

2011 IL App (2d) 101102-U
No. 2-10-1102
Order filed November 28, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of McHenry County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06-CF-1256
)	
KEITH M. BOUNDS,)	Honorable
)	Sharon L. Prather,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Zenoff concurred in the judgment.

ORDER

Held: The judgment of the McHenry County circuit court was affirmed where defendant's indictment arguments failed, the evidence was sufficient to sustain the armed violence convictions, the ineffective assistance of trial counsel arguments failed, and where there was no evidentiary weakness to support defendant's argument under Rule 615(b)(3) for a reduction in his offense.

¶ 1 Defendant, Keith M. Bounds, appeals his conviction of two counts of armed violence (720 ILCS 5/33A-2(a) (West 2006)) and one count of mob action (720 ILCS 5/25-1(a)(1)) (West 2006)). After the bench trial, the trial court sentenced defendant to 10 years' imprisonment to run concurrently on the two counts of armed violence and one year to run concurrently on the mob

action count. After the trial court denied defendant's motions for a new trial and reconsideration of the sentence, he timely appealed. Defendant argues that: (1) the indictment failed to comply with *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (2) there was insufficient evidence to support the armed violence convictions; (3) he received ineffective assistance of counsel when trial counsel failed to object to certain evidence, failed to impeach certain State witnesses, and did not wait for potentially exculpatory scientific evidence to be available for trial; and (4) this court should reduce his conviction to aggravated battery and reduce his sentence accordingly because of the evidentiary weaknesses of this case. We affirm.

¶ 2

I. BACKGROUND

¶ 3 On January 18, 2007, defendant was indicted as follows. Count I alleged that on December 7, 2006, defendant committed the offense of armed violence (720 ILCS 5/33A-2(a) (West 2006)), in that while armed with a dangerous weapon, a knife, he knowingly caused great bodily harm to Darryl W. Burkett Jr. Count II alleged the same in relation to Jason M. Premas. Count III alleged that defendant committed the offense of aggravated battery¹ (720 ILCS 5/12-4(b)(1) (West 2006)) when he, without legal justification, and by use of a deadly weapon, a knife, knowingly caused bodily harm to Burkett by stabbing Burkett about the back and left forearm areas. Count IV alleged that defendant committed aggravated battery by stabbing Premas about the shoulder and forearm areas. Count V alleged that defendant committed the offense of mob action (720 ILCS 5/25-1(a)(1) (West 2006)) in that he knowingly, by the use of force or violence, disturbed the peace while acting

¹ The aggravated battery statute has been renumbered effective, July 1, 2011, from 720 ILCS 5/12-4 (West 2010) to 720 ILCS 5/12-3.05 (West Supp. 2011).

together with Aron J. Averkamp and Rudy D. Saldana, when defendant struck Burkett and Premas, thereby inflicting injury.

¶ 4 Defendant's trial began on November 23, 2009. Before the start of trial, the State informed the court that defendant was likely not informed at the time of his jury waiver that he was facing a minimum mandatory 10-year jail sentence if found guilty of the armed violence offense and that he would have to serve 85% of that sentence at a minimum. Defendant acknowledged this information and after conferring with counsel, he stated he wanted to proceed with a bench trial.

The parties then entered into the following stipulation regarding medical testimony. If called to testify, Patrick Rozhon, a paramedic with the Crystal Lake Fire Department, would state that he arrived at the Suds R Us bar around 2:15 a.m. on December 7, and met with Jason Premus. Premus had a penetrating stab wound approximately one inch in length to the left upper chest/pectoral area. Premus also had a "3" laceration to the left forearm with soft tissue involvement.² Premus's lacerations were covered with gauze, and bleeding was controlled. David Kaltenbach, another responding paramedic, would testify that he arrived at Suds R Us around 2:12 a.m. and met with Darryl Burkett. Burkett was conscious and laying on the ground. Burkett had two lacerations: one to the left arm, approximately four inches long with muscle hanging out, and another wound to his back, just left of the spinal column at a 45-degree angle, about five inches long. The bleeding on both lacerations were controlled with direct pressure and dressings. Centegra Hospital nurse, D. Dusik, would testify that she attended to Premus when he arrived at the hospital. Premus had a wound to his right upper chest that had controlled bleeding and a stab wound to his left forearm with controlled bleeding. The left forearm wound measured three centimeters and was closed with seven

² The stipulation does not specify what unit of measurement the "3" described.

sutures. The chest wound was also sutured. Dr. Oscar Habhab would testify that he treated Burkett at Woodstock Memorial Hospital. Burkett sustained two large lacerations: one to the left front arm that measured five inches, penetrating through to the muscle; and a second to the left lower back, deep to muscle, that measured about 3/12 inches long. Dr. Habhab would testify that this type of wound was consistent with being caused by a box cutter. Bleeding was controlled with pressure dressings and tate sutures were used to close the wounds. A total of 56 sutures were used to close the wound to Burkett's arm; 20 were subcutaneous sutures, and 26 were used to close the skin.³ He would testify that 29 sutures were used to close the wound on Burkett's back; 10 were subcutaneous, and 19 were used to close the skin.

¶ 5 The State first called Burkett, who testified that he went out with his good friends, Premas and Matt Armbrust, on the night of December 7, 2006. They went to Crystal's, a "party bar" in the Crystal Lake Holiday Inn. They met Marshall Harrison, Andy Castillo, and a man known as "Black," at Crystal's. Burkett thought that he consumed four or five vodka-cranberry cocktails while at Crystal's. The group left Crystal's when it closed and went to Suds R Us, which is about 1½ to 2 miles from Crystal's. They arrived at Suds R Us around 1 a.m. to continue drinking. At Suds R Us, Burkett felt "tipsy" but overall felt able to control his thoughts and actions. Armbrust and Premas began arguing; they were yelling loudly at each other. Defendant approached them and said that he used to be a bouncer at the bar, knew the owner, and that there "wouldn't be any problems in his house, so to speak." Premas asked who defendant was, and Burkett was drinking his drink and staring at defendant. Defendant said that he did not like the way Burkett was looking at him. Burkett did not respond. There were no threats of physical violence by any one at this point.

³ We note that the stipulation must contain a typographical error as 20 plus 26 equals 46.

Burkett's friend, "Black," came up and asked if there was a problem. Defendant said no and walked away. Burkett and his friends continued to drink and talk to one another, and defendant did not interact with them inside the bar again.

