

2012 IL App (2d) 100670-U
No. 2-10-0670
Order filed March 13, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-2970
)	
VINCENT D. HOLMES,)	Honorable
)	Rosemary Collins,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Bowman and Schostok concurred in the judgment.

ORDER

Held: Defendant was not denied the effective assistance of trial counsel and defendant received a fair sentencing hearing; affirmed.

¶ 1 Following a jury trial, defendant, Vincent D. Holmes, was found guilty of attempted first-degree murder for discharging a firearm that caused great bodily harm to Robert White, and the trial court sentenced defendant to 55 years' in prison. Defendant contends on appeal that he was denied the effective assistance of counsel at trial and, alternatively, that he was denied a fair sentencing hearing. We affirm.

¶ 2

FACTS

¶ 3 On October 1, 2008, defendant was charged by indictment with the following: (1) attempted murder (count I); (2) aggravated battery with a firearm for shooting White in the chest area (count II); (3) aggravated battery with a firearm for shooting White in the abdomen area (count III); (4) aggravated battery with a firearm for shooting White in the leg (count IV); (5) unlawful use of a weapon by a felon (UUW), based on defendant's prior conviction for a Class 2 felony in violation of the Controlled Substances Act (count V); and (6) armed habitual criminal, based on defendant's prior conviction for the violation of the Controlled Substances Act and another prior conviction for a Class 2 felony violation of the Controlled Substances Act (count VI).

¶ 4 Defendant alleged self-defense. Following the receipt of initial discovery from the State, defendant's trial counsel filed a motion for supplemental discovery. Counsel sought information relating to White's prior acts of violence, including prior convictions for acts of violence. In response, the State related that White had been placed on court supervision on January 5, 2004, pursuant to a charge of aggravated assault, that he was currently on probation for a 2007 charge of manufacture or delivery of cocaine, and that the 2009 Class X and Class 1 charges for manufacture or delivery of cocaine and a Class 4 charge of possession of a controlled substance had been dismissed on motion of the prosecution. The State denied that there were any agreements between White and the State with respect to the 2007 charge, for which he was serving probation, or with respect to his 2009 charges, which had been dismissed.

¶ 5 Defense counsel filed motions to suppress identification testimony, to suppress statements, and to suppress physical evidence. All of these motions were denied.

¶ 6 The State also filed various motions *in limine*, including a motion requesting that it be allowed to use defendant's prior Class 2 felony drug convictions for purposes of proving the offenses of UUW and armed habitual criminal and to impeach defendant should he decide to testify. The State also requested that it be allowed to use defendant's 2002 Class 4 felony conviction for possession with intent to deliver cannabis for impeachment purposes.

¶ 7 Defense counsel stated that defendant intended to testify at trial and acknowledged that the Class 2 convictions would be coming into evidence for purposes of proving counts V and VI of the State's superseding indictment, but he asked that the court not allow the use of the Class 4 felony conviction for impeachment purposes. The State agreed that it would be "somewhat confusing" for the jury because they would be hearing about defendant's two Class 2 felony convictions for purposes of proving two of the charges, but the State asked that it be allowed to use both of those convictions, as well as defendant's Class 4 conviction, to impeach defendant. The court granted the State's motion to allow defendant's prior convictions for impeachment purposes, after applying the balancing test set forth in *People v. Montgomery*, 47 Ill. 2d 510 (1971). The court noted further that the other convictions would be coming in under the armed habitual criminal charge as proof of the underlying offenses and to allow defendant to be impeached with the prior convictions.

¶ 8 In another motion, the State requested that it be allowed to elicit evidence at trial that, one to four weeks prior to the shooting in question, there had been an altercation between defendant and White that, the State alleged, involved White interceding in an argument between defendant and his girlfriend, Tina Bradt, in which White punched defendant in the face. The State alleged the prior altercation was relevant to show defendant's motive for shooting White. Defense counsel had no

objection as he also planned to introduce evidence regarding the same altercation but with defendant's version of the incident.

¶ 9 During the opening statement, the prosecutor remarked that in the early morning hours of July 31, 2008, defendant was plotting his revenge against White because earlier in the month White became involved in an argument between defendant and his girlfriend, which ended with White punching defendant in the face. The prosecutor further stated that the police recovered the gun defendant had used in the shooting from the basement of an apartment building where his sister resided; "a gun that this defendant should not have even had because this defendant is a convicted felon and he did not have a right to possess a handgun, let alone fire it at anybody."

¶ 10 The State presented White's testimony and the testimony of two other witnesses to the crime who were present at 1610 Seventh Street, Rockford, Illinois, where the shooting took place. White stated that, at the time of the incident and at the time of trial, he was on probation for a felony charge of possession with intent to deliver a controlled substance. After the incident, White was arrested for and charged with another possession with intent to deliver, but that charge was dismissed. White denied that there was any agreement between himself and the State leading to the dismissal of the last charge.

¶ 11 White knew defendant because defendant hung around the house on Seventh Street where White also spent time, although he did not live there. White identified the Seventh Street house as "everybody [sic] friends' house." In July of 2008, a girl by the name of Tina Bradt also spent time around the house but, according to White, did not live there either. White denied knowing whether defendant was dating Tina at the time.

¶ 12 White admitted that, about two weeks prior to the incident, he had an altercation with defendant at the Seventh Street location. He characterized it as “just basically a—a drunken argument over money,” which ended up in a fist fight. Defendant’s girlfriend was present at the time. When asked who threw the first punch, White agreed it could have been him, but he could not remember, as it occurred long ago. He also could not remember what part of defendant’s body White hit and White could not recall whether defendant also had hit him.

