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SIXTH DIVISION
September 28, 2012

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 1724
)	
MARTIN SOTELO,)	The Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Garcia and Robert E. Gordon concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant was accountable for the acts of codefendants in the home invasion, armed robbery, and unlawful restraint of the victims; however, one of defendant's armed robbery convictions was not supported by the evidence where it was demonstrated that one of the victims did not have anything taken from him, thus that conviction is reduced to attempted armed robbery. Defendant's arrest at the time he arrived at the police station was supported by probable cause; therefore, his statement to the police was properly admitted. Defense counsel was not

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ineffective for failing to challenge defendant's knowing and voluntary waiver of his *Miranda* rights. A number of defendant's multiple convictions violated the one-act, one-crime rule and are vacated.

¶ 2 Following a bench trial, defendant, Martin Sotelo, was convicted of multiple counts of home invasion, armed robbery, and unlawful restraint based on a theory of accountability where he advised his codefendants to rob an apartment belonging to his friends and provided details regarding the interior layout and valuable items contained within the apartment. Defendant was sentenced to a total of eight years' imprisonment.

¶ 3 On appeal, defendant contends: (1) the State failed to prove beyond a reasonable doubt that he was accountable for the acts of his codefendants because he was a victim of the crime or withdrew from the criminal enterprise; (2) the State failed to prove beyond a reasonable doubt the elements of armed robbery of one of the victims; (3) his home invasion convictions should be reduced to criminal trespass to a residence where the State failed to prove him guilty beyond a reasonable doubt of home invasion; (4) the trial court erred in denying his motion to quash arrest and suppress his statement where the police lacked probable cause to arrest him; (5) his counsel was ineffective for failing to challenge defendant's ability to knowingly and intelligently waive his *Miranda* rights based on his lack of knowledge of the justice system and his limited knowledge of the English language; and (6) his multiple convictions should be reduced or vacated as violations of the one-act, one-crime rule. Based on the following, we affirm in part, reduce and/or vacate a number of defendant's convictions, and remand for resentencing on the remaining convictions.

¶ 4

FACTS

¶ 5 On January 1, 2010, defendant was visiting the home of friends, Anthony Pieroni and Jerry Blake, along with Sigmundo Acevedo and Raul Toledo, when between 4 and 5 men posing as police officers entered the apartment and forced the victims onto the floor at gunpoint while they robbed the victims and ransacked the home. Defendant was eventually implicated in the crimes for having suggested to the offenders that they rob Pieroni's apartment.¹

¶ 6 Prior to trial, defendant filed a motion to quash arrest and suppress his police statement. At the subsequent hearing, defendant testified, through a Spanish interpreter, that he was in Pieroni's apartment when codefendants entered, while impersonating the police, and demanded that the individuals inside the apartment get on the floor. According to defendant, after the offenders left, he called 911 with his telephone. Defendant was the only person left in the apartment with a phone because the offenders took all of the others. Defendant spoke to the police when they arrived at the apartment. Approximately two or two and a half hours later, the police told defendant, Acevedo, and Toledo that they were obligated to go to the police station. Pieroni offered to drive the men; however, according to defendant, the police insisted on transporting the men to the station instead. While in transport, the men remained in a group and were not handcuffed.

¶ 7 Defendant testified that, upon their arrival at the police station, a detective asked his name and immediately placed him in handcuffs when he responded that his name was Martin Sotelo.

¹Although Pieroni and Blake shared the apartment, the apartment will be referred to as Pieroni's for ease of description.

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Defendant said he was moved into a separate room where he made a statement. According to defendant, he was not in communication with any of codefendants, Alexander Vega, Jesus Silva, or Juan Miramontes, on January 1, 2010. Defendant added that he did not drive anyone past Pieroni's apartment on January 1, 2010, to point out the location. Defendant said he did not know Vega or Silva, but recognized Miramontes. According to defendant, his nickname is "Poyo," Blake's nickname is "Ruben," and Miramontes' nickname is "Cheeto." Defendant testified that he spoke a little bit of English.

¶ 8 Officer Salvador Esparza testified that, after receiving a flash message providing the physical descriptions of the offenders, he observed Miramontes and took him into custody.

¶ 9 Sergeant Eric Madsen testified that he interviewed Miramontes at the police station at approximately 1 a.m. or 1:30 a.m. on January 2, 2010. According to Sergeant Madsen, Miramontes provided a statement in which he described the offenders. One description was of a man nicknamed "Poyo," who was a short, thin, young Hispanic with green eyes. In the statement, Miramontes said that, about one month prior, "Poyo" informed Miramontes that Pieroni's place would be a good location to rob. "Poyo" drove Miramontes to the location to "case it out." Madsen testified that Miramontes did not identify "Poyo" as defendant.

¶ 10 Detective Jensen testified that he investigated the offenses at Pieroni's apartment. While at the apartment, Detective Jensen spoke to Blake, who said that defendant was a guest inside the apartment. According to Detective Jensen, one of the victims described an offender as wearing a mask. Around 4:30 a.m. on January 2, 2010, Detective Jensen interviewed Miramontes, who said defendant previously told him and Silva that Pieroni's apartment contained a safe, as well as

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drugs and guns. Miramontes added that defendant took Miramontes and Silva to the outside of the apartment and provided a description of the internal layout of the apartment. Miramontes additionally said that he wore a mask during the offense.

¶ 11 The trial court denied defendant's motion to quash his arrest and suppress his statement, finding the police had probable cause to arrest him. The case proceeded to a bench trial, which was conducted simultaneously for all of the offenders, but was severed such that the trial judge did not consider any of the postarrest statements against any codefendant.