¶ 6 Around 1:45 a.m., the bar began closing down. As Burkett walked out, he felt a shove from behind, causing his neck to jerk back. He turned around and noticed defendant. Burkett told defendant if he had a problem, then "let's bring it outside." Burkett continued outside where there were about 10 or more other people. He went over to talk to Armbrust in the parking lot. As they were speaking for about one minute, Burkett turned around and noticed that Premas was in a fight with three people about 20 yards away. Burkett recognized the three people fighting with Premas as defendant, Averkamp, and Saldana. Burkett ran over and grabbed defendant by the back of his shirt and pulled him away from Premas. Defendant started "swinging haymaker punches." The third punch hit Burkett's arm, and Burkett then punched defendant in the stomach. Defendant tried to tackle Burkett, but Burkett dropped to his knee and pulled defendant to the ground. Burkett was above defendant and attempted to hit defendant in the face. Burkett then felt a punch in his back, and he crawled off of defendant. The punch felt like a "pinch, a hard pinch." Defendant then ran away and took Averkamp with him. Burkett noticed that his white sweater was completely red on his arm. He noticed he had been stabbed in his arm but not his back.

¶ 7 Burkett denied having any weapons on his person that night. He did not see if defendant had any weapons on him. He did not notice that he was bleeding anywhere else until his friend, Marshall Harrison, told him that he was. Harrison used his shirt as a tourniquet for Burkett's forearm, and used Burkett's sweater to apply pressure to his back wound. They then waited for paramedics to arrive. Premas was about 15 feet to Burkett's right side, and Premas was also bleeding. Burkett did not see defendant have any type of physical altercation with Premas after their

fight ended. He never saw defendant with a knife. He admitted on cross-examination that while on top of defendant, he was unable to keep track of Premas and Averkamp. When defendant ran away from him, Burkett noticed Premas kicking Averkamp, who was on the ground. Defendant then grabbed Averkamp and took him away.

¶ 8 Andy Castillo testified for the State that he was a friend of Burkett's and knew Premas through Burkett. Because he was the designated driver, Castillo limited his alcohol intake to what he believed was three drinks the entire night. About 15 to 20 minutes prior to the closing of Suds R Us, Castillo heard arguing between Burkett and Premas and individuals from another group. He could not identify the men that he saw in the courtroom but described one as "shorter, huskier" with "blond-orangish hair." There was no physical contact inside the bar. Upon closing, Castillo moved his way outside. He saw Burkett arguing with the shorter, huskier man outside. There were a lot of people around him so Castillo could not see everything at first. He saw someone's arm make contact with Burkett but Castillo did not see who threw the punch. At that point, everyone started fighting. The blond male was swinging wildly at Burkett but not making very much contact. Burkett attempted to defend himself by blocking the swings. Castillo then lost track of Burkett and Premas in the crowd. He tried to make his way through the crowd to pull them out of the crowd. By the time Castillo was able to reach them, Premas and Burkett were already bleeding. Castillo looked over towards the blond male and saw that he was pulling his friend away from the fight, pulling him by the shoulders, "kind of by his collar."

¶ 9 On cross-examination, Castillo admitted that he did not see anyone with a weapon of any kind.

¶ 10 Marshall Harrison testified that he was finishing his drink at closing time at Suds R Us. He saw defendant aggressively trying to get Burkett to leave the bar, shoving him towards the door.

Burkett did not react physically but just told defendant that he was leaving. After Burkett left the bar, Harrison was still inside the bar finishing his drink. Someone came in and said everyone was fighting outside. Harrison immediately went outside and saw a man with a lip piercing⁴ holding Armbrust in a headlock. Harrison went over to try to break up the fight. Harrison then heard people yelling that Burkett and Premas had been stabbed. Harrison went over to Burkett, who appeared confused. He grabbed Burkett's arm and his fingers went "inside the wound," causing him to realize that Burkett had been stabbed. The man with the lip piercing came up to Burkett at this point, and Harrison shoved him away. Harrison and this man fell to the ground and started fighting. Premas and Armbrust came over and began stomping on the man and kicking him in the head. The altercation ended when the police arrived. Harrison then assisted in making a tourniquet for Burkett's arm and applying pressure to his back wound.

¶ 11 On cross-examination, Harrison stated that prior to the fight outside, the man with the lip piercing told him that he was going to attack Harrison's friends. Harrison did get into a fight with the man later, stating:

"Yes, because I didn't know if he had the knife or not. I didn't know who did but I do know he stated that he was going to attack them, so I didn't want him coming near my friend who was already obviously injured."

¶ 12 Defense counsel further asked Harrison whether the tall guy with the lip ring told him that he was going to attack one of your friends, and Harrison reiterated "yes." Defense counsel asked which friends the man was going to attack, and Harrison testified that the man pointed to Premas

⁴ Averkamp had a lip ring and is presumably the person referred to at times during trial as the man with the lip ring or lip piercing.

and Burkett. Harrison testified that the man said he and his friends “were going to jump them when they left the bar.” Harrison did not report this to the bar’s security.

¶ 13 Patrick Dillon, a deputy with the McHenry County Sheriff’s Department, testified that he responded to the scene at Suds R Us and was called to the Lube Plus next door by another officer. The Lube Plus facility was closed but there was a red car parked to the side. Dillon looked in the front window and saw a set of feet behind the counter. He also observed two more sets of feet in the office behind the counter. Dillon pounded on the glass for approximately 10 minutes and observed defendant go into the bathroom. Defendant then came and opened the door for Dillon. Dillon could not remember if any of the three individuals appeared beaten up. He also did not know if the inside of the Lube Plus was searched.

¶ 14 The State next called Averkamp. Averkamp testified that he was a co-defendant in this case, having been charged with mob action, misdemeanor battery, and aggravated battery. He admitted that he entered into an agreement with the State for a reduction in charges in exchange for his testimony. Averkamp agreed to plead guilty to the misdemeanor battery and would receive probation and stayed jail time.

¶ 15 Averkamp was with defendant at the Suds R Us when an altercation occurred in the parking lot upon the bar’s closing. Averkamp recalled waking up after defendant dragged him out of the parking lot while he was unconscious. Defendant told Averkamp that he stabbed someone in Averkamp’s defense. Averkamp did not have a weapon on his person. Averkamp admitted making a statement to the police in which he stated defendant “told me that he did stab him.” Averkamp stated that he told the police that defendant stabbed the person in his defense, but that the officer did not include that part of his statement in the report. Averkamp admitted that defendant never said

in his own words that he acted in self-defense but Averkamp testified that he told officers that night that he believed defendant was doing so. Defense counsel did not question Averkamp.

¶ 16 Ralph Pucci, a deputy with the McHenry County Sheriff's Department, testified that he was assigned to collect evidence at the Suds R Us and Lube Plus. At the Lube Plus, Pucci retrieved two knives and took samples of what appeared to be blood from the bathroom door handle. The knives were located on the desk. He also collected clothes and DNA from defendant and Averkamp at the jail. One knife, labeled People's Exhibit No. 16, was a black switchblade. The other knife, labeled People's Exhibit No. 17, was a plastic buck knife. Pucci identified some clothing retrieved from defendant. Defendant's jacket had what appeared to Pucci to be blood stains.

¶ 17 On cross-examination, Pucci admitted that he did know to whom the knives he collected belonged. He did not know whose fingerprints were on the knives. He did not see any blood on the knives and did not know if the stains on defendant's jacket were actually blood stains. Pucci also did not know if the stains proved to be blood from any of the parties at the scene.

