No. 128871

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- SANTANA GRAYER, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-21-0808. There on appeal from the Circuit Court of Cook County, Illinois, No. 20 CR 10002. Honorable Vincent M. Gaughan, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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NATURE OF THE CASE

Santana Grayer was convicted of attempt vehicular hijacking after a bench trial and was sentenced to five years in prison. On direct appeal, the appellate court majority affirmed Grayer's conviction and sentence. *People v. Grayer*, 2022 IL App (1st) 210808. Grayer filed a petition for rehearing, which was denied. This Court allowed Grayer's petition for leave to appeal on November 30, 2022.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether the State proved beyond a reasonable doubt that Santana Grayer, a voluntarily intoxicated Lyft passenger trying to get home safely from a social gathering, had the specific attempt to hijack his Lyft driver's car, where evidence of Grayer's voluntary intoxication was introduced at trial but not raised as an affirmative defense.

STATUTES INVOLVED

720 ILCS 5/8-4. Attempt. (West 2020)

(a) Elements of the offense.

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.

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720 ILCS 5/18-3. Vehicular Hijacking. (West 2020)

(a) A person commits vehicular hijacking when he or she knowingly takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force.

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720 ILCS 5/6-3. Intoxicated or drugged condition. (West 2020)

A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

720 ILCS 5/6-4. Affirmative Defense. (West 2020)

A defense based upon any of the provisions of Article 6 is an affirmative defense except that mental illness is not an affirmative defense, but an alternative plea or finding that may be accepted, under appropriate evidence, when the affirmative defense of insanity is raised or the plea of guilty but mentally ill is made.

STATEMENT OF FACTS

Santana Grayer, a 41-year old construction worker and father of four children, was at a social gathering when someone ordered him a Lyft because he was too intoxicated to get home himself. Several minutes into the Lyft ride, Grayer pulled on the Lyft driver's sleeve and told the driver that he was going in the wrong direction. After the driver told Grayer that he was following the directions in the Lyft app, Grayer, who was clearly intoxicated, asked to drive the car and threatened to kill the driver. The Lyft driver subsequently pulled into a gas station, got out of the car, and went inside the gas station store. While the driver was in the store, Grayer waited outside for about 20 minutes before falling asleep inside the Lyft car, where he was later woken up by the police. Based on the allegation that Grayer pulled on the Lyft driver's arm and threatened to kill him, the State charged Grayer with one count of attempt vehicular hijacking. Following a bench trial, where the State's own evidence established that Grayer was voluntarily intoxicated at the time of the charged offense, Grayer was found guilty and sentenced to five years in prison.

Trial

At trial, complainant Arnold Ong and Chicago Police Sergeant Nicholas Cortesi testified for the State. (R. 34-76). Grayer waived his right to testify, informing the court that he did not remember the case, and defense counsel did not present any evidence on Grayer's behalf. (R. 78-79).

On September 6, 2020, Arnold Ong was driving a white Honda CRV for Lyft, a rideshare service. (R. 34-35, 56). At about 6:00 p.m., Ong received a notification through the Lyft app for a new ride, which included the pickup address. (R. 37, 53). The ride was for a woman named Phyllis. (R. 37, 53). When Ong arrived

at the pickup location, there were a lot of people there. (R. 38). Ong spoke with Phyllis, who informed him that Grayer would be taking the ride. (R. 37-38). Grayer got into the back seat of Ong's car. (R. 38).

According to Ong, it was clear that Grayer was intoxicated. (R. 53). Grayer was able to walk but was moving from side to side. (R. 54). Initially, Grayer did not talk much, but Ong testified that Grayer sounded drunk. (R. 54). Five to ten minutes into the ride, Grayer told Ong that he was driving in the wrong direction and that he wanted to go home. (R. 39, 54-56). Ong was following the GPS directions on the Lyft app and told Grayer that he was going in the right direction. (R. 39, 56). The drop-off location for the Lyft ride was entered directly into the app, and Ong did not know if Grayer had inputted the address into the app or if someone else had. (R. 55). Grayer got upset and raised his voice, telling Ong repeatedly that he wanted to drive the car himself and grabbing the right sleeve of Ong's short-sleeved shirt. (R. 39-42, 58). Ong stated that while Grayer was pulling on his sleeve, Grayer put his right hand on his waist as though he was trying to grab something. (R. 41-42, 58). Ong thought that Grayer was grabbing a knife or a gun. (R. 43). While grabbing his waistband, Grayer said multiple times that he was going to kill Ong. (R. 42). Ong related that he thought his life was at stake and was concerned about his safety, especially since he was driving. (R. 43, 63). As a result, Ong pulled over at a gas station to try to get help. (R. 43, 63).

Once parked at the gas station, Ong got out of the car, taking his cell phone and the only set of car keys with him. (R. 43, 66). Ong did not lock his car because he was in a hurry and the remote control was not working. (R. 64-65). The only way to lock the car was with the car keys. (R. 64). When Ong got out of the car, Grayer "chased" Ong around the car but was not running. (R. 43, 65). Ong suspected

that Grayer was only able to walk and could not run fast because he was intoxicated. (R. 65).

Ong went inside the gas station store, and someone called 911. (R. 44). The people at the store told Ong to stay inside for his protection. (R. 45). Ong did not tell the people in the store that he thought Grayer had a gun but told them that Grayer threatened to kill him. (R. 62). While Ong was waiting for the police to arrive, he took one step outside of the gas station store door to check on his car and saw Grayer standing next to the car holding Ong's house keys, which had been in the cup holder of the car. (R. 45-46, 51). Ong went back inside the store to wait for the police. (R. 45). While inside the store, Ong saw Grayer in the driver's seat. (R. 67). Ong did not testify about what Grayer was doing while in the driver's seat.

When the police arrived, Ong told Officer Hughes and Sergeant Cortesi what had happened. (R. 45-46, 60). At trial, Ong could not remember when he told the police that he thought Grayer had a gun. (R. 61-62). However, the parties stipulated that Cortesi's body worn camera footage would show that while at the gas station, Ong never told the officers that he thought Grayer had a weapon on his waistband. (R. 76). Ong testified that he gave Grayer permission to be a passenger in his car but never gave him permission to get into the driver's seat of the car. (R. 47, 51, 68-69).

Sergeant Cortesi testified that on September 6, 2020 at about 6:30 p.m., he went to the gas station at 6659 S. Wentworth with Officer Hughes. (R. 71-72). There, he saw Ong's car parked near a gas pump and Grayer in the driver's seat. (R. 72). Cortesi approached the car, persuaded Grayer to get out, and arrested Grayer. (R. 73). When the officers talked to Ong at the gas station, Ong did not

mention that he thought Grayer had a gun. (R. 74). Ong said that Grayer threatened to kill him and grabbed him on the sleeve. (R. 75). The police recovered Ong's house keys from the cup holder in the car. (R. 73).

The State introduced surveillance video clips from the gas station (R. 47-49; St. Ex. 1), which showed the following:

- At 6:21 p.m., Ong pulled into the gas station, driving a white Honda CRV. (St. Ex. 1, 2050[1] at 00:00-00:15). Grayer was seated in the back seat, on the passenger side of the car. (St. Ex. 1, 2050 at 00:15). After parking next to a gas pump, Ong grabbed his cell phone and got out of the car. (St. Ex. 1, 2050 at 00:15-00:20). Ong reached back in the car and retrieved the car keys. (St. Ex. 1, 2050 at 00:20-00:30). Grayer then got out of the car, swaying side to side, and walked around the front of the car toward Ong. (St. Ex. 1, 2050 at 00:20-00:40). Ong walked around the car and Grayer followed. (St. Ex. 1, 2050 at 00:40-01:00). When Grayer circled the car a second time, he opened the driver's door but did not get inside. (St. Ex. 1, 2050 at 01:00-01:05). Ong walked inside the gas station store. (St. Ex. 1, 2050 at 01:05-01:20) (the interior of the gas station store is not visible in the surveillance video). After Ong went inside the store, Grayer stood outside of the car, between the open driver's door and the gas pump for about 30 seconds. (St. Ex. 1, 2050 at 01:10-01:45). He then stumbled before walking around the back of the car toward the gas station store. (St. Ex. 1, 2050 at 01:40-01:50).

[1] St. Ex. 1 is a DVD containing four surveillance video clips, saved as four separate files: A12_20200906182050, A12_20200906182745, A12_20200906183840, A12_20200906185730. In order to differentiate between these videos, when referencing the surveillance video footage, Grayer will cite to the last four digits of the file name—e.g. St. Ex. 1, 2050.

Grayer pointed and looked inside the store through the windows. (St. Ex. 1, 2050 at 01:45-02:05). Grayer returned to the car and leaned back on the rear passenger's door with his arms crossed. (St. Ex. 1, 2050 at 2:00-2:11).

- At 6:27 p.m., Grayer was standing by the driver's side of the car, and the driver's door was still open. (St. Ex. 1, 2745 at 00:00-00:12). While looking in the direction of the gas station store, Grayer held up a set of keys, shaking them. (St. Ex. 1, 2745 at 00:00-00:12). He then walked toward the store with the keys in his hand. (St. Ex. 1, 2745 at 00:10-00:16).
- At 6:39 p.m., about 20 minutes after arriving at the gas station, Grayer got inside the driver's seat, closed the door, and reached forward. (St. Ex. 1, 3840 at 00:00-00:45). The video does not show what Grayer was reaching for or if he was holding anything. After about 45 seconds, Grayer took out his cell phone, fully reclined the driver's seat, and lied back in the seat. (St. Ex. 1, 3840 at 00:45-01:10). With the seat still fully reclined, Grayer sat up and reached forward, but he eventually lied back in the reclined seat. (St. Ex. 1, 3840 at 01:10-02:21).
- At 6:57 p.m., almost 40 minutes after Ong had pulled into the gas station, the police arrived. (St. Ex. 1, 5730 at 00:00-00:10). Grayer was still reclined in the driver's seat and appeared to be asleep when the police approached the car. (St. Ex. 1, 5730 at 00:00-00:10). Three officers entered the car and one officer went inside the gas station store. (St. Ex. 1, 5730 at 00:10-01:01).

After the State rested, the court denied the defense's motion for a directed finding. (R. 77). Defense counsel did not present any evidence, informing the court that Grayer did not want to testify. (R. 78). When the judge asked Grayer to confirm that he did not want to testify, Grayer said, "Yeah, I guess. I can't remember the

case." (R. 78).

In closing arguments, defense counsel argued that the State failed to prove beyond a reasonable doubt that Grayer had the specific intent to steal the car. (R. 83). Defense counsel stressed that Grayer was very intoxicated, as shown in the video, and that he could not form the requisite intent to steal the car. (R. 80-82). Grayer wanted to go home, and there was no evidence that Ong was driving in the right direction. (R. 79, 81). Additionally, counsel argued that while Ong may have been afraid of a battery and concerned about driving safely, Ong was not afraid of being car jacked. (R. 80-81). Counsel suggested that Grayer may have been waiting for Ong to finish the ride, emphasizing that at the gas station, Grayer held up the keys, sat down in the car, looked at his phone, reclined in the seat, and fell asleep. (R. 81, 83). In the State's closing argument, the prosecutor conceded that Grayer was drunk but that being drunk was not an excuse for criminal activity. (R. 83). Further, the State contended that Grayer's possession of Ong's house keys and movement toward the ignition of the car while in the driver's seat was evidence of Grayer's intent to take the car. (R. 85).

The court found Grayer guilty of attempt vehicular hijacking, explaining that Ong did not give Grayer permission to take or drive the car and that his level of intoxication was not a legal defense as he was aware of his environment and knew that he was being driven in the wrong direction. (R. 86-87). The judge found that while Grayer was pulling on Ong's sleeve, Grayer reached for his waistband with the other hand and said that he wanted to kill Ong several times. (R. 86-87). According to the court, after Ong pulled into the gas station, there was a "slow motion chase" around the car, during which Ong tried to avoid Grayer. (R. 87). Ong then went inside the gas station store. (R. 87). Finally, the court noted that

in the surveillance video, Grayer held up "the key" before getting into Ong's car, and while inside, Grayer "motioned towards where the ignition would be as if to start the car." (R. 87).

Post-Trial Motions and Sentencing

Defense counsel filed post-trial motions arguing, *inter alia*, that the State failed to prove beyond a reasonable doubt that Grayer possessed the specific intent to commit a vehicular hijacking. (C. 59-60, 65-69). The court denied the defense's motions. (R. 101).

Grayer then filed *pro se* pleadings requesting a new attorney and a new trial. (C. 71-74, 76-86). Grayer alleged that trial counsel was ineffective for failing to present police body worn camera video and that the State intentionally used perjured testimony at trial. (C. 76-86). Grayer asserted that the body worn camera video showed that the arresting officers pressured and threatened Ong to press charges. (C. 77-78). Addressing Grayer's allegations against the State, the State filed a written response and attached a transcript of one of the officer's body worn camera videos.[2] (C. 99-113).

According to the body worn camera transcript, Ong told the police that Grayer was drunk and that while he was driving, Grayer asked to take the wheel, grabbed Ong's sleeve, and said "I will kill you." (C. 108). The police asked if Grayer had a weapon, and Ong said that he was not sure. (C. 109). Ong explained that when he got out of the car, he took his car keys but left his house keys in the car, which Grayer later took. (C. 109-10). Ong told the police that he did not want to press

[2] The body worn camera footage can be found in the first volume of exhibits. Based on appellate counsel's review of the body worn camera transcript and videos impounded by the trial court, the relevant video is saved under file name: Axon_Body_3_Video_2020-09-06_1857-3.

charges. (C. 110). The police urged Ong to press charges, saying that Grayer had probably done this before and that if he did not press charges, they would let Grayer go and that Grayer could do this again. (C. 110-12). When Ong continued to resist pressing charges, one of the officers said to Ong, "if we don't take a stance against evil . . . then what will happen to society?" (C. 111-12). Ong then agreed to press charges. (C. 112).

On July 1, 2021, the court held a hearing on Grayer's allegations against the State and a separate *Krankel* hearing. (R. 107-21). After hearing arguments regarding Grayer's allegations against the State, the court concluded that the body worn camera video spoke for itself and that there was no evidence to support Grayer's allegations against the State. (R. 109-15).

At the *Krankel* hearing, the court heard from both defense counsel and Grayer regarding his ineffective assistance claims. (R. 116-21). During the hearing, Grayer said, ". . . all I remember is I was at a party that night that evening, I got too drunk so I don't even remember getting in the car, the Lyft car. My auntie [and] cousin [] say they carried me to the car, but when we got to the gas station, I saw on the video --[.]" (R. 120). The court cut Grayer off and found that there was no basis for his allegation of ineffective assistance of counsel. (R. 120-21).

Grayer's sentencing followed the *Krankel* hearing. (R. 121). The State related that it was initially going to ask for the lowest prison sentence because Grayer seemed to be remorseful when he said at trial that he was too drunk and could not remember what happened, but because Grayer later "blame[d] everyone except himself[,]" the State asked for a sentence at the top of the sentencing range. (R. 123). According to the Pre-Sentence Investigation ("PSI") report, Grayer admitted to having an alcohol problem but expressed a willingness to participate in treatment.

(C.I. 10). When asked about the offense, Grayer stated: "I was too drunk. I don't even remember getting in the Lyft." (C.I. 8). At the sentencing hearing, defense counsel explained that Grayer's drinking had gotten worse after his mother passed away two years ago. (R. 128). Defense counsel also highlighted that Grayer, who was 41 years old at the time of the offense, had worked as a carpenter for almost 20 years and supported his four school-aged children. (R. 125-26; C.I. 9). In allocution, Grayer apologized to Ong, recognizing that he messed up his work situation that day. (R. 128-29). Similarly, during the PSI interview, Grayer stated: "I feel bad for [Ong] because I work everyday too. I wish I could apologize to him. I wish I could have controlled my alcohol that day. I made his job harder that day." (C.I. 11).

The court initially sentenced Grayer to five and half years in prison, noting Grayer's apology to Ong and acceptance of responsibility. (R. 129). But, after advising Grayer of his appeal rights, the court reduced Grayer's sentence to five years in prison due to Grayer's respectful demeanor in court. (R. 130). The court denied Grayer's motion to reconsider sentence. (C. 116-17; R. 132). Grayer filed a timely notice of appeal. (C. 120).

Direct Appeal

On appeal, Grayer argued that the State presented insufficient evidence that he had the specific intent to commit vehicular hijacking and that he committed an act that constituted a substantial step toward the commission of a vehicular hijacking. *People v. Grayer*, 2022 IL App (1st) 210808, ¶ 32. With respect to specific intent, relying on *People v. Slabon*, 2018 IL App (1st) 150149, Grayer averred that although voluntary intoxication was no longer an affirmative defense in Illinois, evidence of voluntary intoxication may be relevant to specific intent offenses like

attempt. *Grayer*, 2022 IL App (1st) 210808, ¶¶ 37-38. Grayer also argued that his five-year prison sentence was excessive due to the unique facts of the case and mitigating evidence presented. *Id*., ¶ 32.

In holding that there was sufficient evidence of Grayer's specific intent to commit attempt vehicular hijacking, the appellate court majority determined a defendant's voluntary intoxication is not relevant to the question of intent in specific intent offenses and that "*Slabon* misstates the law on voluntary intoxication as it stands today." *Id*., ¶ 41. The majority explained that Grayer's intent to hijack Ong's car was supported by Grayer's "grasp on directions" and the surveillance video that showed Grayer shaking Ong's house keys "in a taunting manner," attempting to put Ong's house keys into the car's ignition, and "chasing" Ong around the car. *Id*. The majority further held that there was sufficient evidence that Grayer took a substantial step toward the commission of vehicular hijacking and that his sentence was not excessive. *Id*., ¶¶ 48, 57.

Justice Gordon dissented, finding that the State failed to prove that Grayer specifically intended to hijack the Lyft car and that his actions constituted a substantial step toward hijacking the car. *Grayer*, 2022 IL App (1st) 210808, ¶ 61 (Gordon, J., dissenting). With regard to specific intent, Justice Gordon disagreed with the majority's assessment of the surveillance video, explaining: "once defendant went into the driver's side of the vehicle, the video does not show what defendant is doing in the vehicle. That statement is false." *Id*. Additionally, Justice Gordon found that there "never was any real evidence that the defendant intended to take the vehicle from the driver" and that Grayer's "drunken threat" and momentary grabbing the driver's shirt was "caused by the defendant's intoxication and his belief that the driver was not taking the defendant to his residence and was going

the wrong way." *Id.* Finally, Justice Gordon concluded that Grayer "may have been guilty of assault and battery but not the attempted hijacking of a motor vehicle." *Id.*

Grayer filed a petition for rehearing, which was denied on August 3, 2022. This Court granted leave to appeal on November 30, 2022.

ARGUMENT

The State failed to prove beyond a reasonable doubt that Santana Grayer committed attempt vehicular hijacking, where Grayer, a voluntarily intoxicated Lyft passenger trying to get home from a social gathering, did not have the specific intent to commit the underlying offense.