¶ 12 At trial, Pieroni testified that, on January 1, 2010, he and Blake entertained guests at their apartment at 2562 West Winnemac Avenue, in Chicago, Illinois. While returning home from dinner, the group, which included Pieroni, Blake, defendant, and Acevedo, noticed a small, silver-gray SUV illegally parked nearby. Four people were inside the vehicle and appeared to be looking at the group. After parking the car in the garage, Pieroni and his friends went to the second floor apartment. At approximately 9:30 p.m., Toledo arrived and joined the rest of the group to watch television in Pieroni's apartment. Pieroni added that defendant was 20 years old at the time and was a very close friend. Pieroni considered defendant to be "like a son."

¶ 13 Around 10:15 p.m., the doorbell rang. Pieroni left his apartment and walked down the stairs to the front door of the building. An individual later identified as Silva stood outside the front door dressed as a police officer. Silva was wearing a "Chicago police shirt," a vest, a gun holster with a silver or chrome handgun in the holster, and a ski cap. Pieroni reached for the door while Silva simultaneously pushed the door open. Once the door was open, Silva asked an individual later identified as Miramontes whether "this [is] the guy?" When Miramontes said

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yes, Silva instructed Pieroni to go upstairs. Pieroni testified that Miramontes was wearing a dark-hooded sweatshirt with the hood pulled over his head; however, Pieroni could still see his face. Pieroni said he allowed the men to enter the building because he believed they were officers following up on a break-in that occurred in his home less than a month earlier. Pieroni led the men up the stairs and heard at least two other sets of footsteps behind his and those of the officer.

¶ 14 When they arrived at the apartment door, Silva instructed Pieroni to wait outside on the steps and asked if there were any guns or drugs inside. Silva and Miramontes, who had pulled a ski mask over his face, then walked into the apartment. After their initial entry into the apartment, Silva demanded that Pieroni take him to the safe. Silva seemingly knew where the safe was located. When Pieroni questioned Silva's instruction to open the safe, Silva explained that he was searching for guns and drugs. Once the safe was open, Silva removed money, an iPod, a GPS navigation system, and a pair of sunglasses. Pieroni was forced at gunpoint to return to the living room.

¶ 15 Pieroni additionally testified that he believed there were a total of five offenders in his apartment collecting items of value and placing them near the back door. Silva said the items were being placed near the back door and on the back porch in order to be searched by canine dogs. According to Pieroni, the offenders took a laptop, a 52 inch plasma television, a digital camera bag with a camcorder, a few digital cameras, two video gaming systems and accessories, jewelry, liquor, and cigarettes. Pieroni further testified that all of his guests had their wallets and phones stolen, except for defendant. Pieroni said that he observed Miramontes and defendant

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sharing jokes. The incident lasted approximately 45 minutes, after which two men exited through the front door and three men exited through the back door. After the offenders left, defendant gave Pieroni his phone to call 911. Pieroni testified that "because of the dialogue, I wanted to make sure the facts got across, I *** made the call."

¶ 16 Acevedo testified at trial that, when the offenders entered the apartment, Miramontes pointed a black handgun at the men inside and demanded that "everybody [get] on the floor" for "a police search." Acevedo, Blake, Toledo, and defendant complied. Acevedo recalled seeing Silva with a handgun as well, but Silva did not point the gun at Acevedo. Acevedo testified that Silva grabbed him by his shoulder and pulled him up against a wall to search him. Acevedo did not have a phone or wallet on his person, so nothing was taken from him. Acevedo did not see anything being taken from anyone because his face was on the ground, but, when the offenders left, he realized that items had been stolen. Acevedo testified that, when Miramontes approached defendant, "they were talking to each other." Acevedo heard one of the offenders say, "put a bullet in his head," meaning defendant.

¶ 17 Toledo testified that, approximately 10 minutes after Silva and Miramontes entered the apartment, Silva opened the back door where at least two additional men were waiting on the second floor landing. The additional men entered the apartment. The offenders said they were searching for money, guns, and drugs. Miramontes pulled Toledo up off of the floor and pushed him against the wall to search his person. Miramontes retrieved Toledo's wallet. After asking if Toledo had anything else on him, Toledo retrieved his cell phone. According to Toledo, defendant was on the floor next to him and he heard defendant "going at it" with one of the

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offenders. Toledo testified that defendant asked "what are you looking for?" Miramontes told defendant to be quiet or "he was going to get shot." Toledo was unaware of whether defendant joked with the offenders or if any of his belongings were taken.

¶ 18 Officer Kast testified that he was on routine patrol on the night in question. Shortly before 11 p.m., Kast observed a man quickly walking from a car illegally parked in an alley near Winnemac Avenue and Rockwell Street. Kast lost sight of the individual during a pursuit. Kast testified that he and his partner returned to the illegally-parked Dodge minivan. The engine of the car was on and running, but no passengers were inside. There were two phones on the driver's seat and a ski mask in the rear. After checking the license plate, Kast learned that the vehicle was registered to Maria Silva, Silva's sister. Meanwhile, Kast received radio information regarding a burglary. A victim of the burglary flagged down the officers. Kast testified that he remained with the vehicle while his partner accompanied the victim.

¶ 19 Officer Esparza testified that he was also on routine patrol in the area on the night in question. Esparza received a flash message with the description of an offender. Esparza proceeded to Foster Avenue and Western Avenue where he observed a man fitting the description. The man was detained and taken to a parking lot where a show-up identification was conducted with Pieroni. Pieroni identified the man as the hooded offender. Esparza made an in-court identification of Miramontes.

¶ 20 Officer Allen testified that, on January 2, 2010 at 6 a.m., he and a tactical investigation team went to 5549 W. Dakin in Chicago, Illinois, in search of Silva. Ms. Martinez opened the door of the apartment and allowed the officers inside. Silva was detained and Martinez provided

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the officers with a signed consent form to search the apartment. The search revealed a navigation system, an iPhone, and a camera, along with a black bullet-proof vest, a blue shirt, and a duty belt with a gun holster. In the stairwell of the building, the officers recovered a white canvas bag containing a loaded Glock .40 caliber handgun and an unloaded .357 magnum revolver.

