No. 1-09-0406

FIFTH DIVISION
May 20, 2011

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, Illinois.
	)	
	)	
	)	No. 05 CR 27240 (01)
v.	)	
	)	
DEMARCUS DUNN,	)	Honorable
	)	Joseph M. Claps
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices HOWSE and EPSTEIN concurred in the judgment.

HELD: The circuit court did not abuse its discretion in denying the defendant's request to have the jury instructed on the lesser included offenses of kidnaping, vehicular hijacking and robbery, where there was not even slight evidence in the record from which the jury could infer that the weapon used in the commission of the offenses was not a "dangerous weapon" so as to permit the jury to find the defendant guilty of the lesser included offenses and acquit the defendant of the charged offenses (*i.e.*, aggravated kidnaping, aggravated vehicular hijacking and aggravated robbery). The defendant failed to establish that the circuit court's decision not to instruct the jury on the lesser included offenses was compounded by its failure to give the jury the proper definition of "dangerous weapon" pursuant to the Illinois Pattern Jury instructions, so as to permit our review under the plain error doctrine. The defendant also forfeited his sentencing claim, namely that the trial judge's decision to impose an extended term sentence on the basis of his two prior juvenile adjudications violated the United State's Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348 (2000), because the fact of

those juvenile adjudications was never presented to or found beyond a reasonable doubt by the jury. The defendant failed in his burden to establish that any such alleged *Apprendi* error rose to the level of plain error so as to require our review under the plain error doctrine. The defendant was not denied his constitutional right to the effective assistance of counsel where counsel failed to object to codefendant's counsel's fleeting remark regarding codefendant's presence at the scene of the crime.

ORDER

Following a jury trial in the circuit court of Cook county, the defendant, Demarcus Dunn, was found guilty of aggravated kidnaping, aggravated vehicular hijacking and armed robbery. The defendant was sentenced to concurrent terms of 29 years' imprisonment for aggravated vehicular hijacking, 29 years' imprisonment for armed robbery, and an extended-term sentence of 32 years for aggravated kidnaping. On appeal, the defendant argues that: (1) the trial court erred when it refused to instruct the jury on the lesser included offenses of kidnaping, vehicular hijacking and robbery; (2) the instruction defining a "dangerous weapon" tendered to the jury incorrectly stated the law; (3) the imposition of the extended-term sentence for his aggravated kidnaping conviction, which was based solely upon his prior juvenile adjudications, violated the decision of the United States Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348 (2000); and (4) defense counsel's failure to object to a statement by codefendant's attorney, admitting to codefendant's involvement in the offenses charged in the presence of the defendant's jury, deprived the defendant of his constitutional right to the effective assistance of counsel. For the reasons that follow, we affirm.

I. BACKGROUND

On November 12, 2005, 17- year-old defendant, was charged together with 18-year-old

codefendant, Tyree Howard,[1] with, *inter alia*, one count of aggravated kidnaping (720 ILCS 5/10-2(a)(5) (West 2004)), one count of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(3) (West 2004)) and one count of armed robbery (720 ILCS 5/18-2(a) (West 2004)) for his participation in the abduction of the victim, Loretta Wheeler. The defendant was tried simultaneously with codefendant but before two separate and severed juries, albeit some of the witnesses were cross-examined in front of both juries. The following relevant testimony was adduced at the defendant's trial.

The 59-year-old victim, Loretta Wheeler, first testified that in November 2005, she lived at 4736 South Woodlawn Avenue in Chicago. Wheeler stated that about 9:30 p.m. on November 7, 2005, she was returning home from work in her maroon 1996 Mercury Sable, but had difficulty finding parking in front of her building, so she proceeded further north on Woodlawn Avenue before parking her vehicle near 47th Street. Wheeler testified that as she exited her car and reached back inside to grab her purse and coat, a man, whom she identified in court as the defendant, walked up behind her, placed a gun against her forehead, and demanded her car keys. Wheeler described the defendant's gun as being aluminum and having a 4-inch long barrel that was round and wide enough for a bullet to travel through.

During trial, the State showed Wheeler People's Exhibit No. 21, a BB gun, which was found on the defendant's person at the time of his arrest, two days after the incident. Wheeler

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[1]Codefendant Howard's conviction was affirmed by this appellate court on September 30, 2010. See *People v. Howard,* No. 1-08-2601 (Sept. 30, 2010) (unpublished order pursuant to Supreme Court Rule 23).

denied that this was the gun the defendant had used on the night in question. Wheeler stated that the gun the defendant had placed against her forehead had a longer and broader barrel, as well as more aluminum, and that it felt like "hard metal" pressing against her skin. Wheeler stated that on the other hand, the BB gun (in People's Exhibit No. 21) appeared to have been made of heavy plastic, was very light and had a small barrel hole. Wheeler testified that she was familiar with BB guns because her husband and sons played with them and that People's Exhibit No. 21 looked like a BB gun to her. Wheeler finally reiterated that she was certain that the gun the defendant used during the crime was not a BB gun.

Wheeler next testified that after she gave the defendant her car keys, he took her cell phone from her pocket and ordered her to the trunk of the car. Wheeler stated that as she moved to the back of the car, she observed another man, whom she identified as codefendant Howard, standing there, removing and discarding items from her trunk. Wheeler stated that Howard was also carrying a gun, and that after he showed it to her, he "stuffed it back" into his unusually large pocket. Wheeler testified that she was certain that the gun Howard was holding was not a BB gun.

According to Wheeler, Howard next pushed her inside the trunk, while the defendant threatened her that if she made any noise, pounded on the trunk, or brought any attention whatsoever to the car, he would stop the car and "blow [her] head off." Wheeler got into the trunk and lay in the fetal position before the lid was closed. She then heard the car start and felt it move at an "extremely high speed."

Wheeler testified that after approximately ten minutes, the car stopped and she was

ordered out of the trunk. Wheeler did not know where she was at the time but she could hear "traffic wheezing by." Wheeler stated that Howard pushed her toward the front of the car where she saw the defendant, sitting in the passenger seat, going through the glove compartment and her purse. Howard asked Wheeler whether she had any money or credit cards, and she told him that she had no credit cards and that all the money she had would be in her purse. Howard then showed Wheeler her wallet and pulled her ATM card out, saying, "so you have no credit card?" Howard then told Wheeler to lie on the ground and put his foot on her back. Howard next ordered Wheeler to turn around. The defendant approached and gave Howard a wire cord, with which he tied Wheeler's hands before placing her back into the trunk. Howard asked Wheeler for her personal identification number (PIN) and she gave him a number, which she believed to be her PIN. Howard slammed the trunk door and Wheeler felt the car move off at a high speed again.

Wheeler testified that about 45 minutes later, the car made another stop. Wheeler heard male and female voices in addition to those of defendant and Howard. She was unable to understand the conversation but she heard Howard say he "needed to score" some drugs. After about 10 minutes, the car took off again at high speed. Wheeler testified that soon afterward, the car made a third stop. The trunk was opened once more, and Wheeler saw the defendant, holding a gun, while Howard asked for her PIN again. Wheeler told him that she could not remember her PIN and that it was written on a piece of paper in her purse. Howard then told Wheeler that her belongings were "scattered all over the place," and she looked up out of the trunk and saw many items from her purse on the grassy knoll outside of the car. Wheeler then

attempted to remember her PIN again, and gave a different number to Howard. He closed the trunk and the car raced off again.

Wheeler testified that after about 15 minutes, Howard opened the trunk again. He pointed a gun at Wheeler's head and shouted, "You are f***g with our minds," and "Is your life worth $40?" Wheeler asked Howard if he was going to kill her, and Howard said he would not. However, Wheeler then heard the defendant say, "you know we're going to kill the f***g b**c." Howard then asked Wheeler if he was using the ATM card correctly, and she explained the process of withdrawing money to him. She also swore to him that she could not remember her PIN.

According to Wheeler, the car took off once more, this time at a very high speed. Wheeler stated that the car moved so fast that the bottle of bleach she kept in her trunk, spilled all over her, making it difficult for her to breath. Wheeler testified that the car stopped several more times. On one occasion, she heard gas being pumped into the car, and on another, she overheard several new male and female voices, talking about "needing a fix," before she smelled sweet and nauseating smoke. Wheeler testified that at one such stop she also overheard the defendant telling someone that they "had taken the car" and that they "had a white broad [inside]."

During yet another stop, the defendant opened the trunk and put Wheeler's cell phone to her face, asking her whether anyone was expecting her at home. Wheeler explained that she did not want the defendant and Howard to know that she lived alone, so she lied and told them that her husband and three sons were waiting for her. The defendant then placed the cell phone closer

to Wheeler's face and told her to call her family and tell them that she would be late. Then he said "the next day they will find you dead." The defendant shut the trunk door and the car drove off again.

