FIRST DIVISION
June 26, 2017

No. 1-14-3474

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. 12 CR 3281
	)	
DELMAR GRAY,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for aggravated vehicular hijacking and armed robbery are affirmed because a rational fact finder could conclude that, based on the evidence, he was armed with a dangerous weapon during the commission of the offenses. Defendant's sentences of 30 years each for aggravated vehicular hijacking and armed robbery served at 85% time are affirmed because the trial court's finding that the conduct which led to those convictions caused the victim great bodily harm was supported by the evidence. Defendant's due process and jury trial rights were not violated when the trial court, and not a jury, determined that he caused the victim great bodily harm.

¶ 2 After a jury trial, defendant Delmar Gray was convicted of aggravated vehicular hijacking, armed robbery, aggravated kidnapping, and aggravated battery, and was sentenced to a

total of 90 years in prison. On appeal, Mr. Gray contends that (1) the State failed to prove him guilty beyond a reasonable doubt of aggravated vehicular hijacking and of armed robbery because neither he nor his codefendant was armed with a dangerous weapon during the commission of either of those offenses; (2) the trial court erred in finding that Mr. Gray caused the victim great bodily harm during the commission of the aggravated vehicular hijacking and armed robbery—resulting in Mr. Gray having to serve his sentence on those offenses at 85% time instead of the default of 50% time—when the great bodily harm to the victim was caused after those two offenses were completed; and (3) the trial court violated Mr. Gray's rights to due process and a jury trial by making this finding of fact at sentencing, because such a finding must be made by a jury and proved beyond a reasonable doubt. For the following reasons, we affirm Mr. Gray's convictions and his sentence.

¶ 3 BACKGROUND

¶ 4 Mr. Gray and his codefendant Rachel Schram, who is not a party to this appeal, were charged with multiple offenses based on events that took place on February 5 and 6, 2011. The charges included aggravated vehicular hijacking, armed robbery, aggravated kidnapping, and aggravated battery. Count 8 alleged the offense of armed robbery by knowingly taking property, including a wallet, ATM card, and cell phone from Laura O'Donnell "by the use of force or by threatening the imminent use of force and carried on or about their persons or were otherwise armed with a dangerous weapon, other than a firearm, to wit: bludgeon." Count 9 charged armed robbery in the same terms but described the weapon as "to wit: ice skate blade." Similarly, the charges for aggravated vehicular hijacking alleged that Mr. Gray and Ms. Schram knowingly took a motor vehicle from the victim "by the use of force or by threatening the imminent use of force, and carried on or about their persons or were otherwise armed with a dangerous weapon, other than a firearm," including "to wit: bludgeon" (count 10) and "to wit: ice skate blade"

(count 11). The State nol-prossed counts 9 and 11, referencing the ice skate blade, before trial.

¶ 5 On appeal Mr. Gray does not contest the sufficiency of the evidence for his convictions for aggravated battery or aggravated kidnapping, and he concedes that the evidence was sufficient to support convictions for simple vehicular hijacking and robbery. Mr. Gray's sufficiency argument on appeal is that the trial evidence was insufficient to show that he was armed during the commission of the vehicular hijacking or the robbery. Much of the evidence presented at trial is not disputed, and we discuss it here only to the extent necessary to frame the arguments that Mr. Gray makes.

¶ 6 A. Testimony of Laura O'Donnell

¶ 7 The victim, Laura O'Donnell, testified that at approximately 10 or 10:30 p.m. on February 5, 2011, she stopped near the Eisenhower expressway and Cicero Avenue during her drive home from work to buy cocaine. A man, whom she identified as Mr. Gray, approached her car and asked what she was looking for. Ms. O'Donnell did not see anyone with Mr. Gray when she first saw him and she "didn't really answer him." She did not see a bottle or anything else in his hands. According to Ms. O'Donnell, Mr. Gray then "kind of basically just sort of asserted and jumped into [her] car," telling her he would show her where to buy drugs. Mr. Gray got into Ms. O'Donnell's car with a woman, who he called Rachel. Ms. O'Donnell had never seen Mr. Gray or Rachel before, but she followed their directions for where to buy cocaine. When they arrived at that location, Mr. Gray purchased twenty dollars' worth of cocaine each for himself and for Ms. O'Donnell.

¶ 8 After the cocaine purchase, Ms. O'Donnell asked where to drop off Mr. Gray and Rachel, but "[t]hey wouldn't give [her] a straight answer" and "wouldn't get out of [her] car." The two argued with each other and then started arguing with Ms. O'Donnell. At some point, Mr. Gray directed Ms. O'Donnell to stop at a building, where he removed the car keys from the ignition

without her permission. Ms. O'Donnell then testified that Mr. Gray "started tearing at" her clothes, looking for her packet of cocaine. After he took it from her, either Mr. Gray or Rachel took Ms. O'Donnell's cell phone, which Rachel broke in half and threw out of the car window. Ms. O'Donnell testified: "I felt very scared. I felt everything escalating. I had no power to move my own car, to get away, to do anything."