¶ 13 On July 30, White arrived at the Seventh Street house around 11 p.m. and went upstairs to sleep. Prior to arriving there, he had been drinking about six or seven beers. White awakened around midnight and went down to the front porch to smoke a cigarette. He remembered talking to other people who were outside of the house. There were around 5 to 10 adults and perhaps 4 children outside.

¶ 14 Defendant showed up at the house around 5 to 10 minutes later. White, who was on the porch, stood by the door of the house, holding a cigarette in one hand and the door with the other. Defendant said something to White, although White could not recall exactly what he said. White initially stated that he could not recall having any conversation with defendant, but he later agreed that “words were said” between them, but he could not remember what they were. White testified that he was not angry with defendant that evening and that he did not have a grudge against defendant because of the earlier altercation with him. White did not have a gun on him that evening and denied reaching into his waistband or pockets when defendant came up to the porch.

¶ 15 After some conversation between them, defendant pulled out a gun and started shooting at White. White thought he should just run out of the way to save the children from harm. He ran into the house and up the stairs, while defendant continued shooting. When he arrived upstairs, White

told someone to call 911 and then he collapsed. He could not recall anything that happened after that.

¶ 16 As of July 31, Jacqueline Muriel was living at 1620 Seventh Street, a few houses down the block from the 1610 Seventh Street house. During the evening of July 30 and into the early morning hours of July 31, Muriel was sitting on the ground at the 1610 Seventh Street house, talking to friends. Her good friend, Erica Perez, was living at 1610 Seventh Street at the time. Tina Bradt also lived there. Muriel had known Perez about 9 or 10 years and she had known White, Perez's brother, about six years.

¶ 17 While Muriel was outside talking to Bradt, White came out of the house to smoke a cigarette. Muriel testified that there was one child in a stroller, who was five or six months old, and another child on the porch. Muriel testified that Bradt got up "all of a sudden" and ran into the house after looking toward the street corner. Muriel then looked and saw defendant coming around the corner.

¶ 18 Muriel stated that, as defendant approached the porch, he said to White, "I heard you was [*sic*] looking for me." White replied, "Yeah. I just wanted to squash whatever happened." Defendant responded, "I'm not squashing nothing. You think you can just steal on me and think you are gonna get away with it." Muriel testified that defendant then dug into his side, pulled out a gun, and started shooting at White. White turned around and ran back into the house and up the stairs, while defendant continued shooting. Muriel stated that she never saw White with a weapon that night, never saw him reach into his waistband, and did not see him come down the porch stairs toward defendant.

¶ 19 Muriel agreed that, when she spoke to the police about the shooting in early August 2008, she was on parole for aggravated discharge of a firearm. After the shooting, another charge was

brought against her but that charge was dismissed after she agreed to cooperate and testify for the State. Muriel testified that the State did not make any deals with her and her testimony was truthful.

¶ 20 Jamesha Irwin also was sitting on the porch at 1610 Seventh Street when the shooting took place. She was 15 years' old at the time. Irwin was "hanging out" with her friends and drinking alcohol, but she did not remember how much she had to drink. Irwin knew White as a friend of a friend.

¶ 21 Irwin stated that White came outside and stood by the door in the early morning hours of July 31. Irwin was talking to her sister, and the two of them noticed defendant walk up to the house. Irwin's sister noticed that defendant had his hand underneath his shirt and Irwin saw defendant pull a gun out from under his shirt. When defendant pulled out the gun, Irwin started running. She did not hear any words exchanged between defendant and White and did not see White go toward defendant. Irwin estimated that defendant was at the house maybe three or four minutes before he started shooting. She denied telling the police that night that she heard arguing between White and defendant, and she denied stating that White actually went down to the bottom of the porch steps.

¶ 22 At 12:49 a.m., Rockford fireman, Jeffrey Althoff, responded to a report of a shooting at 1610 Seventh Avenue. He found White lying on his back in an upstairs bedroom. White was conscious and alert but in some respiratory distress. Althoff observed an injury to White's left chest area and he found two other injuries.

¶ 23 Dr. Marc Whitman, the general surgeon who performed surgery on White, testified that White had a "missile wound" to his front chest, another to his flank on the left side, and a third on his outer thigh. During surgery, doctors discovered that White had not suffered a heart injury, but the bullet that entered his chest had just narrowly missed his heart. Whitman found injuries to

White's spleen and multiple injuries to his bowel. White's spleen had to be removed and parts of the bowel as well. White remained in the hospital for approximately one month. Initially, White needed a ventilator for breathing support. Whitman believed that the gunshot wounds White sustained were life-threatening and, if White had not received medical treatment, he would not have survived.

¶ 24 Police officers dispatched to the scene received information that defendant might be located about two miles away from 1610 Seventh Street, at 2012 Kishwaukee, where his sister Tamesha lived. Officer Amy Kennedy accompanied other officers to that location and found Tamesha standing outside and entered the apartment with her. Officers found defendant inside the apartment lying on the couch, holding a small child. Defendant appeared to be sleeping and the officers roused him and asked him his name, to which he responded, "Vincent." He was then taken into custody, and Tamesha allowed the officers to search her apartment.

¶ 25 Officer Todd Prager searched defendant after he was handcuffed and brought outside. Prager found a cell phone in defendant's left front pants pocket and a magazine for a handgun containing several bullets. When Prager found the loaded magazine, defendant went limp, started to cry, and repeatedly yelled out, "I'm gonna die, I'm gonna die." Defendant was cooperative and did not fight or try to flee. Officers subsequently recovered, from a storage room in the basement of the apartment building where Tamesha lived, a silver 9mm handgun, a black and yellow T-shirt, identified as the shirt defendant had been wearing at the time of the shooting, and two bullets.

