

No. 2-03-0386

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

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| PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court |
| |) | for the 15 th Judicial Circuit, |
| Plaintiff-Appellee, |) | Lee County, Illinois. |
| |) | |
| -vs- |) | No. 01 CF 222. |
| |) | |
| SCOTT O. VUE, |) | Honorable |
| |) | Tomas M. Magdich, |
| Defendant-Appellant. |) | Judge Presiding. |

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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V.

In his memorandum order, the trial judge found that the defendant’s armed robbery and home invasion convictions triggered consecutive sentences. However, because there was only one harm --- the injury to the complainant’s head, there should have only been one triggering

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VI.

As a factor in aggravation, the trial court considered a factor inherent in the defendant’s armed robbery conviction. Accordingly, the defendant’s armed robbery sentence should be vacated and the cause remanded for a new trial.

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NATURE OF THE CASE

After a jury trial, the defendant was convicted of ten counts total: two home invasion counts; an armed robbery, robbery, residential burglary, armed violence count, and unlawful use of weapons count; and three aggravated battery counts. The trial court vacated one home invasion count, the robbery count, the unlawful use of weapons count, and two aggravated battery counts. Then, the trial court sentenced the defendant to 15 years-imprisonment on the armed robbery conviction, 10 years-imprisonment on the home invasion conviction, and 5 years-imprisonment each on the residential burglary, aggravated battery, and armed violence convictions. Because the home invasion and armed robbery convictions triggered consecutive sentences, the total was 30 years imprisonment.

The defendant directly appeals without challenging the charging document.

ISSUES PRESENTED FOR REVIEW

1. Was the defendant denied a fair trial when the prosecution repeatedly introduced collateral evidence of the defendant's drug use and of his failure to pay taxes?
2. Should the defendant's armed violence conviction be vacated where the alleged Category III weapon was not a bludgeon *per se* but a metal flashlight?
3. Should the defendant's aggravated battery conviction be vacated as a lesser-included offense of his home invasion conviction?
4. Should the defendant's residential burglary conviction be vacated on one-act-one-crime grounds because it is based on the same act as his home invasion

conviction?

5. In imposing consecutive sentences, could the sentencing judge consider two offenses to trigger consecutive sentences when the defendant arguably inflicted only one act of severe bodily harm on the complainant.

6. In sentencing the defendant to 15-years imprisonment on his armed robbery conviction, the trial court explicitly considered that the defendant received compensation for the crime. Because this is a factor inherent in the offense, did the trial judge err in considering this as an aggravating factor and if so, should the defendant's armed robbery sentence be vacated and the cause remanded for a new sentencing hearing on that charge?

JURISDICTION

Scott O. Vue appeals his criminal convictions. On September 24, 2002, a Lee County jury convicted the defendant of 10 counts: two home invasion counts; an armed robbery, robbery, residential burglary, armed violence count, and unlawful use of weapons count; and three aggravated battery counts. (C. 179-188) The trial court vacated one home invasion count, the robbery count, the unlawful use of weapons count, and two aggravated battery counts. (C. 288-289) On December 13, 2002, the trial court sentenced the defendant to 15 years-imprisonment on the armed robbery conviction, 10 years-imprisonment on the home invasion conviction, and 5 years imprisonment each on the residential burglary, aggravated battery, and armed violence convictions. (C. 297-299) The home invasion and armed robbery convictions triggered consecutive sentences. (C. 276; R. 1298)

On January 13, 2003, the defense filed a motion to reduce sentence and for other relief (C. 300-300A), which was denied on April 3. (R. 1316)

On April 3, 2003, a notice of appeal was filed (C. 309-310), and on April 11, 2003, an amended notice of appeal was filed. (C. 312) Therefore, under the Illinois Constitution, Article VI, Section 6, and Supreme Court Rules 603 and 606, this Court has jurisdiction.

STATEMENT OF FACTS

An information charged the defendant, Scott O. Vue, with 10 counts. Counts I and II alleged home invasion under different theories. Count III, IV, V, and VI alleged armed robbery, robbery, residential burglary, and armed violence, respectively. Counts VII through IX alleged aggravated battery under different theories. Count X charged the defendant with unlawful use of weapons. The complainant was Arden Strub. (C. 13-14)

State's case

An interrupted phone call

Michele Lurette was Arden Strub's friend. On September 3, 2001, around 7:40, she called him and talked until around 9:45 p.m., when she heard a sound and then, 30 seconds later, the phone went dead. Lurette did not hear any sounds of struggle or a cry for help. (R. 465-472)

Tom Gasciogne of Gallatin River Communications testified that, on September 3, 2001, there was a call that ended at 9:35 p.m. from Lurette's home to the complainant's home. (R. 475-478)

Assisting and treating the complainant

Linda Smith, the complainant's daughter, and Officer Mark Haverland saw the complainant relatively soon after the charged crimes. Drs. Jonathan Ortman and David Deets treated the complainant.

Linda Smith

On September 3, 2001, around 9:45 or 10:00 p.m., Smith saw her father

coming through her front door wearing only his pants, with blood running. from his forehead onto his clothes. The complainant said that someone had robbed him and taken his wallet, which contained \$650. (R. 409-410, 414) However, the complainant could not recall what had happened, nor who committed the robbery. (R. 411, 415)

Smith phoned "911." After the complainant was taken away by ambulance, Smith went to the complainant's house, where she saw that the screen door had been recently cut. (R. 411-412)

Dr. Jonathan Ortman

Dr. Jonathan Ortman, a KSB Hospital emergency room physician, treated the complainant on September 3, 2001 from 10 through 11 p.m. (R. 438-440) After a physical examination, Ortman drew two conclusions: first, that the complainant's left scalp was lacerated; and second, that there were multiple contusions or bruises around the complainant's face, eyes, neck, chest, and shoulders. (R. 445) The scalp laceration was six centimeters and had penetrated into the scalp's muscle. Ortman concluded that a blunt instrument wielded with considerable force struck the complainant's head. (R. 459, 464)

Dr. David Deets

On September 3, 2001, Dr. David Deets, a KSB Hospital surgeon, was consulted about the complainant's condition. (R. 1051-1052) Deets theorized that the complainant had been struck three times: the complainant suffered a blow over his left eye, a blow over his right eye, and a third blow. that caused the laceration

atop the complainant's head. (R. 1054-1055)

Deets theorized that the complainant must have been struck very hard over the left eye, because his wounds resembled those in auto accidents. (R. 1056) Because the complainant lost consciousness, he suffered a stage 3 concussion. (R. 1057)

Police officers on the case

Patrolman Matt Coppotelli

Dixon police patrolman Matt Coppotelli testified briefly. On Monday, September 3, 2001, as Coppotelli drove to a disturbance call on the town's west end, he saw the defendant riding his bike in the middle of the road with a white male in his twenties. Coppotelli came up right behind them, and when they saw him, they moved to the road's right side. Coppotelli briefly questioned the defendant. (R. 996-999)

Officer Mark Haverland

Dixon patrol sergeant Mark Haverland responded to an emergency call on September 3, 2001, around 10 p.m. (R. 422-424) When Haverland arrived, he met Linda Smith. The complainant, Arden Strub, sat at a table with a bloody cloth to his head. He was still bleeding heavily, with blood coming down the side of his face onto his chest. (R. 424) There was a big cut atop the complainant's head. The complainant appeared confused and upset. (R. 425)

The complainant could not remember what had happened: he was sitting in his home, and after that, he only remembered waking up on the floor and then driving to his daughter's home. (R. 426, 436) The complainant said that his wallet,

containing about \$500, was missing. (R. 426, 436)

After the complainant was taken away by ambulance, Haverland went to the complainant's house. There was blood spatter in the kitchen. On the living room carpet, there was a six to eight inch circle of blood. (R. 428, 433-434) Haverland saw no blood upstairs. (R. 435-436)

After ensuring that there was no one else in the house, Haverland contacted Detective Sergeant Clayton Whelan. When Whelan arrived, Haverland took him inside the residence to show him what he had found. Then, with more police, Haverland searched around the yard to see if he could locate the complainant's wallet, a weapon, or anything unusual. (R. 429) This search revealed nothing. (R. 430)

Haverland saw that the front screen door had a six-inch vertical cut that looked "very clean." (R. 430-431)

Officer Matthew Richards

On September 3, 2001, Dixon police investigator Matthew Richards was summoned by Clayton Whelan to a home invasion at 1903 West 1st Street. (R. 658-659) After arriving, Richards and Whelan walked through the crime scene, looking for evidence. (R. 660)

On September 4, Richards looked for the complainant's wallet throughout a circle extending one block from the complainant's house. (R. 665) He also spoke with numerous neighbors. (R. 666)

On September 7, Richards and Whelan searched Jou Vang's apartment, with

her consent. Vang was the mother of the defendant's children. At Whelan's direction, Richards looked for clothing and a metal flashlight. (R. 668) He did not look for a drill, and did not find one. (R. 667-669)

On September 21 and October 1, Richards spoke with inmate Beau Loomis at the Lee County Jail. (R. 666)

Officer Clayton Whelan

On September 3, 2001, Dixon police department detective sergeant Clayton Whelan received a call from Officer Haverland. In response, Whelan went to the complainant's house at 1903 West 1st Street. (R. 489-491) There was a skate park a few hundred feet from the house. (R. 570)

Initially, Whelan assessed the crime scene, partly by walking inside and outside the house. (R. 492) While Whelan was doing this, he met Scott Strub, the complainant's son. The complainant's wallet was taken. The wallet contained about \$500 and credit cards and a driver's license. However, the police never recovered the wallet. (R. 609-610)

Whelan described the house's interior. On a kitchen table, there was a battery compartment for a cordless phone handset. This compartment had blood on it. (R. 504-505) Underneath the table, there was a battery pack, near a table leg. (R. 580)

By the kitchen sink, blood had accumulated and gotten onto towels and dripped onto cabinets beneath the sink. (R. 509, 520, 630) There was also blood on two different carpets by the sink: blood on the carpet by the sink, and blood on the carpet by the microwave stand. (R. 581, 630-631)

By the kitchen sink, there was a watch that had blood on the back. (R. 509, 573) Whelan would later get a latent print from this watch. Although he could not make out the fingerprint “ridges,” Whelan saw impressions consistent with a cloth pattern being made directly on the watch face. (R. 575)

On the dining room floor, there was also considerable blood, more than in the kitchen. (R. 636) In the dining room, there were signs of struggle, such as the complainant’s broken eyeglasses, a chair knocked down, and the blood spatter around the area. (R. 493-495, 506-508, 517, 579) Whelan theorized that the Arden Strub left a bloody handprint on the floor. (R. 578)

In the living room, there was also blood. (R. 493-495, 503-504, 508) Based on the pool of blood located just inside the living room, Whelan theorized that the complainant’s head laid there after the complainant lost consciousness. (R. 576)

On redirect examination, Whelan admitted that his theories might be wrong and that the complainant might have regained consciousness and crawled around, and that the bloody handprint on the carpet might have come from the defendant. (R. 629)

In the complainant’s front room, there were filing cabinets. Next to the filing cabinet handles, there were blood smudges, as if a bloody cloth or glove had brushed up against the filing drawers. (R. 512-513) By the filing cabinet, there was a piece of sports memorabilia --- a dollar bill that had the picture of a prominent athlete where the President’s face would normally be. (R. 514)

