

CH. 3
ARMED VIOLENCE

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§3-1

Generally

[People v. Frias, 99 Ill.2d 193, 457 N.E.2d 1233 \(1983\)](#) To sustain a conviction for armed violence, the State must prove the elements of the predicate felony and that it was committed while armed. Where the jury acquitted defendant of the predicate felony, the armed violence conviction could not stand.

[People v. Payne, 98 Ill.2d 45, 456 N.E.2d 44 \(1983\)](#) A defendant may not be convicted of both armed violence and the underlying felony. See also, [People v. Simmons, 93 Ill.2d 94, 442 N.E.2d 891 \(1982\)](#).

[People v. Haron, 85 Ill.2d 261, 422 N.E.2d 627 \(1981\)](#) The armed violence statute does not require that the weapon be "used" during the predicate felony. The plain language of the armed violence statute requires only the presence of a weapon while the felony is being committed.

[People v. Neylon, 327 Ill.App.3d 300, 762 N.E.2d 1127 \(4th Dist. 2002\)](#) Defendant was not proven guilty beyond a reasonable doubt of armed violence based on personally discharging a firearm while committing the felony of possession of a controlled substance. The court found sufficient evidence to show that defendant was in constructive possession of controlled substances found in a dresser drawer in his bedroom, but no evidence that defendant personally discharged a firearm.

[People v. Taylor, 314 Ill.App.3d 943, 733 N.E.2d 902 \(2d Dist. 2000\)](#) Offense of attempt armed violence exists under Illinois law.

[People v. Hobbs, 249 Ill.App.3d 679, 619 N.E.2d 258 \(5th Dist. 1993\)](#) The purpose of the armed violence statute is to enhance the penalty for a felony involving the use of a weapon. That purpose cannot be satisfied where, even without the use of a weapon, the predicate felony is punishable by a more severe sentence than is available for armed violence.

[People v. Cannes, 61 Ill.App.3d 865, 378 N.E.2d 552 \(2d Dist. 1978\)](#) Armed violence is committed by performing an aggravated assault while armed with a dangerous weapon. See also, [People v. Stuller, 71 Ill.App.3d 118, 389 N.E.2d 593 \(5th Dist. 1979\)](#) (Armed violence based upon simple assault upheld).

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[People v. White, 2015 IL App \(1st\) 131111 \(No. 1-13-1111, 12/16/15\)](#)

[720 ILCS 5/33A-2](#) states that "[a] person commits armed violence when, while armed with a dangerous weapon, he commits any felony [other than enumerated exceptions] defined by Illinois Law." Defendant was convicted of two counts of armed violence for the simultaneous possession, while armed with a handgun, of two controlled substances.

The court concluded that [720 ILCS 5/33A-2](#) is ambiguous concerning whether a person may be convicted of multiple counts of armed violence for simultaneously possessing two controlled substances while armed with a dangerous weapon. Because the ambiguity must be interpreted in favor of the defendant, the court concluded that the statute does not authorize multiple armed violence convictions under these circumstances. One of defendant's armed violence convictions was reversed and the cause remanded for sentencing for possession of the same substance.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

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§3-2

“Armed with a Dangerous Weapon”

[People v. Smith, 191 Ill.2d 408, 732 N.E.2d 513 \(2000\)](#) Under [720 ILCS 5/33A-2\(a\)](#), armed violence is committed where defendant, while armed with a dangerous weapon, commits a felony. A person is armed with a dangerous weapon "when he or she carries on or about his person or is otherwise armed" with a weapon.

Defendant was not "armed with a dangerous weapon" where, as police approached to execute a search warrant, he threw an unloaded handgun out an upper story window. Once defendant threw the weapon out the window, he lacked "immediate access to" and "timely control over" it, as well as either intent or capability of maintaining such control. See also, [People v. Neylon, 327 Ill.App.3d 300, 762 N.E.2d 1127 \(4th Dist. 2002\)](#) (an unloaded weapon in a closet inside a house is not "immediately accessible" to defendant arrested outside the house; the firearm would be "immediately accessible" only if defendant "was standing next to the closet door and the gun were loaded").

[People v. Condon, 148 Ill.2d 96, 592 N.E.2d 951 \(1992\)](#) The purpose of the armed violence statute is to "deter felons from using dangerous weapons so as to avoid the deadly consequences which might result if the felony victim resists." This purpose would not be served by applying the armed violence statute to the mere presence of weapons in a house where those weapons were neither on defendant's person nor within his immediate control.