¶ 26 Officers also recovered at 1610 Seventh Street two spent 9mm shell casings in the front yard, near the front of the porch, and a spent bullet on the floor of the foyer area at the base of the stairs

rising to the second floor. Officers noted that the front storm door of the house had been shattered, and they located what appeared to be at least three bullet strikes on the interior staircase.

¶ 27 Rockford detectives, David Swanson and Dwayne Beets, questioned defendant at 5 a.m. on July 31. They read defendant his *Miranda* rights and defendant agreed to talk to them. Defendant denied that he had taken drugs or alcohol the prior evening. He did not appear to be under the influence of drugs or alcohol, and he displayed no symptoms of either. When the detectives told defendant they were there to question him about the shooting of White on Seventh Street, defendant acted surprised, said he was not there, and that he did not shoot White. After the detectives told defendant that he was identified by people who knew him as the person who had shot White, defendant began to tell them what had happened.

¶ 28 Defendant related the following. He had been dating Bradt for about five months. About a week before the shooting, he and Bradt had an argument at the house on Seventh Street and, in the course of the argument, White “sucker-punched” defendant in the face. Defendant left after the altercation. On July 30, defendant was at his sister’s apartment on Kishwaukee when Bradt came over and asked him to come to her house later that evening. When defendant went to her house, he saw White on the porch with his head down. When defendant got closer, White lifted his head and said something like, “What’s good now, nigger?” White then rushed off the front porch toward defendant while lifting up his shirt and showing defendant a handgun in his waistband. Defendant and White wrestled over the gun and defendant was able to get it away from White and fired it at him. White then turned around and ran toward the house, but defendant continued to shoot. Afterwards, defendant walked down Seventh Street, threw the gun into a vacant lot at Seventh Street and 18th Avenue, and continued on to his sister’s apartment.

¶ 29 The detectives told defendant that his story was inconsistent with accounts they had received from witnesses at the scene and that defendant had been seen with a gun beyond the area of Seventh Street and 18th Avenue. Defendant began to cry and told the detectives that, if he told them the truth, he would go away for a long time. Defendant then asked to talk to his mother and the detectives brought him a phone around 6:20 a.m. The detectives were present during the call. He said something like, “I fucked up,” and made his mother promise that she would get his daughter and take care of her.

¶ 30 The detectives left defendant alone in the room, and when they returned, defendant had stopped crying and was calm. Defendant then made a third statement, relating the following. Defendant said that everything he had said earlier was true except that he had brought a handgun with him and that White did not have a handgun. Defendant had a handgun in his waistband, and when White starting coming down the stairs toward him, defendant pulled the gun from his waistband and started shooting at him. White turned around and ran into the house, and defendant continued to shoot, although he could not remember how many shots he had fired. Defendant went to his sister’s home after the shooting, where he took off his shirt and hid the gun in the basement of the apartment building. This final statement was memorialized in writing and later introduced at trial. The written statement provides:

“About one or two weeks ago, Tina and I were arguing at 1610 7th Street. It was nothing physical because I would never hit her. This dude stepped in the middle of it. I don’t know his name. This was the first time I saw this dude. I didn’t know his name was Robert until you guys told me. He told me to leave and he started punching me. I left the house after that.

* * *

Early this morning (07-31-08), I walked over to Tina's house on 7th Street. I took a silver 9mm handgun over to Tina's house for protection. I had the handgun in my waistband at the time. There was a lot [*sic*] of people hanging out at the house when I got there. I saw Tina get up from where she was seated on the porch and walk into the house. The same guy that punched me last week was sitting on the porch with his head down. The dude got up from his seat and said something to me that made me feel threatened. I don't remember what the dude said. The dude then walked off the porch toward me.

* * *

I know that I fucked up and I didn't know what Robert was going to do when he walked toward me. I have a four year old daughter that I take care of. I sorry [*sic*] that this happened and I did not mean for this to happen."

¶ 31 At the close of the State's case-in-chief, it introduced, without an objection, certified copies of defendant's two prior Class 2 felony drug convictions.

¶ 32 Defendant testified that, in July 2008, he was 24 years' old. He lived occasionally with his mother and also stayed from time to time with his sister Tamesha at her apartment on Kishwaukee. As of July, defendant was dating Bradt, who lived at 1610 Seventh Street. In early July, defendant was on the porch at the house on Seventh Street with Bradt. A person defendant did not know, who went by the name of "Lucky," who defendant later learned was White, was also present. Defendant and Bradt started arguing; they were not involved in any physical altercation. White stepped into the situation and became really "aggressive." He told defendant, "You got to leave, and you get off the porch." White then pushed defendant and punched him in the face. Defendant then left. He did

not want to fight with White and did not want any trouble. When asked if he had experienced any problems with White before, defendant said, “No. I didn’t—I didn’t even know him.”

¶ 33 Defendant continued his testimony. Later that month, on July 31, Bradt apologized for what had happened between defendant and White and asked defendant to come by her house. Before going to the house, defendant stopped at a friend’s house where he was drinking “a lot” of alcohol and also smoking pot and ingesting cocaine. Defendant walked over to Bradt’s house around midnight. He took a gun with him for protection. When asked what he needed protection from, defendant stated:

“From the altercation and certain stuff that was going on around in the community at that—you know what I am saying—really scared around that time. And I didn’t know whether or not—who was going to be over there at that address when I went over there.”

