2017 IL App (1st) 14-2566-U

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THIRD DIVISION
March 15, 2017

No. 1-14-2566

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellant,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 12 CR 19279
JEFFREY GRAFTON,	)	
	)	The Honorable
Defendant-Appellee.	)	Mauricio Araujo,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Cobbs concurred in the judgment.

ORDER

Held: The trial court's admission into evidence of a "video of a video of a video" of the shooting, did not violate the best evidence rule, where the testimony of the police officer who obtained the video established the prior existence of the presently unavailable original video, the authenticity of the officer's substitute video and the detective's diligence in attempting to procure the original video. Further, the trial court did not abuse its discretion in permitting the victim to identify the defendant from that surveillance video. Pursuant to *People v. Thompson*, 2016 IL 118667, the victim had contact with the defendant that the trier of fact did not posses and therefore his opinion would have proved helpful to the trial judge. The trial court's admission of a police officer's out-of-court identification of the defendant as the shooter while improper hearsay constituted harmless error in the light of overwhelming evidence of the defendant's guilt. The State proved the defendant guilty beyond a reasonable doubt, where three eyewitnesses identified the defendant as the shooter, and their testimony was corroborated by the surveillance video. Pursuant to *People v. McFadden*, 2016 IL

117424, the defendant's armed habitual criminal conviction can stand even though it is premised on the defendant's prior AUUW conviction, which is *void ab initio* pursuant to *People v. Aguilar*, 2013 IL 112116. The trial court's use of the defendant's prior armed robbery conviction to prove both of the predicate felonies necessary to find the defendant guilty as an armed habitual criminal was not an improper double enhancement. In addition, the defendant's attempt murder and armed habitual criminal convictions were not based upon the same physical act so as to violate the one-act, one-crime rule. The defendant failed to establish that he was denied his constitutional right to effective representation of trial counsel, where he failed to establish prejudice pursuant to *Strickland v. Washington*, 466 U.S. 668. The trial court properly sentenced the defendant to consecutive sentences for his attempt murder and armed habitual criminal convictions with no double enhancements.

¶ 1 Following a bench trial in the circuit court of Cook county, the defendant, Jeffrey Grafton, was found guilty of attempt first degree murder, aggravated battery with a firearm, armed habitual criminal and aggravated unlawful use of a weapon (hereinafter AUUW). For purposes of sentencing, the aggravated battery conviction was merged with the attempt first degree murder conviction and the AUUW conviction was merged with the armed habitual criminal conviction. Accordingly, the defendant was sentenced to consecutive terms of 45 years' and 20 years' imprisonment. On appeal, the defendant argues that: (1) he was denied a fair trial by the court's improper admission of (a) hearsay testimony and (b) impermissible lay opinion; (2) the State's introduction of a "video of a video of a video" replete with police voice-overs, violated the best-evidence rule; (3) the State failed to prove him guilty beyond a reasonable doubt; (4) the State failed to prove the requisite two applicable predicate felonies for the armed habitual criminal conviction without double enhancement; (5) his conviction for armed habitual criminal is unconstitutional where the predicate conviction for AUUW violates the second amendment; (6) he was denied his constitutional right to effective assistance of counsel where counsel failed to challenge inadmissible impeachment testimony and inconsistent statements; (7) his convictions for attempt first degree murder and armed habitual criminal violated the one-act one-crime rule; and (8) the imposition of consecutive sentences is reversible error because the trial court used the

same factor of "severe bodily injury" to enhance the sentence twice, and because it believed that consecutive sentencing was mandatory. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 The record before us reveals the following facts and procedural history. In October 2012, the defendant was charged in a 14-count indictment with numerous crimes arising from the September 17, 2012, shooting of the victim, Donald Rogers. The State proceeded with only four counts, namely: (1) attempt first degree murder, for having proximately discharged a firearm that caused great bodily harm (Count 4); (2) armed habitual criminal (Count 10); (3) aggravated battery with a firearm (Count 8); and (4) AUUW (Count 14).

¶ 4 A. Motion *In Limine*

¶ 5 Prior to trial, the State filed a motion *in limine* pursuant to *People v. Montgomery*, 47 Ill. 2d 510 (1971), seeking permission to introduce three of the defendant's prior convictions for purposes of impeachment if the defendant chose to testify at trial. According to that motion, the State sought to introduce the following prior convictions: (1) a February 7, 2008, conviction for AUUW in which the defendant was sentenced to 42 months' imprisonment (case No. 07 CR 20784); (2) a November 5, 1999, armed robbery conviction for which the defendant was sentenced to 10 years' imprisonment, and from which he was discharged from mandatory supervised release on July 15, 2006 (case No. 98 CR 11866); and (3) two February 26, 1999, convictions for terrorism and possession of a controlled substance with intent to deliver in which the defendant was sentenced to 10 years' imprisonment on each count to be served consecutively to each other (case No. CR 130586), but concurrently, to the armed robbery sentence (case No. 98 CR 11866).

¶ 6 At the hearing on the State's motion, the trial court inquired if defense counsel had any

objections. Defense counsel stated that he did not, so long as the three prior convictions comported with the 10-year limitation set forth in *Montgomery*, 47 Ill. 2d 510. The State then described the convictions it sought to introduce to the court in the following manner: (1) a ten-year sentence in 1999 for armed robbery; (2) two consecutive ten-year sentences (for a total of 20 years) in Iowa for terrorism and possession with intent to deliver a controlled substance, which were served concurrently with the 10 year Illinois armed robbery sentence; and (3) a 42-month sentence on February 7, 2008, for AUUW. The State argued that because the defendant had been "discharged from mandatory supervised release or parole in 2006" for his Illinois armed robbery sentence, which he was serving concurrently with the Iowa 20-year sentence, all three convictions (armed robbery, terrorism and possession of a controlled substance with intent to deliver) fell within the 10 year limit required under *Montgomery*. With respect to the prior AUUW conviction, the State argued that because the defendant had been "released from – sentenced on February 7th of 2008" the AUUW conviction also fell within the ten-year *Montgomery* rule.

¶ 7 Without objection from defense counsel, the trial court granted the State's motion *in limine*, permitting the State to use all three prior convictions for purposes of impeachment should the defendant choose to testify at trial.

¶ 8 B. Bench Trial

¶ 9 On December 12, 2013, the parties proceeded with a bench trial at which the following evidence was adduced. The victim, Donald Rogers (hereinafter the victim), first testified that on September 17, 2012, at about 10 p.m., he went to the tire shop at 4339 West Madison Street to fix a flat tire on his wife's car. The victim testified that the car was a gold 2005 Chevy Impala. The victim knew Billy Davis (hereinafter Davis), who worked at the tire shop. When the victim

arrived at the tire shop he parked the car in the back alley and went to get Davis. Although Davis usually repairs cars in the alley, this time he instructed the victim to move his car to the front of the shop. The victim obliged and parked the car, facing east, on Madison Street, right in front of the shop. Davis then began working on the front right tire, while the victim stood next to him on the sidewalk. At trial, the victim identified photographs of the car parked in front of the shop.

¶ 10 The victim next testified that while he was standing next to Davis he observed two individuals, whom he had never seen before, approaching them. One was a man on foot, and the other an individual who rode up on a bicycle. The victim made an in-court identification of the defendant as the pedestrian. According to the victim, the defendant walked up to the tire shop door and stood there with his right hand in his pocket. The individual on the bicycle approached the pedestrian and the two had a brief conversation.

¶ 11 After Davis had finished changing the tire, he proceeded to the tire shop, and the victim followed him across the sidewalk toward the shop. As the victim was about to walk by the defendant, the defendant pulled a black gun out of his right pocket, said "F**k this," aimed it at the victim's head and shot at him. The victim stated that he ducked and started running into the middle of the street, which was filled with traffic, but that the defendant chased after him. The victim felt shots penetrating his back and shoulder, and after that, the defendant striking him with the gun on the back of the head.

¶ 12 The victim saw a Chicago police car traveling eastbound on Madison Street, heard the defendant drop the gun and watched him fleeing northbound across the street. The victim fell to the ground and observed the police car chase after the defendant.

¶ 13 Soon thereafter an ambulance arrived and the victim was transported to Mount Sinai

Hospital. The victim underwent surgery for five bullet wounds, some in the neck and some in the chest area. At trial, he demonstrated all five scars, and testified that he still has one bullet remaining in his neck that the physicians were unable to remove.

¶ 14 The victim next testified that when he observed the defendant moments before the shooting, he was only four or five feet away from him. The victim explained that even though it was nighttime, because there are businesses on the street, there were lights illuminating the sidewalk where the defendant stood. According to the defendant, it was about 60 degrees Fahrenheit that day, and the streets were wet because it had rained previously.

¶ 15 The victim further averred that when the defendant started shooting at him, he saw fire and sparks coming from the gun, but did not hear a regular gunshot (which he had heard before and was familiar with). He described the sound coming from the gun as something like "chu chu chu, [like the gun] had something on it."

¶ 16 The victim stated that on September 18, 2012, while still at Mount Sinai Hospital, he spoke to two Chicago police detectives, who showed him a photo lineup, from which he selected the defendant as the shooter. The photo lineup was introduced as an exhibit into evidence. It contains photographs of six African American men (three per row), and indicates a circle mark, date and the victim's signature, next to the third individual in the top row, depicting the defendant's photograph.

¶ 17 At trial, the victim was next asked if he had previously viewed a video of the incident and he stated that he had. He averred that the video truly and accurately reflected what had happened. The video was then introduced into evidence, and the victim testified to its contents (with the

help of the trial court).[1] For the record, the court indicated that the video was actually a "video of a video."

¶ 18 Using the video, the victim testified that his vehicle was seen in the far right corner of the screen. He identified the two men standing in front of his vehicle as himself and Davis. The video next showed the individual whom the victim identified as the defendant walking on the sidewalk and approaching the open door of the tire shop, immediately followed by the bicyclist. On the video, the defendant hugs the bicyclist and they appear to stand on the corner having a conversation. According to the video, an individual carrying a car jack (presumably Davis) then walks by the defendant, while the victim stays behind. As the victim follows behind Davis, all of a sudden the defendant pulls out his arm and holds it straight out, shooting at the victim and running after him into the street. The victim falls to the ground in the middle of the street, while the defendant disappears from the screen, chased by a police car that makes a U-turn on Madison Street. The video next shows the individual on the bicycle cycling over to the victim lying in the middle of the street and talking with him.[2]

¶ 19 In the video, the individual identified by the victim as the defendant wore a black garment

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[1] At trial the parties subsequently stipulated to the content of the video.

[2] We further note that the video, which is a video of a video is 4 minutes 56 seconds in length. The video contains a soundtrack of voices of unseen individuals replete with conversation, narration and commentary. A human arm from a person seemingly in a police uniform is visible on the video handling a VCR. At the outset a female voice announces that a USB device is "broke[n]." The video shows the first frames of the surveillance video on the VCR being fast-forwarded. The surveillance video then resumes in real time when two persons enter the scene in front of the tire shop (the individual on the bicycle followed by the shooter).

(hoodie) on top of a white garment, as well as dark baggie shorts, and white sneakers with black stripes.