¶ 21 Detective Jensen testified that he spoke to witnesses at the police station and interrogated Miramontes at approximately 4:30 a.m. on January 2, 2010. According to Jensen, he spoke to defendant at approximately 5:50 a.m. on January 2, 2010. Jensen advised defendant of his rights and asked if he understood those rights. Jensen testified that defendant said he understood and agreed to waive his *Miranda* rights. They proceeded to speak for approximately 10 to 15 minutes, during which time defendant implicated himself in the events that had transpired the previous day. Detective Jensen further testified that he then spoke to Silva around 7:30 a.m. on January 2, 2010. Silva provided a statement. Jensen added that he spoke to Miramontes again at approximately 10:30 a.m., during which time Miramontes provided another oral statement. According to Detective Jensen, at approximately 3:56 p.m., defendant waived his *Miranda* rights again and provided a written, memorialized statement to Assistant State's Attorney (ASA) Howlett.

¶ 22 Defense counsel interrupted Jensen's testimony and offered to stipulate to the foundation of defendant's statement. The trial judge then asked whether defendant was read his rights and interrogated in English. Jensen responded in the affirmative. Jensen further stated that defendant spoke to him in English and did not indicate any trouble understanding the conversation. Jensen said defendant never asked for an interpreter. The trial court accepted defendant's statement into

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evidence.

¶ 23 Jensen further testified that defendant was the individual that called 911 to report the offenses. Jensen said that, during his initial conversation with defendant, he learned that defendant's first language was not English and that defendant had only been in the United States for four years. Defendant attended high school in the United States for three years. Jensen said defendant spoke broken English at times, but was never offered an interpreter.

¶ 24 In his statement, defendant indicated that sometime in October or early November 2009, he was with Miramontes, Angel Alverio, and another individual he did not know. On that date, the group went for a walk, looking for a place to "do a lick," or robbery. According to the statement, defendant said Miramontes and his friends were always looking to steal from drug dealers. Miramontes and his friends asked defendant to be a lookout, but the men decided not to go through with a robbery. Defendant then told the men about Pieroni's apartment, describing it as a "crib where he sometimes stays." Defendant stated that the apartment contained numerous expensive items, like flat screen televisions and a safe with valuables, such as money and jewelry, as well as drugs. Defendant indicated that the safe was in the first bedroom in the apartment. Defendant said he lied about the existence of drugs in Pieroni's apartment to make the robbery sound better and to impress Miramontes and his friends. Defendant also believed he would receive some money and proceeds from the robbery.

¶ 25 In defendant's statement, he said he spoke to Alverio a couple of weeks after the initial discussion and learned that he was not going to receive any proceeds from the robbery. Defendant responded by telling Alverio that "he did not want them to do a lick on his friends

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anymore." According to defendant's statement, Alverio told defendant they would not go through with the robbery of Pieroni's apartment because he agreed that defendant's friends were cool people. After the conversation, defendant believed nothing would happen to his friends.

¶ 26 In his statement, defendant further provided that he was at Pieroni's apartment on January 1, 2010, with Pieroni, Blake, Acevedo, and Toledo when the doorbell rang. Pieroni answered the door and returned with Miramontes and Silva. Miramontes was wearing a mask and Silva was dressed as a police officer. Miramontes pointed a handgun and instructed everyone to get on the floor. Miramontes asked Pieroni whether there were any drugs in the apartment. Pieroni responded in the negative. According to defendant's statement, he recognized Miramontes' voice despite not seeing his face behind the mask. Defendant said he heard people rummaging around the apartment and heard Miramontes ask Blake to open the safe, but defendant kept his head down during the incident.

¶ 27 According to his statement, when the offenders left, defendant did not tell his friends that he knew codefendants because he was afraid Miramontes and the other offenders would retaliate. Defendant said he called 911, but did not tell the police he knew the offenders until after they were arrested and he was questioned by the police.

¶ 28 In his statement, defendant additionally said he was treated well by the police and ASA Howlett, was never handcuffed while he spoke to them, and was not promised anything or threatened to give a statement. The statement further provided:

"[Defendant] states that he reads a little bit of English even though he speaks English well. He demonstrated this by reading the entire first page aloud.

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He stated that he followed along as Assistant State's Attorney Howlett read the entire statement aloud. He stated that he was allowed to make any changes or corrections to his statement and that he placed his initials by those changes and signed the bottom of each page to show that it is accurate. He states that everything in his statement is true and correct."

ASA Howlett reviewed each page of his memorialized statement with defendant and made initialed changes and corrections. Defendant signed each page of his memorialized statement.

¶ 29 Detective Jensen additionally testified that defendant signed a consent to search form in order for Jensen to search defendant's cell phone. Nothing of note was discovered during the search.

¶ 30 Defendant was found guilty of four counts each of home invasion, armed robbery, and unlawful restraint. The trial court concluded that defendant "was the one that alerted" his codefendants regarding the "vulnerable people" and participated in the premeditated scheme to rob the home. The court added that it would give defendant and codefendants the "benefit of the doubt" and find that they were not armed with a firearm at the time of the offense for sentencing purposes. The trial court denied defendant's motion for a new trial and proceeded to sentencing. Defendant was sentenced to eight years' imprisonment on the home invasion and armed robbery counts and three years' imprisonment on the unlawful restraint counts, all to run concurrent. Defendant's motion to reconsider his sentence was denied. This appeal followed.