Whelan discussed processing the crime scene. Processing the scene involved

photographing it, noting specific evidentiary items, and looking for fluid samples -- e.g. blood, saliva, semen --- that would later undergo D.N.A. testing. Whelan photographed the crime scene. (R. 500-501, 521) One photograph indicated that the front screen door had a six inch vertical cut. (R. 502) He also took blood samples because he could not determine if the blood at the scene had come from the complainant or the home invaders. (R. 520)

Whelan also dusted the house, including the filing cabinets, for latent finger prints. He did not find any identifiable prints in the house. (R. 516, 520-521)

Whelan finished by preparing a press release outlining the situation and requesting public assistance. (R. 521)

Whelan received a list of suspects from a prior burglary of the complainant's house: Thomas Cover, Blaine Henley, and Jessie Elder. (R. 602) Whelan also knew about the defendants in an earlier 2000 robbery of the complainant's house: Jeremy Miller, Justin Winters, and Jessie Elder. (R. 603-604) Using these suspects as a starting point, Whelan pursued leads. The defendant became a suspect because he was a friend to some suspects, including Tom Cover. (R. 603, 633-634)

On September 4, Whelan looked for the defendant and Tom Cover at Jou Vang's house. Vang was the mother of the defendant's children, and although they were not legally married, they were considered husband and wife within their culture's context. Neither man was there, and Vang believed they were in Milwaukee. (R. 523-524, 526-528, 610-611) Vang denied that the men were at

her home on September 3, the day of the home invasion. (R. 611)

On September 6, Whelan received a call from Amboy police officer Tom Lehman. Lehman said that a confidential informant had implicated the defendant and Tom Cover in the break-in at the complainant's home. (R. 525-526) Whelan returned to Jou Vang's apartment looking for the defendant. In the adjacent parking lot, Whelan saw the defendant's mother knocking on Vang's door, with no response. (R. 529) After 15 minutes, Whelan was notified that Vang was on her way, and the police stopped Jou Vang on the street. (R. 530) Vang gave the police permission to search her home. (R. 612-613) Whelan found neither man in Vang's apartment, and Vang said she did not know the defendant's whereabouts. (R. 531)

Inside the apartment, Whelan did find some blood-stained clothes. (R. 613) It was later established that Tom Cover's blood was on these clothes. (R. 622-623) Inside Vang's apartment, Whelan also saw two BMX bikes, although he did not then know their significance. (R. 614)

Whelan asked Tom Cover's father to contact his son. The father contacted his son in Milwaukee, Wisconsin, and arrangements were made for the police and father to meet Tom Cover in Beloit, Wisconsin. On September 6, the father, accompanied by Officer Tom Lehman, picked up Tom Cover in Beloit and brought him back to Dixon around 9 p.m. (R. 541-544, 616) According to Cover, the defendant and Stephanie Machen had dropped him off in Beloit. (R. 616)

After Cover waived his *Miranda* rights, Whelan questioned him about the

home invasion against Arden Strub. Cover talked for approximately four hours, from the late evening on September 6 into the early morning on September 7. (R. 543-545)

Whelan saw that Cover had blood on his shoes. (R. 624-625) Whelan thought that this was the complainant's blood. (R. 627)

On September 7, an arrest warrant was obtained for the defendant. (R. 617) The police forwarded the information therein to the Milwaukee police. (R. 545)

On September 11, Whelan got a tip that the defendant and his girlfriend, Stephanie Machen, might be in LaCrosse, Wisconsin. Ultimately, the LaCrosse police arrested the defendant and Machen later that day in their car. (R. 548-549, 617)

On September 12, Whelan went with Officer Harry Ulferts to LaCrosse. If the defendant waived extradition, Whelan would take him back to Dixon. (R. 549)

At the defendant's extradition hearing, Whelan saw the defendant blowing kisses to a female and mouthing, "I love you." Whelan guessed that this was Stephanie Machen, and he and Ulferts approached this woman outside the courthouse. It was Stephanie Machen. Machen consented to have her car searched. (R. 549) In the vehicle's glove compartment, the police found sports memorabilia, including dollar bills with the pictures of prominent athletes instead of the President's picture. One was a \$70 bill with Mark McGwire's picture in the center, and the other was a \$1 bill with Jeff Gordon's picture in the center. (R. 550) Machen said that this memorabilia came from Tom Cover, who in turn said

that he got it from Blaine Henley. Cover said that he intended to give this memorabilia to his father. (R. 620-621, 635, 637)

On September 12, at the LaCrosse police station, the defendant waived his *Miranda* rights. On the ride back to Dixon, he talked briefly with Ulferts and Whelan about the crime. Back at the Dixon police station, Whelan asked the defendant if Machen was involved in the home invasion. The defendant said, I give you my word as a man she was not involved in this. She was just our ride.” (R. 553-559) At that point, Whelan testified that the defendant refused to give a statement, and he was turned over to the Lee County Jail. (R. 560)

On September 13, Whelan talked to Cover again. Based on that conversation, on September 14, Whelan returned to Jou Vang’s apartment to recover evidentiary matter. (R. 559-560) Vang consented to the search. (R. 561) In Vang’s apartment, Whelan found two BMX bikes in a utility room adjacent to the kitchen, and a Nikita cordless drill. (R. 560-563, 635) Whelan believed that the defendant and Cover had ridden these bikes to the home invasion. (R. 562) Later, Cover’s father would say that the drill was his. (R. 565, 620)

Whelan also learned that a flashlight was involved in the crime. (R. 570) Based on the description that Whelan got of the flashlight, he believed that it was involved in the crime. (R. 571)

Whelan took the BMX bikes to an Illinois State Police investigator to see if blood could be found on them. (R. 565) A reagent test revealed no blood on the bikes. (R. 618)

On September 21, Whelan met with the complainant, Arden Strub. Whelan showed the complainant the two sports memorabilia “dollars” that he had retrieved from Stephanie Machen’s car’s glove compartment. When the complainant saw these, he removed his wallet and pulled out another sports memorabilia dollar --- with a picture of Mark McGwire --- that was exactly like the one that Whelan had gotten from Machen’s car. (R. 566-567)

On October 10, Whelan talked with Beau Loomis, an inmate at the Lee County Jail. Loomis would later testify against the defendant in the prosecution’s case-in-chief. (R. 568-569)

On March 1, 2002, Whelan talked with Verlin Smith, another inmate at the Lee County Jail. Like Loomis, Smith would later testify against the defendant. (R. 569)

A few weeks before he testified, Whelan got a black hooded sweatshirt from Machen that the defendant purportedly wore the night of the incident. The police obtained no evidence of blood from the sweatshirt. (R. 624, 628) *Officer Philip Craig*

Illinois State Police Sergeant Philip Craig examined two bicycles and a drill that Clayton Whelan brought him. Craig could not find anything on the bikes identifiable as blood. (R. 649-651) On visual inspection, Craig saw a couple of spots on the drill that were similar to blood. (R. 651) Craig conducted a presumptive blood test on the drill using phenolphthalein solution, and he received positive results. (R. 656) Craig then returned the drill to Whelan. (R. 657)

Officer Harry Ulferts

Dixon police department lieutenant Harry Ulferts had specialized training in processing latent fingerprints and had processed “thousands” of latent prints. (R. 1045-1046) At the complainant’s house, Ulferts lifted a latent print lift from a watch crystal. The latent impression was from a cloth-type substance. (R. 1047) However, Ulferts could draw no conclusion regarding who lifted the fingerprint, and he could not tell what cloth was used. (R. 1049-1050)

Ulferts said that two active warrants were outstanding for Jody Hartwig. (R. 1048-1049)

The defendant’s “family and friends”

Jou Vang, Stephanie Machen, Tom Cover, and Michael Charleston testified about the defendant’s activities in the hours and days surrounding the charged crimes. Cover was the only occurrence witness.

Michael Charleston

On September 3, 2001, Charleston, who then lived in Dixon at 1513 West 9th Street, had the defendant and Tom Cover visiting at his house. (R. 641, 643) He was “pretty sure” that the defendant and Cover came to his house on bikes. (R. 643) The defendant asked to borrow Charleston’s cordless drill so that the defendant’s girlfriend could hang pictures on her wall. Because Charleston was using the drill, he said, “no.” (R. 643, 645-646)

Jou Vang

23-year-old Jou Vang and the defendant were “culturally married,” meaning

their Laotian Hmong culture recognized them as married. However, they were not married in a way the American legal system could discern. (R. 681, 702, 1089, 1092) Vang and the defendant had two young children. (R. 682)

On September 3, Vang lived in a Dixon apartment (R. 683) Although “culturally married” for five-and-a half-years, Vang and the defendant separated before September 3, 2001, and the defendant came and went as he pleased. (R. 683, 703)

Late in the evening on September 3, Vang saw the defendant riding with Tom Cover towards her house. They stayed at her house for 30 to 60 minutes. (R. 683-684, 685) Vang heard the men talking about a safety box, and Tom was drawing a picture. (R. 685) She remembered the defendant telling Cover, “If you want it, let’s do it. If you don’t want to do it, then we won’t do it.” Rather than one trying to persuade the other, Vang believed that the two were collaborating together. (R. 686)

The men left the apartment together, both wearing dark clothing. (R. 684, 687) Vang asked what they were doing at such a late hour, the defendant told her that it was none of her business, and Vang went to sleep. (R. 687)

The two young men were gone for about a half-hour. (R. 688) Cover returned first on his bike, carrying nothing and looking calm. (R. 688-689) 15 minutes later, the defendant returned on his bike, looking scared and carrying a box the size of an Adidas shoe box. (R. 689) The two brought their bikes inside the apartment. (R. 690) One of them --- Vang was not sure who --- also brought a drill

and black flashlight into the house. (R. 693) The drill was hidden under a kitchen sink. (R. 705)

The defendant asked Vang to get him and Cover new clothes to change into, and to throw the old clothes in a trash bag. Vang did not notice whether the clothes that they wore had blood on them. (R. 691)

Vang placed the clothes in a trashbag along with the flashlight. (R. 692, 694) Ultimately, she threw these out. (R. 706)

After putting these items in the trashbag, Vang went to the kitchen and saw that in her bedroom, Cover and the defendant were opening the box, and that this box contained “a bunch of pennies and some of them were a collector penny. They were inside a white envelope.” Some pennies were loose, and some were contained in a plastic seal. (R. 692-693)

When they came out of the bedroom, they asked her to burn the box. (R. 695) Vang tried to burn it in the sink, but the defendant raised his voice, said she was not doing it fast enough, and slapped her. (R. 695-696) Then, the defendant began burning the box himself. When the smoke alarm went off, Cover ripped it off the wall. (R. 695-696)

The defendant and Cover then left the apartment. When Vang asked the defendant where he was going, he said that he had to meet with Stephanie Machen, adding, “Don’t you understand, I just beat up someone.” (R. 696-697)

Later, the police came to Vang’s house, and she allowed them to search the house. (R. 697, 700) In one search, the police recovered a drill, and Vang said that

this was the same drill that Cover and the defendant brought to her house on September 3. (R. 705)

On direct examination, Vang had said that she and the prosecution had a deal: in exchange for her testimony, she would not be prosecuted for obstructing justice. (R. 698) On cross-examination, Vang said that when Whelan first visited her, she denied having discarded clothes and denied having seen the defendant on September 3.

