2015 IL App (4th) 130192-U

NO. 4-13-0192

FILED
April 10, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS.,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ALLEN BROWN,	)	No. 11CF1145
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justice Appleton concurred in the judgment.
Justice Holder White dissented.

ORDER

¶ 1 *Held*: (1) Defendant was not denied his constitutional right to self representation.

(2) The State proved defendant guilty of armed robbery as charged beyond a reasonable doubt.

(3) Defendant's armed-robbery sentences do not violate *Apprendi*.

(4) Defendant's aggravated-battery conviction and sentence do not violate the one-act, one-crime doctrine.

(5) The trial court erred in sentencing defendant to an extended-term sentence for aggravated battery as this offense was not the most serious offense for which he was convicted, nor was it the result of an unrelated course of conduct.

(6) Defendant's sentence, as modified, is not excessive.

¶ 2 Following an October 2012 trial, a jury found defendant, Allen Brown, guilty of two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and one count of aggravated

battery (720 ILCS 5/12-3.05(f)(1) (West 2010)). In November 2012, the trial court sentenced defendant to 35 years' imprisonment for each count of armed robbery and an extended 10-year prison sentence for aggravated battery, all sentences to be served consecutively.

¶ 3 Defendant appeals, asserting as follows: (1) the trial court violated his constitutional right to self-representation; (2) the State failed to prove him guilty of armed robbery beyond a reasonable doubt as charged; (3) the sentences for armed robbery violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (4) his conviction and sentence for aggravated battery violates the one-act, one-crime doctrine; (5) the trial court erred in sentencing him to an extended term for aggravated battery; and (6) the 80-year sentence is excessive. We affirm as modified.

¶ 4 I. BACKGROUND

¶ 5 On January 11, 2012, the State charged defendant by indictment with two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) (counts I and II) and one count of aggravated battery (720 ILCS 5/12-3.05(f)(1) (West 2010)) (count III). These charges stemmed from a robbery committed at Casey's General Store (Casey's) on Gill Street in Bloomington on December 30, 2011.

¶ 6 A. Pretrial Proceedings

¶ 7 At a March 7, 2012, status hearing, defense counsel filed a petition to appoint an expert in order to determine defendant's sanity and fitness to stand trial.

¶ 8 At a June 5, 2012, status hearing, defendant asked the trial court for a new attorney. Defendant's complaints regarding his attorney concerned the wording of letters sent to potential character witnesses, failure to furnish him with a copy of his discovery, and conclusions

regarding his sanity and fitness. Defendant stated his attorney was "out to get" him. The court found defendant's complaints were meritless.

¶ 9 At a July 5, 2012, status hearing, defense counsel informed the trial court that defendant refused to appear in court and refused to open counsel's letters or communicate with him any other way. On July 9, 2012, counsel filed a motion to withdraw as counsel for the reasons given during the status hearing days earlier.

¶ 10 At an August 2, 2012, hearing on defense counsel's motion to withdraw, defendant refused to cooperate, causing a commotion in the courtroom. Defendant demanded to be taken "back downstairs." After defendant had been removed from the courtroom, the trial court noted for the record that defendant was removed after refusing to cooperate with the court's request that he sit down and speak with the court. Specifically, the court stated as follows:

> "[Defendant] as I said was here with a number of correctional officers and deputies, he was brought up in a wheelchair, he was in restraints, he had what is commonly called the spit sock on, he was extremely vocal, the court could hear him from the back before it [*sic*] even came in the courtroom shouting obscenities and demanding to be returned back to the jail. The court came in and while the court was announcing the case the defendant continued to have verbal outbursts, obscenities, demanding to be returned to the jail. He was trying to get out of his chair despite being restrained by at least four officers and he was able I saw to stand up, they were continuing to try to force him back down into the chair. He continued to demand to return to the

> jail and screaming obscenities. The court attempted to get his attention and indicate that I just wanted to speak with him, he simply continued to shout obscenities and demand being returned to the jail so at that point for everyone's safety the court felt it was more appropriate that he be simply removed from the courtroom and returned to the jail so that the correctional officers and deputies did remove him from the courtroom."

The court then continued the matter for another status hearing and declined to rule on defense counsel's motion to withdraw at that time. The record does not reflect whether the motion to withdraw was ever ruled upon.

¶ 11 At an August 17, 2012, status hearing, during which defendant appeared via closed-circuit television, defendant told the court he had tried to fire his attorney at least eight times. Defendant stated, "I don't feel safe around him. I don't know what else to tell you. I mean, I tried telling you guys this a long time ago. I don't feel safe in the courtroom. I don't feel safe around him. I barely feel safe coming out of my cell here." Defendant stated the last time he was in the court's conference room, "I caught the holy ghost and your sheriff tried to shoot me."

¶ 12 Defendant refused to appear at a September 25, 2012, status hearing, but defense counsel informed the trial court that he had been able to speak with defendant one or two weeks before and he had been cooperative at that time. The court set the matter for a fitness hearing.

¶ 13 At an October 5, 2012, fitness hearing, Dr. Terry M. Killian, a psychiatrist, testified that he examined defendant on two occasions. Dr. Killian testified that he first interviewed defendant on March 18, 2012, for approximately 35 minutes. According to Dr.

Killian, defendant was not cooperative during that interview. Dr. Killian interviewed defendant again on September 25, 2012. Defendant was cooperative at that time. The second interview lasted approximately 1 1/2 hours. In addition to the interview, Dr. Killian reviewed police reports and mental-health records. Based on the information he had, Dr. Killian opined within a reasonable degree of psychiatric certainty that defendant was fit to stand trial. Dr. Killian also testified that after the second interview, he was convinced that defendant was feigning mental illness.

¶ 14 Dr. Killian's evaluations of defendant were admitted as exhibits. Dr. Killian's March 18, 2012, report, indicated as follows. He interviewed defendant in the booking section of the McLean County jail. During the interview, defendant interrupted Dr. Killian several times to make a variety of religious comments. For example, defendant's comments included, "I don't want no part of the devil"; that God wanted him "to bring the message"; that his attorney was "supposed to be Judas. He [*sic*] supposed to turn me over, to turn me over to be crucified"; and "I can see the devil in the judge's eyes." Defendant asked Dr. Killian to read his "papers" and put them together in a book so that others could read his message. Defendant then decided he no longer wished to speak with Dr. Killian and began screaming obscenities at him. After the interview ended, Dr. Killian remained in the booking section of the jail to interview another inmate, during which time defendant continued screaming obscenities. Dr. Killian noted, "it was [my] impression that [defendant] was putting on a show for me." Dr. Killian reviewed defendant's writings and noted that most of the writings were "re-wording[s] of many things written in the Judeo-Christian Bible" but that "[n]one of the writing has the oddities of thought process or language that are characteristic of many persons with true psychotic illnesses." At the conclusion of his first evaluation, Dr. Killian believed that defendant was "more likely than not

malingering the apparent grandiose and paranoid statements he made to me." Dr. Killian was unable to give an opinion regarding whether defendant was sane at the time of the robbery because defendant did not allow Dr. Killian to question him adequately, but Dr. Killian noted that nothing in defendant's text messages, statements from the victims, or statements from the police suggested mental illness.

