

No. 1-10-1040

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 10432
	)	
JOSE ROQUE,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court  
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

*HELD:* defendant's convictions for robbery and possession of a stolen motor vehicle upheld where he was proven guilty of the offenses beyond a reasonable doubt; defendant's sentence upheld where he failed to properly preserve the issue for appeal and where he did not receive the enhanced sentence of which he complained.

¶ 1 Following a bench trial, defendant Jose Roque was convicted of robbery and possession of a stolen motor vehicle. On appeal, defendant argues: (1) the State failed to prove him guilty of the offenses beyond a reasonable doubt; and (2) the trial court violated his constitutional right to

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due process by sentencing him under the Class X sentencing guidelines. For the reasons detailed herein, we affirm the judgment of the trial court.

## ¶ 2 BACKGROUND

¶ 3 On May 18, 2009, defendant was arrested and subsequently charged with two counts of home invasion (720 ILCS 5/12-11(A)(1) (West 2008)), one count of armed robbery (720 ILCS 5/18-2(A)(1) (West 2008)), one count of burglary (720 ILCS 5/19-1(A) (West 2008)), and one count of possession of a stolen motor vehicle (720 ILCS 5/4-103(A)(1) (West 2008)).

¶ 4 Defendant elected to proceed by way of bench trial. At trial, Santos Rodriguez, defendant's step-father, testified that he had been married to defendant's mother, Maria Rodriguez, since 2000, but that they had been living separately for the past three or four years. Santos lived in a second-floor apartment located at 4332 South Hermitage, while Maria resided a few miles away at another residence owned by Santos, located at 5600 South Spalding. On May 18, 2009, Santos and Maria were both at the South Hermitage location. Santos indicated that defendant had been repeatedly calling him throughout the day, but that he had refused to answer defendant's call. Santos explained that he and defendant had a volatile relationship and fought often. According to Santos, he would "never start the trouble;" rather, defendant was the one who would start arguments with Santos. The arguments usually concerned money or Santos' relationship with defendant's mother.

¶ 5 At approximately 1 a.m. on May 19, 2009, defendant placed another call to Santos. This time, Santos answered his phone, and defendant said, "I'll be there in a little bit, you son of a [bitch]." Santos testified that he and Maria were going to leave the apartment to avoid an

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encounter with defendant. However, while they were at the back door, defendant arrived and began hitting the first-floor door of the building with a hammer. Santos ran to his bedroom to retrieve his cell phone to call the police. When he returned to Maria, Santos saw that defendant had broken through a panel of the building's first-floor door and had made his way upstairs to Santos' second-floor apartment. Santos tried to lock his door, but defendant had a steak-knife in his hand and forced his way into Santos' apartment. Defendant began yelling at Santos and called him various names and started to kick Maria. Defendant then told Santos to give him some money. When Santos told defendant that he did not have any money to give, defendant ordered Santos to give him the keys to Santos' car, a 1995 red Jeep Cherokee. Santos said defendant made the demand for Santos' car keys while he was holding a knife in his hands. When Santos refused to give defendant his car keys, defendant opened his shirt and pointed to the waistband of his pants, where he had a gun. Defendant put down his knife, pulled out the gun, and again demanded Santos' car keys. At that point, Santos provided defendant with the keys, explaining "[w]hen he was pointing at me the way he was, I didn't want to say no." Santos, Maria and defendant then went outside and Santos opened the garage. Defendant turned to Santos and told him, "[I]n the morning this car will not exist." Defendant almost crashed the Jeep when he backed it out of the garage, and then drove off. After defendant left, Santos used his cell phone to call the police. Maria initially tried to take Santos' phone to prevent him from making the call, but she was unsuccessful and left Santos' house on foot.

¶ 6 Santos spoke to the police when they arrived at his home, explained what had occurred and filled out a report. Afterwards, he attempted to fix the broken door. Approximately one to

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two hours later, Santos was contacted by the police and was informed that they had recovered his Jeep. When Santos arrived at the police station, defendant and Maria were both already present.

¶ 7 On cross-examination, Santos acknowledged that he had previously been arrested and that there was an order of protection in place barring him from having contact with Maria.

Santos indicated that he was unaware of the order of protection at the time the events in this case transpired. He further acknowledged that he had hit Maria on two prior occasions and had been ordered to attend anger-management and substance abuse classes. Santos, however, denied that he had been drinking on the day that defendant took his Jeep. He also denied that Maria had called defendant and asked him to pick her up because Santos was beating her. Santos acknowledged that he may not have initially informed the responding officer that defendant had a knife, but testified that defendant had cut him on his hand during the incident. After defendant's arrest, Santos admitted that he had visited defendant in prison on two occasions and had given him \$40 or \$50. He had done so at Maria's request.