She further stated that she was in the United States with permission from immigration authorities. (R. 700, 702-703) On redirect examination, she said that she was scared to talk to the prosecutors because she feared putting her life in danger. Evidently referring to the defendant, she said, “I don’t know what he’s capable of doing.” (R. 705) On recross-examination, Vang said that she cooperated with the prosecutors because she feared being removed from the United States. (R. 706-707) On further direct examination, Vang said that she feared the defendant more than the police or the prosecutor. (R. 708)

Tom Cover

21-year-old Tom Cover testified about what the defendant did before, during, and after the alleged break-in. In 2000, Cover and the defendant became friends. They became closer over time; Cover hung out with the defendant daily, and he accompanied the defendant on numerous trips to Milwaukee. (R. 716-717)

Throughout the 2001 Labor Day weekend, Cover, the defendant, and Stephanie Machen partied in Milwaukee. In Milwaukee, the defendant hoped to complete a

rap recording. (R. 717-718, 790) The three drove to Milwaukee and checked into an airport hotel. Then, they visited various people and various stores, purchasing compact discs and clothes. Cover purchased some rare knives to add to his collection. They also purchased drugs --- ecstasy and cannabis:

A. [Tom Cover]: We went a couple of places, obtained some drugs so that we could kick back, relax.

Q. [The prosecutor]: What types of drugs?

A. Ecstasy, cannabis.

Q. Okay. Where were you doing the drugs?

A. Motel.

Q. And were all three of you doing the drugs?

A. Yes.

Q. Do you know where they were --- the drugs were obtained?

A. No. (R. 719)

Cover had \$200 or \$300. (R. 789)

On Sunday, September 2, they discussed returning home because they were running low on money. On Monday, September 3, they returned to Dixon. (R. 720) Machen dropped the defendant and Cover off at Jou Vang's house, and then she left. (R. 722)

They stayed there for an hour, listening to music and playing Playstation. The defendant said that he wanted to collect money from people who owed him. Cover accompanied him, and they both left on bikes. (R. 722) They stopped at various places, but found no one who could give them money. (R. 723, 793-796) At some

point, they passed the complainant's home, although Cover was not then aware of this. (R. 797)

The defendant was unhappy about not finding anyone with money. (R. 726) He said that Jou Vang was complaining that she needed money to put their child in school. (R. 797, 806)

The defendant then told Cover that he had earlier heard a plan concerning a burglary. (R. 726) Six months earlier, in the defendant's presence, Blaine Henley discussed his earlier robbery of a house. However, Henley did not tell Cover where the house was located, nor did he tell Cover that Arden Strub lived there. (R. 802-803, 805) When the defendant discussed his plan to rob a house, Cover knew that the defendant was referring to the house that Henley had talked about. (R. 805) Cover inferred that the defendant had obtained a layout of the house from Henley. (R. 836)

Returning to the time of the charged crime: Cover and the defendant stopped at Mike Charleston's house where the defendant asked for a drill. (R. 725) Because the defendant did not get one there, he went to Nate Keener's house, where again he asked for a drill. Keener said that he could not give the defendant a drill because his father had locked up the tools. However, he did give the defendant a black, hooded sweatshirt. The defendant then got a drill from Cover's father's house. While they rode past a residence on First Street, the defendant again started talking about a robbery. (R. 726-728, 791)

After they got the drill, Cover went back to the Vang's apartment. Inside,

Cover gave the defendant the drill, and the defendant stored it in a back room. (R. 728, 792) Cover and the defendant spent a couple of hours getting stoned and listening to music:

Q. [The prosecutor]: Okay. What happened at Jou's house the second time?

A. [Tom Cover]: We had sat there a couple of hours, got stoned, played video games, listened to some CD's. (R. 729)

Meantime, the defendant agitatedly talked about a robbery. (R. 728-729) After two hours, he went into a back room and came out with two socks. (R. 729)

At first, Cover did not want to accompany the defendant on any robbery. But, because the defendant said that he would go regardless of whether Cover came, Cover decided to go to "look out for" the defendant. While at Vang's house, they agreed to go, and the defendant brought out socks and panty hose. (R. 730) Cover dressed completely in black. The defendant, already wearing black Nike tear-away pants, put on Nate Keener's black, hooded sweatshirt. (R. 730-731, 797-798) These tear-away pants had no pockets. (R. 798) Cover did not know if the defendant was wearing shorts underneath the pants, and he did not know if the defendant kept the drill in his waistband. (R. 900, 903-904)

Cover and the defendant rode their bikes to a nearby skate park. There, they put the panty hose over their faces and the socks over their hands. (R. 732)

From the skate park, the defendant and Cover walked down 1st street towards town, then crossed the street on the river side, and then they stopped in front of the complainant's house. (R. 733) Although Blaine Henley had discussed robbing

this house, Cover did not recognize it from the angle that they approached it. (R. 802)

Down the street, Cover saw a party, which made him nervous. The two walked onto the porch and saw that the outside screen door was shut, but the inside door was open. The defendant said that the complainant's money was in a filing cabinet. From the porch, Cover saw the top of a filing cabinet inside. (R. 734, 739-740, 809, 837, 840)

From the time that they left the skate park until they entered the complainant's home, Cover said that he continually tried to dissuade the defendant from committing robbery. Cover explained to the defendant that there were different ways of getting money: the defendant could work for his father, for example. He also told the defendant that there were many ways that a robbery could go wrong. The defendant said that it did not matter, and he further said that if Cover wanted no part of this, he could leave. (R. 732-733, 799-801, 810-811, 842)

The two left the porch and walked down the house's side because they saw a light coming from a window. Below the window, there was a water spigot that the defendant jumped on, with Cover bracing him. The defendant said that he had not seen anyone, so Cover assumed no one was home. (R. 735-736)

The two walked up the porch again. Cover had been on the porch for a minute and a half or two minutes when he heard a click. When he turned around, the defendant was gone. (R. 737-738) Cover remained standing on the front porch. (R. 739) Cover testified that he never intended to enter the house. However,

defense counsel impeached him with a prior statement in which he said that he intended to enter the house so that the defendant would not do anything stupid and only what needed to be done. (R. 815)

On direct examination, Cover said that he heard a yell from the residence, and then he entered through the front door. (R. 740-741) On cross-examination, Cover said that he heard one yell, then entered the house, then heard two more yells for help. (R. 815-816, 823) Cover said he ran inside to get the defendant out. (R. 824)

Inside, Cover recognized the defendant charging at something. Cover headed towards the kitchen, where he thought the defendant was going. Entering the kitchen, he saw someone on one knee grab the defendant's shirt. There was blood covering this person's whole head and the shoulders of his shirt. Cover saw the defendant strike this person in the head using a downward motion with the flat part of his hand and forearm. Cover saw an object in the defendant's hand, but he was not sure what it was. (R. 741-745) The person holding the defendant fell, lost his footing, and sank to the floor with his hand sliding down the defendant's shirt. (R. 745) When the victim's head stopped rolling, the defendant took two steps back and struck him twice more. Cover said he saw the defendant strike the complainant three times. (R. 746) He did not see the defendant strike the complainant with a flashlight. (R. 829) Indeed, he had not seen the defendant traveling with any weapon. (R. 841)

Cover lost sight of the defendant and stared at the complaint for five to seven

minutes. Cover heard gargling noises from the victim's mouth and throat, as if he were scarce of breath. However, Cover feared touching the complainant lest he kill him. (R. 746-747, 825-827) Cover denied striking the complainant. (R. 827, 829)

While staring at the prostrate complainant, Cover heard a noise from inside the house. (R. 830) He stepped over the victim and went from the living room to the dining room to the front door and out of the house. (R. 747, 748)

Outside, Cover did not see the defendant and he had no idea where the defendant had gone. Cover returned to the skate park. (R. 749-750) At the skate park, he removed the socks and pantyhose, lit a cigarette, and waited from three to five minutes for the defendant to appear. Cover did not see any tire marks clearly indicating that the defendant had left, so he got on his bike, and rode to Jou Vang's residence. (R. 750-751)

Cover knocked, Jou Vang opened the door, and she said the defendant was not in. Waiting for the defendant, Cover changed his clothes, which belonged to his brother, and folded them on a couch. (R. 752, 818)

The defendant arrived, carrying his bike and a small cardboard box. (R. 751) As he walked in, he placed a flashlight on a table. (R. 757) The defendant had blood on his face and under his hat's brim. (R. 753) He placed a drill on the floor, and this was the same drill that Cover had gotten from his father. (R. 758)

The defendant went to the apartment's back room. The defendant dumped the cardboard box, --- which containing envelopes, pennies, and the stockings and

socks the defendant wore --- onto the bed. (R. 752-753, 843, 844) Each envelope had five to 10 pennies, and Cover saw 100 to 200 envelopes. Cover never saw a wallet, and he did not remember the defendant talking about getting any other money. (R. 754)

As the defendant looked through the items, he got irritated and upset. He complained about obtaining nothing more than a bunch of pennies and said that this had been a waste of time. (R. 753, 755) Cover did not remember the defendant having pennies while in Milwaukee. (R. 863)

The defendant threw the envelopes back in the box. He then put the box in the sink and lit it on fire. The fire alarm went off, and Vang began yelling at the defendant. Cover ripped the alarm off the wall because he did not want to alert the neighbors. (R. 755)

In the meantime, Vang and the defendant argued. The defendant had changed clothes, and he threw his and Cover's clothes on the floor, telling Vang to get a bag to dispose of them. (R. 756, 819, 820) Vang continued to argue until the defendant slapped her. Vang then got a bag for the clothes. (R. 756)

At some point, Cover noticed that the flashlight that the defendant had brought had been torn apart so that it could be cleaned. There was blood on the mag light. (R. 758-759, 845-846) On redirect examination, he also said there was blood on the outer rim. (R. 902) Cover recognized the flashlight as belonging to his father. (R. 758-759) Cover guessed that the defendant had hit the complainant on the head with this flashlight, although he did not see the defendant with a flashlight

when they were riding around together. (R. 757-758, 817)

Cover shaved the defendant's head, except for a tail in the back. (R. 756, 820-821) The two then went to a friend's house so the defendant could have Stephanie Machen pick them up. Returning, they rode slowly to calm down. (R. 756-757)

Within five minutes of the men arriving at Vang's apartment, Machen pulled up. (R. 757) The defendant told Vang that he and Cover were going to Milwaukee to let things cool down and so they would not be suspects by remaining in the area. (R. 762) Cover said that he wanted to leave town. (R. 849) They left late on Monday, September 3, and arrived in Milwaukee early on Tuesday, September 4. (R. 822)

The defendant gave Machen's car keys to Cover so he could drive. Cover avoided main roads. They stopped at a Citgo to get some gas. As Machen went inside the gas station, Cover tried to talk about the robbery, but the defendant indicated that he wanted silence because there were monitors that could pick up a conversation. (R. 762-763)

When Machen came back, the defendant threw out some papers that looked like receipts along with some keys --- two Ford keys on a ring. (R. 764) Cover never saw that the defendant with a wallet or credit cards. (R. 765)

When the three reached Milwaukee, they first went to a party. (R. 768) Then, with two of the defendant's relatives along, they got a hotel room. (R. 766-767)

Again, Cover stated that they got drugs at various places in Milwaukee. The constant references to drug use drew an objection from defense counsel at a side-

bar:

Q. [The prosecutor]: Did you take anything to the hotel room?

A. [Tom Cover]: We had some alcohol and things like that but nothing else.

Q. Did you take any --- did you have any drugs at the hotel room?

A. Yes, we did.

Q. What kind of drugs?

A. Ecstasy and pot. (R. 767)

* * *

Q. Okay, once you got to the hotel what did you do?

A. We sat there, watched T.V., talked a little bit, drank, smoked, did some ecstasy. (R. 768)

* * *

[Defense counsel]: As to relevance and the statment about use of alcohol and drugs and so on, we are post-crime as I am understanding this.

