No. 118728

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, Fifth District,
Plaintiff-Appellant,	)	No. 5-13-0085
	)	There on Appeal from the Circuit Court of the
v.	)	Twentieth Judicial Circuit, St. Clair County, Illinois,
	)	No. 10 CF 1007
JAMES CHERRY,	)	The Honorable Michael N. Cook,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

CAROLYN E. SHAPIRO
Solicitor General

MICHAEL M. GLICK
ERIN M. O'CONNELL
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-1235

Attorneys for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

Following a jury trial in the Circuit Court of St. Clair County, defendant James Cherry was convicted of one count of armed violence predicated on aggravated battery causing great bodily harm and one count of aggravated battery with a firearm. C151-55.[1] The trial court sentenced defendant to twenty-five years in prison on the armed violence count and found that the lesser count merged. C176. The Appellate Court of Illinois, Fifth District, vacated defendant's armed violence conviction and remanded for resentencing on defendant's aggravated battery with a firearm conviction. A9. This Court granted the People's timely petition for leave to appeal (PLA). A question is raised as to the validity of the charging instrument predicating a charge of armed violence on aggravated battery causing great bodily harm.

ISSUE PRESENTED

Whether aggravated battery causing great bodily harm is a proper predicate offense for a charge of armed violence.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court granted the People's timely PLA on March 25, 2015. *People v. Cherry*, 31 N.E.3d 769 (Ill. 2015) (Table).

[1] "C_" refers to the common law record; "R_" refers to the reports of proceedings; and "A_" refers to the appendix to this brief.

STATUTORY PROVISIONS INVOLVED[2]

720 ILCS 5/12-4(a) (2010) (Aggravated battery).

> A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.

720 ILCS 5/12-4.2(a) (2010) (Aggravated battery with a firearm).

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

720 ILCS 5/33A-2(b) (2010) (Armed violence – Elements of the offense).

> A person commits armed violence when he or she personally discharges a firearm that is a Category I or Category II weapon while committing any felony defined by Illinois law, except . . . any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range.

STATEMENT OF FACTS

I. The Trial, Convictions, and Sentencing

In October 2010, Bey Miller-Bey operated a parking lot in East St. Louis, Illinois on the site of a defunct gas station. R119-20. Miller-Bey's son, Larry Miller, and daughter, Montrese Miller, helped him run the business. R121. The lot was located near several East

[2] Pertinent provisions are excerpted here, and the statutes are reprinted in their entirety in the appendix to this brief. A12-20. The People rely on the versions in effect at the time of defendant's crimes in 2010. Since then, the statutory provisions have been amended and renumbered. Section 5/12-4 (aggravated battery) was designated section 5/12-3.05, and 720 ILCS 5/12-4.2 (aggravated battery with a firearm) was repealed and replaced by 5/12-3.05(e).

St. Louis night clubs, including the Club Illusion, and offered parking to their patrons on Fridays and Saturdays between 11:00 p.m. and 4:30 a.m. R119-20.

At 2:00 a.m. on October 31, 2010, Miller-Bey and Montrese were working at the lot when a black sports utility vehicle (SUV), a Dodge Nitro, pulled in. R124-25, R161. The female driver and her male passenger (defendant) appeared to be arguing when they arrived. R126-27. They parked the SUV, paid for parking, and went next door to the Club Illusion. R127. Subsequently, Larry and his friend, Jairus Lacey, arrived to help Miller-Bey and Montrese with closing. R132, R137.

At 4:00 a.m., defendant returned, alone. R132. Miller-Bey, Montrese, Larry, and Lacey were on the lot, preparing to close. R166. Defendant circled the SUV several times. R133-34, R168. Larry asked him, "is that you?" (meaning, in other words, are you the owner of the vehicle?), and Miller-Bey and Montrese confirmed that defendant had arrived in the SUV. R133-34, R167-68. Defendant went briefly to the back of the lot, apparently to urinate, then returned. R171. He asked the employees on the lot, "what you all trying to steal my MF'n stuff?" *Id.* Larry responded, "man, it ain't that serious. You ain't got to pull a gun." R134.

Defendant, armed with a pistol equipped with a laser sight, began shooting at Larry. R134-35, R172-75. The first shot hit Larry in the stomach, and he tried to run toward the street. R400-01. The second shot hit Larry in the left knee, causing him to fall on his side. R401-02. Two more bullets then hit Larry's left leg. R404. As a result of his wounds, Larry spent a week in the hospital and underwent three surgeries to repair damage to his colon and spleen. R432-33.

After the shooting started, Montrese ran behind her car, which was parked nearby. R175. Defendant fired multiple shots in her direction, and bullets pierced her driver's door and two car windows. R246-47, R297-302. At one point during the shooting, Montrese was trying to see defendant through her tinted windows when she "felt . . . burning in [her] neck." R177.

Officer Ramon Carpenter of the East St. Louis Police Department was down the street from the parking lot when he heard gunshots. R229. Driving in the direction of the sounds, he encountered Montrese bleeding from the neck, and she said that her brother had been shot by a man wearing a red jacket. R229-30, R233. Lacey indicated to Carpenter that the shooter had run behind the building, which was overgrown with brush. R235; *see also* Peo. Exhs. 23 & 25 (photographs of area behind building). Officer Carpenter heard rustling, and a man in a red jacket, whom Carpenter identified as defendant, came out. R235-38. Defendant yelled, "don't shoot me"; "I'm a cop"; and "I didn't mean to do it." R138, R366. Lacey and Miller-Bey both confirmed to Carpenter at the scene that defendant was the shooter. R237, R239.

Carpenter searched the wooded area behind the building and located a 9-millimeter semiautomatic pistol that was equipped with a red laser sight. R249-52, R304, R488-90. Inside the Dodge Nitro, he found a fully-loaded magazine that fit the pistol. R242-43, R492. Behind the Nitro were eight shell casings. R245, R281. A firearms expert determined that the eight casings, as well as a fired bullet recovered from inside of Montrese's car, R295, R302, were fired from the 9-millimeter pistol. R494, R497. No other casings or bullets were found. R253-54.

