individual, has committed a battery. 720 ILCS 5/12-3(a)(1) (2014). If the victim has, for example, a special status, then the defendant has committed an aggravated battery. 720 ILCS 5/12-3.05(d)(1-11) (2014). If the defendant had a gun in his pocket while committing the aggravated battery, but never touched the gun, or indeed, the gun was not discovered until he was arrested for the aggravated battery, the Fifth District's holding would preclude charging the defendant with armed violence, even though none of the charging language for the aggravated battery would mention a gun. The fact that the defendant had a gun on his person while he committed the aggravated battery could have escalated the incident from "causing bodily harm" to that of a homicide, precisely the type of conduct the armed violence statute was meant to deter. The Fifth District's opinion has now undermined that purpose of the armed violence statute.

In this cause, the "base offense" was a battery that was aggravated because defendant caused great bodily harm to the victim. 720 ILCS 5/12-4(a). The appellate court reasoned:

> Aggravated battery, which prohibits battery causing great bodily harm [720 ILCS 5/12-4(a)] and battery using a weapon other than a firearm [720 ILCS 5/12-4(b)(1)] [are] Class 3 felon[ies]. Aggravated battery with a firearm [720 ILCS 5/12-4.2] is a Class X felony. Consequently, aggravated battery with a firearm is an enhanced version of aggravated battery. As aggravated battery is an offense that makes the use of a dangerous weapon an enhanced version of the offense, the logical conclusion is that it is specifically excluded by the statute's most recent iteration, despite the fact that the prosecution chose a subsection of the predicate offense that does not reference a weapon. *Cherry*, 2014 IL App (5th) 1300865, ¶ 19.

This reasoning is flawed. The court's first premise, that aggravated battery with a firearm is an "enhanced version of aggravated battery" is without foundation. The offense of

aggravated battery with a firearm is not an "enhanced verison of aggravated battery," as there is no such thing. Both aggravated battery with a firearm and aggravated battery causing great bodily harm, are an aggravated form of battery, but the aggravation is based on different premises. There is no such thing as an "enhanced version" of aggravated battery; rather, there are different subcategories of aggravated battery. In this cause, the battery was aggravated because defendant caused great bodily harm to the victim. The great bodily harm was committed with a firearm, but that factor only was necessary as an element of the offense of armed violence. It is not an element of the offense of aggravated battery. Therefore, the appellate court's opinion, based on a flawed premise, should be reversed.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Honorable Court grant leave to appeal from the Fifth District's judgment vacating the armed violence conviction of defendant, James Cherry, and remanding for sentencing on the aggravated battery conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this petition for leave to appeal conforms to the requirements of Rules 341(a) and (b). The length of this petition for leave to appeal, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the petition for leave to appeal under Rule 342(a), is nine pages.

/s/ Joan M. Kripke
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Staff Attorney
State's Attorneys Appellate Prosecutor

IN THE

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PEOPLE OF THE STATE OF ILLINOIS,	)	On Petition for Leave to Appeal
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	)	There on Appeal from the
v.	)	Circuit Court of the
	)	20th Judicial Circuit,
	)	St. Clair County, Illinois,
	)	No. 10 CF 1007
	)	
JAMES CHERRY,	)	The Honorable
	)	Michael N. Cook,
Defendant-Respondent.	)	Judge, Presiding.

NOTICE AND PROOF OF SERVICE

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The undersigned certifies that an electronic copy of the Petition for Leave to Appeal in the above-entitled cause was submitted to the Clerk of the above Court for filing on January 6, 2015. On that same date, we caused to be delivered three copies to the Office of the State Appellate Defender in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. The original and twelve copies of the Petition for Leave to Appeal will be sent to the Clerk upon receipt of the electronically submitted filed stamped Petition.

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APPENDIX

People of the State of Illinois, Plaintiff-Petitioner

Appellate Court Decision

2014 IL App (5th) 130085

Appellate Court of Illinois,
Fifth District.

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

James CHERRY, Defendant–Appellant.

No. 5–13–0085. | Dec. 10, 2014.

Synopsis

Background: Defendant was convicted in the Circuit Court, St. Clair County, Michael N. Cook, J., of aggravated battery with a firearm and armed violence. Defendant appealed.

[Holding:] The Appellate Court, Welch, J., held that armed violence statute excludes aggravated battery as a possible predicate felony for an armed violence conviction.