¶ 34 When defendant walked up to the house, he saw several people there, including Irwin and her sister, and Brandon Williams, whom he knew as “B-Dog.” Defendant then saw White standing on the porch. As defendant walked to the bottom of the porch steps, White lifted his head up and said, “Oh, uh, ain’t nobody tell you I was looking for you? What are you doing over here?” Defendant told him that he was there to see Bradt. Defendant explained that White gave him a look as though defendant was not supposed to be there, and then all of a sudden rushed at defendant, coming down the porch steps as he did so. As he came toward defendant, White reached for something near his waistline and, defendant did not know “if [White] had a knife or a gun or what.” In response, defendant pulled a gun from his waist and started firing because he did not know what White was going to do. Defendant stated, “I honestly really did not know what he was gonna do. I really didn’t.” When asked how many times he fired the gun, defendant could not “really say how

many times,” but he “was scared ‘cause I thought he was gonna come at me, you know, like he did the first time, you know. I didn’t know what he was gonna do.”

¶ 35 Defendant acknowledged that he did not actually see any weapon but “I seen [*sic*] him going for something, and I didn’t know if it was a weapon or not. It could have been one. I don’t know. I’m not sure.”

¶ 36 Defendant testified that he walked away after he shot at White. He was not even sure whether he had hit White. Defendant walked to his sister’s place, where he changed his shirt and hid the gun in the basement. Then he returned to his sister’s apartment, where he lay down on the couch. Defendant did not call the police at the time because he was scared.

¶ 37 Defendant denied knowing anything about the shooting when the police first spoke to him because he was scared. He first learned that White had actually been shot when the police spoke to him. The subsequent statement he gave, when he told the police that White had the gun, was not completely truthful, but he told that story because he felt intimidated and was scared. However, he later told the police what really happened.

¶ 38 Defendant reiterated that he fired the gun because he feared for his life and that he did not know what White was going to do. He thought White was going to “pull a gun or—I didn’t know what he was gonna do.”

¶ 39 At the close of defendant’s case-in-chief, the State introduced a certified copy of defendant’s 2002 conviction for the Class 4 felony of possession with intent to deliver cannabis.

¶ 40 Following closing arguments, the jury found defendant not guilty of the aggravated battery charge (count II), which alleged that defendant shot White in the chest area with a handgun, but the jury found defendant guilty on the remaining five charges. The jury also found that, during the

commission of the offense of attempted murder, defendant had personally discharged a firearm proximately causing White great bodily harm.

¶ 41 Defendant filed a 13-page, handwritten, *pro se* motion complaining of defense counsel's representation. Defense counsel filed a three-paragraph motion for a new trial on the same date, alleging that the verdict was contrary to the law and the evidence, the State did not prove defendant guilty beyond a reasonable doubt, and the trial court erred in denying defendant's motions to suppress statements and physical evidence.

¶ 42 On inquiry, defendant agreed with the trial court's summarization of defendant's allegations of ineffective counsel as counsel's failure to: (1) question all of the police officers called by the State; (2) file a motion to reconsider the court's rulings on the various pre-trial motions defense counsel had filed; (3) challenge the voluntariness of the consent to search given by defendant's sister; and (4) properly argue the motion to suppress statements. Defense counsel and the State responded to the allegations. At the close of the inquiry, the trial court found that defendant had not raised any complaints relating to defense counsel's performance that rose to the level of ineffective assistance.

¶ 43 Following defendant's statement in allocution, the receipt of evidence in aggravation, and argument by the parties, the trial court agreed that defendant should be sentenced only on the attempted murder count, with all the other counts being merged.

¶ 44 Prior to issuing the sentence, the court addressed defense counsel's motion for a new trial. Defendant stated that he no longer wished to be represented by counsel and wanted to proceed *pro se*. The court granted the request, after it advised defendant of the sentencing range for attempted murder and questioned him regarding his level of education and whether any outside factors influenced his decision. The court then denied the motion for a new trial and announced its sentence.

The court stated that it had not heard any statement from defendant “really of remorse or understanding of the consequences of [his] behavior on society or the individuals involved,” and that defendant just felt sorry for himself and treated himself as the victim. The court stated, “You went over to this house with a loaded gun, and you shot a man in a—in what you consider to be self-defense but to which the jury found absolutely was not a self-defense case.”

¶ 45 The court sentenced defendant to 30 years’ imprisonment on the underlying attempted murder conviction and an additional 25 years’ for the gun enhancement. The court reappointed defense counsel, who filed a timely notice of appeal on defendant’s behalf.

¶ 46

ANALYSIS

¶ 47

Ineffective Assistance of Trial Counsel

¶ 48 Defendant contends that he was denied the effective assistance of trial counsel when counsel failed to: (1) sever the charges of attempted murder and aggravated battery from the charges of UUC and armed habitual criminal; (2) introduce evidence regarding White’s violent tendencies to corroborate defendant’s claim of self-defense; (3) object to evidence regarding the presence of children at the scene of the shooting; and (4) object to a jury instruction directing the jury to consider evidence of a prior altercation between defendant and White only for the purpose of showing defendant’s motive to shoot White.

¶ 49 To prevail on a claim of ineffective assistance of counsel, a defendant must establish both: (1) that his counsel’s representation fell below an objective standard of reasonableness; and (2) that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *People v. White*, 221 Ill. 2d 1, 20 (2006). If a reviewing court “finds that the defendant did not suffer

any prejudice from counsel's acts or omissions, it need not consider whether counsel's performance was deficient." *White*, 221 Ill. 2d at 20-21.