Here, police found weapons in two bedrooms while they were searching for drugs in defendant's home; defendant was in the kitchen when the officers entered the home. Because defendant did not have "immediate access to or timely control over" the weapons, he was not "armed" within the meaning of the armed violence statute. See also, [People v. Shelato, 228 Ill.App.3d 622, 592 N.E.2d 585 \(4th Dist. 1992\)](#) (defendant did not have "immediate access" to a weapon wrapped in a rag at the bottom of a closed bag 15 feet away; defendant was "under the watchful eyes of several police officers with their weapons drawn . . .").

[People v. Harre, 155 Ill.2d 392, 614 N.E.2d 1235 \(1993\)](#) Defendant was convicted of armed violence predicated upon unlawful possession of cannabis with intent to deliver. Police conducted a stakeout of a deserted house that was the site of cannabis processing. Officers observed a car approaching. The car stopped, and the officers heard the gate to the lane open.

When the car reached the house, defendant was sitting on the hood between the right wheel well and the passenger door. When the car stopped, defendant jumped off the hood and took two steps to the passenger-side door before he was stopped by an officer. The window on the passenger side was "slightly more than half-opened," and the front seat of the car

contained a .22 caliber rifle and a .22 caliber pistol sitting next to the driver's right leg. Officers eventually discovered a large quantity of cannabis in the trunk.

An individual is "armed," within the meaning of the armed violence statute, when he carries a weapon on his person or has immediate access to or timely control over a weapon. The jury's determination that defendant had access to the weapons on the front seat was supported by the testimony of two police officers, who said that defendant could have reached the weapons as he stood by the passenger-side door. Furthermore, the evidence supported an inference that before defendant got out of the car to open the gate, he had immediate access to and control over the weapons while he was on the way to deliver the cannabis.

[People v. Davis, 199 Ill.2d 130, 766 N.E.2d 641 \(2002\)](#) A pellet/BB gun is not a "dangerous weapon" within the meaning of the armed violence statute.

[People v. Vue, 353 Ill.App.3d 774, 818 N.E.2d 1252 \(2d Dist. 2004\)](#) A flashlight is not a "dangerous weapon" within the meaning of the armed violence statute, even where it was used to strike the complainant in the head.

The State argued that the flashlight was a category III weapon - a "bludgeon, black-jack, slung shot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character." The legislature did not intend to define the term "bludgeon" so broadly as to include any object which could be used as a bludgeon. A flashlight has a legitimate purpose and is not a dangerous weapon per se.

[People v. Dressler, 317 Ill.App.3d 379, 739 N.E.2d 630 \(3d Dist. 2000\)](#) A canister of mace is not a "dangerous weapon" for purposes of the armed violence statute.

[People v. Weger, 154 Ill.App.3d 706, 506 N.E.2d 1072 \(4th Dist. 1987\)](#) A straight-blade razor is not a dangerous weapon per se. Thus, to support an armed violence conviction, the State was required to show that the razor was used as a dangerous weapon. Because there was no such proof in this case, defendant's conviction was reversed.

[People v. Hall, 117 Ill.App.3d 788, 453 N.E.2d 1327 \(1st Dist. 1983\)](#) Although the armed violence statute specifies that a knife with a three-inch blade is a dangerous weapon per se, a knife with a shorter blade is also a dangerous weapon when it is used in a dangerous manner.

[People v. Rivera, 260 Ill.App.3d 984, 636 N.E.2d 753 \(1st Dist. 1994\)](#) Defendant was convicted in a jury trial of armed violence and possession of cocaine with intent to deliver, but was sentenced only for the latter offense. On appeal, he contended that the evidence was insufficient to convict him of armed violence.

The Appellate Court could consider the sufficiency of the evidence used to convict defendant of armed violence, although no sentence had been imposed on that conviction, because the trial court refused to impose a sentence in the erroneous belief that the conviction merged with a count that was properly before the court.

Even viewing the evidence most favorably to the prosecution, there was insufficient evidence to sustain the armed violence conviction. A police officer chased defendant through the open door of defendant's apartment, through the kitchen, and up the stairs. Defendant was apprehended and returned to the kitchen, where a loaded handgun was found on a table. Defendant had not attempted to grab the gun when he ran through the kitchen.

The legislature did not intend to allow an armed violence conviction every time a weapon is found somewhere in a defendant's home; instead, there must be "a relationship between the weapon and the defendant" or between defendant and the "potential hazard that exists" when an armed defendant commits a felony. Because there was no such connection here, the conviction for armed violence was reversed.

[People v. Henry, 3 Ill.App.3d 235, 278 N.E.2d 547 \(1st Dist. 1971\)](#) The evidence was insufficient to prove armed violence. There was no evidence that defendant possessed a dangerous weapon when he resisted a policeman; instead, the evidence showed that defendant discarded his weapon before he was aware of the officer's presence.