¶ 20 At trial, the victim identified a photograph of the defendant taken upon the defendant's arrest and testified that the clothing the defendant wore in that photograph was the same as the clothing worn by the man who shot him. On cross-examination, however, the victim admitted that this was not the case, because according to the video, at the time of the shooting, the perpetrator wore shorts and a black hoodie on top of a white shirt, while the photograph depicted the defendant only in shorts and a white T-shirt.

¶ 21 The victim admitted that he has a prior 2006 conviction for possession of a controlled substance and that he had a pending felony drug case for possession of a controlled substance with intent to deliver. He testified, however, that the State had not offered or promised him anything in return with regard to that case, in exchange for his testimony in the defendant's trial.

¶ 22 On cross-examination, the victim admitted that while he was standing in front of the tire shop neither the defendant nor the individual on the bicycle spoke to him, or asked him for money, or yelled any gang slogans at him. He acknowledged that the defendant never gave him a reason for shooting him.

¶ 23 On cross-examination, the victim also admitted that he never gave the police a description of the man that shot him. In addition, he acknowledged that before the defendant shot him, he only had a split second, which he described as "bam" to observe his face. The victim stated, however, that while Davis was fixing his tire, he was watching the pedestrian's face (for about 7 to 10 minutes), and that he had a photographic memory. When asked, the victim could not, however, describe the individual on the bicycle, and could not explain why he had focused on the defendant and not the cyclist while his tire was being repaired.

¶ 24 On cross-examination, the victim was asked if he was a member of any gangs, and responded in the negative.

¶ 25 Davis next testified that he owns the tire shop at 4339 West Madison Street, and that he went to grammar school with the victim, and that they are friends. He stated that on September 17, 2012, the victim came to his tire shop because he had a flat tire on the front passenger side. The victim pulled up with his car in the back alley and honked. Davis went to the door to see who it was. At that point, he saw a van pass by and a man standing in the alley, so he asked the victim if the man was with him. When the victim told him he was not, Davis became uneasy and told the victim to pull up to the front of the store. Davis then locked the back door of his store, and proceeded to the front where he met the victim on the street. Davis then worked on the victim's car, while the victim stood next to him. Davis had to go in and out of the tire shop a couple of times to select the appropriate replacement tire. While working outside, Davis saw a "young lady" on a bicycle approach the tire shop, followed by a pedestrian. The two struck up a conversation on the sidewalk in front of the tire shop. According to Davis, the victim (who had also been going in and out of the tire shop) had just come out of the store when these two individuals appeared. When Davis finished working on the tire, he walked by the two individuals and entered his shop. About two minutes later he heard what sounded like firecrackers. He jumped back and looked out and saw the victim running toward the middle of the street with a man behind him, trying to hit him in the head with a gun. Davis described the gun as long, with something built on top of it, not "like a regular gun," which he had seen "plenty of." At that moment, the police pulled up, and Davis observed the man drop the gun and run northbound.

¶ 26 Davis went to the victim who told him he had been shot. After the ambulance arrived to take

the victim, Davis remained on the scene. The police later brought an individual for him to view. Davis identified the person as the man who chased the victim into the street and tried to hit him with the gun. He made an in-court identification of the defendant as that individual.

¶ 27 On cross-examination, Davis admitted that during this show-up, he could not see the defendant's clothes because the defendant was seated inside a police squad car. Davis could therefore not see how much the defendant weighed nor how tall he was. He stated that all he could see was the defendant's face. On cross-examination, Davis further admitted that the only opportunity he had to observe the defendant's face was as he passed by him on the sidewalk to go into his tire shop. He, therefore, admitted he did not have a "great opportunity to study the face" of the perpetrator.

¶ 28 Chicago Police Officer Salvador Michael Soraparu (hereinafter Officer Soraparu) next testified that at about 10:15 p.m. on September 17, 2012, together with his partner Officer Melissa Schroeder (hereinafter Officer Schroeder), he was in the vicinity of Davis' tire shop, on special assignment for neighborhood violence reduction. At about 10:18 p.m., Officer Soraparu was driving his marked squad car eastbound on Madison Street, between Kildare Avenue and Kostner Avenue, when he heard several muffled gunshots. Officer Soraparu described the sound as a CO2 gun with pellets, and therefore much quieter than a real gunshot.

¶ 29 Officer Soraparu then observed an individual chasing the victim into the street, firing from a dark colored automatic or semiautomatic pistol. The individual was running form the south side of Madison Street toward the median, chasing and shooting the victim. He was about 10 to 15 feet away from the officer's vehicle, and the officer could see his profile. The officer made an in-court identification of the defendant as the man he observed chasing and firing at the victim.

¶ 30 Officer Soraparu testified that he stopped his vehicle and made a u-turn to follow the

defendant, who ran across the street and a little bit west into a vacant lot right off of Kostner Avenue, heading northbound towards Washington Boulevard. Officer Soraparu's partner attempted to exit the vehicle to follow the defendant on foot, but he ordered her back into the car because of the "neighborhood they were in," and they proceeded to chase the defendant with their vehicle. After the defendant ran over to Washington Boulevard he went over two fences, heading northbound, and the officers lost sight of him.

¶ 31 Officer Soraparu testified that as soon as they observed the shooting, he and his partner put a flash message over the radio, describing the offender. He explained that two separate flash messages were submitted because his partner had sent the first one to the "wrong police zone." Officer Soraparu acknowledged that his flash message described the offender as wearing a white baggy T-shirt and black long baggy shorts, while the defendant actually wore a black hoodie when the officer observed him shooting the victim. Officer Soraparu explained, however, that by the time he gave his second flash message the defendant had removed the dark hoodie he had been wearing over his T-shirt, and had thrown it into a vacant lot. Accordingly, the officer's flash message described the offender as African American male defendant about 5 ' 8" tall, wearing a white baggy T-shirt and black long baggy shorts.

¶ 32 Officer Soraparu testified that as he and his partner continued to search for the defendant near Washington Boulevard, he received a radio call that another police unit had apprehended the suspect. Officer Soraparu and his partner relocated to the scene of the shooting, where they met Officer Matt McNicholas and Officer Vera, who had the defendant in custody. Officer Soraparu recognized the defendant as the shooter and was able to identify him. He stated that he made this identification only about 3 or 4 minutes after he observed the shooting. He also

acknowledged that at the time of his identification, the defendant was wearing only a white T-shirt and black long baggy shorts.

¶ 33 On cross-examination, Officer Soraparu admitted that he never recovered the black hoodie. He claimed he believed other officers at the scene had recovered it but then later learned no one had. On cross-examination, Officer Soraparu also admitted that he never observed the defendant's face from the front, but only saw his profile. He acknowledged that he viewed the profile for only about 5 to 10 seconds.

¶ 34 Chicago Police Officer Anthony Chavez (hereinafter Officer Chavez) next testified that at about 10 p.m. on September 17, 2012, he was in the vicinity of 4339 West Madison Street with his partner Officer Matthew Brophy. Officer Chavez was driving his marked squad car, westbound on Madison Street when he saw an individual, whom he later learned was the victim, lying in the middle of the street. The officer rolled down his window and spoke to the victim. Over defense counsel's objection, Officer Chavez testified that the victim was yelling for help because "someone" had shot him. Officer Chavez stated that he and his partner immediately exited their vehicle and observed that the victim was injured and in pain. Officer Chavez radioed for assistance, and his partner remained with the victim until the ambulance arrived.

¶ 35 Officer Chavez testified that he also observed a weapon lying on the median about 10 feet away from the victim. He described the weapon as a small blue steel handgun with a silencer. Officer Chavez testified that while his partner assisted the victim, he stood next to the weapon until an evidence technician arrived at the scene to inventory it. The officer identified the weapon in court as the one that was recovered from the scene.

¶ 36 On cross-examination Officer Chavez admitted that he did not hear any flash messages on his radio at the time he observed the victim in the middle of the street.

¶ 37 Chicago Police Officer Matt McNicholas (hereinafter Officer McNicholas) next testified that at about 10:20 p.m. on September 17, 2012, he was working with his partner Officer Vera in the vicinity of the tire shop when they received a flash message from Officer Soraparu regarding a male African American suspect wearing a white T-shirt and black jeans shorts fleeing northbound from the area of Kostner Avenue and Madison Street. In response to the message, Officer McNicholas and his partner toured the immediate area. After entering the 4300 block of Washington Boulevard, with their vehicle, using their spotlight, Officer McNicholas and his partner began searching for the offender. Officer McNicholas observed an individual matching the description of the offender lying down on his stomach underneath a black SUV in the north alley of 4338 West Washington Boulevard. According to the officer, the individual was lying on his stomach with his head facing northbound and clutching an unknown object in one of his hands. According to the officer, it had been raining that day, so the ground the individual was lying on was wet. Officer McNicholas made an in-court identification of the defendant as the man he observed hiding under the SUV.

¶ 38 According to Officer McNicholas, both officers exited the vehicle and ordered the offender to place his hands out from underneath the vehicle and to let go of what he had been holding—his cell phone. The defendant complied and the officers handcuffed and arrested him.

¶ 39 Officer McNicholas testified that they then took the defendant to the scene of the crime, where he was identified by both Officer Soraparu and his partner as the person they observed shooting the victim. The officers transported the defendant to the police station, where he was photographed. Officer McNicholas identified photographs of the defendant as he looked when he was arrested, and of the black SUV under which the defendant was seen hiding.

¶ 40 Officer McNicholas also testified that he received the flash message at 10:19 p.m. and

detained the defendant at 10:22 p.m. He further stated the distance between where the defendant was found and where the shooting took place was one block.

¶ 41 On cross-examination, Officer McNicholas admitted that the flash message only indicated that the offender wore a white T-shirt and black jeans or black jeans shorts. He could not recall any height or weight or age being supplied in the message. He also did not remember whether any other police officers asked him to try and recover a hoodie.

¶ 42 Chicago Police Detective Greg Swiderek (hereinafter Detective Swiderek) next testified that at about 10:30 p.m. on September 17, 2012, he headed to the vicinity of 4339 West Madison Street in response to a radio call of a person shot. Once there, the detective learned that a suspect had been apprehended. The detective identified the defendant as the person detained.

¶ 43 While at the scene of the crime, Detective Swiderek also learned that there was as witness to the incident, namely Davis, the owner of the tire shop. Accordingly, the detective proceeded to interview Davis. Detective Swiderek asked Davis if he was willing to look at the apprehended suspect and determine if he was the offender, and Davis agreed. At about 10:43 p.m. that evening, a show-up was performed and Davis viewed the defendant who was seated in a Chicago police marked squad car. According to the detective, Davis identified the defendant as the man he had observed struggling with the victim and attempting to strike the victim in the head with a handgun before he was chased by the police.

¶ 44 On cross-examination, Detective Swiderek acknowledged that when the show-up was performed, Davis was about eight feet away from the defendant. He also admitted that it was still dark outside, but stated that the squad car spotlight shine was on the defendant.

¶ 45 Chicago Police Detective Timothy Thompson (hereinafter Detective Thompson) next

testified that at about 10:45 p.m. on September 17, 2012, he proceeded to the scene to investigate the shooting. He stated that it was raining when he arrived and that he saw a gun on the ground in the middle of the street, which he described as a "dark semiautomatic handgun" with a "silencer and maybe some laser sights on it."

