FOURTH DIVISION
December 21, 2017
Modified upon Denial of Rehearing, March 22, 2018

No. 1-15-0208

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 2581 (03)
	)	
CORTEZ MOORE,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions and sentences affirmed. (1) Prosecutor's improper description of police officers as "superheroes" in opening statement was harmless error. (2) Evidence that defendant assisted accomplice in stripping victim was sufficient to find him accountable for accomplice's sexual assault of victim. (3) Illinois Pattern Jury Instruction 3.06-3.07 applies only to self-incriminating statements by defendant; harmless error to give instruction here, where no such statements were before jury. (4) Defendant did not definitively invoke, and was not improperly denied, right of self-representation. (5) Trial court made adequate preliminary *Krankel* inquiry, as defendant was allowed to fully explain factual basis of allegations of ineffective assistance. (6) Trial court did not improperly consider defendant's profession of innocence as aggravating factor at sentencing where court could reasonably find defendant's claims untruthful. (7) Defendant's sentence not unfairly disparate from codefendant's or excessive in light of criminal history and rehabilitative potential. (8) Remanded for corrections to mittimus.

¶ 2 Defendant Cortez Moore, along with Ned James, Rashawn Coleman, and Henry Sistrunk, broke into a south-side apartment around four o'clock in the morning on January 17, 2011. The men attacked two male occupants and bound them with duct tape; forced a female occupant, A.W., to undress at gunpoint; and herded everyone into the kitchen. While defendant, Sistrunk, and James ransacked the apartment in search of money or drugs—neither of which they found—Coleman stood guard over the occupants with a rifle and sexually assaulted A.W.

¶ 3 Defendant and his confederates were charged with home invasion, armed robbery with a firearm, and aggravated criminal sexual assault. Sistrunk died while awaiting trial. The other codefendants were convicted of all charges after simultaneous but severed trials—defendant and James by separate juries, and Coleman before the bench. Defendant was sentenced to an aggregate prison term of 80 years.

¶ 4 Defendant raises several issues on appeal. Briefly, he contends that: (1) the evidence was insufficient to prove him accountable for the sexual assault of A.W.; (2) the trial court erred in omitting the bracketed language in IPI 3.06-3.07 when instructing the jury; (3) the prosecutor committed misconduct during her opening statement; (4) the trial court improperly refused to allow defendant to represent himself in posttrial proceedings; (5) the trial court failed to conduct an adequate preliminary *Krankel* inquiry; (6) the trial court abused its sentencing discretion by imposing an excessive sentence and improperly considering defendant's profession of innocence; and (7) his mittimus contains errors.

¶ 5 Some of these issues are identical to, and others significantly overlap with, issues raised by James and Coleman in their own pending appeals. See *People v. James*, 2017 IL App (1st) 1143391; *People v. Coleman*, 2017 IL App (1st) 1143470-U. Here, we resolve these issues only

as they pertain to defendant. For the reasons we explain below, we correct defendant's mittimus, but otherwise affirm his convictions and sentences.

¶ 6 I. BACKGROUND

¶ 7 Believing they were robbing a drug house, defendant, Coleman, James, and Sistrunk broke into an apartment on South Wentworth Avenue in Chicago. The apartment was home to two couples and a baby: Maritza Morales, Khalil Cromwell Sr., and their eight-month-old son, Khalil Jr.; as well as A.W. and Isaac Andrews.

¶ 8 Morales, Andrews, and A.W. testified for the State, as did several responding police officers and forensics experts. None of the codefendants testified or presented any witnesses.

¶ 9 The State's theory was that the codefendants shared a common design to rob the victims of drugs and money, and that every act or threat of force by any of them—including Coleman's sexual assault of A.W.—was an act in furtherance of that common design. The State thus proceeded on accountability theories of guilt as to all charges. Defense counsel argued that defendant—who was arrested about a block away from the apartment, by officers who claimed to see him fleeing from the premises—was never in the victims' apartment at all. Rather, he heard a commotion outside as the police arrived, went to see what was going on, and was arrested nearby.

¶ 10 A. Victims' Testimony

¶ 11 Morales, Cromwell, and their baby stayed in the rear bedroom of the apartment, off the kitchen. Andrews and A.W. stayed in the front bedroom, off the living room. Morales testified that she awoke to a loud noise around 3:45 a.m. She roused Cromwell, who went to the kitchen to see what was happening. Morales peeked out of the bedroom door and saw Cromwell on the

kitchen floor. Two men in masks were beating him with their fists and kicking him in the face and back.

¶ 12 Morales hid in the bedroom closet with the baby. A man wearing a "scary Halloween mask" came into the bedroom and rummaged through the drawers. Codefendant James's DNA was found on the mask Morales identified. After the baby made a noise, the man opened the closet door, pulled Morales and the baby into the kitchen, and told Morales to sit on the floor and stare at the wall. She glanced at Cromwell: He was lying on his stomach, with his hands, feet, and face duct-taped; and there was blood around him on the floor. The men brought Andrews and A.W. into the kitchen and ordered them to get down on the floor. They duct-taped Andrews's hands, feet, and face. A.W. was naked.

¶ 13 Andrews and A.W. also woke up when they heard noise in the apartment. Andrews got out of bed and cracked open the bedroom door, where he was confronted by a man dressed all in black, brandishing a handgun, and wearing a "Halloween scream" mask. Andrews identified the same mask as Morales. According to Andrews, the man in the mask, and two others, who were also dressed in black, came into the bedroom. A.W. testified that she saw two men: a taller man wearing a mask; and a shorter, heavier man, who was not wearing a mask, and whom she identified as Coleman. One of the men, according to A.W., was pointing a "long wooden gun" (the exhibits depict what appears to be rifle) at Andrews.

¶ 14 The men—however many there were—ordered Andrews to get on the floor and keep his head down. A.W. tried, unsuccessfully, to hide under the covers. The men ordered her to get out of bed, take off her clothes, and lie down on the floor with Andrews. A.W. testified that both of the men she saw—Coleman and the taller man in the mask—told her to take off her clothes. A.W. removed her bra and pajama shorts. She testified that one of the men was pointing a gun at

her. Andrews testified that while A.W. was lying naked on the floor next to him, the men—Andrews could not be more specific, but he used the plural "they"—told A.W. to open her legs and said "fat as[s] pussy" or something like that.

¶ 15 The men asked where the "shit" or "white" was, and they threatened to drop a barbell on Andrews's head if he did not tell them. Andrews looked up, and one of them hit him in the face with a crowbar or tire iron. While Andrews was being attacked, A.W. was being taken to the kitchen. A.W. could not remember which of the men took her to the kitchen, but she testified that it was only one. Soon after that, Andrews was taken separately to the kitchen.

¶ 16 On cross-examination before defendant's jury, Andrews testified that the two men who "had him" both wore masks, and he identified a second "scream" mask, which the police recovered from Moore's pocket, as the other mask that he saw.

¶ 17 In the kitchen, Andrews and A.W. were told to lie down on the floor with Cromwell and Morales (who was holding Khalil Jr.). Andrews was duct-taped in the same fashion as Cromwell, and A.W. was still naked. The victims saw a total of four men, three of whom were masked: two of the masks were "Halloween" or "scream" masks of different varieties, and the third was a black ski mask. Morales, Andrews, and A.W. all identified the fourth man, whose face they said was visible, as Coleman.

¶ 18 The men repeatedly threatened to "cut" or "stab" the victims if they did not say where the money and the "stuff" or "white" was. Everyone understood the men to be asking for drugs, which the victims denied having. There was no evidence that any drugs, paraphernalia, or large sums of cash were ever found in the apartment. The men took the victims' wallets, phones, and video games instead.

¶ 19 While the others ransacked the apartment, Coleman stood guard over the victims in the kitchen with a rifle. A.W. testified that Coleman, whose voice she recognized, hovered over her while she was lying on her stomach. He smacked or grabbed her buttocks, and put his fingers into her vagina. A.W. testified that no one else touched her, but she acknowledged that in her handwritten statement, she had previously said that "the biggest man"—who, she said, was not Coleman—had grabbed her buttocks before Coleman walked over and digitally penetrated her several times.

¶ 20 Andrews testified that he saw one of the men bend over A.W. in the kitchen, but he could not see which man it was or what he was doing. He heard the man tell A.W. to spread her legs and say, "[t]hat's a big old fat pussy," or some such "little vulgar words towards her pussy." Andrews acknowledged that he did not mention this in his statement to the police.

¶ 21 Morales, who remained in the kitchen until the police arrived, did not testify that anyone touched A.W. or made vulgar comments about her.

¶ 22 Neighbors had called the police, who responded within 20 or 25 minutes of the intruders' initial entry. A.W. and Morales (along with Khalil Jr.) hid in a utility closet when they heard a police radio. Andrews testified that when the officers entered, Coleman was still in the kitchen; two of the men were in the front of the apartment, near his bedroom; and the fourth man, whom Andrews identified as James, ran into the bedroom adjoining the kitchen and pretended that he lived in the apartment.

¶ 23 B. Police Officers' Testimony

¶ 24 The first-responders were Officers Buckhalter and Randall (who testified), and Sergeant Cruz (who did not). Upon entering the apartment, Randall and Cruz went to the kitchen; Buckhalter went toward Andrews's bedroom. Officer Randall testified that when he entered the

kitchen, he saw a man in a mask holding a handgun and kicking one of the male victims. At Randall's command, the man—Coleman—took off the mask. He put the gun inside the mask, tossed those items into the adjoining bedroom, and was detained in the kitchen.

¶ 25 Randall ordered another man to come out of the adjoining bedroom. James walked into the kitchen and was detained there. Cromwell's ring and identification card were later recovered from his pocket.

¶ 26 Morales and A.W. emerged from the utility closet. A.W. hugged Officer Randall and said, "God is good."

¶ 27 Meanwhile, Officer Buckhalter had approached the front bedroom. There, she saw two men. One opened the bedroom door and said, "help, we are being robbed." The other was lurking in the dark. She told the men to come out, but they slammed the door. Buckhalter did not think it was safe to enter the bedroom until reinforcements arrived. When they did, the men were gone, and the window—the only other egress in the bedroom—was open.

¶ 28 Outside, several officers had pulled up along Wentworth Avenue and in the rear alley. The building was surrounded by vacant lots, and the officers saw only two men in the vicinity: Sistrunk and Moore. At first, Sistrunk was seen hanging from a window; he was later found crawling in a vacant lot, 20 or 30 feet from the building, with severe leg injuries.

