FOURTH DIVISION
December 19, 2013

No. 1-12-0518

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. 10 CR 17607
	)	
ANDRE WILLIAMS,	)	Honorable
	)	Rosemary Grant-Higgins,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction and sentence are affirmed. The trial court properly admitted evidence of the circumstances surrounding a statement written by a witness while jailed with defendant to demonstrate the involuntariness of that statement and a subsequent statement by the same witness which defendant introduced at trial, including the fact that defendant was jailed. The trial court properly sentenced defendant to an extended term for a class of offense lower than the most serious offense for which defendant was convicted because defendant received natural life imprisonment for the most serious offense. The mittimus is corrected to reflect defendant's conviction for armed robbery rather than "habitual

criminal."

¶ 2 The State indicted defendant Andre Williams for armed robbery and possession of a controlled substance. Following a jury trial during which defendant acted *pro se*, the trial court convicted defendant of both counts and sentenced him to natural life imprisonment as a habitual criminal for the armed robbery and to an extended-term sentence of 6 years' imprisonment for possession of a controlled substance and ordered the sentences to run concurrently. Defendant appeals, arguing the trial court committed reversible error by admitting evidence of defendant's custodial status to the jury, by admitting a letter written by defendant to his investigators, and by sentencing him to an extended term for an offense other than the most serious class of offense for which he was convicted. Defendant also argues that his mittimus must be corrected to reflect his conviction for armed robbery, where the mittimus currently reads defendant was convicted for "habitual criminal."

¶ 3 For the following reasons, we affirm defendant's conviction and sentence and order the clerk of the circuit court to correct the mittimus to reflect defendant's conviction for armed robbery.

¶ 4 BACKGROUND

¶ 5 The State indicted defendant for the armed robbery of Bruce Lee on a street corner in Chicago. Lee testified that he was on the street with his friend, Steven Willis, selling DVDs and CDs from a bag when a man approached and requested a specific genre of film. As Lee searched his bag for an appropriate title, the man displayed a handgun, demanded all of Lee's money, and threatened to shoot him if Lee did not comply. Lee testified that he handed over approximately

$200 and watched the robber flee. Lee stopped a passing Chicago police department vehicle which was occupied by officers Michael Suing and John O'Keefe. Lee pointed to the man, and informed the two officers "he just robbed me." The officers, who both testified at defendant's trial, identified defendant as the man to whom Lee pointed.

¶ 6 Defendant fled, and Suing chased defendant on foot while O'Keefe followed in their police vehicle via Suing's radio transmissions. Suing caught and detained defendant. Suing testified that the person he pursued and detained is the person to whom Lee pointed, he only lost sight of the person he was pursuing for two seconds when he made a turn, and defendant is that person. O'Keefe arrived at Suing's location and handcuffed defendant. O'Keefe recovered $327 from defendant's hands and hanging from defendant's pockets.

¶ 7 At trial, Lee could not identify defendant as the person who robbed him. Before trial Lee signed a statement that Lee could not positively identify defendant as the person who robbed him. Before signing that statement, Lee was approached by a person who identified herself as defendant's girlfriend. Lee testified in court that he could not say whether or not defendant was the person who robbed him.

¶ 8 Lee testified that after the robbery he left the area but returned a short time later to learn police had apprehended the man who robbed him. Lee and his friend went to the street where police held defendant. Lee spoke to police, but they never asked him to identify the robber, and he could not see the robber, who was seated in the back seat of a police car with tinted windows. O'Keefe testified that he spoke to Lee and another person, Steven Willis, at the location where police detained defendant. O'Keefe explained to Lee that police were going to show him the

individual Lee pointed to earlier, and who Lee said robbed him, and who police pursued. O'Keefe said to Lee: "I need you to identify this guy." According to O'Keefe, Lee, standing at a distance of 20 feet, identified defendant as the robber.