¶ 9 Mr. Gray moved into the driver's seat of the car and told Ms. O'Donnell to move to the front passenger seat, which she did by exiting the car and reentering on the passenger side. Mr. Gray began to drive and Ms. O'Donnell testified that, "at some point" as he was driving, both he and Rachel hit her on the head. As he was driving, Mr. Gray also instructed Rachel to tie up Ms. O'Donnell, which she did. Ms. O'Donnell testified that once she was tied up, she was no longer able to see what was going on because she had been beaten and her eyes were swollen. Mr. Gray and Rachel covered her face with coats, reclined the passenger seat, and told her not to move. Ms. O'Donnell stated: "Any flinch or movement I made they whack[ed] me again in my head so [I] learned to lay still. I didn't want to get hit anymore." Ms. O'Donnell was bound at her ankles, her wrists, her fingers, and gagged with a filthy piece of "material"; she remained bound for the duration of her time in the car.

¶ 10 Ms. O'Donnell testified that she had a bag in her car, which contained two pairs of laced ice skates. She remembered seeing both Mr. Gray and Rachel holding the ice skates. They told Ms. O'Donnell that they were "going to slit [her] throat with the blade," and Mr. Gray threatened to kill Ms. O'Donnell "over and over." Mr. Gray also told her that he "could take [her] in any of [the] abandoned garages, put [her] in there, and set [her] afire."

¶ 11 At some point, Ms. O'Donnell heard a different woman's voice in the car for "[m]aybe an hour" but she was unable to see the woman because her face was still covered and "at that point [she] probably couldn't see anyway." The woman did not say anything to Ms. O'Donnell.

¶ 12 Ms. O'Donnell testified that Mr. Gray "[w]ent through [her] clothes" until he found her wallet with her debit card inside "and pulled it out of [her] pocket." Mr. Gray asked for Ms. O'Donnell's PIN to withdraw money with her debit card. Ms. O'Donnell testified that she gave him her PIN because she was "scared if [she] didn't give it to him he'd hit [her] again." She was "tired of being hit."

¶ 13 Ms. O'Donnell remembered stops being made while she was in the car, during which Mr. Gray and Rachel would "get out and come back into the car." Sometimes only Mr. Gray exited the car and, as he left, he told Rachel "don't let her move. Watch her." Each time Ms. O'Donnell moved, Mr. Gray and Rachel would "hit [her] on the head with a bottle or with their fists whatever—they would even hit [her] with a shovel that was in the back of [her] car, you know, a little snow shovel. Whatever they had in their hand, they'd slam it into [her]." Ms. O'Donnell did not provide any clear timeline as to when the bottle came into the car or when Mr. Gray began using it to hit her, other than to acknowledge that she did not see either Mr. Gray or Rachel with the bottle at the time they first entered her car.

¶ 14 At some point, the car "got stuck," and Ms. O'Donnell stated that she "felt like it had smashed into something." Ms. O'Donnell stated that she did not make much effort to escape while Mr. Gray was still around "because any time [she] tried anything even a slight movement in any way meant a big blow on the head and [she] couldn't take it anymore." However, when Ms. O'Donnell realized that Mr. Gray had exited the car and Rachel was no longer around, she attempted to free herself by moving to the side of the car and opening the door, but closed the door when she heard Mr. Gray approaching again. Mr. Gray reentered the car, threatened to kill her again, and hit her on the head with a bottle. "Then it seemed as if he just walked off."

¶ 15 At that point, Ms. O'Donnell had been in the car for a total of 18 hours, bound, with no water, and she had become "weaker and weaker." After some time passed, she did not hear Mr.

Gray and "figured he was gone," so she freed her fingers, opened the car door, and rolled out of the car because she "had no strength left at all." She was unable to walk so she "just laid there" in the snow, screaming for help. The police soon arrived and Ms. O'Donnell was taken to the hospital for treatment, where she remained until February 9, 2011.

¶ 16 In describing her injuries, Ms. O'Donnell testified that her head was "busted open," her nose was broken, her hands were "severely cut up," and Rachel had bit her on the hand. She lost consciousness while she was in the car. At the hospital, Ms. O'Donnell received 10 staples or stitches for her head wound. Ms. O'Donnell was in "excruciating pain" even after she was discharged from the hospital and still had scars at the time of the trial.

¶ 17 The emergency room doctor who treated Ms. O'Donnell testified that her injuries included "marked swelling around both eyes" which made examining her eyes difficult because they were "completely" swollen; "a laceration on the back of her head"; swelling on both ears and blood in the "external canal in the left ear"; and swelling and bruising on both of her hands.