¶ 29 Officers Powell, Polonio, and Calhoun were among those who chased and apprehended Moore. They testified, in sum, that Moore came running around the building onto Wentworth Avenue, headed north, turned into an empty lot, and slipped on a patch of ice. Officer Calhoun testified that Moore tossed a plastic bag while he was running; inside the bag were some number of smaller plastic bags. Calhoun's partner, Griggs, handcuffed Moore after he slipped and patted him down. Griggs removed a "scream" mask, a neck wrap, and A.W.'s wallet from Moore's

front pocket. Morales, Andrews, and A.W. identified that mask as having been worn by one of the intruders.

¶ 30 C. Forensic Evidence

¶ 31 Several items recovered from the apartment were examined for forensic evidence by the Illinois State Police.

¶ 32 A rubber mask was recovered from the bedroom adjoining the kitchen. It contained two DNA profiles. The major profile matched James, and the other codefendants were excluded from the minor profile.

¶ 33 A ski mask was recovered from the same bedroom. It contained a DNA mixture from at least three people. Coleman could not be excluded from the major profile, but the other codefendants were.

¶ 34 The mask recovered from defendant's pocket contained a mixture of three DNA profiles, from which all four codefendants were excluded. Defendant's DNA was found on the black neck fleece that was also recovered from his pocket.

¶ 35 Officer Buckhalter found a rifle just outside the front bedroom. A handgun was recovered from the floor of the rear bedroom, right next to the black ski mask. A knife with reddish stains was found on the kitchen floor. No latent fingerprints suitable for comparison were found on any of these items. DNA profiles found on the knife excluded all four codefendants.

¶ 36 DNA recovered from the edge of a roll of duct tape excluded all four codefendants but matched Cromwell. The DNA recovered from the crow bar or tire iron was insufficient to make a comparison.

¶ 37 D. Jury deliberations and verdicts

¶ 38 During deliberations, the jury sent two notes to the trial judge. The first asked, "Can we convict on a witness' testimony alone or do we need physical evidence to charge the offender with aggravated criminal sexual assault?" The judge responded, without objection, "You have all the evidence. Please continue to deliberate." The second note said, "We are unable to make a decision unanimously on one of the charges. What is our choice in this matter?" The judge answered, again without objection, "Please continue to deliberate until you reach a verdict on all counts." The jury returned its verdicts shortly thereafter.

¶ 39 The jury found defendant guilty on five counts of home invasion (one count against each of the apartment's occupants), two counts of armed robbery (against Cromwell and A.W.), and one count of aggravated criminal sexual assault.

¶ 40 The trial court sentenced defendant to an aggregate term of 80 years in prison: 25 years for home invasion, plus a 15-year firearm enhancement; a concurrent term of 25 years for armed robbery, plus a 15-year firearm enhancement; and a consecutive term of 25 years for aggravated criminal sexual assault, plus a 15-year firearm enhancement.

¶ 41 II. ANALYSIS

¶ 42 A. Prosecutor's Opening Statement

¶ 43 Defendant first claims that improper remarks in the prosecutor's opening statement deprived him of a fair trial. The prosecutor began by telling the jury a bit about Khalil Jr. (For now, we will simply call him Khalil.) Khalil was four years old at the time of trial, and like most boys his age, he loved superheroes. Nowadays, they would come to him "though his imagination or through animation," but when he was eight months old, "he met a couple really heroes. Real live heroes. On January 17, 2011, those real life heroes were Chicago Police Officer[s]." And "just as real as those heroes," the prosecutor continued, was the "nightmare" that Khalil and the

other victims lived through. After summarizing the charged offenses, and the officers' actions upon arriving at the scene, the prosecutor informed the jury that "you will get to meet Khalil Cromwell Jr.['s] super heroes. You will hear from the police."

¶ 44 Defendant argues that these remarks were calculated to elicit unfair sympathy for Khalil and Morales, and to bolster the credibility of the testifying officers. We agree that these remarks were improper. In light of the strong evidence of defendant's guilt, however, we are confident those limited improprieties did not affect the jury's verdicts.

¶ 45 The purpose of an opening statement is to give the jury a brief and general introduction to the factual issues in dispute and what each party expects the evidence to prove. *People v. Kliner*, 185 Ill. 2d 81, 127 (1998); *People v. Jones*, 2016 IL App (1st) 141008, ¶ 22. The parties do not enjoy the same "wide latitude" in commenting on the case as they do in closing arguments. *Id.* Comments that are inflammatory, irrelevant to the question of guilt, or that tend to bolster a witness's credibility, are improper. *People v. Richmond*, 341 Ill. App. 3d 39, 47 (1st Dist. 2003); *People v. Fluker*, 318 Ill. App. 3d 193, 203 (1st Dist. 2000). Improper comments require a new trial only if "the jury could have reached a contrary verdict" in their absence, or in other words, if "the reviewing court cannot say that [they] did not contribute to the defendant's conviction." *Jones*, 2016 IL App (1st) 141008, ¶ 23 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007)). Our review is *de novo*. *Id*.

¶ 46 We begin with Khalil, and the preschooler's interest in superheroes that he had acquired in the years since the incident. There was no legitimate reason to broach this topic, much less for the prosecutor to begin her initial address to the jury on this note, because it was obviously irrelevant to the question of guilt, did not orient the jury to any factual issue that would be in dispute, and did not preview for the jury any of the evidence the State expected to elicit. (As

defendant notes and the State concedes, Khalil's interest in superheroes was never proven up at trial, and that was surely because it was irrelevant.) In this limited sense, then, Khalil's fondness for superheroes was an inappropriate topic for the prosecutor's opening statement.

¶ 47 But defendant goes too far when he argues that "[t]here was no reason to mention" Khalil at all in the State's opening—except, that is, to appeal to the jury's sympathies. We cannot agree that the mere mention of Khalil is proof that the prosecutor was unfairly playing to the jury's emotions. Khalil was a victim of the home invasion—even if, as defendant says, he was not physically injured and was too young at the time to remember anything—and that alone was a good reason to mention him in the opening statement. His young age (or more precisely, that he was under twelve) was fair game too; it was alleged in the indictment as a sentencing aggravator, which had to be found by the jury beyond a reasonable doubt. See 725 ILCS 5/111-3(c-5); *People v. Nitz*, 219 Ill. 2d 400, 409 (2006). Thus, Khalil was a perfectly legitimate subject of discussion—to a point—in opening statement.

¶ 48 It bears emphasis that even a clinical and dispassionate description of events that placed a mother and her baby in the path of extreme violence would itself elicit some sympathy—or ire—from a jury. The State was not required to excise Khalil (or Morales) from its overview of the case to avoid eliciting some such response during its opening statement. The question, rather, is whether the prosecutor "dwelled" on Khalil at undue length, or in ways calculated to appeal *unfairly* to the jury's sympathies. See, *e.g.*, *People v. Thomas*, 137 Ill. 2d 500, 525 (1990).

¶ 49 Our answer, in both respects, is no. For one thing, the prosecutor's digression into Khalil's interest in superheroes was brief; the State's opening, as a whole, mostly comprised an overview of the charged offenses and the testimony the State expected to elicit. Defendant's claim that the State's opening "focused" on Khalil is at best an overstatement.

¶ 50 Moreover, defendant does not identify, and we do not discern, any specific way in which the prosecutor's remarks were likely to elicit undue sympathy toward either Khalil or Morales. In previewing the case to come, the prosecutor was surely permitted to inform (and did inform) the jury that the men dragged Morales out of a closet, where she was hiding with baby Khalil; unleashed a torrent of violence against everyone else in the apartment, including Khalil's father, while Morales clung to a screaming Khalil on the kitchen floor; and threatened to kill Morales and Khalil if they did not "shut up." These facts themselves, as we noted above, would likely have a strong emotional pull with any jury. As far as engendering sympathy is concerned, Khalil's later-acquired interest in superheroes adds little—perhaps nothing—to a brief recitation of the facts of the case.

¶ 51 In short, the prosecutor's opening gambit was not calculated, or otherwise apt, to elicit an unfairly sympathetic reaction from the jury. Rather, its obvious purpose was to provide a foil for introducing the "superhero" theme that the prosecutor would use to extol the testifying officers. We turn now to that issue.

¶ 52 As we have noted, the prosecutor's opening statement described the responding officers, several of whom testified, as "real life *** super heroes." This was not the first time a prosecutor has drawn this comparison in front of a jury. In *People v. Rivera*, 235 Ill. App. 3d 536 (1st Dist. 1992), we held that similar remarks in closing argument were improper. *Id.* at 540-41. We agree with defendant that the comparison was improper here too.

¶ 53 In *Rivera*, the prosecutor began a protracted speech extolling Chicago police officers by asking the jury to reflect on the "perception" of them "in our community." *Id.* at 540. The prosecutor then argued that "growing up as little kids," everybody thinks that police officers are "running around with little superman outfits under their uniforms." *Id.* Everyone "looks up to

police officers" as "heroes" and "wants to be a police officer" when he or she grows up. *Id.* The prosecutor offered to explain why: The police officer is "the same guy" who "resuscitates the elderly victim"; who "goes out in the alley *** we wouldn't be caught in"; who "gets shot at"; who "has to go into Cabrini Green when there is a family disturbance," or to "the South Side and confront the people in the car, a car whose occupants he cannot see clearly at night." *Id.* at 540-41. And so, the prosecutor concluded, perhaps their "image" has been "tarnished" by "what you see in the news each night, what you read in the paper each day," but "[i]t's only your perception that has changed. Maybe they do have a big S on their chest. Perhaps." *Id.* at 541.

¶ 54 In substance, the prosecutor's remarks in this case were very similar to those in *Rivera*. The State says that the prosecutor's description of the officers as superheroes was meant, in the first instance, to convey that they acted bravely in confronting a dangerous situation. We agree. But we would add that the same was true in *Rivera*, where the prosecutor's speech extolling the police emphasized the courageous acts they routinely perform for the benefit of others. See *id.* at 540-41.

¶ 55 We agree with the State that the prosecutor's "superhero" remarks were not directed to specifically assuring the jury that it could take their testimony as trustworthy. Notably, in *Rivera*, we distinguished the superhero comparison from the prosecutor's separate remark that a State's witness (who testified by way of stipulation) was a retired police officer who stood to lose his pension if he got caught lying under oath. *Id.* at 540. That remark spoke directly to the officer's alleged truthfulness and thus to the believability of his testimony; the superhero comparison did not. See *id.*

¶ 56 Yet we agreed with Rivera that the superhero comparison was an improper commentary on "the police officers' credibility in general." *Id*. We did not elaborate on this point, but our

meaning should be obvious enough: The superhero comparison portrayed the officers as exemplary individuals who had earned a special solicitude and deference from others. And when those same officers appear as witnesses for the State, this deferential attitude can translate, all too easily, into uncritically accepting their testimony, or giving it more weight than it merits—even when the prosecutor has not offered any specific, improper assurances about their truthfulness. The prosecutor's remarks in this case carry the same improper implication.