Vacated and remanded with directions.

West Headnotes (4)

[1] **Criminal Law**

Armed violence statute, disallowing as predicate offense "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range," excludes aggravated battery as a possible predicate felony for an armed violence conviction. S.H.A. 720 ILCS 5/33A–2(b); 5/12-4(a),(b)(1),(e)(1); 5/12-4.2(a)(1),(b).

Cases that cite this headnote

[2] **Criminal Law**

Any ambiguity in a penal statute must be construed in favor of the defendant.

Cases that cite this headnote

[3] **Criminal Law**

Under *Krankel,* a pro se posttrial motion alleging ineffective assistance of counsel can trigger a trial court's obligation to appoint new counsel and set the claims for a hearing; however, the trial court is not automatically required to appoint new counsel to assist the defendant and should first examine the factual basis of the defendant's claim. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[4] **Criminal Law**

If a defendant's posttrial motion's claims of ineffective assistance of trial counsel indicate that defendant's trial counsel neglected the case, the trial court must appoint new counsel. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

Appeal from the Circuit Court of St. Clair County. No. 10–CF–1007, Michael N. Cook, Judge, presiding.

Attorneys and Law Firms

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Brendan F. Kelly, State's Attorney, Belleville, IL, Patrick Delfino, Director, Lawrence M. Bauer, Deputy Director, Joan M. Kripke, Staff Attorney, State's Attorneys Appellate Prosecutor, Elgin, IL, Attorneys for Appellee.

OPINION

Justice WELCH delivered the judgment of the court, with opinion:

***1** ¶ 1 The defendant, James Cherry, was found guilty by a St. Clair County jury of one count of aggravated battery with a firearm, a Class X felony (720 ILCS 5/12–4.2(a)(1) (West 2010)), and one count of armed violence, a Class X felony (720 ILCS 5/33A–2(b) (West 2010)). The armed violence conviction was predicated on his knowingly causing great bodily harm to another as prohibited by the Illinois aggravated battery statute (720 ILCS 5/12–4(a) (West 2010)). On July 6, 2011, the defendant was sentenced to 25 years' imprisonment to be served at 85% on the armed violence conviction, with the lesser count of aggravated battery with a firearm merged into it for sentencing purposes. For the following reasons, we vacate the defendant's armed violence conviction and remand for sentencing based on the defendant's remaining conviction.

¶ 2 On November 19, 2010, the defendant was charged by indictment with one count of armed violence and two counts of aggravated battery with a firearm. One count of aggravated battery with a firearm was dismissed pursuant to the State's March 21, 2011, motion. The State filed a "[n]otice of intent to seek extended-term sentencing pursuant to 730 ILCS 5/5–5–3.2(b)(10) [*sic*]," as the defendant committed the offenses with a firearm with an attached laser sight.

¶ 3 Evidence adduced at trial reflected that on October 31, 2010, the defendant was involved in an altercation in an East Saint Louis parking lot owned by Bey Miller–Bey and his son, Larry Miller. Bey's daughter, Montrese Miller, also worked on the parking lot, as did their friend Jarius Lacey. The defendant arrived in Bey's parking lot around 2 a.m. in a black Dodge Nitro. The defendant, a passenger in the vehicle, paid Montrese for parking privileges. The driver parked at a perpendicular angle to Montrese's vehicle, a blue Chrysler. The defendant and his companion then walked over to Club Illusion. Sometime around 4:30 a.m., the defendant returned to the vehicle alone. Larry Miller testified that the defendant walked around the vehicle, got in and out, and eventually stood next to the building as though he was urinating. Larry asked the defendant not to disrespect the property, and the two began arguing. The defendant then pointed a gun with a laser sight at Larry. Larry testified that the defendant asked if Larry was trying to steal his truck, and then shot him in the stomach. The witnesses heard between 6 and 12 gunshots. Larry was shot multiple times and Montrese was shot in the neck. After the shooting stopped, Montrese flagged down a police car. Larry's girlfriend, Tonya Moore, arrived to take Larry to the hospital. Montrese and Bey accompanied Larry to the hospital.