¶ 46 Detective Thompson further testified that after canvassing the area, he observed several businesses, including a convenience store, with a surveillance camera outside. The business was closed, so Detective Thompson returned the following day to try and obtain any video footage that was available. Detective Thompson spoke to one of the workers at the store, and was told that the cameras were not operational. He asked the worker if she would show him where the cameras were. The detective was taken to a small room in the back of the store, where the cameras were located. He noted that the cameras appeared functional and asked the worker if she would call the manager. Once the manager appeared, the detective asked that the footage from the previous night be played for him. After the video was shown to him, the detective telephoned his department hoping to get an officer to come and download the video, but no one answered his call. Based on the responses of the individuals in the store, the detective was not confident that the store would maintain the footage, and therefore asked that the video be shown to him again so that he could videotape it with his Iphone camera.

¶ 47 Detective Thompson testified that he was told that the footage would be retained for three days. However, when the police subsequently arrived to retrieve the video, they were told that "they must have made a mistake" and that videos were retained only for 18 hours, which had already passed. Accordingly, Detective Thompson was unable to obtain the original video footage.

¶ 48 Detective Thompson testified that the video he took with his Iphone camera on September

18, 2012, was a true and accurate copy of the video shown at trial, which was admitted into evidence.

¶ 49 Detective Thompson further testified that as part of his investigation of the shooting, on September 18, 2012, he visited the victim, in the hospital. Detective Thompson showed a photo-array to the victim, including a photograph of the defendant, and the victim identified the defendant as his shooter.

¶ 50 On cross-examination, Detective Thompson acknowledged that while at the hospital, he asked the victim whether he knew the motive for the shooting, and the victim responded that he believed it was related to him owing money to someone. Detective Thompson further admitted that although the victim told him the name of the person whom he owed money, the detective never attempted to talk or interview that individual.

¶ 51 On cross-examination, and over the State's objection, Detective Thompson also admitted that in his police report he noted that the victim was a member of the Four Corner Hustler gang, and that this information was obtained directly from the victim.

¶ 52 Chicago Police evidence technician Amy Campbell next testified that on September 17, 2012, at approximately 10:45 p.m. she was called to process the scene at 4339 West Madison Street. Once there, she met Detective Thompson who described the incident to her and walked her around to show her the evidence. Campbell observed several cartridge cases on the ground and the sidewalk, a red stain on the ground and a firearm with a silencer in slide lock (indicating that the weapon was empty). Campbell recovered the firearm (with the silencer), seven shell casings and some blood from the scene. All of the cartridges were the same caliber. She also photographed the scene and each piece of evidence. The evidence was then marked, inventoried and taken to the crime lab.

¶ 53 On cross-examination, Campbell admitted that six of the seven cartridges were found on the sidewalk or the curb. Specifically two were found right next to the curb, four were on the sidewalk and only one was recovered from the street. That last one was recovered near the other side of the victim's car. While Campbell could not testify to exactly where the cartridges were fired from, she did admit that from their location, it appeared that the gunman was shooting, at some point, from the general area of the sidewalk.

¶ 54 Illinois State Police firearms examiner Tonia Brubaker next testified that she received the firearm, silencer, magazine, and seven fired cartridges that were inventoried at the crime scene . She described the firearm as a Walther P22, .22 long rifle caliber semiautomatic with a sound suppressor and a detachable magazine. Brubaker testified that the serial number on the firearm was obliterated. Brubaker performed testing to compare the fired cartridges to the weapon retrieved and concluded that all seven cartridges were fired from the Walther .22 caliber gun.

¶ 55 The parties next proceeded by way of stipulation. They stipulated that if called to testify, Illinois State Police forensic scientist and latent fingerprint expert, Cassandra Richards, would testify that she performed a fingerprint analysis on the gun, the seven discharged cartridges and the magazine retrieved at the crime scene, and found no fingerprints suitable for comparison. She would also testify that whether prints are left on items depends on many factors including the texture of the surface and the amount of oil or sweat on the fingers of the person touching the object.

¶ 56 Chicago Police evidence technician Cara Kuprianczyk next testified that early in the

morning[3] of September 18, 2012, she was called to perform a gunshot residue test on the defendant. She testified that when she first observed the defendant he appeared a little disheveled, and was handcuffed to the wall. After the defendant was un-handcuffed she performed the test on both of his hands and sent the kit to the Illinois State police forensic lab.

¶ 57 Illinois State Police forensic scientist, Ellen Chapman (hereinafter Chapman), next testified that she received that gunshot residue kit from the Chicago police. After testing it in the laboratory, she concluded that both of the defendant's hands were negative for gunshot residue. She testified, however, that an individual taking off his clothing, or grabbing onto items such as a fence, or touching wet pavement, could affect the amount of gunshot residue found on that person's hands. She explained that gunpowder residue is a little like chalk dust and eventually will wear off by itself, with the amount of time depending on the activity the person goes through after they fire the firearm. Chapman testified that if a person was not trying to get rid of the gunshot residue, it would disappear after about 6 hours of normal hand activity.

¶ 58 On cross-examination, Chapman acknowledged that the most effective way to remove gunshot powder residue would be to wash one's hands with soap. She admitted that the fact that it rained outside would have no effect on the removal of gunshot residue from a person's hands. On cross-examination, Chapman also acknowledged that no gunshot residue test was performed on the defendant's clothes, even though generally one would find gunshot residue on clothes

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[3] Although not introduced or discussed at trial, we note that in his posttrial motion the defendant argued that the gunshot residue test was performed less than 2 hours after the shooting and the defendant's arrest. A copy of the gunshot residue forensic report was attached to the defendant's motion for a new trial. According to that report, the gunshot residue test was performed at exactly 12:30 a.m. on September 18, 2012.

worn by someone who fired a gun. On redirect she testified, however, that if a person removed an article of clothing after having used a firearm she would not expect to find any gunshot residue on any clothing underneath the removed garment.

¶ 59 The State next introduced into evidence copies of the defendant's two prior convictions for: (1) AUUW (Class 2 felony) on February 7, 2008 (case No. 07 CR 20784); and (2) armed robbery on November 5, 1999 (case No. 98 CR 11866). The court asked defense counsel if he had any objection to the introduction of these convictions and counsel stated that he did not because they were being introduced only for the armed habitual criminal charge.

¶ 60 After the State rested its case, the defense proceeded with its case-in-chief by calling the defendant to the stand. The defendant testified that on September 17, 2012, he was not at 4339 Madison Street. Instead, he was in the alleyway on the corner of Washington Boulevard and Kostner Avenue, underneath an SUV, which he was attempting to steal. The defendant testified that he had a screwdriver and a wire cutter, which he was going to use to cut the alarm on the SUV. He testified he was on his back and not on his stomach when the police arrested him. The defendant averred that he was working on dismantling the car's alarm system, using his tools and his Iphone as a flashlight to see what he was doing, when he heard voices. The defendant immediately threw the screw driver to his right (all the way to the fence), and put the wire cutter in a groove underneath the SUV's muffler. When the police showed up he believed he was being arrested because someone in the building had seen him under the SUV trying to steal the vehicle, and had called the police. The defendant denied knowing anything about a shooting or having a gun that night. He also denied having a black hoodie.

¶ 61 On cross-examination, the defendant admitted that the photograph taken by the police after

his arrest depicted him in ripped jeans shorts exposing his undergarments. When asked if his clothes looked that way when he left the house that morning, the defendant replied that they did because he had stormed out of his house after having "gotten into it with his wife."

¶ 62 After the defendant testified at trial, in rebuttal the State introduced all three of the defendant's prior convictions as impeachment evidence, including: (1) AUUW (Class 2 felony) on February 7, 2008 (case No. 07 CR 20784); (2) armed robbery on November 5, 1999 (case No. 98 CR 11866); and (3) terrorism and possession of a controlled substance with intent to deliver on February 26, 1999, in Iowa District Court, Cole County (case No. CR 130586). At this juncture, defense counsel inquired into the release-date for the Iowa convictions and indicated that the defendant had told him that the sentences had not been consecutive. The trial court stated that it would not matter, since the defendant's release date (on parole) in 2006 was within ten years and therefore within the *Montgomery* rule. The court asked defense counsel if he had any objections, and counsel indicated that he did not. Accordingly, the three convictions were placed into evidence both for impeachment purposes and as proof for the armed habitual criminal charge.

¶ 63 After closing arguments, the trial court found the defendant guilty on all four charges: (1) attempt first degree murder (including personally discharging the firearm that caused the victim great bodily harm); (2) aggravated battery; (3) armed habitual criminal; and (4) AUUW. In doing so, the court noted that the central issue in the case was not whether the victim was shot or whether the gun retrieved from the middle of the street was the one used in the shooting, but rather whether the defendant was the one who shot the victim. The court found the testimony of all of the State's witnesses to be credible and based his guilty findings upon the three eyewitness (the victim, Davis and Officer Soraparu) identifications of the defendant as the shooter.

¶ 64 After trial, the defendant retained new counsel, who filed a supplemental (and subsequently amended supplemental) motion for judgment notwithstanding the verdict and for a new trial. Among numerous allegations, in that motion, the defendant alleged *inter alia*, that he was denied his right to effective assistance of trial counsel, when counsel failed: (1) to challenge the State's use of his prior convictions for impeachment pursuant to *Montgomery*, and (2) to confront Officer Soraparu with inconsistent statements and/or omission regarding the hoodie from the police reports and flash message. Attached as exhibits to the defendant's posttrial motion were *inter alia*: (1) handwritten and typed police reports reflecting the contents of the officers' flash messages; and (2) Officer Soraparu's report of viewing the offender as wearing shorts, and no mention of the offender removing his hoodie during the pursuit.

¶ 65 Despite newly retained counsel's presence, at the hearing on the motion for a new trial, the State requested that the trial court conduct a "pre-*Krankel* hearing" with respect to the allegations of ineffective assistance of counsel.[4] In the presence of the newly retained counsel, the trial court then proceeded to question original defense counsel regarding his representation of the defendant. Defense counsel explained, *inter alia*, that he made no objections to the motion *in limine*, because one of those convictions was "used for the armed habitual criminal" charge to which *Montgomery* does not apply. In addition, he testified that he thoroughly cross-examined

[4] We note some confusion in the record before us as to this point. While in his brief the defendant states that prior to retaining private counsel, he filed a *pro se* motion alleging ineffective assistance of counsel, that *pro se* motion is not part of the record on appeal. In fact, the record contains no *pro se* motions filed by the defendant. What is more, the transcript of the proceedings affirmatively establishes that the defendant was represented by private counsel prior to, during, and after the State requested that the court conduct the preliminary *Krankel* hearing.

Officer Soraparu as to his failure in retrieving the hoodie, even without specifically using the officer's police report, which failed to mention the removal of that hoodie. The State requested that based on defense counsel's answer, the court make a finding that the defendant's claims with respect to counsel's ineffectiveness were meritless. The court agreed, and found that the claims were without merit.

¶ 66 The court then proceeded to address the remainder of the defendant's claims and ultimately denied his motions for judgment notwithstanding the verdict and for a new trial.