This Court should reverse Santana Grayer's conviction for attempt vehicular hijacking because the State failed to prove beyond a reasonable doubt that Grayer, a drunk Lyft passenger who was trying to get home safely, specifically intended to hijack his Lyft driver's car. 720 ILCS 5/8-4(a), 18-3(a) (West 2020). At trial and on direct appeal, Grayer argued that given his level of intoxication and drunken belief that he was being driven in the wrong direction, the State failed to prove that Grayer specifically intended to commit a vehicular hijacking. Critically, Grayer never asserted that his voluntary intoxication constituted an affirmative defense. Yet, on direct appeal, the State argued for the first time that Grayer's voluntary intoxication was not relevant to the question of specific intent due to the legislature's elimination of voluntary intoxication as an affirmative defense in 2002. In affirming Grayer's conviction, the appellate court majority concluded that following the 2002 amendment to section 6-3 of the Criminal Code of 2012, which removed voluntary intoxication as an affirmative defense, a defendant's voluntary intoxication is no longer relevant to specific intent offenses like attempt. *People v. Grayer*, 2022 IL App (1st) 210808, ¶ 42 (finding *People v. Slabon*, 2018 IL App (1st) 150149 "misstates the law"). The plain language of the attempt statute, 720 ILCS 5/8-4, supported by the legislative history of section 6-3, makes clear that by amending section 6-3 in 2002, the legislature only intended to eliminate voluntary intoxication as an affirmative defense and the amendment had no impact on the State's burden to prove all elements of attempt offenses under section 8-4. Therefore, considering

Grayer's voluntary intoxication, along with the other circumstances of this incident, the State failed to prove beyond a reasonable doubt that Grayer specifically intended to hijack his Lyft driver's car.

A. Standard of Review

When considering the sufficiency of the evidence, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004).

B. The State's burden of proving specific intent in attempt offenses

At criminal trials, the State bears the burden of proving all elements of the offense, including the requisite mental state, beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *In re Winship*, 397 U.S. 358, 361-64 (1970). In Illinois, "[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." 720 ILCS 5/8-4(a) (West 2020); *see also* 720 ILCS 5/4-4 (West 2020) ("A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct.").

Attempt is a specific intent offense, which requires the State to prove that a defendant intended to commit the stated offense. *People v. Harris*, 72 Ill. 2d 16, 27-28 (1978); *People v. Holmes*, 254 Ill. App. 3d 271, 276 (1st Dist. 1993) ("It is established law in Illinois that 'attempt' is a specific intent crime"). Unlike general

intent offenses, which only require that the prohibited result be reasonably expected to follow from the offender's voluntary act, regardless of the offender's subjective desire, specific intent offenses require "proof that the prohibited harm was intended[.]" *People v. Lewis*, 165 Ill. 2d 305, 337 (1995); *see also People v. Garland*, 254 Ill. App. 3d 827, 832 (1st Dist. 1993) ("Specific intent exists where from the circumstances the offender must have subjectively desired the prohibited result.").

Illinois law is clear. When the State charges a defendant with the crime of attempt, the State must prove beyond a reasonable doubt that the defendant specifically intended to commit the underlying offense.

C. The 2002 amendment to section 6-3, concerning affirmative defenses, did not change the State's burden of proving the required mental state in specific intent offenses.

Historically, Illinois courts have recognized that a defendant's state of voluntary intoxication can be used to challenge the sufficiency of the State's evidence of specific intent, distinguishing between specific intent offenses and general intent offenses. *People v. Cochran*, 313 Ill. 508, 518 (1924) (explaining that for offenses that require intent, it is "settled law" that "where intoxication is so extreme as to suspend entirely the power of reason and the accused is incapable of forming an intent, he cannot be held guilty of such crime unless the intent was formed before the intoxication."); *Bruen v. People*, 206 Ill. 417, 426-27 (1903) ("We have held that while drunkenness is no excuse for crime, either at common law or under the statute, yet, where it is necessary to prove a specific intent before a conviction can be had, it is competent to prove that the accused was at the time wholly incapable of forming such intent, whether from intoxication or otherwise."); *see also* Timothy P. O'Neill, *Illinois' Latest Version of the Defense of Voluntary Intoxication: Is It Wise? Is It Constitutional?*, 39 DEPAUL L. REV. 15, 21-22 (1989)

(explaining that prior to the Criminal Code of 1961, Illinois common law allowed defendants to use evidence of voluntary intoxication as a defense to specific intent offenses).

In 1961, the legislature designated voluntary intoxication as an affirmative defense. Ill. Rev. Stat. 1961, ch. 38, § 6-3; *see also* Ill. Rev. Stat. 1961, ch. 38, § 6-4 ("A defense based upon any of the provisions of Article 6 is an affirmative defense."). And voluntary intoxication remained an affirmative defense in Illinois until 2001. 720 ILCS 5/6-3 (West 2000) (formally formerly Ill. Rev. Stat. 1961, ch. 38, § 6-3) (to successfully raise voluntary intoxication as an affirmative defense, a defendant's voluntary intoxication had to be "so extreme as to suspend the power of reason and render him incapable of forming a specific intent which is an element of the offense").

By designating voluntary intoxication as an affirmative defense, additional requirements were placed both on the defense and the State. Defendants had to provide the State with written notice of the affirmative defense, Ill. S. Ct. Rule 413(d), and at trial, the defense had to present some evidence to support the affirmative defense, "unless the State's evidence raises the issue involving the alleged defense." 720 ILCS 5/3-2(a) (West 2000). If some evidence of the affirmative defense was presented, then the State had to "sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense." 720 ILCS 5/3-2(b) (West 2000).

Then, in 2002, the legislature removed all language regarding voluntary intoxication from section 6-3, thus eliminating voluntary intoxication as an affirmative defense. Public Act 92-466 (eff. Jan. 1, 2002) (amending 720 ILCS 5/6-3 (West 2000)) (maintaining *involuntary* intoxication as an affirmative defense);

720 ILCS 5/6-4 (defenses found in Article 6 are affirmative defenses). Following the 2002 amendment, section 6-3 now provides that a defendant's intoxication is only an affirmative defense where "such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." 720 ILCS 5/6-3, 6-4 (West 2020). This is the statute that was in effect at the time of Grayer's trial in March 2021.

Importantly, the 2002 amendment to section 6-3, which only governs intoxication as an *affirmative defense*, had no impact on the State's *burden* when prosecuting attempt charges under section 8-4. 720 ILCS 5/8-4(a) (West 2020). The omission of voluntary intoxication from section 6-3 did not alter or amend the attempt statute in any way, nor did it change the fact an attempt, as a specific intent offense, requires "proof of an additional special mental element." *People v. Slabon*, 2018 IL App (1st) 150149, ¶ 33 (citing *People v. Robinson*, 379 Ill. App. 3d 679, 684 (2d Dist. 2008)). Thus, as recognized by Illinois courts long before the defense of voluntary intoxication was ever designated as an affirmative defense, a defendant's voluntary intoxication remains relevant to specific intent offenses.

The legislative history of the 2002 amendment confirms that the legislature only intended to eliminate voluntary intoxication as affirmative defense and that the amendment to section 6-3 in no way changed the State's burden of proving the required mental state in specific intent offenses. During Senate debate on the amendment, Senator Hawkinson wanted "to make a point for legislative intent[,]"explaining that "[n]othing in this bill removes the obligation of the people of the State, through the State's Attorney, *to prove the mental intent that is requisite for the underlying offense*. This bill simply removes a separate affirmative defense

from the statute." 92d Ill. Gen. Assem., Senate Proceedings, Mar. 20, 2001, at 27 (emphasis added). Senator Hawkinson further explained that "nothing in this legislation would, in any way, affect the ability to introduce any evidence, *including evidence of voluntary intoxication, which might go to negate the required mental state for any individual criminal offense*. *Id*. (emphasis added).

In response to Senator Hawkinson's statements, Senator Molaro asked why the amendment was necessary if a defendant could still argue that the State's evidence of a required mental state was insufficient due to a defendant's voluntary intoxication. *Id*. at 28. Senator Jacobs explained that the difference was in the burden of proof. *Id*. Senator Hawkinson added that "[a]ffirmative defenses normally have to be noticed." *Id*. Senator Hawkinson also pointed out that eliminating voluntary intoxication as an affirmative defense would resolve confusion in the law:

> . . . by having [] a separate statute for voluntary intoxication, we believe can create some confusion in the law, *might suggest that somehow voluntary intoxication is a separate defense, in addition to being a negation of the required mental state*. . . . I think we should avoid that confusion, with the understanding that we have put forward here that *we're not attempting to, in any way, undermine the -- the burden on the prosecution to prove mental state*.

Id. (emphasis added). Furthermore, in the House of Representatives, the only reference to this amendment was that it removed voluntary intoxication as an *affirmative defense*. 92d Ill. Gen. Assem., House Proceedings, May 10, 2001, at 8 (statements of Representative Hoffman).

As discussed by Senators Jacobs and Hawkinson, when voluntary intoxication was designated as an affirmative defense, additional requirements were placed both on the defense and the State. The defense was required to provide written notice to the State prior to trial, Ill. S. Ct. Rule 413(d), and at trial, the defense

was required to present some evidence of defendant's voluntary intoxication, unless the State presented evidence of the defendant's voluntary intoxication in its case in chief. 720 ILCS 5/3-2(a) (West 2000). If some evidence of the defendant's voluntary intoxication was presented, then the State had the burden of proving that the defendant's voluntary intoxication was not "so extreme as to suspend the power of reason and render him incapable of forming a specific intent which is an element of the offense[,]"along with all the other elements of the offense. 720 ILCS 5/3-2(b) (West 2000); 720 ILCS 5/6-3 (West 2000) (eff. Jan. 1, 1988 to Dec. 31, 2001). By eliminating voluntary intoxication as an affirmative defense, the State no longer carries this *additional* burden.

Senator Hawkinson asserted that eliminating voluntary intoxication as an affirmative defense would resolve confusion in the law regarding the role of voluntary intoxication in criminals trials. 92d Ill. Gen. Assem., Senate Proceedings, Mar. 20, 2001, at 28. Designating voluntary intoxication as an affirmative defense may have caused confusion because voluntary intoxication is different from most other affirmative defenses. *See* O'Neill, *supra* at 40. Unlike the affirmative defenses of necessity or entrapment, where a defendant admits to all the elements of the offense but proves a mitigating factor that excuses the defendant's actions, when raising a voluntary intoxication defense, the defendant does not admit to all the elements of the offense. *Id*. Instead, "because voluntary intoxication negates an essential element of a particular crime, it is more precisely a 'failure of proof' argument, rather than a true affirmative defense." *Id*. Thus, voluntary intoxication, whether it is designated as an affirmative defense or not, is always failure of proof argument.

Accordingly, removing voluntary intoxication as an affirmative defense

merely removed the procedural requirements and additional burdens that come with affirmative defenses. And the amendment in no way altered the prosecution's burden of proving the required mental state for attempt offenses beyond a reasonable doubt.

Given the legislature's clear objective in amending section 6-3, the appellate court's conclusion in Grayer's direct appeal—that a defendant's voluntary intoxication is not relevant to the required mental state in specific intent offenses and that *People v. Slabon*, 2018 IL App (1st) 150149 "misstates the law"—is wrong. *People v. Grayer*, 2022 IL App (1st) 210808, ¶ 42. Grayer, therefore, urges this Court to find that *Slabon* correctly states the law as it stands today and that Grayer's voluntarily intoxicated state is relevant to this Court's determination of whether the State proved he had the specific intent to hijack the Lyft car.

In *Slabon*, the appellate court found that a defendant's voluntary intoxication may be relevant to negate *mens rea* in specific intent offenses, "even if it does not provide an affirmative defense against [the defendant's] criminal conduct." 2018 IL App (1st) 150149, ¶ 33. Slabon argued on direct appeal that: (1) he was denied his right to present a defense where the trial court barred him from presenting evidence of his voluntary intoxication and did not allow him to argue that his intoxicated state was relevant in determining whether he possessed the requisite *mens rea* for aggravated battery, and (2) the trial court erred when it instructed the jury, using a non-Illinois Pattern Jury Instruction, that voluntary intoxication was not a defense to aggravated battery. *Id.*, ¶ 1. Notably, the State on appeal acknowledged that:

> It is accepted that, despite section 5/6-3 of the Code, *the defense of voluntary intoxication may be employed when the offense charged requires proof of a specific intent as to one of the elements of the crime*.

> This is based on the rationale that a defendant cannot be said to be guilty if he was intoxicated to such a degree as to be unable to form an intent required to commit the offense.

State's Brief at 32-33, *People v. Slabon*, 2018 IL App (1st) 150149 (emphasis added).[3] Consistent with this position, the State asserted that the trial court correctly barred evidence of the Slabon's voluntary intoxication because aggravated battery is a general intent offense, and the jury instruction properly stated the law because voluntary intoxication was no longer an affirmative defense. *Id*. at 33-34, 41-42. The appellate court adopted the State's view, finding that because section 6-3 does not mention voluntary intoxication, a defendant's state of voluntary intoxication is not an affirmative defense. *Slabon*, 2018 IL App (1st) 150149, ¶ 33. However, the *Slabon* court also found that a defendant's state of voluntary intoxication is still relevant to specific intent offenses:

> We do not find, however, that the omission of voluntary intoxication in section 6-3 means this condition is never relevant in a criminal proceeding. Rather, a person's state of voluntary intoxication may be relevant in the commission of specific intent crimes, which "require proof of an additional special mental element."

Id., ¶ 33 (quoting *People v. Robinson*, 379 Ill. App. 3d 679, 684 (2d Dist. 2008)). The *Slabon* court further explained that Illinois courts have long recognized that "where voluntary intoxication is so extreme as to suspend entirely the power of reasoning," a defendant is not capable of forming specific intent or malice. *Id*.

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[3] This Court may take judicial notice of readily verifiable public documents such as filings before Illinois courts. Indeed, as the court system is a "unified" one, this Court may take judicial notice of its records. *See People v. Davis*, 65 Ill. 2d 157, 165 (1976) (judicial notice of facts readily verifiable from sources of indisputable accuracy is important, the appropriate use of which is to be commended); *People v. Jimerson*, 404 Ill. App. 3d 621, 634 (1st Dist. 2010) (taking judicial notice of the trial records in codefendant's related appeal).

(citing *People v. Cunningham*, 123 Ill. App. 2d 190, 209 (1970) and cases cited therein). The *Slabon* court's interpretation of the current version of section 6-3 is fully supported by the legislative history and correctly states the law.

On the other hand, in *Grayer*, the majority's interpretation of section 6-3 directly conflicts with the legislature's objective in amending section 6-3. In reaching the conclusion that a defendant's voluntary intoxication is no longer relevant to specific intent offenses, the *Grayer* majority relied on cases where appellate courts generally asserted that voluntary intoxication was no longer "an excuse for criminal conduct," when they actually mean that it is no longer an *affirmative defense*. *Grayer*, 2022 IL App (1st) 210808, ¶ 40 (citing to *People v. Jackson*, 362 Ill. App. 3d 1196, 1201 (4th Dist. 2006); *People v. Rodgers*, 335 Ill. App. 3d 429, 433 (5th Dist. 2002)). The *Grayer* majority also cited to *People v. Himber* for the proposition that "voluntary intoxication cannot be asserted as an affirmative defense to negate the element of intent." *Grayer*, 2022 IL App (1st) 210808, ¶ 40 (quoting *People v. Himber*, 2020 IL App (1st) 162182, ¶ 55). But, this assertion conflates voluntary intoxication as an affirmative defense with a defendant's ability to contest the sufficiency of the State's evidence at trial. As discussed earlier, this confusion is precisely why the legislature decided to amend section 6-3 and eliminate voluntary intoxication as an affirmative defense. *See supra* p. 20 (quoting 92d Ill. Gen. Assem., Senate Proceedings, Mar. 20, 2001, at 27 (statements of Senator Hawkinson)).

Furthermore, unlike other reviewing courts that have recognized and applied *Slabon*'s holding, the *Grayer* majority wrongly concluded that *Slabon* misstates the current state of law regarding voluntary intoxication. *Grayer*, 2022 IL App

(1st) 210808, ¶ 41; *see People v. Scott*, 2022 IL App (5th) 190079-U, ¶¶ 83-85[4] (applying *Slabon* but finding that the defendant's intoxication was not extreme enough to render him incapable of forming the element of specific intent); *People v. Rutigliano*, 2020 IL App (1st) 171729, ¶ 72 (applying *Slabon* and finding that the court did not err by instructing the jury that voluntary intoxication was not generally a defense to a criminal charge because the instruction did not state that the jury could not consider evidence of the defendant's intoxication at all).

The *Grayer* majority found that the *Slabon* court's reasoning was flawed because it cited to *People v. Cunningham*, 123 Ill. App. 2d 190, 209 (1st Dist. 1970), which was decided before the 1988 and 2002 amendments to section 6-3. *Grayer*, 2022 IL App (1st) 210808, ¶ 41. But, *Slabon* was decided in 2018, well after the 2002 amendment, and the *Slabon* court was clearly aware of the changes in the law. *Slabon*, 2018 IL App (1st) 150149, ¶ 33 (specifically addressing the fact that voluntary intoxication had been omitted from section 6-3). Moreover, the *Slabon* court's citation to *Cunningham* and the cases cited therein, was merely to demonstrate that long before voluntary intoxication was ever designated as an affirmative defense, Illinois courts recognized that a voluntarily intoxicated defendant may be so intoxicated as to be incapable of forming specific intent. *See Cunningham*, 123 Ill. App. 2d at 209 (citing a line of cases dating back to 1924). Accordingly, the *Grayer* court's determination that *Slabon* misstates the law is wrong.

Consistent with *Slabon*, this Court should conclude that a defendant's

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[4] Although unpublished, this Court may consider the appellate court's decision in *Scott* as persuasive authority. *See* Ill. S. Ct. R. 23(e)(1). A copy of the *Scott* decision is included in the appendix.

voluntary intoxication remains relevant to the element of intent in specific intent offenses. 2018 IL App (1st) 150149, ¶ 33. By passing the 2002 amendment to section 6-3, the legislature only intended to remove voluntary intoxication as an affirmative defense. The legislature never intended to relieve the prosecution of its duty to prove every element of an offense, including the required mental state for specific intent offenses like attempt. And, as recognized by Illinois courts long before voluntary intoxication was ever designated as an affirmative defense, a defendant's voluntary intoxication remains relevant in trials for specific intent offenses.

D. Here, considering Grayer's voluntary intoxication, the State failed to prove beyond a reasonable doubt that Grayer had the specific intent to hijack his Lyft driver's car, where the evidence merely established that Grayer was an intoxicated Lyft passenger who trying to get home safely.

Given the unique circumstances of this case, including the undisputed fact that Grayer was a drunk Lyft passenger who thought he was being driven in the wrong direction, the State failed to prove beyond a reasonable doubt that Grayer attempted to hijack the Lyft car. Here, the State alleged that the attempt vehicular hijacking occurred when Grayer "pulled at victim's arm and threatened to kill victim[.]" (C. 11). As a result, the State was required to prove that Grayer subjectively desired to steal his Lyft driver's car when, from the back seat, he pulled on the driver's sleeve and made these statements. *See People v. Garland*, 254 Ill. App. 3d 827, 832 (1st Dist. 1993) (specific intent requires that the offender "subjectively desired the prohibited result"). But, as trial counsel argued below, the State failed to prove that Grayer, who was clearly intoxicated, had the specific intent to steal the Lyft car. Instead, the evidence only showed that Grayer wanted to go home and that he pulled on his Lyft driver's sleeve because he believed he was being driven in the wrong direction. In fact, when the police arrived at the

gas station, they found Grayer asleep in the car. Therefore, viewing the evidence in the light most favorable to the State, the State failed to meet its burden at trial, and this Court should reverse Grayer's conviction for attempt vehicular hijacking.