¶ 9 Officer Michael Laurie testified that he and his partner responded to a foot pursuit by fellow officers. When he arrived he saw two police officers escorting defendant. Laurie placed defendant in the back seat of his vehicle. Approximately 5 minutes later, Laurie removed defendant from the back of the car and illuminated his face with his flashlight for purposes of a show-up. O'Keefe looked in Laurie's direction, nodded, and said "Yes." Laurie placed defendant back in the vehicle and drove him to the police station, where a custodial search revealed six plastic baggies containing a substance later determined to contain heroin.

¶ 10 O'Keefe did not ask Willis to identify defendant as the robber at the scene, but Willis did testify at defendant's trial. At trial, Willis identified defendant as the robber. Willis testified he was with Lee when Lee was robbed. Willis went with Lee to the location where police detained defendant. Willis testified that Lee did point to defendant and say "yeah that's him." Willis identified defendant as the person police had in custody and the person who robbed Lee. Despite not having identified defendant in a show up, Willis testified that later, at a police station, he told police that defendant was the robber.

¶ 11 Before trial, defendant filed a motion to suppress identification. Defendant attached two signed statements by Willis in which Willis stated that defendant was not the robber. Defendant also attached a handwritten note to the motion which indicated defendant obtained Willis's first statement in May 2011 while he and defendant were jailed together in Cook County and which

instructed someone to have a person named Bob obtain a duplicate statement from Willis. Defendant withdrew the motion to suppress. At trial, defendant elicited testimony that in June 2011 while Willis remained incarcerated, Willis told two defense investigators that defendant was not the person who robbed Lee and that Willis memorialized the same in a signed, written statement. Willis testified he did not receive any threats or promises for making the June 2011 written statement and that he signed of his own free will.

¶ 12 Defendant's investigator, Robert O'Neil, testified that he took Willis's statement in June 2011. O'Neil testified Willis was not under duress and provided O'Neil with the statement of his own free will. O'Neil agreed the statement he took from Willis was almost identical to the statement defendant obtained from Willis in May 2011, but he testified the May statement was not on the table when Willis gave the June 2011 statement. O'Neil denied receiving any instructions from defendant. The trial court permitted the State to question O'Neil about, and read into evidence, a letter handwritten on the back of the May 2011 statement. During questioning the State purported that defendant wrote instructions to O'Neil's security firm on the back of the May statement. O'Neil testified the letter "doesn't say who it is to." O'Neil testified he may be the "Bob" to whom the letter refers but O'Neil denied ever seeing the letter. The letter reads:

> "Tell Bob to get this guy to rewrite this statement in front of him and to tell this guy we need it for legal reasons. Once this guy rewrites this statement, tell Bob I go to court on June 17th, Courtroom 206, Judge Higgins. Bring new statement to court. Let

judge know guy wrote new statement in front of Bob. That makes everything legal.

This guy wrote this affidavit for me in bullpen on May 12th. Tell this guy Bob works for me and my investigator, and he will rewrite it. That's it."

¶ 13 Willis's testimony had been the subject of a motion *in limine* by the State. Before trial defendant tendered two statements by Willis to the State. Willis made a written statement in May 2011 and a nearly identical written statement in June 2011, both recanting his identification of defendant. The State moved to admit evidence that defendant obtained the May 2011 statement while defendant and Willis were jailed together in Cook County, that Willis was under duress when he made both statements, and that both statements were involuntary. The trial court denied the State's motion *in limine* on the grounds defendant's custodial status was not admissible, subject to defendant's introduction of a statement which may have been made involuntarily. The court ruled that if defendant introduced such a statement, the State could request a sidebar to address the issue.

¶ 14 After defendant elicited Willis's testimony about the June 2011 statement, the State did request a sidebar and asked the trial court to permit it to explore the circumstances of the May statement on the grounds both the May and June statements were involuntary. The court allowed the State to explore that topic over defendant's objection. The State then elicited testimony from Willis that in May 2011 defendant approached Willis while both were jailed in Cook County. Defendant handed Willis pen and paper and dictated a statement that defendant was not the

robber. Upon the State's redirect examination Willis testified that defendant dictated the May 2011 statement and Willis wrote what defendant dictated. Willis testified that when he signed the May 2011 statement he felt he had no choice and that he "felt for my life." Willis testified he still feared for his life in June 2011 when defendant's investigators approached Willis for his statement, because Willis feared he would encounter defendant again while jailed. Willis stated: "The reason I signed that [June 2011] statement is because I felt like I'm going to bump into him again in the jail." Willis testified that neither the May or June statement is true. Willis testified defendant threatened him to write the May statement but admitted defendant never touched him in May 2011, and that he and defendant were housed in different divisions at the jail when defendant's investigators approached him in June. Willis did not see defendant on the day he gave his second statement to the investigators.