Defendant admitted shooting Larry Miller, but claimed that he did so in self-defense. Defendant testified that after he left the Club Illusion and approached the parking lot, he noticed three people standing around his SUV. R533-35. One person stood at the rear door on the passenger side with "a tool in their [*sic*] hand like prying into [his] car"; defendant "could just hear the metal sound." R535. Another person stood at the driver's door and "was doing the same exact thing the person in the rear was doing, trying to get into [his] vehicle with this 12-inch tool." R536. When defendant asked what they were doing, they looked startled and dropped their tools on the ground; defendant thought he heard three "tinks of metal." R536-37. Defendant told them that he didn't "want any problems," but they remained standing by the car, making defendant "nervous." R537-39. Defendant reached into his car for a loaded magazine that was on the floor under the driver's seat. R540. He leaned over the driver's seat and tried to start the engine, but defendant "felt something poke [him] in [his] neck" and then saw a .38-caliber revolver in his peripheral vision. R541-42. He identified the person holding the firearm as Montrese. R543. Defendant testified that he struck Montrese in the chest and knocked her to the ground, causing her to drop the gun. R543-44.

Defendant then reached into his SUV to retrieve his firearm. R544. He ran to the side of the gas station building "to get cover and concealment" and heard three gunshots, followed by the sounds of heavy breathing and approaching footsteps. R546-49. When the person he heard (apparently Larry) came close, defendant fired two shots, hitting Larry and causing him to fall. R549-50. Larry got to his feet and started running toward the street, holding his stomach. R551-52. Four more gunshots came from the parking lot, and

defendant could "hear the bullets going past [him]" as he lay on the ground. R552-53. Defendant returned fire. R553-54. When defendant heard police sirens, he laid down his weapon and came out of the bushes with his hands up, telling the responding officer "that they were trying to kill [him]" and indicating "that [he] was a police officer." R554-55.[3]

The jury was instructed as to two charges: (1) armed violence (720 ILCS 5/33A-2(b) (2010)) predicated on aggravated battery causing great bodily harm (720 ILCS 5/12-4(a) (2010)); and (2) aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (2010)). *See* R630-33; *see also* C35-36 (indictments). The People alleged with respect to both counts that an additional circumstance existed that justified an extended-term sentence: namely, defendant used a firearm equipped with a laser sight (730 ILCS 5/5-5-3.2(b)(10)). Jurors were instructed to determine whether this fact had been proven. R631-32, R634; *see also* C65-66 (notice of intent to seek extended-term sentencing).

The trial court instructed the jury that to convict defendant of armed violence, the People needed to establish four propositions: (1) "[t]hat the defendant committed the offense of aggravated battery"; (2) "[t]hat when the defendant did so, he personally discharged a firearm that is a Category I weapon"; (3) "[t]hat great bodily harm resulted from the discharging of a firearm"; and (4) "[t]hat the defendant was not justified in using the force which he used." R631. On the first element, the court further instructed that "[a] person commits the offense of aggravated battery when he knowingly without legal justification and by any means causes great bodily harm to another person." R630. With respect to

[3] According to defendant, he had served as a military police officer in Kosovo and Iraq. R520-21.

aggravated battery with a firearm, the court instructed that the People needed to prove three propositions: (1) "[t]hat the defendant knowingly caused injury to another person"; (2) "[t]hat the defendant did so by discharging a firearm"; and (3) "[t]hat the defendant was not justified in using the force which he used." R632-33. As the prosecutor distinguished the two charges in closing argument, "armed violence requires great bodily harm," whereas "aggravated battery with a firearm requires less of an injury." R602.

The jury found defendant guilty of both charges and determined that the crimes were committed through use of a firearm equipped with a laser sight. R640-41, C151-54. The trial court imposed a sentence of twenty-five years for armed violence and found that the charge of aggravated battery with a firearm merged with that count. C176.

II. The Appeal

Defendant appealed his convictions and sentence, claiming that (1) the charge of armed violence was improperly predicated on aggravated battery causing great bodily harm; and (2) an attorney appointed to represent defendant with respect to his pro se post-trial motion, which alleged ineffective assistance of trial counsel, was likewise ineffective. The appellate court rejected defendant's ineffective assistance claim but vacated his armed violence conviction.

The appellate court held that aggravated battery causing great bodily harm is an improper predicate for armed violence because it constitutes an "offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range," for purposes of 720 ILCS 5/33-A2(b). *See* A5-7. The court reasoned that

> the plain language of the current [armed violence] statute prohibits predicating armed violence on any part of the aggravated battery statute, including section 12-4(a). The wording unambiguously excludes *any offense* that makes the use of a dangerous weapon either an element of the base offense or an aggravated or enhanced version of the offense. Thus, this clause provides alternative circumstances under which an offense not parts or subsections of an offense cannot be used as a predicate offense. We focus here on the prohibition of "an aggravated or enhanced version of the offense." Aggravated battery, which prohibits battery causing great bodily harm (section 12-4(a)) and battery using a weapon other than a firearm (section 12-4(b)(1)) is a Class 3 felony. Aggravated battery with a firearm (section 12-4.2) is a Class X felony. Consequently, aggravated battery with a firearm is an enhanced version of aggravated battery.

A6-7 (emphasis in original).

This Court granted the People's petition for leave to appeal this holding.

ARGUMENT

I. Standard of Review and Principles of Statutory Construction

The proper construction of the armed violence statute presents a legal question that this Court reviews de novo. *People v. Gaytan*, 2015 IL 116223, ¶ 23.

"The primary goal of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature." *Home Star Bank & Fin. Servs. v. Emergency Care & Health Org., Ltd.*, 2014 IL 115526, ¶ 24. If the statutory language is clear and unambiguous, then its plain meaning is enforced without resort to interpretive aids. *Id.* If this Court finds that the language is instead ambiguous, then it "may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy, as well as other sources such as legislative history." *Id.*

Where appropriate, ambiguities in a statute are construed in a defendant's favor, *see* A4, but this "rule of lenity is subordinate to [the Court's] obligation to determine legislative intent, and the rule of lenity will not be construed so rigidly as to defeat legislative intent." *People v. Gutman*, 2011 IL 110338, ¶ 12.

II. The Plain Language of the Statute Unambiguously Demonstrates that Armed Violence Is Properly Predicated on Aggravated Battery Causing Great Bodily Harm.