[People v. Jones, 86 Ill.App.3d 253, 408 N.E.2d 79 \(5th Dist. 1980\)](#) Conviction for armed violence, based on possession of a knife during a burglary, was reversed where the evidence showed that defendant obtained the knife after gaining entry. Offense of burglary is complete when the illegal entry is made; thus, defendant who obtains a weapon after making the entry does not possess it during commission of the burglary.

[People v. Bond, 178 Ill.App.3d 1020, 534 N.E.2d 156 \(4th Dist. 1989\)](#) Defendant was properly convicted of armed violence; cocaine was present in the residence, and while the police were searching the residence defendant was seated on a sofa that had a gun under the cushion.

Cumulative Digest Case Summaries §3-2

[People v. Hernandez, 2016 IL 118672 \(No. 118672, 5/19/16\)](#)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. [Ill. Const. 1970, art. I, §11](#). Under the “identical elements” test, a sentence will violate the clause if it is greater than the sentence for an offense with identical elements. If the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of armed robbery and sentenced to an extended Class X term of 40 years imprisonment. Defendant was armed with a heavy pair of tin snips and the State charged this as a “dangerous weapon, a bludgeon.” Defendant eventually filed a post-conviction petition arguing that his sentence violated the proportionate penalties clause. The circuit court agreed and held that the armed robbery statute was facially unconstitutional because it carried a harsher penalty, a Class X sentence, than armed violence with a Category III weapon, which had the same elements but only carried a Class 2 sentence.

3. The Supreme Court reversed the circuit court, holding that armed robbery with a dangerous weapon did not have the same elements as armed violence with a category III weapon. A dangerous weapon for the purposes of armed robbery includes objects that may be used in a dangerous manner. By contrast, a category III weapon in the armed violence statute is specifically defined as a “a bludgeon, black-jack, slungshot, sand-bag, sand club, metal knuckles, billy, or other dangerous weapon of like character.” [720 ILCS 5/33A-1](#), 33A-2.

The tin snips used here qualified as a dangerous weapon under the armed robbery statute since they were heavy and large enough that they may be used in a dangerous manner.

But while the tin snips might be capable of being used as a bludgeon, they are not typically identified as such and thus are not “of like character” to the bludgeon-type weapons included as category III weapons.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

[People v. Ligon, 2016 IL 118023 \(No. 118023, 2/19/16\)](#)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. [Ill. Const. 1970, art. I, §11. A](#) sentence violates the clause if it is: (1) so cruel, degrading, or disproportionate to the offense that it shocks the moral sense of the community; (2) greater than the sentence for an offense with identical elements.

Under the second, “identical elements” test, if the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of aggravated vehicular hijacking with a dangerous weapon other than a firearm (AVH/DW). Defendant was armed with a BB gun and the State charged this as “a dangerous weapon, to wit: a bludgeon.” Since this was his third Class X felony conviction, the trial court adjudged him an habitual criminal and sentenced him to natural life imprisonment.

Defendant eventually filed a 2-1401 petition arguing that his sentence violated the proportionate penalties clause because AVH/DW had the identical elements as armed violence with a category III weapon but was punished as a Class X felony with a minimum of seven years imprisonment, while armed violence with a category III weapon was only punished as a Class 1 felony.

3. In the Supreme Court, the State first argued, citing [People v. Cummings, 375 Ill. App. 3d 513 \(1st Dist., 2007\)](#), that it was not appropriate in this case to conduct an identical elements comparison between AVH/DW and armed violence because defendant was not sentenced under the AVH/DW statute, but rather was sentenced as an habitual criminal. The court rejected the State’s argument, holding that an identical elements test may be conducted where a defendant is ultimately sentenced as an habitual criminal.

The Habitual Criminal Act (Act) mandates the imposition of a natural life sentence on defendants convicted of three Class X felonies within a 20-year period. [720 ILCS 5/33B-1\(a\)](#). The act does not create an independent offense, but simply prescribes the circumstances where a defendant may be more severely punished because of his prior convictions. The Act is a recidivist sentencing statute that does not define any crime and has no elements to compare with another statute. Since the identical elements test requires a comparison between the elements of different offenses, it cannot be applied to the Act.

The court thus overruled **Cummings** and held that a defendant’s sentence as an habitual criminal has no effect on a court’s determination of whether a qualifying offense violates the identical elements test.

4. But the court found that the offense of AVH/DW as charged in this case did not have the identical elements as armed violence with a category III weapon.