¶ 57 As both parties note, the prosecutor in *Rivera* extolled police officers generally, whereas the prosecutor in this case commented on the actions of the specific officers who would testify. But the prosecutor's comments in *Rivera* about the "credibility" of police officers at large were surely meant to apply—and the jury would surely understand them to apply—to the officers who testified in that case. We think this is a distinction without a difference, and we see no need to further address the parties' arguments about which way it supposedly cuts.

¶ 58 Whether or not the prosecutor specifically intended to bolster the officers' credibility in the minds of the jurors by likening them to superheroes, the comparison carried a significant risk of doing precisely that. And while the prosecutor's development of the superhero theme was relatively cursory compared to its treatment in *Rivera*, the comparison in this case was made in an opening statement, as opposed to a closing argument, and therefore risked coloring the jury's perceptions even before the officers testified. That, of course, is why the parties are not permitted to *argue*—about the credibility of their witnesses or anything else—in their opening statements. See, *e.g.*, *Jones*, 2016 IL App (1st) 141008, ¶ 22. For these reasons, the prosecutor's comparison of the officers to superheroes was inappropriate.

¶ 59 Having found these remarks improper, we must now determine whether they might have affected the jury's verdicts and therefore denied defendant a fair trial. With respect to the charge

of aggravated criminal sexual assault, we readily answer no, since the officers did not provide any testimony relevant to that charge. With respect to the charges of home invasion and armed robbery, the officers testified that they saw defendant fleeing from the premises; apprehended him almost immediately; and found A.W.'s wallet, and a "scream" mask that the victims identified, in his pocket. It is fair to say, in short, that defendant was caught red-handed. Less so, perhaps, than his confederates—when the police arrived, Sistrunk was dangling from an apartment window, James was trying to hide in Morales's bedroom, and Coleman was still beating Cromwell in the kitchen—but red-handed nonetheless. Given the compelling inference of guilt the evidence supported, we cannot conclude that the improper remarks might have affected the jury's verdicts.

¶ 60 Because the State's case was based primarily on the testimony of the officers who chased and apprehended defendant—Officers Powell, Polonio, and Calhoun—the crucial question, more specifically, is whether the jury might have found their testimony incredible if the prosecutor had not improperly likened the responding officers, as a group, to superheroes.

¶ 61 The key points in the officers' testimony are these: that defendant was seen fleeing the premises; and was caught, more or less immediately, with a "scream" mask and A.W.'s wallet in his pocket. To reject that testimony as incredible is to conclude—as defense counsel argued to the jury—that the officers grabbed defendant off the street and planted the mask and wallet on him because the "real" fourth offender had already eluded them. Defendant has not identified, and we have not found, any reason why the jury might have doubted the officers' testimony on these points. The officers testified clearly and consistently; their account of events was not inherently implausible; and there was no competing evidence that contradicted their account. Because their credibility was never seriously called into question, we are confident that the jury

would have believed their account of defendant's flight and arrest with or without the prosecutor's improper remarks.

¶ 62 Defendant argues that Powell, Polonio, and Calhoun testified inconsistently because they did not mention seeing each other at various points in the pursuit. First, Powell testified that he pursued defendant in front of the apartment building, but Polonio did not see Powell when he joined the pursuit in that general area. Second, Calhoun—who, with her partner, Griggs, initially pursued defendant in a squadrol and ultimately apprehended him on foot—did not testify that she saw Polonio either pursue defendant northbound on Wentworth Avenue or catch up to her and Griggs after they apprehended defendant.

¶ 63 These points do not cast any significant doubt on the key evidence of guilt conveyed in the officers' testimony. At most, they may qualify as impeachments by omission regarding minor details of the pursuit. But it would not be surprising, or a serious blow to the officers' credibility, if they were just not aware of each other's locations throughout a real-time pursuit of a fleeing suspect; they may have focused their attention on defendant instead. Indeed, Polonio testified that when he pursued defendant up Wentworth Avenue, there were no other officers on foot *between* them; beyond that, he did not know whether other officers were also pursuing defendant on foot because he was focused on defendant. Similarly, Calhoun testified that she remained focused on defendant as she pursued him up Wentworth Avenue in the squadrol with Griggs. Further, Polonio never testified that he assisted in defendant's arrest or pat-down. Rather, when he caught up to Calhoun and Griggs, they already had defendant on the ground; seeing that defendant was secured, Polonio walked back to the apartment building. In these circumstances, Calhoun may not have noticed Polonio at all; and even if she had, there was no reason for her to convey that irrelevant fact to the jury.

¶ 64 In sum, the officers' failures to see, or mention seeing, each other at various points in the pursuit do not provide any plausible reasons to discredit their testimony or reject the evidence of guilt their testimony provided. Thus, we cannot conclude that, without the prosecutor's improper remarks, the jury might have disbelieved the officers and acquitted defendant.

¶ 65 Lastly, defendant flatly asserts that the State "relied on" its "bolstering" tactics in trying to "explain away" the (alleged) inconsistencies in the officers' testimony. Defendant does not support this assertion with any record citations, but we suppose such explanations would have to be offered in closing, or perhaps rebuttal, argument. Our review of the State's arguments to the jury, however, has revealed no such explanations, and no reprise at all of the improper superhero comparison. We agree with the State that those remarks were confined to its opening statement.

¶ 66 We therefore conclude that the prosecutor's opening statement, while improper in some respects, did not deprive defendant of a fair trial.

¶ 67 B. Sufficiency of the Evidence

¶ 68 Defendant next challenges the sufficiency of the evidence to sustain his conviction for aggravated criminal sexual assault. Since A.W. identified Coleman as the man who inserted his fingers into her vagina, the only question is whether defendant was accountable for Coleman's offense.

¶ 69 In reviewing a conviction based on a theory of accountability, we ask whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt. *People v. Fernandez*, 2014 IL 115527, ¶ 13; see *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The trier of fact's findings on witness credibility, and the reasonable inferences to be drawn from the evidence—including inferences about a defendant's intent—are entitled to significant deference, but they are not

conclusive. *People v. Ross*, 229 Ill. 2d 255, 272 (2008); *People v. Perez*, 189 Ill. 2d 254, 266 (2000); *People v. Calderon*, 393 Ill. App. 3d 1, 7 (1st Dist. 2009).

¶ 70 A person commits aggravated criminal sexual assault when he knowingly commits an act of sexual penetration by the use or threat of force, while armed with a firearm. 720 ILCS 5/12-14(a)(8) (West 2010).

¶ 71 A person is accountable for another's criminal conduct when, "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2010). To prove that the defendant intended to promote or facilitate the crime, the State must prove beyond a reasonable doubt either: (1) that the defendant shared the principal's criminal intent; or (2) that there was a common criminal design. *Perez*, 189 Ill. 2d at 266.

¶ 72 At trial and on appeal, the State has relied on a common-design theory of accountability. Any party to a "common design or agreement" to commit an offense is accountable for any other party's "acts in furtherance of" the design or agreement to commit that offense. 720 ILCS 5/5-2(c) (West 2010); *Fernandez*, 2014 IL 115527, ¶ 13.

¶ 73 Specifically, the State argues that Coleman's sexual assault of A.W. was an act in furtherance of a common design to rob the victims, because it was just one among many acts of violence meant to coerce them into giving up their (supposed) money and drugs. If the State's theory is right, then all of Coleman's confederates in that undisputed plan are necessarily accountable for the sexual assault, too.

¶ 74 Defendant concedes that he shared a common design with his codefendants to rob the victims, but he contends that the sexual assault was not part of, or an act in furtherance of, that

design. Thus, he argues, he cannot be held accountable for Coleman's "independent" offense on a common-design theory.

¶ 75 For the reasons we will discuss below, we agree with defendant's argument but hold that defendant was properly convicted of aggravated criminal sexual assault based on a different theory of accountability than that argued by the State on appeal. While we agree with defendant that the evidence did not show that the sexual assault was in furtherance of the common design *to rob the occupants*, the evidence did show that the sexual assault was undertaken as part of a second, independent common criminal design to *sexually assault A.W.*, in which defendant actively participated. Defendant was thus properly convicted of aggravated criminal sexual assault based on accountability.

¶ 76 First, we agree with defendant that the evidence, taken in the light most favorable to the State, did not show that the sexual violence here was part of a common criminal design to rob the victims. While it was undoubtedly a criminal act, the evidence does not show that it was undertaken to further the original plan to rob the occupants.

¶ 77 No doubt, defendant and his accomplices used various methods of coercion to induce the occupants of the house to tell them where the (supposed) money and drugs were located, such as repeated threats to stab everyone or to drop a barbell on Andrew's head. And sexual violence, like any other form of violence, can certainly be used for coercive purposes. But there was no evidence that the sexual assault here was used for coercive reasons. The sexual assault was accompanied by lewd comments, but not by requests for information about the whereabouts of drugs or money or threats or warnings associated with the goals of the robbery.

¶ 78 And while we also acknowledge that stripping someone of their clothes could be used to further the commission of a robbery, to render a victim defenseless or less likely to flee, there

was no evidence suggesting that the men disrobed A.W. for that reason. The men did not disrobe anyone else, nor did they sexually assault or even threaten to sexually assault anyone else.

¶ 79 There was simply no evidence that this sexual assault was part of any original plan to commit the robbery, or that it did anything to further the robbery. The evidence showed, instead, that the men's entire course of conduct with A.W.—from stripping her, forcing her to spread her legs and ogling her and making lewd comments about her genitalia, to Coleman's sexual penetration—was an act of sexual violence and degradation unrelated to any initial plan to rob the occupants.

¶ 80 But that does not mean that defendant can wash his hands of this sexual assault. It only means that the sexual violence was not part of the *original* criminal design to commit the robbery. Even if it had nothing to do with the robbery, the sexual violence was an independent crime, and defendant can be just as accountable for that crime as he can for any other offense, provided the elements of the accountability statute are met. And here, we find sufficient evidence for the jury to conclude that defendant shared a separate common criminal design with Coleman to sexually assault A.W. To paraphrase the accountability statute, "before *** the commission of" the sexual assault, "and with the intent to promote or facilitate such commission," defendant "aid[ed] or abet[ted]" Coleman "in the planning or commission of" that sexual assault. 720 ILCS 5/5-2(c) (West 2010).