¶ 15 Dr. Killian's second report, dated September 25, 2012, indicated as follows. During this interview at the McLean County jail, Dr. Killian asked defendant whether he thought he was fit to stand trial. Defendant responded, "I want to represent myself. I don't need to be in a mental hospital." Dr. Killian noted that defendant's medical records indicated prior diagnoses of bipolar disorder and post-traumatic stress disorder. Dr. Killian stated that based on his discussion with, and observations of, defendant regarding an "alleged psychotic disorder," he was convinced that defendant "is not currently psychotic but that he is trying very hard to convince me that he is psychotic. I was reasonably confident after the first exam in March that he was malingering but I am very confident of that now." Dr. Killian further noted, "[d]uring the current interview, it was obvious to me that [defendant] was trying very hard to convince me that he was psychotic without admitting that he knew his 'delusional' beliefs were not correct." Dr. Killian concluded within a reasonable degree of psychiatric certainty that defendant was fit to stand trial. According to Dr. Killian, defendant "demonstrated an adequate understanding of the nature and purpose of the proceedings against him and is *capable* of assisting in his own defense. I emphasized the word 'capable' because while I believe [defendant] is *capable* of assisting in his own defense, he probably will not actually do so." Dr. Killian further opined within a reasonable degree of psychiatric certainty that defendant was not suffering any psychiatric symptoms at the time of the robbery.

¶ 16 After considering the evidence presented at defendant's fitness hearing, including the content of Dr. Killian's reports, the trial court found defendant fit to stand trial.

¶ 17 Immediately following the trial court's finding of fitness, defendant informed the court that he had written his attorney six months ago and informed him that he wanted to proceed *pro se*. The court noted that defendant had never indicated to the court that he wanted to represent himself. The following colloquy occurred:

> "THE COURT: The fitness hearing is over. So my question is, do you—are you asking the court to allow you to represent yourself, or do you want Mr. Tusek to remain as your attorney while we get ready for trial here?
>
> THE DEFENDANT: I would rather not at this point in time. I'd rather not.
>
> THE COURT: I don't know what that means. You'd rather not what?
>
> THE DEFENDANT: There is no guarantee I'm going to be fit when it comes time to go to trial.
>
> THE COURT: That's a different question. I don't understand your answer, and I want to make sure I understand you, okay?
>
> THE DEFENDANT: Yes.
>
> THE COURT: So the question is, are you asking the court to be allowed to represent yourself? Yes, or no.
>
> THE DEFENDANT: Yes, if I can get my medicine, sir.

THE COURT: I'm sorry.

THE DEFENDANT: If I can get on my medicine. I'll be fit to represent myself."

The court responded that the charges against defendant were serious and carried "extremely high penalties." The court acknowledged defendant's constitutional right to represent himself. However, based on the evidence before it, including Dr. Killian's reports and defendant's past behavior in court, the court denied defendant's oral request to represent himself, concluding that defendant was not capable of doing so.

¶ 18 At an October 18, 2012, hearing, defendant again requested to represent himself at trial. After reiterating its earlier determination regarding defendant's request to proceed *pro se*, the court stated as follows:

"Now, frankly, as we sit here today, nothing has occurred to make me change [my opinion]. Your behavior the last two times you've been in court on October 5th and today has certainly been appropriate. I don't have any issues with that. You have conducted yourself well the last couple times we've been in court, but the nature of the problems that we had earlier and all of the information that I have about you and about your history suggests to me that you need the assistance of an attorney to help you on these very serious charges, because these are very serious charges that are pending against you with some very serious possible consequences. So, at this point, given that history, the court is not going to allow you to represent yourself in this case."

¶ 19 B. Jury Trial

¶ 20 Immediately prior to trial, defendant sought a continuance to hire an expert witness to support "an affirmative insanity defense. Or is it guilty but mentally ill?" The court denied this oral motion after explaining that defense counsel had determined he did not have a legal basis on which to present an insanity claim, as had been discussed in prior hearings. Defendant then sought a continuance so that he could "inspect evidence." The court denied this motion as well after informing defendant that it was his attorney's job to review the evidence and discuss it with him. Defendant then asked to be handcuffed. When the court asked him why he wanted to be handcuffed, defendant responded, "[y]ou have my behavior." The court responded that defendant was "doing very well" and defendant responded, "No, I'm not going to make it." Defendant ultimately agreed to forego handcuffs.

¶ 21 At trial, Ashley Bennett testified that she was working at Casey's with Brandi Gordon and Ashley Ferrell on December 30, 2011. Bennett recalled that Ferrell had left the store to take her 30-minute break. At 12:30 a.m., Bennett testified she was writing down lottery ticket numbers when she heard the door open. When she lifted her head to greet the customer, Bennett stated, "I seen a gun in my face." When asked what she did next, Bennett testified, "I mean, I stood there for a minute, and then like I had said, seriously, and the like I went to like go towards the register and I got hit with the gun." Bennett testified that when she was hit with the gun, her glasses flew off her face. A photograph of her injuries, which required medical treatment, including stitches, was admitted into evidence. After she was struck with the gun, Bennett testified she opened the register drawer and put all the money from the register into a white plastic grocery bag the man with the gun brought into the store. Bennett stated she then noticed that Gordon had come out of the kitchen and the two men turned their attention to her. Gordon

opened her register and gave them the money that was in it. According to Bennett, the man with the gun then walked behind the counter and took two cartons of Newport cigarettes from the shelf. When the man with the gun was behind the counter, he asked if there was a safe. Bennett told him there was and walked to the safe and unlocked it. The man with the gun took money bags out of the safe. Bennett identified the bags that were taken. After the men left the store, Bennett stated she called her manager and then locked herself in the bathroom.

¶ 22 Bennett could not identify either of the men because they wore ski masks. However, she testified she later learned that one of the assailants was Keisean Ellis, whom she knew.

¶ 23 Brandi Gordon testified that she was working at Casey's on December 30, 2011. She was in the kitchen making donuts. When she came out of the kitchen, she saw two men enter the store, one whom was holding a gun. Gordon testified the second man, who appeared to have a tire iron, was pacing back and forth. The man with the gun pointed it at her and asked where the money was. The man then saw Bennett and pointed the gun at her. The man then hit Bennett with the gun. Gordon stated that as Bennett was removing the money from the cash register, the man with the gun walked behind the counter and stood behind her and Bennett. Gordon then opened her cash register and gave the man with the gun the money. Gordon testified that the man also grabbed cigarettes and took bank bags and money from the safe before both men left. As soon as the men left, Gordon called the police.