¶ 4 Former police officer Ramon Carpenter testified that he heard gunshots while he was on patrol that night, and was flagged down by Montrese upon his arrival at the scene. Carpenter stated that Lacey and Bey identified the defendant as the shooter, and Lacey testified that the defendant told the arriving officers that he "didn't mean to do it" and that he was a cop. Carpenter noted that when he approached the defendant, the defendant told him, "[T]hey're trying to kill me." The defendant was placed under arrest. Carpenter inventoried the defendant's vehicle, which had a bullet hole on the rear driver's-side passenger door. Inside the vehicle, behind the driver's seat, a fully loaded black magazine to a handgun was recovered. A firearm was recovered in a wooded area behind the building. No other weapons were located in the area. Carpenter confirmed that the only discharged casings in the area were the ones by the defendant's vehicle.

***2** ¶ 5 Crime scene investigator Michael Grist processed the scene, collecting eight casings into

evidence. He opined that the bullet defect in the Nitro's door was fired from back to front of the vehicle. He also recovered a projectile fragment from the front driver's-side floorboard of the Chrysler, which had a bullet hole in the front driver's-side door trim. He noted that the firearm that was recovered from the woods had a laser sight and still contained several live rounds. Thomas Gamboe, a forensic scientist employed by the Illinois State Police, confirmed that the discharged casings were fired from the firearm that was recovered from behind the building.

¶ 6 The jury found the defendant guilty of armed violence, and that he committed the offense while armed with a firearm with an attached laser sight. The jury also found him guilty of aggravated battery, and that he committed the offense while armed with a firearm with an attached laser sight.

¶ 7 The defendant filed a "post-trial motion for new trial" on April 6, 2011, asserting that the State failed to prove him guilty of the charges beyond a reasonable doubt, and that there was not credible evidence demonstrating that he committed the crimes "without legal justification." The motion was denied at the defendant's July 6, 2011, sentencing hearing.

¶ 8 On June 30, 2011, the defendant wrote a letter to the trial court asserting that he received ineffective assistance from his trial counsel where his counsel had his bond assigned as part of the fee, without the defendant's knowledge, and that his attorney operated under a conflict of interest because he was an associate of Miller–Bey. The letter also asserted that his counsel failed to interview witnesses, did not conduct an investigation, did not investigate other crimes near the parking lot, did not hire a ballistics expert, did not test the bullet that was removed from his vehicle, and failed to challenge the admission of the magazine found in his vehicle. The defendant also claimed that the State acted in bad faith by failing to maintain the chain of custody for the vehicles involved in the incident, by not calling Miller's girlfriend as a witness, and by not questioning the Club Illusion patrons from that evening.

¶ 9 While the defendant was speaking in allocution at his July 6, 2011, sentencing hearing, he began reading the aforementioned letter to the trial court. The State requested a side-bar and noted to the court that it felt that the hearing was not an appropriate venue for the defendant's assertions. In response, defense counsel noted that he was "probably going to be withdrawing anyway for purposes of appeal" and agreed with the trial court and the State that he did not see the relevance at a sentencing hearing. The trial court told the defendant that his complaints were more properly brought up on appeal, and not relevant to the sentencing. The defendant was allowed to continue reading his letter, but again the State requested a side-bar and objected to the relevance of the defendant's statement. The court sustained the objection and told the defendant, "[A]ny error that you believe the Court or the attorneys made is something that is germane to an appeal, not to your statement in allocution." The defendant received his sentence. After receiving his appellate admonitions, the defendant asked how he could obtain a different lawyer. The court asked the defendant whether he believed that there was "a breakdown in [his] lawyer/client relationship with [his attorney] among other things and would request that the court appoint a lawyer." The defendant agreed, and the court appointed a public defender to represent the defendant.

*3 ¶ 10 On August 4, 2011, the defendant's newly appointed counsel (posttrial counsel) filed a motion to reconsider the sentence, asserting that the defendant's sentence was extreme in light of all the circumstances involved, and that the events were unlikely to recur. After a hearing on December 7, 2011, the motion was denied.

¶ 11 On January 2, 2012, the trial court filed an order granting the defendant a hearing on his *pro se* letter regarding the ineffective assistance of his trial counsel, pursuant to the rule in *People v. Krankel,* 102 Ill.2d 181, 80 Ill.Dec. 62, 464 N.E.2d 1045 (1984). At the January 16, 2013, hearing, the defendant's posttrial counsel requested that the court consider the issues presented in the defendant's letter, as well as an allegation that his trial counsel was ineffective for failing to investigate medical records that may have demonstrated that the defendant was not under the influence of alcohol during the incident. No witnesses were called, and the court requested that the parties give brief argument on the issues. The defendant's allegations were presented, and the State responded that these were matters of trial strategy. The State also

noted that some of the defendant's allegations occurred during the pretrial stage, and the defendant could have fired his privately retained trial attorney at any time. The court found that the defendant's allegations did not meet his burden under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as he did not demonstrate a reasonable probability that any errors by his trial counsel would have substantially changed the outcome of his case, and that the defendant was not prejudiced by his trial counsel's performance. The court denied the defendant's motion.