¶ 81 Taking the evidence in the light most favorable to the State, it is reasonable to infer that defendant was one of the men who barged into A.W.'s bedroom. Andrews saw a total of three men in the room, though A.W. only saw two. A.W. identified the unmasked Coleman as one of them. She testified that one of the men (she was not sure which one) took her to the kitchen while Andrews was still in the bedroom. Andrews testified that the other men—the two who

"had him"—both wore Halloween "scream" masks. One of those masks had James's DNA on it, so it is reasonable to infer that James was one of those two men. See *People v. James*, 2017 IL App (1st) 143391, ¶ 53. The only other "scream" mask, and the only other mask Andrews identified (there were a total of three masks in evidence) was the mask found in defendant's pocket when he was arrested down the street from the apartment building. Thus, it is reasonable to infer that defendant was the other masked man in the bedroom.

¶ 82 In the bedroom, the men found A.W. hiding under the covers, wearing only a bra and pajama shorts. Two of the men brandished guns: the man who confronted Andrews at the bedroom door had a handgun, and someone else had a rifle. Some of the men dragged A.W. out of bed. She noticed one of the men pointing a gun at her, and two of the men—Coleman and a taller, masked man—ordered her to strip naked.

¶ 83 In so doing, the men in the bedroom—defendant included—initiated a course of conduct that culminated in the sexual assault of A.W. in the kitchen. Their preliminary act of forcibly undressing A.W., in particular, facilitated that offense by rendering her vulnerable to Coleman's later act of penetration. And there is no doubt that all of the men in that room contributed to the overall show of force that was used to strip A.W. naked. Thus, regardless of whether defendant actually pointed his gun at A.W., or whether he was one of the men who ordered her to undress, his conduct aided Coleman in forcibly undressing and, in turn, sexually assaulting, her.

¶ 84 That establishes defendant's act of aiding in the commission of the sexual assault. As for doing so with the requisite intent to facilitate the commission of the sexual assault, a common purpose or design sufficient for accountability may be inferred from the circumstances of a defendant's conduct. *People v. Cooper*, 194 Ill.2d 419, 435 (2000); see *Calderon*, 393 Ill. App. 3d at 7 (intent generally proven by "inferences drawn from conduct appraised in its factual

environment"). Evidence that a defendant "voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another." *Cooper*, 194 Ill.2d at 435. The jury could have rationally concluded that defendant, in helping forcibly strip A.W. of her clothes, did so with the common purpose of committing a sexual assault.

¶ 85 In other words, a reasonable jury could find that a spontaneous common design to sexually assault A.W. emerged in her bedroom, and that defendant was a part of it. See *Cooper,* 194 Ill. 2d at 435 (common design need not be planned in advance and may emerge from "spontaneous acts of the group"). He is therefore accountable for the act, committed by Coleman, that consummated the design.

¶ 86 In both *People v. Tyler*, 78 Ill. 2d 193, 195-96 (1980), and *People v. Jones*, 184 Ill App. 3d 412, 431-32 (1st Dist. 1989), the defendant was accountable for a sexual assault committed by a codefendant in the course of a robbery they were committing together. Neither reviewing court suggested that the sexual assault was an act in furtherance of the *robbery*; rather, the convictions were both affirmed on the ground that the defendant was aware of the sexual assault as it was happening, failed to dissociate himself from it, and indeed, assisted the codefendant by keeping a lookout. *Tyler*, 78 Ill. 2d at 197; *Jones*, 184 Ill. App. 3d at 431-32.

¶ 87 Our holding is exactly in line with those cases, and indeed presents, if anything, a stronger case for accountability, as here, defendant played an affirmative role in assisting with the sexual assault. As we have explained, it is reasonable to infer that when defendant assisted Coleman in forcibly undressing A.W., he understood that she had been singled out as a sexual target. In this sense, defendant "knew perfectly well what was happening." See *Tyler*, 75 Ill. 2d at 197. And far from dissociating himself from the conduct that ultimately led to her sexual

assault, he took an active part in it and thus facilitated the offense. In these circumstances, it is immaterial whether defendant was aware that Coleman, at that very moment, was following through on the intentions that had become evident in A.W.'s bedroom. By then, defendant had already facilitated, and was already accountable for, Coleman's offense.

¶ 88 It is of no import that the theory of accountability on which we affirm defendant's conviction is not the one the State urges on appeal. We are not bound by a party's particular argument or concession on appeal. *People v. Horrell*, 235 Ill. 2d 235, 241 (2009). We review the judgment below—the conviction for aggravated criminal sexual assault—and ask whether a properly-instructed jury could have rationally found defendant guilty beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007); *Jackson v. Virginia*, 443 U.S. 307, 318 (1979).

¶ 89 Here, the jury received IPI 5.03, the general instruction on the law of accountability, and there is no element of our analysis that was not conveyed to the jury by that instruction. And while the State's closing argument at trial was not altogether consistent, at times suggesting that the sexual assault was an act in furtherance of the robbery, the State certainly argued to the jury, as well, that the men were accountable for Coleman's sexual assault of A.W. because they actively participated in it, noting that the men "busted into her room together. They held her up at gunpoint together. They forced her to take off her clothes together." That is precisely the evidentiary basis on which we affirm defendant's conviction for aggravated criminal sexual assault. The jury was not required to accept any particular theory of the prosecution. As long as it was properly instructed (it was), and the evidence, taken in the light most favorable to the State, supports its verdict (it does), we will affirm that judgment. We do so here.

¶ 90 C. Illinois Pattern Jury Instruction 3.06-3.07

¶ 91 Defendant contends that the trial court erred in omitting the following bracketed language from Illinois Pattern Jury Instruction (IPI) 3.06-3.07:

> You have before you evidence that the defendant made statements relating to the offenses charged in the indictment. It is for you to determine [whether the defendant made the statements, and, if so,] what weight should be given to the statement [*sic*]. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made.

IPI Criminal 4th 3.06-3.07. That bracketed language should be omitted only when the defendant admits that he made the statements at issue. *Id.*, Committee Note; *People v. Richmond*, 341 Ill. App. 3d 39, 51 (1st Dist. 2003). Here, the instruction was based on the codefendants' repeated threats to kill or stab the victims, and the various commands (*e.g.*, to give up their money and drugs; to stay on the floor; or in A.W.'s case, to spread her legs) that they directed at the victims in the course of the offenses. Defendant did not admit that he made any of these "statements," and they could not be attributed to him with certainty, since the intruders were mostly masked and the victims were not sure who said what. Thus, defendant argues, the jury should have been instructed that it was free to decide for itself whether he made any of these "statements" in the first place.

¶ 92 We affirm. We hold that the threats and commands on which the instruction was based were not "statements" within the meaning of IPI 3.06-3.07. Because the instruction does not apply to those utterances (as we will continue to call them), we reject defendant's argument that the jury should have been given the instruction with the bracketed language included. Instead, we hold that it was error for the trial court to give this instruction at all. Defendant has forfeited that error, but in any event, it was harmless.

¶ 93 1. Interpretation of IPI 3.06-3.07

¶ 94 Our first task is to interpret the meaning of the phrase "statements relating to the offenses charged" in IPI 3.06-3.07. The meaning of a word or phrase used in a jury instruction presents a question of law. *People v. McBride*, 2012 IL App (1st) 100375, ¶ 51. Our review is therefore *de novo*. See *In re A.A.*, 2015 IL 11860543, ¶ 21.

¶ 95 When we interpret a statute, we begin with the plain and ordinary meaning of the words used. *People v. Bywater*, 223 Ill. 2d 477, 481 (2006). In particular, we give an "undefined term" in a statute "its ordinary and popularly understood meaning." *In re Ryan B.*, 212 Ill. 2d 226, 232 (2004). To discern that meaning, "it is 'entirely appropriate' to consult the dictionaries." *People v. Barnes*, 2017 IL App (1st) 142886, ¶ 35 (quoting *People v. Bingham*, 2014 IL 115964, ¶ 55). Since the interpretation of a jury instruction is, in many respects, akin to statutory interpretation, we think these principles provide a helpful starting point for our inquiry here too.

¶ 96 Generally speaking, the term "statement" has several related meanings. In the context of a criminal case, one such meaning is particularly relevant: "An account of a person's knowledge of a crime, taken by the police during their investigation of the offense." Black's Law Dictionary (10th ed. 2014); see also Webster's Third New International Dictionary ("a formal declaration *** made in the course of some official proceeding (as a statement of a witness)). Examples of such formal statements, which are commonly introduced into evidence at criminal trials, include a defendant's handwritten or other custodial statement given to the police or prosecutors in the course of an interrogation.

¶ 97 But an admissible statement need not be formal, in the above sense, or made to law enforcement. A witnesses' prior inconsistent hearsay statement, for example, may be admissible for the limited purpose of impeaching the declarant, and the statement need not have been made to the police. See 725 ILCS 5/115-10.1(c). This usage reflects the most general definition of the

term "statement," which includes any "verbal assertion or nonverbal conduct intended as an assertion." Black's Law Dictionary (10th ed. 2014); see also Webster's Third New International Dictionary ("something stated: as a report or narrative (as of facts, events, or opinions)"; "a single declaration or remark: allegation, assertion"); 725 ILCS 5/115-10.1(b) (prior inconsistent statement may be admissible if it "narrates, describes, or explains an event or condition of which the witness had personal knowledge").

¶ 98 We need not decide, at this time, whether IPI 3.06-3.07 applies only to formal statements given to law enforcement, or, more broadly, to any assertions of fact about the offense that the defendant may have made, to anyone, in any informal context. But either way, to qualify as a statement, an utterance or writing must make a claim about a matter of fact; it must express a proposition that is either true or false. Threats and commands are not assertions; and thus, even in the most general sense of the term, they are not statements.

¶ 99 We acknowledge that defendant, the State, and the trial court all seemed to think it was obvious that the threats and commands directed at the victims were "statements relating to the offenses" within the meaning of the instruction. We think this conflates the term "statement," in its proper usages, with the far more general term "utterance," which could apply to these (or any other) types of non-declarative speech. Notably, the parties have not cited, and we have not found, any case in which the instruction was based on a threat, command, or other type of non-declarative utterance. In every case to reach a reviewing court, the instruction was based on the defendant's confession, admission, or false exculpatory statement—in a word, the defendant's self-incriminating statement. We are not aware of any case specifically limiting IPI 3.06-3.07 to these (or any other) types of statements, but we now explicitly hold that this is the instruction's proper scope.