A defendant commits AVH/DW as charged here when he takes a motor vehicle from another person by force and is armed with a dangerous weapon other than a firearm. 720 ILCS 18-4. The charging instrument identified the dangerous weapon here as a bludgeon. In comparison, a defendant commits armed violence with a category III weapon when he commits any felony and is armed with “a bludgeon, black-jack, slungshot, sand-bag, sand club, metal

knuckles, billy, or other dangerous weapon of like character.” [720 ILCS 5/33A-1](#), 33A-2.

The AVH/DW statute does not define dangerous weapons. Instead, the definition is derived from common law and includes any object capable of being used in a manner likely to cause serious injury. Many objects, including the BB gun in this case, can be used in a deadly fashion as bludgeons and are thus properly classified as dangerous weapons even if they were not actually used in that manner. It is sufficient that they have the potential for such use.

By contrast, the armed violence statute specifically defines what constitutes a dangerous weapon. In [People v. Davis, 199 Ill. 2d 130 \(2002\)](#), the court held that a BB gun was not a bludgeon or other dangerous weapon of like character as defined by the statute. Although a BB gun might be used as a bludgeon, it is not typically identified as such and thus is not “of like character” to the bludgeon-type weapons included as category III weapons.

Accordingly, the elements of AVH/DW are not identical to the elements of armed violence with a category III weapon.

5. The court also held that the State was not equitably barred from arguing that the two statutes did not have identical elements. Defendant argued that since the State took the position during prior proceedings, including trial and direct appeal, that defendant was armed with a bludgeon, it could not now assert that defendant’s weapon was not a bludgeon.

Under the common law, weapons are divided into four categories: (1) objects that are dangerous *per se*, such as knives and loaded guns; (2) objects that are never dangerous, such as a four-inch plastic toy gun; (3) objects that are not necessarily dangerous weapons, but can be used in a dangerous manner, such as an unloaded gun made of heavy material, that can be used as a bludgeon; and (4) objects that are not necessarily dangerous, but were actually used in a dangerous manner.

At trial, defendant was properly convicted of using a BB gun as a common-law dangerous weapon of the third type, one that can be used as dangerous weapon. The court thus found that it was irrelevant that the indictment used the term “bludgeon” instead of “BB gun.” The State consistently contended in the prior proceedings that defendant was armed with an object that could have been used as a bludgeon. It was not inconsistent for the State to also argue that the BB gun was not an actual bludgeon. Accordingly, the State was not equitably barred from making its current argument before the Supreme Court.

Defendant’s conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

[People v. McBride, 2012 IL App \(1st\) 100375 \(No. 1-10-0375, 5/17/12\)](#)

Defendant was charged with aggravated vehicular hijacking under the pre-amended version of [720 ILCS 5/18-4\(a\)](#), which defined the offense as committing vehicular hijacking while “armed with a dangerous weapon.” The evidence at trial showed that the defendant approached the complaining witness with a handgun which he held to the complainant’s forehead and which caused a bruise and a small amount of bleeding. The court found that there was sufficient evidence to allow the jury to find that the handgun was used as a dangerous weapon.

1. Under [People v. Ross, 229 Ill. 2d 255, 891 N.E.2d 865 \(2008\)](#), a weapon may be dangerous in one of three ways. First, weapons such as loaded guns are dangerous *per se*. Second, some objects which are not dangerous *per se* are considered dangerous because they were actually used in a dangerous manner during the offense. Third, some objects that are not dangerous *per se* are considered dangerous because they potentially could be used in a dangerous matter.

Under **Ross**, the trier of fact cannot presume that an object which has the outward

appearance of a gun is loaded and operable, because such a presumption would shift to the defendant the burden of proving that the object was not dangerous. Instead, the State must prove dangerousness either by presenting evidence that the gun was loaded and operable or by showing that it either was used or was capable of being used as a bludgeon. Where the State fails to present evidence that a gun was loaded and operable, used in a dangerous manner, or capable of being used in a dangerous matter, as a matter of law it fails to prove dangerousness.

Because the handgun was actually used as a bludgeon and caused injury when the defendant forced it against the complainant's forehead, the jury had sufficient evidence to find that the gun was dangerous. Therefore, defendant's reasonable doubt challenge was rejected.

2. The court concluded, however, that the trial court committed reversible error when it gave a supplemental instruction concerning the definition of "dangerous weapon." The trial court instructed the jury that the elements of aggravated vehicular hijacking include that the defendant was "armed with a dangerous weapon." During deliberations, the jury sent a note to the trial judge asking for the definition of "dangerous weapon." After consulting with counsel, the trial court gave a supplemental instruction combining the definition of "dangerous weapon" from the armed violence statute and a definition from Black's Law Dictionary. Defense counsel objected to giving the definition from the armed violence statute.