[The prosecutor]: I believe it's particularly relevant because I think they're using the proceeds of the crime, and I can argue that they had no money beforehand. Now, all of a sudden they're getting ecstasy, alcohol, marijuana. (R. 769)

(R. 767, 853) Cover said that he paid for the drugs and alcohol using the \$800 that he brought with him. He also said that he paid for gas, food, and lodging. To his knowledge, no one else had money. (R. 861-862, 869-871)

At one point, when they were running low on alcohol, the defendant asked Cover to take Machen's car and get some alcohol. While doing this, Cover got in an accident. (R. 769, 855) Cover said that the accident was not severe and that no

one was hurt; only the car itself was damaged somewhat. (R. 769, 872)

On cross-examination, Cover said that they returned on Wednesday, September 5. (R. 851, 855) Cover said that he did not want to return, but he could not stay in Milwaukee without connections or family to stay with. Also, the three had discussed that it would look suspicious if they were the only people out-of-town when the crime occurred. (R. 851)

So, Machen dropped Cover and the defendant off at Vang's house. Vang told them that the police had stopped by numerous times looking for them. (R. 771) Cover also heard that the Dixon police had questioned "everyone in town" about his and the defendant's whereabouts. (R. 858)

After Vang said this, the defendant and Cover talked about how they could make the case that they were not in Illinois when the charged crimes occurred, given that they had numerous receipts from Milwaukee stores and given that people had seen them in Milwaukee. (R. 772)

When Cover got home, his father said the police were looking for him and that he should stay put until the police returned because they wanted to question him about the incident at the complainant's house. (R. 859) However, Cover and his father had an argument, and after that, Cover decided to leave. He packed some clothes for returning to Milwaukee. The night of September 5, the three drove back to Milwaukee. (R. 778, 857, 859)

Cover wanted to return from Milwaukee to elude the authorities, and he did not intend to come back because he thought he would get accused of something he did

not do --- commit attempted murder. (R. 861) Initially, Cover testified that he planned to return to Milwaukee, and lay low there because Milwaukee was a big city. (R. 861) Later on cross-examination, he modified this testimony and said that from Milwaukee, his cousin would take him to Green Bay and from there, to Iron Mountain, Michigan. In Iron Mountain, he would work for his uncle and call probation to see if he could transfer to Michigan. He would leave the defendant and Stephanie Machen behind in Milwaukee. (R. 873-875)

Upon returning to Milwaukee, the three stayed with the defendant's relatives. (R. 778, 866) In Milwaukee, at a job service and at other places, Cover, the defendant, and Machen filled out applications. (R. 865-866) Cover said that Machen wanted to move to Milwaukee with the defendant. (R. 866)

On September 5, Cover got a call from his father. After speaking with his father, Cover decided to meet him in Beloit, Wisconsin. On September 6, Machen and the defendant took Cover to Beloit. The defendant dropped Cover off near a truck stop in Beloit, and he told Cover not to mention anything to anybody. (R. 778-780) Cover walked over to the truck stop, and he saw his father and Tom Lehman waiting for him. (R. 781)

Cover rode in his father's van to the Dixon police department. (R. 781) At the police station, Cover spoke to Tom Lehman, Lehman's brother, Clayton Whelan, and some other policemen. (R. 782)

That night, Cover gave a statement to the police. When the police questioned him, there was blood on his left shoe. (R. 887-888) On redirect examination, he

said that he told the police that when he stepped over the complainant, there was blood coming from the complainant's mouth, and this likely caused the blood on the shoes. (R. 901)

After Cover made a statement to the police, the police arrested him and placed him in the Lee County Jail, where he had remained until testifying. (R. 782-783)

On direct examination, Cover said that he pled guilty to residential burglary in exchange for a 10-year prison sentence. (R. 786) On cross-examination, he said that he had not yet pled guilty, but had a tentative agreement with the prosecution that encompassed not only the charged incidents, but violations of probation for his earlier, unrelated robbery conviction. On cross-examination, Cover said that he had home invasion, robbery, residential burglary, and two aggravated battery charges pending, in addition to a pending charge for violating the conditions of probation on his previous robbery conviction. (R. 890-894) Cover said the prosecution demanded that he testify truthfully; if they determined he did not, then, he said, "I guess I am screwed." (R. 892, 894) On redirect examination, Cover said that his deal encompassed the prosecution not filing petitions to revoke probation for prior convictions. (R. 897)

Stephanie Machen

21-year-old Stephanie Machen was the defendant's girlfriend. (R. 906-907) Machen testified that around the time of the charged crimes, she, the defendant, and Tom Cover drove from Dixon to Milwaukee on three separate occasions. After dropping Cover off in Beloit, Wisconsin, she and the defendant made a

fourth trip from Beloit to Milwaukee.

The three first drove to Milwaukee early on Sunday morning, September 2, 2001. (R. 908) On Monday, September 3, they returned to Dixon. (R. 909-910) Machen dropped off the defendant and Cover at Jou Vang's house, and she went to Sterling to visit some friends. (R. 910, 939)

They then returned to Milwaukee around 10 p.m. on September 3, with Machen picking up the defendant and Cover. (R. 912-913)

When she picked up the defendant on September 3, Machen remembered that he wore blue jeans, a dark blue hooded sweatshirt or "hoody", and a white T-shirt. (R. 913-914)

Before getting on the interstate to Milwaukee, Machen stopped at a Dixon gas station to call her mother. While she made the phone call, police drove by with their lights on, and the defendant and Cover said, "Let's go. Let's go." (R. 913) As Machen drove, she heard Cover and the defendant talking about burning clothes. (R. 914) She also saw the defendant swing his arm downward and say, "Wham." (R. 914-915, 948) When she tried to question the two about what they were talking about, they said, "Never mind. Never mind." Then, the conversation shifted to other topics. (R. 915)

When the three arrived in Milwaukee on September 3, they checked into a hotel and partied for the rest of the evening. In Milwaukee, the defendant purchased drugs and alcohol. Prior to Machen's discussion of purchasing drugs. Defense counsel objected in a side-bar:

[Defense counsel]: This is a continuing series of character attacks. This is character evidence. It is an attempt to prejudice the jury by suggesting that Scott Vue consumes alcohol and drugs as a reason to convict him.

The last time this was brought up during the testimony of Tom Cover the Court was give the assurance that the proof was intended only for the purpose of showing that what happened to the proceeds of the crime. They never tied it up. Tom Cover testified that he had 170, whatever the amount ended up being, of dollars in his wallet and no testimony was presented to this Court that proceeds from this crime had been used to the purpose of purchasing alcohol and drugs and now they're doing it again and it is --- the prejudicial value clearly, clearly outweighs any probative effect, particularly since they haven't even made a probative presentation. (R. 916-917)

* * *

[The prosecutor]: The proceeds was he was out of money. That's why they committed the burglary and home invasion. Now he's got money to buy drugs. (R. 917)

Ultimately, the trial judge permitted the prosecution to introduce evidence that the defendant had purchased drugs in Milwaukee, provided the prosecution showed that the proceeds of the crime were used to purchase drugs in Milwaukee. (R. 918) Machen testified that the defendant bought drugs in Milwaukee:

Q. [The prosecutor] : Stephanie, when you were up in Milwaukee, who purchased drugs?

A. [Stephanie Machen]: Scotty did.

Q. And did you give Scotty money to purchase the drugs?

A. I gave him what I had but I didn't have very much.

Q. And did he use the money that he had to purchase the drugs?

A. Yes. (R. 919)

In Milwaukee, the three also visited the defendant's friends, including Sa, who was either Jou Vang's brother or the defendant's brother. While at Sa's house, the

defendant got new shoes from him and got rid of his old shoes, meaning the shoes that he wore when she picked him up in Dixon on September 3. (R. 919-920) The three returned to the hotel around 1 or 2 a.m. on Wednesday, September 5. (R. 922)

Later on September 5, the three drove back to Dixon so that Machen could get her paycheck. (R. 922, 942) Her paycheck was \$80 or \$90. (R. 954) Before picking up the paycheck, Machen dropped the defendant and Cover off at Jou Vang's house. (R. 923) After she got her paycheck, Machen visited the defendant's mother, Bea Vue. (R. 954-955) While visiting the defendant's mother, Machen noticed that her arm was bruised. (R. 955)

Later, in the car, the defendant and Cover talked about the bruise on Ms. Vue's arm. However, Machen said this conversation was different from the one in which the defendant made a swinging motion with his hand and said "Wham." (R. 956-957)

Then, on the evening of September 5, they drove to Milwaukee for the third time. (R. 922-923) While they were in Milwaukee, Cover received a phone call, and he said that he wanted to return to go to Beloit. (R. 945) On September 6 or 7, they dropped Cover off in Beloit. On the trip to Beloit, the defendant told Cover to be quiet and that everything would be fine.

After dropping off Cover in Beloit, Machen and the defendant went to Milwaukee for the fourth time. They stayed at Sa's Milwaukee house for another day or two. Then, Machen and the defendant left for LaCrosse, Wisconsin, so that

they could visit the defendant's relatives. (R. 923-925)

On September 11, as Machen and the defendant drove in LaCrosse, they were arrested. (R. 925-926) When Machen first saw a police car behind her, she pulled over thinking that she would get a ticket for blowing past a stop sign. Then, approximately 15 police cars pulled up around her. Inside the vehicle, the defendant said that he was sorry, that he could not tell Machen anything because she would get in trouble, and that he loved her. (R. 926)

After the arrest, the police searched her car, with her consent. (R. 927) Inside the car, the police found sports memorabilia, including fake dollars that had the picture of a sports figure in the middle. Machen said that these fake dollars had come from Cover. (R. 952) She admitted that it was possible that Cover put these fake dollars in the car on Wednesday, September 5. (R. 953)

After the defendant's arrest, Machen visited him often at the Lee County Jail. (R. 927) Machen said that she had been granted immunity from prosecution. She said that she was scared that she would get in trouble for using drugs and for giving false information to the police the first time she had talked to them. She said that she was very scared when talking to the police. (R. 929-931)

On cross-examination, Machen said that she told the police that she wanted immunity before she talked. (R. 933-934) She admitted that the defendant frequently would stay in Wisconsin with relatives, and that the defendant had a business in Milwaukee involving breeding dogs. (R. 937-938)

On cross-examination, Machen admitted that she was unsure about the dates

when certain events occurred. (R. 935) Although she admitted that it was possible that she had not picked up Cover, she said that she was “pretty sure” that she had picked him and the defendant up on September 3 (R. 950-951)

Jailhouse snitches: Beau Loomis and Verlin Smith

Two jailhouse informants testified about what the defendant said while he was in the Lee County Jail: Beau Loomis and Verlin Smith.

Beau Loomis: F block

21-year-old Beau Loomis was friends with both the defendant and Tom Cover. (R. 962-964, 991) From September 12 through October 9, 2001, he shared the F cell block with the defendant at Lee County Jail. (R. 964-966) The Jail held Loomis for burglary and theft charges.