¶ 100 The history and origins of IPI 3.06-3.07 supports this interpretation. The instruction was adopted in the second edition of the IPI, and it has not been modified since. It was meant to consolidate and replace two instructions from the first edition—3.06 and 3.07—that had proven problematic.

¶ 101 Instruction 3.06 in the first edition of the IPI, entitled "Admission," provided as follows:

> You have before you evidence that [the] [a] defendant made [an admission—admissions] of [a fact—facts] relating to the crime charged in the indictment.
>
> It is for you to determine [whether the defendant made the admission(s), and, if so,] what weight should be given to the [admission—admissions]. In determining the weight to be given to an admission, you should consider all of the circumstances under which it was made.

¶ 102 Similarly, Instruction 3.07, entitled "Confession," provided as follows:

> You have before you evidence that [the] [a] defendant confessed that he committed the crime charged in the indictment. It is for you to determine [whether the defendant confessed, and, if so,] what weight should be given to the confession. In determining the weight to be given to confession, you should consider all of the circumstances under which it was made.

¶ 103 As with the current instruction, IPI 3.06-3.07, the Committee Notes accompanying both instructions in the first edition specified that the bracketed portions should be "deleted only when the defendant admits making all the material statements attributed to him."

¶ 104 Having two separate jury instructions required the parties to litigate the question whether a statement was a strict confession of guilt or merely an admission of an incriminating fact. And it required the trial court to communicate this legal conclusion in its instructions to the jury. This line can be difficult to draw, and the wrong instruction could prove highly prejudicial, because a judge's "characterization of a statement as a confession may discourage a jury from making a close analysis of what defendant actually said." *People v. Horton*, 65 Ill. 2d 413, 418 (1976). For this reason, it was error, and often reversible error, "to instruct a jury that defendant has

confessed to a crime when he has made only an admission." *Id.* (citing cases); see, *e.g.*, *People v. Floyd*, 103 Ill. 2d 541, 548-49 (1984) (conviction reversed on this ground).

¶ 105 In the second edition, these two instructions were consolidated into one, IPI 3.06-3.07, which used the general term "statement" in place of the more specific terms "confession" and "admission." IPI Criminal 2d 3.06-3.07. These changes were made to "avoid[ ] the complications that ensue when a judge characterizes a statement" and thereby eliminate this unnecessary risk of prejudice to the defendant. *Id.*, Committee Note; *Floyd*, 103 Ill. 2d at 549. Notably, the Seventh Circuit's substantively identical pattern instruction also "utilizes the word 'statements' in place of words such as 'admission' and 'confession'," and for precisely the same reasons: "the word 'statements' is a more neutral description" that does not convey any judicial characterization of the defendant's words to the jury, and it "eliminates the need for additional debate or litigation regarding whether a particular statement fits the definition of a 'strict confession.'" Pattern Jury Instruction 3.09, Seventh Circuit, Committee Comment; *United States v. Gardner*, 516 F.2d 334, 345-46 (7th Cir. 1975); see *Opper v. United States*, 348 U.S. 84, 91 (1954) ("a strict confession," as distinct from an admission, is "a complete and conscious admission of guilt").

¶ 106 There is no indication that the general term "statement" was meant to be broader than the antecedent categories it replaced. Indeed, the committee made clear in its comment that the new instruction reflected its determination that "whether a statement is an admission, confession, or false exculpatory statement is a legal conclusion that ought not to be communicated to the jury." IPI Criminal 2d 3.06-3.07, Committee Note. While this might seem to add a new category—false exculpatory statements—to the instruction's purview, such statements are considered a species of admissions because they are incriminating. See, *e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 477 (1966) ("no distinction may be drawn between inculpatory statements and statements alleged to

be merely 'exculpatory'," as the latter, when proven false, are "incriminating in any meaningful sense of the word"); *People v. Gerrior*, 155 Ill. App. 3d 949, 954 (2d Dist. 1987) (defendant's statement to police denying that he committed robbery "was relevant as an admission" of certain material facts). In short, IPI 3.06-3.07 did not substantively extend the scope of the first-edition instructions it replaced. Like its predecessors, it applies only to a defendant's self-incriminating statements: confessions and admissions, in the first instance, and false exculpatory statements by extension.

¶ 107 Moreover, the instruction addresses a specific problem that arises only when a defendant has made a self-incriminating statement about the charged offense(s). For the moment, we will follow the practice of the relevant case law and speak in terms of confessions, but as we will see, the point applies to self-incriminating statements generally.

¶ 108 To be admissible, a confession must be voluntary, a threshold legal determination that is made by the trial judge. *People v. Jefferson*, 184 Ill. 2d 486, 498 (1998). But even after a confession has been found to be voluntary, a defendant may still present evidence to the jury that affects its credibility or weight, or that challenges its reliability or truth. *Id.*; *People v. Cook*, 33 Ill. 2d 363, 370 (1965); *People v. Johnson*, 385 Ill. App. 3d 585, 598 (1st Dist. 2008); see also 725 ILCS 114-11(f) (West 2009) ("The issue of the admissibility of the confession shall not be submitted to the jury. The circumstances surrounding the making of the confession may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession."). The jury's credibility inquiry will often turn on largely the same evidence as the judge's voluntariness inquiry, but the two are nonetheless "separate inquires"; and the latter, a factual matter, is "exclusively for the jury to assess." *Crane v. Kentucky*, 476 U.S. 683, 688 (1986).

¶ 109 In *Crane*, the Supreme Court emphasized the importance of giving the jury an active role in assessing the credibility of a defendant's (alleged) confession. If that evidence could not be put before the jury, the defendant would be "effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Id.* at 689. Evidence concerning "the manner in which a confession was secured" will often be critical to the defendant's attempt to cast doubt upon the confession's "credibility," minimize its "probative weight," or show that it was "insufficiently corroborated or otherwise unworthy of belief." *Id.* And all of this applies equally to admissions and statements intended to be exculpatory—both of which entail "the same pressure of coercion" and "possibilities for error," and so "call for corroboration to the same extent as," strict confessions. See *Opper*, 348 U.S. at 92.

¶ 110 IPI 3.06-3.07 instructs the jury to undertake this factual inquiry and guides the jury in this role. By instructing the jury to expressly consider whether the defendant's self-incriminating statement was credible, given the circumstances in which it was elicited, the instruction prevents the jury from simply assuming that the defendant must be guilty because he (ostensibly) admitted his guilt. As *Crane* reminds us, that inference is all too easy for a jury to make. 476 U.S. at 689; see also *People v. R. C.*, 108 Ill.2d 349, 356 (1985) ("[A] confession is the most powerful piece of evidence the State can offer, and its effect on the jury is incalculable.") The presentation of a defendant's self-incriminating statement to a jury thus warrants a special cautionary instruction. IPI 3.06-3.07 is that instruction.

¶ 111 In contrast, this cautionary instruction has no meaningful application to non-declarative utterances like threats and commands. There is no intelligible concern that a defendant may have been led to falsely incriminate himself when he threatened or verbally coerced a victim. It makes

no sense to ask whether a threat or command was elicited in circumstances that rendered it unworthy of belief. And there is no question of how much "weight" to give a defendant's threat of force against a victim; when the defendant is charged with armed robbery or home invasion, for example, the use or threat of force is an element of the offense, and the defendant either engaged in that conduct or not. See 720 ILCS 5/18-2(a); 5/19-6(a)(1). To be sure, there is a question of how much weight to give the testimony of the *witnesses* who reported the alleged threats, but by its terms, IPI 3.06-3.07 does not apply to *their* testimony. And it doesn't need to; their testimony is fully addressed by IPI 1.02, the general instruction on the jury's role as the sole judges of "the believability of the witnesses and of the weight to be given to [their] testimony." IPI Criminal 4th 1.02. In short, there is simply no meaningful way to apply IPI 3.06-3.07 to non-declarative utterances like threats or commands.

¶ 112 For these reasons, we hold that IPI 3.06-3.07 applies to a defendant's self-incriminating statements—confessions, admissions, or false exculpatory statements—relating to the charged offense(s).

¶ 113 As we have interpreted the instruction, its guiding concern is the possibility that a false or unreliable incriminating statement was elicited from the defendant. This concern, at a minimum, is most pressing when the statement at issue was a formal statement made to law enforcement. See, *e.g.*, *United States v. Broeske*, 178 F.3d 887, 889-90 (7th Cir. 1999) (limiting circuit's corresponding instruction to statements made to law enforcement). As we noted at the outset, however, we do not need to decide in this case whether IPI 3.06-3.07 is limited to such statements, and we reiterate that our holding today should not be taken to answer that question.

¶ 114 2. Harmless Error

¶ 115 Having settled on the meaning of the term "statements relating to the offenses" in IPI 3.06-3.07, we must now determine whether it was error for the trial court to instruct the jury as it did, and, if so, whether that error entitles defendant to a new trial. We review the trial court's decision whether to give a jury instruction for an abuse of discretion. *People v. Lovejoy*, 235 Ill.2d 97, 150 (2009).

¶ 116 It was error for the trial court to give IPI 3.06-3.07 in this case. As we have noted, the instruction was given based solely on the threats and commands that the codefendants directed at the victims throughout the home invasion. No self-incriminating statements by defendant, either to law enforcement or any other third parties, were put before the jury. Hence, there was no basis for this instruction. It should not have been given—with or without the bracketed language.

¶ 117 Defendant, however, has forfeited that error. Our supreme court has held that "a specific objection [to a jury instruction] waives all other unspecified grounds." *E.g.*, *People v. Cuadrado*, 214 Ill. 2d 79, 89 (2005). On appeal, defendant contends only that the omission of the bracketed language was error, arguing, as he did in the trial court, that none of the utterances at issue could be specifically attributed to him. He does not claim that it was error to give the instruction at all, and he does not dispute that the utterances at issue were "statements" to which the instruction applies. Nor, for that matter, did defendant raise this error in the trial court. There, defendant did object to giving the instruction, but he did so on the ground that the utterances at issue could not be specifically attributed to him; he did not dispute the assumption that those utterances were "statements" and hence a proper basis for the instruction in the first place.

¶ 118 Forfeiture aside, the improper instruction was inconsequential; even if the error had been preserved at trial and raised on appeal, we would find it harmless. An error in a jury instruction is

harmless if a properly instructed jury would have rendered the same verdicts. *People v. Kirchner*, 194 Ill. 2d 502, 557 (2000).