¶ 24 Gordon testified that officers later brought two men to the credit union located across the street from Casey's for a "showup." Gordon was sitting in a police vehicle and they flashed the lights on the men separately. She identified both men as the individuals who had robbed Casey's. On cross-examination, Gordon explained she made the identification based on

the clothing they were wearing, a white shirt under a hooded sweatshirt and a red shirt under a hooded sweatshirt. She could not describe their faces because they were wearing ski masks.

¶ 25 Rebecca Vieira testified that she was the acting manager of Casey's on December 30, 2011. After being notified of the robbery, Vieira went to Casey's, where she watched the surveillance footage and made a copy of the video for the police. She identified People's exhibit No. 1 as the video of the robbery itself, and it was played for the jury. Vieira testified that after watching the video and closing down the registers, she determined cash and property in the amount of $625.32 was missing from the store in addition to nine lottery tickets. Vieira also identified People's exhibit No. 2 as a video taken from Casey's surveillance system on December 28, 2011, two days prior to the robbery.

¶ 26 Paul Swanlund, a Bloomington police officer, testified he was patrolling on December 30, 2011, when he was dispatched to Casey's for an armed robbery. Once there, he obtained a description of the suspects from Gordon and relayed the description to other officers in the area. After checking on Bennett, Swanlund reviewed the surveillance footage and observed the two suspects in the store. After observing the footage, he testified, "the description I started putting out [on the] suspects was the white shirt sticking out underneath the red shirt sticking out from underneath the hoodie, black shoes, and then the stark white shoes and black hoodie and both wearing blue jeans." Swanlund stated the white shoes had a dark Nike swoosh running down the side. He further testified that the shorter suspect had a handgun and the taller suspect had a tire iron or a lug wrench.

¶ 27 Joseph Rizzi, a detective with the Normal police department, testified that on December 30, 2011, he was a patrol officer working the midnight shift. Upon hearing the call regarding an armed robbery at Casey's, he drove to the intersection of Fort Jesse Road and

Airport Road in Normal because he heard the suspects had fled on foot and thought they might be headed in that direction. While at the intersection, Rizzi observed a red Pontiac with the passenger-side headlight out. Rizzi testified that when he looked at the driver of the vehicle, "he stared at me intently, and as he made his turn, he also looked back in this motion to actually see what I was doing and where I was going." Rizzi thought the passenger seat was laid back because he could not see the see the headrest. Rizzi got behind the car and followed it as it "made a loop through several streets." Rizzi observed the vehicle cross over the center line at one point, so he continued to follow the vehicle for safety reasons. When the vehicle began heading away from town, Rizzi activated his overhead lights and initiated a traffic stop at 12:43 a.m. Rizzi testified the vehicle did not immediately pull over but continued to drive for more than one minute, despite his lights being activated, and that he used his air horn and sirens "a couple times."

¶ 28 After stopping the vehicle, Rizzi approached the car. The driver identified himself as Keisean Ellis. Rizzi identified defendant as the passenger. Rizzi testified that he arrested Ellis because he did not have a valid driver's license. He then asked defendant to exit the vehicle. As defendant exited the vehicle, he locked the car's doors with the keys still inside. Rizzi testified that he was able to unlock the doors and began conducting an inventory of the items inside the vehicle. After locating items in the vehicle, including a bank bag, ski masks, a firearm, cartons of Newport cigarettes, and rolls of coins, Rizzi stopped the inventory and called for an evidence technician.

¶ 29 Matthew Badalamenti, an officer with the Normal police department, testified he was on patrol on December 30, 2011, and assisted Rizzi with the traffic stop. Badalamenti stated that he approached the passenger side of the vehicle while Rizzi approached the driver's side. He

testified that the passenger, whom he identified as defendant, was reclined as far as the seat could go. Badalamenti testified that defendant appeared to be nervous. After the officers learned that Ellis did not have a driver's license, they placed him under arrest and asked defendant to exit the vehicle. According to Badalamenti, as defendant exited the vehicle, he pulled the keys out of the ignition, set them in the center console, and hit the door lock button. Badalamenti told defendant they would have to tow and inventory the vehicle. After he and Rizzi unlocked the vehicle, they began conducting an inventory. Underneath a hooded sweatshirt on the floorboard behind the passenger seat, they located National City money bags, a lot of loose change, and several cartons of Newport cigarettes. Badalamenti recognized these items as those reported stolen from Casey's.

¶ 30 Scott Mathewson, a crime-scene detective with the Bloomington police department, testified that he was on his way to Casey's in the early morning hours of December 30, 2011, when he was diverted to another location where officers had stopped the robbery suspects' vehicle. Mathewson testified that he took photographs of the suspects' vehicle, which were admitted into evidence. He also retrieved a firearm from the backseat of the vehicle. Mathewson identified the firearm as the one he seized from the suspects' vehicle as well as photographs he took of the firearm. After securing the firearm and taking photographs of the vehicle, Mathewson proceeded to Casey's, where he collected further evidence.

¶ 31 Keisean Ellis testified for the State. In exchange for his testimony and guilty plea to one count of armed robbery, he received an agreed sentence of six years' imprisonment. Two other counts of armed robbery, as well as several traffic citations, were dismissed as part of the plea agreement. Ellis testified that he and defendant were sitting at home on December 27, 2011, when they discussed robbing Casey's. Ellis stated he had second thoughts and did not want to

commit the robbery but defendant "was all for it." After driving to Casey's, they got out of the car, put on ski masks, and walked into the store. Ellis admitted that he had a crowbar but stated he did not know defendant had a gun prior to seeing it. Ellis testified that the clerk kept asking defendant if he was serious and the third time she asked him defendant hit her in the head with the gun. Ellis testified defendant then made the clerk empty out the register and place the money in a plastic bag. Ellis stated defendant then grabbed cartons of cigarettes and had the clerk open the safe.

¶ 32 In the video of the robbery, Ellis identified himself and defendant by the clothing they were each wearing. Ellis also identified the clothes, shoes, and ski masks he and defendant were wearing, as well as the handgun defendant had at the time of the robbery. In addition, on the December 28, 2011, video from Casey's, Ellis identified himself, his Grand Am—which he testified was used in the robbery—and defendant.

¶ 33 Ellis further testified he knew the clerk that defendant hit with the gun because she was his "baby mom's cousin." On cross-examination, Ellis admitted he lied to the officers when he was first questioned about the robbery. Initially, Ellis claimed that defendant had just picked him up, that defendant held a gun to his head and threatened him, and that defendant threatened to kill his children.

¶ 34 Defendant testified in his own defense. He admitted to prior convictions for theft and burglary. Defendant stated that on December 30, 2011, he was staying at his sister's house when Ellis came and told him about a party. Defendant decided to go with Ellis to the party, but he testified that shortly after getting in the car, they "[g]ot pulled over, ended up in jail."

¶ 35 Defendant was found guilty on all three counts.