¶ 8 Chicago Police Officer Brian Chen testified that on March 18, 2009, he and his partner, Officer Garcia, responded to a call about a female needing assistance near the 5600 block of South Spalding. When he arrived at that location, Officer Chen observed Maria talking to defendant who was sitting inside a vehicle. Officer Chen ran the license plate of the vehicle, learned that the vehicle had been reported stolen and took defendant into custody. He also recovered a knife from the vehicle. The knife had a metal blade and a black handle and was inventoried in accordance with police protocol. Santos identified the knife as the weapon defendant used during the robbery and informed Officer Chen that defendant also had a gun on

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his person at the time of the offense. Officer Chen did not recover a gun from Santos' vehicle.

¶ 9 That same day, Officer Chen subsequently learned that Maria had filed a domestic complaint against Santos and had been issued an order of protection. Santos claimed he had not been served with the paperwork so Officer Chen served him with a copy of the order of protection and placed him under arrest.

¶ 10 At the conclusion of Officer Chen's testimony, the State rested its case-in-chief. The defense subsequently called Chicago Police Officer Damien Bolden, who testified that he interviewed Santos on March 18, 2009, after the offense occurred. Santos reported that he was in his second-floor apartment when he heard the sound of glass breaking. When he opened the door, defendant came up the stairs and forced himself into the apartment. Santos further informed Officer Bolden that defendant had initially broken the glass in the building's front door to gain entry into the building. Santos indicated that he gave defendant the keys to his Jeep after defendant pulled out a black handgun from his pants and demanded the keys to Santos' vehicle. Officer Bolden completed a report after his interview with Santos. In his report, Bolden did not indicate that defendant forced his way into Santos' apartment; rather, the report stated that Santos let defendant into his home. Officer Bolden clarified that Santos never indicated that he gave defendant permission to enter his residence.

¶ 11 Perla Serrano testified that on May 18, 2009, she was living in a first-floor apartment in the 4332 South Hermitage building and that Santos lived in the apartment above her. In the early morning hours of May 19, 2009, Perla was throwing out her garbage when she heard a lady crying and saying, "Just let me go. Why are you doing this to me?" Perla saw Santos in the back

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of the building by the stairs and testified that he was drunk. Perla was alert but did not call the police because she had heard Santos and Maria argue on prior occasions and she was not that concerned. Defendant then arrived and Perla observed him go up the stairs, and hug Maria. She heard defendant tell Maria, "Come on Ma, let's go." Perla never observed defendant with a gun or a knife in his hands, but acknowledged that she was not able to see into Santos' apartment. Perla further acknowledged that she is friends with Maria, that Maria told her that the defense was looking for witnesses to testify, and that Maria drove her to court that day.

¶ 12 Maria Rodriguez, defendant's mother, testified that she had an argument with her husband, Santos, at his apartment on May 18, 2009. She stated that the fight started when she met Santos on the street and he indicated that he wanted to talk to her. Maria refused because she "had an order of protection [against Santos] and he shouldn't come near [her]," but Santos took her into the car with him "by force" and brought her to his apartment. While she was at Santos' apartment, her son called Santos and asked where his mother was. Santos told defendant he had seen his mother in the area of 47th Street and Ashland Avenue, but defendant did not believe him and came to Santos' apartment. Defendant saw that Santos was "very drunk" and asked Maria if she was okay. Maria responded, "Let's go." Maria denied that defendant arrived at Santos' apartment with a knife or a gun. She further denied that her son asked Santos for his car keys or threatened Santos in any way. Rather, Maria explained that Santos voluntarily gave his car keys to defendant "because he was very drunk" and wanted defendant to drive Maria home. After giving defendant his keys, Santos opened the door to his garage and "let" Maria and defendant leave.

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¶ 13 Maria testified that Santos had been physically abusive to her during the course of their marriage. On one occasion, on July 31, 2005, Santos assaulted her in his car. Maria indicated that he beat her in the face, stabbed her in the back with a screwdriver, and choked her. Police were called in response to that incident and Santos was arrested and forced to obtain counseling for alcohol and drug abuse. Maria also testified that on December 27, 2008, Santos pressed a stick against her throat to choke her and that she had to receive medical treatment following that assault. Maria subsequently obtained an order of protection against Santos following another assault and informed the police of the order of protection when she went to the police station on May 19, 2009, to discuss the incident. Maria acknowledged that she knew Perla Serrano, confirmed that she had asked Perla to be a witness and that she drove Perla to court to testify that day.

