

NOTICE
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2013 IL App (4th) 110876-U

NO. 4-11-0876

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 1, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
CALVIN SMITH,)	No. 00CF1349
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Where defendant failed to present a colorable claim of actual innocence, the trial court did not err in denying his motion for leave to file a successive postconviction petition and (2) where defendant's 31-year sentence for armed robbery violated the proportionate-penalties clause of the Illinois Constitution, remand is required for a new sentencing hearing.

¶ 2 In September 2001, a jury found defendant, Calvin Smith, guilty of first degree murder and armed robbery. In December 2001, the trial court sentenced him to a 55-year prison term for first degree murder to run consecutively to a 31-year prison term for armed robbery. Defendant later filed a *pro se* postconviction petition and a petition for relief from judgment, both of which were dismissed by the trial court. In September 2009, defendant filed a *pro se* motion for leave to file a successive postconviction petition, which the court denied. In November 2010, defendant filed a second *pro se* motion for leave to file a successive

postconviction based on newly discovered evidence. In September 2011, the trial court denied the motion.

¶ 3 On appeal, defendant argues (1) the trial court erred in denying him leave to file a successive postconviction petition and (2) the additional 25-year sentence for the offense of armed robbery during which he personally discharged a firearm causing the death to another person violated the proportionate-penalties clause of the Illinois Constitution. We affirm in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 On the night of November 8, 2000, while working as a cashier at the Main Street Convenience store in Bloomington, Mahendra Patel (Mike) received a gunshot wound to the left eye during a robbery and died from that injury. The police later arrested defendant in connection with Mike's death.

¶ 6 In November 2000, a grand jury indicted defendant on single counts of intentional, knowing, and felony murder under various subsections of section 9-1 of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1 (West 2000)). The grand jury also indicted defendant on single counts of armed robbery (720 ILCS 5/18-2(a)(4) (West 2000)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2000)). The State later nol-prossed the aggravated-battery indictment. Defendant pleaded not guilty.

¶ 7 In September 2001, defendant's jury trial commenced. As the parties are familiar with the facts of this case, we need only set forth the facts necessary to analyze the issues in this appeal. Bloomington police officer Tommy Lee Walters testified he arrived at the convenience store and observed an open cash register drawer and the victim lying on the floor. He recovered

a .22-caliber shell casing from the pool of the victim's blood. Walters also testified a gun was recovered in an area near the convenience store.

¶ 8 Chris Jacobson, a forensic scientist, testified defendant's fingerprint matched one found on the cash register insert. Jacobson was unable to recover any prints from the recovered gun. Linda Yborra, also a forensic scientist, testified the shell casing found at the scene was fired from the gun. The parties stipulated the blood on the \$113 recovered from defendant belonged to the victim.

¶ 9 Bloomington police detective Clay Wheeler testified he interviewed defendant on November 9, 2000, the day after the shooting. When defendant was asked if he had any money from the robbery, he reached into his pants pocket and placed some money on the table. He then reached into his sock, removed a wad of cash, and threw the cash on the table, stating it was "dirty money." The videotaped interview was played for the jury. Therein, defendant stated he believed the gun's safety mechanism was on when he entered the store with codefendants Robert Goodman and Marvin Alexis and that the gun accidentally discharged. They had only intended to rob the store.

¶ 10 Defendant testified on his own behalf. On November 8, 2000, defendant lived in an apartment in Bloomington. At about 1:30 p.m., Alexis and Goodman stopped by the apartment. According to defendant, Alexis and Goodman wanted to buy a quarter-pound of marijuana from him. The pair stated they would be back that night to pick up the marijuana.

¶ 11 At 9 p.m., Alexis and Goodman returned to defendant's apartment and sampled the marijuana. The pair did not purchase any and said they would return in five minutes. At around 9:30 p.m., they came back. Goodman appeared nervous and shook up. He stated he

wanted defendant to bring the marijuana to him in 5 to 10 minutes because Goodman wanted to make sure everything was "cool" at the house first. Defendant received between \$250 and \$260 from Goodman before he left.

¶ 12 Defendant and his cousin, Ethan Bailey, walked over to Goodman's apartment, with defendant concealing the marijuana in his waistband. As they approached, they noticed a lot of police. The police detained the two for about 10 minutes. Defendant returned to his apartment and hid the marijuana. He and Bailey then proceeded to the apartment of Samantha Turrentine and Jackie Zimmerman.