¶ 18 B. Testimony of Latosha Ransom

¶ 19 Latosha Ransom testified that she knew Rachel Schram by her first name but had not known her long on February 6, 2011. Ms. Ransom was at a Marathon Gas Station when she saw Mr. Gray pull into the gas station. He exited the car and asked where to find "some rocks," or crack cocaine. Ms. Ransom entered the car and saw Ms. Schram sitting in the back seat. She also saw another woman in the front passenger seat of the car "like covered up" and blood on the headrest of the front passenger seat.

¶ 20 While Mr. Gray drove the car and Ms. Ransom tried to help him find some crack cocaine, the woman in the front seat said she "wanted to get out." Mr. Gray told the woman to "[s]hut the f*** up, b***." Ms. Ransom saw Ms. Schram hit the woman first and then saw Mr. Gray hit her; they hit the woman "[a]ll over." Ms. Ransom also saw Ms. Schram remove the laces from an ice

skate in the back seat of the car, hit the woman with the skate, and tie the woman up with the laces. Ms. Ransom never saw Ms. Schram give the ice skates to Mr. Gray and never saw Mr. Gray hit the woman with an ice skate. When Mr. Gray and Ms. Schram stopped beating the woman, Ms. Ransom asked to use the bathroom, exited the car, and "just kept walking." She did not call the police. Ms. Ransom did not say anything about seeing Mr. Gray or Ms. Schram hit Ms. O'Donnell with the bottle.

¶ 21 C. Police Investigation

¶ 22 One of the officers who found Ms. O'Donnell at approximately 7 p.m. on February 6, 2011, testified that when he first saw her, he "couldn't even distinguish her features. She was so swollen. She was black, blue and bloody." The police recovered a large glass bottle with blood on it from near where Ms. O'Donnell was found. The police learned that, in the early morning hours of February 6, 2011, Ms. O'Donnell's debit card was used at three Citgo gas station locations.

¶ 23 D. Testimony of Delmar Gray

¶ 24 Mr. Gray testified on his own behalf, stating that he saw Ms. O'Donnell and Ms. Schram in Ms. O'Donnell's car at approximately 10:30 or 11 p.m., and Ms. O'Donnell approached him and asked where she could buy cocaine. Ms. O'Donnell told Mr. Gray to "jump in the car," and he took her to another location to buy drugs. He and she both bought drugs, then Ms. O'Donnell drove to a liquor store because she wanted Mr. Gray to buy her a drink. Mr. Gray bought "some 211," then got back into the back seat of Ms. O'Donnell's car; Ms. Schram was in the front passenger seat. According to Mr. Gray, Ms. O'Donnell drove the three of them around while they drank, got high, and smoked cigarettes. At some point Mr. Gray saw Ms. Ransom and told her to get into the car; he gave her crack cocaine and money and she performed oral sex on him before leaving the car.

¶ 25 Ms. O'Donnell continued to get high with Ms. Schram, and the two women eventually began arguing about "[d]rugs, cocaine, who was going to spend what and who had what." They drove to the Kilbourn Avenue Citgo where Ms. Schram hit Ms. O'Donnell. Mr. Gray testified: "Rachel had hit Miss O'Donnell and I jumped between them. Miss O'Donnell's nose was bleeding. I jumped between them like this here and they start fighting. I said you all just hold on till I go in there and come back out." Mr. Gray stated that he did not hit Ms. O'Donnell, did not tie her up, did not take her car keys, and did not tell Ms. Schram to tie Ms. O'Donnell up or cover up her face.

¶ 26 Mr. Gray admitted to being the individual in surveillance video at the Kilbourn Avenue Citgo, where Ms. O'Donnell's debit card was used. He testified that he went to the back of the store and stood near the ATM to see how much money he had with him, and then came back to the counter, doing this a few times without ever taking money out of the ATM. Mr. Gray went back into the car and took off his coat to "[s]it back and relax so [he could] get high again." Ms. O'Donnell and Ms. Schram were still arguing, then "got to swinging and fighting." Mr. Gray did not want to stick around, explaining: "Police around the corner, it's hot, it's my neighborhood, I know it. I'm gone, I got drugs on me. Uhn-uhn, I'm not fittin' to sit there. I left." He realized he did not have his coat but did not want to go back and get caught by the police. Mr. Gray testified that he never went back to the car and never saw Ms. O'Donnell or Ms. Schram again.

¶ 27 E. Jury Deliberations, Finding of Guilt, and Sentencing

¶ 28 The jury received several agreed-upon instructions, including instructions for the offenses of aggravated vehicular hijacking and armed robbery. The aggravated vehicular hijacking instruction stated: "A person commits the offense of aggravated vehicular hijacking when he knowingly takes a motor vehicle from the person or immediate presence of another by the use of force or by threatening the imminent use of force, and he carries on or about his person or is

otherwise armed with a dangerous weapon." The armed robbery instruction provided: "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, knowingly takes property from the person or presence of another by the use of force or threatening the use of force." The jury found Mr. Gray guilty of aggravated vehicular hijacking, armed robbery, aggravated battery, and aggravated kidnapping.