Due process protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2; *In re Winship*, 397 U.S. 358, 361-64 (1970); *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). The State bears the burden of proof as to each of the essential elements of the offense, and may not leave essential elements to conjecture or assumption. *People v. Weinstein*, 35 Ill. 2d 467, 470 (1966); *People v. Laubscher*, 183 Ill. 2d 330, 335-36 (1998). When considering the sufficiency of the evidence, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A conviction must be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it creates reasonable doubt of the defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999).

By charging Grayer with attempt vehicular hijacking, the State was required to prove that Grayer (1) specifically intended to commit a vehicular hijacking and (2) committed an act that constituted a substantial step toward the commission of a vehicular hijacking. 720 ILCS 5/8-4(a); 18-3(a) (West 2020). A defendant's intent to commit a crime may be proved by circumstantial evidence and can be inferred from the circumstances of the offense. *People v. Acklin*, 2020 IL App (4th) 180588, ¶¶ 21-26 (reversing defendant's conviction residential burglary by unauthorized entry because neither direct nor circumstantial evidence established

that the defendant entered the home with the intent to commit a theft or felony therein, where the defendant had been invited into the home for a party, got drunk, fell asleep, and then removed property from the home the next day). A substantial step is any act committed by the defendant that puts him in "dangerous proximity to success." *People v. Lipscomb-Bey*, 2012 IL App (2d) 110187, ¶¶ 24, 43 (reversing the defendant's conviction for attempt armed habitual criminal because the evidence failed to show that defendant was not dangerous proximity of selling a gun, where there was no evidence that the defendant possessed a gun to sell); *see also People v. Oduwole*, 2013 IL App (5th) 120039, ¶ 44 (whether a substantial step was taken must be determined "on a case-by-case basis by evaluating the unique facts and circumstances in each particular case").

Here, the State failed to prove that Grayer intended to commit a vehicular hijacking while in the back seat of the Lyft car. Ong testified that on September 6, 2020, he was driving for Lyft when he picked up Grayer as passenger. (R. 34-37). A person named Phyllis had ordered a Lyft ride for Grayer, presumably because Grayer was drunk. (R. 37-38, 53-54). Ong testified that when he picked up Grayer, Grayer was clearly intoxicated. (R. 53). Grayer was moving from side to side and sounded drunk. (R. 54). Five to ten minutes into the ride, Grayer, who was in the back seat, told Ong that he was driving in the wrong direction and that he wanted to go home. (R. 39, 54-56). Ong told Grayer that he was going in the right direction, explaining that he was following the GPS directions provided in the Lyft app. (R. 39, 56). As Ong continued driving, Grayer became upset and told Ong he wanted to drive while grabbing Ong's right shirt sleeve. (R. 39-41, 58). Although not initially reported to the police, Ong testified that while Grayer was grabbing his sleeve, Grayer put his right hand on his waistband and said he was going was going to

kill him. (R. 41-42, 76). Ong thought that Grayer was grabbing a knife or a gun. (R. 43). However, the parties stipulated that police body worn camera footage would show that Ong did not tell the officers on scene that he thought Grayer had a weapon on his waistband. (R. 76). Ong eventually pulled into a gas station because he was scared and concerned about driving safely with Grayer grabbing his shirt sleeve. (R. 43, 63). Ong testified that while at the gas station, Grayer was so intoxicated that he was incapable of running. (R. 65). The surveillance video footage confirms this. (St. Ex. 1, 2050 at 00:20-00:40, 01:40-01:50).

The State alleged that the attempt vehicular hijacking occurred when Grayer grabbed Ong's shirt sleeve and said he was going to kill him. (C. 11). As a result, the State was required to prove that Grayer had the specific intent to hijack Ong's car while he was still seated in the back seat of the car and while Ong was still driving. The State failed to meet this burden.

Notably, Ong never testified that he thought Grayer was trying to steal the car. Additionally, Grayer never threatened to steal Ong's car; he never reached for Ong's car keys or otherwise attempted to take control of the car while Ong was driving; he never brandished or possessed a weapon; and he did not strike or harm Ong in any way. *See People v. Jones*, 184 Ill. App. 3d 412, 415-16 (1st Dist. 1989) (finding that, where the defendant had an opportunity to engage in behavior likely to cause the complainant's death, but did not engage in that behavior, the evidence failed to prove an intent to kill). As a Lyft passenger, Grayer had permission to be inside the car, and Ong never testified that he terminated that permission by telling Grayer to get out of the car. While Ong testified that he pulled into the gas station because he was scared and feared for his life, Ong never testified that he feared Grayer was going to hijack his car. *See People v. Grayer*, 2022 IL

App (1st) 210808, ¶ 61 (Gordon, J., dissenting) (Justice Gordon found that Grayer "may have been guilty of assault and battery but not the attempted hijacking of a motor vehicle.").

Instead, the trial evidence supports that Grayer pulled on Ong's shirt sleeve because he thought he was being driven in the wrong direction and any remarks about "killing" Ong was due to Grayer's inebriated state. At trial, the State did not dispute that Grayer was intoxicated or that he thought he was being driven in the wrong direction. In fact, the State's own evidence, Ong's testimony and the gas station surveillance video, established that Grayer was very drunk. (R. 53-54, 65; St. Ex. 1). Ong testified that Grayer was so drunk that he was moving from side to side and was incapable of running due to his level of intoxication. (R. 53-54, 65). Surveillance video from the gas station corroborates this, showing Grayer swaying from side to side and stumbling while walking. (St. Ex. 1, 2050 at 00:20-00:40, 01:40-01:50).

While it was irrational for Grayer to think that he should have been allowed to drive Ong's car—given that he was taking a Lyft ride and he was too drunk to drive—this unreasonable belief is probative of his level of intoxication. It was similarly inappropriate for Grayer to tell Ong that he was going to kill him after Ong told him that he could not drive. However, given Grayer's drunken state and as shown by the events that occurred afterwards, Grayer's statements were mere drunken hyperbole. *See Grayer*, 2022 IL App (1st) 210808, ¶ 61 (Gordon, J., dissenting) ("The drunken threat . . . was caused by the defendant's intoxication and his belief that the driver was not taking the defendant to his residence and was going the wrong way.").

The fact that Grayer's drunken statements were not acted upon further

supports that he did not intend to hijack the Lyft car. Aside from pulling at Ong's sleeve, Grayer did not physically touch or harm Ong in any way. Indeed, Grayer's actions at the gas station were consistent with a drunk person wanting to go home and not of a person who just tried to steal a car. The surveillance video shows that after Ong pulled over at the gas station and went inside the store, Grayer leaned on the outside of the car with his arms crossed as if he was waiting for Ong to complete the Lyft ride. (St. Ex. 1, 2050 at 02:00-02:11). After waiting outside for over five minutes,[5] Grayer eventually retrieved Ong's house keys from the car and held them up so Ong could see them from inside the store. (St. Ex. 1, 2745 at 00:00-00:12). After waiting almost 20 minutes for Ong to complete the Lyft ride,[6] Grayer eventually got into the driver's seat, fully reclined the seat to lie down, and appeared to fall asleep. (St. Ex. 1, 3840 at 00:00-02:21 and 5730 at 00:00-00:10; R. 85). This drunken behavior is not reflective of a person who had just attempted to commit a vehicular hijacking.

The appellate court majority held that the State's evidence of intent was sufficient because Grayer's conduct demonstrated that he was not so intoxicated as to be incapable of forming specific intent. *Grayer*, 2022 IL App (1st) 210808, ¶ 42. The majority emphasized that Grayer "appeared to have a grasp on directions, knowing which direction Ong was driving and believing that it was not in the direction of his home." *Id.*, ¶ 42. The trial court similarly found that Grayer's level

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[5] The timestamp on the surveillance video indicates that Ong entered the gas station store at 6:22 p.m. and that Grayer held up Ong's keys at 6:27 p.m. (St. Ex. 1, 2050 at 01:10 and 2745 at 00:01).

[6] The timestamp on the surveillance video indicates that Ong pulled into the gas station at 6:21 p.m. and Grayer got into the driver's seat and reclined the seat at 6:39 p.m. (St. Ex. 1, 2050 at 00:01 and 3840 at 01:00).

of intoxication did not amount to a legal defense, explaining that Grayer was "aware of his environment" and knew that Ong was driving him in the wrong direction. (R. 86). But, the evidence *never* established that Grayer's drunken assertion that Ong was driving in the wrong direction was in fact true. There was no evidence of Grayer's home address or the address that was inputted into the Lyft app. The trial evidence did not even establish whether Grayer inputted the destination address in the Lyft app or whether Phyllis, the account holder who ordered the ride, had inputted the address. (R. 37, 54-55).

Furthermore, the appellate court majority found that Grayer's intent was supported by the surveillance video from the gas station because it shows that when Grayer was "chasing" Ong around the car, Grayer "appeared to speed up in his pursuit and never took his eyes off of Ong." *Grayer*, 2022 IL App (1st) 210808, ¶ 42. The trial court referred to it as a "slow motion chase." (R. 87). *But see People v. Radojcic*, 2013 IL 114197, ¶ 34 (while a trial court's factual findings that are based on live testimony are entitled to great deference, when the trial court's findings are based on evidence that is not live testimony, the trial court does not occupy a position to superior to the appellate courts); *People v. Dixon*, 2015 IL App (1st) 133303, ¶ 20 (same); *People v. Shaw*, 2015 IL App (1st) 123157, ¶ 29 (same).

The interaction between Ong and Grayer at the gas station can hardly be described as a "chase." The surveillance video, which does not contain any audio, shows that Ong pulled into the gas station and got out of the car. (St. Ex. 1, 2050 at 00:00-00:20). Grayer, who was still seated in the back seat, then got out of the car, swaying from side to side, and walked around the front of the car, toward Ong. (St. Ex. 1, 2050 at 00:20-00:40). Ong walked around the car and Grayer followed. (St. Ex. 1, 2050 at 00:40-01:00). As Grayer circled the car a second time,

Ong walked inside the gas station store, but Grayer did not follow him. (St. Ex. 1, 2050 at 01:05-01:20). At no point did Grayer go inside the gas station store. Grayer waited outside, leaning on the car with his arms crossed, as though he was waiting for Ong to return to the car to complete the Lyft ride. (St. Ex. 1, 2050 at 2:00-2:11).

The appellate court majority also emphasized that Grayer, "perhaps believing he was in the possession of Ong's car keys, appeared to shake Ong's house keys toward him in a taunting manner." *Grayer*, 2022 IL App (1st) 210808, ¶ 42. However, shaking Ong's house keys, in this context, is not indicative of a specific intent to hijack a car. *See Grayer*, 2022 IL App (1st) 210808, ¶ 61 (Gordon, J., dissenting) (Justice Gordon found that when Grayer "stood in front of the vehicle at the gas station holding the driver's house keys . . . he was 'playing with' the driver as some intoxicated people do when they are under the influence of liquor."). Grayer, who ultimately waited at the gas station for about 40 minutes, could have been trying to get Ong's attention so that Ong would exit the gas station store and complete the Lyft ride.

Additionally, the appellate court found that after Grayer held up Ong's house keys, Grayer then "got into the driver's seat and appeared to attempt to put Ong's house keys into the vehicle's ignition and start the vehicle." *Grayer*, 2022 IL App (1st) 210808, ¶ 42. The trial court found that "there was a motion towards where the ignition would be if to start that car." (R. 87). However, while the surveillance video shows that Grayer moved his arm forward, it does not show what he was reaching for. (St. Ex. 1, 3840 at 00:00-00:45, 01:10-02:21). *See Grayer*, 2022 IL App (1st) 210808, ¶ 61 (Gordon, J., dissenting) (finding that"the video does *not* show what [Grayer was] doing in the vehicle") (emphasis added). Due

to angle of the camera and siding of the car, the ignition is not visible in the video. As a result, the video does not establish whether this car even had a traditional key ignition or if it had push-button ignition. There also was no testimony from Ong, or anyone else who was present at the gas station, about what Grayer was doing in the car. Grayer could have just as easily been reaching for the radio, a cup holder, or anything else in front of him. Thus, the appellate court's conclusion that Grayer reached for the ignition to start the car was speculative and not supported by the evidence. *See Dixon*, 2015 IL App (1st) 133303, ¶¶ 20, 27-34 (reversing the defendant's conviction for armed robbery because that the trial court's finding, which was based on a surveillance video, that the defendant possessed a dangerous weapon that could be used a bludgeon, was not entitled to any deference and was not supported by the video); *Shaw*, 2015 IL App (1st) 123157, ¶ 29 (holding that the trial court does not occupy a position superior to the appellate courts when reviewing video evidence and disagreeing with the trial court's finding that the surveillance video corroborated the essential elements of the offense).

The surveillance video also shows that Grayer never attempted to flee or acted in a manner consistent with consciousness of guilt. (St. Ex. 1, 5730 at 00:00-01:01). In fact, when Grayer was in the driver's seat, he fully reclined in the seat and appeared to fall asleep. (St. Ex. 1, 3840 at 00:00-02:21 and 5730 at 00:00-00:10; R. 85). When police found Grayer in this reclined position, he did not try to run or evade the police. (St. Ex. 1, 5730 at 00:00-00:10). As a result, the surveillance video supports that Grayer's actions were not indicative of a person who had just attempted to steal a car.

The unique facts and circumstances of this case, including Grayer's level

of intoxication, demonstrate that the State failed to prove the necessary elements of attempt vehicular hijacking. The State's own evidence established that Grayer was highly intoxicated, that someone ordered a Lyft to take Grayer home because he was unable to get home on his own, and that once in the Lyft, Grayer believed he was being driven in the wrong direction. The fact that Grayer ultimately waited at the gas station for 40 minutes, falling asleep inside the Lyft car, supports that Grayer wanted Ong to complete this Lyft ride, not that Grayer wanted to steal the car. Thus, the State failed to prove that Grayer had the specific intent to hijack the Lyft car and that he was in dangerous proximity to stealing the car.

In holding that the State's evidence was sufficient, the *Grayer* majority wrongly concluded that due to the 2002 amendment to section 6-3, voluntary intoxication was no longer relevant to the State's burden of proving specific intent in attempt offenses. *Grayer*, 2022 IL App (1st) 210808, ¶ 42. That conclusion both conflicts with both long-standing case law recognizing that a defendant's state of voluntary intoxication is relevant to specific intent and the legislative history of section 6-3, which confirms that the 2002 amendment only eliminated voluntary intoxication as an affirmative defense and had no impact on the State's burden to prove all elements of attempt offenses. Therefore, considering Grayer's voluntary intoxication, along with the other circumstances of this incident, the State failed to prove beyond a reasonable doubt that Grayer specifically intended to hijack the Lyft car. Accordingly, this Court should reverse the appellate court's decision and reverse Grayer's conviction for attempt vehicular hijacking.

CONCLUSION

For the foregoing reasons, Santana Grayer, defendant-appellant, respectfully requests that this Court reverse his conviction for attempt vehicular hijacking.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 36 pages.

/s/Cristina Law Merriman
CRISTINA LAW MERRIMAN
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Santana Grayer No. 128871

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Sentence to Illinois Department of Corrections **CCG N305**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS

v.

SANTANA GRAYER
Defendant

Case Number	**20CR1000201**
Date of Birth	**03/03/1979**
Date of Arrest	**09/06/2020**
IR Number	**1153515** **SID Number** **37182070**

ORDER OF COMMITMENT AND SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Years	Months	Class	Consecutive	Concurrent
001	720 ILCS 5/8-4(18-3(a))	ATTEMPT VEHICULAR HIJACKING	5		2		

On Count _____ defendant having been convicted of a class _____ offense is sentenced as a class _ offender pursuant to 730 ILCS 5/5-4.5-95(b).

On Count _____ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of _____ years and 299 days, as of the date of this order. Defendant is ordered to serve 2 years Mandatory Supervised Release.

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case numbers(s) _____ _____ _____ _____

AND: consecutive to the sentence imposed under case number(s) _____ _____ _____ _____

IT IS FURTHER ORDERED THAT ____

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

Dated July 1, 2021
Certified by: A. Mister
Deputy Clerk A. Mister

Judge **Gaughan, Vincent M.** 1553
Judge's No.

Verified by: _____

ENTERED
7/1/2021
Iris Y Martinez
Clerk of the Circuit Court
of Cook County, IL
DEPUTY CLERK A. Mister

IRIS Y MARTINEZ, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
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STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS)
)
v.)
) 20CR1000201
Santana Grayer)

IRIS Y MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

FILED
2021 JUL -6 AM 10:08

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:
COURT TO WHICH APPEAL IS TAKEN: APPELLATE COURT OF ILLINOIS
APPELLANT'S NAME: Santana Grayer
IR#: 1153515 **DOB:** 3/3/1979
APPELLANT'S ADDRESS: ILLINOIS DEPARTMENT OF CORRECTIONS
APPELLANT'S ATTORNEY: STATE APPELLATE DEFENDER
ADDRESS: 203 N. LASALLE, 24TH FLOOR CHICAGO, IL
OFFENSE: Attempt Vehicular Hijacking
DATE OF JUDGMENT: 3/31/21
SENTENCING DATE: July 1, 2021
SENTENCE: 5 YEARS ILLINOIS DEPARTMENT OF CORRECTIONS

APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the appellant; order the Clerk to prepare the Record on Appeal and to Appoint Counsel on Appeal. Appellant, being duly sworn, says that at the time of his conviction he was and is unable to pay for the Record or an appeal lawyer.

APPELLANT'S ATTORNEY

ORDER

IT IS ORDERED the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished to appellant without charge.
Date to be transcribed:

ENTERED
Judge Vincent Gaughan #1553
JUL 01 2021
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

TRIAL DATES: March 31, 202
SENTENCING DATES: July 1, 2021

DATE: July 1, 2021 , ENTER: Vincent M Gaughan
JUDGE

2022 IL App (1st) 210808

No. 1-21-0808

Opinion filed July 20, 2022

Third Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 20 CR 1000201
	)	
SANTANA GRAYER,	)	Honorable
	)	Vincent Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court, with opinion.
Justice McBride concurred in the judgment and opinion.
Presiding Justice Gordon dissented, with opinion.

OPINION

¶ 1 Following a bench trial, defendant Santana Grayer was found guilty of attempted vehicular hijacking, then sentenced to five years' imprisonment. The evidence introduced at trial showed that defendant was the passenger in Lyft rideshare vehicle driven by the victim, Arnold Ong. Defendant was intoxicated and believed that Ong was driving in the wrong direction. From the back seat of the vehicle, defendant grabbed Ong's shirt sleeve and threatened to kill him. Ong parked the vehicle at a gas station, took the keys to the vehicle, and called police.

¶ 2 On appeal, defendant contends that the court erred in finding him guilty of attempted vehicular hijacking where the State failed to present sufficient evidence to show that he had the intent to commit vehicular hijacking or that his actions constituted a substantial step toward the commission of that offense. Defendant maintains that his actions demonstrate that he was simply a highly intoxicated person who wanted to go home rather than represent a serious attempt to hijack Ong's vehicle. In the alternative, defendant contends that his sentence is excessive in light of the nonserious nature of the offense where no one was hurt and in light of the substantial mitigating evidence presented. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 A. Trial Proceedings

¶ 5 At trial, Ong testified that, in September 2020, he was driving for Lyft when he received a pickup request from a Lyft account-holder named Phyllis. When he arrived at the designated location, he saw a large group of people. Ong spoke to Phyllis who told him that defendant would be the passenger for the requested ride. Ong could tell that defendant was intoxicated. Defendant got into the back seat of Ong's vehicle, and Ong started to drive toward the designated location. Several minutes into the drive, defendant told Ong that he was driving the wrong direction. Ong testified that he was following the GPS directions in the Lyft application. The destination for the ride was inputted when the ride was requested. Ong did not know who put the destination information into the Lyft application. Ong told defendant that he was going in the right direction because he was following the GPS in the Lyft application.