Ultimately, Loomis pled guilty to two burglary counts and one count of theft of over \$300. (R. 962-963) Although the court had not sentenced him, Loomis denied any promises of leniency in exchange for his testimony. (R. 963, 967-968, 978, 980, 988-989) On cross-examination, Loomis admitted that he had a criminal damage to property charge pending. (R. 979)

On September 7, September 21, October 1, and October 10, 2001, Loomis talked to the police about statements that the defendant made. (R. 966-967, R. 988) Although he did not remember the dates, Loomis said he and the defendant had several conversations about the charged crimes. (R. 968-969, 988)

One day while playing cards with the defendant, Loomis asked him how much he got from the home invasion and robbery. The defendant said that he got \$500,

which he took to Milwaukee to party with. (R. 969-970) By “partying,” the defendant meant that he bought ecstasy, weed, and Hennessey alcohol. (R. 970-971) The defendant said that he and Cover rode to the “old guy’s” house on First Street. Although the complainant did not say the name Arden Strub, Loomis said that “we all” knew to whom the defendant referred. (R. 971) The defendant said that Cover was being a “bitch” about it, meaning that he was scared to commit the crime. During the robbery, as the victim talked to Cover, the defendant “bombed on that fool,” meaning that he beat the complainant in the head with a flashlight. (R. 972-974) The defendant worried that there was a camera near the skate park by the complainant’s house and that he might have been caught on surveillance tape. He also feared that the police retrieved his mask, gloves, and bicycle from Jou Vang’s house. (R. 974)

Loomis said that he overheard part of another of the defendant’s conversations when they had visitation together; i.e, when he and the defendant had visitors at the same time. Loomis’ fiance was visiting him, and Stephanie Machen and Vang’s younger brother, Goonie, were visiting the defendant. (R. 975-976) During the visit, Loomis overheard the defendant say, “They took the bikes?” (R. 977)

On cross-examination, Loomis said that the prosecution told him to be honest and try to remember everything and they gave him his earlier statements so that he could refresh his memory. (R. 993) On redirect examination, asked why he had come forward to testify, Loomis said that he had befriended the complainant’s

grandson from early childhood. (R. 995)

Verlin Smith: C block

At the time that he testified, Verlin Smith was an Ohio prisoner, sentenced for marijuana possession. Smith admitted having a lengthy criminal history, centering around narcotics cases. (R. 1000-1002)

From January 13, 2001, until early March 2001, Smith lived in the Lee County Jail's C block. (R. 1000-1001) Four people lived in Smith's cell, including one "Jody." During this time, the defendant lived in C block, a couple of cells from Smith. (R. 1004)

Smith overheard the defendant and Jody talking. (R. 1004-1007) While the two talked, Smith silently listened. (R. 1009) Smith described the conversation:

Q. [The prosecutor]: Okay. On this particular occasion describe to me what you overheard when you walked up to them that day?

A. [Verlin Smith]: When I first walked up they was talking about ---- Scott had mentioned that they have had a house staked out and he said --- he used the word we. We had the house staked out. I don't know how many times he mentioned that. They went into the house some date and there was some person in there and he hit him with some object. I don't know what the object was.

Q. Now, did Scott specifically say that he hit this person with an object?

A. That's right. (R. 1009)

The defendant also said, "If I had hit the old motherfucker harder, I might have killed him." (R. 1010) The defendant continued that he would sue the city, get an Asian lawyer, and that someone in Wisconsin would cover for him for the time when the crimes took place. (R. 1010-1011)

Smith told the warden about this information, and he later spoke to two task force members, including Clayton Whelan. Smith told Whelan that the defendant said that he intended to steal money, guns, or antiques from the complainant's home. (R. 1013)

On cross-examination, Smith admitted that he had a deal with the prosecutors: in exchange for his testimony, he would receive the minimum sentence for the Class 3 felony of unlawful intent to deliver cannabis --- two years. And, in fact, Smith's sentence was two years. (R. 1014-1016, 1017)

Douglas Carlson

After Smith testified, Douglas Carlson, the Lee County Jail assistant warden, testified. (R. 1019) Carlson said that the defendant arrived in the Lee County Jail on September 12, 2001. From September through October 2001, the defendant lived in the jail's F block. The defendant was in the jail's C block from January through February 2002. (R. 1021)

From January until mid-February 2002, Verlin Smith lived in the jail's C block. (R. 1021) During that period, an inmate named Jody Hartwick also lived in the jail's C block. (R. 1022)

Carlson also testified that two prisoners could have visitors at the same time. (R. 1027-1028) Carlson testified that the visitor's log from September 15, 2001, indicated that Beau Loomis and the defendant had visitors on that day. The defendant's visitor was Stephanie Machen. (R. 1028-1029)

After the prosecution rested, the defense's motion for a directed verdict was

denied. (R. 1060)

The defense

Only the 25-year-old defendant testified. The defendant described Tom Cover as an acquaintance, although Cover had gone with him to Milwaukee perhaps a dozen times. (R. 1062-1063)

Late on Saturday, September 1, or early on Sunday, September 2, 2001, he went to Milwaukee with Tom Cover and Stephanie Machen. (R. 1062, 1100) When he left for Milwaukee, the defendant had around \$175. Before he returned to Dixon, he got another \$200 from a dog kennel that he ran in Milwaukee. (R. 1076-1077)

At this dog kennel, the defendant bred dogs, and sold puppies. This dog kennel business helped support his family. (R. 1109)

Around 2:30 or 3 p.m. on Monday, September 3, the three returned to Dixon because Cover had to work with his father on Tuesday, and the defendant needed to get a tape for a CD recording that he was working on. (R. 1062-1065, 1103) Machen stopped by Vang's house, but she was not home. Machen dropped Cover off at his father's house, and then she dropped the defendant off at his mother's house. However, she too was not home. The defendant then returned to Vang's home, but she was still not there. (R. 1065-1068)

Nate Keener stored his bike at Vang's house. At Vang's house, the defendant got out this bike and he rode it around town. He first went to Third Street to get some cigarettes or use the phone at the gas station there. Then, he saw Coppottelli.

The defendant denied that Cover was with him when he saw Coppotelli. (R. 1068-1069)

The defendant went to Vang's house for the third time, but she was still not there. Riding towards Mike Charleston's house, the defendant saw Cover at his father's house, and the two rode to Charleston's house together. At Charleston's house, the defendant asked Charleston if he could borrow a drill. Although Charleston said that the defendant could borrow it the next day, the defendant knew he would not be in town the next day. The defendant then crossed the street to Nate Keener's house, and asked Keener to lend him his drill. Keener said that he did not have access to his father's tools. The defendant never borrowed a drill from anybody. Although Cover had left his drill at Vang's house, the drill had a depleted battery and could not be used to hang things up. (R. 1069-1075)

It was chilly outside and the defendant did not have a jacket. So, he asked Keener if he could borrow one of his sweatshirts. He had borrowed sweatshirts from Keener before, and the defendant explained that Keener had a "community" sweatshirt that was freely passed around his circle of friends. (R. 1071-1072)

After leaving Nate Keener's, around 6:30 or 7 p.m., the defendant split up with Tom Cover. The defendant thought that Cover was going to his father's house because he had to work on Tuesday, September 5. After Cover left, the defendant tried arranging a ride to Milwaukee. The defendant called Stephanie Machen, and she agreed to take him to Milwaukee. In the early evening on September 3, the defendant and Stephanie Machen went to Milwaukee, unaccompanied by Tom

Cover. (R. 1073-1075, 1102)

Upon arriving in Milwaukee on Monday, September 3, the defendant and Machen first went to a hotel. Then, they went to a cousin's house to see if they wanted to work on his recording or if they wanted to listen to the defendant's tape. They listened to the defendant's tape and talked about what more had to be done. (R. 1077-1078)

On Tuesday, September 4, the defendant and Machen went sight-seeing in Milwaukee. The defendant showed her the lakefront, downtown, and where he used to go to school. (R. 1078) The defendant denied that Cover was with him when he was in Milwaukee this time. (R. 1086)

Around 5 or 6 p.m. on Wednesday, September 5, the defendant and Machen returned to Dixon. The defendant did not want to return because his cousin wanted him to work on their rap recording. (R. 1108) Machen, however, needed to return because she had to work on Thursday, September 6. (R. 1078-1079) Machen dropped the defendant off at Jou Vang's house, but Vang was still not there. In the house, the defendant checked the refrigerator to make sure that it had food and checked that there were diapers for his children. The defendant informally supported Vang, periodically giving her cash. (R. 1080, 1111)

The defendant went to Cover's house. Cover said that he was fighting with his father. Cover asked the defendant what he was doing, and the defendant said that he intended to return to Milwaukee. Cover asked if he could go along. The defendant said that he would let Cover know when he got a ride. (R. 1084)

The defendant then called Machen, who was upset because she had fought with her mother and father. Because she would not be working on Thursday, she offered to take the defendant back to Milwaukee. (R. 1081) Machen then picked up the defendant at Vang's house. Because he thought he had left something there, the defendant asked Machen to return to Vang's house. On the way there, he saw Cover. The defendant said that he had to see Vang, but that he would return to pick up Cover. Machen and the defendant drove to Edelman's, which is where Vang worked. There, the defendant told her that he would be leaving town for a week to visit his family and attend to his compact disc recording and his dogs. He told Vang to take care of the children. (R. 1087) The defendant denied seeing Vang on Monday, September 3, and said the visit at Edelman's was the first time that he had seen her. (R. 1088)

After seeing Vang, the defendant picked up Cover, and the three visited with his mother. The defendant's mother had a bruise on her arm. She showed it to him. (R. 1087)

After vising with the defendant's mother, the three went to Rock Falls so that Machen could pick up a work check. From Rock Falls, the three went straight to Milwaukee. (R. 1083-1085)

On late Wednesday, September 5, or early Thursday, September 6, the three stayed at the Milwaukee home of one of the defendant's relatives. The defendant said that on Thursday, Cover and Machen relaxed at his cousin's house while he tried to make progress on his recording. (R. 1087) The defendant said that he

changed shoes with his cousin while up in Wisconsin. However, before he went to LaCrosse, Wisconsin, he changed back to his original shoes. (R. 1117-1118)

On Friday, September 7, Cover told the defendant that he wanted to return to Dixon. As the defendant understood it, Cover's father had called and had told Tom Cover that he was in big trouble. The defendant suspected that Cover was in trouble because he had left Illinois while on probation. The defendant made arrangements to drop Cover off in Beloit, Wisconsin. (R. 1094)

The defendant denied going to Milwaukee on Monday, September 3, 2001, with Tom Cover. (R. 1098) He denied going to Arden Strub's house or burglarizing his house or striking him. (R. 1094) He denied confessing his involvement in the crimes to Beau Loomis. (R. 1095) He denied having the conversation with Jody Hartwig that Verlin Smith said he overheard. He did not recall becoming panicky when, on the night of the charged crimes, ambulances and police cars drove by. (R. 1097) He denied that he allowed Tom Cover to shave his head. (R. 1120)

On cross-examination, the prosecutor asked the defendant if he filed taxes from the income generated from his dog kennel business:

Q. [The prosecutor]: All right, since I'm not having any real numbers, what were your taxes that you filed last year?

A. [Defendant]: Actually I didn't file.

Q. Why is that?

A. I don't think I did, because I didn't have a job. It's hard to find a job here in Dixon, a good-paying job.

Q. You are saying that you made money from the dogs?

A. Right.

Q. I, I didn't so. (R. 1110)

Jury verdicts, sentencing, post-trial motions

On September 24, 2002, the jury found the defendant to be guilty on all counts. (C. 179-188; R. 1229) On December 13, 2002, the trial judge filed a memorandum decision. In this memorandum decision, he vacated Count I (home invasion), Count IV (robbery), Count VII (aggravated battery), and Count IX (aggravated battery). (C. 288-289) The trial judge then sentenced the defendant to 15-years imprisonment for Count III (armed robbery), 10-years imprisonment for Count II (home invasion), and 5 years-imprisonment each for Count V (residential burglary), Count VI (armed violence), and Count VIII (aggravated battery). The trial judge found that the 15-year armed robbery sentence and the 10-year home invasion sentence were subject to truth-in-sentencing and that they further triggered consecutive sentences. Thus, the defendant's total sentence was 30 years imprisonment, with 25 years being subject to truth-in-sentencing. (R. 1298; C. 290-299)

In his memorandum order setting forth his reasons for structuring the defendant's sentences as he did, the trial judge explicitly said that he relied on the defendant receiving compensation as a factor in aggravation for the armed robbery conviction. The trial judge wrote:

The factors in aggravation under 730 ILCS 5/5-5-3.2(a) which apply are:

(2) Defendant received compensation for committing the offense (approximately \$500 according to Count III). (C. 286)

Down further on the same page, the trial judge continued that this factor in aggravation specifically applied to the armed robbery charge:

The first individual offense the Court addresses is the conviction of Armed Robbery. *Here all factors in aggravation and mitigation apply.* This is a Class X felony where imprisonment in the penitentiary is mandatory. Having due regard for the character of the offender and the nature and circumstances of the offense the Court sets the sentence for this offense at 15 years. (C. 287)

Thus, the trial judge found that an aggravating factor in the armed robbery was that the defendant received \$500 compensation.