¶ 67 At the subsequent sentencing hearing, in aggravation the State relied on the evidence presented at trial. In mitigation, the defense argued, *inter alia*, that the defendant had a stable home, an income, and children to support, and that he had expressed sympathy for the victim and maintained his innocence throughout trial.

¶ 68 After hearing arguments by both parties, the trial court found that consecutive sentencing was mandatory and sentenced the defendant to a total of 65 years' imprisonment. Specifically, the court sentenced the defendant to 45 years' imprisonment for the attempt murder conviction (20 years for the attempt murder and 25 years for the firearm enhancement), merging the attempt murder conviction with aggravated battery. The court also sentenced the defendant to 20 years' imprisonment for the armed habitual criminal conviction, merging that conviction with AUUW. The defendant now appeals.

¶ 69 III. ANALYSIS

¶ 70 On appeal, the defendant makes numerous contentions. He argues that: (1) the trial court improperly admitted into evidence: (a) impermissible hearsay identification testimony, (b) lay opinion, and (c) a "video of a video of a video," in contravention of the best-evidence rule; (2) the State failed to prove him guilty beyond a reasonable doubt; (3) the State failed to prove the

requisite two applicable predicate felonies for the armed habitual criminal conviction without double enhancement; (4) his conviction for armed habitual criminal is unconstitutional where the predicate conviction for AUUW violates the second amendment; (5) he was denied his constitutional right to effective assistance of counsel where counsel failed: (a) to challenge inadmissible impeachment testimony and (b) to introduce prior inconsistent statements against the State's witnesses; (6) his convictions for attempt first degree murder and armed habitual criminal violate the one-act one-crime rule; and (7) the imposition of consecutive sentences is reversible error because the trial court used the same factor of "severe bodily injury" to enhance the sentence twice, believing that consecutive sentencing was mandatory. We will address each contention in turn.

¶ 71 A. Evidentiary Issues

¶ 72 We begin by focusing on the defendant's contentions regarding several pieces of evidence that were improperly admitted at trial, because our sufficiency of evidence analysis depends upon the propriety of their admission. The defendant argues that the trial court erred in admitting into evidence: (1) the "video of a video" of the camera surveillance video; (2) impermissible lay opinion on the identity of the offender in that surveillance video; and (3) an out-of-court identification of a non-testifying third party. We commence by addressing the introduction of the surveillance video.

¶ 73 1. Surveillance Video

¶ 74 On appeal, the defendant contends that the State's presentment of a murky "video of a video of a video" replete with voiceovers (narration and conversation), fast-forwarding, and frame manipulation by the police detective's use of his Iphone, violated the best evidence rule.

¶ 75 The State initially responds and the defendant concedes that he has forfeited this issue for

purposes of appeal by failing to object to it at trial. See *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in written posttrial motion") (citing *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988)). The defendant, nonetheless, urges us to consider his claim under the plain error doctrine, arguing that the evidence at trial was closely balanced so that the introduction of the "video of a video of a video" prejudiced the outcome of his trial. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."); *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 76 The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *Thompson*, 238 Ill. 2d at 613 (citing *People v. Averett*, 237 Ill. 2d 1, 18 (2010)). Specifically, the plain error doctrine permits "a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *Herron*, 215 Ill. 2d at186-87); see also *Thompson*, 238 Ill. 2d at 613; see also *People v. Adams*, 2012 IL 111168, ¶ 21. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 29 (citing *People v. Lewis*, 234 Ill. 2d 32, 43 (2009)).

¶ 77 "The first step of plain-error review is to determine whether any error occurred." *Lewis*,

234 Ill. 2d at 43; *Thompson*, 238 Ill. 2d at 613; see also *People v. Wilson*, 404 Ill. App. 3d 244, 247 (2010) ("There can be no plain error if there was no error at all."). This requires "a substantive look" at the issue raised. *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). We must therefore first determine whether any error occurred.

¶ 78 The defendant contends that the best evidence rule required the admission into evidence of the original surveillance video from the convenience store, as opposed to the Iphone camera recorded video of that surveillance video footage. He asserts that the State did not adequately account for the absence of the original video and that therefore the video should not have been admitted into evidence. We disagree.

¶ 79 "The *** purpose of the best evidence rule is the prevention of fraud, requiring that the [record] in issue be produced in its original form, or, if proven to be unavailable, that its substitute be a true and correct reproduction." *People v. Prince*, 1 Ill. App. 3d 853, 857 (1971) "The best evidence rule states a preference for the production of original documentary evidence when the contents of the documentary evidence are sought to be proved." *People v. Vasser*, 331 Ill. App. 3d 675, 685 (2002); see also *People v. Tharpe–Williams*, 286 Ill. App. 3d 605, 610 (1997); see also Ill. R. Evid. 1002 (eff. Jan. 1, 2011) ("To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."). There is no general rule, however, that a party must produce the best evidence that the nature of the case permits. *Tharpe–Williams*, 286 Ill. App. 3d at 610. Under the best evidence rule, the original documentary evidence should be introduced into evidence unless the original is shown to be lost, destroyed, or unavailable. *Electric Supply Corp. v. Osher*, 105 Ill. App. 3d 46, 48 (1982). If the original is lost, destroyed, or unavailable, the offering party must prove the following: (1) the prior existence of the

original, (2) the original is currently unavailable, (3) the authenticity of the substitute, and (4) the proponent's diligence in attempting to procure the original. *Electric Supply Corp.*, 105 Ill. App. 3d at 48-49. "The sufficiency of the evidence showing that it is not within the offering party's power to produce the original depends upon the circumstances of each case and is within the discretion of the trial court." *In re Estate of Weiland*, 338 Ill. App. 3d 585, 604, 788 N.E.2d 811, 827 (2003).

¶ 80 In the present case, Detective Thompson testified that when he attempted to retrieve the original copy of the surveillance tape from the convenience store, the employees indicated to him that the surveillance system was broken. Detective Thompson testified that he nevertheless insisted on going into the back room to see the surveillance system, and was therefore able to view the original video. After viewing the video, the detective immediately made a telephone call to the police station to have someone from the recording team retrieve the video, but he was unsuccessful. Based on the evasive answers from the employees and manger of the store, the detective feared that the surveillance video may be destroyed and therefore asked those present to play the video for him again so that he could make a video of the surveillance footage using his Iphone camera. The detective further testified that even though he was informed by the store employees that the video would be kept for the next three days, when police returned to retrieve it, they were told that the video, like all surveillance videos, was destroyed within 18 hours. Under this record, we find that the State unequivocally established the prior existence of the now unavailable original surveillance video; the authenticity of the detective's substitute video; and the detective's diligence in attempting to procure the original. We therefore find no abuse of discretion by the trial court's admission of the substitute video into evidence. *Weiland*, 338 Ill. App. 3d at 604.

¶ 81 Since we find no error in the admission of the "video of the video of the video," there can be no plain error. See *People v. Smith,* 372 Ill. App. 3d 179, 181 (2007) ("without error, there can be no plain error.")

¶ 82 2. Lay Opinion Testimony

¶ 83 We next address the defendant's contention that the victim's identification of the defendant in the surveillance video was "impermissible lay opinion," because it lacked foundation. Although the defendant acknowledges that in Illinois a witness may make an identification from a videotape, he argues that in order to do so: (1) the witness must have been familiar with the defendant prior to the offense; and (2) the testimony must aid in resolving the issue of identification without invading the function of the trier of fact. In support of this position, the defendant relies on our appellate decisions in *People v. Thompson*, 2014 IL App (5th) 120079 and *People v. Starks*, 119 Ill. App. 3d 21 (1983).

¶ 84 We note, however, that after the defendant filed his appeal in the instant case, our supreme court reversed the appellate court's decision in *Thompson*, explicitly rejecting *Starks* as being "at odds with the great weight of authority." See *People v. Thompson*, 2016 IL 118667, ¶ 52. Instead, the court held that:

> "[O]pinion identification testimony is admissible *** if (a) the testimony is rationally based on the perception of the witness and (b) the testimony is helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. Lay opinion identification testimony is helpful where there is some basis for concluding the witness is more likely to correctly identify the defendant from the surveillance recording than the [trier of fact.] A showing of sustained contact, intimate familiarity, or special knowledge of the defendant is not required. Rather, the witness must only have had contact with the defendant that the

[trier of fact] would not possess, to achieve a level of familiarity that renders the opinion helpful." *Thompson*, 2016 IL 118667, ¶ 50.

¶ 85 Our supreme court adopted a totality of circumstances approach, listing the following factors as those that should be considered by the trial court in determining whether there is some basis for concluding that the witness is more likely to correctly identify the defendant: (1) the witness's general familiarity with the defendant; (2) the witnesses' familiarity with the defendant at the time the recording was made or where the witness observed the defendant dressed in a manner similar to the individual depicted in the recording; (3) whether the defendant was disguised in the recording or changed his/her appearance between the time of the recording and trial; and (4) the clarity of the recording and extent to which the individual is depicted. *Thompson*, 2016 IL 118667, ¶ 51. Our supreme court explained that "the absence of any particular factor does not render the testimony inadmissible." *Thompson*, 2016 IL 118667, ¶ 51.

¶ 86 In addition, the court held that the extent of the witness's opportunity to observe the defendant goes to the weight of the testimony and not its admissibility. *Thompson*, 2016 IL 118667, ¶ 52. Accordingly, the court held that the trial court's decision "to admit lay opinion identification testimony is reviewed for an abuse of discretion." *Thompson*, 2016 IL 118667, ¶ 52.

¶ 87 Applying the aforementioned ruling to the cause at bar, we find no abuse of discretion in the trial court's decision to permit the victim to identify the defendant from the surveillance video. First, the victim testified in detail to all of the events that occurred on the night of the shooting, prior to being shown the video at trial. He stated that he had ample opportunity to observe the defendant chatting with the individual on the bicycle, while waiting for the tire on his car to be repaired. In addition, the victim identified the defendant as the shooter from a photo

array, after having been taken to the hospital, and prior to having viewed the surveillance video. Also, the victim testified that when the defendant shot at him, he wore a black hoodie, which was depicted in the video, but which the defendant was not wearing when he was arrested and which was not retrieved from the scene of the crime. Since the video recording of the surveillance video is blurry and does not plainly show the shooter's face, there was ample basis for concluding that the victim was more likely to correctly identify the defendant from that recording than the trial judge. The victim here clearly had contact with the defendant that the trial judge did not possess, and therefore his opinion would have proved helpful to the trier of fact. *Thompson*, 2016 IL 118667, ¶ 50.

¶ 88 3. Out-of Court Identification of the Defendant by Non-Testifying Witness

¶ 89 On appeal, the defendant next contends that the trial court erred in permitting Officer McNicholas to testify that when he apprehended the defendant and brought him to the crime scene for a show-up, both Officer Soraparu, and Officer Soraparu's partner, Officer Schroeder identified the defendant as the individual they observed shooting the victim. The defendant asserts that because Officer Schroeder did not testify at trial, Officer McNicholas's testimony regarding her identification of the defendant constituted inadmissible hearsay evidence.