¶ 36 C. Posttrial Proceedings

¶ 37 On November 15, 2012, defendant filed a motion for a new trial, alleging that the State did not prove him guilty beyond a reasonable doubt. Following a November 28, 2012, hearing, the trial court denied defendant's motion. The court then proceeded to sentencing. The State presented defendant's records from the McLean County jail and testimony from the jail superintendent, Greg Allen. Allen testified defendant had caused many problems at the jail, including the destruction of property, assaulting officers, and violating rules. Specifically, Allen stated defendant jammed locks, destroyed glass windows, destroyed several pairs of handcuffs, tore up a restraint chair, and threw feces at officers on several occasions.

¶ 38 Based upon defendant's significant criminal record, as documented in the presentence investigation report, the trial court determined that consecutive sentences were necessary to protect the public, regardless of whether consecutive sentences were mandatory (730 ILCS 5/5-8-4(d) (West 2010)). Regarding the two counts of armed robbery, the court noted they were "based on two separate physical acts" and that the court would be imposing sentences on both counts. The court ultimately found that mandatory consecutive sentences were necessary because one victim suffered severe bodily injury. The court sentenced defendant to consecutive 20-year prison terms on counts I and II, plus a 15-year firearm enhancement on each count, for a total of 35 years' imprisonment on count I and 35 years' imprisonment on count II. The court also imposed a 10-year extended-term prison sentence on count III to be served consecutively to counts I and II.

¶ 39 On December 26, 2012, defendant filed a motion to reconsider his sentence, alleging his sentence was excessive. Following a February 5, 2013, hearing, the trial court denied the motion.

¶ 40 This appeal followed.

¶ 41 II. ANALYSIS

¶ 42 On appeal, defendant asserts (1) the trial court violated his constitutional right to self-representation; (2) the State failed to prove him guilty of armed robbery beyond a reasonable doubt as charged; (3) the sentences for armed robbery violate *Apprendi*; (4) his conviction and sentence for aggravated battery violates the one-act, one-crime doctrine; (5) the trial court erred in sentencing him to an extended term for aggravated battery; and (6) the 80-year sentence is excessive. We affirm as modified.

¶ 43 A. Denial of Defendant's Requests To Waive Counsel and Proceed *Pro Se*

¶ 44 Defendant first asserts that the trial court erred in denying his requests to waive counsel and proceed *pro se*. The State contends that defendant has forfeited this issue because he did not raise it in his posttrial motion. Defendant responds that the law is not clear regarding whether the failure to properly preserve a claim pertaining to a trial court's denial of a defendant's request to waive counsel and proceed *pro se* results in forfeiture. We disagree. The law is well-settled that to preserve an error for appellate review, a defendant must raise the issue at trial and in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). Here, defendant did not raise the issue in his posttrial motion, and thus, he has forfeited it. Forfeiture aside, defendant asserts this court can review the issue for plain error.

¶ 45 "The plain-error doctrine permits a reviewing court to by-pass normal rules of forfeiture and consider '[p]lain errors or defects affecting substantial rights *** although they were not brought to the attention of the trial court.' " *People v. Eppinger*, 2013 IL 114121, ¶ 18, 984 N.E.2d 475 (quoting Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). "Plain-error review is appropriate under either of two circumstances: (1) when '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) when 'a clear or obvious error occurred and that error is 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.' " *Id.* (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)). "The first step in our analysis is to determine whether an error occurred." *Id.* ¶ 19, 984 N.E.2d 475. If error occurred, we will then consider whether either of the two prongs of the plain-error doctrine has been satisfied. *People v. Sargent*, 239 Ill. 2d 166, 189-90, 940 N.E.2d 1045, 1059 (2010).

¶ 46 Pursuant to the United States and Illinois Constitutions, a defendant has a right to represent himself in a criminal trial. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *Faretta v. California*, 422 U.S. 806, 832 (1975). A court may reject a defendant's free, knowing, and intelligent waiver of his right to counsel only in very limited circumstances. *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 24, 959 N.E.2d 674. First, a court may reject a defendant's request to represent himself when that request comes so late in the proceedings that granting it would be disruptive to the orderly schedule of proceedings. *Id.* (quoting *People v. Ward*, 208 Ill. App. 3d 1073, 1084, 567 N.E.2d 642, 649 (1991)).

" 'Second, a trial judge may terminate self-representation by a defendant who engages in serious and obstructionist misconduct ***. While this authority ordinarily would be exercised only after a defendant has begun to represent himself, in exceptional situations, *** a defendant's behavior in the course of seeking to obtain self-representation may in itself be disruptive and thereby justify denying his motion to proceed *pro se*.' " *Id.* " 'Third, defendant's request for self-representation may be denied when, despite the court's efforts to explain the consequences of waiver, the court finds the defendant is unable to reach the level of appreciation needed for a knowing and intelligent waiver.' " *Id.*

¶ 47 In this case, defendant argues the trial court erred in denying his "repeated requests to dismiss counsel and proceed *pro se* because the record does not support a finding that [he] was mentally ill, let alone too ill to represent himself." Our review of the record, however, indicates that the court rejected defendant's request to represent himself based on his obstructionist behavior rather than the status of his mental health.

¶ 48 Following defendant's October 5, 2012, request to proceed *pro se*, the trial court stated, "[b]ased on all the evidence that I have in front of me in this case and your actions in court and so forth, I do not believe that you are capable of representing yourself. I believe you're certainly capable of helping [defense counsel] and consulting with him and suggesting your thoughts to him and so forth, but I do not believe you are capable of representing yourself." The court continued, "for that reason, based on the evidence in these reports and your behavior in court in the past, the court is going to deny your request for allowing—for waiving your right to counsel and representing yourself in this case." Following defendant's request to represent himself on September 25, 2012, the court stated as follows:

> "Now, frankly, as we sit here today, nothing has occurred to make me change [my opinion]. *** You have conducted yourself well the last couple times we've been in court, but the nature of the problems that we had earlier and all of the information that I have about you and about your history suggests to me that you need the assistance of an attorney to help you on these very serious charges, because these are very serious charges that are pending against you with some very serious possible

consequences. So, at this point, given that history, the court is not going to allow you to represent yourself in this case."