The plain language of the armed violence statute, "[t]he best indication of legislative intent," *see Home Star Bank & Fin. Servs.*, 2014 IL 115526, ¶ 24, demonstrates that aggravated battery causing great bodily harm is a proper predicate offense for armed violence.

A person commits armed violence if "personally discharges a firearm . . . while committing any felony defined by Illinois law," other than certain enumerated offenses not relevant here or "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." 720 ILCS 5/33A-2(b) (2010). Here, the relevant "offense" is aggravated battery causing great bodily harm, 720 ILCS 5/12-4(a) (2010), as provided in the jury instructions and indictments. R630-31, C35.

The appellate court, however, failed to identify the correct "offense." Its analysis appears to rest on the mistaken assumption that the base offense was not aggravated battery causing great bodily harm, but was instead generic aggravated battery. The appellate court stated, for example, that "the plain language of the current [armed violence] statute prohibits predicating armed violence on *any* part of the aggravated battery statute" because the statute

sets forth "circumstances under which an offense not parts or subsections of an offense cannot be used as a predicate offense." A6 (emphasis added). Thus, the appellate court appears to have concluded that generic "aggravated battery" is an "offense," while aggravated battery causing great bodily harm is only a "part[ ] or subsection[ ]" of that offense.

But there is no single crime defined as aggravated battery. Rather, the aggravated battery statute sets forth twenty-four distinct forms of aggravated battery, each with unique elements. *See* 720 ILCS 5/12-4 (2010) (circumstances that elevate simple battery to aggravated battery include use of deadly weapon other than firearm; use of disguise; administration of intoxicating substances without consent; use of poison; infliction of battery on protected individuals, such as teachers, emergency medical technicians, public transportation drivers, the elderly, and the handicapped; and commission of crime in certain locations, such as public way or sports arena). The myriad forms of aggravated battery set forth in the aggravated battery statute are properly viewed as distinct offenses. *See People v. Guevara*, 216 Ill. 2d 533, 537, 546 (2005) (different types of home invasion set forth in comparable umbrella home invasion statute, 720 ILCS 5/12-11(a) (2000), are "distinct offenses"); *People v. Koppa*, 184 Ill. 2d 159, 170 (1998) (comparable "statutes for aggravated criminal sexual abuse and aggravated kidnapping provide aggravating factors which form the basis of separate and distinct offenses"). And the language of the armed violence statute dictates that the offense be defined with particularity. Under the plain meaning of the statute, the relevant "offense" must have a defined set of elements that constitutes the "base offense," and aggravated battery cannot serve sensibly as a singular

"base offense" because it exists in multiple forms, each having distinct elements. The more specific crime of aggravated battery causing great bodily harm, by contrast, has but one set of elements that constitutes the "base offense."

Aggravated battery causing great bodily harm would be an improper predicate for armed violence only if (1) it contained, as an element, "the possession or use of a dangerous weapon"; (2) there existed "an aggravated or enhanced version" of aggravated battery causing great bodily harm that included "the possession or use of a dangerous weapon" as an element; or (3) the sentencing provision of the aggravated battery statute made "the possession or use of a dangerous weapon" a mandatory sentencing factor. *See* 720 ILCS 5/33A-2(b). None of these criteria is met.

First, the "possession or use of a dangerous weapon" is not an element of the "base offense." To prove aggravated battery causing great bodily harm, the People must show that defendant (1) committed a battery; and (2) "intentionally or knowingly cause[d] great bodily harm, or permanent disability or disfigurement." 720 ILCS 5/12-4(a). The first element is satisfied by proof that defendant "intentionally or knowingly without legal justification and by any means" either (1) "cause[d] bodily harm to an individual" or (2) "[made] physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a) (2010).

Second, there is no "aggravated or enhanced version of the offense" that includes, as an element, the possession or use of a dangerous weapon. Indeed, there exists no aggravated or enhanced version of aggravated battery causing great bodily harm at all, because no offense includes the same elements as this base offense and adds an aggravating circumstance. *See Black's Law Dictionary* 75 (9th ed. 2009) (an "aggravated" crime is one

"made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime"); *id.* at 277 (defining "aggravating circumstance" as "[a] fact or situation that increases the degree of liability or culpability for a criminal act").

The appellate court reasoned that the separate offense of "aggravated battery with a firearm" (720 ILCS 5/12-4.2 (2010)) is an "enhanced" version of aggravated battery causing great bodily harm, A7, but it cannot be, because aggravated battery with a firearm does not include all of the same elements. To prove aggravated battery with a firearm, the People must show that defendant (1) "in committing a battery" (2) "knowingly or intentionally . . . cause[d] any injury to another person" (3) "by means of the discharging of a firearm." 720 ILCS 5/12-4.2(a)(1). Because the offense of aggravated battery with a firearm does not require the People to show "great bodily harm," it is not an "enhanced" version of aggravated battery causing great bodily harm. Instead, both types of "aggravated battery" are alternative, enhanced forms of simple battery. *Compare* 720 ILCS 5/12-4.2(a) ("A person commits aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm . . . causes any injury to another person."); *with* 720 ILCS 5/12-4(a) ("A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.").

In this case, two "aggravating" factors (in addition to the fact of defendant's use of a firearm equipped with a laser sight) were *both* present: (1) great bodily harm; and (2) defendant's discharge of a firearm. For both factors to be considered together as part of

a single offense, the People could charge only armed violence predicated on aggravated battery causing great bodily harm. As this Court reasoned in *Koppa*, where two separate aggravating factors applied to the defendant's kidnapping and sexual abuse of the victim, armed violence charges predicated on aggravated kidnapping and aggravated criminal sexual abuse provided the only mechanism for ensuring that both aggravating factors were considered together, such that "the entirety of defendant's alleged conduct" was penalized. 184 Ill. 2d at 170-71.