[1] [2] ¶ 12 The defendant presents two points on appeal. First, he asserts that his conviction for armed violence is void, as the armed violence statute specifically excludes aggravated battery as a possible predicate felony for an armed violence conviction. In addressing this claim, we begin by noting that our primary objective is to give effect to the intention of the legislature, and if this court can ascertain the intent from the plain language of the statute, that intent must prevail. *People v. Blair,* 215 Ill.2d 427, 442–43, 294 Ill.Dec. 654, 831 N.E.2d 604 (2005). Further, any ambiguity in a penal statute must be construed in favor of the defendant. *People v. Whitney,* 188 Ill.2d 91, 98, 241 Ill.Dec. 770, 720 N.E.2d 225 (1999). This court reviews questions of statutory construction *de novo. Blair,* 215 Ill.2d at 443, 294 Ill.Dec. 654, 831 N.E.2d 604. A review of the relevant statutes' language and history aids our decision in the instant case.

¶ 13 The Illinois statute prohibiting armed violence is the vehicle that allows the State to seek higher Class X penalties for a defendant where a predicate felony is committed in circumstances involving the presence or use of a dangerous weapon. [1] The General Assembly's stated intention of the statute is to deter the use of firearms in the commission of a felony, due to their more lethal nature, the significant escalation of the threat, and the potential for bodily harm that comes with their presence. 720 ILCS 5/33A–1(a), (b) (West 2010). However, the statute also specifically excludes certain felonies from providing the basis for an armed violence conviction, providing in relevant part:

> *4 "(b) A person commits armed violence when he or she personally discharges a firearm that is a Category I or Category II weapon while committing any felony defined by Illinois law, except first degree murder, attempted first degree murder, intentional homicide of an unborn child, second degree murder, involuntary manslaughter, reckless homicide, predatory criminal sexual assault of a child, aggravated battery of a child as described in Section 12–4.3 or subdivision (b)(1) of Section 12–3.05, home invasion, or *any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range.*" (Emphasis added.) 720 ILCS 5/33A–2(b) (West 2010).

¶ 14 The statute providing the predicate felony for the defendant's armed violence conviction, aggravated battery, provides in relevant part:

> "(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm * * * commits aggravated battery.
>
> (b) In committing a battery, a person commits aggravated battery if he or she:
>
> (1) Uses a deadly weapon other than by the discharge of a firearm * * *[.]
>
> * * *
>
> (e) * * *
>
> (1) * * * [A]ggravated battery is a Class 3 felony." 720 ILCS 5/124(a), (b)(1), (e)(1) (West 2010).

¶ 15 The relevant subsection of the statute prohibiting aggravated battery with a firearm provides:

"(a) A person commits aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm (1) causes any injury to another person * * *.

(b) A violation of subsection (a)(1) of this Section is a Class X felony." 720 ILCS 5/12–4.2(a)(1), (b) (West 2010).

¶ 16 The defendant's argument is based on the language of the armed violence statute, which we have emphasized above. The defendant notes that the use of a firearm elevates a charge of aggravated battery to a charge of aggravated battery with a firearm, creating an enhanced version of the offense. Thus, the defendant argues, aggravated battery is a specifically prohibited predicate felony per the clause in the armed violence statute excluding "any offense that makes the possession or use of a dangerous weapon either an element of the base offense[ ][or] an aggravated or enhanced version of the offense" (720 ILCS 5/33A–2 (West 2010)).