¶ 29 At sentencing, the State asked the court "to make a finding of great bodily harm to [Ms. O'Donnell] on the armed robbery count, as well as the aggravated vehicular hijacking count, therefore subjecting [Mr. Gray] to an 85 percent sentencing range." After considering the factors in aggravation and mitigation as argued by the parties, including Mr. Gray's significant criminal background, the court stated that "this by far [was] one of the worst cases [it had] heard" and found that "[p]eople need[ed] protection from Delmar Gray." The court referred to the multiple hours of beating and torture Ms. O'Donnell was subjected to, then found that, "obviously, based on the injuries inflicted upon this woman, injuries were severe bodily injuries. At least three days in the hospital afterwards, two or three days. And she was totally unrecognizable when the police found her." After a brief exchange with the State, the court again stated: "There's no question about great bodily harm. It's not even an issue, as far as I'm concerned. It's no question of great bodily harm. The lady was beaten to a pulp, in the hospital for three days. The court finds it's great bodily harm." The court sentenced Mr. Gray to three consecutive terms of 30 years in prison for armed robbery, aggravated vehicular hijacking, and aggravated kidnapping, for a total of 90 years, all to be served at 85% time. Mr. Gray was also sentenced to a five-year prison term for the aggravated battery, to be served concurrently at 50% time. The same day Mr. Gray was sentenced, the trial court denied Mr. Gray's motion to reconsider his sentences on the basis that they were excessive.

¶ 30 JURISDICTION

¶ 31 Mr. Gray was sentenced on October 17, 2014, and filed a timely notice of appeal that same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 32 ANALYSIS

¶ 33 A. Sufficiency of the Evidence

¶ 34 On appeal, Mr. Gray argues that the State failed to prove that either he or Ms. Schram was armed with a dangerous weapon during the vehicular hijacking or the robbery and that the evidence was therefore insufficient to support his convictions for *aggravated* vehicular hijacking or *armed* robbery. Mr. Gray argues that both of those crimes were completed before the evidence showed that he or his codefendant had armed themselves with the glass bottle that was found at the scene when Ms. O'Donnell was discovered. Mr. Gray does not dispute that the bottle was used or that it met the definition of a dangerous weapon under the relevant statutes.

¶ 35 When a defendant challenges his conviction based on insufficient evidence, a reviewing court considers whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). It is not our function as a reviewing court to retry the defendant; rather, the responsibility of resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from the facts belongs to the trier of fact. *Id.* We will not substitute our judgment for that of the trier of fact on issues of witness credibility or the weight of the evidence. *Id.* A conviction will only be reversed for insufficient evidence if the evidence was so unreasonable, improbable, or unsatisfactory as to justify a

reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 36 The aggravated vehicular hijacking statute under which Mr. Gray was charged provides that the offense is established when a defendant "knowingly takes a motor vehicle from the person or the immediate presence of another by the use of force or threatening the imminent use of force" (720 ILCS 5/18-3(a) (West 2010)) and "carries on or about his *** person, or is otherwise armed with a dangerous weapon, other than a firearm." 720 ILCS 5/18-4(a)(3) (West 2010). Similarly, a person commits armed robbery when he or she commits the offense of robbery—"knowingly takes property *** from the person or presence of another by the use of force or by threatening the imminent use of force" (720 ILCS 5/18-1(a) (West 2010))—and, at the time of the taking, "carries on or about his *** person or is otherwise armed with a dangerous weapon other than a firearm" (720 ILCS 5/18-2(a)(1) (West 2010)).

¶ 37 The State argues, relying on a 2000 amendment to the armed robbery statute (see Pub. Act 91-404, § 5 (eff. Jan. 1, 2000) (amending 720 ILCS 5/18-2)), that a defendant need not be armed with a dangerous weapon at the same time that the robbery is committed. Prior to the amendment, the statute presented a single definition of armed robbery: when a person commits robbery "while he *** carries, on or about his *** person, or is otherwise armed with a dangerous weapon." 720 ILCS 5/18-2(a) (West 1998). The statute now includes four definitions of armed robbery, the operative one being:

> "[W]hen [a person] violates Section 18-1 [the robbery statute]; and
>
> (1) he or she carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm[.]" 720 ILCS 5/18-2(a)(1) (West 2010).

The State argues that the amended statute "exchanged the conjunctive 'while'—indicating a requirement for the two elements to happen at the same time—with 'and' which connects the

two elements as two conditions met."