¶ 31

DECISION

¶ 32

I. Sufficiency Of The Evidence

¶ 33 Defendant contends the State failed to prove beyond a reasonable doubt that he was accountable for the actions of his codefendants where he was a victim of the crime or withdrew from the criminal enterprise.

¶ 34 A challenge to the sufficiency of the evidence requires a reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is not the reviewing court's function to retry the defendant or substitute its judgment for that of the trial court. *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939 (2004). The trial court assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts or inconsistencies in the evidence. *Id.* at 211. In order to overturn the trial court's judgment, the evidence must be "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307, 537 N.E.2d 317 (1989).

¶ 35 In order to sustain a conviction under a theory of accountability, the State must prove the defendant, "either before or during the commission of the offense, intentionally aided or abetted an offender in conduct that constitutes an element of the offense." *People v. Taylor*, 186 Ill. 2d 439, 447, 712 N.E.2d 326 (1999). Accountability is established where the State proves beyond a reasonable doubt that the defendant either shared the criminal intent of the principal or there was

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a common criminal design. *People v. Perez*, 189 Ill. 2d 254, 266, 725 N.E.2d 1258 (2000).

Pursuant to the common design rule, where two or more persons engage in a common criminal design or agreement, any acts in furtherance thereof committed by one party are considered to be the acts of all parties to the common design or agreement and are all equally responsible for the consequences of such further acts. *Id.* at 267. Accountability may be established through a person's knowledge of and participation in the criminal plan, even though there is no evidence that the defendant directly participated in the criminal act itself. *Id.* To establish accountability, the trier of fact may consider proof that the defendant was present during the commission of the offense, that he fled the scene, that he maintained a close affiliation with his companions after the commission of the crime, and that he failed to report the crime. *Id.* However, a defendant will not be held accountable if he is a victim of the offense or sufficiently withdrew from the offense. 720 ILCS 5/5-2 (West 2010).

¶ 36 Defendant contends he was a victim of the offense and the State failed to prove he shared a common criminal intent with the offenders. Our review of the record demonstrates defendant was actively involved in the planning of the robbery.

¶ 37 In his police statement, defendant admitted that he suggested codefendants should rob the apartment shared by Pieroni and Blake. Defendant enticed codefendants with the items they would find inside the apartment, even further bolstering the potential recovery by stating that they would find drugs, which he knew to be untrue. Defendant additionally admitted that he provided codefendants with the internal layout of the apartment and the location of the safe. Defendant said he thought he would receive proceeds from the robbery in exchange for his

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assistance. Only after learning that codefendants had no intention of sharing the proceeds did defendant urge Alverio not to rob his friends. During the commission of the robbery, defendant did not alert the victims or warn them and he did not report the offense to the police. Rather, defendant only admitted he knew the offenders after they were arrested and he was interviewed by the police.

¶ 38 While defendant said in his statement that he believed the robbery plan had been abolished, the fact that he was not searched and nothing was taken from him demonstrates that he was not a victim of the offense. We recognize that Toledo testified defendant appeared obstinate and that Miramontes threatened to shoot defendant; however, Pieroni testified that he observed defendant joking around with Miramontes. It was the function of the trier of fact to resolve inconsistencies in the testimony and assess the credibility of the witnesses. *Evans*, 209 Ill. 2d at 211. It is completely plausible that defendant portrayed himself as a victim to distance himself from the offense while in the presence of his friends. We, therefore, conclude that the evidence was sufficient to hold defendant accountable for the underlying offenses.

¶ 39 In the alternative, defendant contends he sufficiently withdrew from the crime when he communicated his desire to abolish the planned robbery. The extent of defendant's withdrawal from the offense was a conversation with Alverio once he found out he would not receive any proceeds from the robbery. The record, however, is completely devoid of Alverio's participation in the offense, connection to the offenders, or connection to defendant beyond the conversation in which defendant encouraged Alverio to abolish the plan to rob his friends.

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¶ 40 Pursuant to the accountability statute, a person is not accountable if:

"Before the commission of the offense, he or she terminates his or her effort to promote or facilitate that commission and does one of the following: (i) wholly deprives his or her prior efforts of effectiveness in that commission, (ii) gives timely warning to the proper law enforcement authorities, or (iii) otherwise makes proper effort to prevent the commission of the offense." 720 ILCS 5/5-2(3) (West 2010).

"A person who encourages the commission of an unlawful act cannot escape responsibility by quietly withdrawing from the scene." *People v. Lacey*, 49 Ill. 2d 301, 307, 200 N.E.2d 11 (1964).

¶ 41 Defendant did not make any attempts to convince Miramontes to withdraw the planned robbery. Defendant did not alert Pieroni or Blake about the plan to rob them. Defendant did not contact the police to alert them about the plan. Moreover, defendant did nothing during the commission of the offense to stop the acts. Defendant's "quiet withdrawal" inasmuch as his self-serving statement that he tried to convince a nonparticipant, Alverio, to dismantle the plan that defendant initiated does not amount to a sufficient withdrawal. We, therefore, conclude that defendant was accountable for the underlying offenses.

¶ 42 The State, however, concedes that the evidence failed to prove defendant guilty beyond a reasonable doubt of armed robbery of Acevedo because the trial testimony demonstrated that nothing was taken from the victim.

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¶ 43 In order to sustain a conviction for armed robbery, the evidence must demonstrate the defendant took property from the person or presence of the victim by force or threat of the imminent use of force while armed with a dangerous weapon. 720 ILCS 5/18-2(a)(1) (West 2010). Where the evidence does not support an armed robbery conviction, it must be vacated or reduced. *People v. Robinson*, 92 Ill. App. 3d 397, 398-99, 416 N.E.2d 65 (1981).