The Appellate Court found that the supplemental instruction was erroneous because it informed the jury that a person is considered armed with a dangerous weapon if he carries a Category I, Category II, or Category III weapon, and defined a Category I weapon as a "handgun, sawed-off shotgun, sawed-off rifle, any other firearm small enough to be concealed upon the person, semi-automatic firearm, or machine gun." The court concluded that this instruction could have misled the jury into believing that the handgun used by the defendant was dangerous *per se*, thus relieving the State of its obligation to prove that the weapon was either loaded and operable, actually used as a bludgeon, or capable of being used as a bludgeon. Because the supplemental instruction could have relieved the State of its burden to prove that the gun was a dangerous weapon, reversible error occurred.

The court concluded that the error was not harmless where the only issue at trial was whether defendant was armed with a dangerous weapon, a finding of dangerousness could only have been based on a finding that the gun was actually used as a bludgeon, and the supplemental instruction allowed the jury to sidestep that issue simply because the weapon was a handgun.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

[People v. Scott, 2011 IL App \(2d\) 100990 \(No. 2-10-0990, 8/9/11\)](#)

A person commits armed violence when, "while armed with a dangerous weapon, he commits any felony defined by Illinois [l]aw [with certain exceptions]." [720 ILCS 5/33A-2\(a\)](#). The purpose of the statute is to deter felons from using dangerous weapons so as to avoid the deadly consequences that might result if the felony victim resists. One is "armed" within the meaning of the statute when the weapon is either on one's person or one has immediate access to and timely control over the weapon. Mere possession of a dangerous weapon is not sufficient if there is no possibility of an imminent threat of violence.

Defendant admitted that he possessed cannabis with intent to deliver. When the police arrived outside defendant's home, he was on a couch, a foot or two from a love seat under which he had placed a shotgun. Defendant would have had little difficulty reaching for and taking control of the shotgun, despite the presence of a coffee table, when the police opened

his door. The shotgun's presence created the type of danger that the armed-violence statute was intended to prevent, even though defendant did not reach for the shotgun, he offered the police no resistance, and no actual violence occurred. The potential for violent encounters, not whether any such encounters take place, is the concern of the armed-violence statute.

"The evidence showed that defendant was in the business of selling cannabis, an enterprise that he knew was dangerous, and that he protected his business with his shotgun, kept close to his merchandise." The court affirmed the armed violence conviction.

[People v. Westmoreland, 2013 IL App \(2d\) 120082 \(No. 2-12-0082, 9/24/13\)](#)

1. [720 ILCS 5/33A-2\(a\)](#) provides that a person commits armed violence by committing any felony while armed with a dangerous weapon. Under [720 ILCS 5/33A-1\(c\)\(1\)](#), a person is armed with a dangerous weapon when he carries or is otherwise armed with a Category I, Category II, or Category III weapon.

Defendant was charged with armed violence for committing domestic battery by beating a child with a studded belt, which the State alleged was a Category III weapon. A Category III weapon is defined as a "bludgeon, black-jack, slungshot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character." [720 ILCS 5/33A-1\(c\)\(3\)](#).

2. The court concluded that the studded belt did not qualify as a Category III weapon because it was not of like character to a "bludgeon, black-jack, slungshot, sand-bag, sand-club, metal knuckles, [or] billy," the other objects defined as Category III weapons. The court concluded that to constitute a Category III weapon, an object must be "an inherently dangerous weapon" of like nature to the items specified in §33A-1(c)(3).

A "bludgeon" is generally described as a short stick used as a weapon and having one thick, heavy, or loaded end. An article of clothing, even if capable of being used as a bludgeon, is not an inherently dangerous weapon that is similar to a bludgeon. Furthermore, there was no evidence that the belt had been altered to make it more bludgeon-like or suitable for use as a weapon. Under these circumstances, the belt was not a Category III dangerous weapon.

The armed violence conviction was reversed and the cause remanded for sentencing on the lesser included offense of aggravated battery of a child.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

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§3-3

Double Enhancement and Improper Predicate Felonies

[People v. Lucas, 231 Ill.2d 169, 897 N.E.2d 778 \(2008\)](#) To establish armed violence, the State must prove beyond a reasonable doubt that while armed with a dangerous weapon, defendant committed a felony which is covered by the armed violence statute. To prove armed violence predicated on driving with license revoked, which is a misdemeanor elevated to a felony because it is a subsequent offense, the State would be required to show that defendant committed the offense of driving while his license was revoked, the cause of the revocation was DUI, and defendant had a prior conviction for driving while license revoked.