¶ 38 We do not accept the State's suggestion that the amendment eliminated the requirement that the defendant be armed contemporaneously with the commission of the crime. The amendment merely "altered [the prior statutory scheme] by creating substantively distinct offenses based on whether the offenses were committed with a dangerous weapon 'other than a firearm' or committed with a 'firearm.' " *People v. Washington*, 2012 IL 107993, ¶ 6. So we agree with Mr. Gray that the State was required to prove that he was armed during the commission of both the robbery and the vehicular hijacking. We need not decide whether there was sufficient evidence to support a finding that Mr. Gray or Ms. Schram was armed with the glass bottle at the time they first gained control over the car and took Ms. O'Donnell's cell phone and wallet. Even if the use of the bottle did not occur until after both of the crimes—vehicular hijacking and robbery—were accomplished, those crimes were not over. To the contrary, the evidence supported a finding that both of these crimes continued after Mr. Gray and Ms. Schram had armed themselves with the glass bottle.

¶ 39 Our supreme court's analysis regarding when an armed robbery is considered complete is instructive for both offenses, as this court has noted that the aggravated vehicular hijacking and armed robbery statutes are "so similar that vehicular hijacking could fairly be described, for all practical purposes, as robbery of a specific kind of property, a motor vehicle" (*People v. Jackson*, 2016 IL App (1st) 133823, ¶ 50). The general rule in such cases has been that the "offense of robbery is complete when force or threat of force causes the victim to part with possession or custody of property against his will." *People v. Smith*, 78 Ill. 2d 298, 303 (1980). But our supreme court has made clear that simply because all of the elements of an offense have been met for the purposes of a finding of guilt does not mean that the offense is over.

¶ 40 In *People v. Smallwood*, 102 Ill. 2d 190, 193 (1984), the court considered whether a

defendant had properly received an extended-term sentence. The defendant was convicted of both armed robbery and aggravated battery, and the trial court extended the term of the armed robbery sentence under a statutory scheme requiring it to find that the "most serious offense of which the offender was convicted" (see 730 ILCS 5/5-8-1(a) (West 2010)) was "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty" (see 730 ILCS 5/5-5-3.2(b)(2) (West 2010)). *Id.* at 191-92. The defendant in *Smallwood* relied on *Smith* to argue that the armed robbery was complete before the battery and therefore he could not be found to have engaged in brutal or heinous behavior as part of the armed robbery. Our supreme court affirmed the defendant's extended-term sentence for armed robbery, explaining:

> "The defendant would have us narrowly define and distinctly separate the various offenses that arose out of defendant's conduct. He argues that at the time the defendant took the money from [the victim] the armed robbery was completed, *** and that the violent conduct which followed did not accompany the more serious crime of armed robbery but accompanied the lesser crime of aggravated battery. *** Under the [armed robbery statute], the necessary elements which constitute the offense of robbery are completed when those acts occur. [Citation.] However, the act of the robbery itself has not necessarily been completed at the time the victim surrenders the property so that no further consequences will attach to the robber's conduct subsequent to the surrender of the property." *Id.* at 195.

¶ 41 And in *People v. Gilliam*, 172 Ill. 2d 484 (1996), the court examined the issue of when a crime has ended in the context of a venue challenge. There, the defendant was convicted of first-degree murder, aggravated kidnapping, and robbery in Jefferson County and argued that "venue on the charge of robbery of the victim's car properly lay in Cook County and not in Jefferson

County." *Id.* at 507. The defendant had made the victim drive to a parking area near a Chicago beach where he ordered her into the trunk of her car, then drove south on Interstate 57; the victim's body was found approximately 2.5 miles from the interstate in Jefferson County. *Id.* at 494, 496. On appeal, the defendant argued that the robbery "was completed in Chicago," where he forced the victim into the trunk of her car. *Id.* at 506-07. In finding the venue was proper, the supreme court stated:

> "Of course, the offense of robbery is complete when force or threat of force causes the victim to part with possession or custody of property against the victim's will. [Citation.] Thus, defendant's robbery of the victim's car was completed in Cook County, in the alley behind the victim's home when he forced her into the car to drive him away. However, defendants' taking of the victim's car, *with the victim forced in the car trunk*, continued the essence of the robbery, *i.e.*, the use of force. ***
>
> Defendant continued to be as guilty of robbery in the field in Jefferson County as when the robbery occurred in Cook County." (Emphasis in original.) *Id.* at 507-08.