Wheeler testified that at that point she believed she was going to die. She stated that before that she did not attempt to scream or bang on the trunk door because she thought she would be killed. At this point, however, she was certain she would die and so she attempted to open the trunk door from inside, but unsuccessfully.

Wheeler stated that at this point the car drove faster than ever before, and she could feel the driver "cutting corners and streets" at high speed because she was being tossed around in the trunk. According to Wheeler, all of a sudden she felt the shock of the car being hit hard on the side twice, and heard metal scraping against it. The car came to a stop, and it was still for a few minutes before Wheeler heard an unfamiliar voice say, "I need backup. They bailed." Wheeler pounded on the trunk door from inside, and heard a police officer identify himself. The officer opened the trunk and helped Wheeler out. At that point, Wheeler saw that the car was running in reverse against an iron fence. Wheeler immediately gave the officer a description of the two offenders. Two days later, in lineups, Wheeler positively identified the defendant and Howard.[2]

Chicago Police Sergeant Richard Rochowicz next testified that at about 11:50 p.m., on the night in question, he was inside his unmarked police car, near 48th Street and Cottage Grove Avenue when he observed a vehicle traveling in the opposite direction of a one-way street. Sergeant Rochowicz observed two black male teenagers inside the vehicle. He followed the

[2]At trial, she identified People's Exhibits No. 18 and 19 as photographs of those lineups.

vehicle and observed as it was park in front of a set of rowhouses, where the driver proceeded to honk the car horn repeatedly. Sergeant Rochowitz ran the vehicle's license plate number on his computer and discovered that it was registered to Wheeler. Once the vehicle drove off, Sergeant Rochowicz followed it activating his police lights. The vehicle immediately stopped, but as Sergeant Rochowicz opened his car door to approach, the two occupants fled on foot while the car reversed toward him. Sergeant Rochowicz moved his car to avoid a collision, and the vehicle struck a parked van and then backed into a wrought iron fence.

Sergeant Rochowicz testified that after he radioed for assistance, he heard muffled cries from the car trunk. Sergeant Rochowicz opened the trunk and found Wheeler inside.

Michael Guice, next testified that he is the manager for security at South Shore Bank. He stated that the bank has approximately six locations in Chicago, one being at 4659 South Cottage Grove Avenue. Guice testified that after the incident in question, he provided police with video surveillance footage from the Cottage Grove Avenue South Shore Bank branch for the date November 7, 2005. Guice testified that this branch had a drive-up facility located at the north side of the building with an auxiliary parking lot located behind the building. The drive-up facility contained four drive-up lanes, each with surveillance video cameras facing east of the building. The surveillance video was played for the jury and it showed two individuals, one wearing a camouflage jacket, making several attempts that night to access the ATM machine in lane two, on foot.

The parties stipulated that there were seven attempts to withdraw money from Wheeler's account made between 10:45 p.m. and 11:13 p.m. on the night in question. The parties further

stipulated that the first two attempts at withdrawal were denied due to an invalid PIN entry, while the last four were denied due to too many invalid PIN entries.

Evidence technician, Officer Alan Grzyb of the Cook County Sheriff's Department next testified that at about 1 a.m. on November 8, 2005, he was assigned to assist in the investigation of this crime. Grzyb stated that, among other things as part of his investigation, he processed Wheeler's car for fingerprints, and retrieved several items from inside, including two cups with straws. Grzyb also processed the scene at the Cottage Grove branch of the South Shore Bank for fingerprints, and retrieved several receipts from there. Leo Cummings, a latent print examiner for the Chicago Police Department, testified that on November 10, 2005, he compared the latent prints he received from Grzyb to those of defendant, codefendant Howard, and the victim. Cummings found that while none of the latent prints matched those of codefendant Howard, several of the prints collected from the driver's side window of Wheeler's car and the outside of the trunk lid, matched those of the defendant. In addition, the parties stipulated that a palm print found on an ATM receipt in the parking lot of the bank matched codefendant Howard's DNA and that the DNA of both Howard and Dunn was found on soda straws retrieved from inside of Wheeler's vehicle.

The State next called codefendant Howard's grandmother, Hertha Kennedy, and Howard's mother Anisia Kennedy. Both witnesses testified that at about 10 p.m., on November 9, 2005, they were watching television, when they saw the South Shore Bank surveillance video on the local news. Hertha and Anisia both thought that the individual in the camouflage jacket looked like Howard. Hertha and Anisia both testified that they did not know whether Howard

possessed a camouflage jacket. However, Hertha stated that when she asked her grandson if that was him in the video, he looked at the floor. Hertha and Anisia therefore drove Howard to the police station at 51st Street and Wentworth Avenue.

Hertha further admitted that she did not use her debit card at White Castle on November 7, 2005. The parties stipulated that at about 11:40 p.m. on November 7, 2005, Hertha's debit card was used to make a $20.10 purchase at a White Castle located at 22nd Street and Wabash Avenues.

Detective David Bishop next testified that at about 11:55 p.m., on November 9, 2005, he met with Anisia, Hertha, and codefendant Howard at the Wentworth Avenue police station. Detective Bishop interviewed Howard for about 10 minutes and then placed him under arrest. After this interview, Detective Bishop proceeded to an apartment building at 452 East 46th Street, where he obtained a photograph of the defendant. Detective Bishop showed the photograph to Howard and subsequently issued an investigative alert for the defendant.

Detective Ernest Turner testified that together with a team of officers, he apprehended the defendant on November 10, 2005 at 11:15 a.m. at the defendant's home. Detective Turner testified that when he arrested the defendant, the defendant was playing a video game and had a BB gun in his waistband. Detective Turner identified People's Exhibit No. 21 as the BB gun retrieved from the defendant's person upon his arrest. He further described that gun as weighing roughly a pound and half and resembling a nine-millimeter blue steel and stainless automatic handgun but with a smaller barrel that was not large enough to shoot bullets, but could and was designed to emit pellets. Detective Turner further testified that this type of gun could cause

significant injury if used as a bludgeon or club. He also stated that the gun if fired, could "put someone's eye out."

Assistant State's Attorney (ASA) Jennifer Gonzalez nest testified that at about 3:18 p.m. on November 10, 2005, she interviewed the defendant at Area 1 police station. After advising the defendant of his *Miranda* rights, ASA Gonzalez prepared a handwritten statement, which the defendant then signed. That statement was published to the jury.

In this statement, the defendant admitted that he was 17 years old and that he lived at 452 East 46th Street. The defendant stated that he met codefendant Howard at Dunbar High School and that he has known him for about two years. According to the defendant, on November 7, 2005, he was walking in the neighborhood when he saw Howard riding his bicycle. The two of them started talking about prior robberies they had committed, and decided to "do a[nother] lick." The defendant averred that he had a "toy gun" on him.

According to the defendant, soon thereafter somewhere near 45th Street, they observed Wheeler getting out of her car. The defendant and Howard decided to rob Wheeler because she looked "sweet" and like she had money. The defendant stated that he then pulled out his "toy gun" from his front pocket and pointed it at Wheeler instructing her to get out of her car. The defendant told Wheeler to open the trunk and she abided by his instructions. He took Wheeler's car key and her cell phone from her pocket, and then ordered her into the trunk.

The defendant next searched the inside of Wheeler's car and found an ATM cash car in her purse. The defendant then drove around for a while, with Howard in the passenger seat. The defendant stated that, at some point, he and Howard tied Wheeler's hands with a cord because

they were frightened that she might have a weapon inside the trunk.

The defendant further stated that he and Howard made several attempts that night to use Wheeler's ATM card at a drive-up bank located at 47th Street and Cottage Grove Avenue. The defendant stated that throughout the night, Wheeler gave them several different ATM PIN numbers and that Howard attempted to withdraw money from her account, each time unsuccessfully. After several attempts, the defendant and Howard left the bank and decided to buy some food.

In his statement to police, the defendant also averred that once they left the bank, Howard told him that they had to "get rid of the lady," and suggested that they "go see one of [his] guys." The defendant stated that he then first drove to a gas station and then to 21st Street and Michigan Avenue where Howard's friend lived, but that friend was not at home. The defendant then drove to the White Castle restaurant located at 22nd and State Streets, where he purchased food and returned with it to the car.

In his handwritten statement, the defendant admitted that when he opened the trunk for the last time, Wheeler begged him not to kill her, and he asked her whether anyone was expecting her at home. The defendant stated that soon thereafter near 48th Street and Drexel Avenue, he observed an unmarked police car following him. After the police car turned on its lights, the defendant became frightened because he knew the car was stolen and Wheeler was tied up in the trunk. The defendant then attempted to put the car into park and jumped out of the driver's side door, running home.

The defendant finally stated that he hid the gun that he had on him that night in a

gangway outside of his apartment building because it was stolen. According to the defendant, when he was subsequently arrested, he had the same gun on him that he used on November 7, 2005.