¶ 44 We agree that the evidence did not support defendant's armed robbery conviction of Acevedo where no property was taken from him. Pursuant to Supreme Court Rule 615(b)(3) (eff. Aug. 27, 1999), we may reduce a defendant's conviction. Defendant, however, argues that his conviction must be vacated, and not reduced, where he was not charged with attempted armed robbery and his indictment for armed robbery does not allege elements establishing attempted armed robbery as a lesser included offense.

¶ 45 The charging instrument approach governs whether an uncharged offense is a lesser included of a charged offense. *People v. Miller*, 238 Ill. 2d 161, 173, 938 N.E.2d 498 (2010).

The supreme court advised:

"Under the charging instrument approach, the court looks to the charging instrument to see whether the description of the greater offense contains a 'broad foundation' or 'main outline' of the lesser offense. [Citation.] The indictment need not explicitly state all of the elements of the lesser offense as long as any missing element can be reasonably inferred from the indictment allegations." *Id.* at 167.

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To sustain a conviction of attempted armed robbery, the evidence must demonstrate the intent to commit armed robbery plus an act constituting a substantial step toward the commission of the offense. *Robinson*, 92 Ill. App. 3d at 399.

¶ 46 Here, the indictment charged defendant with armed robbery, in that he knowingly took property from "the person or presence of [Acevedo] by the use of force or by threatening the imminent use of force and [he] carried on or about [his person] or [was] otherwise armed with a firearm." It is clear that the indictment provided a broad foundation or main outline of attempted armed robbery where the State alleged that defendant had the intent to commit armed robbery by alleging he knowingly took property and that defendant took a substantial step toward committing armed robbery by carrying a firearm and using or threatening the use of force. The details of defendant's "substantial steps" can reasonably be inferred from the indictment. Moreover, an "included offense" consists of "an attempt to commit the offense charged or an offense included therein." 720 ILCS 5/2-9(b) (West 2010). We, therefore, conclude defendant's charging instrument established attempted armed robbery as a lesser included offense of armed robbery.

¶ 47 Further, the evidence supported a finding of attempted armed robbery where the record demonstrates that codefendant Silva pulled Acevedo up off the floor, pushed him against a wall, and searched him for property. Pursuant to Rule 615(b)(3), we, therefore, reduce one of defendant's armed robbery convictions (count VIII) to attempted armed robbery. Pursuant to Rule 615(b)(1), we instruct the clerk of the circuit court to amend defendant's mittimus to make the necessary corrections. *People v. Mitchell*, 234 Ill. App. 3d 912, 921, 601 N.E.2d 916 (1992).

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However, because we cannot tell from the record whether defendant's sentence was influenced by the improper armed robbery conviction, we must remand the cause to the trial court for resentencing.

¶ 48 Defendant additionally contends, and the State concedes, that the evidence failed to support his home invasion convictions under subsection (a)(6) of the statute, as recorded in his mittimus, because there was no proof that a sex crime occurred during the offense. 720 ILCS 5/12-11(a)(6) (West 2010). Defendant further argues that his convictions should be reduced to criminal trespass to residence. The State, instead, argues that defendant's mittimus should be corrected to reflect convictions under subsection (a)(1), which required proof that the offenders were armed with a dangerous weapon during the offense. 720 ILCS 5/12-11(a)(1) (West 2010).

¶ 49 Defendant was charged with home invasion under subsection (a)(3) of the statute, which provides that a person commits home invasion "when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present and while armed with a firearm uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs." 720 ILCS 5/12-11(a)(3) (West 2010). Contrary to defendant's argument, the record demonstrates there was sufficient evidence to convict defendant of home invasion. Under all subsections of the home invasion statute, the State must prove that a defendant knowingly entered the dwelling place of another without legal authority when he or she knew or had reason to know that one or more persons was present. 720 ILCS 5/12-11(a) (West 2010). Here, codefendants forcibly entered the apartment shared by Pieroni and Blake with the knowledge that individuals, or at the

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very least Pieroni, was present. We have established that defendant is accountable for the actions of codefendants and, therefore, defendant is accountable for the home invasion.

¶ 50 The evidence further demonstrated that Miramontes pointed a gun at the victims and forced them to remain on the floor while the home was ransacked and the individuals were robbed, or attempted to be robbed, of their wallets and phones. In its findings, the trial court gave defendant the "benefit of the doubt" and found codefendants were not armed with a firearm at the time of the offense for purposes of sentencing. Section (a)(3) of the home invasion statute carries a firearm sentencing enhancement. 720 ILCS 5/12-11(c) (West 2010). It is, therefore, apparent from the record that defendant was not found guilty under section (a)(3) of the statute. The home invasion statute, however, contains an additional section, namely, (a)(1), where a defendant commits the offense when "while armed with a dangerous weapon, other than a firearm, uses force or threatens the use of force." 720 ILCS 5/12-11(a)(1) (West 2010). Our review of the record makes it clear defendant was convicted of home invasion under section (a)(1) of the statute and the evidence supports that finding. Pursuant to Rule 615(b)(1), we, therefore, instruct the clerk to correct defendant's mittimus to accurately reflect the section of the statute under which he was convicted, *i.e.*, 12-11(a)(1). *Mitchell*, 234 Ill. App. 3d at 921.

¶ 51 II. Motion To Quash Arrest And Suppress Evidence

¶ 52 Defendant next contends the trial court erred in denying his motion to quash his arrest and suppress his police statement where there was no probable cause for his arrest when he was transported by the police from Pieroni's apartment to the police station.

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¶ 53 The State argues that defendant forfeited review of his contention because he failed to raise it at trial. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988) (in order to preserve an error for appellate review, the defendant must raise a contemporaneous objection at trial and must include the alleged error in a posttrial motion). Prior to trial, defendant filed a motion to quash arrest and suppress his statement on the basis that the police lacked probable cause to arrest him when he was at the police station. Defendant now contends he was arrested prior to arriving at the station. The trial court, however, determined the police had probable cause to arrest defendant when he arrived at the police station, after having learned that an individual matching defendant's description and going by defendant's nickname, "Poyo," was involved in the robbery. Defendant's new probable cause argument was not raised in the trial court. We, therefore, find defendant forfeited review of his contention.