¶ 119 We begin with a preliminary question: How might defendant's jury have understood this instruction? The jury heard no evidence that defendant made, or allegedly made, any statements about the offenses. Thus, if the jury understood the term "statements" to have its ordinary meaning, it would not have found any use for this instruction. Moreover, the jury instructions as a whole did not define the term "statements" or specify what alleged "statements" fell within the instruction's purview. So what, if anything, might the jury have done with the instruction? We cannot know for sure. But one possibility is that the jury did not apply the instruction at all because there was nothing it logically applied to. In those circumstances, the superfluous instruction might have puzzled the jury, but it did not prejudice defendant.

¶ 120 The other possibility is that the jury (mis)understood the instruction in the same way as the parties, and so applied—or tried to apply—it to the threats and commands at issue. Indeed, if the jury applied the instruction to anything, it must have been these utterances, since the jury did not hear evidence of any others. The question we then face is whether the instruction, as given, and thus understood, prejudiced defendant. Defendant argues that it did, because it prevented the jury from considering whether he personally uttered any of those threats or commands. We disagree.

¶ 121 The State's theory was that the codefendants were all accountable for each other's actions because they shared a common criminal design. The threats of violence and other verbal acts of compulsion were directed at the victims in furtherance of the common design. (Granted, we have rejected the State's common-design theory with respect to the sexual assault, but since defendant was still accountable for that offense, our conclusion here does not change.) As the prosecutor

argued in closing, the codefendants all "worked together," so that defendant was responsible for "every single action" of the others, including "every threat" that any one of them made to the victims. Indeed, if defendant was accountable for his confederates' actions, it is irrelevant whether he personally uttered any threats or commands at the victims. The instruction did not prejudice defendant.

¶ 122 Defendant argues, however, that attributing these utterances to him was "crucial" to the State's proof of accountability, especially with respect to the sexual-assault charge. Not so. With respect to the armed robbery and home invasion, defendant was caught more or less red-handed: He was seen fleeing from the premises, with nobody else (other than Sistrunk) in the vicinity, and apprehended almost immediately; and he had A.W.'s wallet, and a mask worn by one of the intruders, in his pocket. The evidence of his guilt was overwhelming, without attributing any commands or threats to him at all.

¶ 123 With respect to the charge of aggravated criminal sexual assault, defendant argues that nothing linked him to Coleman's offense *except* the commands that A.W. undress and spread her legs, and the accompanying vulgar remarks about her genitals. We disagree. As we previously explained, defendant was accountable for the sexual assault because he contributed to the show of force used to strip A.W. in the bedroom—whether or not he was one of the men who actually ordered her to undress or spread her legs. Because it was not necessary for the jury to find that defendant personally ordered her to do so, we conclude that the erroneous instruction did not affect the jury's verdict.

¶ 124 For these reasons, we conclude that the trial court's erroneous instruction does not entitle defendant to a new trial.

¶ 125 D. Denial of Self-Representation

¶ 126 At the hearing set for posttrial motions and sentencing, defendant at one point said to the trial judge, "I want to exercise my Sixth Amendment right to go pro se." The judge did not grant that apparent request. On appeal, defendant argues that he was denied his constitutional right to self-representation, which he "repeatedly and unequivocally" invoked. We disagree.

¶ 127 The United States and Illinois Constitutions guarantee criminal defendants the right of self-representation. *Faretta v. California*, 422 U.S. 806, 812-18 (1975); *People v. Baez*, 241 Ill. 2d 44, 115 (2011); see U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. 1, § 8. To invoke this right, a defendant must knowingly and intelligently waive his right to counsel. *Faretta*, 422 U.S. at 835; *Baez*, 241 Ill. 2d at 116. "Courts must 'indulge in every reasonable presumption against waiver' of the right to counsel." *Id.* (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). Thus, the "waiver of counsel must be clear and unequivocal, not ambiguous" (*id.*); the defendant must "articulately and unmistakably demand[ ] to proceed *pro se*." *People v. Burton*, 184 Ill. 2d 1, 22 (1998). Presented with an apparent request to proceed *pro se*, "a court must determine whether the defendant truly desires to represent himself and has definitively invoked his right of self-representation." *Baez*, 241 Ill. 2d at 116. We review the trial court's determination for an abuse of discretion. *Id.*

¶ 128 At the start of the post-trial motion and sentencing hearing, defense counsel informed the trial court that although she was ready to proceed, defendant "is telling me again that he is in the process of hiring [private counsel]," who "called this morning regarding this." The clerk said that "[private counsel] called, but he did not call about this case." (We note that it is not clear from the transcript whether counsel was claiming that the private attorney had called her or the court.) Defendant alleged that he had not seen his public defender since the trial, and had not seen any transcripts or "documents" pertaining to the motion set for argument that day. After a brief back-

and-forth with defendant, the trial judge found that he was "articulating his desire to delay this matter further." Defendant responded, "Your Honor, I just had two deaths in my family," to which the judge retorted, "You are telling me if you had been sentenced earlier, they [*sic*] wouldn't have occurred during the pendency of your sentence?" Defendant responded, "I want to exercise my Sixth Amendment right to go *pro se*." The judge reiterated his finding that defendant was "trying to *** find some way to delay sentencing in this matter." Defendant then articulated several complaints about his attorney and insisted that "[t]his sentence can't occur today." The trial court conducted the hearing, as scheduled, with defendant still represented by his public defenders. Defendant never reasserted his right of self-representation.

¶ 129 Defendant did not clearly and unequivocally, much less repeatedly, invoke his right of self-representation. While defendant left no doubt that he was dissatisfied with his public defender and wanted a continuance, he did not say with any clarity or resolve how he wanted to proceed—other than without his public defender. At one point, he ostensibly invoked his right of self-representation. But he also told his attorney that he was "in the process of hiring [private counsel]." We have no reason to question the public defender's representation to the trial court, and in any event, defendant did not dispute it. If defendant was truthful with counsel, his purported request to represent himself was ambiguous. If defendant was lying to counsel, then it would seem—as the trial court believed—that defendant was merely searching for any possible way to delay the hearing. Either way, we cannot say, based on this record, that defendant "truly desire[d] to represent himself" (see *Baez*, 241 Ill. 2d at 116); all we can say for sure is that he did not want to be represented by his public defender any longer. Defendant did not definitively invoke, and therefore was not improperly denied, his right of self-representation.

¶ 130 E. Preliminary *Krankel* Inquiry

¶ 131 Defendant contends that the trial court failed to conduct an adequate preliminary *Krankel* inquiry. See *People v. Krankel*, 102 Ill. 2d 181 (1984). Pursuant to *Krankel*, the trial court must "conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d, 68, 78 (2003). No specific procedure is mandated, but an adequate inquiry will generally involve "some interchange" between the judge and the defendant, and, if necessary, counsel. *Id*. The defendant must be permitted to articulate his complaints about counsel and explain their factual basis. *Id.* If this initial "probe" reveals that the allegations are "conclusory, misleading, or legally immaterial," pertain to matters of trial strategy, or otherwise fail to state a "colorable claim" of ineffective assistance, the trial court "may be excused from further inquiry." *People v. Ford,* 368 Ill. App. 3d 271, 276 (1st Dist. 2006). We review the adequacy of the trial court's inquiry *de novo*. *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 80.

¶ 132 As we previously noted, defendant advanced several complaints about his attorney at his post-trial motion and sentencing hearing. The judge asked defendant, albeit with some sarcasm, to articulate his allegations: "What magic bullet do you have? Explain it. Tell me and [counsel]. Explain it." A brief interchange between defendant and the judge ensued, in which defendant set forth several allegations (as described below) about counsel's performance. The judge dismissed defendant's allegations as meritless, on the ground that he was apprehended while "leaving the scene of the incident." The judge then asked counsel to argue her motion for new trial point by point. After denying counsel's motion, largely on the ground that defendant was apprehended while leaving the scene with proceeds of the robbery in his pocket, the court heard sentencing arguments and asked defendant if he wished to speak in allocution. Defendant again complained about his attorney's performance, reiterating some of his previous allegations and adding several

new ones. When defendant was finished, the judge said "thank you" and immediately proceeded to sentence him.

¶ 133 Defendant's allegations were varied and numerous, and many were undeniably without merit. Many centered on his contention that counsel failed to marshal available evidence to prove that he was arbitrarily detained by the police somewhere else and "brought back to the area" where these crimes were committed. Appellate counsel, quite reasonably, has been selective in arguing that certain of defendant's allegations required further inquiry by the trial court. We accordingly focus our discussion on the specific allegations on which defendant's argument on appeal is based.

¶ 134 First, defendant alleged that counsel failed to investigate the victims. This allegation is deficient on its face. Defendant either participated in these crimes or he did not, and that question does not turn on any facts about the victims' lives or backgrounds—for instance, whether or not they were drug dealers, as the codefendants' attorneys repeatedly alleged at trial. We do not see how this irrelevant allegation called for any further inquiry or discussion.

¶ 135 Second, defendant alleged, several times, that counsel failed to obtain medical records to prove that he could not have been running from the police, as the officers testified. Defendant's allegations were a morass of contradictions. At one point, he alleged that he had been shot in the stomach two weeks earlier and had a bullet lodged in his hip, "which made it impossible for [him] to be running." But he also alleged that he had been shot and wounded on the night of the offense and was "wearing gauze." Because he had "already [been] severely wounded," defendant asserted, he "couldn't possibly have been running this late at night." Yet, despite his severe and recent wounds, he alleged that he was at a nearby gas station, getting coffee at 4:00 a.m., when these offenses were committed. Moreover, defendant's PSI, which the trial judge had reviewed

before the hearing, states that he told the probation officer he was shot in the stomach sometime in 2010. (The night in question was January 17, 2011.) Defendant thus presented a materially different version of this allegation each time he returned to it. In light of their ever-shifting content, and the trial court's assessment of the officers' contrary testimony, we think the trial court could reasonably reject these allegations as incredible without any further inquiry.

¶ 136 Third, defendant alleged that counsel "never subpoenaed the alibi witnesses." "Whether to call certain witnesses and whether to present an alibi defense are matters of trial strategy, generally reserved to the discretion of trial counsel." *People v. Kidd*, 175 Ill. 2d 1, 45 (1996) (*pro se* allegation that counsel failed to call unnamed alibi witnesses did not warrant appointment of new counsel and full *Krankel* hearing). Given the testimony of the responding officers, we also note that an alibi defense would have been extremely weak, and thus counsel's decision not to present an alibi was certainly a reasonable strategic choice.