¶ 15 The jury returned guilty verdicts for armed robbery and possession of a controlled substance. After trial, defendant relinquished his *pro se* status and the trial court appointed counsel for posttrial proceedings. The court denied defendant's posttrial motions and the matter proceeded to a sentencing hearing. The court sentenced defendant to natural life imprisonment for armed robbery and an extended term of 6 years' imprisonment for possession of a controlled substance to run concurrent with defendant's sentence of natural life.

¶ 16 This appeal followed.

¶ 17 ANALYSIS

¶ 18 Defendant argues the trial court abused its discretion by permitting the State to elicit testimony from Willis concerning the circumstances leading up to his June 2011 statement to

demonstrate that the June statement was involuntary. Defendant argues his convictions should be reversed and the cause remanded for a new trial because the trial court allowed the State to place inadmissible evidence of his custodial status before the jury and admitted his letter to defense investigators in violation of several rules of evidence. Defendant argues the trial court erroneously admitted defendant's letter to his investigators for purposes of the State's impeachment of Willis's June 2011 statement because the State failed to lay a proper foundation for the letter, the letter was hearsay not subject to any recognized exception, and the admission of the letter violated the work product doctrine. Defendant argues that the erroneous admission of the letter combined with the disclosure of his custodial status resulted in unfair prejudice and denied him a fair trial.

¶ 19 Rulings on evidentiary matters are within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, unreasonable, or when no reasonable person would take the same view. *People v. Morris*, 2013 IL App (1st) 110413, ¶ 47. "The decision to admit a document into evidence or to send an admitted document back to the jury room is a discretionary act." *People v. Jones*, 169 Ill. App. 3d 883, 896 (1988).

¶ 20 Defendant also argued that his extended term sentence for possession of a controlled substance should be either reduced to a non-extended term or vacated and the matter remanded for resentencing because the trial court erroneously sentenced defendant to an extended term for an offense other than the most serious class offense for which he was convicted. "[T]he trial court is vested with broad discretion in imposing an appropriate sentence upon a defendant, and

this court will not reverse unless the sentence imposed by the trial court constitutes an abuse of discretion. [Citation.] The decision to impose an extended-term sentence also rests with the trial court's discretion." *People v. Britt*, 265 Ill. App. 3d 129, 151 (1994).

¶ 21 Finally, defendant argues that should this court affirm his conviction, the mittimus should be corrected to reflect defendant's conviction for armed robbery. "Under Illinois Supreme Court Rule 615(b)(1), a reviewing court may 'reverse, affirm, or modify the judgment or order from which the appeal is taken.' [Citation.] Remand is unnecessary because we have the authority to directly order the clerk of the circuit court to make the necessary corrections to defendant's sentencing order. [Citations.]" *People v. Walker*, 2011 IL App (1st) 072889, ¶ 40.

¶ 22 A. Letter and Defendant's Custodial Status

¶ 23 Defendant's first argument is that the State failed to lay a proper foundation for the admission of the letter written on the back of the May 2011 statement[1]. Defendant argues that although he failed to object at trial to the State's questioning of O'Neil regarding the letter or its admission into evidence, the trial court's error in admitting the letter is subject to plain error review. "The plain-error doctrine allows a reviewing court to consider an unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the

[1] In a conversation outside the presence of the jury in chambers, defendant told the trial judge "I wrote those instructions."

closeness of the evidence." *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 44.