[725 ILCS 5/111-3\(c\)](#) provides that when seeking an enhanced sentence (i.e., one which raises the classification of an offense because of a prior conviction), the State may not disclose the prior conviction at trial. Because §111-3(c) prevented the State from proving the prior conviction to the jury, there was no way for the State to prove all of the elements of armed violence at trial. Thus, driving with license revoked, subsequent offense, cannot serve as the

predicate for armed violence.

[People v. Koppa, 184 Ill.2d 159, 703 N.E.2d 91 \(1998\)](#) Armed violence charges predicated on aggravated criminal sexual assault (based on bodily harm) and aggravated kidnapping (based on concealment of identity) did not violate the prohibition against double enhancement of a single factor. "Double enhancement" occurs when a single aggravating factor is used twice - once to enhance a lesser crime to an aggravated offense, and again to enhance the aggravated offense to armed violence. Double enhancement is generally improper unless clearly authorized by the legislature.

Here, the predicate felonies for armed violence were enhanced to aggravated offenses based not on the presence of a weapon, but on other aggravating factors (i.e., bodily harm or concealment of identity). Because defendant's possession of a weapon was used only once - to enhance to armed violence offenses aggravated due to other factors - no double enhancement occurred.

[People v. Haron, 85 Ill.2d 261, 422 N.E.2d 627 \(1981\)](#) A single act of possessing a weapon cannot be used twice to create an armed violence conviction; the legislature did not intend one possession to be used both to elevate a misdemeanor to a felony and also to elevate that felony to armed violence. Thus, the "requirement of section 33A-2 that there be the commission of a felony while armed with a dangerous weapon contemplates the commission of a predicate offense which is a felony without enhancement by the presence of a weapon." See also, [People v. Hanson, 138 Ill.App.3d 530, 485 N.E.2d 1144 \(5th Dist. 1985\)](#) (same).

[People v. DelPercio, 105 Ill.2d 372, 475 N.E.2d 528 \(1985\)](#) Basing armed violence on attempt armed robbery violates the prohibition against double enhancement because the presence of a weapon both enhances defendant's conduct to attempt armed robbery and also enhances that offense to armed violence.

The Court specifically rejected appellate court decisions holding that [People v. Haron, 85 Ill.2d 261, 422 N.E.2d 627 \(1981\)](#) applies only when a misdemeanor is enhanced to felony by reason of the weapon, and is then enhanced again, by reason of the weapon, to armed violence. Such holdings "are incorrect and are not to be followed."

[People v. Alejos, 97 Ill.2d 502, 455 N.E.2d 48 \(1983\)](#) The legislature did not intend for armed violence to be based on the underlying offense of voluntary manslaughter. The purpose of the armed violence statute is to deter persons from committing felonies while armed by punishing such offenses more severely; offenses that normally do not involve criminal intent on the part of defendant cannot be deterred. See also, [People v. Ferneti, 104 Ill.2d 19, 470 N.E.2d 501 \(1984\)](#) (armed violence may not be based on underlying offense of involuntary manslaughter); [People v. Miller, 144 Ill.App.3d 69, 493 N.E.2d 1095 \(5th Dist. 1986\)](#) (conviction for armed violence based on voluntary manslaughter vacated at post-conviction proceeding). Note: The statute has since been amended to reflect this principle.

[People v. Drakeford, 139 Ill.2d 206, 564 N.E.2d 792 \(1990\)](#) Defendant may not be convicted for armed violence predicated on aggravated battery causing bodily harm where he is simultaneously convicted of second degree murder for the same act.

The holding of [People v. Alejos, 97 Ill.2d 502, 455 N.E.2d 48 \(1983\)](#) is equally applicable to second degree murder. Thus, the armed violence statute does not apply to second degree murder.

A conviction of second degree murder means that defendant's conduct was "unpremeditated, undeterrable, and caused by an actual but unreasonable belief that the circumstances required the use of deadly force in self-defense." Under *Alejos*, such conduct is not subject to the armed violence statute even if it also constitutes aggravated battery causing great bodily harm, a proper predicate felony for armed violence.

The second degree murder statute would be nullified if armed violence could be predicated on aggravated battery where there was a simultaneous conviction for second degree murder arising out of the same act, because prosecutors could always seek Class X sentencing (for armed violence) rather than Class 1 sentencing (for second degree murder).