¶ 90 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008). As such " '[t]estimony by a third party as to statements made by another nontestifying party identifying an accused as the perpetrator of a crime constitutes hearsay testimony and is inadmissible.' " *People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005) (citing *People v. Lopez*, 152 Ill. App. 3d 667, 672 (1987)). "The fundamental reason for excluding hearsay is the lack of an opportunity to cross-examine the declarant." *Yancy*, 368 Ill. App. 3d at 385; see also *People v. Jura*, 352 Ill. App. 3d 1080, 1085 (2004) (citing *People v.*

Shum, 117 Ill. 2d 317, 342 (1987)); see also *People v. Dunmore*, 389 Ill. App. 3d 1095, 1106 (2009). A trial court has discretion to determine whether statements are hearsay, and a reviewing court will reverse that determination only for an abuse of discretion, *i.e*., where the trial court's ruling is "arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *People v. Leak*, 398 Ill. App. 3d 798, 824 (2010); see also *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2008).

¶ 91 In the present case, the State concedes that Officer McNicholas's testimony regarding Officer Schroeder's identification of the defendant as the shooter was inadmissible hearsay that should not have been considered by the trial court. The State, nevertheless, maintains that the officer's testimony regarding Officer Schroeder's identification of the defendant was admissible as an exception to the hearsay rule showing the course of the police investigation. We disagree.

¶ 92 Statements are not inadmissible hearsay when they are offered for the limited purpose of showing the course of a police investigation, but only where such testimony is necessary to fully explain the State's case to the tier of fact. *Jura*, 352 Ill. App. 3d at 1085; see also *People v. Edgecomb*, 317 Ill. App. 3d 615, 627 (2000); see also *People v. Warlick*, 302 Ill. App. 3d 595, 598-99 (1998) (quoting *People v. Simms*, 143 Ill. 2d 154, 174, (1991)). Accordingly, a police officer may testify about a conversation that he had with an individual and his actions pursuant to the conversation to recount the steps taken in his investigation of the crime, and such testimony will not constitute hearsay, since it is not being offered for the truth of the matter asserted. *People v. Hunley*, 313 Ill. App. 3d 16, 33 (2000) (citing *People v. Pryor*, 181 Ill. App. 3d 865, 870 (1989)). However, the police officer may not testify to information beyond what was necessary to explain the officer's actions. *Jura*, 352 Ill. App. 3d at 1085; *Hunley*, 313 Ill. App. 3d 16, 33 (2000). As such our courts have repeatedly held that the State may not use the limited

investigatory procedure exception to place into evidence the substance of any out-of-court statement that the officer hears during his investigation, but may only elicit such evidence to establish the police investigative process. See *Hunley*, 313 Ill. App. 3d at 33-34; Jura, 352 Ill. App. 3d at 1085; see also *People v. Gacho*, 122 Ill. 2d 221, 248 (1988) (holding that it was permissible for a police officer to testify that after he spoke to the victim he went to look for the defendant, but indicated that it would have been error to permit the officer to testify to the contents of that conversation); see also *People v. Trotter*, 254 Ill. App. 3d 514, 527 (1993) ("[T]here is a distinction between an officer testifying to the fact that he spoke to a witness without disclosing the content of that conversation and an officer testifying to the content of the conversation. [Citation.] Under the investigatory procedure exception, the officer's testimony must be limited to show how the investigation was conducted, not place into evidence the substance of any out-of-court statement or conversations for the purpose of establishing the truth of their contents. [Citation.] The police officer should not testify to the contents of the conversation [citation], since such testimony is inadmissible hearsay. [Citation.]").

¶ 93 In the present case, contrary to the State's position, there can be no doubt that Officer McNicholas's testimony as to Officer Schroeder's identification of the defendant was offered for the truth of the matter asserted and was not necessary to describe the course of the police investigation. The State's contention that this identification was not offered to show the defendant's guilt is at best disingenuous, since in closing argument, the State explicitly enumerated all of the individuals who had identified the defendant as the shooter, including the non-testifying Officer Schroeder, in asking the court to find the defendant guilty. Moreover, it was absolutely unnecessary for Officer McNicholas to testify about Officer Schroeder's identification in order to explain the course of his investigation. Officer McNicholas could

simply have testified that after he apprehended the defendant, he brought him to the scene of the crime for a show-up with Officer Soraparu, Officer Schroeder, and Davis, whereupon the defendant was taken to the police station. This testimony would have been sufficient to explain his police conduct, without disclosing Officer Schroeder's identification. This is particularly true where Officer Soraparu had already testified at trial that he positively identified the defendant during that same show-up. Accordingly, we find that Officer McNicholas's testimony regarding Officer Schroeder's identification of the defendant as the shooter constituted improperly admitted hearsay. See *Warlick*, 302 Ill. App. 3d 600; *Jura*, 352 Ill. App. 3d 627.

¶ 94 Nonetheless, for the reasons set forth below, we find that the admission of this evidence was harmless error. It is well-accepted that an evidentiary error will not serve as a reason to overturn a verdict if other properly admitted evidence was overwhelming, rather than closely balanced. See *People v. Nixon*, 2015 IL App (1st) 130132, ¶ 120; see also *People v. Miller,* 173 Ill. 2d 167, 195 (1996); *People v. Carlson*, 92 Ill. 2d 440, 449 (1982) (evidentiary errors may be considered harmless if the other properly admitted evidence is overwhelming). In the harmless-error analysis, the State bears the burden of persuasion, and must prove beyond a reasonable doubt that the verdict would have been the same absent the error. *People v. Thurow*, 2013 Ill. 2d 352, 363 (2003).

¶ 95 "Hearsay identification is reversible error only when it serves as a substitute for courtroom identification or when it is used to strengthen or corroborate a weak identification." *People v. Davis*, 285 Ill. App. 3d 1039, 1045 (1996) (citing *People v. Colon*, 162 Ill. 2d 23, 34 (1994)). "If it is merely cumulative or supported by a positive identification and by other corroborative circumstances, it constitutes harmless error." *Davis*, 285 Ill. App. 3d at 1045.

¶ 96 In the present case, we find that the State has met its burden in establishing that the

admission of the hearsay identification could not have prejudiced the outcome of the defendant's trial. The record before us reveals that at trial, three witnesses, the victim, Davis, and Officer Soraparu, identified the defendant as the shooter. Two of those identifications were made less than 45 minutes after the shooting, and all three identifications were made within 24 hours. The surveillance video introduced into evidence, although murky, corroborated in full the testimony of the three witnesses as to what transpired at the scene. In addition, the video established that, apart from the hoodie, which Officer Soraparu positively testified he observed the defendant removing during the chase, the shooter wore baggy shorts, a white shirt, and white sneakers with black stripes. The evidence at trial further established that the defendant was arrested only minutes after the shooting, one block from the scene (in the direction of where Officer Soraparu had observed the shooter running after jumping over a fence) also wearing baggy shorts, a white T-shirt and white sneakers with black stripes. Although at trial the defendant claimed he had no involvement in the shooting, and no gunpowder residue was found on the defendant's hands, the arresting officer testified that when he observed the defendant hiding under the SUV, the defendant was lying on his stomach with his hands on the wet pavement, and the State's forensic scientist testified that the amount of gunshot residue could be affected by a person taking off his clothes, grabbing a fence, or touching wet pavement. Under this record, we hold that the evidence was not so closely balanced that the introduction of Officer McNicholas's hearsay statement about a fourth individual's identification of the defendant as the shooter could have changed the outcome of the defendant's trial. Officer McNicholas's testimony regarding Officer Schroeder's out-of-court identification of the defendant was merely cumulative of the already properly introduced in-court identifications of three other witnesses, the victim, Davis, and Officer Soraparu. Accordingly, any error in its introduction was harmless. See *Davis*, 285 Ill.

App. 3d at 1045 (holding that the admission of a witness's out-of-court identification of the defendant was harmless error where the defendant was positively identified in court by the victims of the crime, so that any out-of-court identification would have merely been cumulative).

¶ 97 B. Sufficiency of Evidence

¶ 98 Having disposed of all of the evidentiary issues, we next address the defendant's contention that the State failed to prove him guilty beyond a reasonable doubt.

¶ 99 We initially begin by rejecting the defendant's contention that multiple standards of review should guide our analysis. It is well-established that when reviewing a challenge to the sufficiency of evidence, a reviewing court must determine whether the evidenced, when viewed in the light most favorable to the State, would have permitted any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48; see also *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004) (citing *People v. Smith*, 185 Ill. 2d 532, 541 (1999)). It is the responsibility of the trier of fact to resolve conflicting testimony to weigh the evidence and to draw reasonable inferences from those facts. See *Brown*, 2013 IL 114196, ¶ 48. Where the evidence produces "conflicting inferences" it is the trier of fact's responsibility to resolve that conflict. *People v. Pryor*, 372 Ill. App .3d 422, 430 (2007). Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on issues of weight of evidence, or the credibility of witnesses. See *Brown*, 2013 IL 114196, ¶ 48. A criminal conviction will be reversed only where evidence is so contrary to the verdict, or so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt regarding defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48. This same standard will apply regardless of whether the evidence is direct or circumstantial, and regardless of whether the defendant receives

a bench or a jury trial. *Brown*, 2013 IL 114196, ¶ 48; see also *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 100 On appeal, the defendant contends that the State failed to establish beyond a reasonable doubt that he was the shooter. In that vein, the defendant first contends that the evidence at trial established the three individuals who identified him had little or no opportunity to view him, thereby placing their identifications, particularly the two suggestive show-ups with the defendant inside the police car, into doubt. For the reasons that follow, we disagree.

¶ 101 Identification by a single eyewitness is sufficient to support a conviction if the defendant is viewed under circumstances permitting a positive identification. *People v. Gabriel*, 398 Ill. App. 3d 322, 341 (2010). The following five factors articulated in *Neil v. Biggers*, 409 U.S. 188, 192 (1972) are relevant in assessing the reliability of identification testimony of a witness: (1) the witness's opportunity to view the suspect during the offense; (2) the witness's degree of attention; (3) the accuracy of any prior description provided; (4) the witness's level of certainty at the time of the identification procedure; and (5) the length of time between the crime and the identification. See *Piatkowski*, 225 Ill. 2d at 567; see also *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989).