¶ 50 To establish a deficient performance, a defendant "must prove that counsel's performance, as judged by an objective standard of competence under prevailing professional norms, was so deficient that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Bew*, 228 Ill. 2d 122, 127-28 (2008). Moreover, to establish a deficient performance, a defendant "must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Trial counsel's "strategic choices are virtually unchallengeable" and even "mistakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent." The fact that "another attorney might have pursued a different strategy is not a factor in the competency determination." *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 51 Prejudice based upon trial counsel's representation requires a defendant to affirmatively show "actual prejudice, not mere speculation as to prejudice." *Bew*, 228 Ill. 2d at 135-36. Therefore, prejudice cannot be presumed or be based on mere conjecture or speculation. *Palmer*, 162 Ill. 2d at 481. A "reasonable probability" of a different outcome means a "probability sufficient to undermine confidence in the result of the trial." *People v. Rizzo*, 362 Ill. App. 3d 444, 452 (2005).

¶ 52 Failure to Move for a Severance

¶ 53 Defendant first contends that his counsel was ineffective by failing to file a motion to sever the charges of UUW and armed habitual criminal from the charges of attempted murder and aggravated battery with a firearm. The charges of UUW and armed habitual criminal were based on defendant's two prior Class 2 felony convictions, in 2000 and 2002, for violations of the Controlled

Substances Act. Defendant maintains that the introduction of evidence that he was involved in illegal drug activity on more than one occasion had no bearing on the question of what his state of mind was at the time he shot White or the reasonableness of his actions in that regard but served only to portray him as a bad person with criminal propensities.

¶ 54 Ordinarily, charges arising out of the same transaction should be tried together. 725 ILCS 5/114-7 (West 2008). Where it appears that the joinder of related charges will result in undue prejudice to the defendant, a court may order that the charges be severed for trial. 725 ILCS 5/114-8 (West 2008). However, generally it is the defense that must move for a severance and its decision not to seek one, although it may prove unwise in hindsight, is regarded as a matter of trial strategy. *People v. Gapski*, 283 Ill. App. 3d 937, 942 (1996).

¶ 55 In support of his argument, defendant relies primarily on *People v. Edwards*, 63 Ill. 2d 134 (1976), and *People v. Bracey*, 52 Ill. App. 3d 266 (1977). In *Edwards*, the defendant was convicted of the offenses of armed robbery, robbery, and UUW. The supreme court held that the trial court erred in refusing to grant the defendant's motion to sever the UUW charge from the armed robbery charge. During trial, a stipulation was read to the jury stating that the defendant had been convicted of burglary. The jury also was instructed that the indictment was not evidence against the defendant, but only a formal accusation, and that the evidence of the prior conviction was to be considered "solely in determining the defendant's credibility as a witness and not as evidence of defendant's guilt." *Edwards*, 63 Ill. 2d at 137. The supreme court held that there was a "significant risk that the trier of fact will use evidence of a prior conviction in determining the defendant's guilt or innocence of an unrelated offense" and "that the joinder of the armed robbery and the felonious unlawful use of weapons charges created such a strong possibility that the defendant would be prejudiced in his

defense of the armed robbery charge” that it was an abuse of the trial court’s discretion to deny a severance. *Edwards*, 63 Ill. 2d at 140.

¶ 56 In *Bracey*, the defendant was convicted of the offenses of murder, attempted murder, aggravated battery, UUW, and felonious UUW. The weapons offenses required proof of the defendant’s prior conviction, which was armed robbery. The trial court denied the defendant’s motion to sever the enhanced weapons count from the other charges, and evidence of the prior conviction was introduced. Relying on *Edwards*, the appellate court held that the trial court abused its discretion in denying a severance. *Bracey*, 52 Ill. App. 3d at 273. The court noted that “evidence which directly, or by inference, tends to show that the accused has committed another criminal offense is inadmissible where its only value is to create an inference that because an individual has committed other crimes he is more likely to have committed the one for which he is on trial.” *Bracey*, 52 Ill. App. 3d at 273. The court found that, although the jury was instructed to consider the prior convictions only as to the weapons offense and in determining the defendant’s credibility, and not as evidence of guilt, the error was not cured. “If such limiting instructions were insufficient to prevent the defendant from being prejudiced by the introduction of evidence of his prior convictions where such evidence was offered to impeach that defendant’s credibility,” it was difficult for the court to see how such instructions could effectively prevent prejudice where the evidence was offered to establish an element of the crime of the felonious unlawful use of a weapon. *Bracey*, 52 Ill. App. 3d at 274-75.

¶ 57 The State argues that defendant was not prejudiced by the admission of the prior convictions. The State points out that the crucial factual issue at trial was whether defendant or White was the aggressor at the incident; *i.e.*, whether defendant shot White in self defense in response to affirmative

aggressive conduct by White. The State notes that it is undisputed that defendant carried a loaded gun to the residence on Seventh Street where White was present and defendant shot him three times, and that defendant's prior convictions consisted of a violation of the Controlled Substances Act in 2000 and possession with intent to deliver a controlled substance in 2002. The State argues that, while the court in *Bracey* noted that a jury might infer a criminal propensity from any prior conviction of a defendant, there is a greater chance of prejudice when the prior conviction was the same or generally similar offense for which the defendant is on trial. Here, the prior convictions were not similar to the offenses for which he was being tried. Additionally, the offenses on trial were not in any way related to the possession, use, or sale of controlled substances and the jury was instructed as to the limited purpose for which evidence of the prior convictions were to be used.