¶ 49 Our review of the record indicates that prior to defendant's request to represent himself, he engaged in behavior which obstructed the court proceedings. For example, defendant refused to cooperate with Dr. Killian during the March 18, 2012, interview, instead feigning symptoms of mental illness and otherwise "putting on a show." At the June 5, 2012, status hearing—which defendant declined to attend—defense counsel informed the trial court that defendant returned counsel's letters to him unopened and refused to communicate with him through any other medium. At the August 2, 2012, motion hearing, defendant refused to cooperate with the court, screamed obscenities, resisted officers, and demanded to be taken back to jail. At the August 17, 2012, status hearing, defendant claimed he did not feel safe with his attorney or in the courtroom, and that last time he was in court he "caught the holy ghost and [the] sheriff tried to shoot [him]." During his second evaluation of defendant on September 25, 2012, Dr. Killian became convinced defendant was not psychotic but was "trying very hard to convince [him] that he [was] psychotic." Dr. Killian was confident in his opinion that defendant was feigning mental illness. Further, while Dr. Killian opined that defendant was *capable* of assisting in his own defense, he likely would not do so. After the trial court found defendant fit to stand trial, and defendant first requested to represent himself, defendant informed the court there was "no guarantee I'm going to be fit when it comes time to go to trial." We further note that immediately prior to the commencement of defendant's trial, he sought a continuance to hire an expert to support an insanity defense—which defense counsel had previously determined had no merit. After that request was denied, defendant sought a continuance to "inspect evidence."

¶ 50 Based on the above, it is clear that defendant engaged in this behavior in order to obstruct or delay the court proceedings. Accordingly, the trial court did not err when it relied on defendant's past behavior and Dr. Killian's expert opinion that defendant was feigning mental illness in denying defendant's request to represent himself at trial. Because we find no error was committed, we need proceed no further in the plain-error analysis.

¶ 51 B. Sufficiency of the Evidence

¶ 52 Defendant next asserts that the State failed to prove him guilty of armed robbery with a firearm beyond a reasonable doubt as charged in the indictment. Specifically, defendant argues that the jury instructions combined language from two subsections of the armed-robbery statute, making it unclear whether he was convicted of armed robbery with a dangerous weapon other than a firearm (720 ILCS 5/18-2(a)(1) (West 2010))—an uncharged offense, or armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2010))—a charged offense. As such, he asserts his conviction for what may have been an uncharged offense cannot stand because armed robbery with a dangerous weapon is not a lesser-included offense of armed robbery with a firearm. See *People v. Kolton*, 219 Ill. 2d 353, 360, 848 N.E.2d 950, 954 (2006) ("A defendant may *** be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument [citation], and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense [citation].").

¶ 53 While defendant concedes that he failed to raise this issue in a posttrial motion, he asserts this court can review the issue for plain error. Alternatively, he contends that defense counsel was ineffective for failing to raise the issue in a posttrial motion.

¶ 54 At the outset, we agree that under the current version of the statute—which is at issue here—armed robbery with a dangerous weapon other than a firearm (under section 18-2(a)(1)) and armed robbery with a firearm (under section 18-2(a)(2)) are two distinct offenses (see Public Act 91-404 (eff. Jan. 1, 2000) (creating two separate crimes depending on whether the defendant possessed either a dangerous weapon other than a firearm *or* a firearm)). We further agree that armed robbery with a dangerous weapon other than a firearm is not a lesser-included offense of armed robbery with a firearm (see, *e.g.*, *People v. Barnett*, 2011 IL App (3d) 090721, ¶ 38, 952 N.E.2d 669 ("the language of the current statute clearly demonstrates that a violation under section 18-2(a)(1) and one under section 18-2(a)(2) are mutually exclusive of each other")). The issue before us concerns whether the instructions tendered to the jury combine the two distinct crimes of armed robbery in such a way that the jury may have convicted defendant of armed robbery with a dangerous weapon other than a firearm—an uncharged offense.

¶ 55 1. *Plain-Error Doctrine*

¶ 56 According to defendant, "review under the second prong [of the plain-error doctrine] is proper because conviction of an uncharged offense which is not a lesser-included offense of the charged offense affects the integrity of the judicial process." Under the second prong of the plain-error doctrine, a "defendant must demonstrate not only that a clear or obvious error occurred [citation], but that the error was a structural error [citation]." *Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *People v. Thompson*, 238 Ill. 2d 598, 609, 939 N.E.2d 403, 410 (2010). As

mentioned above, the first step in our plain-error analysis is to determine whether error occurred. *Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475.

¶ 57 In *People v. Herron*, 215 Ill. 2d 167, 187-88, 830 N.E.2d 467, 480 (2005), our supreme court noted, "[t]he function of jury instructions is to convey to the jury the law that applies to the evidence presented. [Citation.] Jury instructions should not be misleading or confusing [citation], but their correctness depends upon not whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them [citation]." Further, "a jury instruction error rises to the level of plain error only when it 'creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.' " *Id.* at 193, 830 N.E.2d at 483 (quoting *People v. Hopp*, 209 Ill. 2d 1, 8, 805 N.E.2d 1190, 1194 (2004)).

¶ 58 Here, defendant was charged with two counts of armed robbery "while armed with a firearm, a handgun." The instructions tendered to the jury provided as follows:

> "A person commits the offense of armed robbery when he, while carrying on or about his person, or while otherwise armed with *a dangerous weapon, a firearm*, knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force." (Emphasis added.)

Further, the jury instructions listing the elements of armed robbery—also tendered to the jury—provided as follows:

> "To sustain the charge of armed robbery as to [the named victims], the State must prove the following propositions:

First Proposition: That the defendant knowingly took property from the person or presence of [the victim]; and

Second Proposition: That the defendant did so by the use of force or by threatening the use of force; and

Third Proposition: That the defendant was armed with a *dangerous weapon, a firearm*, at the time of the taking."

(Emphasis added.)

¶ 59 According to defendant, these instructions combined the "dangerous weapon" language of section 18-2(a)(1) and the "firearm" language of section 18-2(a)(2) in such a way that it is impossible to determine under which subsection of the armed-robbery statute he was convicted and that the jury may have convicted him on the basis of the crowbar evidence. We disagree.

¶ 60 Contrary to defendant's contention, we do not read the jury instructions as advising the jury that it could find defendant guilty of armed robbery if it found defendant was armed with a dangerous weapon *or* a firearm. Rather, the instruction reads "a dangerous weapon, a firearm." Although the jury instructions need not have included the phrase, "dangerous weapon"—because the State was not required to prove the firearm was a dangerous weapon—we do not find its inclusion amounted to error in this case. Based on the above, an ordinary person acting as a juror in this case would have understood that the State was required to prove beyond a reasonable doubt that defendant was armed with a firearm at the time of the robbery. Accordingly, we find no error in the jury instructions and need not proceed further in our plain-error analysis.

¶ 61 2. *Ineffective Assistance of Counsel*

¶ 62 Defendant next asserts his counsel was ineffective for failing to preserve the jury-instruction issue in a posttrial motion. In order to prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, "a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476, 795 N.E.2d 231, 238 (2003). Because we have concluded the trial court did not err in giving the jury instructions and defendant was not convicted of an uncharged offense, defendant cannot show any deficiency in counsel's performance or demonstrate that he was prejudiced by counsel's failure to raise this issue in a posttrial motion.

¶ 63 C. Alleged *Apprendi* Violation

¶ 64 Defendant next asserts that he is entitled to a new sentencing hearing because the sentences for armed robbery violate the rule announced in *Apprendi*. While defendant again concedes this issue was not preserved for appeal, he asserts this court can review the issue for plain error. Alternatively, he contends that defense counsel was ineffective for failing to raise the issue in a posttrial motion.