¶ 14 At the conclusion of Maria's testimony, the parties proceeded by way of stipulation. The parties stipulated that if Chicago Police Officer Evangelides was called to testify, he would state that he pulled over a vehicle driven by Santos on July 31, 2005. Officer Evangelides would further testify that after he stopped the vehicle, he observed a broken window and noticed that Maria, who was sitting in the passenger seat, had multiple cuts and lacerations to her face. He also observed that Santos' hands were bloody and that he had strands of Maria's hair between his fingers. Officer Evangelides recovered a bloody screwdriver from the vehicle.

¶ 15 The parties also stipulated to the testimony of Detective James Anderson. If called to testify, Detective Anderson would confirm that he spoke to Santos on May 18, 2009, but that Santos never informed him that defendant hit his door with a hammer. Santos also never

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informed him that defendant had been hitting and kicking his mother during the incident or that defendant had cut Santos' hand with a knife. Santos did inform Detective Anderson that defendant had a knife and a gun on his person and that he pushed his way into Santos' apartment and asked for money. Santos also indicated that he gave defendant the keys to his car after defendant pointed the gun at him.

¶ 16 Finally, the parties stipulated the Maria suffers from Bells Palsy and that she filed another domestic violence complaint against Santos in November 2009.

¶ 17 Thereafter, the parties delivered closing arguments. After hearing the evidence and the arguments of the parties, the court found defendant guilty of possession of a motor vehicle. In so finding, the court observed that there was "a highly dysfunctional family dynamic" and acknowledged that it heard different versions of the events that transpired. However, the court noted: "the fact of the matter is that the car was recovered [from] the person supposed to have taken it, that being defendant." The court ultimately rejected defendant's consent argument, stating:

"These are people who had bad blood, had been bad blood for a long period of time over the woman in common—the mother and wife. There is no way that this court can conclude in light of the circumstances, the history of the parties and the matter in which [Santos] immediately called the police, talked about what happened, that there was any consensual giving of this car to [defendant] for any proper purpose like taking his mother home. I do not believe for a second that that is what happened."

The court "g[a]ve [defendant] the benefit of the doubt" and acquitted him of the home invasion

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and burglary charges. The court also found defendant not guilty of armed robbery, but guilty of the lesser-included offense of robbery, stating, "I do believe that the car was taken and the car was taken by force" but indicated that it was "unclear about what role a knife or other weapons may have played in this manner."

¶ 18 Thereafter, the court presided over defendant's sentencing hearing. At the hearing, the State cited defendant's pre-sentence investigation (PSI) report and informed the court of defendant's prior criminal history. The State noted that on September 12, 2007, defendant was convicted of aggravated battery, a Class 2 felony, where Santos was the complaining victim, and was sentenced to three years in the Illinois Department of Corrections. Defendant was also convicted of robbery in California, a Class 2 felony, and received three years' probation for that offense. Defense counsel acknowledged that there appeared to be a probation violation in connection with the California robbery offense, but informed the court that the PSI "indicates a different name other than the defendant, so I'm not certain [that defendant was in violation of probation]. I assume they're going by a federal number or some sort of identifying number." Based on defendant's background, including the out-of-state conviction, the State asserted that defendant was Class X eligible. After hearing the arguments in aggravation and mitigation, the trial court sentenced defendant to 78 months' imprisonment. In delivering the sentence, the court observed: "this is not the first time that [defendant] has chosen a violent solution to family issues and he's hurting people and he's been to the penitentiary for similar type of conduct. He had a matter in California, I'm not sure what that was about, although he did get probation there." Defendant's mittimus indicates that he was sentenced as a Class 2 offender. This appeal

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followed.

## ¶ 19 ANALYSIS

### ¶ 20 I. Sufficiency of the Evidence

#### ¶ 21 A. Possession of a Stolen Motor Vehicle

¶ 22 On appeal, defendant first challenges the sufficiency of the evidence. He argues that the State failed to prove him guilty of the offense of possession of a motor vehicle beyond a reasonable doubt because it did not establish that defendant was not entitled to possession of his step-father's car or that he intended to permanently deprive his step-father of the use of his vehicle.

¶ 23 The State responds that defendant's challenge to the sufficiency of the evidence is without merit because trial court specifically considered and rejected defendant's claim that he had consent to use Santos' vehicle. Moreover, given that defendant took the car and was in possession of the vehicle at the time of his arrest, the State argues that the evidence demonstrates that defendant intended to permanently deprive his step-father of the use his vehicle.