¶ 24 The State responds plain error review is not available because forfeiture is particularly appropriate where the failure to object deprived it of the opportunity to elicit a proper foundation at trial, the trial court did not abuse its discretion in allowing the State to introduce defendant's handwritten instructions to impeach Willis's June statement, and defendant cannot show unfair prejudice from the alleged error.

> "[T]he basic rules of evidence require a proponent of documentary evidence to lay a foundation for the introduction of that document into evidence. [Citation.] Evidence must be presented to demonstrate that the document is what its proponent claims it to be. [Citation.] Without proper authentication and identification of the document, the proponent of the evidence has not provided a proper foundation and the document cannot be admitted into evidence. [Citation.]" (Internal quotation marks omitted.) *Complete Conf. Coordinators, Inc. v. Kumon North Am., Inc.,* 394 Ill. App. 3d 105, 108 (2009).

¶ 25 Defendant also argues the letter was inadmissible hearsay, and that its probative value was far outweighed by its prejudicial effect. Defendant argues the letter was not probative of O'Neil's "thinking or reasons for interviewing Willis" because O'Neil testified he never saw the letter.

> "Hearsay evidence is in-court testimony or written evidence

> of a statement made out of court which is offered as an assertion of the truth of the matters contained in the out-of-court statement. [Citation.] The rule that hearsay is generally not admissible is not merely a technical one, but rather is 'fundamental,' as it is based on the need for cross-examination." (Internal quotation marks omitted.) *Evans and Associates, Inc. v. Dyer*, 246 Ill. App. 3d 231, 238 (1993).

¶ 26 The State asked O'Neil whether he received any instructions from defendant with respect to Willis's statement. O'Neil testified he did not and that his superior Dan Davis asked O'Neil to accompany Davis to take a statement. The State showed O'Neil an exhibit marked for identification, which was Willis's May 2011 statement. O'Neil agreed the May statement was "basically what I did." The following exchange between the State and O'Neil occurred:

> "Q. [Assistant State's Attorney:] People's Exhibit No. 2, there are instructions on there written by the defendant Andre Williams to your security firm, correct?
>
> A. [O'Neil:] It doesn't say who it is to.
>
> Q. Well, then that statement that's handwritten on the back says tell Bob, are you Bob?
>
> A. I would be Bob in this I would imagine. It doesn't give a last name, but I would imagine I would be."

¶ 27 O'Neil confirmed that the contents of the letter are written on the back page of the exhibit

and that he was in fact "the Bob that's being referred to in this writing." Defendant proceeded to examine O'Neil. Defendant began to say, in reference to Willis's May 2011 statement "it is a handwritten statement that I gave to one of the guys at the [criminal investigation unit at the Cook County jail] because I knew that--" but the State objected to defendant's testifying and the trial court sustained the objection. Instead, defendant asked O'Neil whether O'Neil had ever heard those instructions and O'Neil responded he had not. Later, in reference to the handwritten material on the back of Willis's May 2011 statement, defendant asked O'Neil if the directions were directed to O'Neil or another person. O'Neil agreed that the written material was a directive to another person to instruct O'Neil. He later opined the directions were to his superior to instruct O'Neil to take "that statement."

¶ 28 The parties marked Willis's May 2011 statement as People's Exhibit 2-A and the handwritten portion on the back of the statement as People's Exhibit 2-B. The State rested its case and moved all of its exhibits, including Willis's May 2011 statement and the handwritten instructions on the back, into evidence without objection. Later in the proceedings, defendant moved Willis's June 2011 statement, which had been marked as Defendant's Exhibit 2, into evidence without objection. The following exchange then occurred:

> "DEFENDANT: Now on that, your Honor, it's actually two parts. With the State, we listed it as 2-A and 2-B.
>
> THE COURT: Because of the instruction to Bob on the back?
>
> DEFENDANT: Yes.
>
> MS. MULAY [Assistant State's Attorney]: Judge, if I may. The

Defendant's 2 was the one that his investigators took of Steven Willis [in June 2011]. The State's 2 is the one the defendant took of Steven Willis [in May 2011]. That's 2-A and 2-B. I already offered that, and it's been accepted.