¶ 102 We begin by addressing the reliability of the victim's identification. In that respect, there can be no doubt that the victim identified the defendant with certainty, as he identified him three times: (1) from a photo array within 24 hours of the shooting; (2) from the surveillance video footage; and (3) in court. While it is true that the victim never had the opportunity to describe his shooter to the police, as he was immediately transported to the hospital, he had ample opportunity to view the defendant's face. The victim testified that he first observed the defendant and another individual on a bicycle approach Davis's tire shop. He stated that while Davis was

fixing his tire, he watched the defendant's face for several minutes,[5] while the defendant conversed with the cyclist, in front of the tire shop. According to the victim, there were numerous businesses nearby and there was ample light illuminating the sidewalk where the defendant stood. The victim testified that as he began walking toward the tire shop he came as close to about 4 or 5 feet from the defendant, before the defendant began to shoot and chase him down the street. The victim's testimony was corroborated by the surveillance video, which shows ample illumination on the sidewalk, the victim leaving the tire shop to walk over to his car, as the defendant and the cyclist approach the tire shop, with the victim looking in the

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[5] We note that, at trial, the victim testified that he observed the defendant for about 7 to 10 minutes while standing in front of the tire shop, but that the 4 minute 56 second surveillance video (which includes fast forwarding of the frames) shows that the camera captured the defendant in front of the tire shop for only about 2 minutes before the shooting occurred. However, any inconsistencies between the time as recorded by the video and the victim's perception of time, are not ours to resolve, and do not negate the trial court's credibility determination, particularly under the circumstances of this case (*i.e.*, a vicious, unprovoked and nearly lethal-attack). See *People v. McCarter*, 20122 IL App (1st) 092864, ¶ 23 ("The trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases."); see also *People v. Hogan*, 388 Ill. App. 3d 885, 895 (2009) (it is well established that it is the function of the trier of fact to "resolve conflicts or inconsistencies in the evidence," as well as the credibility of witnesses and any inferences arising from their testimony, and that the reviewing court may not substitute its judgment for that of the trier of fact.). Accordingly, regardless of whether the victim observed the defendant for 2 or 7 minutes, for the reasons that shall be articulated above, we find that the *Neil* factors weigh in favor of sufficient reliability.

direction of the defendant. The video further shows the victim subsequently walking to near-touching distance of the defendant before the defendant begins to shoot. Accordingly, the *Neil* factors weigh in favor of sufficient reliability.

¶ 103 Addressing Officer Soraparu's reliability, we being by noting that, just as the victim, the officer had sufficient opportunity to view the offender before the identification. Officer Soraparu testified that he was working in the vicinity, driving his squad car eastbound on Madison Street when he heard several muffled gunshots, and then observed the defendant chasing the victim into the street firing at him. The officer explained that the defendant was only about ten to fifteen feet away from him when he viewed his profile. In addition, the officer's description of the offender matched that of the defendant. At trial, the officer testified that when he first observed the defendant, the defendant as wearing a dark-colored hoodie, long black baggy shorts and a white T-shirt. The officer explained at trial that he observed the defendant remove his black hoodie while escaping, and therefore radioed an updated description to other officers in the area. That updated flash message described the offender as a 5' 8" tall African American male wearing a white baggy T-shirt and black long baggy shorts. It was undisputed at trial that upon his arrest the defendant wore just such a white baggy T-shirt and black long baggy shorts. Finally, the officer testified that after losing the suspect, he learned the offender had been apprehended and returned to the crime scene to identify him. He testified that only three or four minutes elapsed between his first observation of the defendant and his identification. Just as with the victim, the video surveillance corroborated the officer's testimony. Accordingly, just as with the victim's identification, the *Neil* factors weigh in favor of reliability.

¶ 104 With respect to Davis's identification of the defendant as the shooter, we acknowledge that at

first blush, the factors of reliability are not as favorable to the State. Davis testified that his only opportunity to view the defendant's face was a brief one, as he passed the defendant on his way into the tire shop, and therefore admitted that he did not have "a great opportunity to study the [offender's] face." In addition, Davis acknowledged that during the show-up, the defendant was seated inside a marked squad car, with Davis only viewing his face. On the other hand, a very short period of time elapsed between the crime and the identification. What is more, Davis's entire testimony regarding the events of that night were corroborated by the surveillance video, and the testimony of both Officer Soraparu and the victim. In addition, Davis made a second positive in-court identification of the defendant as the shooter.

¶ 105 Based on the totality of circumstances, we conclude that all three witness identifications were sufficiently reliable, so that the court's finding that the defendant was the shooter was not against the manifest weight of the evidence.

¶ 106 The defendant nonetheless contends that the State failed to prove him guilty beyond a reasonable doubt because the surveillance footage introduced at trial does not corroborate the testimony of the State's identification witnesses, but rather irrefutably establishes that the defendant did not commit the crime. In that vein, the defendant asserts that the surveillance footage shows that the facial features and clothes of the perpetrator (namely his sneakers) do not match the features and clothes of the defendant upon his arrest only minutes after the crime was committed. We disagree.

¶ 107 Our review of the rather murky footage of the surveillance video introduced at trial does not support the defendant's interpretation. Nothing in that video indisputably excludes the defendant as the shooter. In fact, contrary to the defendant's position, the video depicts the perpetrator wearing white sneakers with black stripes, as does the photograph of the sneakers worn by the

defendant upon his arrest. Any difference in the angle of the black stripes on the sneakers of the perpetrator and the sneakers worn by the defendant upon his arrest, pointed to by the defendant, can reasonably be attributed to glare, shadow and lighting. Similarly, contrary to the defendant's position, because of the blurry quality of the surveillance footage, the facial features of the perpetrator (mostly facing away from the camera) are indistinguishable.

¶ 108 Moreover, even if the video did positively reveal certain discrepancies in the appearance of the shooter's clothing or facial features, which because of its murkiness we find that it does not, it would be for the trier of fact to reconcile the defendant's arrest photo with that video. *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 21 (it is "the province of the trier of fact to *** resolve conflicts in the evidence, and draw conclusions based on all the evidence. [Citation]. A reviewing court will not substitute its judgment for that of the trier of fact on these matters.").

¶ 109 The defendant next contends that the negative gunshot residue test and the testimony of the State's forensic chemist regarding the extent of time, namely six hours, it normally takes for gunshot residue to dissipate from a person's hands after using a firearm proved his innocence beyond a reasonable doubt because his gunshot residue test was performed only two and a half hours after the crime was committed. We disagree.

¶ 110 The forensic scientist did not testify that it invariably takes six hours for gunshot residue to dissipate. Instead, she merely testified that it would take six hours if a person was not attempting to get the gunshot residue off his hands. Moreover, she specifically testified that if a person's hands were coming in contact with objects, such as while a person was removing his clothing, jumping over a fence, or lying on wet pavement, she would expect this to affect the amount of trace gunshot residue found on that person's hands. Considering the fact that it was undisputed at trial that the shooter in this instance used a silencer, as well as took off his hoodie while being

chased by police, it would not have been unreasonable for the trial judge to infer that the same sophisticated shooter who had the wherewithal to use a silencer to muffle the sound of the gunshot, would also have known how to remove gunshot residue from his hands after being chased by police. Since it was uncontroverted that the defendant was out of sight of police officers for at least a few minutes, the court could have inferred any number of ways in which the defendant removed the gunshot residue from his hands. More specifically, since the arresting officer in this case testified that the defendant was found hiding under the SUV, lying on his stomach with his hands on the wet pavement, it would not have been unreasonable for the trier of fact to infer that the defendant had rubbed his hands against the wet pavement so as to remove the gunshot residue. The fact that the defendant testified to the contrary, is unavailing, since the trier of fact is in the best position to judge the credibility of the witnesses (*Brown*, 2013 IL 114196, ¶ 48), and in this case found all of the State's witnesses to be credible. Accordingly, in our view, neither the lack of physical evidence nor the disagreements in the witnesses' accounts render the evidence in this case so unreasonable, improbable or unsatisfactory as to justify this court's reversal of the trial court's determination that the defendant is guilty beyond a reasonable doubt. See *People v. Rodriguez*, 2012 IL App (1st) 972758-B, ¶ 48 ("lack of physical evidence and minor inconsistencies do not render the evidence so unreasonable, improbable or unsatisfactory to justify reversal of the [trier of fact's] determination."); see also *People v. Wheeler*, 401 Ill. App. 3d 304, 31299 (2010); see also *People v. Berland*, 74 Ill. 2d 286, 305-06 (1978).

¶ 111 B. Constitutionality of the Armed Habitual Criminal Conviction

¶ 112 On appeal, the defendant next contends that his armed habitual criminal conviction is

unconstitutional because it is predicated upon his prior AUUW conviction, which was itself held to be void *ab initio* under the decision in *People v. Aguilar*, 2013 IL 112116.

¶ 113 The defendant is correct that to sustain a conviction for armed habitual criminal, the State was required to prove that he possessed a firearm after having been convicted of at least two qualifying predicate offenses. See 720 ILCS 5/24–1.7(a) (West 2012). In the present case, the two predicate offenses were armed robbery (720 ILCS 5/18-2(A) (West 2012)) in case number 98 CR 11866, and a Class 2 AUUW (720 ILCS 5/24-1.6(a)(1) (West 2012)) in case number 07 CR 20784.

¶ 114 The defendant is further correct that in *Aguilar*, our supreme court found that section 24-1.6(a)(1) of the AUUW statute, which prohibited the carrying outside of the home of a firearm which is uncased, loaded, and immediately accessible, was facially unconstitutional under the second amendment of the United States Constitution. See *Aguilar*, 2013 IL 112116, ¶ 22; see also *People v. Burns*, 2015 IL 117387, ¶ 21 (clarifying the holding in *Aguilar*).

¶ 115 The defendant contends that because under *Aguilar*, his AUUW conviction was void *ab initio*, his armed habitual criminal conviction, which was necessarily predicated on the AUUW conviction must also be vacated.

¶ 116 The State contends that since the defendant's predicate AUUW conviction was never vacated pursuant to *Aguilar* (*i.e.*, was not vacated before he possessed the firearm in 2012 when he was charged with armed habitual criminal in the instant cause, and has yet to be vacated), the defendant cannot retroactively assert that his armed habitual criminal conviction is improper. We agree.

¶ 117 Since the defendant filed his appeal in this cause and after the State filed its response brief,

our supreme court issued its decision in *People v. McFadden*, 2016 IL 117424, resolving this issue in the State's favor. In *McFadden*, the defendant was convicted of UUWF based on his possession of a firearm after having been convicted of AUUW. *McFadden*, 2016 IL 117424, ¶ 1. On appeal, the defendant argued that his UUWF conviction must be vacated because it was predicated on his prior AUUW conviction, which was entered under the section of the statute that was held facially unconstitutional in *Aguilar* and, thus, the State failed to prove all the elements of the UUWF offense. *McFadden*, 2016 IL 117424, ¶ 8.

¶ 118 Our supreme court held that the defendant was properly convicted of UUWF even though his felony status arose from his AUUW conviction under a statute that had been found unconstitutional by *Aguilar*. *McFadden*, 2016 IL 117424, ¶ 37.

¶ 119 In doing so, the court first examined the language of the UUWF statute, which prohibits a person from knowingly possessing a firearm after having been convicted of a felony. *McFadden*, 2016 IL 117424, ¶ 27 (citing 720 ILCS 5/24–1.1(a) (West 2008)). The court explained that the statute only requires the State to prove the defendant's felon status, and does not require the State to prove the predicate offense at trial. *McFadden*, 2016 IL 117424, ¶ 27. The court expressly found that "[n]othing on the face of the statute suggests any intent to limit the language to only those persons whose prior felony convictions are not later subject to vacatur." *McFadden*, 2016 IL 117424, ¶ 27.

¶ 120 The court further held that "the language of section 24–1.1(a) is 'consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated.' " *McFadden*, 2016 IL 117424, ¶ 29 (citing *Lewis v. United States*, 445 U.S. 55, 61 n. 5 (1980)). In addition, the court noted that the because the purpose of the statute was to "protect the public from persons

who are potentially irresponsible and dangerous," it was immaterial whether the predicate conviction ultimately turned out to be invalid. *McFadden*, 2016 IL 117424, ¶ 29. As the court explained:

> "[T]he *** statute is not concerned with prosecuting or enforcing the prior conviction. Rather, the legislation is concerned with 'the role of that conviction as a disqualifying condition for the purposes of obtaining firearms.' [Citation.]" *McFadden*, 2016 IL 117424, ¶ 29.