¶ 54 Despite forfeiture, we conclude defendant was not under arrest until he arrived at the police station. An individual has been arrested " 'when, by means of physical force or a show of authority,' that person's 'freedom of movement is restrained.' " *People v. Brownlee*, 186 Ill. 2d 501, 517, 713 N.E.2d 556 (1999) (quoting *United States v. Mendenhall*, 446 U.S. 544, 553 (1980)). The relevant inquiry is whether a reasonable person under the circumstances would have believed that he was not free to leave. *Id.* *Mendenhall* provides four factors to consider when determining whether an arrest occurred: (1) the threatening presence of several police officers; (2) the display of a weapon by the police; (3) physical touching of the individual by the police; and (4) the use of imposing language, such that the officer's request is compelled. *Mendenhall*, 446 U.S. at 554-55. In addition, the presence of normal police practices

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accompanying an arrest should be considered, namely, handcuffing, searching, booking, photographing, and fingerprinting. *People v. Smith*, 214 Ill. 2d 338, 353, 827 N.E.2d 444 (2005).

¶ 55 None of the *Mendenhall* factors or normal arrest practices were present in the case before us. The presence of multiple officers at the apartment was not for threatening purposes, but rather to investigate the crime. Defendant conceded that he was not handcuffed and that he was transported with his victimized friends to the police station. Only when he arrived and was asked his name was defendant separated and placed into an interview room. Although the police rejected Pieroni's offer to transport defendant, Acevedo, and Toledo to the police station, we do not find the transport restricted defendant's freedom such that he would have considered himself under arrest. Rather, the seriousness of the offenses under investigation lent themselves to the police ensuring the safe transport of three victims in order to continue the investigation. A reasonable person under defendant's circumstances, namely, 20 years old, with some command of the English language, three years of high school experience in the U.S., no criminal history, not handcuffed, and with his fellow victims, would have believed he was free to leave. Unlike the defendant in *People v. Sanchez*, 362 Ill. App. 3d 1093, 1102, 841 N.E.2d 478 (2005), who was picked up by four police officers, transported in a police car, interviewed by at least 2 officers during each interrogation, had limited knowledge of the English language, *and* was intoxicated, the totality of the circumstances here would not have led defendant to reasonably conclude he was unable to leave while in route to the police station.

¶ 56 Defendant also challenges the trial court's ruling on his motion to quash arrest and suppress his statement. Following a hearing on the motion, the trial court found that the police

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had probable cause to arrest defendant when he arrived at the police station because Miramontes implicated him in the crimes. Whether probable cause exists depends on whether, under the totality of the circumstances presented, a reasonable person would believe that a crime was committed and the defendant committed the crime. *People v. Martinez*, 242 Ill. App. 3d 915, 929, 611 N.E.2d 1027 (1992). On review of a decision regarding a motion to quash arrest and suppress evidence, we give great deference to the trial court's factual findings, such that we will not reverse unless those findings are against the manifest weight of the evidence. *People v. Close*, 238 Ill 2d 497, 504, 939 N.E.2d 463 (2010). We, however, review the ultimate decision whether to grant or deny the motion *de novo*. *Id.*

¶ 57 The evidence demonstrated that Miramontes was arrested following a show-up identification during which Pieroni identified him as one of the offenders. Sergeant Madsen testified that he interviewed Miramontes around 1 a.m. or 1:30 a.m. on January 2, 2010. During that conversation, Miramontes provided the description of a co-offender, namely, a man nicknamed "Poyo," who was a short, thin, young Hispanic with green eyes. Madsen testified that defendant arrived at the police station at approximately 2:30 a.m. on January 2, 2010, and was placed under arrest. According to defendant's testimony at the hearing on the motion, he was arrested after arriving at the police station and providing his name. It is unclear from the record when and how the police learned that defendant used the nickname "Poyo;" however, defendant matched the physical description of a suspected offender as provided by a co-offender. We conclude defendant's arrest was supported by probable cause and his statement was not evidence obtained as a result of an illegal arrest.

¶ 58

III. Ineffective Assistance Of Counsel

¶ 59 Defendant contends his counsel was ineffective for offering to stipulate to defendant's statement rather than challenging the admissibility of the statement on the basis that he could not have knowingly and intelligently waived his *Miranda* rights where he did not understand the English language and had no experience with the criminal justice system.

¶ 60 To raise a successful claim for ineffective assistance of counsel, a defendant must demonstrate: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A defendant must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" such that the challenged action may be considered sound trial strategy. *Id.* at 689. "The decision whether to file a motion to suppress is often one of trial strategy, which 'seldom [has] any bearing on issues of incompetency of counsel.'" *People v. Brisco*, 2012 IL App (1st) 101612, ¶33 (quoting *People v. Mendez*, 221 Ill. App. 3d 868, 873, 582 N.E.2d 1265 (1991)).

¶ 61 We find that defense counsel's decision not to file a motion to suppress defendant's statement on the basis alleged was not objectively unreasonable. A counsel's decision not to raise a futile argument cannot support a finding of ineffective assistance. *People v. Haynie*, 347 Ill. App. 3d 650, 654, 807 N.E.2d 987 (2004). To effectively waive *Miranda* rights, a defendant must be informed of his rights and the waiver must be knowing and voluntary. *Martinez*, 242 Ill. App. 3d at 930.