¶ 6 Defendant then became angry and told Ong that he wanted to drive the vehicle himself. Ong told defendant that he could not drive the vehicle. Defendant asked to drive the car himself "multiple times" in a loud voice. Defendant then "got mad," grabbed Ong's shirt at his right

shoulder, and threatened to kill him. While grabbing Ong's shoulder with his left hand, defendant reached his right hand toward his waist. Ong thought defendant was trying to "grab something" from his waist. Ong believed defendant was attempting to get a "deadly weapon" from his waistband, such as a knife or a gun. Defendant repeatedly told Ong that he was going to kill him while holding onto his shirt sleeve.

¶ 7 Ong testified that he was scared and realized his "life was at stake." Ong drove the vehicle to a gas station. Ong got out of the vehicle and took his car keys and his cellphone with him. Defendant also got out of the vehicle and started "chasing" Ong around the vehicle. Ong acknowledged that defendant was moving slowly while following him around the vehicle, but Ong testified that he believed defendant could not run fast because he was intoxicated. Ong did not lock his vehicle after he got out because his keyless entry remote was not working. Ong testified that he could have used his keys to lock the vehicle, but he was in a hurry and did not have time to do so.

¶ 8 Ong was able to get away from defendant and went into the convenience store at the gas station. The people in the convenience store called the police for Ong. Ong did not tell the people in the convenience store that he believed defendant had a gun but did tell them that defendant threatened to kill him. While waiting for police, Ong wanted to check on his vehicle so he took a step outside of the convenience store to look at it. He saw defendant standing near the vehicle holding Ong's house keys, which Ong had left in the vehicle's cup holder. Defendant was waiving the keys toward Ong. Ong saw defendant get into the driver's seat of the vehicle with the house keys.

¶ 9 The State then submitted into evidence a surveillance video of the incident from the gas station's security system. The surveillance video shows Ong driving the vehicle into the gas station

near a pump. Ong then exits the vehicle, and defendant exits too. Ong walks toward the front of the vehicle but turns around when defendant also begins walking toward the front of the vehicle. Ong briefly opens the front, driver's side door, but closes it as defendant approaches. Ong then starts walking around the back of the vehicle while defendant follows. Ong then circles the vehicle again while defendant follows.

¶ 10 When defendant reaches the front driver's side, he opens the door and looks at Ong over the top of the vehicle. Defendant remains standing near the open door while Ong goes inside the convenience store. After Ong enters the store, defendant walks around the vehicle and leans against the rear passenger side door. Ong later comes out of the convenience store and stands near the entrance next to two men, one of whom is speaking on a phone. Ong and the two men then go back inside the convenience store when defendant approaches them.

¶ 11 Another segment of the video shows defendant standing near the open, front driver's side door holding Ong's house keys. Defendant is shaking the keys toward the convenience store.

¶ 12 Defendant then gets inside the vehicle with Ong's house keys in his hand. Defendant can be seen reaching toward the ignition of the vehicle with the keys in his hand and making a turning motion as though attempting to start the vehicle. Defendant repeats this motion several times. Defendant then reclines the driver's seat and lies back until police arrive and force him to exit the vehicle.

¶ 13 The police arrived on the scene and took defendant into custody. Ong did not tell the responding officers that he believed defendant had a gun but did tell them that defendant threatened to kill him.

¶ 14 Sergeant Nicholas Cortesi testified that he responded to the call from the gas station. When he arrived, he saw defendant sitting in the driver's seat of Ong's vehicle. Sergeant Cortesi

persuaded defendant to exit the vehicle and then placed him under arrest. Sergeant Cortesi testified that Ong did not tell him that he believed defendant had a gun. The parties stipulated that the footage from Sergeant Cortesi's body-worn camera would show that Ong did not make any statements to the officers that he thought defendant had a weapon on his waistband.

¶ 15 The State rested, and the court denied defendant's motion for a directed verdict. Defense counsel indicated that defendant did not wish to testify. The court asked defendant if that was correct and defendant responded: "Yeah, I guess. I can't remember the case." Defendant subsequently rested without presenting any evidence.

¶ 16 Following closing argument, the court reviewed the evidence presented. The court noted that there was evidence of "some intoxication" but that the evidence showed that defendant was aware of his environment, knew different directions, and "knew to his way of thinking" that Ong was driving in the wrong direction. The court therefore found that defendant was "not intoxicated as a legal defense." The court found credible Ong's testimony that defendant grabbed Ong's shirt sleeve and that defendant reached toward his waistband with his other hand. The court observed that the surveillance video depicted a "slow motion" chase around the vehicle where defendant actually changed directions in his pursuit of Ong. The court found that the video also showed that once defendant sat in the driver's seat of the vehicle with Ong's house keys, he repeatedly made a motion toward "where the ignition would be as if to start the car." The court therefore found defendant guilty of attempted vehicular hijacking.

¶ 17 Following the court's ruling, defendant filed motions to set aside the finding of guilty and for a new trial, which the trial court denied after a hearing.

¶ 18 B. Postjudgment Motions

¶ 19 Defendant subsequently filed a *pro se* "motion for appointment of new counsel based upon ineffective assistance of trial counsel or in the alternative grant a new trial." In the motion, defendant alleged that he reviewed the arresting officer's body-worn camera recording with his attorney. Defendant contended that this recording contained "exculpatory or exonerating evidence." This evidence included Ong stating that defendant did not hit him and that Ong did not want to press criminal charges against defendant. Defendant alleged that the video showed the arresting officer coerce and intimidate Ong into pressing charges. Defendant alleged that defense counsel was aware of this evidence but failed to present it at trial.

¶ 20 Defendant also alleged misconduct by the State, contending that the State used perjured testimony and allowed Ong to present false testimony at trial. This contention also concerned statements from the arresting officer's body-worn camera recording, which defendant asserted showed that the officers pressured Ong into pressing charges against defendant. Defendant alleged that the State improperly covered up this evidence.

¶ 21 The State filed a response to defendant's *pro se* motion, maintaining that it did not cover up any evidence as defendant suggested and did not present false or misleading testimony. The State also attached to its motion a transcript from a portion of the body-worn camera recording. In the transcript, Ong tells the officers that he was giving defendant a ride when defendant told him to take him home. Ong told defendant that he was taking him home, but defendant said that he was not. Defendant asked to take the wheel, but Ong told him he could not. Defendant grabbed Ong's shirt sleeve and threatened to kill him. The officers asked Ong if defendant had a weapon, but Ong said he was not sure. Ong told the officers that defendant grabbed him but did not put him in a "head lock."

¶ 22 When the officers asked Ong if he wanted to press charges, Ong said that he did not. The officers asked him why he did not want to press charges, and Ong replied that he just wanted to continue working. The officers told Ong that this was a violent crime and asked if he believed this was the last time defendant would do something like this. The officer told Ong, "Okay sir, it's like this; if you don't wanna do anything then we just let him go. And him—he can do it again. And he can do it again to you." The officer told Ong that it was a "priority" to get justice for Ong and the community. The officer told Ong that if he had not sought help in the gas station and if the officers had not arrived, defendant could have hurt him and stolen his vehicle. Ong then agreed to cooperate with the police and "press charges."

¶ 23 In denying defendant's motion with regard to the allegations against the State, the court found that the recoding from the body-worn camera spoke for itself. The court found that Ong was initially reluctant to press charges and reluctant to come to court, but he voluntarily complied with the subpoena the State sent him and voluntarily testified at trial. The court found there was no evidence that the State forced him to testify.

¶ 24 The court then addressed defendant's allegations against defense counsel in a *Krankel* hearing. See *People v. Krankel*, 102 Ill. 2d 181 (1984). At the hearing, defense counsel stated that she watched the body-worn camera recordings with defendant on more than one occasion before trial. She explained to him that merely because Ong was initially hesitant to press charges did not stop defendant from being charged because the State ultimately decides whether to bring charges. Defense counsel explained that she developed a trial strategy with defendant and they discussed that strategy together. Defense counsel stated that she considered using the body-worn camera footage in impeachment but did not need to do so when the State stipulated that Ong never told the responding officers that he thought defendant had a weapon on his waistband. Defense counsel

stated that part of why she did not seek to introduce the video was because it depicted "a man who just had his car taken from him, who felt that he needed to go to a gas station to protect himself."

¶ 25 The court asked defendant if he had anything further to say in support of his ineffective assistance claim. Defendant began to explain that he was too drunk and did not even remember getting in Ong's vehicle, but the court cut him off. The court found that nothing defendant was saying was relevant to his claim of ineffective assistance. The court then found that there was no basis for his allegations.

¶ 26 C. Sentencing

¶ 27 The court proceeded to sentencing. The State presented defendant's background, which included a 2002 aggravated battery with great bodily harm for which defendant was sentenced to eight years' imprisonment. Defendant also had a 1999 conviction for possession of a controlled substance and 1997 conviction for aggravated battery to a police officer. The assistant state's attorney (ASA) recounted the facts of the case and noted that defendant represented that he was too drunk to remember the incident. The ASA stated that this appeared to show contrition and the State was prepared to recommend the lowest sentence possible. "However, since then, the defendant has done nothing but blame everyone except himself. He blames the victim. He blames the State. He blames his own attorney." The ASA stated that defendant had not shown contrition or remorse and had not shown that he was willing to comport himself with the rules and expectations of society. The ASA therefore asked for a sentence in the "top range."

¶ 28 In mitigation, defense counsel represented that defendant was a "family man." Defendant had lived with his brother and his own children "at different points in time." Defense counsel detailed defendant's relationship with his four children and stated that he also had a good relationship with the mothers of his children. Counsel represented that defendant had worked as a

carpenter for 20 years. Defense counsel stated that defendant was willing to participate in an alcohol treatment program and argued that probation was appropriate in this case.

¶ 29 In allocution, defendant stated that he wished he could apologize to Ong for the situation that he caused that day.

¶ 30 In sentencing defendant, the court stated that it was considering a much higher sentence before defendant made his statement in allocution. The court was impressed that defendant accepted responsibility and that he wanted to apologize to Ong. The court initially found that an appropriate sentence in this case was 5½ years' imprisonment. However, after explaining to defendant his right to an appeal, the court decided to reduce defendant's sentence to five years' imprisonment because of his courtesy and respect in front of the court. The court subsequently denied defendant's motion to reconsider the sentence. This appeal follows.

¶ 31 II. ANALYSIS

¶ 32 On appeal, defendant contends that the court erred in finding him guilty of attempted vehicular hijacking where the evidence presented failed to establish that he had the requisite intent to commit vehicular hijacking or that he took a substantial step toward the commission of that offense. Defendant asserts that the evidence shows that he did not intend to hijack Ong's vehicle, but was merely intoxicated and wanted to go home. In the alternative, defendant contends that his sentence is excessive in light of the nonserious nature of the offense where no one was harmed, and in light of the mitigating evidence presented.

¶ 33 A. Sufficiency of the Evidence

¶ 34 We will first address defendant's contention that the evidence presented was insufficient to prove him guilty of the offense of attempted vehicular hijacking beyond a reasonable doubt. Where a defendant challenges the sufficiency of the evidence to sustain his conviction, the

reviewing court must consider whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). This standard recognizes the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any conflicts and inconsistencies in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the State and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 35 Here, the trial court found defendant guilty of attempted vehicular hijacking. A defendant commits the offense of vehicular hijacking where he "knowingly takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-3(a) (West 2020). A defendant 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).

¶ 36 1. *Specific Intent*

¶ 37 Defendant first contends that the State failed to prove him guilty beyond a reasonable doubt because the evidence presented does not show that he had the specific intent to commit vehicular hijacking. Defendant maintains that his actions of grabbing Ong's shirt sleeve were not indicative of attempt and his threats to kill Ong were "mere drunken hyperbole." Defendant asserts that the evidence presented did not show that defendant actually intended to take Ong's vehicle but rather portrayed an intoxicated individual who wanted to go home. Defendant acknowledges that

voluntary intoxication is not an affirmative defense but contends that it is relevant to specific intent offenses such as attempt.

¶ 38 Defendant essentially contends that he was so intoxicated that he was unable to form the specific intent necessary to commit the offense of attempted vehicular hijacking. As defendant points out, this court has found that a defendant's voluntary intoxication may be relevant where " 'voluntary intoxication is so extreme as to suspend entirely the power of reasoning,' [such that] a defendant is incapable of forming a specific intent or malice." *People v. Slabon*, 2018 IL App (1st) 150149, ¶ 33 (quoting *People v. Cunningham*, 123 Ill. App. 2d 190, 209 (1970)). As such, a person's state of involuntary intoxication may be relevant to the commission of specific intent crimes, which " 'require proof of an additional special mental element.' " *Id.* (quoting *People v. Robinson*, 379 Ill. App. 3d 679, 684 (2008)).

¶ 39 Before addressing the merits of defendant's contention, we must first examine this court's holding in *Slabon*, which defendant relies on in support of his contention that his state of voluntary intoxication was relevant to his intent in this case. In finding that a defendant's voluntary intoxication may be relevant in the commission of specific intent crimes, the *Slabon* court relied on this court's decision in *Cunningham*, 123 Ill. App. 2d at 208-09. Significantly, *Cunningham* was decided in 1970. At the time *Cunningham* was decided, the intoxicated or drugged condition statute of the Criminal Code of 1961 provided that an intoxicated or drugged person was

> "criminally responsible for conduct unless such condition either: (a) Negatives the existence of a mental state which is an element of the offense; or (b) Is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Ill. Rev. Stat. 1963, ch. 38, ¶ 6-3.

See *People v. Rutigliano*, 2020 IL App (1st) 171729, ¶ 69 (reviewing the legislative history of the Illinois intoxicated or drugged condition statute).

The statute was amended in 1988 to provide that an intoxicated person was:

> "criminally responsible for conduct unless such condition either:
>
> (a) Is so extreme as to suspend the power of reason and render him incapable of forming a specific intent which is an element of the offense; or
>
> (b) Is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." 720 ILCS 5/6-3 (West 2000).

The statute was amended again in 2002 to its current form to provide that an intoxicated or drugged person "is criminally responsible for conduct unless such condition is involuntarily produced *and* deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." (Emphasis added.) 720 ILCS 5/6-3 (West 2020). As such, since the 2002 amendment, Illinois courts have recognized that "voluntary intoxication cannot be asserted as an affirmative defense to negate the element of intent." *People v. Himber*, 2020 IL App (1st) 162182, ¶ 55 (citing *People v. Jackson*, 362 Ill. App. 3d 1196, 1201 (2006) ("Effective January 1, 2002, Illinois no longer recognized voluntary intoxication as an excuse for criminal conduct."), and *People v. Rodgers*, 335 Ill. App. 3d 429, 433 n.1 (2002) ("Illinois no longer recognizes voluntary intoxication as an excuse for criminal conduct")).

¶ 40 Defendant maintains that *Slabon* correctly states the law on voluntary intoxication, explaining that although it is no longer an affirmative defense, it may still be "relevant in a criminal proceeding." *Slabon*, 2018 IL App (1st) 150149, ¶ 33. Defendant contends that this interpretation is supported by the legislative history of section 6-3, which shows that the legislature intended

only to remove voluntary intoxication as a statutory affirmative defense but did not intend to preclude a defendant from introducing evidence of his intoxication to negate the appropriate mental state. Defendant contends, consistent with *Slabon*, evidence of a defendant's voluntary intoxication may be relevant " 'where voluntary intoxication is so extreme as to suspend entirely the power of reasoning,' [such that] a defendant is incapable of forming a specific intent or malice." *Id.* (quoting *Cunningham*, 123 Ill. App. 2d at 209).

¶ 41 Defendant maintains that he is not attempting to use his state of voluntary intoxication as an affirmative defense but contends that his intoxication may be relevant in the commission of specific intent crimes, such as the attempted vehicular hijacking offense in the case at bar. As noted, however, the precedent defendant relies on in support of that contention is this court's ruling in *Slabon*, which in turn relied on this court's ruling in *Cunningham*. *Cunningham* was decided in 1970, before the 1988 and 2002 amendments to the Illinois intoxicated or drugged condition statute. Indeed, the cited portion of *Cunningham* that *Slabon* relies on explicitly states: "Voluntary intoxication is an affirmative defense if it negatives the existence of a mental state which is an element of the offense." *Cunningham*, 123 Ill. App. 2d at 208-09 (citing Ill. Rev. Stat. 1963, ch. 38, ¶ 6-3(a)). This is clearly at contrast with the law as it stands today following the two amendments to section 6-3 after *Cunningham* was decided. The *Slabon* court's reliance on *Cunningham* for the proposition that a defendant's voluntary intoxication may be relevant where it is so extreme as to "suspend entirely the power of reasoning," such that a defendant is incapable of forming a specific intent or malice, is therefore misplaced. Accordingly, we find that *Slabon* misstates the law on voluntary intoxication as it stands today. Simply put, section 6-3 now provides that voluntary intoxication is not an excuse for criminal conduct. *Jackson*, 362 Ill. App. 3d at 1201.

¶ 42 Nonetheless, we find that the evidence presented did not demonstrate that defendant's intoxication was "so extreme" as to suspend entirely his power of reasoning. Although Ong testified that he believed defendant was intoxicated, as the trial court recognized, defendant's conduct demonstrated that he was not so intoxicated that he was incapable of forming specific intent. For instance, defendant appeared to have a grasp on directions, knowing which direction Ong was driving and believing that it was not in the direction of his home. Defendant's intent can also be seen on the video surveillance recording where defendant, perhaps believing he was in the possession of Ong's car keys, appeared to shake Ong's house keys toward him in a taunting manner. Defendant then got into the driver's seat and appeared to attempt to put Ong's house keys into the vehicle's ignition and start the vehicle. The surveillance video also shows that while defendant was chasing Ong around his vehicle, defendant appeared to speed up in his pursuit and never took his eyes off of Ong. These actions do not suggest that defendant's intoxication was so extreme such that his ability to reason was suspended such that he was unable to form specific intent. Accordingly, we cannot say that the evidence presented was insufficient to support the trial court's determination that defendant had the specific intent to commit the offense of attempted vehicular hijacking.

¶ 43 2. *Substantial Step*

¶ 44 Defendant next contends that the State failed to prove him guilty beyond a reasonable doubt because the evidence presented does not show that he took a substantial step toward the commission of vehicular hijacking. What constitutes a substantial step is determined by the unique facts and circumstances of each case. *People v. Perkins*, 408 Ill. App. 3d 752, 758 (2011). 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, 423-24 (2000). Illinois courts have relied

on the Model Penal Code for guidance in determining whether a defendant has taken a substantial step toward commission of a crime. See *People v. Terrell*, 99 Ill. 2d 427, 435-36 (1984). Under the Model Penal Code, an attempt has occurred when a person, acting with the required intent, " 'purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.' " *Perkins*, 408 Ill. App. 3d at 758 (quoting Model Penal Code § 5.01(1)(c) (1985)).

¶ 45 Defendant asserts that his act of pulling on Ong's shirt sleeve and threatening to kill him was not a substantial step toward the commission of vehicular hijacking because it did not put him in "dangerous proximity" to successfully hijacking the vehicle. However, under the standards of the Model Penal Code, defendant's actions of telling Ong he wanted to drive the vehicle, grabbing Ong's shirt, and threatening to kill him were acts purposely done in a course of conduct planned to culminate in his commission of a crime.