Therefore, the court found that the UUWF statute is a "status offense," and that the legislature intended that the defendant clear his felon status through the judicial process by having his prior conviction vacated or expunged prior to obtaining firearms. *McFadden*, 2016 IL 117424, ¶ 29.

¶ 121 Our supreme court in *McFadden* further stated:

> "It is axiomatic that no judgment, including a judgment of conviction, is deemed vacated until a court with reviewing authority has so declared. As with any conviction, a conviction is treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack. Although *Aguilar* may provide a basis for vacating defendant's prior 2002 AUUW conviction, *Aguilar* did not automatically overturn that judgment of conviction. Thus, at the time defendant committed the [UUWF] offense, defendant had a judgment of conviction that had not been vacated and that made it unlawful for him to possess firearms." *McFadden*, 2016 IL 117424, ¶ 31.

¶ 122 Accordingly, the court found that, although the defendant could seek to vacate his prior conviction for AUUW under the *void ab initio* doctrine based on the holding of *Aguilar*, under the UUWF statute, he was still required to clear his felon status prior to obtaining a firearm. *McFadden*, 2016 IL 117424, ¶ 37. As such, the court concluded that the defendant's prior

conviction for AUUW properly served as proof of the predicate felony conviction for UUWF. *McFadden*, 2016 IL 117424, 37.

¶ 123 Since McFadden, in *People v. Perkins,* 2016 IL App (1st) 150889, this appellate court has applied the *McFadden* analysis to an armed habitual criminal conviction. In *Perkins*, the defendant was convicted as an armed habitual criminal and filed a postconviction petition alleging the State failed to prove him guilty beyond a reasonable doubt because his armed habitual criminal conviction was predicated on the AUUW statute found facially unconstitutional under *Aguilar* and void *ab initio*. *Perkins,* 2016 IL App (1st) 150889, ¶ 2. The State appealed the trial court's grant of the postconviction petition. *Perkins,* 2016 IL App (1st) 150889, ¶ 3.

¶ 124 On appeal, the defendant argued that the reasoning in *McFadden* was limited to the offense of UUWF, which requires the State to prove only his felon status and does not require proof of a specific felony conviction. *Perkins,* 2016 IL App (1st) 150889, ¶ 6. The defendant contended that because the offense of armed habitual criminal requires the State to prove that he was convicted of specific enumerated offenses, the armed habitual criminal offense "imposes a conduct-based disability by allowing for harsher punishment based on a defendant's commission of specific acts." *Perkins,* 2016 IL App (1st) 150889, ¶ 6. The defendant therefore asserted that because the conduct for which he was previously convicted (possession of a firearm) was constitutionally protected, it could not serve as the predicate for his armed habitual criminal conviction. *Perkins,* 2016 IL App (1st) 150889, ¶ 6.

¶ 125 The appellate court disagreed, explaining:

> "We find this to be a distinction without a difference. In order to sustain its burden to prove that a defendant is an armed habitual criminal, the State need only prove the fact of the prior convictions of enumerated offenses [citations], just as the State need only prove the fact

of a prior felony conviction to support a UUWF conviction. Nothing in the armed habitual criminal statute requires a court to examine a defendant's underlying conduct in commission of the enumerated offenses in order to find that the State has sustained its burden of proof. And because here, as in *McFadden*, [the defendant's] prior convictions had not been vacated prior to his armed habitual criminal conviction, they could properly serve as predicates for that conviction." *Perkins,* 2016 IL App (1st) 150889, ¶ 7.

¶ 126 Consequently, the appellate court held that because the defendant's prior AUUW conviction had not been vacated at the time he possessed a firearm, it could serve as the predicate for his armed habitual criminal conviction. *Perkins,* 2016 IL App (1st) 150889, ¶ 10.

¶ 127 In the present case, it is undisputed that the defendant's AUUW conviction in case number 07 CR 20784 was not vacated prior to his armed habitual criminal conviction. Accordingly, applying the holdings in *McFadden* and *Perkins* we conclude that the defendant's AUUW conviction properly served as the predicate for the defendant's armed habitual criminal conviction. See *Perkins,* 2016 IL App (1st) 150889, ¶ 10; *McFadden*, 2016 IL 117424, ¶ 37.

¶ 128 C. Double Enhancement

¶ 129 The defendant nonetheless contends that his armed habitual criminal conviction must be reversed because he was subjected to an improper double enhancement. Specifically, the defendant argues that the trial court improperly used his 1999 armed robbery conviction (case No. 98 CR 11866) twice to prove both of the predicate felonies necessary for an armed habitual criminal conviction: once as its own predicate felony and once as an element of the second predicate felony (his 2008 AUUW conviction in case No. 07 CR 20784). For the reasons that follow, we disagree.

¶ 130 An impermissible double enhancement occurs when either: (1) a single factor is used as an

element of an offense and as a "basis for imposing 'a harsher sentence than might otherwise have been imposed' "; or (2) "when the same factor is used twice to elevate the severity of the offense itself." *People v. Phelps*, 211 Ill. 2d 1, 12–13 (2004) (quoting *People v. Gonzalez*, 151 Ill. 2d 79, 83–84 (1992)). Our supreme court has explained that "[t]he reasoning behind this prohibition is that it is assumed that the legislature, in determining the appropriate range of punishment for a criminal offense, necessarily took into account the factors inherent in the offense." *Gonzalez*, 151 Ill. 2d at 84. Where our legislature "designates the sentences which may be imposed for each class of offenses," it "necessarily considers the factors that make up each offense in that class." *Gonzalez*, 151 Ill. 2d at 84. "Thus, to use one of those same factors that make up the offense as [a] basis for imposing a harsher penalty than might otherwise be imposed constitutes a double use of a single factor." (Emphasis omitted.) *Gonzalez*, 151 Ill. 2d at 84. Whether a defendant has been subjected to an improper double enhancement is a question of statutory construction, which is reviewed *de novo*. *Phelps*, 211 Ill. 2d at 12.

¶ 131 In the present case, the statutory provision at issue is section 24–1.7 of the Criminal Code of 2012 (Criminal Code), which provides in pertinent part:

> "(a) A person commits the offense of being an armed habitual criminal if he *** possesses *** any firearm after having been convicted of a total of 2 or more times any combination of the following offenses:
>
> (1) a forcible felony ***;
>
> (2) unlawful use of a weapon by a felon ***; or
>
> (3) any violation of the Illinois Controlled Substances Act *** that is punishable as a Class 3 felony or higher.

(b) Sentence. Being an armed habitual criminal is a Class X felony." 720 ILCS 5/24–1.7 (West 2012).

¶ 132 This appellate court has had several opportunities to consider and reject the same arguments raised here by the defendant. See *e.g.*, *People v. Johnson*, 2015 IL App (1st) 133663; see also *People v. Fulton*, 2016 IL App (1st) 141765.

¶ 133 In *Johnson*, 2015 IL App (1st) 133663, the defendant was convicted as an armed habitual criminal based on his possession of a weapon after having been previously convicted of residential burglary, which qualifies as a forcible felony pursuant to section 2–8 of the Code (720 ILCS 5/2–8 (West 2012)), and UUWF (720 ILCS 5/24–1.1 (West 2012)). *Johnson*, 2015 IL App (1st) 133663, ¶ 16. The defendant in *Johnson* argued on appeal that he was subject to an improper double enhancement because his prior residential burglary conviction "was used to prove both predicate felonies of the armed habitual criminal offense—once by itself, and then again as an element of the second predicate felony of UUWF." *Johnson*, 2015 IL App (1st) 133663¶ 13. This court disagreed, found no double enchantment and affirmed the armed habitual conviction. *Johnson*, 2015 IL App (1st) 133663, ¶ 12.

¶ 134 In doing so, the appellate court first noted that both of the predicate offenses relied on by the trial court were "clearly enumerated" by section 24–1.7 of the Code "as valid offenses upon which to base an armed habitual criminal conviction." *Johnson*, 2015 IL App (1st) 133663, ¶ 16. The court then held that the "fact that the residential burglary conviction was the felony upon which defendant's UUWF conviction was based does not negate the validity of the two offenses as the predicate offenses for defendant's armed habitual criminal conviction." *Johnson*, 2015 IL App (1st) 133663, ¶ 16. The court explained its reasoning, as follows:

> "Finding that a UUWF conviction could not be predicated on the same conviction (here, residential burglary) as that used for one of the predicate offenses required for an armed habitual criminal conviction would render the armed habitual criminal statute illogical. If defendant's construction of the armed habitual criminal statute were to be accepted, any defendant whose armed habitual criminal conviction consisted of the offense of UUWF would then have to have a third conviction—one that did not serve as a predicate offense to his UUWF conviction. Defendant's conclusion reads into the armed habitual criminal statute an element that is not there: that a court can only use the predicate felony of UUWF if that UUWF conviction is based on a felony other than the one used as the second predicate felony for the armed habitual criminal conviction. In other words, when using UUWF as a predicate felony for an armed habitual criminal conviction, the offender would have to have at least three prior felony convictions instead of two. There is no such language in the armed habitual criminal statute, and we refuse to read it into the statute. [Citation.] Accordingly, we find that there was no improper double enhancement in this case." *Johnson*, 2015 IL App (1st) 133663, ¶ 18.

¶ 135 For these same reasons, in *Fulton*, 2016 IL App (1st) 141765, this appellate court similarly rejected the defendant's contention that he was subjected to an improper double enhancement when his 2006 conviction for delivery of a controlled substance was used twice to support his armed habitual criminal conviction, once as its own predicate felony and once as an element of the second predicate felony, his 2007 conviction for AUUWF. See *Fulton*, 2016 IL App (1st) 141765, ¶¶ 9-12.

¶ 136 Applying the rationale of *Johnson* and *Fulton* to the cause at bar, we are compelled to

conclude that the defendant was not subjected to a double enhancement when his 1999 and 2008 convictions for armed robbery and AUUW were used to convict him as an armed habitual criminal. Both predicate felonies are clearly enumerated as valid offenses upon which to base an armed habitual criminal conviction. See 720 ILCS 5/24-1.7 (West 2012). As *Johnson* explains, the fact that the 1999 armed robbery conviction supported the defendant's 2008 AUUW conviction "does not negate the validity of the two offenses as the predicate offenses" for the defendant's armed habitual criminal conviction. *Johnson*, 2015 IL App (1st) 13363, ¶ 16. ; see also *Fulton*, 2016 IL App (1st) 141765, ¶¶ 12-13.