On January 13, 2003, the defense filed a motion to reduce sentence and for other relief. (C. 300-300A) On April 3, 2003, the trial judge denied this motion. (R. 1316) On that same day, the defendant filed a timely notice of appeal. (C. 309) On April 11, an amended notice of appeal was filed. (C. 312)

ARGUMENT

I.

Evidence that the defendant purchased and took drugs with Stephanie Machen and Tom Cover and that he had not paid income taxes was inadmissible evidence of uncharged conduct and deprived the defendant of a fair trial.

During Tom Cover's testimony, he admitted that he took drugs, including alcohol, marijuana, and ecstasy, with the defendant. Stephanie Machen admitted the same thing. Beau Loomis said that the defendant said in jail that he purchased drugs and alcohol with the proceeds from his robbery. Finally, in cross-examining the defendant, the prosecution essentially accused him of not paying income taxes. Such testimony constituted evidence of uncharged misconduct by the defendant, which undermined the presumption of innocence and deprived him of a fair trial.

A defendant's right to a fair and impartial trial entitles him to have his guilt or innocence rest solely on evidence surrounding the charged crimes. *People v. Goodwin*, 69 Ill.App.3d 347, 349, 387 N.E.2d 433 (3d Dist. 1979). Evidence of uncharged conduct, as in this case, undermines the presumption of innocence. *People v. Hendricks*, 137 Ill.2d 31, 52, 560 N.E.2d 611 (1990).

During Tom Cover's testimony, he mentioned at least three times that the defendant used drugs. During the first trip to Milwaukee, Cover testified that he and the defendant took drugs together:

A. [Tom Cover] We went a couple of places, obtained some drugs so that we could kick back, relax.

Q. [The prosecutor] What types of drugs?

A. Ecstasy, cannabis.

Q. Okay. Where were you doing the drugs?

A. Motel?

Q. And were all three of you doing the drugs?

A. Yes.

Q. Do you know where they were --- the drugs were obtained?

A. No. (R. 719)

While the defendant and Cover spent time and Jou Vang's house, he testified that he and the defendant took drugs:

Q. [The prosecutor]: Okay. What happened at Jou's house the second time?

A. [Tom Cover]: We had sat there a couple of hours, got stoned, played video games, listened to some CD's. (R. 729)

During the second trip to Milwaukee, he said that he and the defendant both took drugs:

Q. [The prosecutor] Did you take anything to the hotel room?

A. [Tom Cover]: We had some alcohol and things like that but nothing else.

Q. Did you take any --- did you have any drugs at the hotel room?

A. Yes, we did.

Q. What kind of drugs?

A. Ecstasy and pot. (R. 767)

* * *

Q. Okay, once you got to the hotel what did you do?

A. We sat there, watched T.V., talked a little bit, drank, smoked, did some

ecstasy. (R. 768)

Similarly, Stephanie Machen testified that when the three arrived in Milwaukee on September 3, the defendant purchased drugs and alcohol.

Q. [The prosecutor} : Stephanie, when you were up in Milwaukee, who purchased drugs?

A. [Stephanie Machen]: Scotty did.

Q. And did you give Scotty money to purchase the drugs?

A. I gave him what I had but I didn't have very much.

Q. And did he use the money that he had to purchase the drugs?

A. Yes. (R. 919)

Beau Loomis also testified that the defendant told him that he "partied" in Milwaukee, meaning that he used ecstasy, marijuana, and Hennessey alcohol. (R. 970-971)

Finally, when cross-examining the defendant, the prosecution essentially charged him with not paying his taxes:

Q. [The prosecutor]: All right, since I'm not having any real numbers, what were your taxes that you filed last year?

A. [Defendant]: Actually I didn't file.

Q. Why is that?

A. I don't think I did, because I didn't have a job. It's hard to find a job here in Dixon, a good-paying job.

Q. You are saying that you made money from the dogs?

A. Right.

Q. I, I didn't so. (R. 1110)

Evidence about the defendant's drug purchases or failure to pay income tax was irrelevant regarding whether the defendant committed the charged crimes. The prosecutor said that she would show that the defendant committed the home invasion and armed robbery to pay for the drugs. However, both Jou Vang (R. 692-693) and Tom Cover (R. 752-754, 843, 844) testified that the defendant came home only with a box of pennies. And while Arden Strub testified that he lost his wallet, no one ever said that he saw the defendant with Strub's wallet. Finally, Tom Cover testified that he, not the defendant, bought drugs for the group. To Cover's knowledge, the other two had no money. (R. 861-862, 869-871)

Where evidence of collateral crimes serves only to establish a defendant's propensity to commit crimes, it should not be admitted because it tends to overpersuade the jury towards conviction because the jurors believe that the defendant is a bad person who must be punished. *People v. Lindgren*, 79 Ill.2d 129, 137, 402 N.E.2d 238 (1980). In *People v. Mikyska*, 179 Ill.App.3d 795, 534 N.E.2d 1348 (2d Dist. 1989), this Court found evidence of the defendant's past drug use to be irrelevant and prejudicial and to constitute reversible error in Mikyska's reckless homicide trial. See also, *People v. Howard*, 305 Ill.App.3d 300, 386, 712 N.E.2d 380 (2d Dist. 1999); *People v. Park*, 245 Ill.App.3d 994, 1002, 615 N.E.2d 753 (2d Dist. 1993).

In this case, the trial court allowed in evidence of drug use on the grounds that it would show why the defendant committed the charged crimes. However, this connection was never made.

Accordingly, this Court should find that evidence of the defendant's drug use was plain error under Illinois Supreme Court Rule 615(a) and reverse the defendant's convictions because the error was so fundamental and of such magnitude as to deny the defendant a fair trial. *People v. Herrett*, 137 Ill.2d 195, 210, 561 N.E.2d 1 (1990). *See People v. McMillan*, 130 Ill.App.3d 633, 636-637, 264 N.E.2d 554 (2d Dist. 1970)(evidence of unproven and unrelated prior drug transactions found to be reversible error in conviction for unlawful sale of narcotics even though no objection at trial).

Alternatively, this Court should find the admission of this collateral evidence to be plain error because the overall evidence was closely balanced. Nearly every witness who was not a police officer had a bias to testify against the defendant because the witness had cut a deal with the prosecution. The only occurrence witness was Tom Cover, a co-defendant who cut a favorable deal with the prosecution in order to save himself from having to serve the majority of his life in prison. Stephanie Machen requested immunity before she would testify. (R. 929-934) And Jou Vang feared leaving the United States if she did not cooperate with the prosecutors. (R. 706-707)

Wherefore, the defendant request that this Court reverse his convictions, and remand the cause for a new trial.

II.

Because a metal flashlight is not a Category III weapon within the the armed violence statute's meaning, defendant's armed violence conviction must be vacated.

Standard of review

Properly interpreting the armed violence statute presents legal questions meriting *de novo* review. *People v. Davis*, 199 Ill.2d 130, 766 N.E.2d 641 (2002).

Analysis

Count VI of the information charged the defendant with armed violence because he committed a felony while armed with a metal flashlight:

That on or about the 3rd day of September 2001, in Lee County, Illinois, the above captioned defendant committed the offense of ARMED VIOLENCE in that said defendant, while armed with a dangerous weapon, a metal flashlight, committed aggravated battery to an individual of 60 years age or older in violation of 720 ILCS 5/12/-4(b)(10), a Class 2 felony.

(C. 14) According to Jou Vang, after the charged crimes, either Tom Cover or the defendant brought a drill and black flashlight into her house. (R. 693) According to Cover, after the defendant returned from the complainant's house, he brought a flashlight. However, the flashlight had been torn apart so that it could be cleaned because there was blood on the mag light. (R. 758-759, 845-846) On redirect examination, Cover also said there was blood on the outer rim. (R. 902) The jury was meant to infer that this was the complainant's blood.

But the key question is: Is a metal flashlight a category III weapon within the armed violence statute? Under 720 ILCS 5/33A-2(a)(2001), a person commits armed violence, "when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law." Under 720 ILCS 5/33A-1(c)(1)(2001), "A person is considered armed with a dangerous weapon for purposes of this Article, when he or she carries on or about his or her person, or is otherwise armed with a Category I, Category II, or Category III weapon." In charging the defendant with a Class 2 felony, the prosecution classified the metal flashlight as a Category III weapon. See

720 ILCS 5/33A- 3(a-b)(2001)(violation with category I or II weapon is a Class X felony, and violation with a Category III is a Class 2 felony). A Category III weapon is defined as "a bludgeon, black-jack, slungshot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character." 720 ILCS 5/33A-1(c)(3)(2001).

In this case, the armed violence charge alleged that the Category III weapon was a metal flashlight. (C. 12) Because a metal flashlight is not a Category III weapon within the armed violence statute, the defendant's armed violence conviction must be vacated.

People v. Davis, 199 Ill.2d 130, 766 N.E.2d 641 (2002) governs. *Davis* dealt with whether a pellet/BB pistol was a dangerous weapon under the 1992 armed violence statute. The 1992 armed violence statute differs slightly from the 2001 version: the 1992 version basically included in its category I definition all of the weapons that are now listed as separate category I and II weapons. The relevant part of the 1992 version provided:

(b) A category I weapon is a pistol, revolver, rifle, shotgun, spring gun, or any other firearm, sawed-off shotgun, a stun gun or taser as defined in paragraph (a) of Section 24-1 of this Code, knife with a blade of at least 3 inches in length, dagger, dirk, switchblade knife, stiletto, or any other deadly or dangerous weapon or instrument of like character. (c) A category II weapon is a bludgeon, blackjack, slungshot, sand-bag, sand-club, metal knuckles, billy or other dangerous weapon of like character.

720 ILCS 5/33A-1(1992). *Davis* noted that pellet/BB guns were not included in the specific list of firearms. If the pellet/BB gun fell within the statute, it would have to be through the two inclusive clauses for Category I weapons---"any other firearm" or "any other deadly or dangerous weapon or instrument of like nature."