¶ 58 In *Gapski*, a jury convicted the defendant of one count of criminal sexual assault and one count of UUW. We rejected the argument that trial counsel was ineffective by failing to move to sever the UUW count, which was based on the defendant's burglary conviction, from the count of criminal sexual assault. We found that the trial counsel's failure to seek a severance could be viewed as a matter of trial strategy. *Gapski*, 283 Ill. App. 3d at 942. We observed that "counsel no doubt anticipated that the defendant would testify at trial and that his credibility could be impeached with his prior felony." *Gapski*, 283 Ill. App. 3d at 942 (citing *People v. Montgomery*, 47 Ill. 2d 510, 515-16 (1971)). Thus, we concluded that, regardless of whether the two counts were severed, the jury would have been aware that the defendant had a prior felony. *Gapski*, 283 Ill. App. 3d at 942. We ascertained that defense counsel may have "felt that it made sense to try for an acquittal of both counts in one proceeding, thinking that the impact of the additional conviction would not be significant." *Gapski*, 283 Ill. App. 3d at 943. We noted further that the jury for the sexual assault

count would hear all the evidence regarding the related weapons charge whether or not the counts were severed because the evidence regarding the weapons charge was related to the sexual assault count as an admission against the defendant's interest. *Gapski*, 283 Ill. App. 3d at 943-44.

¶ 59 Unlike in *Edwards*, the defendant in *Gapski* had at least one felony conviction that would be heard by the jury even if the counts were severed. Additionally, in *Edwards* (as well as *Bracey*), the defendant had sought a motion for severance; whereas in *Gapski*, the defendant did not seek a severance. Accordingly, we determined that counsel's decision not to seek a severance could be viewed as a matter of trial strategy. *Gapski*, 283 Ill. App. 3d at 943.

¶ 60 We find the reasoning in *Gapski* applicable here and conclude that defense counsel's decision not to move for a severance was a matter of trial strategy. Even if the UUW and the armed habitual criminal charges had been severed, the jury still would have been made aware of defendant's prior convictions at a trial for attempted murder and aggravated battery. Counsel anticipated this knowing that defendant would testify regarding self defense and that defendant's credibility would be impeached with the prior felony convictions.

¶ 61 Defendant argues that the drug offenses are not proper impeachment. We disagree. Felony drug offenses fit the *Montgomery* criteria and are admissible as impeachment if their probative value outweigh their prejudicial effect. See *People v. Harden*, 2011 IL App (1st) 092309, ¶¶ 47-48. Moreover, in a case of self-defense, credibility is critical and the jury should be allowed to hear this evidence. The trial court conducted a weighing process under *Montgomery* as to the Class 4 offense and determined that it was not an abuse of discretion to admit it as impeachment.

¶ 62 Defendant further points out that, because the weapons offenses were part of the trial, the State was allowed to argue his propensity to commit the offenses based on his prior felony

convictions, as the prosecutor cited, during both the opening statement and closing argument, defendant's status as a "convicted felon." Defendant contends that, if the convictions had been admitted only for impeachment, this type of "propensity" argument would not have been allowed. Defendant also observes that the jury acquitted him of aggravated battery with a firearm based upon the shot to White's chest, which defendant maintains is a reflection that the jury may have believed that this first shot was fired in self-defense, but they rejected defendant's self-defense claims with respect to the remaining shots. Had the prejudicial information regarding his prior drug convictions not come in, defendant asserts that there is a "reasonable probability" that the jury may have taken a more generous view of the evidence and given him more favorable consideration to his claim of self-defense on the remaining counts.

¶ 63 While the decision not to seek a severance might have proved unwise in hindsight, we cannot hold that it was a matter of ineffective assistance (see *Gapski*, 283 Ill. App. 3d at 942), as counsel was aware that defendant was to testify at trial and that his credibility would be impeached with the prior convictions. The jury was informed that White had been convicted of "felony possession with intent to deliver a controlled substance" and that he was on probation for that conviction at the time of the incident. Thus, we find no rational basis for the jury to consider it more likely that defendant, rather than White, was the aggressor because of controlled substance convictions six and eight years earlier, when White also had been convicted of a controlled substance offense more recently. There is simply no basis in the record to conclude that the jury's acquittal on one of the six counts was based on its acceptance of defendant's self-defense claims. The jury may very well have found the evidence as to one count insufficient or the verdicts could have been based on compromise, lenity, or confusion. See *People v. Ferro*, 195 Ill. App. 3d 282, 290 (1990). While both parties presented

plausible explanations for the jury's acquittal of aggravated battery with a firearm based upon the shot to White's chest, we will not speculate as to possible rationales for the jury's verdict.

¶ 64 Furthermore, there is no showing that defendant suffered any prejudice, as the evidence against defendant was overwhelming. As stated, all of the witnesses testified that White did make any aggressive movements or threats toward defendant. White did not have a gun or reach into his waistband or act like he had a weapon, and defendant pulled out a gun and started shooting and continued to do so after White ran up the stairs of the house. In addition, the police found a loaded magazine for a handgun containing several bullets in defendant's pocket after he was arrested. Officers also recovered a silver 9mm handgun, a black and yellow t-shirt that was identified as the shirt defendant had been wearing at the time of the shooting, and two bullets from a storage room in the basement of the apartment building where they found defendant. Officers also recovered several spent 9mm shell casings from the front yard, the foyer area, at the base of the stairs going to the second floor and, on the interior staircase of the house on Seventh Street. The only evidence of self-defense came from defendant, but he gave three different versions of the incident to the police. Thus, we conclude that defendant has not established that his counsel's alleged ineffective assistance prejudiced him. See *People v. Gonzalez*, 339 Ill. App. 3d 914, 925 (2003) (defendant failed to establish a reasonable probability that he would have been acquitted in separate trials had counts been severed).