After the State rested, the defendant called Chequita Morrow as a witness on his behalf. Morrow testified that on the night of November 8, 2005, she watched the 10 p.m. local news and saw the South Shore Bank surveillance video. She testified that she recognize the man in the video wearing the black hooded sweatshirt and identified him as Cameron Walker. Morrow testified that she contacted the police with this information.

In closing argument, defense counsel posited a theory of misidentification, arguing that the evidence did not establish that the defendant had anything to do with the crime, but rather only that he was in or around the victim's car at some point during the evening in question.

During the jury deliberation conference, the defense counsel requested that the jurors be instructed on and given verdict forms for the lesser-included offenses of aggravated robbery, robbery, vehicular hijacking and kidnaping. The trial judge denied this request finding that: (1) aggravated robbery was not a lesser-included offense of armed robbery and (2) that because there was evidence in the record that the BB gun could be used as a bludgeon, no rational trier-of-fact could find the absence of a "dangerous weapon" in the charges filed, so as to permit instruction on the remaining lesser-included offenses. In doing so, the trial judge explained:

> "[L]et me expand a little bit on my decision not [to] allow the lesser offenses that the defense proposed, although for the aggravated robbery I don't believe that is a lesser included; but if it is, that concept is the same.

> The evidence in this case is as to the dangerous weapon is two-fold. The victim, Ms. Wheeler, testified as to what she saw, and gave descriptions of what she saw. The State also introduced an item that was recovered from [defendant] when he was arrested. That's been admitted into evidence as People's Exhibit Number 21. It was testified by a police officer as to its recovery, as to what it is, its shape what its composed, its weight and ability to be used as a club or a bludgeoned [sic.] And also it[s] dangerousness [sic] even if used as a BB-gun while expelling BBs.
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> There was no attack on that testimony, and so the only evidence in this trial is of the dangerous nature of that item. Defense in this case is primarily identification. So for that reason, no rational trier of fact could find for a lesser included; and for those reasons, in addition to what else I said, it remains denied."

After deliberations, the jury found the defendant guilty of all three Class X offenses, aggravated kidnaping, aggravated vehicular hijacking and armed robbery.

During sentencing, the State sought an extended term sentence beyond the statutory maximum of 30 years,[3] on the basis of the defendant's prior juvenile adjudications. Defense counsel, on the other hand, sought a 20 year sentence, arguing in mitigation that the defendant was an A-high school student, a basketball and football player, and that he came from a loving family, but that he had just recently "fallen in with the wrong crowd," mostly because of a lack of male role mode in his life. In support of these arguments, defense counsel called the defendant's

[3]A Class X felony has a sentencing range of 6 to 30 years imprisonment. 730 ILCS 5/5-8-1(a)(3) (West 2002).

mother as a witness on his behalf, and the defendant himself spoke in elocution, apologizing to the victim for any pain and suffering he inflicted upon her and her family. After hearing arguments in aggravation and mitigation, the trial judge sentenced the defendant to an extended-term of 32 years' imprisonment for aggravated kidnaping and concurrent 29 year prison terms for the aggravated vehicular hijacking and armed robbery. The defendant filed a motion for reconsideration of his sentence but that motion was denied. The defendant now appeals.

II. ANALYSIS

On appeal, the defendant makes three contentions. The defendant first argues that the trial court erred when it refused to instruct the jury on the lesser included offenses of kidnaping, vehicular hijacking and robbery, where there was no evidence that defendant had used a "dangerous weapon" in the course of the charged offenses. The defendant further contends that this error was compounded by the fact that the instruction defining a "dangerous weapon" incorrectly stated the law. Next, the defendant contends that the imposition of the extended-term sentence for his aggravated kidnaping conviction violated the decision of the United States Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), because to enhance the defendant's sentence the trial court relied on the defendant's prior juvenile adjudications despite the fact that a jury had never found proof of those adjudications beyond a reasonable doubt. Finally, the defendant argues that he was denied his constitutional right to the effective assistance of counsel because counsel failed to object to a statement by codefendant Howard's attorney, admitting to Howard's involvement in the offenses charged before the defendant's jury. We will address each of the defendant's contentions in turn.

1. Jury Instructions on the Lesser Included Offenses

We begin with the defendant's improper jury instruction argument. The defendant first argues that the trial court erred when it refused to instruct the jury on the lesser included offenses of kidnaping, vehicular hijacking, and robbery[4], where there was no evidence that defendant had used a "dangerous weapon" in the course of the charged offenses. For the reasons that follow, we disagree.

At the outset, we note that contrary to the defendant's position, the decision to issue a jury instruction on a lesser-included offense is not a question of law to be reviewed under a *de novo* standard. See *People v. Perry,* No. 1–08–1228 , slip. op. (Ill. App. March 31, 2011); see also *People v. Hudson*, 222 Ill. 2d 392, 400-401 (2006); *People v. DiVincenzo,* 183 Ill. 2d 239, 249 (1998). Rather, such as decision is within the discretion of the trial court, and a reviewing court will not reverse that decision absent an abuse of discretion. See *Perry,* No. 1–08–1228 , slip. op. (Ill. App. March 31, 2011), see also *Hudson*, 222 Ill. 2d at 401; *DiVincenzo,* 183 Ill. 2d at 249; *People v. Tijerina*, 381 Ill. App. 3d 1024, 1030 (2008); see also *People v. Woodard*, 367 Ill. App. 3d 304, 315 (2006). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

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[4]Although during the jury conference defense counsel also sought an instruction on aggravated robbery, on appeal the defendant concedes that the circuit court properly denied this instruction as aggravated robbery is not a lesser included offense of armed robbery. See *People v. Kelley*, 328 Ill. App. 3d 227, 231-32 (2002).

A lesser-included offense is an offense proven by lesser facts or a lesser mental state, or both, than the charged offense. 720 ILCS 5/2-9(a) (West 2008); see also *People v. Davis,* 213 Ill. 2d 459, 477 (2004). Merely identifying the existence of a lesser-included offense does not "automatically give rise to a correlative right to have the jury instructed on the lesser offense." *People v. Novak*, 163 Ill. 2d 93, 108 (1994), *abrogated on other grounds by People v. Kolton*, 219 Ill. 2d 353 (2006); see also *People v. Greer*, 336 Ill. App. 3d 965, 978 (2003). Whether an instruction on a lesser-included offense is warranted depends on the facts and circumstances of each case. *People v. Grimes*, 386 Ill. App. 3d 448, 451 (2008).

Generally, a defendant is entitled to a lesser included offense instruction only if the evidence presented at trial, would permit a jury rationally to find the defendant guilty of the lesser included offense and acquit him of the greater offense. *People v. Blan*, 392 Ill. App. 3d 453, 458 (2009), citing *Novak*, 163 Ill. 2d at108, *abrogated on other grounds by Kolton*, 219 Ill. 2d 353; see also *People v Tainter*, 304 Ill. App. 3d 384 (1999), citing *DiVincenzo*, 183 Ill. 2d at 249 (a defendant is entitled to an instruction on a lesser included offense where "there is evidence in the record, which, if believed by a jury, would reduce the crime to the lesser offense"). The amount of evidence necessary to meet this factual requirement has been described as "any" "some," or "slight." *Blan*, 392 Ill. App. 3d at 458, citing *Novak*, 163 Ill. 2d at 108; see also *DiVincenzo,* 183 Ill. 2d at 249; *People v. Jones*, 175 Ill.2d 126, 132 (1997); see also *People v. Foster*, 119 Ill.2d 69, 87 (1987); *People v. Ward*, 101 Ill.2d 443, 451 (1984). However, there is a "minimum standard" before an instruction may be given (*People v. King*, 293 Ill. App. 3d 739, 743 (1997)) and the evidence upon which a party relies to justify the request for such an

instruction must be "more than a mere factual reference or witness's comment." *Grimes*, 386 Ill. App. 3d at 451. An instruction on a lesser-included offense is therefore not required where "the evidence rationally precludes such an instruction." *Greer*, 336 Ill. App. 3d at 976.

In the present case, the parties agree that the charged offenses (aggravated kidnaping, aggravated vehicular hijacking and armed robbery) differ from the lesser included offenses (kidnaping, vehicular hijacking and robbery) with respect to one element, *i.e.*, the requisite use of a "dangerous weapon" in the commission of those offenses. See 720 ILCS 5/10-1, 10-2(a)(5) (West 2004)[5]; see also 720 ILCS 5/18-3, 18-4(a)(3) (West 2004)[6]; see also 720 ILCS 5/18-1, 18-2(a)(1) (West 2004)[7].