¶ 13 After about 10 minutes, defendant left with Turrentine and went to a gas station, where he spent over \$40 of the money he received from Goodman. They returned to Turrentine's apartment, where defendant played cards and threw dice. Defendant, along with Zimmerman and Bailey, left the apartment about 1 a.m. and went to a hotel. Defendant paid for the room, but Zimmerman signed for it. The three left the hotel about 1:30 p.m.

¶ 14 Upon returning to his apartment, defendant went over to Goodman's apartment. Defendant learned from Joseph Matthews that Goodman and Alexis had been arrested. Matthews blamed him for their arrest because they were walking to defendant's apartment to get the marijuana when they were arrested. According to defendant, Matthews told him he had to confess to the crime and threatened to kill him and his family. After his arrest, defendant admitted committing the crime when he learned he had been implicated because he did not have time to warn his mother about the threats. When asked how his fingerprint could have been found on the cash register drawer, defendant stated he owed Mike money for cigarettes and Mike told him on a particular occasion to put the money under the tray in the cash register.

¶ 15 On rebuttal, Joseph Matthews testified he talked to defendant on November 9, 2000, and defendant stated the murder was a mistake. Matthews also stated he did not threaten defendant or tell him to confess. On cross-examination, Matthews admitted he had a felony conviction.

¶ 16 Following closing arguments, the jury found defendant guilty of armed robbery and returned a general verdict of guilty for first degree murder. In October 2001, defendant filed a motion for a new trial, which the trial court denied. In December 2001, the court sentenced defendant to 55 years' imprisonment on one count of first degree murder (knowing) to run consecutively with 31 years' imprisonment for armed robbery. In January 2002, the court denied defendant's motion to reduce sentence.

¶ 17 On direct appeal, this court affirmed the trial court's judgment with the modification that defendant's knowing-murder conviction should be vacated, his intentional-murder conviction should be reinstated, and the cause remanded for resentencing on the intentional-murder conviction. *People v. Smith*, No. 4-02-0059 (May 20, 2004) (unpublished order under Supreme Court Rule 23). In January 2005, the trial court sentenced defendant to 55 years in prison for intentional first degree murder and a consecutive term of 31 years in prison for armed robbery.

¶ 18 In April 2007, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2006)). Defendant alleged, *inter alia*, (1) defense counsel was ineffective for failing to call Amy Klawitter as a defense witness; (2) defense counsel was ineffective for failing to call Ethan Bailey as an alibi witness; (3) newly discovered evidence in the form of an affidavit from Zachary Porter showed

he was innocent of the crime; and (4) he was denied a fair trial when the State withheld deoxyribonucleic-acid (DNA) evidence. In July 2007, the trial court dismissed the postconviction petition, finding it frivolous and patently without merit. This court affirmed the dismissal. *People v. Smith*, No. 4-07-0674 (July 23, 2008) (unpublished order under Supreme Court Rule 23).

¶ 19 In September 2007, while his appeal was pending, defendant filed a *pro se* motion seeking posttrial relief under section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2006)). Defendant attached an October 2004 motion to withdraw guilty plea filed by codefendant Marvin Alexis, wherein Alexis claimed he was actually innocent of first degree murder. Defendant argued that since codefendant originally implicated defendant and had since recanted, Alexis' original statement to police implicating defendant was a lie. Defendant claimed that, if he had this "newly discovered evidence" previously, he could have shown his innocence.

¶ 20 In May 2008, the trial court found defendant's motion was untimely because it was filed more than two years after the judgment of conviction. Further, the court found defendant did not plead any ground that would extend the two-year period under the Procedure Code.

¶ 21 On the merits, the trial court stated any claim by defendant that he confessed involuntarily was a matter that should have been raised on direct appeal or in a postconviction petition. In noting defendant's videotaped confession was played for the jury, the court stated as follows:

"If the defendant's claim is correct that Marvin Alexis gave false information to the police that resulted in his arrest, and the confes-

sion is voluntary, the [section] 2-1401 claim has no merit. However, there are no circumstances in the record that would indicate that the confession was involuntary. A review of State [e]xhibit No. 29 reveals that the defendant was more than willing to talk to the officers because he was upset with co[]defendant Marvin Alexis[,] who gave him the gun used in the murder[,] because defendant claims Mr. Alexis told him the safety was on. Therefore, the text of the confession consisted of defendant admitting that he shot and killed the victim but complaining that he was misinformed by his co[]defendant as to the status of the safety on the gun."