¶ 46 Defendant contends that his actions did not demonstrate an attempt to take control of the vehicle. This contention is flatly contradicted by the evidence presented. Although defendant was not able to take control of the vehicle at the time he grabbed Ong's shirt sleeve and threatened to kill him, he did attempt to take control of the vehicle when he had the opportunity to do so. After Ong left the vehicle and went inside the convenience store at the gas station, defendant entered the driver's seat of the vehicle and attempted to use Ong's house keys to start the vehicle. Defendant contests this characterization of his actions, asserting that the video shows him reaching toward the center console of the vehicle but not necessarily toward the vehicle's ignition. The trial court found, however, that the video showed that once defendant sat in the driver's seat of the vehicle with Ong's house keys, he repeatedly made a motion toward "where the ignition would be as if to

start the car." As noted, we defer to the trial court to resolve any conflicts and inconsistencies in the evidence and to draw reasonable inferences therefrom. *Sutherland*, 223 Ill. 2d at 242. We agree with the court's characterization of defendant's conduct where the video unmistakably shows him attempting to start Ong's vehicle with the house keys several times. The video clearly shows the keys in defendant's hand and his forearm and wrist can be seen making a twisting gesture consistent with attempting to start a vehicle.[1]

¶ 47 Moreover, if it was not defendant's intention to take control of the vehicle, defendant could simply have left the scene when Ong parked the vehicle at a gas station or he could have stayed sitting in the back seat. Instead, defendant decided to chase Ong around the vehicle, take possession of Ong's house keys, get into the driver's seat of the vehicle, and seemingly attempt to start the vehicle with Ong's house keys. We therefore find that the evidence presented was sufficient to prove beyond a reasonable doubt that defendant had the requisite intent to commit the offense of vehicular hijacking and took a substantial step toward the commission of that offense.

¶ 48 B. Excessive Sentence

¶ 49 Defendant next contends that his sentence is excessive in light of the nonserious nature of the offense and the mitigating evidence presented. Defendant contends that this was not the "typical" attempted vehicular hijacking case in that it was not premeditated or planned and no one was injured. Defendant contends that there was also minimal evidence of force where defendant only pulled on Ong's shirt sleeve.

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[1]We also observe that, although this evidence was not introduced at trial, in the portion of the body-worn camera recording introduced by the State, when the officers were asking Ong if he wanted to press charges, a bystander said to Ong, "He was trying to take your car." Ong replied: "Yeah, he was try—I saw it—I saw (inaudible). He was trying to—to start it." Ong then made a gesture as though turning keys in a vehicle ignition.

¶ 50 A reviewing court will not alter a defendant's sentence absent an abuse of discretion by the trial court. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A trial court abuses its discretion in determining a sentence where the sentence is greatly at variance with the spirit and purpose of the law or if it is manifestly disproportionate to the nature of the offense. *Id.* The trial court is afforded such deference because it is in a better position than the reviewing court to weigh the relevant sentencing factors such as " 'defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age.' " *People v. Stevens*, 324 Ill. App. 3d 1084, 1093-94 (2001) (quoting *People v. Streit*, 142 Ill. 2d 13, 19 (1991)). In the absence of evidence to the contrary, we presume that the sentencing court considered all mitigating evidence presented. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 51.

¶ 51 Here, defendant was found guilty of attempted vehicular hijacking. The applicable sentencing range for that offense is three to seven years imprisonment. 730 ILCS 5/5-4.5-35(a) (West 2020); see also 720 ILCS 5/18-3(b) (West 2020); 720 ILCS 5/8-4(c)(3) (West 2020). Here, the court sentenced defendant to a five-year term of imprisonment. The sentence imposed therefore fell within the statutorily prescribed range and is presumably valid. *People v. Wilson*, 2017 IL App (3d) 150165, ¶ 14 (citing *People v. Busse*, 2016 IL App (1st) 142941, ¶ 27).

¶ 52 Defendant contends, however, that the trial court abused its discretion in determining his sentence because the court failed to adequately consider the mitigating factors presented and did not account for the nonserious nature of the offense.

¶ 53 Despite defendant's contentions about the nonserious nature of the offense, Ong's testimony paints a different picture. First, it is undisputed that defendant threatened to kill Ong multiple times while holding onto his shirt sleeve. Ong also believed that defendant had a deadly weapon. Ong testified that he was scared and believed his "life was at stake." Furthermore, after

Ong pulled over at the gas station, defendant got out of the vehicle and chased Ong before Ong fled into the convenience store. Although Ong acknowledged that defendant could not move very quickly in his intoxicated state, Ong still testified that he was scared and feared for his life. Indeed, the video shows that while following Ong around the vehicle, defendant appeared to speed up at points and never took his eyes off of Ong. Defendant's contention that this was not a serious offense are therefore not well taken.

¶ 54 Defendant nonetheless contends that the trial court did not adequately consider the mitigating factors presented, such as defendant's family life and his work history. Defendant also points out that he was willing to participate in substance abuse treatment and took responsibility for his actions. Defendant maintains that he was entitled to a lower sentence based on these factors.

¶ 55 The record shows, however, that during the sentencing hearing, defense counsel identified the same mitigating factors defendant brings to our attention on appeal, including defendant's family life and his work history. It is not our function to independently reweigh these factors and substitute our judgment for that of the trial court. *Alexander*, 239 Ill. 2d at 214-15. Although the trial court did not specifically identify which factors it considered in determining defendant's sentence, we observe that a trial court is not required to specify on the record the reasons for the sentence imposed (*People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 22), nor is it required to recite and assign value to each factor presented at the sentencing hearing (*People v. Baker*, 241 Ill. App. 3d 495, 499 (1993)). Rather, we presume that the trial court properly considered all mitigating factors and rehabilitative potential before it, and the burden is on defendant to affirmatively show the contrary. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). Defendant here has failed to do so.

¶ 56 Further, the record shows that the court expressly considered defendant's remorsefulness in imposing his sentence. After defendant made his statement in allocution in which he expressed his desire to apologize to Ong, the court stated that it was considering a "much higher sentence" before defendant accepted responsibility for his actions. Moreover, after initially imposing a sentence of five and a half years, the court *sua sponte* reduced defendant's sentence to five years based on defendant's courtesy and demeanor in the court room. The record thus shows that the court fully considered the nature of the offense, the mitigating factors presented, and " 'defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age.' " *Stevens*, 324 Ill. App. 3d at 1093-94 (quoting *Streit*, 142 Ill. 2d at 19). We therefore find that the trial court did not abuse its discretion in determining defendant's sentence.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 59 Affirmed.

¶ 60 PRESIDING JUSTICE GORDON, dissenting:

¶ 61 I must respectfully dissent. The only witness in this case was the driver of the Lyft vehicle and the arresting police officer, as defendant chose not to testify. In my review of the evidence, I cannot find that the conduct of the defendant constituted a substantial step toward hijacking the Lyft vehicle beyond a reasonable doubt. The defendant was intoxicated at the time with a blood-alcohol level of .244. A person named Phyllis[2] used her Lyft account to hail a Lyft vehicle to take him home. He thought the direction the driver was going was wrong, and as a result, he told the driver that he wanted to drive the vehicle to his residence, not steal the vehicle. When he

[2]Phyllis's last name is not found in the record.

wrongfully grabbed the driver's shirt and threatened him, the driver drove into a gas station and called the police. The driver expressed to the arresting police officer that he did not desire to bring charges; he only wanted defendant to be removed from his vehicle, but the police helped change his mind at the gas station. The initial expression of the driver illustrates that the driver never thought that the defendant's conduct was a step toward hijacking the vehicle or that defendant intended to hijack his vehicle. When the defendant stood in front of the vehicle at the gas station holding the driver's house keys and then entered the driver's seat, he was "playing with" the driver as some intoxicated people do when they are under the influence of liquor. The majority writes that in the video "[d]efendant can be seen reaching toward the ignition of the vehicle with the keys in his hand and making a turning motion as though attempting to start the vehicle." *Supra* ¶ 12. However, once defendant went into the driver's side of the vehicle, the video does not show what defendant is doing in the vehicle. That statement is false. There never was any real evidence that the defendant intended to take the vehicle from the driver. The drunken threat and the momentary grabbing of the driver's shirt was caused by the defendant's intoxication and his belief that the driver was not taking the defendant to his residence and was going the wrong way. Any reasonable person believing that a driver of a common carrier is not taking them to where they are supposed to would be terrified and disturbed, especially when that person is under the influence of liquor. In the case at bar, the defendant may have been guilty of assault and battery but not the attempted hijacking of a motor vehicle. This defendant had no criminal record. In aggravation, the State submitted defendant's lack of contrition and defendant's prior convictions for aggravated battery with great bodily harm, for aggravated battery to a police officer, and for possession of a controlled substance. In mitigation, defendant has been a carpenter who provided for four children and is

willing to participate in a substance abuse program. Yet the defendant received a five-year sentence in the IDOC.

¶ 62 For the foregoing reasons, I must respectfully dissent.

People v. Grayer, 2022 IL App (1st) 210808

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 20-CR-1000201; the Hon. Vincent M. Gaughan, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, Daniel T. Mallon, and Christina Law Merriman, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Enrique Abraham, Brian A. Levitsky, and Sharon Kim, Assistant State's Attorneys, of counsel), for the People.

2022 IL App (5th) 190079-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois, Fifth District.

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

v.

Larry L. SCOTT, Defendant-Appellant.

NO. 5-19-0079

|

August 22, 2022

Appeal from the Circuit Court of Christian County. No. 17-CF-194, Honorable Bradley T. Paisley, Judge, presiding.

ORDER

JUSTICE WHARTON delivered the judgment of the court.

***1** ¶ 1 *Held*: The defendant's statutory right to a speedy trial was not violated where he acquiesced to substantial portions of the delay by failing to demand a trial as required by statute. The evidence was sufficient to prove beyond a reasonable doubt that the defendant acted with the specific intent to kill, as is required to support his conviction for attempted murder. The defendant's claims of ineffective assistance of counsel fail where he is unable to demonstrate a reasonable probability that the outcome of his trial would have been different had counsel made the objections he now argues should have been made. The court did not abuse its discretion in admitting partially inaudible recordings of phone calls placed from the county jail. The defendant's sentence did not constitute an abuse of discretion.

¶ 2 The defendant, Larry L. Scott, was convicted of attempted first degree murder and sentenced to 45 years in prison. His sentence includes a mandatory enhancement due to a finding that he personally discharged a firearm and proximately caused great bodily harm. See 720 ILCS 5/8-4(c)(1)(D) (West 2016). On appeal, the defendant argues that (1) his right to a speedy trial was violated due to numerous delays, most of which he attributes to the State, and because the trial court abused its discretion in granting the State's motion for a continuance to complete DNA testing; (2) the evidence was insufficient to support his conviction for attempted murder because there was insufficient evidence to prove beyond a reasonable doubt that he had the specific intent to kill; (3) the defendant received ineffective assistance of counsel because his attorney failed to object to the introduction of the prior consistent statements of two State witnesses and failed to object when the prosecutor cross-examined the defendant on whether State witnesses were lying; (4) the trial court abused its discretion in allowing the admission of recordings of telephone calls the defendant placed from jail while awaiting trial; and (5) his sentence was excessive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The incident leading to the charges against the defendant took place approximately 11:30 on the night of September 14, 2017, in front of the home of Samantha Woods in Kincaid, Illinois. Logan Durbin was shot twice and seriously injured during an altercation involving the defendant and several other men. Multiple witnesses placed the defendant at the scene and stated that he had been in possession of a gun that night. Two witnesses directly identified him as the shooter.

¶ 5 The defendant was arrested and taken into custody shortly after midnight on September 15, 2017. He was charged with attempted first degree murder that day (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2016)). The State subsequently filed an amended information charging the defendant with aggravated battery with a firearm (*id.* § 12-3.05(e)(1)), aggravated discharge of a firearm in the direction of another person (*id.* § 24-1.2(a)(2)), and reckless discharge of a firearm (*id.* § 24-1.5). The defendant remained in custody until his trial began in July 2018.

***2** ¶ 6 In January 2018, the State filed a motion for a continuance for DNA evidence (see 725 ILCS 5/103-5(c) (West 2016)). At an evidentiary hearing on the State's motion, forensic scientist Cory Formea testified that the lab had expedited the processing of the evidence in this case in response to a request from either the prosecutor's office or the Kincaid Police Department. However, Formea did not say when the request was made. The court granted a continuance of "up to 120 days." The DNA results became available on April 3, 2018. The trial date was set for May 21, 2018, while additional forensic testing was performed.

¶ 7 The DNA and other forensic testing involved a handgun recovered from inside the home of Samantha Woods, which is where the defendant was arrested. Several witnesses had given statements indicating that they observed the defendant handling that gun earlier in the evening. Although most of the tests, including the DNA analysis, were inconclusive, ballistics testing indicated that at least a shell casing recovered from the crime scene was consistent with having been fired from that gun. Defense counsel moved for continuances to allow him to locate and interview witnesses to help him respond to this evidence, noting that it was the first forensic evidence to implicate the defendant.

¶ 8 In June 2018, the defendant filed a motion for discharge based on the defendant's statutory right to a speedy trial. The court denied that motion after a hearing. The defendant filed a motion to reconsider that ruling, which the court also denied.

¶ 9 Shortly before trial, the defendant filed a motion *in limine* seeking to exclude from evidence recordings of telephone calls he placed from the county jail while awaiting trial. In the recordings, the defendant can be heard telling someone to tell State witness Lucas Stephens that he was drunk and high on the night of the shooting. He can also be heard asking someone to contact State witness Shelby Collins to tell her the same thing and to tell her that he would "get out as long as she didn't come to court." In the recordings, the defendant also expresses satisfaction with the fact that a search warrant was executed at the wrong address. The defendant argued that the recordings should not be admitted because portions were inaudible. The court listened to the recordings prior to ruling on their admissibility. At the motion hearing, the court noted that the "person on the receiving end speaking is very garbled" and "difficult to understand," but that "[y]ou can understand Mr. Scott." The court ruled that portions of the recordings were admissible. We note that the court excluded other portions of the recordings based on relevancy.

¶ 10 The defendant's trial began on Jul 18, 2018. Several witnesses described a party that took place at the apartment of John Ethan Zini on the night of the shooting. The defendant arrived at that party with his friends, Jerome Mason and Brandon Emery. Other attendees included Zini and Lucas Stephens. People at the party were drinking alcohol and taking drugs, although there was conflicting testimony concerning which drugs were present.

¶ 11 Multiple witnesses testified that some of the attendees, including the defendant, were passing around a black and silver handgun at the party. According to Mason, there were two guns, including the black and silver pistol, and the defendant was among the people who handled the gun. The defendant likewise testified that there were two guns. He further testified that Stephens attempted to sell one of the guns. Emery testified that he saw Stephens holding the gun and that he then left the apartment because he was not allowed to be around guns as a condition of his parole. On cross-examination, however, he admitted that he did not mention seeing a gun at the party when he gave a statement to police. He testified that that this was because he did not want to get anyone in trouble. According to Stephens, the defendant was the person who brought the gun to the party. Stephens testified that the defendant pulled out the gun, unloaded it, and allowed the others to pass it around. He stated that he told the defendant that he did not have to unload the gun before allowing others to handle it, to which the defendant replied, "You're not going to get me with my own gun."

***3** ¶ 12 The defendant left the party to buy alcohol at Food Mart, a nearby gas station convenience store. According to the defendant, Mason and Emery walked to the Food Mart with him. Both Emery and the defendant testified that during this walk, Emery pulled the defendant aside and suggested that he try to get the gun away from Stephens before someone got hurt. The defendant stated that he was initially reluctant to do so because he was on parole. According to Mason, Zini and Stephens accompanied Mason and the defendant to Food Mart. He did not mention Emery.

¶ 13 After buying alcohol, the group walked back to the party. It was during this walk that the altercation began that eventually led to the shooting. According to the defendant, he saw Stephens trading a gun for drugs on a street corner. Asked how he knew it was a drug deal, the defendant explained that Stephens had drugs when they returned to the party. According to Mason, they noticed another "group of guys" walking approximately 30 yards behind them. Mason further testified, however, that he and the defendant did not return to the party. He explained that they got into a vehicle with Shelby Collins and Keira Morrisey, who happened to drive by at this point. Mason assumed that Zini and Stephens returned to the party.

¶ 14 Jacob Graham was involved in the shooting but was not at Zini's party. At this point in the evening, he was in the vicinity of the Dial Street Apartments, where Zini lived. Graham testified that he was walking with John Burke when he saw Stephens and Zini making what looked to him like a

drug deal behind a bar. He confronted them and "told them to get that stuff out of our town." This led to an altercation between Graham and Burke on one side and Stephens and Zini on the other. The altercation continued as the four men all walked toward the same apartment complex. According to Graham, he and Burke stayed outside one apartment, while Stephens and Zini stayed outside another.

¶ 15 Stephens likewise described an altercation between the same four men, but he testified that it began when he and Zini walked to Samantha Woods's house. According to Stephens, the argument began when Burke and Graham accused him and Zini of dealing drugs. Stephens denied they were doing so. He testified that the argument between the two groups continued all the way to Samantha Woods's house. At some point, Stephens called to the defendant, saying, "Hey, man, we've got him coming back." Stephens explained that he was referring to Graham. We note that he did not clarify where this took place or where the defendant was during this altercation.

¶ 16 According to the defendant, his group returned to the party at Zini's apartment, but Emery left shortly thereafter. He testified that Stephens was acting aggressive, so he called Emery to ask for a ride home. Emery told the defendant to ask Shelby Collins for a ride instead because she was in Kincaid with Keira Morrisey. The defendant further testified that while waiting for Collins and Morrisey to arrive, he convinced Zini to get Stephens's gun and give it to him because Stephens was acting "out of control." He explained that his intent was to bring it to a friend named Blake Knight to hold the gun for safe keeping until Stephens sobered up, and he testified that Mason and Emery had agreed to this plan. According to the defendant, he got a McDonald's bag out of the trash and held it open for Zini, who dropped Stephens's gun into the bag.

¶ 17 Keira Morrisey and Shelby Collins arrived and stayed at Zini's party for a short time before leaving with Mason and the defendant. Both women testified about what they observed at the party. Neither saw a gun while they were in Zini's apartment, but Morrisey testified that she heard people discussing a gun. Collins testified that while she was hugging the defendant and sitting in his lap, she felt a gun in his pocket. She further testified that the defendant told her about the gun at some point.

***4** ¶ 18 Collins, Morrisey, and the defendant all testified that they left the party together along with Mason. According to the defendant, they first stopped at Knight's house, where the defendant asked Knight to hold the gun until Stephens was sober. He testified, however, that Knight did not want the responsibility, so the gun remained in the defendant's possession. The defendant and Collins both testified that they stopped at a gas station, then drove around in the country for a short period of time before driving to Samantha Woods's house. Collins explained that she was staying at Woods's house to take care of her dogs because Woods was in jail. Morrisey and Mason likewise testified that the group drove around in the country before going to Woods's house.

¶ 19 As discussed earlier, other witnesses described an argument that continued as people walked towards Woods's house from the area of the Dial Street Apartments. Logan Durbin testified that he was walking towards Bradley Graham's house when he heard the commotion, which involved Jacob Graham, Stephens, and Zini. Bradley Graham is Jacob Graham's brother, and Durbin was friends with both Graham brothers. Durbin explained that he was aware that there was likely to be a fight, and that he had come to Kincaid from Taylorville that night to try to deescalate the situation. He testified that he followed Graham, Stephens, and Zini to Samantha Woods's house for this reason.