¶ 17 In rebuttal, the State argues that there is no blanket proscription on predicating an armed violence conviction on aggravated battery. The State notes that the defendant's predicate felony was not based in either section 12–4(b)(1) or section 12–4.2 of the Criminal Code of 1961 (720 ILCS 5/12–4(b)(1), 12–4.2 (West 2010)), both of which are clearly excluded by the armed violence statute by virtue of their inclusion of presence or use of a weapon in the base offense. Rather, the defendant's conviction was based on his battery causing "great bodily harm" as the aggravating factor.[2] The State cites numerous Illinois cases finding section 12–4(a) to be a proper predicate felony to the armed violence statute, as the presence or use of a weapon is not an element of aggravated battery causing great bodily harm. See, *e.g.*, *People v. Hines,* 257 Ill.App.3d 238, 243, 195 Ill.Dec. 955, 629 N.E.2d 540 (1993); *People v. Drakeford,* 139 Ill.2d 206, 214, 151 Ill.Dec. 337, 564 N.E.2d 792 (1990); *People v. Floyd,* 262 Ill.App.3d 49, 59–60, 199 Ill.Dec. 489, 634 N.E.2d 328 (1994); *People v. Decker,* 126 Ill.App.3d 428, 432, 81 Ill.Dec. 666, 467 N.E.2d 366 (1984).

***5** ¶ 18 However, we agree with the defendant's interpretation. Though the State has indeed presented case law supporting its argument, the cited authority predates crucial amendments to the armed violence statute. In 2000, when the Illinois legislature enacted Public Act 91–404 and created the 15–20–25–life sentencing scheme, the armed violence statute was amended to specifically exclude 10 newly enhanced offenses in order to avoid punishing identical conduct more severely and thus violating the proportionate-penalties clause of the Illinois Constitution.[3] 720 ILCS 5/33A–2(b) (West 2000); Pub. Act 91–404, § 5 (eff.Jan. 1, 2000). Despite the amendment, the dueling sentencing options led to proportionate-penalties violations that were successfully litigated in our courts. See, *e.g., People v. Hauschild,* 226 Ill.3d 63, 86–87 (2007) (holding that the 15–year enhancement provided for in the armed robbery statute was unconstitutional because the sentence was more severe than the sentence for the identical offense of armed violence based on robbery). In 2007, the Illinois legislature again amended the statute. The statute currently in force excludes several of the previously included 15–20–25–life offenses, includes several other offenses, and has the umbrella "any felony" clause at issue here.[4] See 720 ILCS 5/33A–2 (West 2010); Pub. Act 95–688, § 4 (eff.Oct. 23, 2007).

¶ 19 We think the plain language of the current statute prohibits predicating armed violence on any part of the aggravated battery statute, including section 12–4(a). The wording unambiguously excludes *any offense* that makes the use of a dangerous weapon either an element of the base offense or an aggravated or enhanced version of the offense. Thus, this clause provides alternative circumstances under which an offense—not parts or subsections of an offense—cannot be used as a predicate offense. We focus here on the prohibition of "an aggravated or enhanced version of the offense." Aggravated battery, which prohibits battery causing great bodily harm (section 12–4(a)) and battery using a weapon other than a firearm (section 12–4(b)(1)), is a Class 3 felony. Aggravated battery with a firearm (section 12–4.2) is a Class X felony. Consequently, aggravated battery with a firearm is an enhanced version of aggravated battery. As aggravated battery is an offense that makes the use of a dangerous weapon an enhanced version of the offense, the logical conclusion is that it is specifically excluded by the statute's most recent iteration, despite the fact that the

prosecution chose a subsection of the predicate offense that does not reference a weapon.

¶ 20 In reaching our conclusion, we note that the defendant was also convicted of aggravated battery with a firearm based on the same event. As such, we find it would be patently unreasonable to conclude that the prosecution may both charge the defendant with an enhanced version of an offense and then also predicate an armed violence charge on a subsection of the same basic offense that does not specifically address weapons in order to sidestep the statutory exclusions. This would clearly frustrate the legislative intent of the General Assembly's multiple, and increasingly thorough, revisions to the statute. We therefore decline to search for meaning beyond the plain wording of the clause by reading into it exceptions, limitations, or conditions. *People v. Boclair,* 202 Ill.2d 89, 100, 273 Ill.Dec. 560, 789 N.E.2d 734 (2002).

***6** ¶ 21 The defendant's remaining point on appeal is that he received ineffective assistance from his posttrial appointed counsel at his *Krankel* hearing. Specifically, he asserts that his posttrial counsel simply adopted and set forth his own *pro se* arguments, which was tantamount to doing nothing to advance his ineffective-assistance-of-trial-counsel claims. The defendant asserts that such inaction "entirely failed to subject the prosecution's case to meaningful adversarial testing" under the standards set by *United States v. Cronic,* 466 U.S. 648, 657, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). We disagree with the defendant's contention.