¶ 42 These cases make clear that, just because Mr. Gray and Ms. Schram had obtained control of the car and the personal property, the hijacking and the robbery were not over because they continued to use force to maintain that control. So the evidence at trial was sufficient to support Mr. Gray's conviction for both *aggravated* vehicular hijacking and *armed* robbery. Viewed in the light most favorable to the State, the trial evidence showed that the force employed by Mr. Gray and Ms. Schram during their 18-hour crime spree, both with and without a dangerous weapon, was used to maintain control of Ms. O'Donnell's belongings, continuing the essence of the vehicular hijacking and robbery. After taking Ms. O'Donnell's car and belongings, Mr. Gray

and Ms. Schram tied up Ms. O'Donnell, kept her in the car for hours, and beat her with their fists or a bottle every time she moved. The jury was entitled to find that use of the bottle to beat Ms. O'Donnell was not separate or distinct from the taking of her car and belongings. See *People v. Heller*, 131 Ill. App. 2d 799, 803 (1971) (stating that "the use of a dangerous weapon at any point of a robbery, so long as it can reasonably be said to be a part of a single occurrence or incident *** will constitute armed robbery").[1]

¶ 43 The cases that Mr. Gray relies on—including *People v. Dennis*, 181 Ill. 2d 87 (1998), *People v. Runge*, 346 Ill. App. 3d 500 (2004), *People v. Johnson*, 314 Ill. App. 3d 444 (2000), and *People v. Simmons*, 34 Ill. App. 3d 970 (1975)—are not to the contrary. None of those cases involved defendants who attempted to *maintain* control of the stolen property by use of a dangerous weapon.

¶ 44 In *People v. Dennis*, 181 Ill. 2d 87, 89 (1998), the defendant was convicted of armed robbery based on a theory of accountability. The defendant admitted that he drove the perpetrator of the armed robbery away from the scene, providing an escape. *Id.* at 91. He testified that he did not know, in advance, that the perpetrator had a gun or that the perpetrator was going to commit robbery, and did not know that the robbery had even occurred until after he had driven away. *Id.* at 91-92. The issue before our supreme court was whether the trial court properly advised the jury that it could convict the defendant based on "the activities involved in escaping to a place of safety." *Id.* at 93. Our supreme court held that the instruction was erroneous, noting that the

[1] The State also argued that one of Mr. Gray's convictions could be affirmed based on a finding that he was armed with the ice skate during the armed robbery. This count was nol-prossed before trial. But we need not reach any issue about whether this created a fatal variance between the charges of the indictment and the evidence presented at trial (*People v. Maggette*, 195 Ill. 2d 336, 351 (2001)) based on our finding that both the aggravated vehicular hijacking and the armed robbery were ongoing and can be affirmed based on use of the bottle as a deadly weapon.

defendant had committed only the "separate" offense of being an "accessory-after-the-fact." *Id.* at 104. Here, in contrast, the force that Mr. Gray and Ms. Schram used to obtain the vehicle and Ms. O'Donnell's personal belongings continued and escalated as they maintained their control over them with a dangerous weapon.

¶ 45 Most significantly, our supreme court expressly noted in *Dennis* that "[a]lthough the force which occurs simultaneously with flight or an escape may be viewed as continuing the commission of the offense [citations], it is the force, not escape, which is the essence and constitutes an element of the offense." *Id.* at 103. In this case, the ongoing use of force, in order to retain control over the vehicle and the items taken from Ms. O'Donnell, meant that the crime was ongoing at the time the dangerous weapon came into play.

¶ 46 In *Runge*, the court reversed the defendant's conviction for armed robbery based on his taking of jail-issued clothing that he was wearing when he committed an armed escape. The court noted that the force used in that case was committed "after the 'taking' was achieved peaceably. The [stolen] clothing *** was physically transferred to defendant's custody and control prior to and separately from any use of force." *Runge*, 346 Ill. App. 3d at 506. *Runge* is distinguishable because it did not involve any force used by the defendant to maintain control of the clothing he was wearing; he just happened to be wearing clothes that belonged to the Department of Human Services at the time he used force to effectuate his escape. *Id.* at 502, 506.

¶ 47 In *Johnson*, the defendant received the title for the victim's vehicle without use of force or threat of force, then left the victim's car; he later returned and ordered the victim out of the car, telling him to walk away while pointing a revolver at the victim's head. *Johnson*, 314 Ill. App. 3d at 446, 450. Force was not used at all until after the defendant completely left the scene and the victim, with the title, then returned and used the gun to take the victim's car. The appellate court held that, under these circumstances, the "receipt of the title *** was a totally

separate act" from the defendant's subsequent use of force to take the car. We cannot similarly parse Mr. Gray's spree into such distinct crimes because Ms. O'Donnell was not permitted to leave her car, was bound for most of the duration, and was beaten by Mr. Gray or Ms. Schram every time she moved, with a bottle or their fists. In other words, Mr. Gray used continued force to maintain his control over Ms. O'Donnell's belongings, thereby continuing those offenses.

¶ 48 And in *Simmons*, the defendant took records from the victim, the victim took the records back, the defendant took the records again and handed them to a companion; then the defendant pulled the victim outside the building, down the steps, and into the street, and "there, for the first time, confronted [the victim] with a gun and told him that if he ran he would shoot him." *Simmons*, 34 Ill. App. 3d at 971. In reversing the defendant's conviction for armed robbery, and instead finding the defendant guilty only of robbery, the court noted that the taking of the records was "completed before any deadly weapon was used," and the court specifically observed that the gun "was not used to obtain the records *or to secure their retention*." (Emphasis added.) *Id*. at 971-72. Here, in contrast, even if no weapon was used to obtain the car or Ms. O'Donnell's personal belongings, force with a dangerous weapon was used to "secure [the] retention" of these things during the ongoing crime spree.