¶ 65 Failure to Introduce Evidence of White's Prior Conviction for Aggravated Assault

¶ 66 Defendant next contends that defense counsel was ineffective for not seeking admission of White's prior court supervision for the misdemeanor offense of aggravated assault. Defendant

claims this would have been admissible to show the victim's propensity for violence and to corroborate defendant's testimony as to the victim coming at him aggressively.

¶ 67 Where a defendant raises self-defense as an affirmative defense and presents some evidence in support of the defense, evidence of the victim's violent or aggressive character may be admissible to show the circumstances confronting the defendant, the extent of the apparent danger, and the motive or state of mind by which the defendant was influenced. *People v. Dennis*, 373 Ill. App. 3d 30, 52 (2007). More specifically, a victim's aggressive and violent character may be admissible to support a theory of self-defense in two ways. *People v. Lynch*, 104 Ill. 2d 194, 199–200 (1984). First, the defendant's knowledge of the victim's tendencies for violence necessarily affects his state of mind in the perception of and reaction to the victim's behavior. *Lynch*, 104 Ill. 2d at 200. Thus, deadly force that may be unreasonable in an altercation with a nonviolent person may be reasonable in response to the same behavior by a person known to have violent and aggressive tendencies. *Lynch*, 104 Ill. 2d at 200. The defendant's knowledge of the victim's character is necessary for evidence of this nature to be probative and admissible. *Lynch*, 104 Ill. 2d at 200.

¶ 68 Second, where there are conflicting accounts as to who the initial aggressor was in a confrontation, evidence of the victim's propensity for violence and aggressiveness may be admissible to support the defendant's version of the facts. *Lynch*, 104 Ill. 2d at 200. In other words, this type of evidence is probative to assist the trier of fact in judging the credibility of the witnesses and to provide the trier of fact with a more complete picture of what occurred. *Lynch*, 104 Ill.2d at 200.

¶ 69 In this case, the record does not support defendant's argument because the record does not show the underlying facts and circumstances of the aggravated assault arrest and whether or not the facts would have been relevant to the victim's aggressive and violent character. A person commits

aggravated assault when “in committing an assault” one of 21 aggravating conditions is present. Those conditions involve not only the use of a deadly weapon, but it also includes being “hooded” or “masked;” the assault is on a “teacher” or “park district” employee; the assault is on the “driver” or “passenger” of a “public transportation” vehicle; the individual assaulted is on “a public way, public property, or public place of accommodation or amusement”; or “knows the person assaulted to be a sports official or coach.” 720 ILCS 5/12-2(a)(1)-(19) (West 2010). Thus, the underlying facts of the aggravated assault are important to determine whether the offense involved is reasonable reliable evidence of violent or aggressive tendencies.

¶ 70 Even if we concluded the aggravated assault is a crime of violence, White was never convicted of this offense, as he received court supervision. As a general rule, evidence of an arrest without a conviction is insufficient to establish that a victim has a reputation for violence and aggressiveness since an arrest alone does not establish that the person arrested actually performed the acts charged. *Dennis*, 373 Ill. App. 3d at 53. We note, however, that the jury did hear evidence of White’s prior act of violence against defendant, which the jury could consider in weighing the witness’s credibility.

¶ 71 Failure to Object to Testimony of Children Present During the Incident

¶ 72 Defendant next contends that counsel was ineffective for failing to object to evidence that there were children in the area at the time of the shooting. Defendant postures that such evidence was irrelevant and prejudicial because it improperly suggested that his actions “endangered several children in the area” and “served only to portray [him] as a dangerous individual uncaring of the safety of innocent children.” We disagree.

¶ 73 Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of an action more or less probable than it would be without the evidence. *People v. Morgan*, 197 Ill. 2d 404, 455-56 (2001). Here, the testimony that children were in the area of the shooting was relevant to explain White’s actions when he ran into the house when the shooting started in order to protect the children on the porch.

¶ 74 The State also notes that defense counsel questioned White and other occurrence witnesses about the number of people on the porch, including the number of children, in an attempted to get the witnesses to contradict themselves. This clearly suggests that the decision not to object to evidence that children were present at the time of shooting was a tactical decision made by counsel.

¶ 75 Failure to Object to a Misleading or Confusing Jury Instruction

¶ 76 Defendant next contends that his trial counsel was ineffective by failing to object to the admission of Illinois Pattern Jury Instruction, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.14), which states:

“Evidence has been received that the defendant has been involved in conduct other than that charged in the indictment.

This evidence has been received on the issue of the defendant’s motive and may be considered by you only for that limited purpose.” IPI Criminal 4th No. 3.14.

Defendant contends that the instruction was confusing and misleading because it instructed the jury that it could *only* consider the evidence of the prior encounter between defendant and the victim on the issue of defendant’s motive for the shooting to the exclusion of his self-defense claim. Defendant asserts that the evidence of the prior altercation was “relevant and admissible to support

the defendant's claim that at the time of the shooting he was in fear of White and to show the reasonableness of that belief."

¶ 77 However, the jury also was given defense counsel's proffered instruction, a modification of Illinois Pattern Jury Instruction, Criminal No. 3.12x (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.12x), which states:

"In this case the State must prove beyond a reasonable doubt the proposition that the defendant was not justified in using the force which he used. You have heard testimony of Robert White's prior act of violence. It is for you to determine whether Robert White committed that act. If you determine that Robert White committed that act you may consider that evidence in deciding whether the State has proved beyond a reasonable doubt that the defendant was not justified in using the force which he used." IPI Criminal 4th No. 3.12x.