¶ 24 Due process requires proof beyond a reasonable doubt to convict a defendant of a criminal offense. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). The trier of fact is responsible for evaluating the credibility of the witnesses,

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drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

¶ 25 The offense of possession of a stolen motor vehicle is set forth in section 4-103(a) of the Illinois Vehicle Code. That section, in pertinent part, provides:

"[I]t is a violation of this Chapter for:

(1) A person not entitled to the possession of a vehicle or essential part of a vehicle to receive, possess, conceal, sell, dispose, or transfer it, knowing it to have been stolen or converted. \*\*\* It may be inferred, therefore that a person exercising exclusive unexplained possession over a stolen or converted vehicle or an essential part of a stolen or converted vehicle has knowledge that such vehicle or essential part is stolen or converted, regardless of whether the date on which such vehicle or essential part was stolen is recent or remote." 625 ILCS 5/4-103(a)(1) (West 2008).

To obtain a conviction for the offense of possession of a motor vehicle, the State is required to prove beyond a reasonable doubt that: (1) the defendant possessed the vehicle; (2) that he was not entitled to possess the vehicle; and (3) that defendant knew the vehicle was stolen. *People v. Cox*, 195 Ill. 2d 378, 391(2001); *People v. Anderson*, 188 Ill. 2d 384, 389 (1999). Although the offense of possession of a stolen motor vehicle is different from the offense of theft of a motor

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vehicle (*Anderson*, 188 Ill. 2d at 390), a person can nonetheless be charged with possession of a motor vehicle even if he is the one who stole the vehicle as long as there is evidence that the defendant knew he had stolen it (*People v. Gengler*, 251 Ill. App. 3d 213, 222 (1993)).

¶ 26 Here, there is no dispute that defendant took his step-father's vehicle or that police found defendant sitting in Santos' Jeep. At trial, there was divergent testimony as to whether defendant had consent to take Santos' car. Santos testified that he gave defendant his car keys when defendant pointed a gun at him. Santos explained that he did not give defendant permission to use his car; rather, he gave defendant the keys to his vehicle because he felt threatened. Santos then called the police to report the offense immediately after defendant drove away in his Jeep. Defendant's mother, in contrast, testified that defendant did not threaten Santos with any weapons or ask Santos for his car. Instead, Maria indicated that Santos merely gave defendant the keys to his car without any provocation because he was "very drunk."<sup>1</sup> The trial court heard the different accounts of the incident and specifically rejected defendant's argument that he had consent to drive Santos' vehicle, stating that it did "not believe for a second that that is what happened" given the dysfunctional relationship between Santos and defendant. We reiterate that it is within the province of the trier of fact to make credibility determinations and resolve inconsistencies in the evidence. *Bannister*, 378 Ill. App. 3d at 39. Here, the trial court found Santos' account of the

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<sup>1</sup> On appeal, defendant suggests for the first time that Maria had a possessory interest in Santos' car because they were married and thus, she and could give her son permission to drive it. However, we note that Maria never testified that she gave defendant permission to drive the vehicle; rather, she indicated that Santos provided defendant with his keys without being asked.

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incident to be more credible than the one provided by Maria, and rejected defendant's claim that he had his step-father's consent to take his vehicle. We do not find the trial court's conclusion to be so improbable that it creates a reasonable doubt as to defendant's guilt; rather, we find that the evidence supports a finding that when defendant took Santos' car, he was not entitled to be in possession of the vehicle.

¶ 27 We similarly reject defendant's argument that the State failed to establish that defendant intended to permanently deprive Santos of his vehicle. Intent to permanently deprive an owner of his property may be established by circumstantial evidence. *People v. Larson*, 158 Ill. App. 3d 135, 139 (1987). It may be inferred from the simple act of taking another person's property. *People v. Adams*, 161 Ill. 2d 333, 343 (1994). Similarly, intent to deprive an owner of his property may also be inferred from the lack of evidence of a defendant's intent to return the property or leave that property in a place where the owner could safely recover it. *Id.* at 343-44. Ultimately, the issue of a defendant's intent to permanently deprive an owner of his property is a question for the finder of fact and will not be disturbed unless the evidence is improbable or unconvincing. *Larson*, 158 Ill. App. 3d at 139. Here, not only did defendant take Santos' vehicle, but he told Santos that "in the morning this car will not exist." At the time he was arrested, defendant had taken no steps to return the vehicle to Santos. Based on this evidence, we find that the State presented sufficient evidence to allow a reasonable trier of fact to conclude that defendant possessed an intent to permanently deprive Santos of his vehicle.

¶ 28 In so finding, we are unpersuaded by defendant's reliance on *In re T.A.B.*, 181 Ill. App. 3d 581 (1989). In that case, a minor took his foster father's car when his father was on vacation and

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did not obtain permission to do so. *Id.* at 583. When the minor's foster father returned from vacation, he learned that the minor had gotten into a car accident and totaled the vehicle. *Id.* The trial court found that there was sufficient evidence that the minor committed the offenses of criminal damage to property and possession of a stolen motor vehicle and adjudged the minor delinquent; however, on review, the Second District reversed the minor's conviction for possession of a stolen motor vehicle because there was no evidence that he intended to permanently deprive his father of possession of the car. *Id.* at 584. The court explained: "The evidence merely reveals that respondent took his foster father's car without permission and drove it around the area in which he resided for a while. Such joyriding escapades are not considered thefts [Citation.] There is simply no evidence that respondent intended to permanently deprive his foster father of the use or benefit of the car. Although respondent did damage the car beyond repair in the accident, \*\*\* the State failed to prove this was a knowing or intentional act." *Id.* at 586.