¶ 18 Casimir Kraft testified that he was working at Suds R Us on the night of the fight, checking ID's at the front door. Shortly after the bar closed, Kraft went outside because a patron told him someone was outside bleeding. Kraft saw two people bleeding. One man had a forearm slash that was bleeding a lot. Kraft said blood was spraying from his arm 10 to 15 feet out. Kraft attempted to provide aid to this man when he saw a man on the ground getting kicked. He saw defendant drag that man away, like defendant "was helping his buddy away." Kraft testified that he witnessed this all within one minute of going outside. On cross-examination, Kraft testified that he believed if the man getting kicked (Averkamp) had not been removed when defendant dragged him away, Averkamp would have been in "serious threat of injury, serious injury."

¶ 19 Jason Premas testified that he had three beers while at Crystal's. He and his group of friends went to Suds R Us after Crystal's closed at 1 a.m. Premas ordered a beer and sat down with Burkett and the others at a table. While at the bar, Premas and Armbrust had a conversation about Premas's ex-girlfriend. Premas denied it was a loud argument and denied that it got physical. Defendant approached Premas when he was speaking with Armbrust and said "if you want to fight, take it outside." According to Premas, defendant was staring at him with an intimidating look on his face. Premas told defendant to mind his own business. Premas, Burkett, and Armbrust got their drinks and went to their table. Nothing physical occurred, and defendant did not approach them while they were at their table. Around 1:50 a.m., the bar was closing. Premas walked out of the bar first; Burkett was behind him. As they approached the door, defendant pushed Burkett. Premas did not hear the two exchange any words, and he could not see what Burkett did, if anything, in response.

¶ 20 Outside, there were about 10 people in the parking lot. Premas was waiting for a friend to pick him up, and Burkett was standing about two or three feet from him. Defendant, Averkamp, and Saldana approached Premas. Defendant said something, but Premas could not recall what he said. Premas responded but could not recall that either. Premas did recall that the exchange was calm and non-aggressive. Then defendant "launched at [Premas's] face" with his fist. Premas blocked the first punch but defendant continued, striking his right chest area and left arm. Premas tried to punch back but missed. Burkett then grabbed defendant, and they began wrestling. Premas was "kind of in a state of shock" as he noticed a laceration to his left arm. He got angry and tackled Averkamp. Premas and Averkamp had no physical contact until this point. Premas kicked Averkamp in the face about three times. Premas stated that he was shocked and angered while kicking Averkamp. He "wasn't sure if [Averkamp] had a knife too and [defendant]–[defendant and Burkett] were going at

it within several feet from” where Averkamp was on the ground. Premas “wasn’t sure if [Averkamp] was going to stab [Burkett] or not,” which was why he tackled Averkamp.

¶ 21 Premas admitted that he did not see any weapons on Averkamp and also did not see defendant with a weapon. After kicking Averkamp three or four times, the police arrived, and the situation diffused. Premas did not see what happened to Averkamp, but he knew Averkamp was gone by the time police arrived. Premas testified that no one made any physical contact with him while he was kicking Averkamp. The police had Premas go into an ambulance to be treated. When the paramedic cut off his shirt, Premas then noticed a second stab wound to his chest. Premas stated that the locations of the chest wound and left arm wound were the same areas where defendant had made earlier contact with him. Premas denied that anyone had made contact with him other than the two places that defendant hit him. On cross-examination, Premas denied telling a police officer that “I never saw a knife, but I assume the tall, dark-haired guy that [*sic*] stabbed me during the fight.” He denied yelling out “why did you just stab me” to Averkamp. Premas stated that he did yell out that “I’ve been stabbed,” but it was not directed towards Averkamp. He denied testifying during a deposition in the civil case that he saw Burkett and Averkamp wrestling on the ground. Premas testified that those two were never fighting.

¶ 22 Jennifer Garafol, a detective with the McHenry County Sheriff’s Police, testified that she met defendant at the police station after the incident. She conducted a taped interview of him. Defendant denied having a knife when Garafol first asked. Garafol testified that defendant then remembered possessing a knife but did not know where he had gotten it from. He told her that he believed that he had picked the knife up from the ground, stabbed somebody, and then dropped the knife to the ground. The videotape and transcripts of the interview were admitted into evidence.

¶ 23 The relevant portions of the transcripts contain the following:

“Q: So how did you get blood all over you?

A: That I don’t know, some guy said, you stabbed me, man..you stabbed me and then he jumped on that other kid, Aron [*sic*] and started wailing the shit out of him. So I went over there and tried to help him..tried to push him, this and that..and some other guy kept screaming, you stabbed me man, you stabbed man [*sic*]. So..

* * *

Q: So why are they saying you stabbed them?

* * *

A: I don’t know..he said, you stabbed me.. He got stabbed..he was bleeding and shit..not by me. Like I said, there were so many people that were rolling around, you know between me and Aron [*sic*] and all their friends. I think one of their buddies fucking stabbed the kid. They’re just fucking stupid. That’s the only thing I can think of. Cause I don’t have no knife. I didn’t stab him with my finger. That’s the only thing I can think of is one of their buddies had a knife and fucked up.

* * *

Q: You had it all over your coat..that’s blood.

A: Yeah, it fucking is. Like I said, I didn’t even know the dude was even stabbed until he stood up and said, you fucking stabbed me, man..and then he said looked like a wife beater or something with blood dripping down. I didn’t even know he was stabbed until that point.

* * *

Q: So now, we’re just trying to justify why [it] is that you stabbed somebody?

A: I didn't stab anybody.

* * *

Q: I know it's hard to remember minute-to-minute, but..

A: We walked out [of] the bar. I'm on the same page you are. I know [how] it looks like, you know, one of the three of us stabbed somebody. That's the way it sounds, but like I'm telling you. The shit went down so fast like I don't even fucking remember who did what..who was wearing what..you know, the only thing I can only think I can maybe think of is maybe one of those dudes is have [sic] a knife. And maybe [one] of us got it and maybe I got it from the fucker. I don't remember stabbing nobody.

Q: Maybe you did but don't remember it.

A: Right, that's what I'm saying..right. When I was in the bar that night, I didn't have it on me.

Q: Ok.

A: All right, coming out of there, you know maybe in the middle of that tousel, someone pulled it out and we fought for it and you know and like that I don't fucking remember. The only thing I fucking remember is Aron [sic] get fucking jumped on.

Q: Ok.

A: And I turn around and this dude scream[s], you stabbed me man, you stabbed me. Then I look down and fucking cover my head cause people starting kicking me and shit and where did it go from there. That's about when it was done. That's about when we started walking over to the Lube. It was right after that. Right after they started kicking me and shit.

* * *

Q: Ok.

A: What was I just going to say. I do remember having a knife now. There was one I picked up off the ground. It was a black one. I don't know where the fuck it came from. It was a little one or something like that. It was a pocket one. I do remember having that now. I don't fucking..it wasn't still in the guy's shoulder or nothing, was it cause I don't remember taking it from there and you guys didn't take it off me you patted me down, right?