The parties, however, dispute whether there was sufficient evidence in the record, even if only slight, which would have permitted a rational jury to find that the weapon used in the commission of the offense was not a "dangerous weapon," so as to require the trial judge to

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[5]See 10-2(a)(5) (West 2004) ("A person commits the offense of aggravated kidnaping when he or she commits kidnaping and ***(5) commits the offense of kidnaping while armed with a dangerous weapon, other than a firearm, as defined in Section 33A-1 of this Code").

[6]See 720 ILCS 5/18-4(a)(3) (West 2004) ("A person commits aggravated vehicular hijacking when he or she violates Section 18-3; and ***(3) he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon, other than a firearm").

[7]See 720 ILCS 5/18-2(a) (West 2004) ("A person commits armed robbery when he or she violates Section 18-1; and (1) he or she carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm").

instruct the jury on the lesser included-offenses. The defendant argues that there was substantial evidence in the record establishing that the weapon used was a BB gun. The defendant specifically points out that: (1) in his handwritten statement to police he indicated that the weapon he used was a "toy gun," and (2) that at trial he identified People's Exhibit No. 21, the BB gun found on his person at the time of his arrest, as the "toy gun" he used in the commission of the crime.[8] Citing to *People v. Thorne*, 352 Ill. App. 3d 1062, 1072 (2004) and *People v. Skelton*, 83 Ill. 2d 58, 66 (1980), the defendant further contends that a BB gun is not an inherently "dangerous weapon", but rather that it is within the province of the jury to determine whether or not it was or could have been used as such. Accordingly, the defendant argues, it was error by the trial judge to take this question "out of the hands of the jury." We disagree.

According to our supreme court, "the State may prove that a gun is a dangerous weapon by presenting evidence that the gun was loaded and operable, or by presenting evidence that it was used or capable of being used as a club or bludgeon." *People v. Ross*, 229 Ill. 2d 225, 276 (2008). While our supreme court has recognized that "a trier of fact may make an inference of dangerousness based upon the evidence" presented at trial (see *Ross*, 229 Ill. 2d at 276), it has also held that "where the character of the weapon is such as to admit of only one conclusion the

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[8]The defendant further points out that in his statement to Detective Bishop, codefendant Howard said that the defendant "may have used a BB gun during the commission of the offenses." However, since this statement was not presented to the defendant's jury, as even the defendant concedes in his brief, we are not permitted to consider it on appeal in reviewing the trial judge's decision not to tender the lesser-included offense instructions.

question becomes one of law for the court" (see *Skelton*, 83 Ill. 2d at 66).

In the present case, contrary to the defendant's contentions, there was not even slight evidence in the record, from which the jury could infer that the weapon used in the commission of the offense was not a "dangerous weapon." The defendant was prosecuted both as a principal for his direct involvement in the commission of the crime, as well as an accomplice, under accountability principles. With respect to evidence of accountability, it was uncontroverted at trial that codefendant Howard was armed with a separate weapon during the commission of the offense. Specifically, Wheeler testified that codefendant Howard carried a gun which, after using it to threaten Wheeler, he "stuffed" into his unusually large pockets. When asked whether the gun used by codefendant Howard could have been a BB gun, Wheeler testified that she was certain that it was not. The defense provided no evidence to counter this statement, or to suggest that the weapon used by codefendant Howard was anything but a real gun. Accordingly, the defendant cannot point to even the slightest evidence, which would justify the giving of an instruction on the lesser-included offenses under accountability principles.

The same is true with respect to the evidence of the defendant's direct involvement in the commission of the offenses. The State presented undisputed evidence at trial of the dangerous nature of the BB gun found on the defendant's person at the time of his arrest. Specifically, Detective Turner testified that the defendant's BB gun weighed roughly a pound and a half and that it was made of stainless steel. Detective Turner further testified that because of its weight and shape, the BB gun could be used as a bludgeon, as well as that it could be used to "put someone's eye out" if fired. The BB gun was then introduced as an exhibit at trial, so as to

permit the jury to examine it themselves. The defendant presented no evidence to counter Detective Turner's testimony regarding the dangerous character of the BB gun. Accordingly, the defendant fails to point to even the slightest evidence that, if believed by the jury, would have permitted it to find that the BB gun was not a "dangerous weapon." See *e.g.*, *People v. Bell,* 264 Ill. App. 3d 753, 756 (1993) (holding that police officer's testimony that a replica toy gun could be used as a deadly bludgeon, along with a description of the replica gun as a "very heavy item," was sufficient to establish that the replica gun was a "dangerous weapon"); see also *People v. Bayless*, 99 Ill. App. 3d 532, 537 (1981) (holding that a toy cap gun could have been used as a bludgeon to inflict serious harm due to its weight and metallic nature); *People v. Greer*, 53 Ill. App. 3d 675, 683 (1977) (holding that because an unloaded pellet gun was made of metal, it could have been used as a bludgeon); *People v. Hill,* 47 Ill. App. 3d 976, 978 (1977) (holding that because an unloaded air pistol was a "piece of metal," which could have been used "in a manner dangerous to the physical well-being of the individual threatened" there was sufficient evidence presented that it was a "dangerous weapon"); *People v. Ratliff*, 22 Ill. App. 3d 106, 108 (1974) (holding that a .22-caliber pistol designed to fire blank cartridges was a piece of metal and could have been used "in a manner dangerous to the physical well-being of the individual threatened," so as to fall within the category of a "dangerous weapon").

Therefore, we find no abuse of discretion in the trial judge's decision not to instruct the jury on the lesser-included offenses. See *e.g.*, *People v. De La Fuente*, 92 Ill. App. 3d 525, 534-36 (1981) (holding that the trial court did not abuse its discretion in not instructing the jury on the lesser included offense of robbery where the defendant, armed with a starter pistol, that could

not fire bullets, used that pistol as a bludgeon in robbing the victim); see also *People v. Moore*, 206 Ill. App. 3d 769, 774 (1990) ("where the evidence shows that defendants are either guilty of the higher offense or not guilty of any offense, an instruction on the lesser included offense is unnecessary and properly refused").

In coming to this conclusion, we have reviewed the decisions in *Thorne*, 352 Ill. App. 3d 1062, and *Skelton*, 83 Ill. 2d 58, cited to the by the defendant and find them inapposite.

In *Thorne*, the appellate court reversed the defendant's conviction for armed robbery, holding that there was insufficient evidence in the record to support a finding that the BB gun used during the commission of the robbery was a "dangerous weapon." *Thorne*, 352 Ill. App. 3d at 1069-70. The court in *Thorne*, provided two reasons for this conclusion: (1) there was no evidence presented at trial that the BB gun was used as a bludgeon or club and (2) there was no testimony as to the BB gun's weight or metallic nature to support a finding that it could have been used in a dangerous manner. *Thorne*, 352 Ill. App. 3d at 1069-70. Unlike in *Thorne*, however, in the present case, Detective Turner's undisputed testimony clearly established that the BB gun could have been used in a dangerous manner. As already noted above, Detective Turner testified that the BB gun weighed roughly a pound and a half, that it resembled a nine-millimeter blue steel and stainless automatic handgun, and that it was designed to shoot pellets. Detective Turner further testified that because of its weight the BB gun could be used as a club, a bludgeon or a striking instrument, or that, if fired, it could be used to "shoot someone's eye out."

We similarly find the defendant's reliance on *Skelton* misplaced. In that case, the court found that the evidence presented at trial was insufficient to convict the defendant of armed

robbery where the State failed to establish that the toy gun used by the defendant was a "dangerous weapon." *Skelton*, 83 Ill. 2d at 66-67. In coming to this conclusion the court in *Skelton* noted that the toy gun in that case "did not fire blank shells or give off a flash," that "it fire[d] no pellets," that it was "entirely too small and light in weight to be effectively used as a bludgeon," and that "except that it could, conceivably be used to poke the victim in the eye (and a finger could be used for that purpose), it [wa]s harmless." *Skelton*, 83 Ill. 2d at 66. The present case is clearly distinguishable from *Skelton*. As already explained in detail above, the testimony of Detective Turner established that the BB gun the defendant alleged he used in the commission of the offense was both heavy and metallic so as to be capable of being used as a bludgeon, as well as designed to shoot pellets, which could "put someone's eyes out" if fired.

2. The Jury Instruction Defining a "Dangerous Weapon"

The defendant next asserts that the trial court's decision not to permit the lesser included offense instruction was compounded by its failure to accurately define the term "dangerous weapon" for the jury. The State initially contends that the defendant has forfeited this issue for purposes of appeal by failing to properly preserve it before the circuit court.

"[A] defendant generally forfeits review of any purported jury instruction error if the defendant does not object to the instruction, or tender an alternative instruction at trial, and does not raise the instruction issue in a posttrial motion." *People v. Bannister*, 232 Ill. 2d 52, 76-77 (2008); see also *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). These requirements ensure that the trial court has the opportunity to correct a defective instruction and to prevent the challenging party from gaining an unfair advantage by failing to act when the trial court could remedy the

faulty instruction and then obtaining a reversal on appeal. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557-58 (2008).