Finally, aggravated battery causing great bodily harm does not make "the possession or use of a dangerous weapon" a mandatory sentencing factor. In contrast to an element of the offense, which is set forth in the statutory provision defining the offense, a "sentencing factor" is set forth in a sentencing provision. *See People v. Robinson*, 232 Ill. 2d 98, 107-08 (2008). The sentencing provision of the aggravated battery statute provides that aggravated battery causing great bodily harm is a Class 3 felony, 720 ILCS 5/12-4(e)(1) (2010), but is enhanced to a Class 1 felony if the perpetrator knows his victim "to be a peace officer, a community policing volunteer, a private security officer, a correctional institution employee, an employee of the Department of Human Services supervising or controlling sexually dangerous persons or sexually violent persons, or a fireman"; the crime relates to the victim's official duties; "and the battery is committed other than by the discharge of a firearm." 720 ILCS 5/12-4(e)(3) (2010). The sentencing provision of the aggravated battery statute does not provide a mandatory sentencing factor for the use or possession of a firearm.

In sum, because aggravated battery causing great bodily harm does not include the use of a firearm as an element of the base offense, does not exist in an aggravated or

enhanced form, and does not make the use of a firearm a mandatory sentencing factor, it is a proper predicate for armed violence.

III. Permitting Aggravated Battery Causing Great Bodily Harm to Serve as a Predicate Offense Is Consistent with the General Assembly's Express Intent in Amending the Armed Violence Statute.

To the extent the language of the armed violence statute is ambiguous, this Court should interpret it in light of its legislative purpose. *See Home Star Bank & Fin. Servs.*, 2014 IL 115526, ¶ 24 (where language is ambiguous, court may properly "consider the purpose behind the law"); *Gutman*, 2011 IL 110338, ¶ 39 ("[A] cardinal rule of statutory construction is that a court must consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another."). And the legislative history further confirms that the General Assembly intended to permit aggravated battery causing great bodily harm to serve as a predicate offense for armed violence.

The relevant language excluding as a predicate "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range" was added to the armed violence statute by Public Act 95-688 (2007). As this Court has recognized, this legislation was enacted to cure the proportionate penalties violations that this Court had identified in *People v. Hauschild*, 226 Ill. 2d 63 (2007). *See People v. Blair*, 2013 IL 114122, ¶¶ 37-38. Interpreting the amendment to preclude reliance on aggravated battery causing great bodily harm is inconsistent with this legislative purpose,

because there has never been a proportionate penalties issue with respect to that predicate offense.

Before the amendment, the armed violence statute excluded as predicates only those offenses specifically enumerated: "first degree murder, attempted first degree murder, intentional homicide of an unborn child, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnaping, aggravated battery of a child, home invasion, armed robbery, [and] aggravated vehicular hijacking." 720 ILCS 5/33A-2(a) (2000). In *Hauschild*, this Court noted that a charge of armed violence predicated on simple robbery had "identical elements" to a charge of armed robbery enhanced by the possession of a firearm, 720 ILCS 5/18-2(a)(2) (2000). *Hauschild*, 226 Ill. 2d at 85-86. Because these crimes were identical, "'common sense and sound logic would seemingly dictate that their penalties be identical,'" yet armed violence carried a lesser penalty than armed robbery enhanced by the possession of a firearm. *Id.* at 86 (quoting *People v. Christy*, 139 Ill. 2d 172, 181 (1990)). Thus, this Court held that the firearm enhancement provisions in the armed robbery statute violated the Proportionate Penalties Clause of the Illinois Constitution. *Hauschild*, 226 Ill. 2d at 86-87. Subsequent cases extended *Hauschild*'s reasoning to invalidate similar firearm enhancement provisions in other criminal statutes. *See*, *e.g.*, *People v. McBride*, 2012 IL App (1st) 100375, ¶¶ 29-36 (firearm enhancement provisions in aggravated vehicular hijacking statute unconstitutional pursuant to *Hauschild*); *People v. Gibson*, 403 Ill. App. 3d 942, 954 (2d Dist. 2010) (firearm enhancement provisions in aggravated kidnapping statute unconstitutional pursuant to *Hauschild*), *abrogated on unrelated grounds by People v. Bailey*, 2014 IL 115459, ¶ 18.

Through Public Act 95-688, the General Assembly remedied the proportionate penalties violations identified in *Hauschild* (and subsequent cases applying *Hauschild*), making clear that simple robbery could not serve as a predicate for armed violence because it "makes the possession or use of a dangerous weapon . . . an element of . . . an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." That the legislature intended to respond to *Hauschild* "is clear" from both the timing of the bill and explicit statements in the legislative record. *Blair*, 2013 IL 114122, ¶¶ 37-38; *see* 95th Ill. Gen. Assem., Senate Proceedings, July 26, 2007, at 8-9 (statement of Sen. Cullerton) (statutory amendment "correct[ed]" this Court's decision in *Hauschild* and "avoid[ed] any further disproportionate penalty challenges to the statute"). And indeed the amendment cured the problem that *Hauschild* identified: "Public Act 95 688 remedied the disproportionality that existed between the armed violence and armed robbery statutes." *Blair*, 2013 IL 114122, ¶ 21.

This legislative history further supports a conclusion that the General Assembly did not intend to exclude aggravated battery causing great bodily harm as a predicate offense. Before the enactment of Public Act 95-688, courts routinely had recognized that aggravated battery causing great bodily harm was a proper predicate for armed violence. *See People v. Drakeford*, 139 Ill. 2d 206, 214 (1990); *People v. Miller*, 284 Ill. App. 3d 16, 22 (2d Dist. 1996); *People v. Hines*, 257 Ill. App. 3d 238, 243 (1st Dist. 1993); *People v. Decker*, 126 Ill. App. 3d 428, 432 (4th Dist. 1984). Aggravated battery causing great bodily harm was not a problematic predicate offense when the General Assembly amended the statute. Because this offense never had "identical elements" to a separate crime carrying a different penalty,

interpreting the amended statute to preclude reliance on aggravated battery causing great bodily harm as a predicate offense would be inconsistent with the General Assembly's express intent to avoid proportionate penalties violations.

Thus, the legislative history of the statutory amendment, like its plain language, establishes that aggravated battery causing great bodily harm is a proper predicate for armed violence.

CONCLUSION

This Court should reverse the judgment of the Illinois Appellate Court, Fifth District, vacating defendant's armed violence conviction and reinstate the judgment of the Circuit Court of St. Clair County.