DEFENDANT: I wanted to offer it the same way as 2-A and 2-B.

THE COURT: Except the State is offering--it's going back to the jury as a State's Exhibit. 2-A and B that had the recant on the front and then the directions to Bob on the back will go back.

You are asking to introduce your 2-A which is a different affidavit.

DEFENDANT: Correct.

THE COURT: And that, without objection, will also go back. So they will receive both."

¶ 29 Later, in discussing the State's exhibits, the parties stated as follows:

"THE COURT: People's No. 1 will go back. No. 2, both sides are asking for, the Willis recant, side A and B to go back; is that correct?

MS. MULAY: Yes.

THE COURT: Mr. Williams?

DEFENDANT: Yes."

¶ 30 Defendant made reference to the letter written on the back of Willis's affidavit in his closing argument. Defendant explained to the jury that the instructions to Bob were to "get this guy Steve Willis to rewrite this affidavit in front of him" because "Everything I do has to be

legal. I try to be legal." Defendant then said that he asked the investigator to give both affidavits to the State and argued "If I was trying to hide them, if I was trying to do something illegal, will I deliver it to the State. If I thought this was doing something illegal, I could have just withheld it." The trial court instructed the jury that in determining what weight should be given an earlier inconsistent statement, the jury "should consider all the circumstances under which it was made."

¶ 31 1. Defendant's Letter to Investigators

¶ 32 "A defendant forfeits any issue as to the impropriety of the evidence if he procures, invites, or acquiesces in the admission of that evidence. [Citations.] It would be patently unfair to allow defendant to raise this challenge at such a late date for the first time on appeal." *People v. Woods*, 214 Ill. 2d 455, 475 (2005). The record clearly establishes that defendant invited and acquiesced in the admission of the letter. Thereby, defendant has "affirmatively waived" his challenge to the admissibility of the letter either on hearsay or foundational grounds, and the plain error doctrine will not save defendant from his acceptance of the evidence. *Woods*, 214 Ill. 2d at 473. In *Woods*, the trial court found the defendant guilty of possession of a controlled substance. *Woods*, 214 Ill. 2d at 462. Our supreme court found that the defendant procedurally defaulted a challenge to the State's chain of custody of the physical evidence of the narcotics violation. *Woods*, 214 Ill. 2d at 473. The court held that the defendant also "affirmatively waived review of the *** issue where he agreed to what he now seeks to challenge on appeal." *Id*. at 475.

¶ 33 We will not address defendant's contention that admission of the letter resulted in an unfair trial under the plain error doctrine where defendant asked to admit the letter into evidence

and argued that the fact defendant instructed his investigator to obtain the June 2011 statement--which is the substance of the complained-of letter--demonstrates his credibility. See *People v. Payne*, 98 Ill. 2d 45, 49-51 (1983) ("While defendants first argue that the trial court committed reversible error in admitting the previously suppressed handgun and related testimony, we agree with the trial and appellate courts that defendants invited or 'opened the door' to this evidence. Consequently, we need not consider the propriety of the search which revealed the gun."). In *People v. Sanders*, 2012 IL App (1st) 102040, the defendant complained that the trial court erroneously admitted gang evidence and hearsay that allowed the State to bolster two witnesses's testimony. *Id*. ¶ 17. Defense counsel did not object, so the admission of the gang evidence was subject only to plain-error review. *Id*. ¶ 26. The court noted that the defendant's attorney "used the gang evidence in order to bolster [the] defendant's theory of the case and counter the identification testimony." *Id*. ¶ 30. This court held that "[a]ssuming that the gang evidence (and the hearsay threat evidence, for that matter) was erroneously admitted at trial, the error was invited by defense counsel. Invited errors are not subject to plain-error review." *Id*. ¶ 30.