The defendant responds by asserting that he has in fact preserved the issue for purposes of appeal by objecting to it before the trial judge and referencing it in his posttrial motion. A review of the record, however, reveals that although during the jury instruction conference, the defendant made a general objection to People's Instruction No. 12, which defined "dangerous weapon" for the jury according to Illinois Pattern Jury Instruction 4.17 (IPI Criminal No. 4.17 (4th edition)), he failed to argue the inappropriateness of this instruction in his motion for a new trial. The only instructional error the defendant raised in his posttrial motion referred to the trial court's failure to tender the lesser-included offense instructions to the jury. Accordingly, the defendant has forfeited the issue for purposes of appeal. *Bannister*, 232 Ill. 2d at 76-77.

The defendant nevertheless contends that we should review this issue under the plain error doctrine. The plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error where either: (1) a clear and obvious error occurred and the evidence is so closely balanced that such error threatens to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred that is so serious that it affects the fairness of the defendant's trial and challenges the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Walker*, 232 Ill. 2d 113, 124 (2009); *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In both instances, the burden of persuasion remains on the defendant. *People v. Herron*, 215 Ill. 2d 167, 187 (2005), citing *People v. Hopp*, 209 Ill. 2d 1, 12 (2004).

In the present case, the defendant contends that it was error to instruct the jury pursuant to Illinois Criminal Pattern Instruction No. 4.17 (IPI Criminal No. 4.17 (4th edition)). This instruction defines a "dangerous weapon" in the following manner: "An object or an instrument which is not inherently dangerous may be a dangerous weapon depending on the manner of its use and the circumstances of the case." IPI Criminal No. 4.17 (4th edition). The defendant argues that, while this definition was appropriate for purposes of the armed robbery charge it should not have been used to define "dangerous weapon" for the aggravated kidnaping and aggravated vehicular hijacking charges. Rather, the defendant asserts, the jury should have been given an additional instruction defining "dangerous weapon" as set forth in section 33A-1 of the Criminal Code (720 ILCS 5/33A-1 (West 2000)) for the two remaining charges.

In support of this contention, the defendant cites to the committee notes for IPI 4.17 (IPI Criminal No. 4.17 (4th edition)) and IPI 8.04 (IPI Criminal No. 8.04 (4th edition)). The committee notes for IPI 4.17 state in pertinent part:

> "This definition is appropriate in those armed robbery cases where the alleged weapon is not inherently dangerous. ***
>
> Do not give this instruction in armed violence cases, *aggravated kidnaping cases*, *or in other cases where the term 'dangerous weapon' is expressly defined by statute*." (Emphasis added.) See IPI Criminal No. 4.17, Committee Notes (4th edition).

The Criminal Code defines aggravated kidnaping in the following manner:

> "A person commits the offense of aggravated kidnaping when he or she commits kidnaping and ***

> (5) commits the offense of kidnaping while armed with a dangerous weapon, other than a firearm, *as defined in Section 33A-1 of this Code*." (Emphasis added.) 720 ILCS 5/10-2(a) (West 2004).

Moreover, the committee notes for IPI 8.04, which sets forth the pattern instruction to be given in defining an aggravated kidnaping charge, specifically direct that "the definition of the term 'dangerous weapon' which is found in 720 ILCS 5/33A-1 (1992)" be used. See IPI Criminal No. 8.04, Committee Notes (4th edition). That section of the Criminal Code (otherwise known as the Armed Violence statute) defines a person "armed with a dangerous weapon," as one who "carries on or about his or her person or is otherwise armed with a Category I, Category II, or Category III weapon." 720 ILCS 5/33A-1(c) (2000). According to section 33A-1(c):

> "(2) A Category I weapon is a handgun, sawed-off shotgun, sawed-off rifle, any other firearm small enough to be concealed upon the person, semiautomatic firearm, or machine gun. A Category II weapon is any other rifle, shotgun, spring gun, other firearm, stun gun or taser as defined in paragraph (a) of Section 24-1 of this Code, knife with a blade of at least 3 inches in length, dagger, dirk, switchblade knife, stiletto, axe, hatchet, or other deadly or dangerous weapon or instrument of like character. ***
>
> (3) A Category III weapon is a bludgeon, black-jack, slingshot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character." 720 ILCS 5/33A-1(c) (2000).

Based on the aforementioned committee notes and statutory provisions, the defendant

contends that for purposes of the aggravated kidnaping and vehicular hijacking charges,[9] it was error for the trial court not to instruct the jury with a more specific definition of a "dangerous weapon" defined by Category I, Category II and Category III weapons.

Without citing to any authority, the State simply contends that a jury instruction pursuant to section 33A-1 was unnecessary, as in this case, the State did not seek the 15-year firearm sentencing enhancement, which is contemplated by section 33A-1 of the Criminal Code (the Armed Violence Statute). See 720 ILCS 5/33A-1. The State further contends that providing the jury with the list of Category I, II, and III weapons would have served no purpose but to confuse the jury.

Although we are not very persuaded by the State's argument, at present, we need not determine whether the trial judge committed an error by defining a "dangerous weapon" with the use of IPI 4.17 for purposes of all three of the charged offenses. Even if this instruction was

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[9]We note that the defendant does not elaborate on why these provisions apply to the aggravated vehicular hijacking charges. This is especially troubling since the Criminal Code does not specifically cite to section 33A-1 to define a "dangerous weapon" for purposes of aggravated vehicular hijacking (see 720 ILCS 5/18-4(a)(3) (West 2004) ("A person commits aggravated vehicular hijacking when he or she violates Section 18-3; and ***(3) he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon, other than a firearm"), nor do the committee notes in IPI 14.23, which set forth the pattern jury instruction to be tendered in defining the charge of aggravated vehicular hijacking (see IPI Criminal No 14.23, Committee Notes (4th edition)).

erroneous, the defendant has failed in his burden to demonstrate either that the evidence presented against him was closely balanced so as to tip the scales of justice against him, or that the error was of such magnitude that it impacted his right to a fair trial and challenged the integrity of the judicial process, requiring our review under the plain error doctrine. See *Walker*, 232 Ill. 2d at 124; see also *Piatkowski*, 225 Ill. 2dat 565.

The defendant here does not even attempt to argue, nor could he, that the evidence presented against him at trial was closely balanced, so as to permit review under the first prong of the plain error analysis. See *Walker*, 232 Ill. 2d at 124; see also *Piatkowski*, 225 Ill. 2dat 565. The evidence presented at the defendant's trial overwhelmingly established that the weapon used fell within the category of "dangerous weapons" as defined either by IPI 4.17 (IPI Criminal No. 4.17 (4th edition)) or by section 33A-1 of the Criminal Code (720 ILCS 5/33A-1(c) (West 2000)). As already elaborated above, it was undisputed at the defendant's trial that the BB gun, the defendant alleged he used during the kidnaping and robbery, weighed roughly a pound and a half, that it was made of stainless steel, and that as a result of its weight and shape it could be used as a bludgeon. This undisputed evidence overwhelmingly placed the BB gun within the category of a "dangerous weapon" either under the IPI 4.17 definition or the definition prescribed by section 33A-1 of the Criminal Code. See 720 ILCS 5/33A-1(c) (West 2000) ("(3) A Category III weapon is a *bludgeon*, black-jack, slingshot, sand-bag, sand-club, metal knuckles, billy, *or other dangerous weapon of like character*." (Emphasis added)); see also IPI Criminal No. 4.17 ("An object or an instrument which is not inherently dangerous may be a dangerous weapon depending on the manner of its use and the circumstances of the case"). Accordingly, the

defendant cannot in good conscience contend that the failure to provide the jury with definitions of Category I, II, and III weapons as defined by section 33A-1 of the Criminal Code (720 ILCS 5/33A-1 (West 2000)) somehow prejudiced the jury's finding that the weapon used was a "dangerous weapon."

Moreover, the remainder of the evidence presented at the defendant's trial was not closely balanced but rather overwhelmingly established the defendant's guilt. The victim, Wheeler, twice identified the defendant as one her kidnapers, first in a lineup soon after the kidnaping, and later in court during trial. In addition, the defendant himself confessed to his involvement in the kidnaping, and his handwritten statement to police, detailing his abduction of Wheeler was read to the jury. Finally, both the defendant's DNA and his fingerprints were retrieved from inside the victim's vehicle and the exterior of the trunk of her car, where she was kept for the duration of the crimes. For all of these reasons, the defendant has failed to establish prejudice and cannot avail himself of review through the first prong of the plain error analysis. See *Walker*, 232 Ill. 2d at 124; see also *Piatkowski*, 225 Ill. 2dat 565.