¶ 78 Defendant maintains that IPI Criminal 4th No. 3.12x did not cure any error in giving IPI Criminal 4th No. 3.14, as giving this instruction also was an error. Defendant points out that the Committee Comments to this instruction direct that the instruction should be given "*only* when evidence of the victim's prior conviction for a crime of violence has been admitted pursuant to *People v. Lynch*, 104 Ill. 2d 194, (1984)." (Emphasis added.) IPI Criminal 4th No. 3.12x, Committee Comments. Defendant argues that the *Lynch* material tendered to defense counsel—namely, White's prior aggravated assault—was not disclosed to the jury, and therefore, this instruction should not have been given under the circumstances of this case. During oral argument before this court, defendant asserted further that *Lynch* only applies where the defendant is not aware of the prior act. Defendant argues that this instruction did not direct the jury that they

could consider evidence of White's prior act of violence for purposes of determining whether White or defendant was the aggressor. We disagree.

¶ 79 Defense counsel tendered a modified IPI Criminal 4th No. 3.12x, which concerned White's prior act of violence, namely, the altercation between White and defendant, not White's prior aggravated assault arrest, which was not introduced into evidence at defendant's trial. IPI Criminal 4th No. 3.12x does not exclusively apply to prior convictions; it may be modified to include the victim's prior violent act. This jury instruction also informs the jury to consider evidence of the victim's prior violent act in deciding whether the State has proved beyond a reasonable doubt that the defendant was not justified in using the force which he used.

¶ 80 Defendant's assertion that *Lynch* only applies where the defendant is not aware of the prior act is also incorrect. In *Lynch*, the supreme court held that "when the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence, *regardless of when he learned of it.*" (Emphasis added.) *Lynch*, 104 Ill. 2d at 200.

¶ 81 We conclude that IPI Criminal 4th No. 3.12x properly clarified the delineation between the actions of defendant and the victim. Considering both IPI Criminal 4th No. 3.14 and No. 3.12x together, as we must (see *People v. Parker*, 223 Ill. 2d 494, 501 (2006)), we do not find the instructions misleading or confusing. The jury was fully and fairly instructed regarding the prior incident between White and defendant on the issue of self-defense. As the State properly points out, counsel "vigorously" contended that defendant acted in self-defense and reasonably believed that defendant had to protect himself from White based upon their prior altercation. Counsel also informed the jury during closing argument that "you'll be able to take into account the prior action

that Robert White committed against [defendant]; a violent act, punching him out.” Accordingly, we do not find that trial counsel was ineffective by failing to object to the admission of IPI Criminal 4th No. 3.14.

¶ 82 Sentencing

¶ 83 At sentencing, the trial court merged all of the offenses and sentenced defendant only on the conviction for attempted murder. We observe that, under the law, the trial court should have sentenced defendant to consecutive sentences for the offense of armed habitual criminal and attempted murder. See *People v. Mimes*, 2011 IL App (1st) 082747, ¶¶ 48-54. Generally, errors in the imposition of mandatory consecutive sentences are void. See *People v. Arna*, 168 Ill. 2d 107, 111-113 (1995) (sentence which is contrary to a statutory requirement is void and the appellate court has the authority to correct it at any time). However, in this case, the prosecutor stated that she believed, based on case law, that the other offenses merged with the offense of attempted murder and only sought to have defendant sentenced for the attempt murder. Thus, the prosecutor abandoned the argument and effectively *nol-prossed* the remaining offenses. See *People v. Artis*, 232 Ill. 2d 156, 169 (2009) (power of the prosecutor to *nol-pros* a charge extends throughout the trial proceedings until sentence is imposed). We therefore need not remand for a re-sentencing hearing to impose consecutive sentences.

¶ 84 Turning now to defendant’s alternative argument regarding the sentence, he contends that he was denied a fair sentencing hearing because the trial court imposed sentence under the mistaken belief that the jury rejected his self-defense claim when it commented at sentencing that the jury had rejected the claim *in toto*. Defendant asserts that the trial court erred because the jury must have believed that he acted in self-defense when they found him not guilty of the charge of aggravated

battery with a firearm to the chest. Defendant acknowledges that this issue was never raised in a post-sentencing motion and is subject to forfeiture but that forfeiture does not apply because he received improper Supreme Court Rule 605(a) admonishments. In the alternative, defendant requests that we review this for plain error. However, the State has forfeited the forfeiture argument raised by defendant by failing to respond to his argument that forfeiture does not apply. See *People v. Flores*, 406 Ill. App. 3d 566, 571, n.1 (2010).

¶ 85 The jury was specifically instructed that, in order to find defendant guilty of attempted murder, the State must prove that defendant was not justified in using the force which he used. The jury found that “without lawful justification and with the intent to kill Robert White[,] the defendant personally discharged a firearm that proximately caused great bodily harm to Robert White.” Consequently, the jury clearly rejected defendant’s self-defense claim regarding the conviction for which he was sentenced. Thus, the trial court’s comments were appropriate in light of the fact that the jury convicted defendant of attempting to murder the victim.

¶ 86 A trial court has considerable discretion in imposing a sentence and in weighing aggravating and mitigating factors, and such determinations are “entitled to great weight.” *People v. Young*, 250 Ill. App. 3d 55, 64 (1993). As in this case, when a sentence is within the statutory limits, the sentence “is presumptively correct, and only where such a presumption has been rebutted by an affirmative showing of error will a reviewing court find that the trial court has abused its discretion.” *People v. Miller*, 284 Ill. App. 3d 16, 27 (1996). Here, the record establishes that the trial court provided defendant with a full and fair sentencing hearing and exercised proper discretion in imposing sentence. Accordingly, we find the trial court did not abuse its discretion.

¶ 87

CONCLUSION

¶ 88 For the reasons stated, the judgment of the circuit court of Winnebago County is affirmed.

¶ 89 Affirmed.