Q: I didn't pat you down.

A: No. I do remember having a knife now. I don't know where I got it though. I know it wasn't mine..the knife it fucking broke.

* * *

It was open..black..with the blade out and everything..you know, something like that.

* * *

I must have picked it up off the ground. Handle black..I remember seeing a black handle..it was fucking bumpy.

* * *

Maybe setting it back on the ground..stab the guy, set it back on the ground, you know..found it on the ground..___put it on the ground..”

¶ 24 Defense counsel then asked the court to sign an order requesting that the crime lab expedite some evidence testing, and the case was delayed until late January 2010. At the January 21 status, the State agreed to allow the evidence be consumed for testing, as requested by the crime lab. The evidence to be consumed included the swabs of the blood found in the bathroom at the Lube Plus.

On January 28, the trial was set to continue on February 18, and the State advised the court that the DNA testing was in progress.

¶ 25 On February 18, defense counsel moved for a directed finding, arguing that it was undisputed that defendant acted in the defense of Averkamp and in self-defense. The State countered that people were already stabbed by the time defendant allegedly dragged Averkamp away. The court denied defendant's motion for a directed finding.

¶ 26 The defense then called Kraft to the stand again. He testified that he asked the two groups to leave at closing time, and that they had separated and left. However, Kraft had defendant remain in the bar to close out his bar tab. Defendant closed his tab at 2:02 a.m., which was about 15 minutes after Kraft had the other parties leave the bar. On cross-examination, Kraft admitted he gave a statement to police around 4:30 a.m. on December 7, and in that statement he never mentioned kicking anyone out of the bar.

¶ 27 A stipulation was entered that if Sergeant Patenaude of the McHenry County Sheriff's Department testified, he would testify that when he arrived at the Suds R Us, he heard several subjects yelling and screaming that both victims had been stabbed; that he deployed canines for crowd control as several subjects were beginning to push and shove each other; and that he attempted to locate witnesses and maintain control of the belligerent and out-of-control crowd. The defense then rested.

¶ 28 On March 4, 2010, the trial court found defendant guilty of counts I and II (armed violence), counts III and IV (aggravated battery), and count V (mob action). In so ruling, the trial court stated that defendant's theory of the case was not supported by the record and that the evidence showed that defendant was the aggressor, based on testimony that defendant shoved Burkett on the way out of the bar. The evidence also showed that defendant took the first swing at Premas. Premas testified

that defendant made contact in the two places that he had stab wounds. Burkett testified that he and defendant were wrestling when he felt a pinch in his back. He rolled off of defendant and had stab wounds in his arm and his back. The evidence also showed that Premas and Burkett had already been stabbed by the time defendant went over to drag Averkamp out of Premas's way.

¶ 29 On October 7, 2010, new defense counsel argued that the indictment violated *Apprendi* because it stated that defendant was subject to a sentencing enhancement without stating how the knife was used. Defense counsel argued that because the State never established that the knife involved had a blade of three inches or more, it was not a *per se* "dangerous weapon," unless the State stated how the alleged knife was used in the indictment. Defense counsel argued that because the State never stated in the indictment or otherwise notified defendant during discovery or at trial how the knife was used as a dangerous weapon, defendant should only be sentenced on the Class 3 offense of aggravated battery and not be subject to the mandatory minimum 10-year sentence for armed violence. Defense counsel also argued a motion for a new trial on the basis that the State failed to prove great bodily harm was caused to the victims.

¶ 30 The court addressed the issues raised by defendant as follows. The court rejected defendant's claim that the State failed to prove the element of great bodily harm where the evidence showed that both victims required medical attention and had deep wounds requiring numerous stitches. The court also rejected defendant's contention that the State was required to prove the length of the knife used in the crime for purposes of the armed violence statute. Knives less than three inches have been included in interpretation of the armed violence statute's language "instrument of like character." The court also stated that *Apprendi* did not apply to armed violence because it was not a penalty enhancement statute. The court found that the armed violence statute created a separate and distinct offense and provided for a separate and distinct penalty. In so ruling,

the court relied upon the dissent in *People v. Delpercio*, 105 Ill. 2d 372 (1985). The court found the indictment to have sufficiently apprised defendant of the offense he was being charged with and to which he would have to prepare his defense. The court therefore denied defendant's motion for a new trial and motion to reconsider the sentencing ranges.

¶ 31 The trial court then sentenced defendant, finding that under the one-act, one-crime doctrine, defendant should not be sentenced for the aggravated battery offenses. The court stated that it felt "under the circumstances of the case that [the minimum 10-year sentence] is extremely harsh" but that it was "bound to follow the law." The court sentenced defendant to 10 years' imprisonment followed by three years of mandatory supervised release for the armed violence offenses, to run concurrently. The court also sentenced defendant to one year imprisonment for the mob action offense, also to run concurrently.

¶ 32 Defendant filed a motion to reconsider the sentence, which the court denied on October 28, 2010. Defendant timely appealed.

¶ 33 II. ANALYSIS

¶ 34 A. *Apprendi* violation

¶ 35 Defendant first argues that the trial court erred in ruling that *Apprendi* did not apply to the armed violence counts and that the indictment was sufficient to apprise him of the penalty enhancement he faced. The State concedes that *Apprendi* does apply to the armed violence statute but argues that the indictment was sufficient to have apprised defendant of the charges and penalties he faced. The parties do not agree as to the standard defendant must meet when the first attack on the indictment took place in a posttrial motion. Defendant claims that he is required to show only that the indictment strictly comply with section 111-3 of the Code of Criminal Procedure of 1963

(725 ILCS 5/111-3 (West 2008)). The State argues that defendant must show how the alleged defect prejudiced him in preparing his defense, which is a looser standard. We agree with the State.

¶ 36 It is well-settled that when a defendant challenges the sufficiency of an indictment prior to trial, the indictment must be reviewed for strict compliance with section 111-3 of the Code of Criminal Procedure. *People v. Cuadrado*, 341 Ill. App. 3d 703, 709 (2003). If the attack on the indictment is first done on appeal, the defendant must show how the alleged defect prejudiced him in preparing his defense. *Id.* at 709. Thus, when reviewing the sufficiency of an indictment on appeal, we must consider whether the issue was raised in the trial court and at what point during the proceedings.

¶ 37 In *Cuadrado*, the defendant did not object to the indictment until after the culmination of the State's case and after the defendant filed a motion for a directed verdict. *Id.* at 710. The court held that under its facts, where there was one indictment properly obtained by the rules of procedure, where defense counsel had ample opportunity to review it, and where counsel was not precluded from objecting to the indictment in a pretrial motion, the defendant was not entitled to a reversal of her conviction without demonstrating how the alleged defect in the indictment prejudiced her in preparing her defense. *Id.* at 712; see also *People v. Cuadrado*, 214 Ill. 2d 79, 87-88 (2005) (holding that the general standard for reviewing an attack on an indictment after commencement of trial requires the defendant to show prejudice). Similarly, in this case, the indictment was properly obtained in accord with rules of criminal procedure, and defense counsel had ample opportunity to review and attack the indictment in a pretrial motion. Defendant failed to raise any issue with the indictment until after trial was complete and judgment was entered against defendant. Accordingly, defendant must show how the alleged defect in the indictment prejudiced him in preparing his defense.