¶ 65 1. *Plain-Error Doctrine*

¶ 66 As mentioned above, the first step in conducting a plain-error analysis is to determine whether error occurred. *Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475.

¶ 67 In *Apprendi*, the Supreme Court held, "[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." *Apprendi*, 530 U.S. at 455.

Defendant contends—for the same reasons as he did above—that due to the instructions tendered to the jury in this case, the jury did not find beyond a reasonable doubt that he was "armed with a firearm" as required to support the 15-year-sentence enhancement imposed by the trial court. We disagree.

¶ 68 As we determined above, the jury instructions tendered in this case required that the jury find beyond a reasonable doubt that defendant was armed with a firearm at the time of the robbery. The jury instructions satisfied the requirements of *Apprendi*. Thus, we find no error occurred, and we need not proceed further in our plain-error analysis.

¶ 69 2. *Ineffective Assistance of Counsel*

¶ 70 Defendant further asserts that defense counsel was ineffective for failing to preserve the *Apprendi* issue in a posttrial motion. Because we have concluded the tendered instructions sufficiently apprised the jury that it must find beyond a reasonable doubt that defendant committed a robbery while armed with a firearm, defendant cannot show any deficiency in counsel's performance or demonstrate that he was prejudiced by counsel's failure to raise this issue in a posttrial motion.

¶ 71 D. One-Act, One-Crime Doctrine

¶ 72 Defendant next contends that his aggravated-battery conviction violates the one-act, one-crime doctrine because it was based on the same physical act as his armed-robbery conviction. Alternatively, he asserts if multiple acts were involved, aggravated battery is a lesser-included offense of armed robbery as charged in the indictment.

¶ 73 Although he did not preserve this issue for appeal, defendant asserts the plain-error doctrine applies. "[A]n alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second

prong of the plain[-]error rule." *People v. Harvey*, 211 Ill. 2d 368, 389, 813 N.E.2d 181, 194 (2004). Accordingly, we will determine whether such a violation occurred here. "The application of the one-act, one-crime rule presents a question of law, which this court reviews *de novo*." *People v. Gillespie*, 2014 IL App (4th) 121146, ¶ 10, 23 N.E.3d 641.

¶ 74 The one-act, one-crime doctrine prohibits multiple convictions and sentences for offenses carved from the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165, 938 N.E.2d 498, 501 (2010) (quoting *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844-45 (1977)). An "act" is defined as " 'any overt or outward manifestation which will support a different offense.' " *People v. Rodriguez*, 169 Ill. 2d 183, 186, 661 N.E.2d 305, 306 (1996) (quoting *King*, 66 Ill. 2d at 566, 363 N.E.2d at 844-45). An analysis under the one-act, one-crime doctrine involves the following two-step process:

> "First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *Miller*, 238 Ill. 2d at 165, 938 N.E.2d at 501.

¶ 75 Defendant first argues that the State "failed to differentiate between the force that supported the armed[-]robbery charge and the conduct supporting the aggravated[-]battery charge." He cites *People v. Isunza*, 396 Ill. App. 3d 127, 133-34, 917 N.E.2d 1079, 1086 (2009), and *People v. Harvey*, 366 Ill. App. 3d 119, 122, 851 N.E.2d 182, 186 (2006), for the proposition

that his aggravated-battery conviction must be vacated because the conduct underlying his conviction for armed robbery is the same as that for aggravated battery, *i.e.*, striking Bennett with the gun. In *Isunza*, the Second District vacated the defendant's aggravated-battery conviction after concluding that the aggravated-battery charge and the vehicular-invasion charge were based on the defendant's one act of extending his arm through the victim's car window and striking him in the head. *Isunza*, 396 Ill. at 134, 917 N.E.2d at 1086. In *Harvey*, the defendant argued, and the State conceded, that his convictions for aggravated battery with a firearm and armed robbery were based on the same physical act of shooting the victim. Accordingly, the First District vacated the defendant's conviction for the less-serious offense of aggravated battery. *Harvey*, 366 Ill. App. 3d at 122, 851 N.E.2d at 186.

¶ 76 Unlike I*sunza* and *Harvey*, the evidence in this case established that defendant committed multiple acts. At trial, Bennett testified that when she looked up to greet the customer, she saw a gun pointed at her face. Only after saying "seriously" did defendant hit her with the gun. After striking Bennett with the gun, defendant instructed her to take the money out of the cash register and place it in a plastic bag. When the prosecutor inquired of codefendant Ellis what happened when he entered the store, the following colloquy ensued:

> "We went in the store. I stood there by the door, and, I like I say, I thought he was just going to go in and snatch the money. He ended up pulling out a gun. He told her to give him the money, give him money, and she kept asking are you serious, are you serious. The third time when she asked him that, I guess it ticked him off, and he hit her.
>
> Q. Where did he hit her at?

A. In the head—

Q. What happened?

A. —up by the temple. He hit her, and she just begin to start pleading and crying, and I was standing there shocked because, like I say, it wasn't part of the plan to do it. I didn't expect him to do that and take it that far. So he ended up hitting her and made her empty the register out. She got a plastic bag, empty the register out, and he went and grabbed cartons of cigarettes and everything. He grabbed that and because we were—as I'm standing by the door, he asked her was it a safe in there, and she said, yes, it's behind the counter, and she pointed and opened it for him. And he went behind the counter, and she just begin to put money in the bag."

¶ 77 Based on the above, the offenses of aggravated battery and armed robbery were not carved from the same physical act. Specifically, when defendant entered the store, he pointed his gun at Bennett and demanded money. Evidence of this act sufficiently supported defendant's armed-robbery conviction by threatening the imminent use of force while armed with a firearm. Only after Bennett balked when defendant demanded money did defendant hit her in the face with the gun. It is this second act that supports his conviction for aggravated battery. Because we find defendant's conduct involved multiple acts, we must next determine whether aggravated battery is a lesser-included offense of armed robbery in this case.

¶ 78 Defendant cites *Kolton*, 219 Ill. 2d at 367, 848 N.E.2d at 958, for the proposition that Illinois courts utilize the "charging instrument approach" to determine whether one offense

is a lesser-included offense of another. However, in *Miller*, 238 Ill. 2d at 173, 938 N.E.2d at 505, our supreme court held that the "charging-instrument approach" is appropriate only with respect to uncharged offenses. In this case, defendant was charged with aggravated battery and armed robbery. "[W]hen the State charges multiple offenses and a defendant alleges a one-act, one-crime violation, the 'abstract elements approach' controls ***." *People v. Stull*, 2014 IL App (4th) 120704, ¶ 63, 5 N.E.3d 328.

> "Under the abstract elements approach, a comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. *** In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense." *Miller*, 238 Ill. 2d at 166, 938 N.E.2d at 502.