The defendant therefore urges us to review this issue under the second prong of the plain error analysis. Citing to *People v. Turner*, 179 Ill. App. 3d 510, 515 (1989), he asserts that instructing the jury with IPI 4.17 resulted in the jury not being "properly apprised of the State's burden as to the dangerous weapon element," and that therefore this error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. We disagree, and find that case inapposite.

We initially note that our courts have repeatedly held that instructional errors do not rise

to the level of structural errors such that prejudice must be presumed under the second prong of the plain error analysis. See *e.g.*, *People v. Taylor*, 397 Ill. App. 3d 813, 817 (2010) (holding that even though it was error by the trial judge to tender an outdated instruction to the jury, which failed to state that a "dangerous weapon" was to be one other than a firearm, the "error was not so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence"); see also *People v. Glasper*, 234 Ill. 2d 173, 196-200 (2009) (narrowly limiting the scope of those errors that are to be considered structural errors for purposes of the second prong of the plain error analysis, and noting that most constitutional errors are subject to a harmless error analysis); *People v. Davis*, 233 Ill. 2d 244, 269-74 (2009) (discussing the decision of the United States Supreme Court in *Hedgpeth v. Pulido*, 555 U.S. 57, 129 S. Ct. 530, 531-32 (2008), noting that instructional errors do not rise to the level of structural errors, and that therefore a defendant who does not object to an instructional error bears the burden of demonstrating prejudice under plain error review); see also *Neder v. United States*, 527 U.S. 1, 10-11, 119 S. Ct. 1827, 1834-35 (1999) (holding that the trial court's erroneous jury instruction that omitted an element of the offense did not render the trial fundamentally unfair, so as to require automatic reversal; rather this type of error was subject to harmless-error analysis); see also, *People v. Thurow*, 203 Ill. 2d 352, 363 (2003) (holding that the trial court's failure to submit every essential element of an offense to the jury for consideration of sentencing enhancements was subject to the first prong of plain error analysis); *People v. Nitz*, 219 Ill. 2d 400, 410-11 (2006) (same).

Moreover, we find the defendant's citation to *Turner*, misplaced. In that case, the

appellate court reviewed the unpreserved issue of whether the trial court failed to instruct the jury on an essential element of the offense of forgery. *Turner*, 179 Ill. App. 3d at 515-16. The appellate court found that the trial court erred in instructing the jury by failing to include an essential element of forgery, namely that "the document made or altered be apparently capable of defrauding another" in any of the jury instructions. *Turner*, 179 Ill. App. 3d at 515-16. The *Turner* court further found that such an instruction was essential to a fair trial and that "failure to give such instruction constitute[d] grave error, when viewing the record as a whole, it appear[ed] that the jury was not apprised of the State's burden of proof." *Turner*, 179 Ill. App. 3d at 515.

Unlike in *Turner*, in the present case, there is nothing in the record to suggest that the jury was not apprised of the State's burden of proof as to the element of a "dangerous weapon," so as to require automatic reversal. In fact, the jury instructions for both the aggravated kidnaping and the vehicular hijacking charges made clear that the use of a "dangerous weapon" was an essential element of both charges, and that the State bore the burden in establishing the use of such a weapon. With respect to aggravated kidnaping, the jury was instructed that "[a] person who kidnaps another commits the offense of aggravated kidnaping when he does so while armed with a dangerous weapon." IPI Criminal No. 8.04 (4th edition). In addition, the jury was instructed that:

> "To sustain the charge of aggravated kidnaping, *the State must prove* the following propositions:
>
> *First*: That the defendant, or one for whose conduct he is legally responsible, secretly confined Loretta Wheeler against her will; and

Second: That the defendant, or one for whose conduct he is legally responsible, acted knowingly; and

Third: *That the defendant, or one for whose conduct he is legally responsible, was armed with a dangerous weapon.*

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond reasonable doubt, you should find the defendant not guilty." (Emphasis added.) IPI Criminal No. 8.05 (4th edition).

Similarly, with respect to aggravated vehicular hijacking the jury was instructed that "[a] person commits the offense of aggravated vehicular hijacking when he knowingly takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force, and he carries on or about his person or is otherwise armed with a dangerous weapon. IPI Criminal No. 14.23 (4th edition). The jury was further instructed:

"To sustain the charge of aggravated vehicular hijacking, *the State must prove* the following propositions:

First: That the defendant, or one for whose conduct he is legally responsible, took a motor vehicle from the person or the immediate presence of Loretta Wheeler; and

Second: That the defendant, or one for whose conduct he is legally responsible, did so by the use of force or by threatening the imminent use of force; and

Third: *That the defendant, or one for whose conduct he is legally responsible, carried on or about his person or was otherwise armed with a dangerous weapon* at the time of the taking.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond reasonable doubt, you should find the defendant not guilty." (Emphasis added.) IPI Criminal No. 14.24 (4th edition).

Accordingly, unlike in Turner, the jury here was at all times apprised of the State's burden of proof as to establishing that the weapon used during the commission of the offenses, was a "dangerous weapon." For all of the aforementioned reasons, we are precluded from reviewing the defendant's claim of error under the second prong of the plain error doctrine. See *Walker*, 232 Ill. 2d at 124; see also *Piatkowski*, 225 Ill. 2dat 565.

3. *Apprendi*

The defendant next contends that the trial judge committed reversible error when he sentenced him to an extended term of 32 years' imprisonment. The defendant specifically contends that to impose the extended term sentence, the trial judge solely relied on the defendant's prior juvenile adjudications despite the fact that a jury had never found proof of those adjudications beyond a reasonable doubt, as required by the decision of the United States Supreme Court in *Apprendi,* 530 U.S. 466, 120 S. Ct. 2348.

We begin by noting that the defendant has, once again, forfeited this issue for purposes of appeal by failing to properly preserve it before the circuit court. To preserve this issue for purposes of appeal, the "defendant was required to make a contemporaneous objection at the sentencing hearing and to raise the issue in a post-sentencing motion." See *People v. Hall*, 194 Ill. 2d 305, 352 (2000). While the record below reveals that defense counsel objected to the imposition of an extended-term sentence before the trial judge, she objected on a separate and distinct basis, never raising the *Apprendi* issue, either in an objection to the trial judge, or in the defendant's subsequent post-sentencing motion. See *Nitz*, 219 Ill. 2d at 410-11 (failure to raise an *Apprendi* objection at sentencing results in forfeiture and the claim may only be reviewed under plain error analysis).

The defendant, however, again, urges us to review this issue under the plain error doctrine. As already noted above, the plain error doctrine permits us to review unpreserved error where the error is clear and obvious and either: (1) the evidence was so closely balanced that such error threatened to tip the scales of justice against the defendant, or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Walker*, 232 Ill. 2d at 124; *Piatkowski*, 225 Ill. 2d at 565. In either event, however, we must first determine whether there was error. See *Walker*, 232 Ill. 2d at 124; *Piatkowski*, 225 Ill. 2d at 565.

In the present case, following his jury trial, the defendant was convicted of three Class X felonies (armed robbery, aggravated kidnaping and aggravated vehicular hijacking). A Class X felony has a sentencing range of 6 to 30 years imprisonment. 730 ILCS 5/5-8-1(a)(3) (West

2002). In imposing sentences for the armed robbery and aggravated vehicular hijacking the trial judge sentenced the defendant to 29 years imprisonment, a sentence within the limits of the Class X sentencing range. However, in imposing a sentence for the aggravated kidnaping conviction, the trial judge found the defendant eligible for an extended-term sentence on the basis of defendant's two prior juvenile adjudications for residential burglary and robbery, pursuant to section 5/5-5-3.2(b)(11) of the Uniform Code of Corrections (Code of Corrections) (730 ILCS 5/5-5-3.2(b)(11) (West 2002)) and sentenced the defendant to an extended term of 32 years' imprisonment.[10] See 730 ILCS 5/8-2 (West 2002) ("A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by section 5-8-1 *** unless the factors in aggravation set forth in paragraph (b) of section 5-5-3.2 were found to be present."); 730 ILCS 5/5-5-3.2(b)(11) (West 2002)) ("The following factors may be considered by the court as reasons to impose an extended term sentence under section 5-8-2 upon any offender: *** When a defendant who was at least 17 years of age at the time of the commission of the offense is convicted of a felony and has been previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a Class X or Class 1 felony when the conviction has occurred within 10 years after the previous adjudication, excluding time spent in custody"). Evidence of these prior juvenile adjudications was presented in the presentence investigation report (PSI) filed with the circuit court and was never presented to the jury.

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[10]Under section 5/8-2 of the Code of Corrections the trial judge had the discretion to impose an extended term sentence between 30 and 60 years. 730 ILCS 5/8-2 (West 2002).