¶ 38 Defendant argues that the indictment was deficient in failing to state the knife's blade was over three inches long or how the knife was used, and therefore he was not notified that he was subject to the enhanced sentence of the armed violence statute. Defendant then argues that the "State's failure to notify [him] of the mandatory minimum sentence until after he waived his right to a jury trial and the trial was continued was prejudicial." According to defendant, the State did not notify him of the enhanced penalty of the armed violence statute until moments before trial and the State's "last minute" attempt to place him on notice of the enhanced penalty did not cure the prejudice because he did not have sufficient time to consider the strength of the evidence in relation to his affirmative defense of another and did not have time to consider this with counsel "to approach his defense differently." According to defendant, his jury trial waiver "robbed him of a tactical advantage in the defense of his case" because he could have pushed for the trial when it was originally set in July 2009, when the State did not have key witnesses to present. According to defendant, the trial court should have "admonished [him] fully as to his right to a jury trial because the possible sentencing required [him] to take additional matters into consideration regarding the strength of his case." We reject defendant's arguments.

¶ 39 First, we note defendant relies on *People v. Bracey*, 213 Ill. 2d 265 (2004), for support that he was prejudiced by the State's failure to comply with section 111-3. *Bracey* dealt with whether the defendant's jury waiver was valid and does not address prejudice caused by an alleged deficiency in the indictment; it is therefore inapplicable to defendant's argument. The substance of defendant's argument pertains more to the validity of his jury waiver than the prejudice caused by the alleged deficiency in the indictment. However, we will address the issue argued by defendant, that he was prejudiced by the deficient indictment.

¶ 40 We disagree with defendant that the indictment was deficient in the manners he claims—that the indictment failed to apprise him of the knife’s length or how it was used. See *In re T.G.*, 285 Ill. App. 3d 838, 845 (1996) (finding a blade less than three inches long falls under the armed violence statute when used as a deadly weapon). Further, we read the indictment and the statutes cited therein as a whole. *People v. Doherty*, 139 Ill. App. 3d 1028, 1031 (1986). Here, the armed violence indictment indicated that the weapon (the “knife”) was used to cause great bodily harm to Premas and Burkett; the aggravated battery portion of the indictment stated that defendant was charged with stabbing both victims in the shoulder, back, and arms. Defendant cannot claim that he was not apprised of the fact he was being accused of using a dangerous weapon, a knife, to stab the victims in violation of the cited armed violence statute (720 ILCS 5/33A-2 (West 2006)), as set forth in the indictment, such that he was prejudiced in preparing his defense. See *People v. Hall*, 117 Ill. App. 3d 788, 803 (1983) (absence of blade-length in indictment did not result in substantial prejudice to the defendant’s ability to prepare defense).

¶ 41 We also reject that defendant was not adequately apprised by the indictment of the sentence he faced. The indictment is not required to inform the defendant of his potential sentence in terms of exact minimum sentences. See 725 ILCS 5/111-3 (West 2006) (statute does not require that minimum sentences be explicitly stated in indictment; only that indictment must state the name of the offense; the statutory provision violated; date and county of offense; name of accused if known or description of offender; be signed by foreman of grand jury; intent to seek enhanced sentence because of prior conviction; and alleged fact being used to seek an increase in the range of penalties for offense beyond the statutory maximum). Here, the indictment contained the necessary elements that notified defendant of the offense that he had to defend against. The indictment properly cited the armed violence statute based on defendant’s use of a knife. The indictment also properly stated

that the offense was a class X felony. The armed violence statute explains that knives are considered a Category II weapon (720 ILCS 5/33A-1(c)(2) (West 2006)) and that such offenses are subject to a minimum term of 10 years (720 ILCS 5/33A-3(a-5) (West 2006)).

¶ 42 We acknowledge that defendant was first admonished that the armed violence offenses subjected him to an imprisonment term of 6 years to 30 years at hearings on two occasions. On January 23, 2007, the court informed defendant of the charges in the indictment and that the armed violence offenses carried a “sentencing range of six to thirty years in the Department of Corrections, fines not to exceed \$25,000, and three years mandatory supervised release.” On November 5, 2007, the court again admonished defendant as to the charges in the amended indictment and that the armed violence offenses carried a sentencing range of 6 to 30 years’ imprisonment, fines not to exceed \$25,000, and 3 years mandatory supervised release. On July 17, 2009, the State moved to continue the trial date because it had not yet subpoenaed one of the doctors it wanted to testify. The trial court denied that motion. Defense counsel then asked to “pass it.” The parties were then recalled shortly thereafter, and defense counsel informed the court that he wanted to execute a jury waiver and asked the case be set for a bench trial. The court asked defendant if he signed the jury waiver form tendered to the court. Defendant responded “yes.” The court asked if defendant understood the form and that it meant he was waiving his right to a jury trial and that the court would determine his guilt or innocence and not a jury. Defendant answered “yes,” and acknowledged he signed the form freely and voluntarily and that his wish was to have a bench trial. The court accepted the jury waiver. The court then set the matter for a bench trial in October.

¶ 43 After more continuances, the trial was set to begin on November 23. The State informed the court that under the armed violence statute, the minimum sentence was 10 years, and it thought it was appropriate that defendant be admonished of that. The Assistant State’s Attorney, Ryan

Blackney, was not the ASA earlier and was not at the earlier hearings or at the jury waiver hearing. Defense counsel agreed because he could not recall whether defendant was admonished as to that minimum. The court then informed defendant that the armed violence offense carried a minimum 10-year sentence. Defendant stated he understood. The court asked defendant if that “in any way change[d] [his] decision with respect to [his] jury waiver,” to which defendant replied “no.” The court asked defendant if he was sure and did he “want a minute to talk to [counsel] about it.” Defendant then said yes, and a recess was given for defendant to confer with counsel. After the recess, defense counsel and defendant told the court that defendant wanted to proceed with the bench trial. Under these facts, we reject defendant’s argument that he suffered any prejudice connected to the alleged deficiency in the indictment. Defendant’s arguments do not even relate to the alleged indictment deficiency but pertain more towards the admonishments given to defendant about the potential sentence and its affect on his jury waiver. The facts, however, demonstrate that the court corrected the admonishment and gave defendant the opportunity to withdraw his jury waiver. Therefore, we reject defendant’s argument as to the sufficiency of the indictment.

¶ 44

B. Sufficiency of the Evidence

¶ 45 A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant’s guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *Id.* The relevant question upon an attack on the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* Defendant claims that because there is no dispute in the facts, our review is *de novo*. We reject that claim because the resolution of defendant’s guilt or innocence depended

on the credibility of the witnesses and the weight given their testimony. See *id* at 261. Thus, we apply the standard of review set forth in *Collins*.