¶ 79 Here, defendant was charged with and convicted of armed robbery under section 18-2(a)(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/18-2(a) (West 2010)), which provides "[a] person commits armed robbery when he or she violates Section 18-1 [by knowingly taking property from the person or presence of another by the use or threat of force]; and *** he or she carries on or about his or her person or is otherwise armed with a firearm." Defendant was also charged with and convicted of aggravated battery under section 12-3.05(f)(1) of the Criminal Code (720 ILCS 5/12-3.05(f)(1) (West 2010)), which provides "[a] person commits aggravated battery when, in committing a battery, he or she *** [u]ses a deadly weapon other than by discharge of a firearm." "A person commits battery if he or she knowingly without

legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a) (West 2010).

¶ 80 A comparison of the two charges reveals that armed robbery does not require the State to prove the defendant committed a battery. Thus, aggravated battery is not a lesser-included offense of armed robbery. Accordingly, defendant was properly convicted of both armed robbery and aggravated battery.

¶ 81 E. Propriety of the Extended-Term Sentence for Aggravated Battery

¶ 82 Defendant next asserts that the extended-term sentence for aggravated battery must be vacated because it was not the most serious class of offense for which he was convicted. "[A] sentence, or portion thereof, that is not authorized by statute is void." *People v. Thompson*, 209 Ill. 2d 19, 23, 805 N.E.2d 1200, 1203 (2004). A void sentence may be attacked at any time and is not subject to waiver. *Id.* at 27, 805 N.E.2d at 1205. We review *de novo* whether a trial court imposed an unauthorized sentence. *Id.* at 22, 805 N.E.2d at 1202.

¶ 83 Generally, a trial court may impose an extended-term sentence only on the most serious offense for which a defendant is convicted. 730 ILCS 5/5-8-2(a) (West 2010). However, our supreme court has held that a court may impose extended-term sentences on "separately charged, differing class offenses that arise from unrelated courses of conduct." *People v. Coleman*, 166 Ill. 2d 247, 257, 652 N.E.2d 322, 327 (1995). To determine whether a defendant's convictions arise from unrelated courses of conduct, courts must consider "whether there was a substantial change in the nature of the defendant's criminal objective." *People v. Bell*, 196 Ill. 2d 343, 354, 751 N.E.2d 1143, 1149 (2001).

> "If there was a substantial change in the nature of the criminal objective, the defendant's offenses are part of an 'unrelated course of conduct' and an extended-term sentence may be imposed on differing class offenses. If, however, there was no substantial change in the nature of the criminal objective, the defendant's offenses are not part of an unrelated course of conduct, and an extended-term sentence may be imposed only on those offenses within the most serious class." *Id.* at 354-55, 751 N.E.2d at 1149.

¶ 84 Defendant argues that his criminal objective did not change during the course of the robbery and that his act of striking Bennett with the gun was the result of her failure to comply with his verbal demands for money. We agree. Here, the evidence reveals that defendant entered the store with the intent to commit a robbery. Only after Bennett failed to comply with defendant's request for money did he strike her with the gun. Immediately thereafter, defendant again demanded money, at which time Bennett complied with his request. Thus, we find that defendant struck Bennett in an effort to further his objective of obtaining the money. Accordingly, the trial court erred by sentencing defendant to an extended-term sentence for aggravated battery, a Class 3 felony (720 ILCS 5/12-3.05(h) (West 2010)), because it is a less-serious offense than armed robbery, a Class X felony (720 ILCS 5/18-2(b) (West 2010)). As such, we reduce defendant's aggravated-battery sentence to 5 years, the maximum nonextended term of imprisonment authorized by the Unified Code of Corrections (730 ILCS 5/5-4.5-40(a) (West 2010)). See *People v. Peacock*, 359 Ill. App. 3d 326, 338, 833 N.E.2d 396, 406 (2005).

¶ 85 F. Excessive Sentence

¶ 86 Defendant's last contention of error is that his 80-year sentence is excessive and the result of several errors committed by the trial court. Specifically, defendant asserts the court inappropriately considered factors inherent in the offenses, incorrectly believed consecutive sentences were mandatory, overemphasized factors in aggravation, and underemphasized factors in mitigation. Defendant acknowledges these specific issues were not raised in his postsentencing motion but asserts this court may review the excessive-sentence issue under the second prong of the plain-error doctrine. Alternatively, he argues that defense counsel was ineffective for failing to include the issue in his postsentencing motion.

¶ 87 Initially, we note as a result of this court's reduction of defendant's aggravated-battery sentence above, defendant's total sentence has been reduced by five years.

¶ 88 Pursuant to the Illinois Constitution, "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The trial court must balance the retributive and rehabilitative purposes of punishment and carefully consider all aggravating and mitigating factors. *People v. Daly*, 2014 IL App (4th) 140624, ¶ 26, 21 N.E.3d 810. "A reasoned sentence must be based on the particular circumstances of each case." *Id.* "Because of the trial court's opportunity to assess a defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age, deference is afforded its sentencing judgment." *Id.* We review a trial court's sentencing decision for an abuse of discretion. *Id.* "An abuse of discretion may be found even if the sentence is within the statutory limitations if the sentence is greatly at variance with the purpose and spirit of the law." *People v. Kenton*, 377 Ill. App. 3d 239, 245, 879 N.E.2d 402, 407 (2007). As previously mentioned, the first step in a plain-error analysis is to determine whether error occurred. *Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475.

¶ 89 Defendant first asserts that the trial court considered factors inherent in the offenses in fashioning his sentences. In support, he cites to the hearing on his motion to reconsider his sentence, stating that "[t]he trial court cited as reasons for the sentences, among other things, Bennett's injury and the use of a weapon." He notes that the use of a weapon was a factor charged in counts I and II, and the injury to Bennett was a charged element of count III.

¶ 90 Our review of the record reveals that the trial court did not improperly consider factors inherent in the offenses. Here, defendant's conviction for aggravated battery was based on his use of a deadly weapon pursuant to section 12-3.05(f)(1) of the Criminal Code (720 ILCS 5/12-3.05(f)(1) (West 2010)), rather than whether he caused "great bodily harm" under section 12-3.05(a)(1) of the Criminal Code (720 ILCS 5/12-3.05(a)(1) (West 2010)). Although the court concluded Bennett suffered severe bodily injury and great bodily harm, it did so only for the purpose of determining whether mandatory consecutive sentences were required and whether the truth-in-sentencing provisions applied to the sentences for armed robbery. Further, any consideration of the use of the firearm was solely for the purpose of the 15-year armed-robbery enhancement. Based on this evidence, we find the trial court did not consider factors inherent in the offenses in fashioning defendant's sentence.