¶ 34 Moreover, "[t]he defendant *** cannot make a case under the second prong of the waiver rule because foundational issues go to the admissibility of the evidence, not to the sufficiency of the evidence. [Citation.] Accordingly, any error does not affect the defendant's substantial rights and the error is waived." *People v. Rigsby*, 383 Ill. App. 3d 818, 823-24 (2008). Regardless, the trial court did not abuse its discretion in admitting the letter on the back of Willis's May 2011 statement into evidence because defendant had the opportunity to question O'Neil about the letter and procured testimony that O'Neil had never seen the letter before trial. The State elicited the

testimony and admitted the letter to demonstrate that Willis's statement was involuntary, but defendant placed evidence before the jury that Willis made the June statement "of his own free will." In *People v. Negron*, 2012 IL App (1st) 101194, ¶ 42, the court found that the defendant preserved his objection to the adequacy of the foundation for an expert's opinions. The court found that the trial court did not commit an abuse of discretion in allowing the expert testimony where "[t]he defense performed a vigorous cross-examination*** but the jury determined the weight of credibility was with the State's expert witness." *Id*. See also *People v. Williams*, 192 Ill. 2d 548, 571 (2000) (finding no error in admission of evidence where the defendant elicited the evidence).

¶ 35 The letter was also admissible under the doctrine of curative admissibility regardless of its hearsay nature. "Under the doctrine of curative admissibility, a party may present inadmissible evidence where necessary to cure undue prejudice resulting from an opponent's introduction of similar evidence." *People v. Duff*, 374 Ill. App. 3d 599, 606 (2007). "The decision to allow curative evidence lies within the sound discretion of the trial court." *People v. Mandarino*, 2013 IL App (1st) 111772, ¶ 29. Defendant elicited testimony from Willis on cross-examination that Willis made the June 2011 statement of his own free will. "[I]n a criminal case, where the door to a particular subject is opened by defense counsel on cross-examination, the State may, on redirect, question the witness to clarify or explain the matters brought out during, or to remove or correct unfavorable inferences left by, the previous cross-examination." *People v. Manning*, 182 Ill. 2d 193, 216 (1998). Evidence that defendant directed the investigators to have Willis duplicate a statement defendant obtained from Willis under circumstances which

could reasonably establish that the original statement was involuntary would explain why Willis made the June 2011 statement *and* correct the unfavorable inference that Willis voluntarily recanted his identification of defendant as the robber.

¶ 36 We reject defendant's argument that the State had no reason to show that the June statement was involuntary because Willis stated that it was voluntary. Undue prejudice is required to render inadmissible evidence admissible under the curative admissibility doctrine. See *Manning*, 182 Ill. 2d at 217. In *Manning*, our supreme court held that the State did not suffer undue prejudice because the defendant's cross-examination "did not mislead the jury." *Id*. In this case, defendant's cross-examination of Willis misled the jury into believing Willis voluntarily recanted his identification of defendant. We further hold that for purposes of the curative admissibility doctrine, a party suffers undue prejudice from an attack on the credibility of a witness's statement where evidence exists to rebut the attack which is otherwise inadmissible. See *People v. Singleton*, 367 Ill. App. 3d 182, 190 (2006) ("defense counsel's argument invited a response from the State as to the accurate facts surrounding Gordon's criminal cases and testimony against defendant."). See also *People v. Lewis*, 52 Ill. App. 3d 477, 485 (1977) ("If one party opens up an issue and the other party will be prejudiced unless he can introduce contradictory or explanatory evidence, then the prejudiced party will be permitted to introduce such evidence, even though it might otherwise be improper.").

¶ 37 The court will "not permit the State, under the guise of the doctrine of curative admissibility, to violate the rules of evidence under the rationale of neutralizing an inference which is favorable to the accused." *People v. Williams*, 240 Ill. App. 3d 505, 506-07 (1992). But

"an exception to the admission of hearsay evidence applies when a line of questioning is opened up by the adverse party. Testimony on behalf of the other party is then admissible to clarify the points touched upon. Such testimony will be limited to that which has a direct tendency to contradict or explain that which has been received." *People v. Moore*, 95 Ill. App. 2d 89, 94-95 (1968). In this case, the questioning was not a guise for placing defendant's pretrial detainment before the jury. The State's questioning regarding the circumstances surrounding both statements had a direct tendency to contradict the testimony that Willis's June statement was made voluntarily, and the evidence was limited to that purpose. *People v. Tolliver*, 347 Ill. App. 3d 203, 222 (2004) (holding evidence of threats admissible to show witness feared for her safety if she continued to testify in order to explain why witness recanted testimony).