[People v. Allen, 153 Ill.2d 145, 606 N.E.2d 1149 \(1992\)](#) Armed violence may be predicated on an aggravated battery committed in sudden or intense passion or in an unreasonable belief in self-defense. Due process prohibits using second degree murder as the predicate for armed violence because the purpose of the armed violence statute, to deter felonies committed with dangerous weapons, cannot be met where defendant acts with sudden and intense passion or with an unreasonable belief of self-defense. However, though aggravated battery (and many other offenses) can be committed with the same state of mind as second degree murder, the legislature has made that state of mind a mitigating factor only for offenses involving homicide. Thus, if the rationale of the second degree murder cases is to be extended to non-homicide offenses, that extension must come from the legislature and not from the courts.

[People v. Christy, 139 Ill.2d 172, 564 N.E.2d 770 \(1990\)](#) A conviction for armed violence may not be based on the predicate felony of kidnapping with a category I weapon (knife with a blade of three inches).

The commission of kidnapping while armed with a knife with a blade of three inches constitutes both aggravated kidnapping, a Class 1 felony ([720 ILCS 5/10-2\(a\)\(5\)](#)) and armed violence, a Class X felony ([720 ILCS 5/33A-2\(b\)](#)). Since the elements of both offenses are the same, "common sense and sound logic would seemingly dictate that their penalties be identical." Because it is illogical for identical offenses to carry different penalties, "the penalties for aggravated kidnapping and armed violence are unconstitutionally disproportionate."

[People v. Lewis, 175 Ill.2d 412, 677 N.E.2d 830 \(1996\)](#) Under [People v. Christy, 139 Ill.2d 172, 564 N.E.2d 770 \(1990\)](#), the imposition of different sentences for identical offenses violates the proportionate penalties clause of the Illinois Constitution. Because armed violence with a Category I weapon involves the same elements as armed robbery, but carries a 15 to 30-year sentence while armed robbery carries a sentence of 6 to 30 years, the legislature has created "two substantially identical offenses which, illogically, are punished with disparate penalties." Note: Armed violence statute now specifically excludes "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."

[People v. Figures, 216 Ill.App.3d 398, 576 N.E.2d 1089 \(1st Dist. 1991\)](#) Defendant was convicted of armed violence based upon "great bodily harm" aggravated battery ([720 ILCS 5/12-4\(a\)](#)), and also of "deadly weapon" aggravated battery ([720 ILCS 5/12-4\(b\)\(1\)](#)). Both convictions arose from the single act of shooting the victim in the foot.

Armed violence conviction reversed because the evidence was insufficient to prove the "great bodily harm" element of the underlying aggravated battery. Although the "deadly

weapon" aggravated battery conviction was upheld, to use this conviction as the predicate felony for armed violence would be a double enhancement because defendant's use of the weapon had already been used to enhance a simple battery to an aggravated battery.

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[People v. Cherry, 2016 IL 118728 \(No. 118728, 9/22/16\)](#)

A defendant commits armed violence when he personally discharges a firearm while committing any felony except a felony that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range. [720 ILCS 5/33A-2\(b\)](#).

Defendant was convicted of armed violence predicated on aggravated battery causing great bodily harm. 720 ILCS 12-4(a). Defendant argued that aggravated battery could not serve as the predicate offense for armed violence since aggravated battery with a firearm is an enhanced version of aggravated battery and it makes the possession or use of a dangerous weapon the element which enhances the offense. [720 ILCS 5/12-4.2](#).

The court rejected defendant's argument. Possession or use of a weapon is not an element of the base offense, aggravated battery. Aggravated battery with a firearm is not an enhanced version of aggravated battery; it is an enhanced version of battery. Both forms of aggravated battery require proof of battery plus an additional aggravating factor. Aggravated battery with a firearm and aggravated battery causing great bodily harm are separate aggravated versions of battery. Aggravated battery causing great bodily harm may thus serve as the predicate offense for armed violence.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

[People v. Cherry, 2014 IL App \(5th\) 130085 \(No. 5-13-0085, 12/10/14\)](#)

Aggravated battery occurs where the accused: (1) intentionally or knowingly causes great bodily harm while committing a battery ([720 ILCS 5/12-4\(a\)](#)), or (2) commits a battery while using a deadly weapon other than by "the discharge of a firearm." ([720 ILCS 5/12-4.2\(a\)\(1\)](#)). The offense of aggravated battery with a firearm occurs when in committing a battery the accused knowingly or intentionally causes any injury to another person by means of discharging a firearm. [720 ILCS 5/12-4\(a\)\(1\), \(b\)](#).

[720 ILCS 5/33A-2\(b\)](#) defines armed violence as personally discharging a firearm that is a Category 1 or Category 2 weapon while committing any felony other than certain specified felonies "or any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."