¶ 49 Accordingly, the evidence presented at trial was sufficient to sustain the jury's finding Mr. Gray guilty of both aggravated vehicular hijacking and armed robbery.

¶ 50 B. Sentencing Finding of Great Bodily Harm

¶ 51 Mr. Gray next contends that the trial court erred when it sentenced him to serve his consecutive 30-year sentences for aggravated vehicular hijacking and armed robbery at 85% time based on its finding that he caused great bodily harm to Ms. O'Donnell. Again, Mr. Gray contends that the harm that the trial court relied on occurred after those offenses were completed.

¶ 52 The trial court here sentenced Mr. Gray to serve his consecutive 30-year sentences at

85% time for aggravated vehicular hijacking and armed robbery under section 3-6-3(a)(2)(iii) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/3-6-3(a)(2)(iii) (West 2010)). This statute is a part of the "truth-in-sentencing" scheme that "the Department of Corrections uses to calculate good-conduct credit." *People v. Salley*, 373 Ill. App. 3d 106, 109 (2007). Under the Unified Code, an inmate generally receives day-for-day good-conduct credit. *Id.* (citing 730 ILCS 5/3-6-3(a)(2.1) (West 2002)). But if a trial court makes the finding that the conduct leading to the inmate's conviction for certain enumerated offenses, including aggravated vehicular hijacking and armed robbery, resulted in "great bodily harm" to a victim, the inmate will receive, at most, 4.5 days of good-sentence credit each month he is imprisoned. 730 ILCS 5/3-6-3(a)(2)(iii) (West 2010)); *Salley*, 373 Ill. App. 3d at 109.

¶ 53 Initially, Mr. Gray concedes that he forfeited this issue on appeal by not including it in his postsentencing motion, but asks that we review it under the plain error doctrine. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (a sentencing issue is forfeited where the defendant fails to make a contemporaneous objection or include the issue in a written postsentencing motion). He also suggests that it can be reviewed as a claim for ineffective assistance of counsel. We need not decide whether this was plain error or ineffective assistance of counsel, since we find no error in the trial court's finding.

¶ 54 Mr. Gray's argument that the trial court erred in making this finding in sentencing rests on the same premise as his sufficiency argument on his convictions. That is, he contends the robbery and the hijacking were completed once he and Ms. Schram first obtained control over Ms. O'Donnell's property and her vehicle. Because we have rejected that premise, we likewise find no merit to Mr. Gray's argument that the trial court erred in making this factual finding at sentencing. There can really be no dispute that by the end of the crime spree Ms. O'Donnell had suffered great bodily harm. For the reasons that we have already discussed, we believe that the

crimes of armed robbery and aggravated hijacking continued and that great bodily harm was suffered as part of the conduct leading to those convictions.

¶ 55 C. Constitutionality of Section 3-6-3(a)(2)(iii) of the Unified Code

¶ 56 Mr. Gray's third argument is that the trial court's application of section 3-6-3(a)(2)(iii) of the Unified Code to his sentence violated his right to due process and a jury trial under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151 (2013). Mr. Gray argues that section 3-6-3(a)(2)(iii) is unconstitutional because it allows the trial court to use a fact at sentencing—that the conduct leading to convictions for certain enumerated offenses caused great bodily harm to the victim—to increase the mandatory minimum sentences for those offenses, without any finding by the jury that this factual predicate exists beyond a reasonable doubt. Because a defendant may challenge the facial constitutionality of a statute at any time (*People v. Wagener*, 196 Ill. 2d 269, 279 (2001)), Mr. Gray has not forfeited this argument.

¶ 57 In *Apprendi*, the Supreme Court held that, "[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 490. After *Apprendi*, this court considered, and rejected, constitutional challenges to section 3-6-3(a)(2)(iii) of the Unified Code based on *Apprendi*. For example, in *People v. Robinson*, 383 Ill. App. 3d 1065, 1071 (2008), we explained that section 3-6-3 "d[id] not change the prescribed maximum penalty of the underlying offense." We stated that, although the truth-in-sentencing law "may well affect the sentence defendant ultimately serves," the statute did not violate *Apprendi* because it "d[id] not affect the sentence imposed." *Id.* We also noted that because the statute concerns good time credit, "it's application is not definite, immediate or automatic." *Id.* See also *People v. Garry*, 323 Ill. App. 3d 292, 299 (2001) (the court's finding of great bodily harm "did

not trigger *any* penalty for [the] crimes" the defendant was convicted of; "the finding of great bodily harm simply had an impact upon the amount of time by which [the] defendant—through his own 'good conduct'—could *decrease* his sentence" (emphases in original)).