¶ 28 Here, unlike the respondent in *In re T.A.B.*, defendant did not live with Santos and simply take Santos' car out for a mere joyride. Rather, defendant forced his way into Santos' residence and threatened Santos in order to obtain the keys to his car. Defendant then informed Santos that his car would "not exist" in the morning. Defendant made no effort to return Santos' vehicle and was found to still be in possession of the vehicle by the police. Unlike the situation in *In re T.A.B.*, there is evidence which would allow a trier of fact to conclude that when defendant took the car without permission, he did so with the intent to permanently deprive Santos of possession of his vehicle. Accordingly, we uphold defendant's conviction for possession of a stolen motor

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vehicle.

¶ 29 B. Robbery

¶ 30 Defendant next disputes his robbery conviction. He argues that his conviction must be reversed because the robbery statute specifically excludes the taking of a motor vehicle from the definition of robbery; rather, the taking of motor vehicles is covered by the vehicular hijacking statute. Because he was convicted of a non-existent offense, defendant argues that his robbery conviction must be overturned. On the merits, defendant argues that even if the State properly charged him with the aggravated robbery of Santos' car and car keys, his robbery conviction must nonetheless be reversed because the State failed to prove that defendant used force against Santos or threatened Santos with use of force, a necessary element to sustain a robbery conviction.

¶ 31 The State acknowledges that the robbery statute excludes the taking of motor vehicles that are covered by the vehicular hijacking statute, but argues that based upon the facts of this case, defendant could not have been charged with vehicular hijacking and was instead properly convicted of robbery. The State observes that the language in the vehicular hijacking statute parallels the language in the robbery statute, but notes that there is one key difference between the two statutes. While the robbery statute requires that the offender takes property "from the person or *presence* of another," (Emphasis added) (720 ILCS 5/18-1(a) (West 2008)) the vehicular hijacking statute specifies that the unauthorized taking must have been "from the person or *immediate presence* of another" (Emphasis added) (720 ILCS 5/18-3(West 2008)). Because the vehicle was not taken from Santos' *immediate* presence and there was evidence that defendant took the vehicle by force, the State argues that defendant was not convicted of a non-

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offense; rather, he was properly convicted of robbery.

¶ 32 Prior to 1993, the offenses of vehicular hijacking and aggravated vehicular hijacking did not exist; rather, the robbery statute encompassed all unauthorized takings of motor vehicles. *People v. McGee*, 326 Ill. App. 3d 165, 169 (2001). In 1993, however, the legislature codified the offenses of vehicular hijacking and aggravated vehicular hijacking and amended the robbery statute to exclude the taking motor vehicles covered by the hijacking statutes. Pub. Act 88-351, § 5, eff. August 13, 1993; *People v. Jamison*, 197 Ill. 2d 135, 159 (2001); *McGee*, 326 Ill. App. 3d at 169. The amended robbery statute now provides: "A person commits robbery when he or she takes property, *except a motor vehicle covered by section 18-3 [vehicular hijacking] or 18-4 [aggravated vehicular hijacking]*, from the person or presence of another by the use of force or by threatening the imminent use of force." (Emphasis added.) 720 ILCS 5/18-1(a) (West 2008). The vehicular hijacking statute contains similar language to the robbery statute and defines the offense as follows: "A person commits vehicular hijacking when he or she takes a motor vehicle from the person or immediate presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-3(a) (West 2006).

¶ 33 In enacting the vehicular hijacking statute, "[t]he intent of the legislature was to create a new offense when someone forcibly removes someone from their car, or otherwise forcibly dispossesses someone of their car." *People v. Cooksey*, 309 Ill. App. 3d 839, 848 (1999); see also *McGee*, 326 Ill. App. 3d at 170 ("the intent of the legislature in enacting vehicular hijacking was to protect against the forceful taking of a car from a victim while the victim is in the immediate vicinity of the car"). To effectuate this intent, the phrase "immediate presence" was