July 28, 2015

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

CAROLYN E. SHAPIRO
Solicitor General

MICHAEL M. GLICK
ERIN M. O'CONNELL
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-1235

Attorneys for Plaintiff-Appellant
People of the State of Illinois

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 containing the Rule 341(d) cover, the Rule 341(h)(1) 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(a), is seventeen pages.

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General

APPENDIX

Table of Contents of Appendix

Illinois Official Reports

Appellate Court

***People v. Cherry*, 2014 IL App (5th) 130085**

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES CHERRY, Defendant-Appellant.
District & No.	Fifth District Docket No. 5-13-0085
Filed	December 10, 2014
Held *(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)*	Where defendant was convicted of armed violence predicated on aggravated battery and aggravated battery with a firearm, which merged into the armed violence conviction for sentencing purposes, and defendant alleged on appeal that his armed violence conviction was void on the ground that aggravated battery is excluded from serving as a predicate felony for an armed violence conviction and that his appointed posttrial counsel provided ineffective assistance, the appellate court upheld the trial court's determination that defendant did not sustain his claims that his posttrial counsel was ineffective and vacated defendant's armed violence conviction on the ground that the armed violence statute prohibited the use of aggravated battery as a predicate offense, and remanded the cause for resentencing on defendant's remaining conviction for aggravated battery.
Decision Under Review	Appeal from the Circuit Court of St. Clair County, No. 10-CF-1007; the Hon. Michael N. Cook, Judge, presiding.
Judgment	Vacated and remanded with directions.

Counsel on Appeal

Michael J. Pelletier, Jacqueline L. Bullard, and Susan M. Wilham, all of State Appellate Defender's Office, of Springfield, for appellant.

Brendan F. Kelly, State's Attorney, of Belleville (Patrick Delfino, Lawrence M. Bauer, and Joan M. Kripke, all of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

Panel

JUSTICE WELCH delivered the judgment of the court, with opinion. Justices Goldenhersh and Stewart concurred in the judgment and opinion.

OPINION

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

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

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

After the shooting stopped, Montrese flagged down a police car. Larry's girlfriend, Tonya Moore, arrived to take Larry to the hospital. Montrese and Bey accompanied Larry to the hospital.

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

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

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

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

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

¶ 9 While the defendant was speaking in allocution at his July 6, 2011, sentencing hearing, he began reading the aforementioned letter to the trial court. The State requested a side-bar and noted to the court that it felt that the hearing was not an appropriate venue for the defendant's assertions. In response, defense counsel noted that he was "probably going to be withdrawing anyway for purposes of appeal" and agreed with the trial court and the State that he did not see the relevance at a sentencing hearing. The trial court told the defendant that his complaints

were more properly brought up on appeal and not relevant to the sentencing. The defendant was allowed to continue reading his letter, but again the State requested a side-bar and objected to the relevance of the defendant's statement. The court sustained the objection and told the defendant, "[A]ny error that you believe the Court or the attorneys made is something that is germane to an appeal, not to your statement in allocution." The defendant received his sentence. After receiving his appellate admonitions, the defendant asked how he could obtain a different lawyer. The court asked the defendant whether he believed that there was "a breakdown in [his] lawyer/client relationship with [his attorney] among other things and would request that the court appoint a lawyer." The defendant agreed, and the court appointed a public defender to represent the defendant.

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

¶ 11 On January 2, 2012, the trial court filed an order granting the defendant a hearing on his *pro se* letter regarding the ineffective assistance of his trial counsel, pursuant to the rule in *People v. Krankel*, 102 Ill. 2d 181 (1984). At the January 16, 2013, hearing, the defendant's posttrial counsel requested that the court consider the issues presented in the defendant's letter, as well as an allegation that his trial counsel was ineffective for failing to investigate medical records that may have demonstrated that the defendant was not under the influence of alcohol during the incident. No witnesses were called, and the court requested that the parties give brief argument on the issues. The defendant's allegations were presented, and the State responded that these were matters of trial strategy. The State also noted that some of the defendant's allegations occurred during the pretrial stage, and the defendant could have fired his privately retained trial attorney at any time. The court found that the defendant's allegations did not meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), as he did not demonstrate a reasonable probability that any errors by his trial counsel would have substantially changed the outcome of his case, and that the defendant was not prejudiced by his trial counsel's performance. The court denied the defendant's motion.

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

¶ 13 The Illinois statute prohibiting armed violence is the vehicle that allows the State to seek higher Class X penalties for a defendant where a predicate felony is committed in circumstances involving the presence or use of a dangerous weapon.[1] The General

[1]The statute states that "[v]iolation of Section 33A-2(a) with a Category I weapon is a Class X felony for which the defendant shall be sentenced to a minimum term of imprisonment of 15 years." 720 ILCS 5/33A-3(a) (West 2010).

Assembly's stated intention of the statute is to deter the use of firearms in the commission of a felony, due to their more lethal nature, the significant escalation of the threat, and the potential for bodily harm that comes with their presence. 720 ILCS 5/33A-1(a), (b) (West 2010). However, the statute also specifically excludes certain felonies from providing the basis for an armed violence conviction, providing in relevant part:

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

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

> "(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm *** commits aggravated battery.
>
> (b) In committing a battery, a person commits aggravated battery if he or she:
>
> (1) Uses a deadly weapon other than by the discharge of a firearm ***[.]
>
> * * *
>
> (e) ***
>
> (1) *** [A]ggravated battery is a Class 3 felony." 720 ILCS 5/12-4(a), (b)(1), (e)(1) (West 2010).

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

> "(a) A person commits aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm (1) causes any injury to another person ***.
>
> (b) A violation of subsection (a)(1) of this Section is a Class X felony." 720 ILCS 5/12-4.2(a)(1), (b) (West 2010).

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

¶ 17 In rebuttal, the State argues that there is no blanket proscription on predicating an armed violence conviction on aggravated battery. The State notes that the defendant's predicate felony was not based in either section 12-4(b)(1) or section 12-4.2 of the Criminal Code of 1961 (720 ILCS 5/12-4(b)(1), 12-4.2 (West 2010)), both of which are clearly excluded by the armed violence statute by virtue of their inclusion of presence or use of a weapon in the base

offense. Rather, the defendant's conviction was based on his battery causing "great bodily harm" as the aggravating factor.[2] The State cites numerous Illinois cases finding section 12-4(a) to be a proper predicate felony to the armed violence statute, as the presence or use of a weapon is not an element of aggravated battery causing great bodily harm. See, *e.g.*, *People v. Hines*, 257 Ill. App. 3d 238, 243 (1993); *People v. Drakeford*, 139 Ill. 2d 206, 214 (1990); *People v. Floyd*, 262 Ill. App. 3d 49, 59-60 (1994); *People v. Decker*, 126 Ill. App. 3d 428, 432 (1984).