[3] [4] ¶ 22 The defendant was granted an evidentiary hearing pursuant to the rule in *People v. Krankel,* 102 Ill.2d 181, 80 Ill.Dec. 62, 464 N.E.2d 1045 (1984), to evaluate his assertions. Under *Krankel,* a *pro se* posttrial motion alleging ineffective assistance of counsel can trigger a trial court's obligation to appoint new counsel and set the claims for a hearing. See *Krankel,* 102 Ill.2d at 189, 80 Ill.Dec. 62, 464 N.E.2d 1045. The trial court is not automatically required to appoint new counsel to assist the defendant; rather, the court should first examine the factual basis of the defendant's claim. *People v. Moore,* 207 Ill.2d 68, 77–79, 278 Ill.Dec. 36, 797 N.E.2d 631 (2003). If the claims indicate that the defendant's trial counsel neglected the case, the trial court must appoint new counsel. *People v. McLaurin,* 2012 IL App (1st) 102943, ¶ 40, 367 Ill.Dec. 682, 982 N.E.2d 832.

¶ 23 The trial court in the instant case did not examine the basis of the defendant's claims when they were brought to its attention at the sentencing hearing, but instead appointed new counsel and set a hearing on the defendant's motion.[5] At this juncture, the defendant was entitled to new counsel that would undertake an independent evaluation of his claim and present the matter to the court from a detached, yet adversarial, position. *People v. Jackson,* 131 Ill.App.3d 128, 139, 85 Ill.Dec. 738, 474 N.E.2d 466 (1985). As noted in our factual summary, the court heard argument from both the State and the defendant's appointed counsel, and made a factual determination on the merits of the defendant's claims by finding that the defendant did not demonstrate that his trial counsel's performance fell below the *Strickland* standards.

¶ 24 However, the defendant's assertion on appeal is not that the trial court conducted an inadequate inquiry into his posttrial claims, but rather that his posttrial counsel was ineffective in presenting his claims regarding his trial counsel. Claims of ineffective assistance of counsel are generally evaluated under the two-part test set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* requires a defendant to show both that (1) his attorney's performance fell below an objective standard of reasonableness and (2) the attorney's deficient performance resulted in prejudice to the defendant; the failure to satisfy either element will preclude a finding of ineffective assistance of counsel. *People v. Shaw,* 186 Ill.2d 301, 332, 239 Ill.Dec. 311, 713 N.E.2d 1161 (1998).

***7** ¶ 25 In certain exceptional situations, as the defendant asserts is appropriate in this case, the two-part *Strickland* test need not be applied and prejudice may be presumed. When "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic,* 466 U.S. at 659.

¶ 26 First we address the defendant's argument that his claim is properly evaluated under the *Cronic* standard.

When distinguishing between the rule of *Strickland* and that of *Cronic,* the differences in evaluating error are not in degree, but in kind. *Bell v. Cone,* 535 U.S. 685, 697, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). Examples of failures that meet the *Cronic* standard include employing a trial strategy that concedes a defendant's guilt when the defendant has pled not guilty (see *People v. Hattery,* 109 Ill.2d 449, 464–65, 94 Ill.Dec. 514, 488 N.E.2d 513 (1985)), insisting on raising an unavailable defense (see *People v. Kozlowski,* 266 Ill.App.3d 595, 203 Ill.Dec. 550, 639 N.E.2d 1369 (1994)), and stipulating to the admission of testimony that is inadmissible against a defendant by a supreme court rule (see *People v. Hoerer,* 375 Ill.App.3d 148, 152, 313 Ill.Dec. 589, 872 N.E.2d 572 (2007)). Because it is the kind of error and not the egregiousness of the error that guides this evaluation, we conclude that the defendant's posttrial counsel's performance must be evaluated under *Strickland.*

¶ 27 There is a strong presumption that an attorney's choices fall within the wide range of choices that could be considered adequate counsel. *Strickland,* 466 U.S. at 689. The defendant's posttrial counsel presented and argued his claims from the letter, as well as an additional claim regarding evidence of the defendant's lack of intoxication. However, we need not address whether the performance was objectively unreasonable, as we can dispose of the defendant's claim because he suffered no resulting prejudice. *Strickland,* 466 U.S. at 697; *People v. Salas,* 2011 IL App (1st) 091880, ¶ 91, 356 Ill.Dec. 442, 961 N.E.2d 831.