199 Ill.2d at 136.

In determining that the pellet/BB gun did not fit within the first inclusive clause, *Davis* reviewed statutory definitions concerning firearms, concluding that a pellet/BB gun was not a firearm. *Davis* then reasoned that because a pellet/BB gun was not a firearm, it could not be included in the "any other firearm" clause of the armed violence statute. 199 Ill.2d at 136-37.

In considering whether the pellet/BB gun fit within the second inclusive clause, "any other deadly or dangerous weapon of like nature," *Davis* applied the doctrine of *ejusdem generis* and the last antecedent rule:

The doctrine of *ejusdem generis* provides that when a statutory clause specifically describes several classes of persons or things and then includes "other persons or things," the word "other" is interpreted as meaning "other such like."

* * *

The fundamental principle of statutory construction known as the last antecedent doctrine provides that relative or qualifying words or phrases in a statute serve only to modify words or phrases which are immediately preceding. They do not modify those which are more remote. 199 Ill.2d at 138. (emphasis added)(citations omitted)

Davis noted that the second inclusive clause "any other deadly or dangerous weapon or instrument of like nature," came after a list of blade-type weapons. Using the last antecedent rule and *ejusdem generis*, *Davis* held that this inclusive clause could only refer to the blade-type weapons that immediately preceded it in the statute's wording; it could not modify the named firearms because these did not immediately precede the inclusive clause in the statute's wording. 199 Ill.2d at 138-39.

Davis went on to hold that a pellet/BB gun was not a Category II (bludgeon type) dangerous weapon either. *Davis* recognized that while a pellet/BB gun could

be used as a bludgeon, "it is not typically identified as such and, under the doctrine of *ejusdem generis*, cannot be interpreted to be 'of like character' to the bludgeon-type weapons included in the category II listing." 199 Ill.2d at 141

Davis further noted that while a pellet/BB gun could be a dangerous weapon within the meaning of the armed robbery statute, it was not a dangerous weapon under the armed violence statute. 199 Ill.2d at 139. *Davis* explained that the armed violence provisions were enacted to discourage individuals from carrying an actual weapon when committing felonies. In contrast, the armed robbery statute encompassed situations where an individual used an object, not by definition a weapon, as a deadly weapon. 199 Ill.2d at 139-40.

Applying *Davis* to this case, it is evident that defendant was not armed with a dangerous weapon within the meaning of the armed violence statute. Under the version of the statute applying to defendant, a category III weapon is, "a bludgeon, black-jack, slungshot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character." 720 ILCS 5/33A-1(c)(3)(2001). Under the principles of *esjudem generis* and the last antecedent rule, the inclusive clause "or other dangerous weapon of like character" refers to objects that can be used to bludgeon and whose principal purpose is to bludgeon. Phrased differently, all the listed items are inherently weapons; outside of the context, they had little or no use.

However, a flashlight's principal purpose is not to bludgeon; it is a tool to shine light into dark places. It could be used to bludgeon; but it is not typically identified as such, unlike a black-jack or billy club. Thus, under *esjudem generis*

and the last antecedent rule, a metal flashlight would not be a “dangerous weapon of like character.”

In sum, using *Davis* as authority and looking to the principles of *esjudem generis* and the last antecedent rule, a metal flashlight is not a Category III weapon under the armed violence statute. Accordingly, the defendant’s armed violence conviction should be vacated.

Procedural forfeiture/ineffective assistance of counsel

Normally, unless an objection is lodged contemporaneously and in a post-trial motion, an issue is forfeited for review. *People v. Enoch*, 122 Ill.2d 176, 188, 522 N.E.2d 1124 (1988). However, the plain error doctrine provides an exception to this rule. Supreme Court Rule 615(a). Under the plain error doctrine, unpreserved errors may be reviewed if (1) the evidence in a criminal case is closely balanced or (2) the error is so fundamental and of such magnitude that the accused is denied the right to a fair trial and remedying the error is necessary to preserve the integrity of the judicial process. Absent reversible error, there can be no plain error. *People v. Johnson*, 208 Ill.2d 53, 64, 803 N.E.2d 405 (2003). The defendant asserts because the alleged error must result in the reversal of his armed violence conviction, it is plain error.

Alternatively, if this Court chooses not to reach the issue as plain error, the defendant asserts that defense counsel was constitutionally ineffective in failing to preserve the issue for appellate review. To determine if the defendant did not receive counsel’s effective representation, the reviewing Court must engage in a two-pronged inquiry, asking 1) whether defense counsel’s performance was

objectively deficient; and 2) whether this deficient performance prejudiced the defendant's trial. *Strickland v. Washington*, 466 U.S. 668, 82 L.Ed.2d 864, 104 S.Ct. 2052 (1984); *People v. Albanese*, 104 Ill.2d 504, 525-526, 473 N.E.2d 1246 (1984).

In this case, defense counsel's performance was objectively deficient. There could not have been a tactical reason for not attempting to argue that the metal flashlight was not a Category III weapon. Such an argument, if successful, could have led to the armed violence count's vacatur. Indeed, the trial court, on its own, had already vacated five of the defendant's 10 convictions.

Furthermore, defense counsel's failure to argue that the metal flashlight was not a Category III weapon prejudiced the defendant. If defense counsel made such an argument, the prosecution had no other evidence that the defendant used an alternative bludgeon. Such an argument, if successful, would have resulted in the armed violence conviction's vacatur.

Wherefore, if this Court rejects Argument I, the defendant asks that this Court vacate his armed violence conviction under Argument II because a metal flashlight is not a Category III weapon within the armed violence statute.

III.

The defendant's aggravated battery conviction should be vacated as a lesser-included offense of his home invasion conviction.

Standard of review and procedural forfeiture

Because this issue implicates legal conclusions, *de novo* review is appropriate.

In re D.G., 144 Ill.2d 404, 408-409, 581 N.E.2d 648 (1991).

Additionally, although counsel did not move to vacate the defendant's residential burglary or aggravated battery conviction, the issue should be noticed under the plain error doctrine because erroneous convictions affect a defendant's substantial rights. *People v. Smith*, 183 Ill.2d 425, 430, 701 N.E.2d 1097 (1998).

Analysis

According to the home invasion charge in Count II, the defendant committed home invasion by hitting the complainant, Arden Strub, with a metal flashlight:

[O]n or about the 3rd day of September 2001, in Lee County, Illinois, the above-captioned defendant committed the offense of HOME INVASION, in that said defendant, not being a peace officer acting in the line of duty, knowingly and without authority, entered the dwelling place of Arden Strub, located at 1903 West 1st Street, Dixon, Lee County, Illinois, and remained in said dwelling until he knew one or more persons was present, *and intentionally caused injury to Arden Strub, in that he struck Arden Strub in the face with a metal flashlight*, in violation of 720 ILCS 5/12-11(a)(2), said offense being a Class X felony. (C. 13)(emphasis added)

Similarly, according to the aggravated battery charge in Count VIII, the defendant committed aggravated battery in hitting the complainant in the face with a metal flashlight:

[O]n or about the 3rd day of September 2001 in Lee County, Illinois, the above-captioned defendant, committed the offense of AGGRAVATED BATTERY in that said defendant, *in committing a battery, in violation of 720 ILCS 5/12-3, and while masked in such a manner as to conceal his identity, knowingly caused bodily harm to Arden Strub, in that he struck Arden Strub*

on the head with a metal flashlight, in violation of 720 ILCS 5/12-4(b)(10), said offense being a Class 3 felony. (C. 14)(emphasis added).

To determine if an offense is a lesser-included offense, the Illinois Supreme Court has adopted the charging instrument approach. *People v. Novak*, 163 Ill.2d 93, 112-113, 643 N.E.2d 762 (1994). Under this approach, the lesser-included offense must have a broad foundation in the instrument charging the greater offense; alternatively, the charging instrument for the greater offense must at least set out the lesser offense's main outline. 163 Ill.2d at 107.

The home invasion count relied on the defendant's act of striking the complainant in the head. Similarly, the aggravated battery count relied on the defendant striking the complainant in the head. In *People v. Damico*, 309 Ill.App.3d 203, 207, 722 N.E.2d 194 (2d Dist. 1999), this Court refused to vacate an aggravated battery count on the theory that it was based on the same act as the home invasion. However, *Damico* found that, under the circumstances, aggravated battery was a lesser-included offense of home invasion because both offenses hinged upon the defendant injuring the complainant. Here too, both the home invasion and aggravated battery charges hinged on the defendant injuring the complainant in the head. Thus, as in *Damico*, the defendant's aggravated battery conviction should be vacated as a lesser-included offense.

Because Tom Cover testified that the defendant hit the complainant three times (R. 741-746), the State may argue that separate acts support the convictions. However, the prosecution did not apportion the blows among the crimes in the charging instrument. Although dealing with the one-act-one-crime doctrine, *People v. Crespo*, 203 Ill.2d 335, 788 N.E.2d 1117 (2003) is instructive. In

Crespo, the defendant stabbed the victim three times in rapid succession. Accordingly, he was charged with, and convicted of, armed violence and aggravated battery. While finding that the various wounds would support multiple convictions, the Supreme Court vacated *Crespo*'s aggravated battery conviction under the one-act-one-crime doctrine. In so doing, the Court found that the State failed to apportion the crimes among the various wounds, both in the charging instruments and at trial. 203 Ill.2d at 343-344. Because the prosecution portrayed the defendant's conduct as a single attack, multiple convictions were untenable. 203 Ill.2d at 345.

Here, as in *Crespo*, the prosecution charged the defendant with injuring the complainant a single time; it did not apportion the blows among the crimes in the charging document. Thus, as in *Crespo*, both the home invasion conviction and the aggravated battery conviction should be seen as resting on the same act. Then, under *Damico*, the aggravated battery conviction should be vacated as a lesser-included offense of the home invasion conviction.

Wherefore, the defendant asks that his aggravated battery conviction be as a lesser-included offense of the home invasion conviction.

IV.

The defendant's residential burglary conviction should be vacated because it is based on the same act as his home invasion conviction.

Standard of review and procedural forfeiture

Because this Court need only make legal conclusions about this issue, the standard of review is *de novo*. *In re D.G.*, 144 Ill.2d 404, 408-409, 581 N.E.2d 648 (1991).

Additionally, although counsel did not move to vacate the defendant's residential burglary conviction, the issue should be noticed under the plain error doctrine because this erroneous conviction affects the defendant's substantial rights. *People v. Smith*, 183 Ill.2d 425, 430, 701 N.E.2d 1097 (1998).

Count II alleged that the defendant committed home invasion by entering the defendant's home:

[O]n or about the 3rd day of September 2001, in Lee County, Illinois, the above-captioned defendant committed the offense of HOME INVASION, in that said defendant, not being a peace officer acting in the line of duty, knowingly and without authority, entered the dwelling place of Arden Strub, located at 1903 West 1st Street, Dixon, Lee County, Illinois, and remained in said dwelling until he knew one or more persons was present, and intentionally caused injury to Arden Strub, in that he struck Arden Strub in the face with a metal flashlight, in violation of 720 ILCS 5/12-11(a)(2), said offense being a Class X felony. (C. 13)(emphasis added)

The act of entering the defendant's home was also implicated in the residential burglary charge, as Count V made clear:

[O]n or about the 3rd day of September 2001 in Lee County, Illinois, the above-captioned defendant committed the offense, RESIDENTIAL BURGLARY, in that said defendant knowingly and without authority, entered into the dwelling place of Arden Strub, located at 1903 West 1st Street, Dixon, Lee County, Illinois, with the intent to commit therein a theft, in violation of 720 ILCS 5/19-3, said offense being a Class 1 felony. (C. 13)

Because both the home invasion and the residential burglary were premised on the defendant unlawfully entering the complainant's home, the residential burglary conviction must be vacated under the one-act-one-crime principle. *See People v. Newbern*, 276 Ill.App.3d 623, 630, 659 N.E.2d 6 (1st Dist. 1995), *citing People v. Jones*, 108 Ill.App.3d 880, 890-891, 439 N.E.2d 1011 (4th Dist. 1982).