The court also noted the evidence showed the cash recovered from defendant after the murder contained bloodstains from the victim. The court concluded the evidence of defendant's guilt was overwhelming and found no merit in the motion. Accordingly, the court *sua sponte* entered judgment against defendant. This court affirmed the dismissal. *People v. Smith*, No. 4-08-0430 (Apr. 15, 2009) (unpublished order under Supreme Court Rule 23).

¶ 22 In September 2009, defendant filed a *pro se* motion for leave to file a successive postconviction petition, claiming he had newly discovered evidence of actual innocence. Attached to the motion was an affidavit from defendant's cousin, Ethan Bailey, who stated he was with defendant in their apartment at 10 p.m. on November 8, 2000, when the convenience store was robbed. Bailey stated he was reluctant to make the affidavit because of his fear of going through the interview process again, and he did not want to "suffer mistreatment" at the

hands of another lawyer who did not care about his cousin's innocence. In addition to the alleged alibi, defendant stated his second piece of newly discovered evidence was the claim the State withheld DNA evidence.

¶ 23 Defendant attached a *pro se* postconviction petition to the motion, alleging (1) trial counsel was ineffective for failing to call Bailey at trial; (2) the State withheld DNA evidence; (3) both trial and appellate counsel were ineffective for not raising the issue of the DNA testing; (4) the appellate court erred in finding the admission of defendant's statement was harmless error; and (5) trial counsel was ineffective in not telling the jury that Alexis and Goodman pleaded guilty.

¶ 24 In February 2010, the trial court denied the motion for leave to file a successive postconviction petition. The court found defendant had raised some of the issues in prior proceedings and the claims of actual innocence were not based upon any newly discovered evidence. This court granted the State Appellate Defender's motion for leave to withdraw and affirmed the trial court's judgment. *People v. Smith*, 2011 IL App (4th) 100167-U.

¶ 25 While his appeal was pending, defendant filed a second *pro se* motion for leave to file a successive postconviction petition in November 2010. In an attached postconviction petition, defendant claimed actual innocence based on newly discovered evidence in the form of an affidavit from Deryke Pfiefer. In the attached affidavit, Pfiefer claimed he had purchased marijuana from defendant at 10 p.m. on the night of the murder. On the way to defendant's apartment, Pfiefer stated he saw Robert Goodman and Marvin Alexis walk toward the convenience store. During the drug transaction, defendant declined Pfiefer's offer to attend a party because defendant was waiting for Goodman and Alexis to bring him some money. Pfiefer left.

While sitting at a red light near the convenience store, he saw Goodman and Alexis, who was holding a shotgun, inside the store. Once the light turned green, Pfiefer pulled away and saw Goodman and Alexis run from the store. Pfiefer then "went on about [his] night." The next day, Pfiefer returned to defendant's residence to tell him what he had witnessed. Pfiefer was unable to do so because defendant had been arrested. Pfiefer kept what he knew to himself because he did not want to put himself or his family in harm's way.

¶ 26 In September 2011, the trial court denied the motion for leave to file a successive postconviction petition. The court found the existence of Pfiefer as a potential witness did not constitute newly discovered evidence. The court stated defendant "offered no explanation as to how, with due diligence, he could not have developed or discovered the testimony of Deryke Pfiefer prior to trial." This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 A. Leave To File a Successive Postconviction Petition

¶ 29 In the case *sub judice*, defendant argues the trial court erred in denying his motion for leave to file his successive postconviction petition, claiming he presented a colorable claim of actual innocence based on the affidavit of Deryke Pfiefer. We disagree.

¶ 30 The Act "provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials." *People v. Taylor*, 237 Ill. 2d 356, 371-72, 930 N.E.2d 959, 969 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill.

2d 79, 83, 885 N.E.2d 1044, 1046 (2008). However, "issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100; see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002).

¶ 31 The Act "generally contemplates the filing of only one postconviction petition." *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009); *People v. Flores*, 153 Ill. 2d 264, 273, 606 N.E.2d 1078, 1083 (1992); see also 725 ILCS 5/122-1(f) (West 2008) (only one postconviction petition may be filed without leave of the court). "[A] ruling on an initial post[]conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Jones*, 191 Ill. 2d 194, 198, 730 N.E.2d 26, 29 (2000). The denial of a defendant's motion to file a successive postconviction petition is reviewed *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 32 The statutory bar to filing successive postconviction petitions, however, will be relaxed when fundamental fairness so requires. *Flores*, 153 Ill. 2d at 274, 606 N.E.2d at 1083.