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

¶ 19 We think the plain language of the current statute prohibits predicating armed violence on any part of the aggravated battery statute, including section 12-4(a). The wording unambiguously excludes *any offense* that makes the use of a dangerous weapon either an element of the base offense or an aggravated or enhanced version of the offense. Thus, this clause provides alternative circumstances under which an offense–not parts or subsections of an offense–cannot be used as a predicate offense. We focus here on the prohibition of "an

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

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

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

aggravated or enhanced version of the offense." Aggravated battery, which prohibits battery causing great bodily harm (section 12-4(a)) and battery using a weapon other than a firearm (section 12-4(b)(1)), is a Class 3 felony. Aggravated battery with a firearm (section 12-4.2) is a Class X felony. Consequently, aggravated battery with a firearm is an enhanced version of aggravated battery. As aggravated battery is an offense that makes the use of a dangerous weapon an enhanced version of the offense, the logical conclusion is that it is specifically excluded by the statute's most recent iteration, despite the fact that the prosecution chose a subsection of the predicate offense that does not reference a weapon.

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

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

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

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

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

State and the defendant's appointed counsel and made a factual determination on the merits of the defendant's claims by finding that the defendant did not demonstrate that his trial counsel's performance fell below the *Strickland* standards.

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

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

¶ 26 First we address the defendant's argument that his claim is properly evaluated under the *Cronic* standard. When distinguishing between the rule of *Strickland* and that of *Cronic*, the differences in evaluating error are not in degree, but in kind. *Bell v. Cone*, 535 U.S. 685, 697 (2002). Examples of failures that meet the *Cronic* standard include employing a trial strategy that concedes a defendant's guilt when the defendant has pled not guilty (see *People v. Hattery*, 109 Ill. 2d 449, 464-65 (1985)), insisting on raising an unavailable defense (see *People v. Kozlowski*, 266 Ill. App. 3d 595 (1994)), and stipulating to the admission of testimony that is inadmissible against a defendant by a supreme court rule (see *People v. Hoerer*, 375 Ill. App. 3d 148, 152 (2007)). Because it is the kind of error and not the egregiousness of the error that guides this evaluation, we conclude that the defendant's posttrial counsel's performance must be evaluated under *Strickland*.

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

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

¶ 29 Thus, the defendant is required to demonstrate that absent his posttrial counsel's inadequate performance, there was a substantial likelihood that he would have prevailed on his claims regarding his trial counsel. We note initially that the defendant failed to address this prong in his brief, arguing only that he met his burden under the *Cronic* standard. However, we

will briefly discuss the defendant's failure to meet his burden regarding his ineffective-assistance-of-trial-counsel claims, which in turn establishes that the actions of his posttrial counsel were not prejudicial.

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

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

¶ 32 Vacated and remanded with directions.

Appellate's

TO THE APPELLATE COURT OF ILLINOIS
APPEAL FROM THE CIRCUIT COURT OF ST. CLAIR
20TH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	**INDICTMENT NO. 10CF1007**
v.	)	
James Cherry	)	
	)	**TRIAL JUDGE**
	)	**HONORABLE Mike Cook**
Defendant-Appellant.	)	

FILED
ST. CLAIR COUNTY
FEB 15 2013
CIRCUIT CLERK
38

NOTICE OF APPEAL

An appeal is hereby taken from the final judgement entered on the above entitled cause.

Appellant's Name: James Cherry
Appellant's Address: Illinois Department of Corrections

Appellant's Trial Attorney: Tom Philo
Address: St. Clair County Building
10 Public Square
Belleville, IL 62221

Appellant's Attorney on Appeal: State Appellate Defender Office
Address: 909 Water Tower Cr.
Mt. Vernon, IL 62864

Offense for which Convicted: Ct. 1-Armed Violence Ct. 2-Agg Battery w/Firearm
The Judgment/Order: 25 yrs DOC 3 yrs MSr

On a Finding (Bench) Verdict XX Guilty Plea
Motion to Withdraw Guilty Plea Filed ___ Revocation of Probation
Date of Denial of Motion to Withdraw Guilty PLEA

If appeal is not from a conviction, nature of order appealed from:

Date of Sentence Imposed: July 6. 2011
The Sentence: 25 yrs. In the Department of Corrections 3 yrs MSR

Defendant-Appellant Thomas Philo

BY: Tom Philo
ASST PUBLIC DEFENDER

Dated: _____
Date Notice Filed: _____
Appeal Check Date: _____

No. 5-13-0085

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JAMES CHERRY, Defendant-Appellant.	)	Appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois 10-CF-1007 Honorable Michael N. Cook, Judge Presiding.

FILED
ST CLAIR COUNTY
MAR 11 2013
CIRCUIT CLERK

AMENDED NOTICE OF APPEAL

An appeal is hereby taken from the order or judgment described below:

1. Court to which appeal is taken: Fifth District Appellate Court
2. Name of appellant and address to which notices shall be sent: Mr. James Cherry, Register No. B87961, Hill Correctional Center, P.O. Box 1700, Galesburg, IL 61401
3. Name and address of appellant's attorney on appeal: Office of the State Appellate Defender, Fifth Judicial District, 909 Water Tower Circle, Mt. Vernon, IL 62864
4. Date of judgment order: January 16, 2013
5. Offense of which convicted: armed violence, and aggravated battery with a firearm
6. Sentence: 25 years in the Department of Corrections and three years of mandatory supervised release
7. If appeal is not from a conviction, nature of order appealed from:

Respectfully submitted,

ELLEN J. CURRY
Deputy Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thDistrict.eserve@osad.state.il.us

STATUTORY PROVISIONS INVOLVED

720 ILCS 5/12-4 (2010) (Aggravated battery).

(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.