¶ 137 Fourth, defendant alleged that counsel failed to challenge the chain of custody of the evidence recovered from his pocket, which included A.W.'s wallet and one of the masks worn by an intruder. The record belies this allegation. Counsel cross-examined Officer Calhoun—who testified that she was present when her partner, Officer Griggs, recovered these items—about the circumstances of their recovery, the inventory process, and chain of custody from the scene of defendant's arrest to the police station. Counsel specifically questioned Calhoun about their failure to have an evidence technician process the scene of defendant's arrest and photograph the recovered items at that location. In closing, counsel argued that these alleged gaps in the State's proof showed that the items in question "were never recovered from" defendant.

¶ 138 Fifth, defendant alleged that counsel failed to subpoena the clothing he wore on the night of the incident from the Cook County Sheriff's Department. Defendant argued that he could not

have had a mask and A.W.'s wallet in his pocket, because he wore "skin tight pants"—despite allegedly having a bullet lodged painfully in his hip—and not "baggy" pants, as the officers testified. There are any number of reasons why the trial court could have found this allegation insufficient. In any event, defendant was allowed to fully explain its factual basis to the trial court. Thus, we do not agree that the trial court's "inquiry"—in the broad and "flexible" sense recognized by the *Krankel* procedure—was deficient. See *Moore*, 207 Ill. 2d at 78.

¶ 139 Sixth, defendant alleged that counsel failed to obtain an affidavit from Sistrunk before he died. Although the trial court did not ask defendant (or counsel) what Sistrunk allegedly would have said, we see no point to such an inquiry in these circumstances. Because Sistrunk had already passed away, any claims defendant might have made to the court, about what Sistrunk's affidavit allegedly would have said, could not possibly have been corroborated. We do not think the trial court was obliged to inquire further into this self-serving allegation.

¶ 140 Lastly, defendant alleged that counsel refused to let him testify on his own behalf. That decision ultimately belonged to defendant. *People v. Enis*, 194 Ill. 2d 361, 399-400 (2000). Whatever advice counsel offered defendant regarding this decision was a matter of trial strategy, but if counsel unduly interfered with defendant's decision or otherwise prevented him from testifying, then she may have been ineffective. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2d Dist. 2009). Our supreme court has held, however, that a defendant is deemed to have "acquiesced in counsel's view that [he] should not take the stand" if, "upon learning at trial that he would not be called as a witness, defendant failed to assert his right by informing the trial court that he wished to testify." *Enis*, 194 Ill. 2d at 399. The trial court did not need to make any further inquiry to know that defendant did not assert this right at trial. To the contrary, when he was admonished at trial, defendant affirmed that he did not wish to testify; that he understood the

decision was his to make, in consultation with counsel; and that he had decided not to testify of his own free will.

¶ 141 Defendant relies heavily on *People v. Vargas*, 409 Ill App. 3d 790 (1st Dist. 2011), but that case is easily distinguished. In *Vargas*, the trial court failed to make any inquiry at all; the court did not even allow the defendant to clarify, much less explain the alleged factual basis of, his vague allegations that counsel failed to "obtain records and information" that the defendant "advised him was very helpful for [his] defense strategy," and failed to file certain unspecified pretrial motions. *Id.* at 801-02. Here, in contrast, the trial court allowed defendant to explain the alleged factual bases for his allegations in some detail. Having reviewed those explanations, we agree with the trial court that no further inquiry, beyond this, was warranted by their content.

¶ 142 F. Defendant's Profession of Innocence

¶ 143 Defendant contends that the trial court improperly considered his profession of innocence as an aggravating factor at sentencing. According to defendant, a bright-line rule prohibiting any such consideration is "well established" law. Defendant is mistaken on this principle of law, and we find no error under the circumstances presented here.

¶ 144 Our supreme court rejected this bright-line rule in *People v. Ward*, 113 Ill. 2d 516 (1986). In *Ward*, the court acknowledged that a defendant's "continued protestation of innocence and his lack of remorse" at sentencing "must not be automatically and arbitrarily applied as aggravating factors." *Id.* at 529. But "[i]n some instances and under certain factual circumstances," they "may convey a strong message to the trial judge that the defendant is an unmitigated liar and at continued war with society." *Id.* at 528. "Such impressions garnered by the trial judge from the entire proceeding are proper factors to consider in imposing sentence," because they speak to the defendant's truthfulness or mendacity, and are thus relevant to an "appraisal of the defendant's

character and his prospects for rehabilitation." *Id*. A trial judge is therefore permitted to evaluate a defendant's assertion of innocence at sentencing "in light of all the other information the court has received in the proceeding concerning the case and the defendant," and, on this basis, make an individualized determination as to what, if anything, the defendant's assertion reveals about his honesty, character, and rehabilitative potential. *Id.* at 530.

¶ 145 Here, the trial court explicitly said that defendant's assertion of innocence was a factor in determining his sentence. Among other factors, the judge stated "that I will be considering *** Mr. Moore's statement in allocution, also Mr. Moore's profession of his innocence still." This cursory statement was the trial court's only reference to defendant's assertion of innocence. Because the trial court did not explain its reasoning, it is not clear whether the court reflexively punished defendant for asserting his innocence or made an individualized determination that his statements at sentencing reflected negatively on his truthfulness, character, and prospects for rehabilitation. Faced with this uncertainty, we must give the trial court the benefit of the doubt. It was not *per se* improper to consider those statements (*Ward*, 113 Ill. 2d at 528-30), and we afford the trial court a "strong presumption" that it "based its sentencing decision on proper legal reasoning." *People v. Csaszar*, 375 Ill. App. 3d 929, 950 (1st Dist. 2007); see also *People v. Burdine*, 362 Ill. App. 3d 19, 26 (1st Dist. 2005) (defendant's burden to overcome presumption). To be entitled to relief, defendant must therefore show that it would have been unreasonable for the trial court to take his statements at the sentencing hearing as evidence of his mendacity and diminished prospects for rehabilitation.

¶ 146 Defendant has not made that showing. The trial court clearly—and, in our view, reasonably—thought defendant was lying when he alleged that the police framed him for these offenses. According to defendant, the police arbitrarily detained him at parts unknown,

transported him to the vicinity of the victims' apartment, and planted a Halloween mask and A.W.'s wallet in his pocket. As we noted above, in discussing defendant's *Krankel* argument, his support for these allegations was a morass of conflicting and incredible claims—that he could not have been running from the police because had been shot two weeks earlier; that he had been shot earlier on the night of the offense; and that he was going out for coffee, at 4:00 a.m., when the offenses were committed. Based on the ever-shifting contents of defendant's allegations, the strength of the circumstantial case against him, and his defiant conduct throughout his sentencing hearing, the trial court could reasonably conclude that defendant's "manipulative defiance of the law" at sentencing was evidence of his mendacity and diminished prospects for rehabilitation. See *Ward*, 113 Ill. 2d at 528 (quoting *United States v. Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974). The trial court did not abuse its discretion by considering his untruthful assertions, and the claim of innocence they were offered to support, in fashioning defendant's sentence.

¶ 147 The two cases defendant cites in his opening brief—*People v. Speed*, 129 Ill. App. 3d 348 (1984), and *People v. Byrd*, 139 Ill. App. 3d 859 (1986)—do not convince us otherwise. In *Byrd*, the court applied a bright-line rule against considering a defendant's claim of innocence at sentencing, but that case was decided before *Ward*, and is no longer good law for that proposition. See *Byrd*, 139 Ill. App. 3d at 866.

¶ 148 In *Speed*, 129 Ill. App. 3d at 349, which was also decided before *Ward*, the court did not apply this bright-line rule at all, but rather recognized that a "persistent claim of innocence" at sentencing may be considered as an aggravating factor if it "bear[s] on defendant's rehabilitative potential." Although the appellate court found reversible error in *Speed*, the facts of that case are easily distinguished. The defendant in *Speed* was convicted of rape. *Id.* At his sentencing hearing, he "expressed his remorse for what had happened, stating that he was 'sorry for what

[he] did' " and for the "pain and suffering he had caused." *Id.* at 350. He also acknowledged that he was "guilty of some crime, such as indecent liberties or attempt rape," but disputed that he was guilty of rape. *Id.* His account of the incident, as relayed in his trial testimony and at sentencing, was consistent with the victim's in all respects except one, namely, whether penetration had occurred; and with respect to this issue, the appellate court noted that he could "reasonably believe that no penetration had occurred given the extent of his alcohol consumption prior to the offense." *Id.* at 350-51. In these circumstances, the defendant's claim of innocence did not demonstrate a lack of either veracity or remorse. *Id.* at 351. None of these considerations, however, are even arguably present here.

¶ 149 Lastly, defendant argues in his reply brief that *Ward* permits a trial judge to consider a defendant's assertion of innocence at sentencing only if the defendant had testified at trial. If the defendant had not testified, he argues, "the reasoning of [*Byrd* and *Speed*] applies." To begin, neither *Byrd* nor *Speed* supports this distinction, since the defendants in both of those cases, like the defendant in *Ward*, testified at their trials. *Speed*, 129 Ill. App. 3d at 351; *Byrd*, 139 Ill. App. 3d at 862.

¶ 150 Moreover, *Ward*'s holding does not depend on the fact that the defendant had testified at his trial. In *Ward*, 113 Ill. 2d at 530, as in this case, the court invited the defendant to speak in allocution, and he responded by expressing dissatisfaction with his attorney and asserting that he was innocent. The trial court rejected his assertion of innocence as false, since it was consistent with his testimony, which the court had previously rejected at the bench trial. *Id.* The supreme court explained that in exercising his right to speak in allocution, the defendant "did not have a right to lie with impunity." *Id.* at 531. Of course, "he had the right to use the opportunity for a protestation of his innocence," but when he did, the trial court "could incorporate the legitimate

inferences drawn from this assertion, including whether the assertion was truthful" into the balance of factors bearing on his character and potential for rehabilitation. *Id.* at 532.

¶ 151 We see no reason why it would be *necessary* for a defendant to testify at trial for these considerations to apply, or for a trial court to be in a position to draw reasonable inferences about a defendant's veracity and rehabilitative potential from any factual representations that he makes at his sentencing hearing. Here, for example, defendant asserted his innocence based on a series of factual representations that were self-contradictory and, at times, outlandish. The trial court could reasonably infer that the strong (albeit circumstantial) case against defendant presented at trial, including, especially, the testimony of the responding officers, put the lie to his assertions at the sentencing hearing. Whether or not defendant had testified at trial, the court could properly incorporate that inference into its assessment of defendant's prospects for rehabilitation.

¶ 152 In sum, we reject defendant's claim that his sentences were based on an improper factor. Having found no error, we need not address the parties' plain-error arguments.

¶ 153 G. Excessive Sentence

¶ 154 Defendant contends that his sentences are excessive and unreasonable in two respects: (1) his sentence for aggravated criminal sexual assault is unfairly disparate from Coleman's; and (2) his aggregate sentence is excessive in light of his criminal history, mitigating evidence, and demonstrated potential for rehabilitation. We consider these arguments in turn.