¶ 20 Mason, Collins, Morrisey, and the defendant all testified that a few minutes after they arrived at Woods's house and went inside, they heard a commotion outside. Morrisey testified that she did not see what happened outside the house, but she heard shots. Mason testified that after they heard the commotion outside, the defendant "charged" past him with a gun in his hand. Mason then heard the shots. When recalled as a witness for the defendant, however, Mason testified that he did not recall seeing a gun in the defendant's hand. He noted that it was too dark to see anything clearly. On cross-examination, Mason agreed that his prior testimony was true.

¶ 21 Collins testified that she went inside the house to let Woods's dogs out, then heard the commotion outside. She saw a group of about seven or eight people outside, including Zini and Stephens. They were arguing and pushing and shoving each other. Collins testified that the defendant ran "up toward the porch area" and then ran toward the street "where everyone was at." She testified that she saw the defendant pull out a gun and shoot Durbin two times.

¶ 22 According to the defendant, Stephens pounded on the front door demanding to get his gun back. The defendant testified that he told Stephens he had left the gun on the kitchen table, let him into the house, and went out to join the fight taking place in the street because he wanted to help Zini.

During the fight, he heard gunshots. He testified that although he did not see who fired the shots, he saw a gun in Stephens's hand after the shooting.

¶ 23 Durbin testified that when he arrived at Woods's house, he saw the defendant emerge from the house. Graham ran toward Durbin and said, "Run, Logan, they've got a gun." Durbin then heard a gunshot and saw a muzzle flash. He testified that he turned around, heard another shot, and then felt the impact. After he was shot, Durbin saw the defendant, Stephens, and Zini running from the scene. He further testified that Mason approached him and asked him if he needed help. According to Durbin, he saw Zini, Graham, and Stephens before the shots were fired, and none of them had a gun. We note that he did not testify to seeing the defendant with a gun or seeing who fired the shots. Durbin did not see John Burke at the scene at all, and did not see Mason until after he was shot.

***5** ¶ 24 Graham testified that when he arrived at Woods's house, two men came out of the house. Meanwhile, Graham got into a fist fight with Stephens in front of the house. At some point, he saw the defendant behind him. Graham testified that he then saw the defendant go inside the house and come back out. He then heard two shots fired.

¶ 25 Stephens testified that he did not remember much of a scuffle outside Woods's house. According to Stephens, he saw the defendant emerge from the house and fire the shots. He testified that he was only approximately two or three feet away when this happened.

¶ 26 Collins, Morrisey, and the defendant all testified that they hid in the basement of Woods's house after the shooting. According to the defendant, Collins called to him to join her there. They took methamphetamines and then had sex before the police arrived. According to Collins, she told the defendant he should not be there, but he stayed anyway. She described his demeanor as "just a little freaked out." She explained that he was sweating, pacing, and looking out the windows. She testified that he began rubbing his hands on her clothing. According to Collins, when the police arrived and announced their presence, she, Morrisey, and the defendant pretended to be asleep. While they were pretending to be asleep, Collins and the defendant had sex. The police then entered the basement and arrested Collins, Morrisey, and the defendant.

¶ 27 Chief Wheeler testified that when police responded to the shooting, they searched the ground floor of Woods's house before working their way to the basement, where they found Morrisey, Collins, and the defendant. He further testified that during their initial search, they recovered a bullet in the kitchen, but did not recover a weapon. Two days later, Samantha Woods called to report that she found a gun in her bathroom while cleaning.

¶ 28 The State also introduced forensic evidence demonstrating that a shell casing found at the scene had fibers matching Durbin's clothing and was consistent with the black and silver gun. Finally, the State played recordings of the seven phone calls that were the subject of the defendant's motion *in limine*.

¶ 29 The defendant was among the last witnesses to testify. He first explained why he was in Kincaid on the night of the shooting. He stated that he had recently moved from Springfield to Taylorville, but that on the night of shooting, he was preparing to return to Springfield after learning that his parole officer was looking for him. He later acknowledged that he knew this was because there was a warrant for his arrest. The defendant planned to get a ride back to Springfield from Brandon Emery, but first, he and Emery planned to "ride around" going to bars and getting drunk and high. However, Emery and the defendant met up with Jerome Mason, who told them that he wanted to go to the apartment of Ethan Zini in Kincaid, and Emery offered Mason a ride. We note that Emery testified that he arrived at Zini's apartment separately and that Mason and the defendant were already there.

¶ 30 When Mason, Emery, and the defendant arrived at Zini's apartment, a party was already in progress. As discussed earlier, the defendant testified that two guns were being passed around. He acknowledged handling one of the guns, but stated that he was initially reluctant to do so because he was on parole. Nevertheless, as we also discussed earlier, he testified that he ultimately did take possession of the gun before leaving Zini's apartment.

***6** ¶ 31 The defendant testified that prior to the night of the shooting, he had never met Jacob Graham, John Burke, Lucas Stephens, or Logan Durbin. He had met Zini a few weeks earlier when he visited his apartment with Mason. The defendant testified that there was a "bad vibe about" Stephens. He explained, "He was like real hyper and aggressive." He further testified that although Zini was not a violent person, "when he gets drunk, he's wild."

¶ 32 We have already discussed most of the defendant's testimony concerning the events that led up to the shooting. We need not repeat that discussion now. However, it is worth setting forth his testimony concerning what happened at Woods's house in greater detail.

¶ 33 The defendant testified that it was too dark to see anything inside the house because the power was out. He testified that he brought Stephens's gun into the house and left it on the kitchen table, still inside the McDonald's bag. He estimated that about 10 minutes after their arrival, someone started banging on the door and screaming for "Brando." He explained that Brando was Brandon Emery's nickname, and that Emery was dating Woods at the time. He further explained that Collins was driving Woods's car. The defendant therefore thought that the person pounding on the door must have assumed that it was Emery who had driven the car to Woods's house. We note that, as mentioned earlier, Woods herself was in jail at the time.

¶ 34 The defendant testified that he did not know who was pounding on the door. He stated that he opened the door, and it was too dark to see who was there. However, he realized that it was Lucas Stephens when the man said, "Where the fuck is my gun?" The defendant told Stephens the gun was on the table. According to the defendant, Stephens entered the house and walked toward the kitchen, although the defendant acknowledged that he did not actually see him grab the gun.

¶ 35 The defendant next described the altercation that took place outside Woods's house. He stated that he saw a group of seven or eight people coming toward the porch. People in the group were using racial slurs and saying, "Brandon, come outside. Let's box. Let's fight." Asked if he could "see who any of those people were," the defendant replied, "I have never seen any of these guys a day in my life." He testified, however, that he recognized Zini as one of the people in the group. Zini was standing near the street, arguing with some of the others.

¶ 36 According to the defendant, a fight then broke out between Zini and others in the group. The defendant stated that he joined the fight to help Zini. During the fight, someone punched the defendant in the back of head. Then, he heard three shots. He opined that it sounded like two people were shooting at each other. He explained, "It was like pop, pop, then pow." He testified that he did not see who fired the shots, but he saw Stephens holding a gun as he ran away after the shooting. The defendant stated that he saw Stephens, Zini, and one other man running toward the back of Woods's house and followed them until he heard Collins call his name. She told him to come to the basement, so he did.

¶ 37 The prosecutor began his cross-examination of the defendant by asking if the defendant decided to testify last so that he would hear their testimony before providing his own. Defense counsel objected, and the court sustained the objection. The prosecutor next asked, "And [you] went over all your discovery and reports with your attorney prior to court, right?" The defendant stated that he had reviewed the discovery. He added that he did not understand why people had told Chief Wheeler that Larry Scott was there when he did not know anyone in Kincaid.

*7 ¶ 38 The prosecutor next asked the defendant to acknowledge he was aware that Stephens and Shelby had identified him as the shooter in their video-recorded interviews. In response, the defendant indicated that he had not seen any of the video recordings of the interviews, but he stated that he had heard that Chief Wheeler was trying to get witnesses to lie. The following exchange took place without objection:

> "Q. Okay. And so it's your testimony here today that Lucas Stephens is lying, right?
>
> A. Oh, yeah. Definitely. Yes, sir.
>
> * * *
>
> Q. And that Logan Durbin saying that he saw you—didn't see the shot—but saw you pull a gun out is lying?
>
> A. Yes, sir.
>
> Q. And that Jacob Graham is lying?
>
> A. Yes, sir. I mean, why wouldn't they lie for their friends? It's only right."

The prosecutor asked the defendant if that was the reason he contacted Emery and Mason asking them "to try and get ahold of the witnesses." The defendant replied, "This was way before trial. It didn't have nothing to do with that. It was because I was hearing all these rumors *** about the Chief Wheeler was trying to get them to lie and say that they seen something that they didn't really see."

¶ 39 The following exchange then occurred:

"Q. Why would Shelby Collins lie?

A. She don't know me. Why wouldn't she lie? She don't know me.

Q. She was with you that night.

A. That don't mean she know me. We was just drunk having sex. She's not my friend. She got more loyalty to Lucas Stephens and Samantha than she does to me.

Q. Samantha wasn't there. She—

A. Well, that's her apartment. It all happened there.

Q. She's got no motive to lie.

A. I mean, why wouldn't she lie for her friend?

Q. That's not her friend.

A. I don't know, sir."

At this point, counsel objected to the line of questions on the basis that it was argumentative. The court sustained the objection.

¶ 40 In response to further questioning, the defendant acknowledged that he told Collins he would get out and be able to see his children if she did not show up for court. He also acknowledged that when he gave a statement to Chief Wheeler, he claimed to have no knowledge of the shooting.

¶ 41 During deliberations, the jury sent a note to the court asking to hear the recordings of the defendant's phone calls again. The court allowed them to do so. After further deliberation, the jury found the defendant guilty of attempted first degree murder. The jury also found that, in committing the offense, the defendant personally discharged a firearm, proximately causing great bodily harm, permanent disability, or permanent disfigurement.

¶ 42 The defendant filed posttrial motions, all of which were denied. The court sentenced the defendant to 45 years in prison—20 years for attempted murder and a mandatory sentence enhancement of 25 years due to use of a firearm that caused great bodily harm or permanent disability or disfigurement. The defendant filed a motion to reconsider his sentence. The court denied that motion.

¶ 43 The defendant filed this timely appeal. We will discuss additional background information as necessary to our analysis of the issues the defendant has raised.

¶ 44 II. ANALYSIS

¶ 45 A. Speedy Trial Act

¶ 46 The defendant first argues that his statutory right to a speedy trial was violated. The defendant was taken into custody on September 15, 2017, and he remained in custody until his trial began 304 days later, on July 18, 2018. The Illinois Speedy Trial Act provides that a criminal defendant in custody must be tried within 120 days of being taken into custody, excluding delays attributable to the defendant. 725 ILCS 5/103-5(a) (West 2016). There are two applicable exceptions to this rule. First, the Intrastate Detainers Act extends the 120-day speedy trial period to 160 days if the defendant is "committed to any institution or facility or program of the Illinois Department of Corrections." 730 ILCS 5/3-8-10 (West 2016). [1] Second, the Speedy Trial Act itself permits a continuance of up to 120 days for DNA testing if the State can demonstrate that (1) the State has exercised due diligence to obtain the DNA results, (2) the evidence is material to the case, and (3) there are reasonable grounds to believe the results may be obtained later. 725 ILCS 5/103-5(c) (West 2016).

***8** ¶ 47 There are three components to the defendant's argument. First, he contends that the Intrastate Detainers Act does not apply and that, as such, the speedy trial deadline was 120 days. Second, he argues that the trial court abused its discretion in granting the State's motion for a DNA continuance because the State did not demonstrate that it exercised due diligence. Third, he contends that only 62 days of delay were attributable to him.

¶ 48 In response, the State contends that the Intrastate Detainers Act is applicable, that the court properly granted the State's motion for a continuance, and that all but 79 days of delay were attributable to the defendant. For the reasons that follow, we find that 211 days of delay were attributable to the defendant, leaving 93 days attributable to the State. Because this is within the 120-day speedy trial deadline, we need not resolve the parties' arguments concerning the applicability of the Intrastate Detainers Act or the propriety of the court's ruling on the motion for a DNA continuance.

¶ 49 Criminal defendants in Illinois have both a constitutional right and a statutory right to a speedy trial. The speedy trial statute is intended to implement the constitutional right to a speedy trial, but the statutory and constitutional speedy trial rights "are not necessarily coextensive." *People v. Janusz*, 2020 IL App (2d) 190017, ¶ 55. As noted previously, the speedy trial statute requires that a defendant who is in custody be tried within 120 days after being taken into custody "unless delay is occasioned by the defendant." 725 ILCS 5/103-5(a) (West 2016). The 120-day speedy trial clock begins to run automatically when the defendant is taken into custody, even if he does not demand a speedy trial. *People v. Myers*, 352 Ill. App. 3d 684, 687 (2004).

¶ 50 The primary issue before us is how much of the delay in this case was attributable to the defendant. As a general matter, delay is attributable to the defendant if he requests or agrees to a continuance. *Janusz*, 2020 IL App (2d) 190017, ¶ 57. Prior to a 1999 amendment to the speedy trial statute, an express agreement to a continuance was considered attributable to the defendant, but remaining silent and failing to object when the State requested a delay was not. *People v. Cordell*, 223 Ill. 2d 380, 386 (2006). Now, however, the statute expressly provides that "[d]elay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2016). The amended statute thus "places the onus on a defendant to take affirmative action when he becomes aware that his trial is being delayed." *Cordell*, 223 Ill. 2d at 391.

¶ 51 Because the Speedy Trial Act protects a defendant's constitutional right to a speedy trial, it is to be construed liberally in favor of the defendant. *Janusz*, 2020 IL App (2d) 190017, ¶ 56. However, we are also cognizant that delaying a trial beyond the statutory speedy trial period can inure to the strategic benefit of the defendant. *People v. Ingram*, 357 Ill. App. 3d 228, 234 (2005). For this reason, under some circumstances, a defendant can be forced to choose between his right to a speedy trial and other constitutional rights, such as the right to effective assistance of counsel. See *People v. Solis*, 207 Ill. App. 3d 357, 363 (1991). Moreover, the burden is on the defendant to demonstrate that his right to a speedy trial was violated. *People v. Collins*, 382 Ill. App. 3d 149, 161 (2008). On appeal, we review the trial court's determination as to whether delay was attributable to the defendant for an abuse of discretion. *Id.* However, we review *de novo* the ultimate question of whether there was a violation of the Speedy Trial Act. *Janusz*, 2020 IL App (2d) 190017, ¶ 56. With these principles in mind, we turn our attention to the procedural history of this case.

***9** ¶ 52 On September 18, 2017, three days after his arrest, the defendant appeared in court with his first appointed attorney, Greg Grigsby. The matter was set for a preliminary hearing on October 3, the first available date. Grigsby informed the court of a possible conflict of interest due to his representation of an individual who was a possible witness. He indicated that he would need to confer with the prosecutor to determine whether his other client had given a statement. He therefore requested that the matter be set for a status hearing before the preliminary hearing. The court set a status hearing on September 21.

¶ 53 Although the State characterizes the defendant's agreement to these settings as "agreed continuances," we find that they do not constitute "delays" for purposes of the Speedy Trial Act. These dates were well within the 120-day speedy trial period, and they left ample time to set the matter for trial within 120 days. As our supreme court explained in *Cordell*, a delay is "[a]ny action by either party or the trial court that moves the trial date outside of that 120-day window." *Cordell*, 223 Ill. 2d at 390. This court has likewise observed that delay attributable to the defendant "has been construed to mean actual delay." *People v. McKinney*, 59 Ill. App. 3d 536, 541-42 (1978).

¶ 54 At the September 21, 2017, status hearing, Grigsby indicated that his other client, Jerome Mason, would be a witness. He stated that when he consulted with the defendant, the defendant indicated he wished to waive the conflict. Grigsby explained, however, that he needed to determine whether it was a waivable conflict. The court explained this to the defendant, who indicated that he understood the situation. The court set another status hearing for September 29 to address the conflict issue and left the preliminary hearing set for October 3. Because setting the additional status hearing did not move the date of the preliminary hearing, we again find that agreement to that date did not constitute a delay for speedy trial purposes. See *Myers*, 352 Ill. App. 3d at 689 (finding no delay where the defendant's motions were resolved before the scheduled trial setting).

¶ 55 At the next status hearing, Grigsby indicated that the conflict was waivable and that both Mason and the defendant had agreed to waive it. However, this would require both clients to sign conflict waivers, and the preliminary hearing

would need to be continued to give him time to obtain the signed waivers. Grigsby stated, "That's fine with Mr. Scott, Judge." The parties agreed to a new preliminary hearing date of October 26, 2017. We find that this resulted in a 23-day delay attributable to the defendant.

¶ 56 The defendant argues that continuing his preliminary hearing did not constitute a delay for speedy trial purposes because even when the matter eventually came for a preliminary hearing on November 30, 2017, the court offered a trial date of January 8, 2018, which was within the 120-day window. It was only because his attorney was unavailable that week due to another trial that the initial trial setting of January 29 was outside the window. We disagree.

¶ 57 As we have already discussed, under *Cordell*, a delay is "[*a*]*ny action* *** that moves the trial date outside of that 120-day window." (Emphasis added.) *Cordell*, 223 Ill. 2d at 390. While the delays to the preliminary hearing did not, by themselves, move the trial beyond the 120-day speedy trial period, they certainly contributed to that occurring. Had the preliminary hearing taken place on October 3, 2017, as initially scheduled, trial dates in November or December likely would have been available. Thus, the continuance constituted delay for speedy trial purposes.

***10** ¶ 58 We note that the First District reached a similar conclusion in *People v. Wade*, 2013 IL App (1st) 112547. There, the defendant agreed to two continuances of the trial setting within the 120-day period. An additional delay due to a request for a continuance by the State then pushed the start of the trial beyond that period. *Id.* ¶ 25. The First District rejected the defendant's argument that by agreeing to the first two continuances "he was merely acquiescing to a trial date within the 120-day period." *Id.*

¶ 59 Having found that the 23-day continuance constitutes delay, we must consider whether that delay is attributable to the defendant. Although the Fifth District has consistently held that delays for the purpose of finding conflict-free counsel are generally not attributable to the defendant (see, *e.g.*, *Myers*, 352 Ill. App. 3d at 688; *People v. Roberts*, 133 Ill. App. 3d 731, 738 (1985); *People v. Collum*, 98 Ill. App. 3d 385, 387 (1981); *McKinney*, 59 Ill. App. 3d at 541), our supreme court has limited the reach of those holdings to some extent. In *People v. Bowman*, the court explained that when an attorney has a conflict of interest, "both the attorney and the accused have no choice. The attorney must withdraw, and the accused must obtain another attorney or have new counsel appointed." *People v. Bowman*, 138 Ill. 2d 131, 145 (1990). The court held that under *those* circumstances, the rationale underlying Fifth District cases like *Roberts* and *Collum* was sound. *Id.*

¶ 60 We note that *Bowman* did not involve a withdrawal due to a conflict; rather, it involved the voluntary withdrawal of the defendant's second attorney followed by a request for a continuance by the defendant's third attorney to give him more time to prepare for trial. *Id.* at 135-36. In interpreting *Bowman* in the context of delays due to conflicts of interest, the Second District has held that such delays are only attributable to the State if "neither the defendant nor his attorney could have prevented the circumstances that led to the attorney's withdrawal." *Collins*, 382 Ill. App. 3d at 168 (distinguishing our decisions in *Roberts* and *Collum* on this basis); *People v. Solis*, 207 Ill. App. 3d 357, 362-63 (1991) (also distinguishing *Roberts* and *Collum* on this basis and explaining that its holding was consistent with *Bowman*).