(b) In committing a battery, a person commits aggravated battery if he or she:

(1) Uses a deadly weapon other than by the discharge of a firearm, or uses an air rifle as defined in the Air Rifle Act;

(2) Is hooded, robed or masked, in such manner as to conceal his identity;

(3) Knows the individual harmed to be a teacher or other person employed in any school and such teacher or other employee is upon the grounds of a school or grounds adjacent thereto, or is in any part of a building used for school purposes;

(4) (Blank);

(5) (Blank);

(6) Knows the individual harmed to be a community policing volunteer while such volunteer is engaged in the execution of any official duties, or to prevent the volunteer from performing official duties, or in retaliation for the volunteer performing official duties, and the battery is committed other than by the discharge of a firearm;

(7) Knows the individual harmed to be an emergency medical technician–ambulance, emergency medical technician–intermediate, emergency medical technician–paramedic, ambulance driver, other medical assistance, first aid personnel, or hospital personnel engaged in the performance of any of his or her official duties, or to prevent the emergency medical technician–ambulance, emergency medical technician–intermediate, emergency medical technician–paramedic, ambulance driver, other medical assistance, first aid personnel, or hospital personnel from performing official duties, or in retaliation for performing official duties;

(8) Is, or the person battered is, on or about a public way, public property or public place of accommodation or amusement;

(8.5) Is, or the person battered is, on a publicly or privately owned sports or entertainment arena, stadium, community or convention hall, special event center, amusement facility, or a special event center in a public park during any 24-hour period when a professional sporting event, National Collegiate Athletic Association (NCAA)-sanctioned sporting event, United States Olympic Committee-sanctioned sporting event, or International Olympic Committee-sanctioned sporting event is taking place in this venue;

(9) Knows the individual harmed to be the driver, operator, employee or passenger of any transportation facility or system engaged in the business of transportation of the public for hire and the individual assaulted is then performing in such capacity or then using such public transportation as a passenger or using any area of any description designated by the transportation facility or system as a vehicle boarding, departure, or transfer location;

(10) Knows the individual harmed to be an individual of 60 years of age or older;

(11) Knows the individual harmed is pregnant;

(12) Knows the individual harmed to be a judge whom the person intended to harm as a result of the judge's performance of his or her official duties as a judge;

(13) (Blank);

(14) Knows the individual harmed to be a person who is physically handicapped;

(15) Knowingly and without legal justification and by any means causes bodily harm to a merchant who detains the person for an alleged commission of retail theft under Section 16A-5 of this Code. In this item (15), "merchant" has the meaning ascribed to it in Section 16A-2.4 of this Code;

(16) Is, or the person battered is, in any building or other structure used to provide shelter or other services to victims or to the dependent children of victims of domestic violence pursuant

to the Illinois Domestic Violence Act of 1986 or the Domestic Violence Shelters Act, or the person battered is within 500 feet of such a building or other structure while going to or from such a building or other structure. "Domestic violence" has the meaning ascribed to it in Section 103 of the Illinois Domestic Violence Act of 1986. "Building or other structure used to provide shelter" has the meaning ascribed to "shelter" in Section 1 of the Domestic Violence Shelters Act;

(17) (Blank);

(18) Knows the individual harmed to be an officer or employee of the State of Illinois, a unit of local government, or school district engaged in the performance of his or her authorized duties as such officer or employee;

(19) Knows the individual harmed to be an emergency management worker engaged in the performance of any of his or her official duties, or to prevent the emergency management worker from performing official duties, or in retaliation for the emergency management worker performing official duties;

(20) Knows the individual harmed to be a private security officer engaged in the performance of any of his or her official duties, or to prevent the private security officer from performing official duties, or in retaliation for the private security officer performing official duties; or

(21) Knows the individual harmed to be a taxi driver and the battery is committed while the taxi driver is on duty; or

(22) Knows the individual harmed to be a utility worker, while the utility worker is engaged in the execution of his or her duties, or to prevent the utility worker from performing his or her duties, or in retaliation for the utility worker performing his or her duties. In this paragraph (22), "utility worker" means a person employed by a public utility as defined in Section 3-105 of the Public Utilities Act and also includes an employee of a municipally owned utility, an employee of a cable television company, an employee of an electric cooperative as defined in Section 3-119 of the Public Utilities Act, an independent contractor or an employee of an independent contractor working on behalf of a cable television company, public utility, municipally owned utility, or an electric

cooperative, or an employee of a telecommunications carrier as defined in Section 13-202 of the Public Utilities Act, an independent contractor or an employee of an independent contractor working on behalf of a telecommunications carrier, or an employee of a telephone or telecommunications cooperative as defined in Section 13-212 of the Public Utilities Act, or an independent contractor or an employee of an independent contractor working on behalf of a telephone or telecommunications cooperative.

For the purpose of paragraph (14) of subsection (b) of this Section, a physically handicapped person is a person who suffers from a permanent and disabling physical characteristic, resulting from disease, injury, functional disorder or congenital condition.

For the purpose of paragraph (20) of subsection (b) and subsection (e) of this Section, "private security officer" means a registered employee of a private security contractor agency under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004.

(c) A person who administers to an individual or causes him to take, without his consent or by threat or deception, and for other than medical purposes, any intoxicating, poisonous, stupefying, narcotic, anesthetic, or controlled substance commits aggravated battery.

(d) A person who knowingly gives to another person any food that contains any substance or object that is intended to cause physical injury if eaten, commits aggravated battery.

(d-3) A person commits aggravated battery when he or she knowingly and without lawful justification shines or flashes a laser gunsight or other laser device that is attached or affixed to a firearm, or used in concert with a firearm, so that the laser beam strikes upon or against the person of another.

(d-5) An inmate of a penal institution or a sexually dangerous person or a sexually violent person in the custody of the Department of Human Services who causes or attempts to cause a correctional employee of the penal institution or an employee of the Department of Human Services to come into contact with blood, seminal fluid, urine, or feces, by throwing, tossing, or expelling that fluid or material commits aggravated battery. For purposes of this subsection (d-5), "correctional employee" means a person who is employed by a penal institution.

(d-6) A person commits aggravated battery when he or she, in committing a battery, strangles another individual. For the purposes of this subsection (d-6), "strangle" means intentionally impeding the normal breathing or circulation of the blood of an individual by applying pressure on the throat or neck of that individual or by blocking the nose or mouth of that individual.