¶ 91 Defendant further argues that the trial court erred in finding consecutive sentences were mandatory. According to defendant, the court determined "severe bodily injury" (a finding required for the imposition of mandatory consecutive sentences) and "great bodily harm" (a finding required for the imposition of truth-in-sentencing) to be synonymous when "severe bodily injury" requires something more. Our review of the record indicates that although the court ultimately concluded mandatory consecutive sentences were appropriate, it also found that permissive "consecutive sentences are required to protect the public from further criminal

conduct of the defendant." The court continued, "[s]o even if mandatory consecutive does not apply in this case, the court believes that it is appropriate to impose permissive consecutive sentences for those reasons."

¶ 92 Section 5-8-4(c)(1) of the Unified Code of Corrections (730 ILCS 5/5-8-4(c)(1) (West 2010)) provides, in part, as follows:

> "The court may impose consecutive sentences in any of the following circumstances:
>
> > (1) If, having regard to the nature and the circumstances of the offense and the history and character of the defendant, it is the opinion of the court that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record."

Thus, assuming, *arguendo*, that mandatory consecutive sentences were not appropriate, the record supports the trial court's imposition of permissive consecutive sentences, which defendant does not take issue with.

¶ 93 Last, our review of the record indicates that the trial court appropriately considered and weighed both aggravating and mitigating factors. Specifically, the court noted, "in this case there is certainly some mitigating evidence in terms of the defendant's history and background, his mental health history, which has been documented in the presentence report and explained to the court, his childhood, including the letter from his sister that also shed a little

light on that, as well as the information in the report." The court continued, "I think it's appropriate to acknowledge that I understand that your childhood, your upbringing, to put it bluntly, was not fair. A child shouldn't have to go through some of the things you had to go through as a child, and those things obviously affected you and have carried over into your adult life." The court found these factors "provide somewhat of a lessening of the imposed sentence here from the maximum, which is being recommended by the People."

¶ 94 The court then considered factors in aggravation, which consisted primarily of defendant's criminal history. The court noted defendant's juvenile record. His juvenile conduct ultimately resulted in his incarceration in the Department of Juvenile Justice. Approximately one month after his release from the Department of Juvenile Justice, defendant committed a theft—his first felony offense as an adult. While on probation for theft, defendant committed burglary and was sentenced to 3 1/2 years in prison. Less than one year after he was released from prison, defendant committed attempted robbery in Indiana and was sentenced to six years in prison there. Four months after his release from an Indiana prison, defendant committed the offenses at issue here. While defendant notes he was only 24 years of age at the time of the subject offenses, his youth does not mitigate against his rather extensive criminal history. Accordingly, we find no error in the trial court's consideration of the mitigating and aggravating factors in determining defendant's sentence.

¶ 95 The 35-year consecutive sentences imposed for defendant's armed-robbery convictions are within the statutory guidelines (720 ILCS 5-18-2(b) (West 2010)). We find that the trial court appropriately considered and weighed both mitigating and aggravating factors prior to imposing sentence. Therefore, we hold that the trial court did not abuse its discretion in

imposing the armed-robbery sentences, which are neither disproportionate to the offenses committed nor at variance with the purpose and spirit of the law.

¶ 96 Because we conclude defendant's armed-robbery sentences were not excessive, defendant cannot show any deficiency in counsel's posttrial performance or demonstrate that he was prejudiced by counsel's failure to raise this issue in a posttrial motion.

¶ 97 III. CONCLUSION

¶ 98 For the reasons stated, we affirm the trial court's judgment as modified. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 99 Affirmed as modified.

¶ 100 JUSTICE HOLDER WHITE, dissenting.

¶ 101 Defendant asserts this matter should be reversed and remanded for a new trial due to the denial of his constitutional right to represent himself. I agree, and therefore, respectfully dissent. Given defendant's failure to raise this issue in the trial court, he has forfeited the issue and can only seek review pursuant to the plain-error doctrine. Defendant asserts plain error pursuant to the second prong of the plain-error doctrine. Under the second prong of the plain-error doctrine, defendant must demonstrate that (1) a clear or obvious error occurred, and (2) the error is so serious, regardless of the closeness of the evidence, that it affects the fairness of the trial and CHALLENGES the very integrity of the judicial process. *Piatkowski*, 225 Ill. 2d at 870 N.E.2d at 410-411. The Illinois Supreme Court has equated the second prong of plain-error review with structural error which, when found, requires reversal. *Thompson*, 238 Ill. 2d at 613-614, 939 N.E.2d 413. The deprivation of one's right to self-representation is an infringement structural in nature. *Id*. at 609, 939 N.E.2d at 411.

¶ 102 The majority accepts the State's argument that due to defendant's obstructionist behavior in the course of seeking to represent himself, he was properly denied his right to self-representation. In exceptional situations, based on defendant's obstructionist behavior in the course of seeking self-representation, denying a defendant's request to represent himself is appropriate. See *Ward*, 208 Ill. App. 3d at 1080, 567 N.E.2d at 646. The facts of this case fail to establish an exceptional situation.

¶ 103 According to the record, defendant appeared in person before the trial court on approximately nine occasions. One of those occasions involved defendant's display of undeniably inappropriate behavior. Subsequent to defendant's outburst, Dr. Killian found

defendant to be malingering regarding his mental health issues. Dr. Killian determined defendant fit to stand trial. In accepting Dr. Killian's expert opinion, the trial court found defendant fit to stand trial but subsequently denied defendant's request to proceed *pro se*.

¶ 104 Undoubtedly, defendant was someone with whom it was difficult to deal. He did not trust his lawyer, acted out in the jail, and at times refused to appear in court. However, on two occasions in open court, defendant asserted his right to represent himself. His requests were denied without a proper basis to do so. The trial court made no effort to admonish defendant pursuant to Illinois Supreme Court Rule 401 (eff. July 1, 1984). Instead, based on defendant's past behavior, the court decided defendant was incapable of representing himself. If the manner in which this defendant refused to cooperate with his appointed lawyer, behaved badly in the jail, and had an outburst in court establishes exceptional circumstances, then the right to self-representation will be greatly diminished.

¶ 105 The facts of this case do not represent an exceptional situation. Instead, the facts are indicative of an all too common circumstance. Hard-working, competent appointed counsel is viewed with suspicion and there is a quick deterioration of the attorney-client relationship. This leads some defendants to elect to represent themselves. Although it is rarely a wise decision, it is one a defendant is allowed to make as long as he does so knowingly and intelligently. Here, defendant's request was not properly considered. Also, while he did seek a continuance, defendant in no way conditioned his request to represent himself on the court allowing a continuance. Moreover, the trial court certainly had the ability to inform defendant that his decision to represent himself would not be, in the court's discretion, a basis to delay the trial.

¶ 106 Given the absence of the exceptional situation required to deprive defendant of his constitutional right to represent himself, I would find it was error to deny defendant's request to proceed *pro se*. Further, I would find the deprivation of defendant's constitutional right to represent himself constituted a clear or obvious error so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-411. Therefore, I would reverse defendant's conviction and remand the matter for a new trial.