¶ 61 Here, the delay was occasioned by the defendant's decision to waive the conflict and by counsel's failure to obtain the required signed waivers before the October 3 setting. These were matters over which the defendant and his attorney had some control. Thus, the 23-day delay is attributable to the defendant.

¶ 62 When the case came for the scheduled preliminary hearing on October 26, 2017, Grigsby informed the court that he learned through discovery that another of his clients, Jacob Graham, would also be a fact witness. Grigsby explained that this constituted an "absolute conflict of interest" that was not subject to waiver because Graham's expected testimony would be essential to the State's case. The court therefore allowed Grigsby to withdraw and appointed Marissa Sands to represent the defendant. The court set the matter for a status hearing five days later. Because neither Griggs nor the defendant had any choice in the matter and because the court immediately appointed Sands, the five days are not attributable to the defendant under *Bowman* or existing Fifth District precedent. See *Bowman*, 138 Ill. 2d at 145; *Myers*, 352 Ill. App. 3d at 688; *Collum*, 98 Ill. App. 3d at 387.

***11** ¶ 63 At the October 31, 2017, status hearing, the court informed the defendant that Sands, too, had to withdraw due to a conflict. The judge explained that he had spoken to attorney Tom Finks, who was willing to take the defendant's case, but Finks wanted to speak with the defendant first. The court suggested setting the case for another status hearing on

November 9, which would give Finks a chance to consult with the defendant. When asked if this was okay with him, the defendant said, "Yes."

¶ 64 We find that the nine days between October 31 and November 9, 2017, constitute delay attributable to the defendant. We reach this conclusion for two reasons. First, the defendant affirmatively agreed to the delay on the record. Second, the purpose of the delay was to allow Finks to meet with the defendant before agreeing to take his case. This is analogous to cases involving continuances to allow newly appointed counsel to prepare for trial. Such continuances are generally attributable to the defendant even if new counsel was appointed due to a previous attorney's conflict of interest. See *Collum*, 98 Ill. App. 3d at 387 (distinguishing delay necessary to appoint a new attorney due to a conflict from additional delay requested to allow the new attorney to prepare for trial). As such, the nine-day delay is attributable to the defendant. At this point in the proceedings, then, a total of 32 days were attributable to the defendant.

¶ 65 Finks appeared with the defendant at a status hearing on November 9, 2017. Finks indicated that he was asserting the defendant's right to a speedy trial and requested the earliest available date for a preliminary hearing.

¶ 66 The preliminary hearing was held on November 30, 2017. The court found probable cause to proceed to trial. Attorney Finks then entered a plea of not guilty on the defendant's behalf. The court noted that Finks was involved in another murder trial set for January and asked whether Finks had discussed this with the defendant. Finks replied, "Yes, in fact, I have, and to be very transparent, my client wishes for me to protect aggressively his speedy trial right." He noted, however, that he needed to discuss the matter of scheduling a trial with the defendant, and asked for a status hearing on December 5 for the purpose of setting a trial date. This continuance was requested by the defendant and delayed the court's ability to set the matter for trial. As such, we find that the 5 days were attributable to the defendant, for a total of 37 days up to this point in the proceedings.

¶ 67 On December 5, 2017, Finks requested a trial date of January 29, 2018. He noted that the defendant's position was that none of the prior delays were chargeable to the defendant and that the speedy trial period therefore ran until January 14. However, Finks was unavailable due to another trial from January 8 until January 29. He acknowledged that this 21-day-period would be attributed to the defendant based on the unavailability of counsel. He further noted that he had discussed the matter with the defendant. The prosecutor then stated that "there will be laboratory issues in this case" and noted that the State "may be filing necessary motions." The court reminded the prosecutor that the State would be required to demonstrate due diligence, and noted that the state's attorney's office must inform the lab of the trial date. The prosecutor replied, "Now that we have a date, we will." The court set the trial for January 29, 2018, with a status hearing on January 4.

***12** ¶ 68 On January 4, 2018, the State filed its motion for a DNA continuance. At the status hearing held that day, the court set the State's motion for a hearing on January 25. We note that the State acknowledged that the period of delay from January 4 to January 25 was attributable to the State, while defense counsel had previously acknowledged that the period from January 8 to January 29 was attributable to the defendant. We find this period attributable to the State. Counsel's concession was based on his position that none of the delay prior to the December 5, 2017, status hearing was attributable to the defendant. As we have explained, however, 37 days were attributable to the defendant. Thus, as of January 4, 2018, the speedy trial period extended to February 20, and the original trial date of January 29 was within this period. Agreeing to a trial date within the speedy trial period does not constitute a delay for purposes of the Speedy Trial Act. *People v. LaFaire*, 374 Ill. App. 3d 461, 464 (2007); *People v. Workman*, 368 Ill. App. 3d 778, 785 (2006).

¶ 69 We find that the defendant acquiesced to the delay between January 29 and May 21, 2018. Although the defendant presented arguments in opposition the State's motion for a continuance, at the end of the January 25 motion hearing, Finks stated that he could "in good conscience" agree to a continuance of 30 days. After that time, there were several status hearings. At no point did the defendant demand a trial date earlier than May 21.

¶ 70 At an April 3, 2018, status hearing, defense counsel Finks informed the court that the DNA test results were complete. He explained that because the testing revealed three or more contributors to the DNA sample obtained from the handgun, the evidence was inconclusive. Finks noted that other testing had not yet been completed, including gunshot residue testing. He argued that the speedy trial statute did not authorize delay for any type of testing other than DNA testing. However, he then stated, "Having said that, we're not sure when we will see those results and that may determine

whether we have a May trial date or whether we have a date later than that at the request of the defendant." Trial was set for May 21, with a status hearing on April 24. The defendant did not demand trial before that date. As we explained earlier, the statute places an affirmative obligation on the defendant to demand a trial date to protect his right to a speedy trial. Otherwise, he is deemed to have agreed to the delay. *Ingram*, 357 Ill. App. 3d at 233. For these reasons, we find that the defendant is deemed to have agreed to the 112 days between January 29 and May 21. This delay was therefore attributable to the defendant, bringing the total to 149 days.

¶ 71 Finks received final discovery from the State on May 14, 2018, which was one week before the trial setting. This discovery included the results of gunshot residue and ballistics testing. The ballistics testing showed that a bullet casing recovered from the scene was consistent with the black and silver handgun several witnesses had seen in the defendant's possession. At a May 17 status hearing, Finks indicated that this was the only physical evidence implicating the defendant. Finks made a two-part motion. He requested that the evidence be excluded so the defendant would not be required to choose between his right to a speedy trial and allowing his attorney adequate time to prepare to counter this evidence. Alternatively, he requested a continuance until June 18. The court granted the latter request.

¶ 72 In June, the defendant requested another continuance. As stated previously, he also filed a motion for discharge based on a speedy trial violation during this time, which the court denied. Trial began on July 18, 2018, which was 62 days after the May 21 trial setting. The defendant concedes that the remaining 62 days of delay were due to his requests for continuances and are attributable to him. This brings the total delay attributable to the defendant to 211 days with the remaining 93 days attributable to the State. Because this is within the 120-day window, we conclude that no speedy trial violation occurred.

¶ 73 B. Sufficiency of the Evidence

***13** ¶ 74 The defendant next contends that the evidence was insufficient to prove him guilty of attempted murder beyond a reasonable doubt. He acknowledges there was sufficient evidence to prove he fired the shots that struck Logan Durbin. He argues, however, that the evidence was insufficient to prove beyond a reasonable doubt that he had the specific intent to kill Durbin or anyone else. As such, he urges this court to reduce his conviction to aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2016)) or discharge of a firearm in the direction of another person (*id.* § 24-1.2(a)(2))—lesser included offenses with which he was charged—and to remand the cause for a new sentencing hearing. We reject the defendant's contention.

¶ 75 When a defendant challenges the sufficiency of the evidence, the question before this court is whether any rational trier of fact could have found all of the essential elements of the offense charged beyond a reasonable doubt. *People v. Brown*, 2015 IL App (1st) 131873, ¶ 12. In answering this question, we consider the evidence in the light most favorable to the prosecution. We also recognize that the credibility of witnesses and the reasonable inferences to be drawn from the evidence are decisions to be made by the jurors, not by this court. *Id.* We will not reverse a conviction based on insufficient evidence unless we find that "the evidence is so unreasonable, improbable, or unsatisfactory" that it creates a reasonable doubt as to the defendant's guilt. *Id.*

¶ 76 To prove a defendant guilty of attempted first degree murder, the State is required to prove two propositions. First, the State must establish that the defendant committed an act which constituted a substantial step towards murdering an individual. *People v. Garrett*, 216 Ill. App. 3d 348, 353 (1991). Second, the State must prove that the defendant acted with the specific intent to kill. *Brown*, 2015 IL App (1st) 131873, ¶ 14; *Garrett*, 216 Ill. App. 3d at 353. The State is required to prove each of these elements beyond a reasonable doubt. *Brown*, 2015 IL App (1st) 131873, ¶ 12. Here, only the element of the defendant's intent is at issue.

¶ 77 Because intent is a state of mind, intent to kill ordinarily must be established through circumstantial, rather than direct evidence. *People v. Teague*, 2013 IL App (1st) 110349, ¶ 24. The requisite intent to kill may be inferred from the circumstances surrounding the offense and from the defendant's conduct. In particular, an intent to kill may be inferred from evidence that the defendant voluntarily committed any act the natural tendency of which was to destroy another's life. *People v. Bailey*, 265 Ill. App. 3d 262, 273 (1994).

¶ 78 A defendant's intent can be inferred from circumstances such as the nature of the assault or the use of a deadly weapon. *Brown*, 2015 IL App (1st) 131873, ¶ 14. A brutal assault or life-threatening injuries are often indicative of a specific intent to kill. See *People v. Viramontes*, 2017 IL App

(1st) 142085, ¶ 66. However, an intent to inflict great bodily harm is not sufficient to support a conviction for attempted first degree murder. *People v. Jones*, 184 Ill. App. 3d 412, 429 (1989). As such, an assault resulting in serious bodily harm will not always support the finding of intent necessary to sustain a conviction for attempted murder. *Id.* at 429-30. Similarly, use of a deadly weapon such as a gun supports a finding of intent to kill, as the defendant acknowledges. See *Teague*, 2013 IL App (1st) 110349, ¶ 26; *Bailey*, 265 Ill. App. 3d at 273; *People v. Thorns*, 62 Ill. App. 3d 1028, 1031 (1978). However, the use of a gun or other deadly weapon is not dispositive. See *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001); *People v. Homes*, 274 Ill. App. 3d 612, 622 (1995).

***14** ¶ 79 Whether a defendant acted with the specific intent to kill a is a question for the jury, as the trier of fact. We will not overturn its determination "unless it clearly appears that there is reasonable doubt on the issue." *Brown*, 2015 IL App (1st) 131873, ¶ 14.

¶ 80 There are three components to the defendant's assertion that the evidence was insufficient to prove he acted with the specific intent to kill. First, he argues that there was no evidence that he aimed at anyone because it was too dark for him to do so. We reject his contention.

¶ 81 As the defendant correctly points out, the evidence showed that the power was off inside Woods's home and there were no streetlights on outside in the vicinity. However, several eyewitnesses identified individuals who were present outside the house and testified regarding what they saw occur, including the defendant. Indeed, the defendant himself testified that he was able to see a group of seven or eight people fighting in front of the house and that he recognized one of them as Ethan Zini. When asked if he recognized the others, the defendant did not state that it was too dark to see them; instead, he testified that he had never seen them before. This evidence indicates that the lighting was at least adequate for him to aim in the direction of the group of people fighting, and that is sufficient to support a finding of specific intent. See *Bailey*, 265 Ill. App. 3d at 273 (evidence that a defendant fired shots down a breezeway where a group of people were running was sufficient to prove beyond a reasonable doubt that he had the specific intent to kill).

¶ 82 Moreover, while poor lighting conditions may have impeded the defendant's ability to aim with precision, this does not negate his intent to do so. See, *e.g.*, *People v. Thompson*, 2020 IL App (1st) 171265, ¶ 75 (noting that "frustrated marksmanship is not a defense to attempted murder"). Jurors were entitled to draw the reasonable inference that the defendant was aiming the gun with the intent to strike and kill someone in the group of people outside Woods's house. See *People v. Green*, 339 Ill. App. 3d 443, 452 (2003) (emphasizing that the inferences to be drawn from the evidence are decisions for the trier of fact).

¶ 83 Second, the defendant contends that evidence that he was intoxicated from drugs and alcohol negated his ability to form the specific intent to kill. In support of this proposition, he cites *People v. Slabon*, 2018 IL App (1st) 150149. However, *Slabon* does not support the defendant's position.

¶ 84 There, the defendant was convicted of aggravated battery. He argued on appeal that the trial court erred and deprived him of the ability to present a defense by excluding testimony about his state of intoxication. *Id.* ¶ 1. He argued that this evidence was necessary to show that, due to his intoxication, he did not have knowledge that his victim was a nurse performing her duties, which was an element of the crime as charged. *Id.* ¶¶ 30-31. In rejecting this claim, the First District noted that while voluntary intoxication is generally not a defense, it is relevant in cases involving specific intent crimes. The court explained that, assuming aggravated battery is a specific intent crime, evidence of the defendant's intoxication would thus be relevant to negate his ability to form that specific intent. *Id.* ¶ 33. The court noted a split of authority on that question, but did not find it necessary to resolve the issue. *Id.* ¶ 34. Instead, the court found that the evidence at trial established that the defendant had the requisite knowledge to commit the offense despite his intoxication. *Id.* ¶¶ 34-37.

***15** ¶ 85 Here, there is no dispute that the defendant was charged with an offense requiring proof of the specific intent to kill. Unlike the trial court in *Slabon*, the court here admitted evidence that the defendant had been drinking, smoking marijuana, and taking methamphetamine in the hours leading up to the shooting. However, while he correctly contends that evidence of his intoxication is relevant to the question of his ability to form the specific intent to kill, we do not believe the evidence showed that the defendant's state of intoxication was " 'so extreme as to suspend entirely the power of reasoning' " (*id.* ¶ 33 (quoting *People v. Cunningham*, 123 Ill. App. 2d 190, 209 (1970))), thereby rendering him incapable of forming that specific intent. As we discussed earlier, the defendant himself gave a detailed account of the events at

issue, and at no point did any witness describe the defendant as displaying any significant impairment.

¶ 86 The final component to the defendant's challenge to the sufficiency of the evidence is an observation that no witness testified that he threatened anyone at the scene. Evidence that a defendant threatened an intended victim is obviously a relevant circumstance that can support a finding of the specific intent to kill. See, *e.g.*, *People v. Hill*, 276 Ill. App. 3d 683, 689 (1995). However, such evidence is not required. For the reasons we have discussed, we find that the evidence was sufficient to prove beyond a reasonable doubt that the defendant acted with the specific intent to kill.

¶ 87 C. Ineffective Assistance of Counsel

¶ 88 The defendant next argues that he received ineffective assistance of counsel. He argues that counsel was ineffective for (1) failing to object to the introduction of prior consistent statements during the direct examination of two State witnesses and (2) failing to object when the prosecutor cross-examined the defendant about whether State witnesses were lying. We reject both claims.

¶ 89 We evaluate claims of ineffective assistance of counsel under the two-prong test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To satisfy that test, a defendant must show that his counsel's performance was deficient, and that he was prejudiced as a result. *Id.* at 687. To demonstrate deficient performance, the defendant must show that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 687-88. To establish prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶ 90 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy both parts of the *Strickland* test. *People v. Morris*, 2013 IL App (1st) 110413, ¶ 62. Thus, if we find that the defendant cannot demonstrate prejudice from counsel's allegedly deficient performance, we may dispose of his claim on this basis alone. *Strickland*, 466 U.S. at 697.

¶ 91 1. *Prior Consistent Statements*

¶ 92 The defendant's first claim of ineffective assistance of counsel involves counsel's failure to object to the admission of prior consistent statements made by two State witnesses, Lucas Stephens and Shelby Collins. During the direct examination of Stephens, the prosecutor asked whether he gave a video-recorded statement to Chief Wheeler. When Stephens stated that he did so, the prosecutor asked, "And in that did you state just as you did here today that you saw the defendant with your own eyes shoot Logan Durbin?" Stephens again replied, "Yes."

¶ 93 The prosecutor then asked Stephens about the statements he gave to Rhonda Keech, a private investigator for the defense. Stephens admitted that he initially told Keech he did not see the defendant on the night of the shootings. Stephens testified, however, that he called her the next day and gave a different statement. When asked why, Stephens testified, "Because it was eating at me. *** So I made the phone call myself, and I told Rhonda that everything I told her was a lie yesterday, that it wasn't right, that I am going to testify against Larry Scott, and that he did shoot my friend, Logan Durbin."

***16** ¶ 94 On cross-examination, defense counsel also questioned Stephens about his statements to Keech. Stephens admitted that he spoke to her a total of three times. He acknowledged that the first time he spoke with her, he told her he did not see anything on the night of the shooting because he was too drunk. When asked whether, during his third conversation with Keech, he again stated that he was too drunk to see what happened on the night of the shooting, he denied it. He also admitted drinking alcohol on the night of the shooting, but he asserted that he was not intoxicated.

¶ 95 The defense later called Keech to testify about her conversations with Stephens. She had a total of four conversations with him. Keech testified that when she first contacted Stephens, he said he was drunk and stoned on the night of the shooting after going on a three-day drinking binge. He asserted that he did not see the defendant with a gun and did not see much of what happened that night. She further testified that Stephens called her the following day and told her that he "wasn't right in the head" during their first conversation and that he wanted to retract his statement. The next conversation took place at the Christian County jail. Keech explained that she visited him there to deliver a subpoena for his testimony. She stated that they spoke at

length. During their conversation, Stephens again told her that "he was out-of-his-mind drunk" on the night of the shooting and that he did not see the defendant fire a gun. The fourth and final conversation took place in the Shelby County jail, where Keech again visited Stephens to deliver a subpoena. She testified that he said he was angry at the defendant and blamed the defendant for his transfer to Shelby County. We note that this final statement was admitted for the limited purpose of showing Stephens's state of mind.

¶ 96 Similarly, on direct examination, Shelby Collins was asked by the prosecutor whether she gave a statement to Chief Wheeler. She answered in the affirmative. The prosecutor then asked, "And did you tell him the truth as well during your interview with the chief?" She replied, "Yes." We note that she was not asked what she told Chief Wheeler or whether she told him the same things she told the jury during her testimony. On cross-examination, Collins acknowledged that during the first 30 minutes of her interview with Chief Wheeler she stated that she did not know anything about what happened.

¶ 97 The defense later recalled Chief Wheeler to the stand. He confirmed that during the first half hour of his interview with Collins, she told him she did not see anything or know what happened. He testified that she seemed to be "very scared," and that she eventually opened up after he reassured her by telling her that she was not a suspect. Chief Wheeler further testified that before transporting Collins to the police station for her interview, he asked her what happened, to which she replied, "Larry fucked up."