¶ 38 Nor was the letter protected by the work product doctrine. "The work-product doctrine provides a broader protection than the attorney-client privilege, and is designed to protect the right of an attorney to thoroughly prepare his case. [Citation.] Work product that reveals the mental impressions, opinions, or trial strategy of an attorney is only discoverable upon a showing of impossibility of securing similar information from other sources." (Internal quotation marks omitted.) *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶ 45. We do not need to decide if this privilege extends to non-attorneys proceeding *pro se*. "[A]s properly understood, *** [the work product] rule does not protect material and relevant evidentiary facts from the truth-seeking processes of discovery." (Internal quotation marks omitted.) *Shields v. Burlington Northern & Santa Fe Ry. Co.*, 353 Ill. App. 3d 506, 509 (2004). The privilege does not apply in this case because nothing in defendant's letter, simply instructing his investigators to obtain

Willis's statement for use at trial, reveals any "conceptual data" nor "the shaping process by which [defendant] has arranged the available evidence for use in trial." (Internal quotation marks omitted.) *Shields*, 353 Ill. App. 3d at 508-09 (quoting *Monier v. Chamberlain*, 35 Ill. 2d 351, 359-60 (1966)).

¶ 39 More importantly, however, this court has held that "the work-product privilege [citation] may be waived as to a communication put 'at issue' by a party who is a holder of the privilege." *Shapo v. Tires 'N Tracks, Inc.*, 336 Ill. App. 3d 387, 394 (2002). Here, defendant put the letter "at issue" by attaching it to his motion to suppress evidence as well as by soliciting Willis's testimony regarding the June statement. The letter is relevant to how defendant obtained the June statement, therefore the letter is "at issue" in this case. Defendant has not argued that his disclosure of the letter when he attached it to his motion to suppress was inadvertent. Therefore, we have no need to apply the balancing test used by Illinois courts to determine whether a knowing waiver of the work-product privilege occurred in this case. See *Dalen v. Ozite Corp.*, 230 Ill. App. 3d 18, 27 (1992). Under the balancing test, a court considers five factors to determine if a party waived the privilege: (1) the reasonableness of the precautions taken to prevent the disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness. *Dalen*, 230 Ill. App. 3d at 28. Even if we applied the test, we would find defendant's voluntary disclosure of the document waived the privilege. *Id*. at 29 ("we find that *** counsel's conduct was completely inconsistent with their claim of confidentiality and conclude that Ozite waived the protection of [the] work product doctrine").

¶ 40 The State possessed evidence to contradict defendant's evidence of a prior inconsistent statement by Willis. The trial court properly allowed the State to introduce that evidence.

¶ 41 2. Custodial Status

¶ 42 For the same reasons, defendant's arguments that he suffered unfair prejudice from evidence of his custodial status, and that the cumulative prejudicial effect of evidence surrounding the letter outweighed its probative value, must fail. The only prejudice to defendant was to contradict his evidence that Willis made a prior inconsistent statement. The concern raised by revealing defendant's custodial status to the jury is that the information may undermine the fairness of the fact-finding process and impair the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503-04 (1976). Yet the United States Supreme Court has recognized "[t]hat such factors cannot always be avoided" and will not always result in a violation of the defendant's right to a fair trial. *Estelle*, 425 U.S. at 505. Similarly, this court has recognized that evidence of other crimes committed by a defendant is admissible if it is relevant to prove any material question other than the defendant's propensity to commit crime. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 72. The trial court properly allowed the State to elicit evidence to prove Willis made the June statement involuntarily. The evidence is not rendered inadmissible because it revealed that defendant was in custody.