(e) Sentence.

(1) Except as otherwise provided in paragraphs (2), (3), (4), and (5) aggravated battery is a Class 3 felony.

(2) Aggravated battery that does not cause great bodily harm or permanent disability or disfigurement is a Class 2 felony when the person knows the individual harmed to be a peace officer, a community policing volunteer, a private security officer, a correctional institution employee, an employee of the Department of Human Services supervising or controlling sexually dangerous persons or sexually violent persons, or a fireman while such officer, volunteer, employee, or fireman is engaged in the execution of any official duties including arrest or attempted arrest, or to prevent the officer, volunteer, employee, or fireman from performing official duties, or in retaliation for the officer, volunteer, employee, or fireman performing official duties, and the battery is committed other than by the discharge of a firearm.

(3) Aggravated battery that causes great bodily harm or permanent disability or disfigurement in violation of subsection (a) is a Class 1 felony when the person knows the individual harmed to be a peace officer, a community policing volunteer, a private security officer, a correctional institution employee, an employee of the Department of Human Services supervising or controlling sexually dangerous persons or sexually violent persons, or a fireman while such officer, volunteer, employee, or fireman is engaged in the execution of any official duties including arrest or attempted arrest, or to prevent the officer, volunteer, employee, or fireman from performing official duties, or in retaliation for the officer, volunteer, employee, or fireman performing official duties, and the battery is committed other than by the discharge of a firearm.

(4) Aggravated battery under subsection (d-5) is a Class 2 felony.

(5) Aggravated battery under subsection (d-6) is a Class 1 felony if:

(A) the person used or attempted to use a dangerous instrument while committing the offense; or

(B) the person caused great bodily harm or permanent disability or disfigurement to the other person while committing the offense; or

(C) the person has been previously convicted of a violation of subsection (d-6) under the laws of this State or laws similar to subsection (d-6) of any other state.

(6) For purposes of this subsection (e), the term "firearm" shall have the meaning provided under Section 1.1 of the Firearms Owners Identification Card Act, and shall not include an air rifle as defined by Section 1 of the Air Rifle Act.

720 ILCS 5/12-4.2 (2010) (Aggravated battery with a firearm).

(a) A person commits aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm (1) causes any injury to another person, or (2) causes any injury to a person he knows to be a peace officer, a private security officer, a community policing volunteer, a correctional institution employee or a fireman while the officer, volunteer, employee or fireman is engaged in the execution of any of his official duties, or to prevent the officer, volunteer, employee or fireman from performing his official duties, or in retaliation for the officer, volunteer, employee or fireman performing his official duties, or (3) causes any injury to a person he knows to be an emergency medical technician–ambulance, emergency medical technician–intermediate, emergency medical technician–paramedic, ambulance driver, or other medical assistance or first aid personnel, employed by a municipality or other governmental unit, while the emergency medical technician –ambulance, emergency medical technician–intermediate, emergency medical technician–paramedic, ambulance driver, or other medical assistance or first aid personnel is engaged in the execution of any of his official duties, or to prevent the emergency medical technician–ambulance, emergency medical technician–intermediate, emergency medical technician–paramedic, ambulance driver, or other medical assistance or first aid personnel from performing his official duties, or in retaliation for the emergency medical technician–ambulance, emergency medical technician–intermediate, emergency medical technician–paramedic, ambulance driver, or other medical assistance or first aid personnel performing his official duties, (4) causes any injury to a person he or she knows to be a teacher or other person employed in a school or a student in a school and the teacher or other employee or student is upon grounds of a school or grounds adjacent to a school, or is in any part of a building used for school purposes, or (5) causes any injury to a person he or she knows to be an emergency management worker while the emergency management worker is engaged in the execution of any of his or her official duties, or to prevent the emergency management worker from performing his or her official duties, or in retaliation for the emergency management worker performing his or her official duties.

(b) A violation of subsection (a)(1) of this Section is a Class X felony. A violation of subsection (a)(2), subsection (a)(3), subsection (a)(4), subsection (a)(5) of this Section is a Class X felony for which the sentence shall be a term of imprisonment of no less than 15 years and no more than 60 years.

(c) For purposes of this Section:

"Firearm" is defined as in the Firearm Owners Identification Card Act.

"Private security officer" means a registered employee of a private security contractor agency under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004.

720 ILCS 5/33A-2 (2010) (Armed violence – Elements of the offense).

(a) A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law, except first degree murder, attempted first degree murder, intentional homicide of an unborn child, second degree murder, involuntary manslaughter, reckless homicide, predatory criminal sexual assault of a child, aggravated battery of a child as described in Section 12-4.3 or subdivision (b)(1) of Section 12-3.05, home invasion, or any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range.

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

(c) A person commits armed violence when he or she personally discharges a firearm that is a Category I or Category II weapon that proximately causes great bodily harm, permanent disability, or permanent disfigurement or death to another person while committing any felony defined by Illinois law, except first degree murder, attempted first degree murder, intentional homicide of an unborn child, second degree murder, involuntary manslaughter, reckless homicide, predatory criminal sexual assault of a child, aggravated battery of a child as described in Section 12-4.3 or subdivision (b)(1) of Section 12-3.05, home invasion, or any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range.

(d) This Section does not apply to violations of the Fish and Aquatic Life Code or the Wildlife Code.

TABLE OF CONTENTS OF RECORD ON APPEAL

Common Law Record

Report of Proceedings: Witnesses

	DX	CX	RDX	RCX
Larry Miller	R384			
Forrest Bevineau	R413			
Jason B. Davis	R417			
Josiah Cherry	R422			
Larry Miller	R429	R436	R461	R462
Amy Hart	R464	R475		
Thomas Gamboe	R476	R502	R511	
James Cherry	R520	R558	R565	

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on July 28, 2015, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following, by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in envelopes bearing sufficient first-class postage:

Jacqueline L. Bullard, Deputy Defender
Susan M. Wilham, Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
P.O. Box 5240
Springfield, Illinois 62705-5240

Brendan F. Kelly
State's Attorney
St. Clair County
Belleville, Illinois 62220

Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail twelve e-stamped copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General