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included in the vehicular hijacking statute. Case law has made it clear that the "immediate presence" element required in vehicular hijacking statute is distinguishable from the "presence" requirement in the robbery statute. See, e.g., *McGee*, 326 Ill. App. 3d at 169-70; *Cooksey*, 309 Ill. App. 3d at 848. Notably, the "presence" element in the robbery statute has been interpreted "broadly" and courts have held that this element may be satisfied "even though the property taken was not on the victim's person or within the victim's immediate control at the time of the occurrence." *McGee*, 326 Ill. App. 3d at 170. In contrast, the "immediate presence" requirement in the vehicular hijacking statute has been strictly construed and reviewing courts have held that a vehicle must have been in the "immediate control" of the victim for the unauthorized taking of a car to constitute the offense of vehicular hijacking. See, e.g., *People v. Robinson*, 383 Ill. App. 3d 1065, 1071 (2008) (finding that the State failed to prove the defendant committed the offense of aggravated vehicular hijacking when he attacked the victim, took her car keys, and drove off in her vehicle because the victim was approximately "three houses away" from her parked car and was not in the immediate presence or control of her vehicle when it was taken); *McGee*, 326 Ill. App. 3d at 170 (finding that the defendant did not commit the offense of aggravated vehicular hijacking when he confronted the victim in her home, took her car keys, and drove off in the victim's car because the car had been parked in the victim's driveway and was not in her immediate presence); *Cooksey*, 309 Ill. App. 3d at 848 (reversing the defendant's conviction for vehicular hijacking where he accosted the victim as she was exiting a mall door and took her car keys and vehicle because the victim's car was parked approximately 25 feet from where the attack occurred and she did not have immediate control over her vehicle at that time the

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defendant took it).

¶ 34 Defendant suggests that the implementation of the vehicle hijacking statute and the amendment to the robbery statute effectively eliminated the offense of robbery of a motor vehicle. He argues that the unauthorized taking of a motor vehicle by force or threat of force can never constitute a robbery and that the robbery statute can only apply to the taking of "car-related property, like car keys and titles, or the contents of a vehicle" and not the car itself. We disagree. To interpret the robbery statute in the manner suggested by defendant, we would have to ignore the plain language of the relevant statutes and ignore the purpose underlying the statutes. The amendment to the robbery statute does not completely exempt all motor vehicles from the types of property covered by that enactment. Rather, as we set forth above, the statute in its amended form provides: "A person commits robbery when he or she takes property, *except a motor vehicle covered by section 18-3 [vehicular hijacking] or 18-4 [aggravated vehicular hijacking]*, from the person or presence of another by the use of force or by threatening the imminent use of force." (Emphasis added.) 720 ILCS 5/18-1(a) (West 2008). Accordingly, by the explicit terms of the amendment, the robbery statute only excludes vehicles that are covered by the vehicular hijacking statute. Thus, only vehicles that are taken from the victim's immediate presence and fall within the vehicular hijacking statute are exempt from the robbery statute. This interpretation of the robbery statute is bolstered by the fact that the stated purpose of the vehicular hijacking statute was to create a new offense, not eradicate a pre-existing offense. *Cooksey*, 309 Ill. App. 3d at 848. If we were to accept the interpretation suggested by defendant, there would be a loophole in the Illinois Criminal Code, as there would be no statute to cover

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scenarios where an offender takes a car and the car was not in the immediate presence of the owner at the time of the offense. We cannot conclude that the legislature would have intended such a result. Accordingly, where as here, there was no evidence that Santos was in the immediate presence of his car or that defendant forcibly removed him from the vehicle before defendant drove off in car, we reject defendant's contention that he was convicted of a non-offense.

¶ 35 In so finding, we are unpersuaded by defendant's reliance on our prior decision in *In re Ricardo A.*, 356 Ill. App. 3d 980 (2005). In that case, three juveniles were adjudicated delinquent after they were found guilty of committing several offenses including vehicular hijacking and armed robbery based upon their taking of the victim's car. On appeal, this court affirmed the delinquency finding of vehicular hijacking because there was sufficient evidence that the victim was within the immediate presence of his vehicle when it was taken. However, we reversed trial court's finding adjudging the minors' delinquent of armed robbery based on the taking of the victim's car explaining that "there is no such offense" where the vehicle is taken from the immediate presence of the owner. *Id.* at 993-94. Our opinion merely demonstrates that a defendant may not be convicted of both armed robbery and aggravated vehicular hijacking based on the taking of a victim's car; rather, the propriety of a conviction for robbery or vehicular hijacking depends upon whether or not the vehicle was taken from the immediate presence of the victim.

¶ 36 Having so found, we now address defendant's challenge to the sufficiency of the evidence. Defendant argues the "State did not meet its burden of proof because it failed to show

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that [defendant] either used force or threatened the imminent use of force when Santos handed [him] the keys to the [car]."