Defendant was convicted of one count of aggravated battery with a firearm and one count of armed violence predicated on aggravated battery. The armed violence charge alleged that defendant caused great bodily harm "while armed with a dangerous weapon" by shooting the complainant in the leg with a handgun that was a Category I weapon.

1. The Appellate Court held that under the plain language of §33A-2(b), armed violence cannot be predicated on any form of aggravated battery even where that offense is charged under §12-4(a). The court concluded that because aggravated battery with a firearm is an enhanced version of aggravated battery, §33A-2(b) specifically excludes the latter offense as a predicate for armed violence.

Noting that defendant was also convicted of aggravated battery with a firearm based on the same conduct, the court stated:

[I]t would be patently unreasonable to conclude that the prosecution may both charge the defendant with an enhanced version of an offense and then also predicate an armed violence charge on a subsection of the same basic offense that does not specifically address weapons in order to sidestep the statutory exclusions.

The conviction for armed violence was vacated and the cause remanded for sentencing on the remaining conviction of aggravated battery while armed with a firearm.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

[People v. White, 2015 IL App \(1st\) 131111 \(No. 1-13-1111, 12/16/15\)](#)

[720 ILCS 5/33A-2](#) states that "[a] person commits armed violence when, while armed with a dangerous weapon, he commits any felony [other than enumerated exceptions] defined by Illinois Law." Defendant was convicted of two counts of armed violence for the simultaneous possession, while armed with a handgun, of two controlled substances.

The court concluded that [720 ILCS 5/33A-2](#) is ambiguous concerning whether a person may be convicted of multiple counts of armed violence for simultaneously possessing two controlled substances while armed with a dangerous weapon. Because the ambiguity must be interpreted in favor of the defendant, the court concluded that the statute does not authorize multiple armed violence convictions under these circumstances. One of defendant's armed violence convictions was reversed and the cause remanded for sentencing for possession of the same substance.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

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Charging the Offense

[People v. Payne, 98 Ill.2d 45, 456 N.E.2d 44 \(1983\)](#) Defendant contended that his armed violence conviction must be vacated because the count charging it failed to include the elements of the predicate felony (burglary). However, since a different count of the information charged burglary and set forth its elements, and the State never intimated that the armed violence was based on an offense other than the burglary set out in the accompanying count, there was no realistic possibility of prejudice. See also, [People v. Hall, 96 Ill.2d 315, 450 N.E.2d 309 \(1982\)](#) (information must be read as a whole; defendant was informed of the elements of the predicate offense, which was charged in another count of the same information).

[People v. Gresham, 104 Ill.App.3d 81, 432 N.E.2d 654 \(4th Dist. 1982\)](#) Defendant's conviction for armed violence vacated because it was predicated on the felony offense of aggravated battery with use of a deadly weapon.

The State contended that the armed violence conviction was proper because it was based upon the predicate felony of aggravated battery in a public place, and not on aggravated battery by using a deadly weapon. This contention was based on the indictment's allegation that the crime occurred at a specified public place. This contention was without merit because the indictment, jury instructions, and State's closing argument all discussed aggravated battery based on a deadly weapon. A "reviewing court may not uphold a conviction for an

offense which was not charged or proven at trial even though under the evidence, defendant could have been charged and convicted of the alternate offense."

[People v. Green, 83 Ill.App.3d 982, 404 N.E.2d 930 \(3d Dist. 1980\)](#) Where the State charged and proved home invasion based on defendant's unlawful entry to the premises, it could not prove armed violence by arguing that he committed a burglary by unlawfully remaining on the premises after making a lawful entry. Because the State failed to prove armed violence as charged, defendant's conviction was reversed.

[People v. Stanley, 4 Ill.App.3d 23, 280 N.E.2d 14 \(4th Dist. 1972\)](#) Armed violence indictment that failed to state the name of the person stabbed was not fatally defective, where the victim was named in the first two counts of the indictment charging the underlying felony.

[People v. Avant, 86 Ill.App.3d 268, 409 N.E.2d 296 \(4th Dist. 1980\)](#) Where the information charged armed violence based on felony criminal damage to property exceeding \$150, defendant could not be convicted in the absence of evidence that the damage exceeded \$150.

[People v. Hall, 117 Ill.App.3d 788, 453 N.E.2d 1327 \(1st Dist. 1983\)](#) An indictment for armed violence was not defective because it failed to allege that the knife blade was at least three inches in length.

[People v. Lincoln, 146 Ill.App.3d 15, 496 N.E.2d 736 \(4th Dist. 1986\)](#) Defendant was not entitled to a jury finding concerning the category of the weapon involved where the offense was committed with a handgun. Further, a gun is a category I weapon regardless of whether it is operable.

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