The defendant contends that the imposition of this extended term sentence violated the decision of the United States Supreme Court in *Apprendi*. Under *Apprendi*, a fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt or else admitted by the defendant. *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63. The *Apprendi* court, however, provided the following exception: a prior conviction can be used to increase the penalty for a crime beyond the prescribed statutory maximum even if it was not submitted to the jury and proved beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63 ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); see also *People v. Swift*, 202 Ill. 2d 378, 384 (2002)("The central tenant of *Apprendi* is that the constitution requires that any facts necessary to authorize the sentence imposed on the defendant must be proven to the jury, beyond a reasonable doubt"). The defendant argues that since the jury was not presented with the facts of his prior juvenile adjudications, it was error by the trial court to impose an extended-term sentence for his aggravated kidnaping conviction.

The State agrees that under *Apprendi*, all factors, apart from prior criminal convictions, used to enhance a defendant's sentence must be found by a jury beyond a reasonable doubt. However, the State argues that a juvenile adjudication is equivalent to a prior conviction and that, therefore, it falls within the exception articulated in *Apprendi*. See *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63 ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and

proved beyond a reasonable doubt"). The State therefore argues that the trial judge was within his discretion to impose an extended term sentence based upon the defendant's prior juvenile adjudications, without the fact of those adjudications being presented to and found, beyond a reasonable doubt, by the jury. The State would therefore have us find that the imposition of the extended term sentence was not made in error.

We need not, however, make that determination here, as shall be more fully explained below, the defendant has failed in his burden to establish that any such alleged error rose to the level of plain error so as to require our review under the plain error doctrine.

We do, however, note that the question of whether a juvenile adjudication constitutes a conviction for purposes of *Apprendi* is a question of first impression in Illinois. What is more, this precise issue has not yet been addressed by the United States Supreme Court. As the law currently stands, there is a split in the federal circuits on this point See *Welch v. United States,* 604 F.3d 408 (7th Cir. 2010); *United States v. Wright*, 594 F.3d 259 (4th Cir. 2010); *United States v. Crowell*, 493 F. 3d 744 (6th Cir. 2007); *United States v. Burge*, 407 F.3d 1183 (11th Cir.2005); *United States v. Jones*, 332 F.3d 688 (3d Cir. 2003); *United States v. Smalley*, 294 F.3d 1030 (8th Cir.2002); *but see, United States v. Tighe*, 266 F.3d 1187 (9th Cir.2001).[11] In

[11]A similar split in authorities has arisen among the state courts. See *e.g*., *State v. Weber*, 159 Wash. 2d 252, 149 P. 3d 646, 653 (2006) (adopting the majority view); *State v. McFee*, 721 N.W.2d 607, 619 (Min.. 2006) (same); *Ryle v. State*, 842 N.E.2d 320, 323 (Ind. 2005) (same)*; State v. Hitt*, 273 Kan. 224, 235, 42 P.3d 732, 739, (Kan.2002) (same); *People v. Bowden*, 102 Cal. App. 4th 387, 125 Cal. Rptr.2d 513 (Cal. Ct. App.2002) (same); *but see, State v. Harris,* 339

each of these cases, defendants were charged with violating the Armed Career Criminal Act (the federal Act) (18 U.S.C. § 924(e) (2000)), which provides that a defendant convicted of being a felon in possession of a firearm is subject to a maximum sentence of 10 years. The federal Act further provides, however, that if the convicted felon is found to have three previous convictions for a violent felony, a minimum sentence of 15 years is required. 18 U.S.C. § 924(e) (2000). The defendants in each of these cases challenged the imposition of the extended term sentence on the basis of *Apprendi*, arguing that their prior juvenile adjudications, which were not obtained by a jury, were not "prior convictions" for *Apprendi* purposes.

The majority of the courts, including the Seventh Circuit, have held that the absence of a jury trial does not prevent the use of a juvenile adjudication to enhance a sentence under the federal Act. See *Welch,* 604 F.3d at 426; *Wright*, 594 F.3d at 264; *Crowell*, 493 F. 3d at 750; *Burge*, 407 F.3d at 1190; *Jones*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1032. In coming to this conclusion, these courts have first noted that the reason *Apprendi* excluded prior convictions from its general rule prohibiting the imposition of extended term sentences on the basis of facts not determined by a jury, was the existence of procedural safeguards that buttress the convictions, namely, the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt. See *Welch,* 604 F.3d at 427; *Wright*, 594 F.3d at 264; *Crowell*, 493

Or. 157, 118 P.3d 236, 246 (2005) (agreeing with the minority view); see also *State v. Brown*, 879 So.2d 1276, 1290 (La.2004), *cert. denied*, 543 U.S. 1177, 125 S. Ct. 1310, 161 L. Ed.2d 161 (2005) (same).

F. 3d at 750; *Burge*, 407 F.3d at 1190; *Jones*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1032. The majority of courts further pointed out that *Apprendi* specifically failed to address juvenile adjudications, or to indicate whether they fall within the prior convictions exception. See *e.g.*, *Smalley*, 294 F.3d at 1032 (while *Apprendi* "established what constitutes sufficient procedural safeguards (a right to a jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), [it] did not take a position on possibilities that lie in between these two poles"); see also, *Welch,* 604 F.3d at 427; *Ryle*, 842 N.E.2d at 322. The majority of courts have then concluded that the question of whether juvenile adjudications should be exempt from *Apprendi*'s general rule should turn on "whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." *Smalley*, 294 F.3d at 1032-33; see also *e.g.*, *Welch*, 604 F.3d at 427; *Burge*, 407 F.3d at 1190. The majority of courts have then held that, given the panoply of procedural safeguards in place in a juvenile proceeding, including, the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, and most importantly, the right to a finding of guilt beyond a reasonable doubt, juvenile convictions can be considered constitutionally reliable enough to satisfy *Apprendi*'s exception without the right to a trial by jury. See *Welch*, 604 F.3d at 428-29; see also *Smalley*, 294 F.3d at 1032-33; see also *Crowell*, 493 F.3d at 750 ("Juvenile adjudications, where the defendant has the right to notice, the right to counsel, the privilege against self-incrimination, the right to confront and cross-examine witnesses, and the right to a finding of guilt beyond a reasonable doubt, provide sufficient procedural safeguards to satisfy the reliability requirement that is at the heart of

Apprendi."); see also *Jones*, 332 F.3d at 696 ("[a] prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes"); see also *Hitt*, 273 Kan. at 235, 42 P.3d at 740 (stating that although *Apprendi* spoke of procedural safeguards attached to a prior conviction, "[i]t did not specify all procedural safeguards nor did it require certain crucial procedural safeguards").

On the other hand, the minority view, espoused by the Ninth Circuit, has unconditionally held that nonjury juvenile adjudications may not be considered prior convictions for *Apprendi* purposes to enhance a sentence under the federal Act. See *Tighe*, 266 F.3d at 1191-95. The minority view is primarily based upon the following language of *Apprendi*:

> " 'There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.' " *Tighe*, 266 F.3d at 1194, quoting *Apprendi*, 530 U.S. at 496, 120 S. Ct. at 2366.

The minority view has interpreted this language to require that "the 'prior conviction' exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial *and* proof beyond a reasonable doubt." (Emphasis added.) *Tighe*, 266 F.3d at 1194. According to the minority view, both requisites (right to a jury trial and proof beyond a reasonable doubt) are mandatory, and since juvenile adjudications do not require a trial by jury they cannot be equated to criminal convictions. See *Tighe*, 266 F.3d at 1194-95.

The proponents of the minority view, have further argued that if *Apprendi* had wanted to include juvenile adjudications in its prior conviction exceptions, it would not have required that those convictions be obtained through proceedings in which the defendant had a right to have a jury trial. See *Tighe*, 266 F.3d at 1194; see also *Welch*, 604 F. 3d at 431 (J. Posner, dissenting) (**"**Otherwise why does the Supreme Court [in *Apprendi*] require that any fact, as distinct from a conviction, used to enhance a sentence be a fact found by a jury (unless of course the defendant waived a jury)? Why didn't the Court [in *Apprendi*] just say that fact must be found by a reliable means?").