¶ 37 Due process requires the State to prove every element of a charge beyond a reasonable doubt. U.S. Const. Amend. XIV; Ill. Const. art. I, § 2; *People v. Lucas*, 231 Ill. 2d 169, 178 (2008). The use of force or the threat of force is a necessary element of the offenses of robbery and armed robbery. *People v. Lewis*, 165 Ill. 2d 305, 339 (1995); see also *People v. Hay*, 362 Ill. App. 3d 459, 465 (2005) ("The gravamen of the offense of robbery is the use of force or threat of imminent use of force"). " [T]he degree of force necessary to constitute robbery must be such that the power of the owner to retain his property is overcome, either by actual violence physically applied, or by putting him in such fear as to overpower his will." *People v. Merchant*, 361 Ill. App. 3d 69, 72 (2005), quoting *People v. Bowel*, 111 Ill. 2d 58, 63 (1986). The fact that the victim did not resist the defendant at the time of the taking, does not negate a robbery charge (*Lewis*, 165 Ill. 2d at 340); rather, " [t]he offense of robbery is complete when force or threat of force causes the victim to part with possession or custody of property against his will" (*Hay*, 362 Ill. App. 3d at 466, quoting *People v. Dennis*, 181 Ill. 2d 87, 102 (1998)).

¶ 38 Here, defendant was charged with the offense of aggravated armed robbery "in that he, knowingly took a car and keys, from the person or presence of Santos Rodriguez by the use of force or by threatening the imminent use of force \*\*\*." In finding defendant guilty of robbery the trial court stated, "weapons, if any, used I am not exactly clear about \*\*\* but I do believe that the car was taken and the car was taken by force." The mere fact that the court expressed reasonable doubt as to defendant's use of weapons did not preclude a finding that defendant used

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force and committed the lesser offense of robbery. Although defendant argues that "after the trial court rejected any use of weapons, there remained no evidence to establish force or the threat of force," we disagree.

¶ 39 Santos testified that defendant broke through a panel of the building's first-floor door and forced his way into his apartment. Defendant then began yelling at Santos and called him names. Although defendant did not hit his step-father, Santos testified that defendant kicked his mother before demanding the keys to Santos' vehicle. See, e.g., *Hay*, 362 Ill. App. 3d at 466 (finding the force or threat of force element was established where force was not applied to the victim's person but was used in the victim's presence); *People v. Ware*, 168 Ill. App. 3d 845, 846 (1988) (same). Santos further testified that he did not want to give defendant the keys to his vehicle, but that he did so because defendant's actions made him feel like he "didn't want to say no." Moreover, after defendant drove away in Santos' vehicle, Santos immediately contacted the police to report the incident. Although Maria provided a different account of the incident and testified that Santos freely gave defendant his keys and denied that defendant kicked her, the trial court ultimately rejected her account, stating: "I do believe that the car was taken and the car was taken by force." We reiterate that the trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence and a reviewing court should not substitute its judgment for that of the trier of fact. *Sutherland*, 223 Ill. 2d at 242; *Bannister*, 378 Ill. App. 3d at 39. Based on the record, even without the weapons, we find that there was sufficient evidence to allow a reasonable trier of fact to conclude that Santos did not part with his car keys or his car of his own

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free will, but did so because he was fearful of defendant. See *Bowel*, 111 Ill. 2d at 63 ("[T]he degree of force necessary to constitute robbery must be such that the power of the owner to retain his property is overcome, either by actual violence physically applied, *or by putting him in such fear as to overpower his will.*") (Emphasis added.); see also *Hay*, 362 Ill. App 3d at 465-66.

Accordingly, we find there was sufficient evidence presented at trial to sustain defendant's robbery conviction.

¶ 40 Defendant nonetheless suggests that we should reverse his robbery conviction because any force he did use was necessary to defend his mother. He argues that the State failed to disprove beyond a reasonable doubt that he acted in defense of his mother, and thus, his conviction must be reversed. The State responds that defendant did not properly raise this affirmative defense at trial, rather, he advanced a consent defense. Therefore, this argument is waived. Even if defendant had properly asserted this defense, the State nonetheless contends that defense of another is not an available affirmative defense to a defendant who commits a forcible felony like robbery.

¶ 41 Although the State is correct that defendant failed to raise this affirmative defense in pre-trial pleadings, we note that defense counsel did inform the trial court on the morning of trial that she had "raised a self defense and defense of others" affirmative defense. Therefore, while defense counsel primarily focused on the consent defense during the trial, we will nonetheless consider defendant's argument on appeal.