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¶ 62 The record demonstrates defendant understood English and had the ability to knowingly and intelligently waive his *Miranda* rights. Detective Jensen testified that defendant was advised of his *Miranda* rights at least twice prior to giving his statement. According to Jensen, defendant spoke "broken" English, but he provided responsive answers during his interrogations and did not request assistance. Moreover, defendant's written statement provided that he spoke English "well" and was able to read English enough to read the first page of the statement. Defendant also signed each page of the statement, indicating its accuracy, and initialed all changes and corrections. Further, the statement contained the usage of slang, such that defendant described the robbery as "hitting a lick" and that Miramontes and Alverio "came over to his crib," which is a "street term for where someone lives." Defendant contends the usage of slang does not demonstrate a command of the English language because the slang was written by ASA Howlett. Defendant's statement, however, provides both the slang terminology and the definition of that terminology. It defies logic for ASA Howlett to have included both the slang terms and definitions if she was not memorializing defendant's words. In addition, although Pieroni testified that he used defendant's phone to call 911 "because of the dialogue," defendant testified at the hearing on his motion to quash and suppress that he called 911 "because it was a robbery in effect at the house I was at" and said in his memorialized statement that he placed the 911 call to report the offenses.

¶ 63 Similar to the defendant in *Martinez*, where this court rejected the defendant's claim that his illiteracy prevented him from comprehending *Miranda* because he was 32 years old, had attended high school for two years, admitted that he understood English, had been read his

Miranda rights more than once and stated that he understood his rights, had been read his memorialized statements, and signed the written statements and initialed corrections, we conclude that defendant knowingly and intelligently waived his *Miranda* rights. This case is distinguishable from *People v. Redmon*, 127 Ill. App. 2d 342, 345-46, 468 N.E.2d 1310 (1984), as cited by defendant, where the court reversed a finding of voluntariness of the confession of a 17-year-old defendant with borderline mental deficiencies primarily because the defendant expressly stated during his police interview that he did not understand his rights. Here, defendant made absolutely no indication that he did not understand his rights of which he was advised both orally and written and of which he provided both oral and written waivers. Defendant, therefore, cannot establish a claim for ineffective assistance of counsel.

¶ 64

IV. One-Act, One-Crime Rule

¶ 65 Defendant finally contends his multiple convictions violate the one-act, one-crime rule. More specifically, defendant argues the four convictions for both home invasion and armed robbery violate the one-act, one-crime rule because they were based on the same physical act. Defendant additionally contends his four unlawful restraint convictions violate the one-act, one-crime rule because they were based on the same physical act underlying the home invasion and armed robbery charges.

¶ 66 Defendant concedes that he failed to preserve his contentions where he did not object at trial or raise the alleged errors in a posttrial motion (*Enoch*, 122 Ill. 2d at 86); however, defendant requests that we review the contentions under the doctrine of plain error.

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¶ 67 This court may review forfeited errors under the doctrine of plain error in two narrow instances:

“First, where the evidence in a case is so closely balanced that the jury’s guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider a forfeited error in order to preclude an argument that an innocent person was wrongly convicted. [Citation.] Second, where the error is so serious that defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process.” *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467 (2005).

"The imposition of an unauthorized sentence affects substantial rights." *People v. Hicks*, 181 Ill. 2d 541, 545, 693 N.E.2d 373 (1998). We, therefore, address the merits of defendant's contentions.

¶ 68 The one-act, one-crime rule, as expressed by the supreme court in its seminal decision in *People v. King*, 66 Ill. 2d 551, 363 N.E.2d 838 (1977), provides that a defendant may not be convicted of more than one offense as a result of the same physical act. *Id.* at 566. However, in *People v. Crespo*, 203 Ill. 2d 335, 788 N.E.2d 1117 (2001), the supreme court added that closely related, yet separate, blows could constitute separate acts to support multiple convictions. *Id.* at 341-42. The supreme court clarified that the State had to apportion those separate blows at the trial level in order to sustain multiple convictions, providing that “the indictment must indicate that the State intended to treat the conduct of defendant as multiple acts in order for multiple

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convictions to be sustained.” *Id.* at 345.

¶ 69 Defendant argues that three of the four counts of home invasion must be vacated where there was only one illegal entry into the home. The State concedes that defendant should not have been convicted of multiple counts of home invasion based on the presence of multiple victims. In *People v. Cole*, 172 Ill. 2d 85, 102, 665 N.E.2d 1275 (1996), the supreme court held that the home invasion statute allows for only one conviction regardless of the number of persons present or harmed during the offense (720 ILCS 5/5-2 (West 2010)). After having established in *Cole* that only one home invasion conviction can stand no matter the number of victims, the supreme court held in *Hicks* that only one conviction can stand even where there are multiple defendants that entered the home. *Hicks*, 181 Ill. 2d at 548-49. Relying on the accountability statute and interpretations thereof, the supreme court reasoned that “[i]f the number of persons present in a home does not increase the number of convictions, we do not believe that the number of entrants into a home provides a valid basis for increasing the number of convictions.” *Id.* at 549. The State argues that the evidence could have supported two home invasion convictions based on multiple entries into the home; however, defendant was not indicted based on separate entries, thus multiple convictions were not proper. Pursuant to Rule 615(b)(1), we, therefore, vacate three of defendant's home invasion convictions, and further instruct the clerk of the circuit court to make the necessary corrections to defendant’s mittimus. *Mitchell*, 234 Ill. App. 3d at 921. Contrary to the State’s argument, we cannot tell from the record whether defendant’s sentence was influenced by the multiple convictions. We, therefore, remand this cause to the trial court for resentencing on the single count of home invasion.