"To establish that fundamental fairness requires that a successive postconviction petition be considered on the merits, the defendant must show both cause and prejudice with respect to each claim presented. See [*Pitsonbarger*], 205 Ill. 2d at 460-61[, 793 N.E.2d at 621-22]. 'For purposes of this test, "cause" is further defined as some objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding, and "prejudice" is defined as an error which so infected the entire trial that

the resulting conviction violates due process. *Flores*, 153 Ill. 2d at 279[, 606 N.E.2d at 1085].'" *People v. Lee*, 207 Ill. 2d 1, 5, 796 N.E.2d 1021, 1023 (2003) (quoting *Jones*, 191 Ill. 2d at 199, 730 N.E.2d at 29).

¶ 33 Even if a defendant is unable to show cause and prejudice, the failure to raise a claim in an earlier petition will be excused "if necessary to prevent a fundamental miscarriage of justice.'" *Ortiz*, 235 Ill. 2d at 329, 919 N.E.2d at 947 (quoting *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621). "In order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence." *People v. Edwards*, 2012 IL 111711, ¶ 23, 969 N.E.2d 829.

¶ 34 When a defendant is seeking leave to file a successive postconviction petition based on actual innocence, our supreme court has held "that leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24, 969 N.E.2d 829. Put another way, "leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Edwards*, 2012 IL 111711, ¶ 24, 969 N.E.2d 829 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

¶ 35 To support a claim of actual innocence, "the evidence in support of the claim must be newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.'" *Ortiz*, 235 Ill. 2d at 333, 919 N.E.2d at 950

(quoting *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004)). Newly discovered evidence has been defined as "evidence that was unavailable at trial and could not have been discovered sooner through due diligence." *People v. Harris*, 206 Ill. 2d 293, 301, 794 N.E.2d 181, 187 (2002). "Evidence is also not newly discovered when the evidence 'presents facts already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative.'" *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21, 964 N.E.2d 1139 (quoting *People v. Collier*, 387 Ill. App. 3d 630, 637, 900 N.E.2d 396, 403 (2008)). The burden is on the defendant to show no lack of due diligence on his part. *Snow*, 2012 IL App (4th) 110415, ¶ 21, 964 N.E.2d 1139.

¶ 36 In his second successive postconviction petition, defendant alleged Pfiefer's affidavit offered newly discovered evidence. In the affidavit, Pfiefer claimed he was on his way to defendant's apartment to buy drugs when he saw Goodman and Alexis approaching the convenience store. Once at defendant's apartment, Pfiefer told defendant he had just seen Goodman and Alexis by the store. After Pfiefer left with his marijuana, he claimed to have seen Goodman and Alexis committing the armed robbery before they ran out of the store. Pfiefer stated he came back the next day to tell defendant what he saw the night before, but defendant had already been arrested. He also claimed he did not come forward with his information until now because he feared for his safety and that of his family.

¶ 37 Pfiefer's affidavit did not constitute newly discovered evidence. The existence of Pfiefer as a potential witness, and the fact that he could testify to being with defendant at or around the time of the robbery, could have been discovered before trial. At trial, defendant mentioned he was in his apartment with Ethan Bailey, who filed an affidavit in conjunction with

defendant's first attempt at a successive postconviction petition. Defendant did not mention Pfiefer at trial, even though Pfiefer could have allegedly vouched for defendant's whereabouts at or near the time of the robbery, or that he sold drugs at his residence at the time of the robbery. Moreover, defendant would have had a compelling reason to have Pfiefer testify at trial even without knowing what Pfiefer observed after leaving defendant's residence. As Pfiefer's potential testimony could have been discovered sooner through the exercise of due diligence, it does not constitute newly discovered evidence. Accordingly, the trial court did not err in denying defendant's motion for leave to file a second successive postconviction petition.

¶ 38 B. Twenty-Five-Year Sentence Enhancement for Armed Robbery

¶ 39 Defendant argues the additional 25-year sentence enhancement for personally discharging a firearm that caused the death of another during the commission of an armed robbery violates the proportionate-penalties clause of the Illinois Constitution. We agree, and the State concedes the issue.