V.

In his memorandum order, the trial judge found that the defendant's armed robbery and home invasion convictions triggered consecutive sentences. However, because there was only one harm --- the injury to the complainant's head, there should have only been one triggering offense.

Standard of review

This is a statutory issue meriting *de novo* review. *In re Mary Ann P.*, 202 Ill. 2d 393, 404, 781 N.E.2d 237 (2002).

Analysis

Prior to sentencing the defendant, the trial court prepared a memorandum order. (C. 287-299) In this order, it found that the defendant's home invasion and armed robbery convictions both triggered consecutive sentences. After citing 720 ILCS 5/5-8-4(a) (C. 292), which states that an offense must trigger consecutive sentences if it is a Class X felony and if severe bodily injury occurred during the crime, the trial judge then noted:

In this case both Armed Robbery and Home Invasion are Class X offenses. The issue then is whether defendant inflicted severe bodily injury. (C. 293)

After concluding that the complainant suffered severe bodily injury and after rejecting a double-enhancement argument in which defense counsel proposed that the home invasion sentence could not be a trigger because the element of "injury" was already inherent in the offense, the trial judge then imposed consecutive sentences. (C. 293-295)

But, the trial judge did not consider *whether two* offenses could trigger consecutive sentences when there was *only one* underlying injury. Section 5-8-

4(a)(i) says:

The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless:

(i) one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury.

The defendant concedes that severe bodily injury occurred to Arden Strub during the commission of both the home invasion and the armed robbery. But the question is, under the above-statute, is this single injury to Arden Strub sufficient to justify multiple triggers, or only one trigger?

There are two reasonable answers. On the one hand, the State could say that, under the statute plain language, if in the course of committing multiple Class X felonies, the defendant inflicts a single severe bodily harm, then each of the Class X felonies must trigger consecutive sentences. For the State then, a single severe bodily injury can lead to several consecutive sentences if the injury occurred while multiple offenses were being committed. For the State, the focus is on the number of offenses.

However, the above statute does not speak of multiple offenses: it only speaks of “one of the offenses.” The defendant could argue that, if in the course of committing multiple Class X felonies, the defendant inflicts a single severe bodily harm, then only one of the Class X felonies shall trigger consecutive sentences. For the defendant then, a single severe bodily injury can lead to only one consecutive sentence if the injury occurred while multiple offenses were being committed. For the defendant, the focus is on the number of severe bodily injuries.

The question then is one of statutory construction. But, it is a maxim of statutory construction that penal statutes are to be strictly construed in the defendant's favor. *People v. Robinson*, 172 Ill. 2d 452, 461, 667 N.E.2d 1305 (1996). Given the dueling interpretations, the defendant's must prevail. The Illinois Supreme Court used a similar strategy to resolve another ambiguity in Section 5-8-4(a)(i). *People v. Whitney*, 188 Ill.2d 91, 720 N.E.2d 225 (1999). In *Whitney*, the State argued, like in the hypothetical above, that, under the statute's plain language, if multiple offenses are committed and some are Class X or Class 1 felonies, then each should trigger consecutive sentences if the defendant has inflicted severe bodily injury on at least one of the victims. As here, the defendant tried to limit that principle, arguing that a Class X or Class 1 felony should trigger consecutive sentences only if the severe bodily injury occurred *during the commission* of the Class X or Class 1 felony. 188 Ill.2d at 95-96.

Whitney found that both the State and defendant's interpretations were reasonable. However, because of the principle of lenity, *Whitney* favored the defendant's interpretation, and held that a Class X or Class 1 felony should trigger consecutive sentences only if severe bodily injury occurred during the commission of this offense. 188 Ill.2d at 98-99.

Here, as in *Whitney*, there is a reasonable difference over whether the statute should be interpreted to correlate the number of injuries with the number of triggering offenses --- e.g. one serious bodily injury, one triggering offense. Because the defendant's interpretation is reasonable, under the principle of lenity,

this Court should favor the defendant's interpretation and modify the sentencing order so that only one offense, either the home invasion or the armed robbery, can trigger consecutive sentences.

The prosecution may argue that the complainant suffered more than one severe bodily injury. After all, Dr. Deets theorized that the complainant was struck three times (R. 1054-1055), and Tom Cover testified that he saw the defendant hit the complainant three times.

However, the prosecution did not apportion the blows among the various crimes when charging the defendant. *See People v. Crespo*, 203 Ill.2d 335, 788 N.E.2d 1117 (2003). The charge merely referred to an injury to the complainant's head resulting from the defendant wielding a metal flashlight. Absent the prosecution's attempt to apportion the injuries among the crimes, this Court should view the defendant as having suffered one severe bodily injury. And, if he suffered one severe bodily injury, then only one conviction can trigger consecutive sentences.

Thus, if this Court rejects Arguments I through IV, the defendant asks, for the reasons in Argument V, that this Court use its power under Supreme Court Rule 615(b)(4) to modify the defendant's sentences so that either his home invasion or armed robbery conviction triggers consecutive sentences. In such a case, the defendant's 5-year convictions for residential burglary, armed violence, and aggravated battery would run concurrently to the other sentences, and not consecutively with them.

VI.

As a factor in aggravation, the trial court considered a factor inherent in the defendant's armed robbery conviction. Accordingly, the defendant's armed robbery sentence should be vacated and the cause remanded for a new trial.

Standard of review/Procedural forfeiture

This Court reviews the trial judge's sentencing decisions under an abuse-of-discretion standard. *People v. Perruquet*, 68 Ill.2d 149, 154, 368 N.E.2d 882 (1977).

Although the defendant did not preserve this issue in a post-sentencing motion, he asks that this Court review it under the plain error rule. because the error implicates the defendant's substantial rights. Supreme Court Rule 615(a)

Analysis

In his memorandum order setting forth his reasons for structuring the defendant's sentences as he did, the trial judge explicitly said that he relied on the defendant receiving compensation as a factor in aggravation. The trial judge wrote:

The factors in aggravation under 730 ILCS 5/5-5-3.2(a) which apply are:

(2) Defendant received compensation for committing the offense (approximately \$500 according to Count III). (C. 286)

Down further on the same page, the trial judge continued that this factor in aggravation specifically applied to the armed robbery charge:

The first individual offense the Court addresses is the conviction of Armed Robbery. *Here all factors in aggravation and mitigation apply.* This is a Class X felony where imprisonment in the penitentiary is mandatory. Having due regard for the character of the offender and the nature and circumstances of the offense the Court sets the sentence for this offense at 15 years. (C. 287)

Thus, the trial judge found that an aggravating factor in the armed robbery was that the defendant received \$500 compensation.

The case law states that a trial judge cannot transform a factor inherent in an offense into an aggravating factor. *See People v. Conover*, 84 Ill.2d 400, 404, 419 N.E.2d 906 (1981)(Court explicitly holds that a factor implicit in an offense should not be used as an aggravating factor at sentencing). This Court has extended that principle to armed robbery sentences. *People v. Burge*, 254 Ill.App.3d 85, 90-91, 626 N.E.2d 343 (2d Dist. 2000).

Although *Burge* ultimately held the error harmless, this case's facts are distinguishable. Citing *People v. Pierce*, 223 Ill.App.3d 423, 442, 585 N.E.2d 255 (2d Dist. 1992), *Burge* said that determining harm turns on whether the sentence is at the low or high end of the statutory range. *Burge* found the trial judge's explicit consideration of compensation to be harmless because defendant Burge only received one year above the minimum. 254 Ill.App.3d at 91.

Scott Vue's armed robbery conviction is a Class X felony punishable by 6 to 30 years. 720 ILCS 5/18-2(b) (2001); 730 ILCS 5/5-8-1(a)(3) (2001). The trial judge sentenced the defendant to 15 years imprisonment; in the sentencing range's middle. Therefore, his presumptive reliance on this improper factor was greater than in *Burge*. Moreover, unlike in *Burge*, the trial judge did not mention this factor in passing: he instead set it out very clearly in a written order. (C. 267-268) Thus, the error is not harmless

Wherefore, the defendant requests that his 15-year prison sentence for armed robbery be vacated, and the cause remanded for a new sentencing hearing.

CONCLUSION

For the reasons requested in Argument I, the defendant, Scott O. Vue, asked

that his convictions be reversed and that the cause be remanded for a new trial.

Alternatively, for the reasons in Arguments II, III, and IV, he asks that his armed violence, aggravated battery, and residential burglary convictions be vacated, along with the attendant sentences.

If Court rejects Arguments I through IV, the defendant asks, for the reasons in Argument V, that this Court modify the defendant's sentences so that either his home invasion or armed robbery conviction triggers consecutive sentences. In such a case, the defendant's 5-year convictions for residential burglary, armed violence, and aggravated battery would run concurrently to the other sentences, and not consecutively with them.

Finally, for the reasons set forth in Argument VI, the defendant asks that this Court vacate his 15-year armed robbery sentence and remand the cause for a new sentencing hearing.

Respectfully submitted,

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No. 2-03-0386

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

| | | |
|----------------------------------|---|--|
| PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court |
| |) | for the 15 th Judicial Circuit, |
| Plaintiff-Appellee, |) | Lee County, Illinois. |
| |) | |
| -vs- |) | No. 01 CF 222. |
| |) | |
| SCOTT O. VUE, |) | Honorable |
| |) | Tomas M. Magdich, |
| Defendant-Appellant. |) | Judge Presiding. |

NOTICE OF FILING AND PROOF OF SERVICE

TO: Mr. Martin P. Moltz, Deputy Director, Illinois State's Attorneys Appellate
Prosecutor, 2032 Larkin Avenue, Elgin, Illinois 60123

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I, Dev A. Parikh, Assistant Defender, **OFFICE OF THE STATE APPELLATE DEFENDER**, Second Judicial District, hereby certify that on May 18, 2004,, I filed an original and five copies of a **Brief and Argument for Defendant-Appellant** with the Second District Court Clerk, hand-delivered four copies to the Illinois State's Attorneys Appellate Prosecutor, and mailed one copy to the Defendant-Appellant in an envelope deposited in the U.S. mailbox at Elgin, Illinois, with postage prepaid and addressed as indicated above.

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No. 2-03-0386

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

| | | |
|----------------------------------|---|--|
| PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court |
| |) | for the 15 th Judicial Circuit, |
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| |) | |
| -vs- |) | No. 01 CF 222. |
| |) | |
| SCOTT O. VUE, |) | Honorable |
| |) | Tomas M. Magdich, |
| Defendant-Appellant. |) | Judge Presiding. |

APPEARANCE

I, Dev A. Parikh, Assistant Defender, **OFFICE OF THE STATE APPELLATE DEFENDER**, hereby enter my appearance as additional counsel to G. Joseph Weller, Deputy Defender, on behalf of Scott O. Vue, Defendant-Appellant.

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