¶ 43 The letter and the fact defendant was jailed when he obtained the first statement were both admissible evidence on the question of the voluntariness of Willis's June statement. O'Neil testified he never saw the letter, but defendant solicited O'Neil's testimony that the letter is directed toward someone else with a directive to instruct O'Neil to obtain the statement, and that

O'Neil's superior, Davis, who was also defendant's former superior, instructed O'Neil to accompany Davis to obtain the statement. Thus the letter provides an explanation for why O'Neil and Davis went to the Cook County jail to obtain a statement from Willis. Defendant admitted in his closing argument that explanation was true. Willis testified he feared for his safety when he made both statements. The admission of the letter provides an explanation for why the June statement is identical to the May statement and the jury could reasonably infer the statements are identical because O'Neil and Davis instructed Willis to duplicate the statement he gave defendant in May. The fact of defendant's custodial status was necessary to prove how defendant obtained Willis's first statement, why Willis felt threatened, and why Willis continued to feel threatened by defendant when he made the June statement. Thus the disputed evidence is probative of whether the June statement was involuntary. Before permitting the State's questioning, the trial court explored minimizing the potential prejudice to defendant. The information contained in the letter and defendant's custodial status at the time of making both statements was probative of material issues at trial, and the trial court correctly found that the probative value outweighed any prejudice to defendant. The trial court did not abuse its discretion. *People v. Pelo*, 404 Ill. App. 3d 839, 867-68 (2010) ("the supreme court explained that the question of whether the danger of unfair prejudice substantially outweighed the probative value of the evidence in question was a matter within the trial court's discretion, and unless that court's decision was arbitrary, fanciful, or unreasonable, the court would not abuse its discretion if it deemed the evidence admissible.").

¶ 44 In sum, plain error review does not apply to defendant's claims and no error occurred in

the admission of defendant's letter or evidence of his custodial status.

¶ 45 B. Extended Term Sentence

¶ 46 Next, defendant argues the trial court erred in sentencing him to an extended term sentence for possession of a controlled substance because it was not the most serious class of offense for which he was convicted.

> "In imposing sentences, trial courts must adhere to statutory requirements. If a trial court imposes a sentence greater than that permitted by statute, the excess portion of the sentence is void. [Citation.] Accordingly, the extended-term portion of a criminal sentence is subject to challenge and cannot stand where the requirements of the extended-term sentencing statute have not been met." *People v. Harvey*, 196 Ill. 2d 444, 448 (2001).

¶ 47 Defendant received a sentence of natural life imprisonment for armed robbery. "Where, as here, a defendant receives a sentence of natural life, section 5-8-2 of the Unified Code of Corrections (730 ILCS 5/5–8–2 (West 2006)) permits the court to impose an extended-term sentence on 'the next most serious offense.' [Citation.]" *People v. Calderon*, 393 Ill. App. 3d 1, 12 (2009). Our supreme court has held that "section 5-8-2 allowed the imposition of an extended-term sentence for the class of the most serious offense of which the defendant was

convicted when defendant was sentenced to a term of years. [Citation.]" (Internal quotation marks omitted.) *People v. Terry*, 183 Ill. 2d 298, 302-03 (1998). The extended-term sentencing provisions cannot "extend" a sentence of natural life imprisonment. *Id*. at 303. "Accordingly, because the extended-term sentencing provisions could not apply to the defendant's natural life sentence *** the extended-term provisions could properly be applied to the next most serious offense of which the defendant was convicted." *Id*. at 304.

¶ 48 Here, the "next most serious offense" was possession of a controlled substance, and the trial court could impose an extended term sentence for that offense.

¶ 49 C. Mittimus

¶ 50 Finally, defendant argues, and the State agrees, that defendant's mittimus should be corrected to properly reflect that defendant's conviction is for armed robbery and not for "habitual criminal." "This court has the authority to order the clerk of the circuit court to correct the mittimus." *People v. Whalum*, 2012 IL App (1st) 110959, ¶ 29. We therefore order the clerk of the circuit court to correct defendant's mittimus to state defendant's conviction is for armed robbery.

¶ 51 CONCLUSION

¶ 52 For all of the foregoing reasons, the trial court's judgment is affirmed and the mittimus is corrected.

¶ 53 Affirmed, mittimus corrected.