¶ 40 Article I, section 11, of the Illinois Constitution provides, in part, that "[a]ll penalties shall be determined *** according to the seriousness of the offense." Ill. Const. 1970, art. I, § 11. The proportionate-penalties clause will be found to have been violated where offenses with identical elements carry different penalties. *People v. Sharpe*, 216 Ill. 2d 481, 487, 839 N.E.2d 492, 498 (2005). A sentence that is in violation of the constitution "is void from its inception and subject to challenge at any time." *People v. Brown*, 225 Ill. 2d 188, 203, 866 N.E.2d 1163, 1172 (2007).

¶ 41 At the time defendant committed the offenses in this case, the armed-violence statute (720 ILCS 5/33A-2(c) (West 2000)) provided as follows:

"A person commits armed violence when he or she personally discharges a firearm that is a Category I or Category II weapon that proximately causes great bodily harm, permanent disability, or permanent disfigurement or death to another person while committing any felony defined by Illinois law, except first degree murder, attempted first degree murder, intentional homicide of an unborn child, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnaping, aggravated battery of a child, home invasion, armed robbery, or aggravated vehicular hijacking."

Also, the armed-robbery statute (720 ILCS 5/18-2(a)(4) (West 2000)) stated: "A person commits armed robbery when he or she [commits robbery]; and (4) he or she, during the commission of the offense, personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person."

¶ 42 A person found guilty of armed robbery under section 18-2(a)(4) was subject to a sentence of 6 to 30 years as a Class X felon (730 ILCS 5/5-8-1(a)(3) (West 2000)) plus an additional 25 years to natural life for personally discharging a firearm that proximately caused the death of another person. Thus, the sentence could range from 31 to 55 years. A person found guilty of armed violence predicated on robbery and personally discharging a firearm that proximately caused the death of another person faced a sentencing range of 25 to 40 years in prison. 720 ILCS 5/33A-3(b-10) (West 2000).

¶ 43 In *People v. Hauschild*, 226 Ill. 2d 63, 86, 871 N.E.2d 1, 14 (2007), our supreme

court found the elements of armed robbery with a firearm were identical to the elements of armed violence predicated on robbery and the use of a firearm. Although the armed-violence statute expressly excluded armed robbery as a predicate offense for armed violence, the statute did not exclude the offense of robbery. *Hauschild*, 226 Ill. 2d at 85, 871 N.E.2d at 13-14. Because robbery could serve as a predicate felony under the armed-violence statute, armed violence could be compared with armed robbery to determine whether these offenses have identical elements but disparate sentences. *Hauschild*, 226 Ill. 2d at 85, 871 N.E.2d at 13-14.

¶ 44 The supreme court noted the General Assembly, in 2000, amended the sentencing statute for armed robbery to allow for, above the 6- to 30-year sentencing range for a Class X felon, an additional 15-year sentence when the offender possessed a firearm. *Hauschild*, 226 Ill. 2d at 71-72, 871 N.E.2d at 6. Under the amended statute, a defendant faced a sentencing range of 21 to 45 years in prison for the offense of armed robbery while armed with a firearm, while a defendant convicted of armed violence predicated on robbery and the use of a firearm faced a sentence of 15 to 30 years. *Hauschild*, 226 Ill. 2d at 86, 871 N.E.2d at 14. The court held the 15-year statutory enhancement for armed robbery violated the proportionate-penalties clause because the penalty for armed robbery while armed with a firearm was more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or category II weapon. *Hauschild*, 226 Ill. 2d at 86-87, 871 N.E.2d at 14.

¶ 45 Although *Hauschild* did not compare the two offenses with the additional element of personally discharging a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person, the two statutes contain identical language concerning that element as well. Based on a comparison of the elements of the offenses

and their applicable sentencing ranges, we find the additional 25-year sentence imposed on defendant in this case violated the proportionate-penalties clause of the Illinois Constitution. Thus, defendant's 31-year sentence for armed robbery must be vacated.

¶ 46 Given the proportionate-penalties-clause violation, we must determine the remedy. In *Hauschild*, 226 Ill. 2d at 88-89, 871 N.E.2d at 15, the supreme court stated that "when an amended sentencing statute has been found to violate the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment." The applicable sentencing range for armed robbery is that of a Class X felon—6 to 30 years in prison. 720 ILCS 5/18-2(b) (West 1998). Accordingly, we remand the cause for resentencing on defendant's armed-robbery conviction with a range of 6 to 30 years in prison.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm in part, vacate in part, and remand with directions. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 49 Affirmed in part and vacated in part; cause remanded with directions.