¶ 46 Defendant's insufficiency of the evidence argument rests on the following claims: the State failed to carry its burden to overcome his self-defense claim in light of Castillo's more credible testimony; the State failed to prove a connection between the knives admitted into evidence and the crime; the State failed to prove that defendant stabbed Burkett; and the State failed to prove great bodily harm. We reject these arguments.

¶ 47 First, defendant's argument that the State failed to overcome his self-defense claim is without merit. Essentially, defendant asks this court to reweigh the evidence and to make credibility determinations on the witnesses. We decline to do so. See *Collins*, 106 Ill. 2d at 261 (function of reviewing court is not to retry the defendant). Defendant argues that Castillo's testimony proves that Premas and Burkett could have been injured by someone else and that his testimony and the testimony of Harrison and others showed the scene was chaotic and reasonable doubt existed as to who stabbed Premas and Burkett. Defendants must present evidence supporting each of the elements required to justify the use of force in defense of a person. Those elements are that: (1) force had been threatened against the defendant; (2) defendant was not the aggressor; (3) the danger of harm was imminent; (4) the force threatened was unlawful; (5) the defendant actually believed that a danger existed, that the use of force was necessary to avert the danger, and that the kind and amount of force actually used was necessary; and (6) the defendant's beliefs were reasonable. *People v. Morgan*, 187 Ill. 2d 500, 533 (1999). Here, there was no evidence presented to sustain defendant's use of force. Witnesses testified that defendant initiated contact with Premas and Burkett in the bar and then shoved Burkett on the way out of the bar; Premas testified that defendant launched at him without any provocation in the parking lot. Premas and Burkett testified that they

did not have any weapons on them and that defendant threw the first punch. While no witness saw anyone with a weapon that night, defendant confessed that he picked a knife up from the ground. Further, by the time that defendant dragged Averkamp away from Premas, both Burkett and Premas had already been stabbed, making defendant's claim that he stabbed anyone in Averkamp's defense illogical. Thus, we reject defendant's argument that the State failed to overcome defendant's claim of self defense of himself or Averkamp.

¶ 48 Next, we reject defendant's argument that the State failed to prove a connection between the knives entered into evidence and the actual crime. Defendant argues that no one testified that he had a knife during the fight and that no evidence was submitted establishing the blood on the knives belonged to Premas or Burkett or that defendant's fingerprints were on the knives. Defendant argues that there was "no evidence of any relationship between [defendant] and the knives, other than they were found in the same location." He also argues that the exhibits do not match the description that defendant gave in his statement. There are no photographs of the weapons that were admitted into evidence, so our review is limited to the descriptions given by the witnesses.

¶ 49 On this issue, we note that defendant did not object to the State's offer to admit the weapons into evidence, and he does not argue that we should review under the plain error doctrine. This contention was also not raised in defendant's posttrial motion. The failure to object or raise an issue in a posttrial motion generally results in forfeiture of the argument on appeal. *People v. Scott*, 401 Ill. App. 3d 585, 599 (2010). Forfeiture is a limitation on the parties, not the court. *Id.* Forfeiture aside, we disagree with defendant's contentions. A weapon may be admitted into evidence where there is proof to connect it to the defendant and the crime. *People v. Wade*, 51 Ill. App. 3d 721, 729 (1977). Such a connection with the crime is shown if a weapon found on the defendant when arrested is suitable for the commission of the crime charged. *Id.* In *Wade*, the question was whether

a gun could be suitable for the commission of the murder when the State knew and conceded that ballistics tests showed the weapon had *not* been used in the crime. *Id.* The court determined that under such facts the admission of the gun and related testimony was reversible error. *Id.* In this case, the knives were recovered at the scene of defendant's arrest, shortly after the stabbing. Defendant told police that he remembered having a knife and thought he picked it up from the ground. He described it as a little black pocket knife. People's Ex. No. 16 was a black switchblade that was recovered from the Lube Plus desk, where defendant had been sitting when Dillon was pounding on the glass door upon investigating the incident. The knife was also demonstrated to be a suitable one for the type of injuries sustained by the victims. It was stipulated that Dr. Habhab would testify that the type of wound that Burkett suffered was consistent with being caused by a box cutter, which is similar to the type of switchblade knife recovered from the Lube Plus. Although defendant argues that the knives recovered are the type of knives expected to be found at an oil lube business and were not the weapons used in the crime, no evidence was entered to support this argument.

¶ 50 We also disagree that the State failed to prove that defendant stabbed Burkett. Burkett testified that he pulled defendant off of Premas in the parking lot, and that he felt "pinches" in the two places that defendant made contact with his body. Those two areas were the areas of Burkett's stab wounds. Premas testified that defendant "launched" at his face and made contact with his right chest area and left arm, which were the locations of his stab wounds. Premas testified that Burkett then came and pulled defendant away from Premas. At that point, Premas realized he had been stabbed, and he attacked defendant's friend, Averkamp, while Burkett and defendant were fighting. Defendant also told police in his recorded statement that he picked up a small, black, pocket knife from the ground. Although defendant could not remember details, he recalled picking up the knife,

and that maybe he stabbed the guy and set it back on the ground. A black switchblade knife was recovered in the Lube Plus, along with defendant's bloody clothing. This evidence was sufficient to sustain defendant's armed violence conviction as to Burkett. Defendant's argument solely requires that this court reweigh what defendant deems as conflicting evidence in order to reverse. However, as stated, it is not this court's function to retry defendant.

¶ 51 Defendant's final argument is that the State failed to prove great bodily harm. Defendant argues that Premas's wounds were minor, did not cause him serious disfigurement or excruciating pain, and thus did not rise to the level of great bodily harm. Similarly, defendant argues that Burkett's wounds were not so serious as to constitute great bodily harm. Defendant argues that the victims did not immediately realize they had been stabbed, the bleeding was controlled at the scene, and they required only some stitches to close the wounds.

¶ 52 While the element of great bodily harm does not have a precise definition, it requires proof of an injury of a greater and more serious nature than a simple battery. *In re J.A.*, 336 Ill. App. 3d 814, 815 (2003). Whether an injury constitutes great bodily harm is determined by the actual injury received. *Id.* On an insufficiency of the evidence attack, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* Whether the defendant inflicted great bodily harm is a question for the trier of fact. *Id.* "Great bodily harm" has been interpreted as harm more serious or grave than lacerations, bruises, or abrasions that characterize "bodily harm." *Id.* at 817. The determination of whether great bodily harm has occurred does not depend upon whether the victim received medical attention or required hospitalization; it also does not require that the victim suffer permanent disability or disfigurement. *People v. Jordan*, 102 Ill. App. 3d 1136, 1140 (1982).