¶ 98 Generally, evidence that a witness made prior statements consistent with his or her trial testimony is not admissible during the direct examination of the witness. Such statements are hearsay, and they improperly bolster or corroborate the witness's testimony. *People v. Ruback*, 2013 IL App (3d) 110256, ¶ 26. However, prior consistent statements are admissible to rebut an express or implied charge that the witness has a motive to testify falsely or that the testimony is a recent fabrication. *Id.* Prior consistent statements are admissible for this purpose only if they were made before the existence of a motive to lie or before the recent fabrication. *People v. Crockett*, 314 Ill. App. 3d 389, 407 (2000).

***17** ¶ 99 Here, the prior consistent statements were elicited during direct examination, before any testimony was elicited suggesting that the witnesses were not being truthful. Introducing evidence of a witness's prior consistent statements during direct examination in anticipation of impeaching evidence that might be introduced on cross-examination is not proper. *Id.* at 408. This is because if the evidence the statements are meant to rebut is *not* introduced during cross-examination, "it would leave the jury with unwarranted evidence of prior consistent statements." *Id.* However, the error will be deemed to be "technical" rather than substantive if the evidence actually elicited on cross-examination would have justified the admission of the prior consistent statements on redirect. *Id.*

¶ 100 The defendant argues both that there was no sound strategic reason for counsel to choose not to object to the testimony regarding these two witnesses' prior consistent statements during their direct examination and that he suffered prejudice as a result. In support of both arguments, he asserts that the credibility of Collins and Stephens was central to the case because they are the only two witnesses to testify that they saw the defendant fire the gun. We are not convinced. We need not consider whether counsel provided deficient representation by failing to object because we find that the defendant cannot establish prejudice.

¶ 101 We reach this conclusion for two reasons. First, as we have discussed, the evidence would have been admissible during redirect examination because defense counsel asked both witnesses about their prior statements denying knowledge of the shooting. Second, the evidence of the defendant's guilt was overwhelming. Although only Stephens and Collins saw the defendant fire the gun, the testimony of other witnesses, including that of the defendant's long-time friend, Jerome Mason, provided support for their accounts. Mason testified that he saw the defendant "charge" past him carrying a gun just before he heard the shots, although he gave inconsistent testimony when recalled as a witness for the defense. Jacob Graham testified that he saw the defendant leave the fight to go inside Samantha Woods's house and come back outside just before the shots were fired. When considered along with the evidence that the defendant had taken possession of the gun, this leads to a reasonable inference that he went inside to retrieve the gun. In addition, no witnesses testified to seeing anyone else in the group in possession of a gun at the scene of the shooting. In the face of this evidence, we do not believe the defendant can demonstrate a reasonable probability that the outcome of his trial would have been different had counsel objected to the premature admission of the witnesses' statements. As such, we reject his claim of ineffective assistance. See *Strickland*, 466 U.S. at 697.

¶ 102 2. *Cross-Examination About the Credibility of State Witnesses*

¶ 103 The defendant further contends that counsel was ineffective for failing to object when the prosecutor asked him during cross-examination whether he believed that four of the State's witnesses were lying. We reiterate that to succeed on this claim, the defendant must demonstrate not only that counsel's performance was objectively unreasonable, but also that there is a reasonable probability that the result of the trial would have been different had counsel objected. See *Strickland*, 466 U.S. at 697; *Morris*, 2013 IL App (1st) 110413, ¶ 62. We find that the defendant is unable to satisfy that burden.

¶ 104 As the defendant correctly contends, it is improper to question a defendant about his or her opinion of the veracity of other witnesses. Such questions invade the province of the jury, and they "also demean and ridicule the defendant." *People v. Schaffer*, 2014 IL App (1st) 113493, ¶ 49. Such questioning, while improper, "generally has not, by itself, been held reversible." *People v. Nwadiei*, 207 Ill. App. 3d 869, 876 (1990). Reversal may be warranted if the evidence is closely balanced and the credibility of witnesses is critical. Conversely, if the evidence of guilt is overwhelming, the error may be found to be harmless. *Schaffer*, 2014 IL App (1st) 113493, ¶ 49. Also pertinent is how extensive the improper questioning is. *Id.* ¶ 56; *Nwadiei*, 207 Ill. App. 3d at 876-77.

***18** ¶ 105 Here, while the credibility of witnesses was an important consideration, as we have already explained, the evidence of the defendant's guilt was overwhelming. Moreover, the improper questioning was not extensive. The prosecutor asked the defendant whether he believed four of the State's witnesses were lying—Lucas Stephens, Shelby Collins, Jacob Graham, and Logan Durbin. There were no follow-up questions concerning Stephens, Graham, or Durbin. Although the prosecutor did ask the defendant additional questions concerning why he believed Collins had a motive to lie, the court sustained an objection to some of these questions on the basis that they were argumentative. We acknowledge that the defendant also testified that unidentified individuals had informed him that Chief Wheeler was urging people to lie about the case. However, this information was volunteered by the defendant.

¶ 106 The improper questioning in this case stands in stark contrast to the questioning that required reversal in *Schaffer* and *Nwadiei*, the cases relied upon by the defendant. We will briefly consider each case.

¶ 107 In *Schaffer*, the prosecutor asked the defendant whether the complaining witness made up numerous details in her account, whether evidence of a tear in her screen door made him look guilty, and whether two detectives were lying. *Schaffer*, 2014 IL App (1st) 113493, ¶ 50. The appellate court found that the evidence in that case was closely balanced. *Id.* ¶ 52. In holding that reversal was warranted, the court found it significant that "the prosecutor repeatedly asked defendant to comment on the veracity" of the complaining witness as well as that of the two detectives. *Id.* ¶ 56.

¶ 108 Similarly, in *Nwadiei*, "the prosecution devoted most of its cross-examination to asking Nwadiei whether six State's witnesses *** had lied." *Nwadiei*, 207 Ill. App. 3d at 876-77. In addition, the prosecutor asked the defendant whether a hypothetical investigator would be lying if he were to testify concerning unrelated conduct that may have constituted an offense. *Id.* at 877. The appeals court criticized this effort to "sidestep[ ]" the rule against admitting evidence of other offenses "merely by suggesting the existence of the evidence." *Id.* In finding that the questioning was prejudicial, the court emphasized that the prosecutor asked the defendant 23 questions about his opinion of the veracity of 6 important State witnesses as well as the hypothetical witness. *Id.* at 878.

¶ 109 The improper questioning in this case was far less extensive than that involved in either *Nwadiei* or *Schaffer*. Because of this, and because we have found that the evidence was overwhelming, we do not believe the defendant can demonstrate a reasonable probability that he would have been acquitted had counsel objected to more of the questions than he did. For these reasons, we reject his claims of ineffective assistance of counsel.

¶ 110 D. Admission of the Defendant's Phone Calls From the County Jail

¶ 111 The defendant next argues that the court erred in admitting recordings of phone calls he placed from the county jail while awaiting trial. We disagree.

¶ 112 At issue are recordings of seven conversations between the defendant and unidentified individuals. The first

conversation took place on April 25, 2018. In the recording, the defendant can be heard saying that there was "some very good news" and that "when they came through, they had a search warrant for the wrong motherfucking address." He can also be heard saying, "Remember your buddy, Stephens? Tell him he was drunk, high, and drunk on meth that night he gave that statement." Finally, the defendant can be heard saying, "You and buddy need to squash that shit."

¶ 113 The second conversation took place later the same day. In the recording of the call, the other speaker can be heard saying, "He hasn't been online in 16 hours," to which the defendant can be heard replying, "Oh, I thought you know where he lived at." The defendant can also be heard saying, "Pick him up." At the end of the call, the defendant can be heard saying, "Choppo gang shit."

***19** ¶ 114 The third phone conversation at issue took place on April 30, 2018. In the recording, the defendant can be heard saying, "I need you to holler at buddy, tell him he was high as fuck when he gave that statement."

¶ 115 The fourth recording was of a May 5, 2018, conversation. In it, the defendant can be heard saying, "I need you to listen. As soon as I get off the phone, inbox Shelby. Tell her to call you or call her and tell her I will get out if they don't have nothing on me, I will get out as long as she don't come to court."

¶ 116 The fifth recording involved a call placed on May 12, 2018. The defendant can be heard saying, "Tell her she didn't see shit."

¶ 117 The sixth recording at issue was of a June 26, 2018, phone call. The defendant can be heard making the following statement:

> "I need you to holler at old girl. It's just her. I go back to court next week, Monday. I just went to court yesterday. She ain't answer when [inaudible] situation. Even my lawyer said [inaudible] the whole time she said 'I don't know, I don't know, I don't know' for 30 minutes straight. They kept saying, 'We know it was him, we know it was him.' She was just like fuck it."

The other speaker can be heard saying, "Lucas said he's rocking with us." The defendant can be heard saying, "I ain't trying to say so many names on bro phone."

¶ 118 The final recording involved a phone call placed later in the day on June 26. The defendant can be heard asking, "Did you holler at Eddie?" He can then be heard saying, "The only thing they really got is the parole violation. She don't even have to come but if she does, they gonna ask her. I want you to try to call Shorty, though, so you can know yourself what's going on." The other speaker can be heard saying in response that she will call Shelby.

¶ 119 As mentioned previously, the defendant filed a motion *in limine* shortly before trial asking the court to exclude these recordings from evidence on the basis that the inaudible portions were substantial enough to render the recordings unreliable. After listening to the recordings and holding a hearing, the court stated that although it was difficult to understand much of what the people on the other end of the line were saying, the defendant's statements could be understood.

¶ 120 Rulings on motions *in limine* are within the sound discretion of the trial court, and we will reverse the court's evidentiary rulings only if they constitute an abuse of discretion. *People v. Way*, 2017 IL 120023, ¶ 18. Partially inaudible sound recordings are admissible "unless the inaudible portions are so substantial" that the recordings are rendered "untrustworthy as a whole." *People v. Manning*, 182 Ill. 2d 193, 212 (1998). As with other evidentiary decisions, the admissibility of such recordings is a matter within the trial court's discretion. *Id.* A trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view as the court. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 121 In support of his position, the defendant calls our attention to the Illinois Supreme Court's decision in *People v. Hunt*, 234 Ill. 2d 49 (2009). We find *Hunt* distinguishable.

***20** ¶ 122 That case involved recorded conversations between the defendant and a police informant. *Id.* at 53. The defendant filed a motion to suppress the recordings of those conversations and the statements he made to the informant, asserting that the recordings were "substantially inaudible." *Id.* at 54. The State countered this argument by emphasizing that the defendant could be heard making incriminating statements in the recordings. *Id.* After listening to the recordings and holding two hearings in the matter, the trial court granted the defendant's motion to suppress, finding that the recordings were inaudible and "worthless." *Id.* at 54-55.

¶ 123 The State filed a certificate of impairment and appealed that ruling. *Id.* at 55. Both the appellate court and the supreme court affirmed the trial court's decision "as within the sound discretion of the trial court." *Id.* at 66.

¶ 124 Here, unlike in *Hunt*, the trial court did not find the recordings at issue to be so indiscernible or inaudible as to be "worthless." Indeed, as noted earlier, the court expressly found that the defendant could be understood. We find no abuse of discretion in this ruling.

¶ 125 Finally, it is worth noting that there was also testimony from two witnesses that the defendant or his associates had attempted to influence the testimony of some of the State's witnesses. Lucas Stephens testified that he was approached by some individuals to discuss his testimony. He further testified that those individuals wanted him to give testimony that was different from the testimony he gave. Jerome Mason acknowledged in response to questions from the prosecutor that the defendant called him on the phone asking him to contact other witnesses to tell them what to say. Mason testified that he asked the defendant to stop calling him about this issue because Mason "just knew it wasn't a good look." While the recordings illustrate more dramatically the extent of the defendant's efforts to influence the witnesses, evidence that he did so would have been put before the jury even if the court had excluded the recordings.

¶ 126 E. Sentence

¶ 127 The defendant's final argument is that the court abused its discretion in imposing a 45-year sentence. He argues that the sentence was excessive because the court failed to give adequate consideration to evidence of his difficult upbringing and his mental health and failed to take into account or "act on" his rehabilitative potential. We disagree.

¶ 128 The presentence investigation report (PSI) revealed that the defendant had been diagnosed with bipolar disorder, depression, and anxiety; that he had a learning disability; that he struggled with substance abuse and addiction; and that he had a difficult childhood. The defendant completed an adverse childhood experience assessment and scored 7 out of 10. The PSI further revealed that the defendant had eight prior felony convictions, nine prior misdemeanor convictions, and several traffic violations.

¶ 129 At the sentencing hearing, Logan Durbin testified about the continuing physical pain and psychological distress caused by the shooting. Chief Wheeler testified that after Keira Morrisey testified for the State, she called the police to report that her house had been spray-painted with the word "snitch" and her car had been egged. Evidence was also presented about the defendant's multiple infractions while in jail awaiting trial, including an assault on jail administrator Rohn Burke.

¶ 130 As evidence in mitigation, the defendant presented the testimony of Jeff Stickel and his daughter, Amanda. Both testified that when the defendant rented a room from Jeff, he was helpful and respectful and did not behave violently. The defendant made a statement in allocution, during which he told Durbin that he felt sorry for what happened to him, but denied being the shooter. The defendant also talked about his difficult childhood and stated that he wanted to take advantage of whatever rehabilitative programs would be available to him in prison.

***21** ¶ 131 In ruling from the bench, the court found that the defendant's prior criminal history was "obviously a significantly aggravating factor for Mr. Scott." See 730 ILCS 5/5-5-3.2(a)(3) (West 2016). Other statutory factors in aggravation the court found to be relevant were the need to deter others (*id.* § 5-5-3.2(a)(7)) and the fact that the defendant committed the offense while on mandatory supervised release (*id.* § 5-5-3.2(a)(12)). Additional nonstatutory aggravating factors found by the court were the need to protect the public from the defendant, the fact that the defendant incurred multiple disciplinary actions while in jail awaiting trial, and the evidence that the defendant attempted to intimidate witnesses.

¶ 132 Although the court did not find that any statutory factors in mitigation were present, it did consider three nonstatutory factors in mitigation. Specifically, the court found that the defendant's learning disability, his upbringing, and his mental health conditions were mitigating factors the court could consider. The court particularly emphasized the defendant's upbringing, noting that his score on the adverse childhood experience assessment was "off the charts."

¶ 133 The court sentenced the defendant to 45 years in prison. As stated earlier, the defendant now challenges this sentence, arguing that the court failed to give adequate consideration to the mitigating evidence we have discussed and failed to act on his rehabilitative potential. We are not persuaded.

¶ 134 Trial courts "are afforded broad discretionary powers" in sentencing. *People v. Etherton*, 2017 IL App (5th) 140427, ¶ 26. We give the trial court great deference on sentencing decisions, recognizing that the trial judge was in the best position to assess and weigh such pertinent factors as the defendant's credibility, demeanor, moral character, social environment, age, and habits. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). We will not alter a defendant's sentence absent an abuse of the trial court's considerable discretion. *Id.* at 209-10; *People v. Busse*, 2016 IL App (1st) 142941, ¶ 20.

¶ 135 A sentence within the statutorily prescribed range is presumed to be proper. *Etherton*, 2017 IL App (5th) 140427, ¶ 28. We will find a sentence within this range to be an abuse of discretion only where the court's decision is "arbitrary, fanciful, unreasonable, or where no reasonable person" would adopt the court's position (*id.* ¶ 26), or if the sentence is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense" (*People v. Fern*, 189 Ill. 2d 48, 54 (1999)). A sentence comports with "the spirit and purpose" of our sentencing laws if it reflects both the seriousness of the offense and the rehabilitative potential of the defendant. *Etherton*, 2017 IL App (5th) 140427, ¶ 28.

¶ 136 The trial court is required to consider any mitigating evidence placed before it. *People v. Cord*, 239 Ill. App. 3d 960, 968 (1993). However, the court is not required to give such evidence more weight than it gives the aggravating factors. The seriousness of the offense is one of the most important factors. *People v. Weiser*, 2013 IL App (5th) 120055, ¶ 32.

¶ 137 Here, as the defendant acknowledges, the court imposed a sentence within the statutory range. The sentence for attempted murder is generally the sentence for a Class X felony, which is 6 to 30 years. 720 ILCS 5/8-4(c)(1) (West 2016); 730 ILCS 5/5-4.5-25(a) (West 2016). In addition, there is a mandatory sentence enhancement of 25 years to natural life when a jury finds that the defendant personally discharged a firearm, thereby proximately causing great bodily harm, permanent disability, permanent disfigurement, or death. 720 ILCS 5/8-4(c)(1)(D) (West 2016). Here, the defendant received a sentence of 20 years for attempted murder, which is a mid-range sentence for that offense, and an enhancement of 25 years, which is the minimum.

***22** ¶ 138 The defendant nevertheless contends that this mid-range sentence constitutes an abuse of discretion because the court gave inadequate consideration to the mitigating evidence concerning his difficult childhood and his mental health diagnoses. We disagree. We note that, absent evidence to the contrary other than the sentence itself, we must presume the court considered any mitigating evidence placed before it. *Weiser*, 2013 IL App (5th) 120055, ¶ 31. Here, we need not rely on this presumption. The court explicitly stated that it found the defendant's mental health diagnoses and his difficult childhood to be factors in mitigation. Additionally, there was significant aggravating evidence in this case. As mentioned earlier, the defendant had an extensive criminal history; he committed the offense while on mandatory supervised release; he committed multiple infractions while in jail awaiting trial, including an assault; and there was evidence he engaged in an effort to influence the testimony of the witnesses. The court's decision to impose a mid-range sentence in the face of this aggravating evidence shows that the court gave some weight to the mitigating evidence.

¶ 139 The defendant also contends that the trial court erred by failing to "act on" his rehabilitative potential. This is so, he explains, because he will not be released from prison until he is at least 72 years old. Although the court did not make an express finding concerning the defendant's rehabilitative potential—something the court was not required to do—we believe the court did appropriately consider this factor. The court emphasized the fact that the defendant continued to commit crimes throughout his adult life. In his argument on appeal, the only evidence of rehabilitative potential the defendant can point to is his statement in allocution, where he told the court that he wanted to take advantage of rehabilitative programs in prison. Under the circumstances, we find no abuse of discretion.

¶ 140 We also note that before ruling, the trial court pointed out that because the defendant was 36 years old, even the minimum sentence of 31 years would result in him spending most of the remainder of his life in prison. The court was not required to overlook the significant aggravating factors and impose the minimum sentence under the circumstances of this case. We find no abuse of discretion.

¶ 141 III. CONCLUSION

¶ 142 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 143 Affirmed.

All Citations

Not Reported in N.E. Rptr., 2022 IL App (5th) 190079-U, 2022 WL 3586502

Justices Barberis and Vaughan concurred in the judgment.

Footnotes

1 To be more precise, the Intrastate Detainers Act makes subsection (b) of the speedy trial statute applicable to such defendants. 730 ILCS 5/3-8-10 (West 2016). That subsection generally applies to defendants who are on bond while awaiting trial, and it provides that they must be tried within 160 days of making a demand for a speedy trial. 725 ILCS 5/103-5(b) (West 2016). The State contends that these provisions are applicable to the defendant because a warrant was issued for his arrest based on violations of his mandatory supervised release four days before he was taken into custody on this charge. Although the defendant remained physically in custody in the Christian County jail, the State contends that he was in custody of the Department of Corrections (DOC) based on receipt for warrant issued by the DOC, which provided that the defendant could not be released on bail in this case.

No. 128871

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- SANTANA GRAYER, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-21-0808. There on appeal from the Circuit Court of Cook County, Illinois , No. 20 CR 10002. Honorable Vincent M. Gaughan, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 21, 2023, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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