¶ 70 Defendant next argues that his armed robbery convictions and attempted armed robbery conviction, as previously reduced, violate the one-act, one-crime rule because the convictions were based on the same act against multiple victims. The State responds that, although, the indictments listed the same property, *i.e.*, "cameras, jewelry, laptop computer, video game console, wallet, television, GPS unit, iPod, cellular telephone, and united states currency" in each charge against the separate victims, the convictions do not violate the one-act, one-crime rule because the State charged defendant on separate acts of robbery. More specifically, the State argues that the indictments put defendant on notice that he was being charged with the armed robbery of each of the victims based on the items taken from that particular victim. We agree.

¶ 71 The indictments put defendant on notice, and the evidence at trial demonstrated, that defendant was accountable for the forcible taking of Toledo's wallet and phone, as well as a number of items owned by Pieroni and Blake. The facts of this case are, therefore, distinguishable from those cases cited by defendant, in which the defendants robbed only one victim despite the presence of multiple people. See *Miller*, 238 Ill. 2d at 163; *People v. Mack*, 105 Ill. 2d 103, 134-35; 473 N.E.2d 880 (1984), *vacated on other grounds* 479 U.S. 1074 (1987) (theft of one victim, namely, a bank, despite taking money from multiple tellers); *People v. Palmer*, 111 Ill. App. 3d 800, 808, 444 N.E.2d 678 (1982); *People v. Washington*, 29 Ill. App. 3d 536, 538-39, 331 N.E.2d 169 (1975).

¶ 72 Defendant lastly argues that his unlawful restraint convictions are based on the same physical act as his convictions for home invasion and armed robbery, in violation of the one-act, one-crime rule. More specifically, defendant argues that the restraint of the victims in this case

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was merely derivative of the home invasion and armed robbery convictions and cannot establish a separate detention to support his multiple unlawful restraint convictions. The State responds that there was not one single act of detention; rather, defendant committed several acts of detention against all of the victims, none of which were necessary to effectuate the armed robbery and all of which exceeded the force required for armed robbery. The State cites, as examples, that the victims testified they were forced to lie on the ground, at least two of the victims testified to being pulled up from the ground and pushed against a wall while being searched, and Pieroni was initially instructed to remain in the front stairway and then instructed to open his safe and lie with the victims.

¶ 73 A defendant is guilty of unlawful restraint when he knowingly and without legal authority detains another. 720 ILCS 5/10-3(a) (West 2010). A defendant is guilty of home invasion when, while armed with a dangerous weapon, he knowingly and without authority enters the dwelling place of another when he knows or has reason to know that one or more persons is present. 720 ILCS 5/12-11(a)(1) (West 2010). A defendant is guilty of armed robbery when he takes property from a person by the use of force or by threatening the imminent use of force while armed with a dangerous weapon. 720 ILCS 5/18-2(a)(1) (West 2010).

¶ 74 In *Crespo*, this court held that the defendant committed separate acts sufficient to support convictions for armed robbery and unlawful restraint when he threatened to shoot anyone who withheld money during the robbery while his codefendant produced a knife, forced the victims to lie on the floor, and a victim was held at knife-point before and during the robbery. *Id.* at 823-24. The *Crespo* court said:

“Although the purpose of restraining the victims may have been to facilitate the commission of the robbery, we have already noted that under King, the offender’s general criminal objective is no longer the standard by which the propriety of multiple convictions with concurrent sentences is determined. So long as there were separate and distinct acts *** which would constitute a crime which is not a lesser-included offense of the more serious crime charged, conviction and concurrent sentencing for both offense is proper.” Id. at 824.

¶ 75 The evidence in this case supports convictions for both armed robbery and unlawful restraint. However, the State did not apportion separate acts of detention to support convictions for both unlawful restraint and armed robbery. Rather, the indictments alleged defendant detained each victim knowingly and without legal authority while using a handgun and defendant took property from the victims by force or by threatening the use of force while armed with a weapon. The charges do not differentiate between different acts of “detention” or the use of force. Moreover, at trial, the theory of the case was the offenders used the ruse of defendant’s impersonation of an officer to gain entry into the home and then ordered the victims to lie on the ground while they retrieved items for the robbery. The supreme court clearly stated that the State cannot chose to change its theory of the case on appeal by specifically apportioning distinct acts to support separate convictions. Crespo, 203 Ill. 2d at 344. The supreme court reasoned:

“Under Illinois law, a defendant has a fundamental right to be informed of the nature and cause of the criminal accusations against him so that he may prepare a defense and so that the charged offense may serve as a bar to subsequent

prosecutions arising out of the same conduct. [Citation.] If we were to agree with the State, defendant would not have known until the cause was on appeal that the State considered each of the separate stabs to be separate offenses, and therefore he would not have been able to defend the case accordingly.” *Id.* at 345.

We, therefore, vacate defendant’s unlawful restraint convictions. We instruct the clerk to make the necessary corrections to defendant's mittimus. *Mitchell*, 234 Ill. App. 3d at 921.

¶ 76

CONCLUSION

¶ 77 In sum, we find defendant accountable for the acts of his codefendants. We further find defendant's armed robbery conviction of Acevedo must be reduced to attempted armed robbery where the evidence failed to establish anything was taken from the victim. We find the evidence established defendant's guilt of home invasion pursuant to section 12-11(a)(1) of the statute. We additionally find defendant was not under arrest until he arrived at the police station and provided his name, at which point there was probable cause to support his arrest. We also find defendant's counsel was not ineffective for failing to challenge defendant's knowing and voluntary *Miranda* waiver. Finally, we find defendant's armed robbery and attempted armed robbery convictions do not violate the one-act, one-crime rule, but his home invasion convictions and unlawful restraint convictions do violate the rule. As a result, we vacate three of the four home invasion convictions and vacate all four of the unlawful restraint convictions. We instruct the clerk to correct defendant's mittimus to reflect the accurate offenses for which he was convicted, and we remand for resentencing on those remaining convictions.

¶ 78 Affirmed in part; vacated in part; mittimus corrected; remanded.

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