¶ 42 Defense of self and defense of others are affirmative defenses that are codified in Section 5/7-1 of the Criminal Code (720 ILCS 5/7-1 (West 2008)). That section, in pertinent part,

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provides: "(a) A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against another's imminent use of unlawful force." A defendant may assert these affirmative defenses in response to a charge involving conduct that would otherwise constitute a crime. *People v. McLennon*, 2011 IL App. (2d) 091299, ¶ 14. In such cases, the defendant admits to the crime, but denies responsibility for it. *McLennon*, 2011 IL App. (2d) 091299, ¶ 14; *People v. Brant*, 394 Ill. App. 3d 663, 671 (2009). Although section 5/7-1 does not limit the applicability of these affirmative defenses to specific offenses, they are generally reserved for crimes against the person, like murder or battery. *McLennon*, 2011 IL App. (2d) 091299, ¶ 14; *Brant*, 394 Ill. App. at 671. Moreover, this defense is not available to an aggressor who uses force before, during, or after the commission of a forcible felony, such as robbery. 720 ILCS 5/7-4(a) (West 2008); 720 ILCS 5/2-8 (West 2008). A defendant seeking to assert such a defense must establish that: unlawful force was threatened against him or the person he was defending; defendant was not the aggressor; defendant believed that the danger of harm was imminent; defendant's use of force was necessary to avert the danger; and the force used was appropriate. *People v. Shields*, 298 Ill. App. 3d 943, 947 (1998). A defendant must present some evidence to satisfy each element, and then the burden shifts to the State to prove beyond a reasonable doubt that defendant did not act in self-defense or in defense of another. *Id.*

¶ 43 Here, we find that the evidence does not support defendant's claim of self-defense or defense of another. There was a plethora of evidence presented at trial regarding defendant's dysfunctional family dynamic and Santos' past history of spousal abuse. At the time of the

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incident, however, although Maria initially testified that Santos took her to his apartment "by force" there was no evidence that he physically abused her or prevented her from leaving his residence any time thereafter. Similarly, there was no evidence that Santos was physically harmed defendant when he arrived at the apartment. Rather, the record reveals that defendant was the aggressor and thus, the affirmative defense was unavailable to him. 720 ILCS 5/7-4(a) (West 2008); 720 ILCS 5/2-8 (West 2008). Even if defendant believed that force was necessary, this affirmative defense nonetheless fails because the force defendant utilized in the commission of robbery was not justified or reasonable. *People v. Bell*, 191 Ill. App. 3d 877, 886 (1989); *People v. Negron*, 77 Ill. App. 3d 198, 206 (1979). Accordingly, for the forgoing reasons, we uphold defendant's robbery conviction.

#### ¶ 44 II. Sentencing

¶ 45 Finally, defendant disputes the sentence imposed by the trial court. He argues that the court erred in sentencing him as a Class X offender where his PSI report proffered by the State showed that one of the convictions used to support his Class X status was a California conviction under a different name. Because the facts that would qualify him for a Class X sentence were not proven beyond a reasonable doubt, defendant argues that his sentence must be vacated and the cause remanded for re-sentencing.

¶ 46 The State responds that defendant forfeited review of this claim where he failed to challenge his sentence in a post-sentencing motion. On the merits, the State observes that defendant did not receive a Class X sentence, rather he was sentenced as a Class 2 offender. Accordingly, notwithstanding the alleged ambiguity of defendant's California conviction, the

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State argues that remand for Class 2 sentencing is not warranted.

¶ 47 In order to properly preserve sentencing issues for appellate review, a defendant must first include any challenges to his sentence in a timely post-sentencing motion. 730 ILCS 5/5-4.5-50(d) (West 2008) (formerly 720 ILCS 5/5-8-1(c) (West 2006) ("A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of the sentence"); see also *People v. Heider*, 231 Ill. 2d 1, 15 (2008); *People v. Reed*, 177 Ill. 2d 389, 393 (1997).

¶ 48 Here, defendant failed to file any motion challenging his sentence, and thus we find that defendant has failed to properly preserve this issue for appeal. Notwithstanding forfeiture, defendant's challenge to his sentence is without merit. Although the State urged the trial court to impose a Class X sentence, no such sentence was imposed. Instead, defendant's mittimus clearly reflects that he was sentenced as a Class 2, not a Class X offender. Given that defendant did not receive a Class X sentence, we need not to address his constitutional challenge to the Class X sentencing statute; however, we observe that the use of PSI reports to impose enhanced sentences is acceptable as reviewing courts have consistently found that they are reliable and that their use accords with the United Supreme Court's ruling in *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). See, e.g., *People v. White*, 407 Ill. App. 3d 224, 237 (2011); *People v. Rivera*, 362 Ill. App. 3d 815, 821-22 (2005); *People v. Yancy*, 368 Ill. App. 3d 381, 393-94 (2005). Accordingly, defendant's sentence is affirmed.

¶ 49 CONCLUSION

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¶ 50 For the reasons explained herein, we affirm the judgment of the circuit court.

¶ 51 Affirmed.