¶ 155 First, defendant was found accountable for the aggravated criminal sexual assault against A.W. and sentenced to 40 years for this offense. Coleman, who actually committed the offense, was sentenced to 21 years—the minimum prison term, including the mandatory 15-year firearm enhancement. See 720 ILCS 5/12-14(a)(8), (d)(1) (West 2011); 730 ILCS 5/5-4.5-25(a). Because Coleman was the more culpable party, defendant contends that their sentences are unfairly

disparate, and he requests that we either reduce his sentence (see Ill. Sup. Ct. R. 615(b)(4)) or remand to the trial court for resentencing.

¶ 156 An "[a]rbitrary and unreasonable disparity" between the sentences imposed on "similarly situated codefendants" violates "fundamental fairness" and is therefore impermissible. *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). A disparity in codefendants' sentences may be warranted, however, by differences in the nature and extent of their participation in the crime, or by other relevant sentencing factors, including, especially, their respective criminal histories and potential for rehabilitation. *Id.*; *People v. Spears*, 50 Ill. 2d 14, 18 (1971); *People v. Jackson*, 145 Ill. App. 3d 626, 646 (1st Dist. 1986). A trial court has broad sentencing discretion, and we will not reverse its decision absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005).

¶ 157 We agree that Coleman was more culpable than defendant for the offense of aggravated criminal sexual assault, as it was Coleman who digitally penetrated A.W. But we do not agree that this difference in culpability alone shows that defendant is entitled to a reduction in his sentence for this offense.

¶ 158 While Coleman was the more culpable actor, defendant dramatically overstates this point. We cannot accept his assertion that he "did not participate in nor assist Coleman's assault on A.W. in any way." As we explained in rejecting his reasonable-doubt argument, the evidence supported a finding that defendant participated in the preliminary conduct in A.W.'s bedroom that culminated in, and indeed facilitated, her sexual assault. At gunpoint, the men forced A.W. to get out of bed, strip naked, spread her legs, and display her genitals for the men's inspection and commentary. This conduct was highly culpable and offensive in its own right; it also

facilitated A.W.'s sexual assault by rendering her vulnerable to Coleman's act of penetration. Defendant's involvement in, and culpability for, this offense was therefore substantial.

¶ 159 Further, defendant's criminal history, while nonviolent, was significantly more extensive than Coleman's. Coleman had one prior conviction for harassment and stalking, a gross misdemeanor in Minnesota (Minn. Stat. § 609.749), for which he was sentenced to two years of probation. See *People v. Jimerson*, 404 Ill. App. 3d 621, 634 (1st Dist. 2010) (reviewing court may take judicial notice of codefendant's related appeal). The trial judge based Coleman's minimum sentence, in part, on "the fact that [Coleman] has a limited criminal history," which "distinguish[ed] him from *** the other defendants" in this case.

¶ 160 Defendant's felony history began in 1997, when he was convicted of possessing a stolen motor vehicle and sentenced to two years of probation. Still in 1997, while he was on probation, defendant was convicted twice more—once for unlawful use of a weapon by a felon, and once for a narcotics possession offense—and was sentenced to four years in prison for each offense. In 1999, shortly after defendant was released, and while he was on supervised release, defendant was convicted of another narcotics possession offense and sentenced to two years in prison. He was released again in 2000, and convicted again that same year, this time for unlawful delivery of a controlled substance, a Class 1 offense for which he was sentenced to the maximum term of 15 years. Defendant was discharged from supervised release in 2009, and he committed these offenses in January 2011.

¶ 161 Thus, while defendant's criminal history largely comprised nonviolent narcotics offenses, it did demonstrate a significant pattern of recidivism, with defendant repeatedly committing new offenses while on probation or supervised release. The trial judge could reasonably infer from this pattern of recidivism that defendant's prospects for rehabilitation were diminished. And that

inference was further supported, as we have explained, by defendant's conduct and assertions at his sentencing hearing. In sharp contrast to defendant, Coleman was contrite in his allocution, taking the opportunity "to apologize to everybody involved in this situation. Especially the little boy in the house. He shouldn't have to witness anything like this, ever." From these differences between defendant and Coleman, the trial court could reasonably conclude that a substantial increase in defendant's sentence, relative to Coleman's, was warranted. For these reasons, we find no abuse of discretion and reject defendant's disparate-sentencing argument.

¶ 162 Second, defendant contends that his aggregate sentence of 80 years is excessive in light of his criminal history and the evidence demonstrating his potential for rehabilitation.

¶ 163 A trial court has broad discretionary powers in imposing a sentence, and its decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). Having observed the defendant and the proceedings, a trial court is in a better position to determine an appropriate sentence than a reviewing court, which must rely on the "cold" record. *Id.* at 213. In particular, the trial court is in a better position "to weigh the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Id.* We will not substitute our judgment for that of the trial court absent an abuse of discretion. *Patterson*, 217 Ill. 2d at 448.

¶ 164 We presume that a sentence within the statutory range is proper, and we will overturn or reduce a sentence only if it: (i) departs significantly from the spirit and purpose of the law, or (ii) is contrary to constitutional guidelines. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 36. A sentence promotes the spirit and purpose of the law if it reflects the seriousness of the offense and gives adequate consideration to defendant's rehabilitative potential. *Id.*

¶ 165 For each of defendant's three Class X convictions—home invasion, aggravated criminal sexual assault, and armed robbery—the trial court imposed a 25-year sentence, plus a mandatory

15-year firearm enhancement, for a total sentence of 40 years for each offense. See 720 ILCS 5/11-1.30(d)(1), 5/19-6(c), 5/18-2(b). Defendant's home-invasion and armed-robbery sentences run concurrently, but his sentence for aggravated criminal sexual assault runs consecutively as a matter of law. 730 ILCS 5/5-8-4(d)(2). Defendant's aggregate sentence is thus 80 years.

¶ 166 That sentence is not only within the statutory range, but significantly below the maximum sentence defendant could have received. Two Class X offenses subject to 15-year enhancements and mandatory consecutive sentencing yield a sentencing range of 42-90 years. 730 ILCS 5/5-4.5-25(a) (Class X range is 6-30 years). Defendant, however, was eligible for an extended-term sentence for home invasion, because the jury found that a victim of the offense, Khalil Jr., was under 12 years of age. 730 ILCS 5/5-5-3.2(b)(3)(1). The range for an extended-term Class X sentence is 30-60 years (730 ILCS 5/5-4.5-25(a)), making defendant eligible for an aggregate sentence of 66-120 years.

¶ 167 We acknowledge that defendant's 80-year sentence is a severe punishment, but we find no abuse of discretion. In truth, his sentence is toward the low end of the range to which he was subject, given his eligibility for extended-term sentencing. The trial court declined to impose an extended-term sentence for the home invasion, and instead imposed a sentence 5 years *less* than the *minimum* extended-term sentence for that offense. This fact alone weighs heavily against finding an abuse of discretion, and it certainly tempers any objection that defendant's aggregate sentence was near the maximum of the non-extended range.

¶ 168 Defendant argues that his sentence "simply does not reflect adequate consideration" of his "strong rehabilitative potential." Defendant notes, in this connection, that his prior offenses were nonviolent. As we previously explained, however, his criminal history displayed a pattern of recidivism, with defendant repeatedly committing offenses while on probation or supervised

release. This recidivist pattern all but refutes defendant's claims about his rehabilitative potential. As we have also explained, the trial court could find that his conduct at sentencing, including his untruthful factual representations to the court, reflected poorly on prospects for rehabilitation.

¶ 169 Defendant points to his assertions to the probation officer, as recorded in his presentence investigation report, that he was employed before these offenses, earning money to support his family, and that he volunteered at certain community-based organizations. We presume that the trial court considers the mitigating evidence before it (*Burton*, 2015 IL App (1st) 131600, ¶ 38), and here, the trial court expressly stated that it considered both the evidence and arguments in mitigation, and defendant's presentence investigation report. "[I]t is not our duty to reweigh" the evidence bearing on a defendant's rehabilitative potential; thus, even if we assume that we would have given this evidence more weight than the trial court did, we may not reverse or reduce defendant's sentence on this basis. *Alexander*, 239 Ill. 2d at 214-15 (reinstating sentence imposed by trial court where appellate court reweighed sentencing factors after finding that trial court, which considered evidence of defendant's rehabilitative potential, gave it inadequate weight).

¶ 170 In sum, we find that the trial court gave due consideration to the evidence bearing, both positively and negatively, on defendant's rehabilitative potential. Given the seriousness of his conduct, and the severity of the penalties to which he was subject, we cannot say that the trial court abused its sentencing discretion. We affirm defendant's sentences.

¶ 171 H. Mittimus Errors

¶ 172 Defendant was convicted of five counts of home invasion, two counts of armed robbery, and one count of aggravated criminal sexual assault. At sentencing, the trial court merged the home-invasion convictions together, and merged the armed-robbery convictions together. The mittimus, however, lists five counts of home invasion and two counts of armed robbery.

¶ 173 The State concedes that defendant's mittimus should be corrected to reflect the court's oral pronouncement, which is controlling. *People v. Smith*, 242 Ill. App. 3d 399, 402 (1st Dist. 1993). As to the home-invasion counts, judgment and sentence should be entered on Count 1, which was the most serious of those counts, because it sought an extended-term sentence on the ground that the victim (Khalil Jr.) was under twelve years old. See *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009) (most serious count, on which judgment and sentence should be entered, is count that carries highest maximum punishment); *People v. Morgan*, 385 Ill. App. 3d 771, 773 (3d Dist. 2008) (home invasion statute supports only single conviction for entry to residence, no matter how many victims). As to the armed-robbery counts, because the punishments are identical and we cannot determine the more serious offense, we remand to the trial court to make that determination. See *In re Samantha V.*, 234 Ill. 2d at 379-80; *In re Rodney S.*, 402 Ill. App. 3d 272, 285 (1st Dist. 2010).

¶ 174 Pursuant to Supreme Court Rule 615(b)(1), we direct the clerk of the Circuit Court of Cook County to correct the mittimus as we have specified regarding the home-invasion convictions. We remand to the trial court to determine which of the armed-robbery convictions should be included in the mittimus.

¶ 175 III. CONCLUSION

¶ 176 For the foregoing reasons, we affirm defendant's convictions and sentences, and direct the clerk of the Circuit Court of Cook County to correct defendant's mittimus.

¶ 177 Affirmed; remanded.