¶ 53 Defendant relies on *In re T.G.*, 285 Ill. App. 3d 838 (1996), to support his argument. We find *T.G.* distinguishable, however, because in that case, there was no evidence of the extent or nature of the victim's stab wounds other than the victim's testimony that he felt like he had been poked with a pen or pencil and that he did not feel the second and third stab wounds. *Id.* at 846. Similarly, in *J.A.*, the victim described the single stab wound as feeling like somebody pinched him but the record lacked evidence regarding the nature of the injury and the harm caused to the victim. *J.A.*, 336 Ill. App. 3d at 817. The victim in *J.A.* was told to have the wound stitched but he refused. *Id.* at 818. The court held that the refusal of treatment was not relevant to its inquiry into the actual injury sustained. *Id.* The court noted that the record in the case was vague as to the number of stitches recommended or who recommended the stitches. *Id.* The only evidence in the record was that of the victim testifying that he felt only a pinch; there was no evidence the victim was bleeding; there was no medical testimony or evidence in the record; no evidence or testimony describing the wound; and there were no photographs of the wounds for the jury to consider. *Id.*

¶ 54 Unlike in *T.G.* and *J.A.*, there was evidence in this case supporting the court's conclusion that defendant inflicted great bodily harm upon both victims. The parties stipulated that the responding paramedics would testify that Premus had a one-inch stab wound to the left upper chest and a three-centimeter laceration to the left forearm with soft tissue involvement; Burkett had a four-inch laceration to his arm with exposed muscle and a five-inch wound to the left of his spine. Both victims were bleeding on the scene but bleeding was controlled with direct pressure and dressings. Nurse Dusik described that Premus required seven sutures to the left forearm and the chest wound was sutured, though no number was given. Dr. Habhab treated Burkett and stated that he required 56 sutures, some subcutaneous, to close his forearm wound, and 29 stitches, some subcutaneous, to close the wound on his back. Photographs of the injuries before and after sutures were entered into

evidence, depicting the nature and extent of the wounds. The fact that Burkett and Premas neither required hospitalization nor incurred permanent injury or disfigurement is irrelevant to the State carrying its burden on this element. Given the circumstances and evidence submitted, that Burkett and Premas were unarmed and received multiple stab wounds that required multiple stitches to close, there was sufficient evidence for the trier of fact to conclude that their injuries rose to the level of great bodily harm.

¶ 55

C. Ineffective Assistance of Counsel

¶ 56 Defendant next argues that he received ineffective assistance of trial counsel when counsel failed to object to hearsay statements introduced during Harrison’s testimony, failed to object to the admission of Exhibit Nos. 16 and 17, and did not wait for certain forensic evidence to become available before trial. We review ineffective assistance of counsel claims under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). That test requires a defendant to show both that: (1) as determined by prevailing professional norms, counsel’s performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by counsel’s deficient performance. *People v. Guerrero*, 2011 IL App. 2d 090972, ¶60. A reviewing court may analyze the facts of its case under either prong first, and if it deems that the prong is not satisfied, it need not consider the other prong. *Id.* To satisfy the deficient-performance prong, the defendant must show that counsel made errors so serious that he or she was not functioning as the “counsel” guaranteed by the sixth amendment. *Id.* To prove prejudice, the defendant must show that there was a reasonable probability that, but for counsel’s deficient performance, the result of the proceedings would have been different. *Id.* A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.*

¶ 57 Defendant first argues that trial counsel should have objected to the testimony elicited from Harrison that the “lip ring guy” told Harrison that he was going to attack his friends. Defendant argues that counsel compounded the error when he elicited further testimony that the “lip ring guy” pointed to Premas and Burkett as the friends Averkamp and “his friends” were going to attack. Defendant argues that the “lip ring guy” was Averkamp. The line of questioning defendant complains of unfolded as follows:

“Q. And you yourself stated that you got into a fight with the taller lip ring guy?”

A. Yeah, he was coming up and he had said earlier in the night that he was going to attack my friends.

Q. I didn’t ask what he said. I asked if you got in a fight with him.

A. Yes, because I didn’t know if he had the knife or not. I didn’t know who did, but I do know he stated that he was going to attack them, so I didn’t want him coming near my friend who was already obviously injured.

Q. So the tall guy with the lip ring told you that he was going to attack one of your friends.

A. Yes, earlier in the evening.

Q. And what friend was that he was going to attack?

A. He pointed to [Premas] and [Burkett].

Q. So he was going to attack two people.

A. He said him and his friends were going to jump them when they left the bar.

¶ 58 Even assuming trial counsel’s performance was deficient in eliciting this testimony from Harrison or failing to object to Harrison’s nonresponsive answers, we find defendant fails to establish the prejudice prong. First, we note that Harrison’s testimony that Averkamp (lip ring guy)

said he was going to attack the victims *helps* defendant's argument that he was not the aggressor, one of the elements necessary to his self-defense claim, as it implicated Averkamp as the aggressor. Regardless, excluding Harrison's implication of defendant when he said "him and his friends were going to jump" the victims when they left the bar would not have overcome the remaining evidence against defendant, including the testimony that defendant shoved one victim on their way out of the bar, defendant launched at Premas's face and threw the first punches, defendant's confession, and the victims' noticing the stab wounds in the places where defendant made contact with their bodies.

¶ 59 Defendant also argues trial counsel failed to perfect the impeachment of Harrison by failing to enter his prior written statement to police into evidence. The same argument is made as to Premas's impeachment using deposition testimony as to whether he saw Averkamp and Burkett fighting. Defendant also makes a failure to impeach argument as to Averkamp and his statement to police. On all three issues, defendant does not explain how he was prejudiced by the failure to admit the entire statements or deposition into evidence as he acknowledges that counsel cross-examined Harrison and Premas on the discrepancies between their prior statements and testimony. As to Averkamp, defense counsel declined to cross-examine him, but defendant does not argue what exactly could have been elicited from Averkamp from his prior statement to police. On these issues, we fail to see how counsel's performance was deficient or how defendant was prejudiced.

¶ 60 Next, defendant argues that trial counsel failed to object to the admission of the knives recovered at the scene of defendant's arrest at the Lube Plus. Defendant argues that the State failed to connect the knives to the crime, and trial counsel should have objected on that ground. As we discussed earlier, the State established a sufficient connection between the knives and the crime. Therefore, on this issue, defendant failed to establish that trial counsel's performance was deficient.

¶ 61 We also reject defendant’s remaining allegations of trial counsel’s ineffectiveness, which defendant includes in various one or two paragraph conclusory arguments. Defendant argues counsel was ineffective for failing to request a continuance in order to obtain DNA evidence, which was tendered to the defense on April 7, about two weeks after defendant’s trial ended. The copy of the laboratory results, however, are not contained in the record, and defendant does not make any claim as to what was contained in the report. Because this issue requires evidence beyond the record, a postconviction petition is the proper venue for raising such an argument. Defendant also complains that counsel failed to attack the indictment during pretrial proceedings. However, defendant fails to establish that had counsel moved to dismiss the indictment at the pretrial stage, the outcome of defendant’s trial would have likely been different. Accordingly, defendant’s ineffective assistance of counsel claims all fail, individually and cumulatively, as defendant failed to establish one or both prongs of *Strickland* on each claim.