¶ 28 Under the second prong of *Strickland,* the defendant is required to demonstrate that his counsel's representation at the *Krankel* hearing was so prejudicial that there is a reasonable probability that absent the errors, the outcome would have been different. *Strickland,* 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *People v. Patterson,* 2014 IL 115102, ¶ 81. This requires a substantial, not just conceivable, likelihood of a different result. *Harrington v. Richter,* 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

¶ 29 Thus, the defendant is required to demonstrate that absent his posttrial counsel's inadequate performance, there was a substantial likelihood that he would have prevailed on his claims regarding his trial counsel. We note initially that the defendant failed to address this prong in his brief, arguing only that he met his burden under the *Cronic* standard. However, we will briefly discuss the defendant's failure to meet his burden regarding his ineffective-assistance-of-trial-counsel claims, which in turn establishes that the actions of his posttrial counsel were not prejudicial.

***8** ¶ 30 We agree with the trial court's determination that the defendant's claims regarding his trial counsel fail under one or both prongs of *Strickland.* The majority of the defendant's claims concern his trial attorney's strategy, which enjoys a strong presumption of competency; for example, whether to call certain witnesses on a defendant's behalf are matters of trial strategy that are generally immune from claims of ineffective assistance of counsel. *People v. English,* 334 Ill.App.3d 156, 164, 268 Ill.Dec. 232, 778 N.E.2d 218 (2002). The remainder of the defendant's allegations regarding his trial counsel are either refuted by the record, present general allegations that are not supported by specific information, or fail to demonstrate how he was prejudiced by the alleged failures. The defendant was entitled to professionally competent assistance, not a perfect attorney or successful representation. *Cone,* 535 U.S. at 702.

¶ 31 The defendant did not demonstrate that he received ineffective assistance from his posttrial counsel at his *Krankel* hearing. However, we find that the armed violence statute currently in force prohibits the use of aggravated battery as a predicate offense. Therefore, we vacate the defendant's conviction for armed violence and remand this cause for sentencing on his remaining conviction, aggravated battery while armed with a firearm, a Class X felony, pursuant to section 12–4.2(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12–4.2(a)(1) (West 2010)).

¶ 32 Vacated and remanded with directions.

Justices GOLDENHERSH and STEWART concurred in the judgment and opinion.

1 The statute states that "[v]iolation of Section 33A–2(a) with a Category I weapon is a Class X felony for which the defendant shall be sentenced

to a minimum term of imprisonment of 15 years." 720 ILCS 5/33A–3(a) (West 2010).

2 The charging instrument stated that the defendant committed armed violence "while armed with a dangerous weapon, a gun," by performing acts prohibited by section 12–4(a) of the Criminal Code of 1961 (720 ILCS 5/12–4(a) (West 2010)), "in that he knowingly caused great bodily harm to Larry Miller, in that he shot Larry Miller in the leg with a handgun, and the said defendant personally discharged a handgun that is a Category I weapon."

3 The preamendment armed violence statute read that "[a] person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law." 720 ILCS 5/33A–2 (West 1994). The 2000 amendment, in relevant part, read that "[a] person commits armed violence when he or she personally discharges a firearm that is a Category I or Category II weapon while committing any felony defined by Illinois law, except first degree murder, attempted first degree murder, intentional homicide of an unborn child, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnaping, aggravated battery of a child, home invasion, armed robbery, or aggravated vehicular hijacking." 720 ILCS 5/33A–2(b) (West 2000).

4 The 2007 amendment added second-degree murder, involuntary manslaughter, and reckless homicide to the list of specifically excluded predicate felonies. The legislature noticeably *removed* aggravated criminal sexual assault, aggravated kidnaping, armed robbery, and aggravated vehicular hijacking, as those felonies were now included under the umbrella "any felony" clause.

5 Contrary to the defendant's assertion, the record of the defendant's sentencing hearing does not reflect that the trial court found that the defendant's trial counsel established a sufficient showing of neglect; the court only inquired as to the defendant's desire for new counsel. However, because no *Krankel* inquiry into the defendant's assertions was made at that time, a hearing on the motion was properly set. See *Moore,* 207 Ill.2d at 79, 278 Ill.Dec. 36, 797 N.E.2d 631 (finding that the law requires an inquiry into a defendant's posttrial assertions of ineffective assistance of counsel).

Parallel Citations

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