The minority view also focuses on the distinction between the purpose of juvenile adjudications versus criminal convictions. As Judge Posner noted in his dissent to the Seventh Circuit's majority opinion in *Welch*:

> "The constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement. So the mere fact that a juvenile had all the process he was entitled to doesn't make his juvenile conviction equivalent, for purposes of recidivist enhancements, to adult convictions.
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> The [United States] Supreme Court's opinion in *McKeiver* [*v. Pennsylvania,* 403, U.S. 528, 91 S. Ct. 1976 (1971)] had acknowledged that the juvenile courts are a mess, and subsequent research confirms that their noncriminal "convictions" may well lack the reliability of real convictions in criminal courts. [Citations.] We learn from this literature

that lawyers in juvenile courts are overloaded with cases, that they often fail to meet with their clients before entering a guilty plea and often rely on parents and on the child defendant himself to contact witnesses, and that they rarely file pretrial motions. And because the philosophy on which the juvenile court system was founded emphasizes protecting the 'best interests of the child' and rehabilitating rather than punishing the child, the culture of the juvenile courts discourages zealous adversarial advocacy even though in its current form the juvenile justice system is much more punitive than its founders envisaged. Lawyers also appear to be reluctant to appeal juvenile cases and to seek postconviction relief; heavy caseloads, a prevalent view that appeals undermine the rehabilitation process, and an absence of awareness among juveniles of their appeal rights are the likely reasons for this reluctance.

Of particular relevance to *Apprendi*, the literature finds that judges are more likely to convict in juvenile cases than juries are in criminal cases. Juvenile-court judges are exposed to inadmissible evidence; they hear the same stories from defendants over and over again, leading them to treat defendants' testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust; and they make their decisions alone rather than as a group and so their decisions lack the benefits of group deliberation. It would be hasty to conclude that juvenile-court judges are more prone to convict the innocent than juries are. But if it is true that juvenile defendants fare worse before judges than they would before juries-if there is reason to think that trial by jury would alter the outcomes in a

nontrivial proportion of juvenile cases-one cannot fob off the *Apprendi* argument with the observation that a jury makes no difference." *Welch*, 604 F. 3d at 431-33.

Although in *People v. Taylor*, 221 Ill. 2d 157, 173 (2006), our supreme court recognized the split in authorities regarding whether a juvenile adjudication should be equated with a criminal conviction for *Apprendi* purposes, it has refrained from taking a position on this issue. We, too, need not make a determination here as to whether it was error to equate a juvenile adjudication with a criminal conviction for purposes of enhancing the defendant's sentence, since the defendant here has failed in his burden to establish that an *Apprendi* error, if it was an error at all, rose to the level of plain error so as to require our review under the plain error doctrine.

In that respect, we note that our supreme court has held that *Apprendi* issues are not structural errors under the second prong of the plain error analysis, but that, rather, the defendant bears the burden in establishing that the error was prejudicial. See *Nitz*, 219 Ill. 2d at 416; see also *Thurow*, 203 Ill. 2d at 363.

There can be no doubt that the defendant has failed to meet that burden here, since the evidence as to his juvenile adjudications was not closely balanced but rather undisputed. The defendant never challenged the PSI report containing certified copies of his prior juvenile adjudications, and in fact, during mitigation, his counsel admitted that defendant had previously been twice adjudicated delinquent. The defendant, therefore, cannot show how, had the jury been presented with the undisputed evidence of his prior juvenile adjudications, it would not have found the fact of those juvenile adjudications beyond a reasonable doubt, so as to prohibit the imposition of an extended term sentence for his aggravated kidnaping conviction pursuant to

section 5-5-3.2(b)(11) of the Code of Corrections. See 730 ILCS 5/5-5-3.2(b)(11) (West 2002)) ("The following factors may be considered by the court as reasons to impose an extended term sentence under section 5-8-2 upon any offender: *** When a defendant who was at least 17 years of age at the time of the commission of the offense is convicted of a felony and has been previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a Class X or Class 1 felony when the conviction has occurred within 10 years after the previous adjudication, excluding time spent in custody"). Accordingly, since the defendant has failed to establish prejudice, the procedural default must be honored, and we must refrain from reviewing this issue under the plain error doctrine. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

3. Ineffective Assistance of Counsel

The defendant next argues that he was denied his constitutional right to the effective assistance of counsel because counsel failed to object when codefendant Howard's attorney admitted, in the presence of the defendant's jury, that codefendant Howard "left the ATM" after trying to access it with Wheeler's debit card. The comment that the defendant complains of was made in the following context. After Michael Guice, manager of security for the bank where the perpetrators attempted to use Wheeler's debit card, testified for the State, he was cross-examined by both defense counsel and codefedant Howard's attorney in the presence of both the defendant's and codefendant's juries. During cross-examination by codefendant Howard's attorney the following colloquy took place:

Q [Codefendant's attorney]: "In the videos you saw, especially the one where my

client left the ATM, he went out to the left, didn't he?"

A [Guice]: North.

Mr. McKay [Assistant State's Attorney]: Objection

The Court: Hold on. Let him answer.

A [Guice]: North.

The Court: Objection is overruled. What was the answer?

A [Guice]: North."

The defendant contends that the aforementioned statement by codefendant Howard's attorney that "[his] client left the ATM" was an admission of codefendant Howard's participation in the crime and that since the defendant was tried under accountability principles, as well as for his direct involvement in the crime, this statement was highly prejudicial, and his defense counsel's failure to object to it constituted ineffective assistance of counsel. For the reasons that follow, we disagree.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation was deficient and that he was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Both prongs of the *Strickland* test must be satisfied to establish an ineffective assistance of counsel claim. *People v. Albanese,* 104 Ill. 2d 504, 525-27 (1984). Counsel's performance is deficient if he fails to satisfy an objective standard of reasonableness. *Strickland*, 466 U.S. at 687, 80 L.E.2d at 693, 104 S. Ct. at 2064. Defendant must overcome a strong presumption that the challenged action or inaction was the product of sound trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). A defendant is

prejudiced if there is a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Such a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In deciding whether a defendant has demonstrated deficient performance and the reasonable probability of a different result, a review court must "consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069. Where a defendant fails to satisfy *Strickland*'s second prong by failing to show prejudice, the reviewing court need not determine whether *Strickland*'s first prong of deficient performance has been met. *People v. Grant*, 372 Ill. App. 3d 772, 777 (2007).

In the present case, the defendant has failed to overcome the second prong of the *Strickland* analysis since he has failed to show how, absent this fleeting statement by codefendant Howard's attorney, the outcome of the trial would have been different. The evidence of the defendant's direct involvement in the crime was overwhelming. First, the victim, Wheeler, positively identified the defendant in a lineup, as well as in court, as one of her kidnapers. She testified in detail as to the defendant's use of a gun to threaten her into entering the trunk of her car, as well as his repeated threats that he would "blow [her] head off" if she tried to escape or seek help. Wheeler further testified to defendant's requests for her ATM PIN number and his threats when she was unable to provide him with the correct one. Moreover, the defendant, in a detailed statement to police, mirroring Wheeler's trial testimony, himself confessed to his involvement in the crimes. In addition, the defendant's DNA was found on the

swab of one of the two straws recovered from Wheeler's car, and his fingerprints were found on the exterior of the driver's side window as well as the lid of the trunk of that car. Under these facts, the defendant cannot establish that but for the statement of codefendant Howard's attorney, the jury would not have found him guilty of the charged offenses as a principal, for his direct involvement in the commission of those crimes. Accordingly, the defendant has failed to establish the requisite prejudice. See *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069.

In that respect, we note that the defendant's reliance on *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968) is misplaced. In *Bruton,* a defendant and codefendant were tried jointly and convicted of armed postal robbery. *Bruton*, 391 U.S. at 124, 88 S. Ct. at 1621. Although during trial, codefendant chose not to take the stand, a postal inspector testified that codefendant had orally confessed to him that he and the defendant had committed the crime. *Bruton*, 391 U.S. at 124-25, 88 S. Ct. at 1622. The trial judge instructed the jury that although codefendant's confession was competent evidence against him it was inadmissible hearsay against the defendant and had to be disregarded in determining the defendant's guilt. *Bruton*, 391 U.S. at 124-25, 88 S. Ct. at 1622. The appellate court found that the hearsay statement should never have been admitted into the evidence but affirmed the conviction because of the trial court's instruction to the jury to disregard that statement. *Bruton*, 391 U.S. at 124-25, 88 S. Ct. at 1622. The United States Supreme Court reversed, holding that the admission of a codefendant's statement, which also inculpates the defendant, in a joint trial, violates the confrontation right of the defendant, even where the trial judge gives a limiting instruction directing the jury to consider the confession only with respect to the confessing codefendant.

Bruton, 391 U.S. at 127, 88 S. Ct. at 1623.

The present case does not present a *Bruton* scenario. Codefendant Howard's statement regarding his and the defendant's involvement in the crimes against Wheeler were not presented to the defendant's jury. The question asked by codefendant Howard's attorney was not akin to a codefendant's confession and did not inculpate the defendant. The statement was made fleetingly and in an attempt by codefendant Howard's attorney to clarify in which direction the codefendant would have been going, if in fact, he had been the individual identified in the bank's surveillance video. Accordingly, we find *Bruton* inapposite.

III. CONCLUSION

For the aforementioned reasons, we affirm both the defendant's conviction and sentence.

Affirmed.