¶ 62 D. Reduction to Aggravated Battery

¶ 63 In his final argument, defendant requests that we exercise our discretion, afforded by Supreme Court Rule 615 (Ill. S. Ct. R. 615 (eff. Jan. 1, 1967)), to reduce his conviction to aggravated battery, given the weakness of the evidence against defendant and the trial court’s statement that the sentence seemed harsh. Defendant argues that the worst evidence against him was his statement but in that statement, he admitted only to picking up a small knife from the ground. Defendant argues that even if he did stab the victims, he did not begin the fight armed. Defendant also claims that there was circumstantial evidence through Dr. Habhab’s statement that Burkett’s injury was caused by a box cutter, not a knife.

¶ 64 Rule 615(b)(3) provides that on appeal, the reviewing court may “[r]educe the degree of the offense of which the appellant was convicted.” Ill. S. Ct. R. 615(b)(3) (eff. Jan. 1, 1967). The use

of Rule 615(b)(3) when the evidence is sufficient to support a conviction should be a “ ‘rare instance.’ ” *People v. Jones*, 286 Ill. App. 3d 777, 783 (1997), quoting *People v. Jackson*, 181 Ill. App. 3d 1048, 1052 (1989). The power to reduce the degree of the offense is to be used with “ ‘caution and circumspection’ ” and not purely out of mercy. *Jones*, 286 Ill. App. 3d at 783, quoting *People v. Coleman*, 78 Ill. App. 3d 989, 992 (1989). Our obligation as the reviewing court is to give deference to the trier of fact and be cognizant that it is the legislature’s prerogative to establish sentences. *Id.*

¶ 65 In *Jackson*, the court stated that there are factual situations that arise where the appellate court “must in the interest of fair and uniform administration of justice exercise the powers granted” by Rule 615. *Jackson*, 186 Ill. App. 3d at 1051. The court stated that among the relevant factors in assessing whether a reduction of an offense is warranted are whether an evidentiary weakness exists and whether the trial judge expressed dissatisfaction with imposing the mandatory sentence. *Id.* An expression of dissatisfaction by the trial judge regarding the sentence “will not by itself mandate that the degree of the offense be reduced.” *Id.* The court also stated that it would not reduce the degree of the offense “solely out of merciful benevolence since there must be some evidentiary weakness before a reviewing court will act.” *Id.*

¶ 66 In this case, the trial court stated it felt the mandatory minimum 10-year sentence was extremely harsh but it was bound by the law. Defendant argues that there was evidentiary weaknesses in the case in addition to the trial court’s expression of dissatisfaction with the minimum 10-year sentence. In *Jackson*, the defendant was convicted of residential burglary after he was charged with entering an apartment without permission and taking \$5 or \$6, which he used to buy food at a convenience store. *Jackson*, 181 Ill. App. 3d at 1050. The appellate court found that the evidence against the defendant was weak as to whether the defendant, who periodically performed

maintenance work on apartments in the complex, entered the apartment to complete a job and whether he entered the apartment with the intent to commit a felony. *Id.* at 1051-52. The appellate court noted that the evidentiary weakness in the case was “not the result of conflicting accounts of the incident” and was not a “mere issue of credibility.” *Id.* at 1052. Rather, the State’s evidence showed little inconsistency with the defendant’s testimony that he did not formulate the requisite intent until after he entered the apartment to perform work. *Id.* In deciding to reduce the offense to the lesser-included offense of criminal trespass to a residence, the court noted that the defendant had no prior criminal record, took a small amount of money, and had entered the home with a key to perform work in the unit. *Id.*

¶ 67 In *Jones*, the court rejected the defendant’s argument that there was weak evidence to support his conviction of the intent to deliver a controlled substance where the defendant possessed 20.76 grams of cocaine in the kitchen and 127.65 grams of cocaine in a canvas bag. *Jones*, 286 Ill. App. 3d at 784. The defendant argued that he did not possess the other items normally associated with intent to deliver cases, such as baggies, scales, and items to cut the drug. *Id.* at 785. However, the defendant admitted to the police that he had been dealing for a few weeks and the amount of drugs were obviously more than that used for personal consumption. *Id.* at 784-85. While the trial court noted its dissatisfaction in sentencing the defendant to the minimum because the defendant was a “salvageable” defendant who had nearly completed his studies to be a certified public accountant, the appellate court did not find the evidentiary weakness in the State’s case against him warranted a reduction in his offense. *Id.* at 781, 785. See also *People v. Godfrey*, 382 Ill. App. 3d 511, 514-15 (2008) (rejecting the defendant’s argument of evidentiary weakness where there was evidence of each element and where the trial court chose to believe two witnesses and not the defendant as to one element).

¶ 68 This district has also rejected the analysis in *Jackson*, providing that a reviewing court may not reduce the degree of an offense unless the evidence was insufficient to prove an element of the offense beyond a reasonable doubt. *People v. Kick*, 216 Ill. App. 3d 787, 792-93 (1991). In *Kick*, the defendants argued that this court should downgrade the severity of their convictions, not because of any insufficiency of the evidence, but because the minimum sentence prescribed by the statute was allegedly too severe under its circumstances. *Id.* at 792. This court declined to reduce the offense, or the sentence, where the evidence was sufficient to sustain the conviction. *Id.* at 793. This court stated that Rule 615(b)(3) was not meant to circumvent the mandatory minimum sentence corresponding to an offense of which a defendant had been proved guilty beyond a reasonable doubt. *Id.*

¶ 69 Regardless of the inconsistency of appellate courts in determining the powers vested to them in Rule 615(b)(3), we disagree with defendant that there was evidentiary weakness in this case such that it warrants this court to reduce the degree of his offense. Defendant's argument that the evidence was weak relies on this court making credibility determinations on witnesses that the trial court already made, which even under the analysis of *Jackson* would be inappropriate. Defendant also argues the evidence was weak because the State did not produce a knife known to be the weapon used or eyewitness testimony placing the weapon in defendant's hand. While no witness stated he saw defendant with the knife, there was plenty of evidence, including defendant's statement to police that he picked up the knife and used it and the victims' testimony, that suggested defendant stabbed both victims. Further, defendant's clothes were bloody, and he was found hiding in the Lube Plus and did not open the door for police until he went to the bathroom. The knife fitting the description that defendant gave of the knife he picked up during the fight was found in the Lube Plus as well. Under the facts of this case, we reject defendant's claim that the evidence

against him was weak. We also agree with the rationale of *Kick* that even though the sentence *may* be harsh under the facts, it is not this court's function to circumvent the minimum sentence for armed violence offenses prescribed by the legislature.

¶ 70

III. CONCLUSION

¶ 71 For the reasons stated, we affirm the judgment of the circuit court of McHenry County.

¶ 72 Affirmed.