¶ 58 After these decisions, the Supreme Court decided *Alleyne*, which expanded *Apprendi*, by holding that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Alleyne*, ___ U.S. at ___, 133 S.Ct. at 2155. In *Alleyne*, the Court overruled *Harris v. United States*, 536 U.S 545 (2002), which had drawn a distinction between facts that increase the statutory maximum, as in *Apprendi*, and facts that increase only the mandatory minimum. In *Alleyne*, the Court reiterated that the "touchstone" for determining whether a fact must be found by a jury beyond a reasonable doubt "is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Alleyne*, 133 S. Ct. at 2158.

¶ 59 The Supreme Court emphasized in *Alleyne* that not all factual findings that underlie a sentence must be made by a jury:

> "Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, *e.g, Dillon v. United States*, 560 U.S. 817, 828-89 (2010) ('[W]ithin established limit[s] … the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts' (emphasis deleted and internal quotation marks omitted)); *Apprendi*, 530 U.S. at 481, ***." *Alleyne*, ___ U.S. at ___, 133 S.Ct. at 2163.

Mr. Gray argues that, in light of the holding in *Alleyne*, the reasoning in *Robinson* and similar cases is "no longer valid" because "the 'great bodily harm' finding unequivocally raises the minimum floor for a defendant from 50% time to 85% time."

¶ 60 In both *Apprendi* and *Alleyne*, the Supreme Court struggled to draw a line between an element of an offense, for which the constitution guarantees a jury trial and proof beyond a reasonable doubt, and a sentencing factor, which can be decided by a judge by a preponderance of the evidence. *Apprendi*, 530 U.S. at 478-79; *Alleyne*, ___ U.S. at ___, 133 S. Ct. 2158-61. The test set forth in *Apprendi*—whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict"—has proved difficult to apply. *Apprendi*, 530 U.S. at 494. As the Supreme Court recognized, this line has become hard to draw because many legislatures, like our own in Illinois, have incorporated numerous fact-based sentencing enhancements into their criminal codes. *Id.* (noting the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors' "). If its factual predicates are met, section 3-6-3(a)(2)(iii) of the Unified Code, like statutory provisions that allow the courts to impose consecutive sentences based on certain factual predicates (see 730 ILCS 5/5-8-4(c) (West 2010)), indisputably raises the minimum time that a convicted defendant can serve and also raises the maximum time that can be served. So an argument could be made that the finding of great bodily harm under section 3-6-3(a)(2)(iii) of the Unified Code must be made by a jury.

¶ 61 But in *Robinson* and other post-*Apprendi* cases, this court has consistently drawn a distinction between findings of fact that impact the minimum or maximum *actual* jail time and those that impact the minimum or maximum sentence imposed, concluding that only the latter must be made by a jury beyond a reasonable doubt. See, *e.g. Robinson*, 383 Ill. App. 3d at 1071. We respect this distinction as a matter of *stare decisis*. See *People v. Colon*, 225 Ill. 2d 125, 145-46 (2007) (noting that, although exceptions to the doctrine of *stare decisis* may be made where "it is clear a court has made a mistake," a reviewing court will otherwise "not depart from precedent merely because it might have decided otherwise if the question were a new one"). By merely extending the reasoning in *Apprendi* to minimum sentences, *Alleyne* provides us with no

justification for disturbing the distinction between the time served and the sentence imposed relied on in our prior rulings.

¶ 62 Mr. Gray argues that, even if section 3-6-3(a)(2)(iii) is not facially unconstitutional under *Alleyne*, we should find either that it was unconstitutional under sections 2, 7, and 8 of the Illinois Constitution (Ill. Const. 1970, art I., §§ 2, 7, 8) or that section 3-6-3(a)(2)(iii) is unconstitutional as applied to him. Mr. Gray provides no support for either of those arguments. While the Illinois Constitution could provide greater protection than the United States Constitution, Mr. Gray articulates no reason that this should give him a claim here. And Mr. Gray has similarly made no cohesive argument as to why application of section 3-6-3(a)(2)(iii) was unconstitutional in his particular case. See *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 29 ("A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and cohesive arguments presented"); Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (stating that argument "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities relied on ***."). We find no merit to either of these arguments.

¶ 63 Finally, Mr. Gray argues that he received ineffective assistance of counsel based on his trial counsel's failure to object to the application of section 3-6-3(a)(2)(iii) to his sentence. In light of our finding above that section 3-6-3(a)(2)(iii) is not unconstitutional either on its face or as applied to Mr. Gray, however, any objection by Mr. Gray's counsel would have been meritless. Counsel cannot be ineffective for failing to make a meritless objection. *People v. Edwards*, 195 Ill. 2d 142, 165 (2001).

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 66 Affirmed.