¶ 137 D. One-Act One-Crime Rule

¶ 138 On appeal, the defendant next contends that his conviction for armed habitual criminal was entered in violation of the one-act, one-crime doctrine, and should have been merged with the attempt murder conviction, because both convictions were based upon the same physical act—the defendant's shooting of the victim (which required his possession of the firearm). Under the one-act, one-crime rule, multiple convictions may not be based on the same physical act. See *People v. King*, 66 Ill. 2d 551, 566 (1977); *People v. Kuntu*, 196 Ill. 2d 105, 130 (2001); see also *People v. Segara*, 126 Ill. 2d 70, 77 (1988) (holding that if the same physical act forms the basis for two separate offenses charged, a defendant can be prosecuted for each offense, but only one conviction and sentence may be imposed); see also *People v. Garcia*, 179 Ill. 2d 55, 71 (1997) (holding that where guilty verdicts are obtained for multiple counts arising from the same act, a sentence should be imposed on the most serious offense). An "act" is defined as "any overt or outward manifestation which will support a different offense." *King*, 66 Ill. 2d at 566. However, if more than one offense stems from "incidental or closely related acts" but one offense is not a

lesser included offense of the other, multiple convictions with concurrent sentences may stand. *King*, 66 Ill. 2d at 566.

¶ 139 When as here, a defendant is charged with multiple offenses, and the issue is whether one offense is a lesser included offense, our supreme court has held that to determine whether the one-act, one-crime rule has been violated, reviewing courts must rely on the abstract elements approach. See *People v. Miller*, 238 Ill. 2d 161 (2010). Under this approach the reviewing court compares the statutory elements of the charged offenses. See *Miller*, 238 Ill. 2d at 166. If that comparison reveals that "all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second," and the defendant can properly be convicted only of the greater offense. *Miller*, 238 Ill. 2d at 166. The question of whether the defendant's conviction violates the one-act, one-crime rule is reviewed *de novo*. *People v. Artis*, 232 Ill. 2d 156, 161 (2009).

¶ 140 To determine whether the defendant's attempt murder and armed habitual criminal convictions here were based upon the same physical act, we turn to the relevant statutes defining those offenses. As to the charge of armed habitual criminal, under the Criminal Code:

> "A person commits the offense of being an armed habitual criminal if he *** possesses *** any firearm after having been convicted a total of 2 or more times of any combination of [certain qualifying] offenses." (Emphasis added.) 720 ILCS 5/24–1.7 (West 2012).

¶ 141 With respect to the attempt murder charge, the Criminal Code provides in pertinent part:

> "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." (Emphasis added.) 720 ILCS 5/8–4 (West 2012).

> "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause the death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another." 720 ILCS 5/9-1(a) (West 2012). "

¶ 142 Comparison of the statutory elements of the offenses at issue here reveals that the armed habitual criminal charge was not a lesser included offense of attempt murder. Each offense required proof of distinct acts not necessary to prove the other offense. Namely, although the armed habitual criminal conviction was based upon the possession of the firearm, the mere act of possessing the firearm was not sufficient to convict the defendant of the attempt first degree murder. Rather, that charge also required proof of separate and distinct acts "with intent to kill," in addition to the possession of the firearm. Accordingly, the defendant's convictions were not improperly based on a single physical act, and are therefore not a violation of the one-act, one-crime doctrine. See *Tolentino*, 409 Ill. App. 3d at 610-11 (holding that a defendant's convictions for *inter alia*, attempt first degree murder of a peace officer, did not violate the one-act, one-crime rule, because although the convictions had possession of firearm as a common element, the mere act of possessing the firearm was not sufficient to convict the defendant of both charges, and his conviction for attempt first degree murder also required proof of separate and distinct acts in addition to the possession of a firearm).

¶ 143 E. Ineffective Assistance of Counsel

¶ 144 On appeal, the defendant next contends that he was denied his constitutional right to effective

representation of counsel when counsel: (1) failed to exclude evidence of his prior convictions; and (2) failed to impeach Officer Soraparu with his police report.

¶ 145 It is axiomatic that every defendant has a constitutional right to the effective assistance of counsel. See U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); see also *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). According to *Strickland*, in order to prevail on a claim of ineffective assistance of counsel a defendant must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness under prevailing professional norms; and (2) that he was prejudiced by counsel's conduct, *i.e.*, that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94); see also *Domagala*, 2013 IL 113688, ¶ 36. Failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. See *People v. Henderson*, 2013 IL 114040, ¶ 11; see also *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 146 While the parties agree that *Strickland* is applicable, at the outset, they dispute the appropriate standard of review. The State contends that because the trial court conducted a *Krankel* inquiry, during which it heard the testimony from the defendant's trial counsel, and made a determination that his conduct was not ineffective, we should review the defendant's claims of ineffective assistance of counsel under a manifest weight of the evidence standard. The defendant, on the other hand, argues that he should not suffer a lesser standard of review

merely because the trial court conducted a *Krankel* hearing, and that our review should be *de novo*. We agree with the defendant.

¶ 147 The State misconstrues *Krankel*. "*Krankel* serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance [of counsel] claims." *People v. Patrick*, 2011 IL 111666, ¶ 39. Accordingly, *Krankel* is triggered only "when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel," and the court must determine whether to appoint new counsel. *People v. Jolly*, 2014 IL 117142, ¶ 29; see also *People v. Taylor*, 237 Ill. 2d 68, 75 (2010) (citing *People v. Krankel*, 102 Ill. 2d 181 (1984)); see also *People v. Patrick*, 2011 IL 111666, ¶ 39. Under *Krankel*, new counsel is not automatically required in every case where a defendant brings such a motion. *Taylor*, 237 Ill. 2d at 75. Instead, the trial court must employ a two step procedure. *Taylor*, 237 Ill. 2d at 75.

¶ 148 First, the court must conduct a preliminary examination of the factual basis underlying the defendant's claim—the so-called *Krankel* inquiry (*i.e.*, pre-*Krankel* hearing). *Taylor*, 237 Ill. 2d at 75; see also *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003); see also *People v. McLaurin*, 2012 IL App (1st) 102943, ¶¶ 39-40. During this preliminary evaluation, a trial court may: (1) question trial counsel about the facts and circumstances surrounding the defendant's allegations; (2) engage in a discussion with the defendant; or (3) rely on its own knowledge of counsel's performance at trial. *Jolly*, 2014 IL 117142, ¶ 30; *Moore*, 207 Ill. 2d at 78-79. "[A] preliminary *Krankel* inquiry should operate as a neutral and nonadversarial proceeding," and the "State's participation at that proceeding, if any, [must] be *de minimis*." *Jolly*, 2014 IL 117142, ¶ 38.

¶ 149 If, after the preliminary inquiry, the court determines that the defendant's claim lacks merit or

pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *Jolly*, 2014 IL 117142, ¶ 29; see also *Moore*, 207 Ill. 2d at 77-78. If, however, the court finds that the allegations show "possible neglect of the case," new counsel must be appointed to represent the defendant at the next stage of the proceeding—*i.e.*, the hearing on the defendant's *pro se* claims of ineffective assistance of counsel. This new counsel can independently evaluate the defendant's ineffectiveness claim and avoid any conflict of interest that might be created were trial counsel forced to justify his or her actions contrary to the defendant's position. See *Moore*, 207 Ill. 2d at 78.

¶ 150 In the present case, contrary to the State's position, the defendant is not seeking review of the trial court's *Krankel* inquiry. The defendant is nowhere arguing that the trial court erred when it refused to appoint him new counsel for his posttrial proceedings, nor could he since the record affirmatively establishes that he was represented by private counsel during the entirety of those proceedings, including the preliminary *Krankel* inquiry. Rather, on appeal, the defendant is making a constitutional argument that he was denied his Sixth Amendment right to effective representation of trial counsel. Our supreme court has repeatedly held that "the standard of review for determining if an individual's constitutional rights have been violated is *de novo*." See *People v. Hale*, 2013 IL 113140, ¶ 15 (applying *de novo* standard of review to ineffective assistance of counsel claims). Accordingly, we review *de novo*, the defendant's claims of ineffective assistance of trial counsel.

¶ 151 1. Failure to Challenge Introduction of Prior Convictions

¶ 152 We begin by addressing trial counsel's failure to challenge the introduction of the defendant's prior convictions as impeachment evidence. In that respect, the defendant contends that counsel's conduct was deficient because he failed to challenge the introduction of the

defendant's: (1) prior AUUW conviction on the basis of our supreme court's decision in *Aguilar*; and (2) all three of his prior convictions (*i.e.*, AUUW, armed robbery, and terrorism and possession of a controlled substance with intent to deliver) on the basis that they should have been excluded under *Montgomery*.

¶ 153 With respect to the AUUW conviction, the defendant contends that competent counsel would have been aware that under our supreme court's decision in *Aguilar*, 2013 IL 112116, which had been decided three months before the defendant's trial, the defendant's AUUW conviction was void *ab initio*, and accordingly could not be used for any purpose. As such, the defendant contends, trial counsel should have objected to the use of the AUUW conviction for impeachment purposes.

¶ 154 The State concedes that *Aguilar* was decided prior to the defendant's testimony but argues that his AUUW conviction was not voided by that decision because his conviction was for a Class 2 and not Class 4 AUUW. See *Aguilar*, 2013 IL 112116. The State contends that it was not until the *Burns*, 2015 IL 117387, decision, two years later, that the court clarified that its holding in *Aguilar* should have extended to all AUUW convictions (including Class 2 AUUW). Accordingly, the State contends trial counsel was not incompetent for failing to challenge the introduction of the AUUW conviction. We disagree.

¶ 155 As already noted above, to succeed on a claim of ineffective assistance of counsel, pursuant to *Strickland*, the defendant must first establish that his defense counsel's performance was deficient. "A defendant meets this burden by establishing that 'counsel's representation fell below an objective standard of reasonableness.' " *People v. Peeples*, 205 Ill. 2d 480, 512 (2002) (citing *Strickland*, 466 U.S. at 688). "In so doing, 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. Clendenin*, 238 Ill. 2d 302, 317 (2010).

¶ 156 In the present case, we find it difficult to ascertain any trial strategy that could have justified trial counsel's failure to in the very least attempt to argue *Aguilar* so as to exclude the introduction of the prior AUUW conviction for impeachment purposes. Contrary to the State's position, *Aguilar* itself was not initially limited to Class 4 convictions and did not suggest the limitation language until the State's rehearing petition, which was then relegated to a footnote. See *Aguilar*, 2013 IL 112116, FN 3. Even then, *Aguilar* was non-committal and never actually held that Class 2 AUUW convictions were constitutional or enforceable. See *Aguilar*, 2013 IL 112116, FN 3 ("In response to the State's petition for rehearing in this case, we reiterate and emphasize that our finding of unconstitutionality in this decision is specifically limited to the Class 4 form of AUUW, as set forth in section 24–1.6(a)(1), (a)(3)(A), (d) of the AUUW statute. *We make no finding, express or implied, with respect to the constitutionality or unconstitutionality of any other section or subsection of the AUUW statute*."). Moreover, numerous decisions immediately following *Aguilar*, some only a few days afterwards, explicitly held that *Aguilar* was not limited to Class 4 convictions. See *e.g.*, *People v. Campbell*, 2013 IL App (4th) 120635, ¶ 14 ("The State seems to misunderstand the nature of the supreme court's decision in *Aguilar*. The court in *Aguilar* did not merely hold that section 24-1.6(a)(1), (a)(3)(A) of the Code was unconstitutional as applied in that case—the court held that the statute was unconstitutional on its face."); see also *People v. Gayfield*, 2014 IL App (4th) 120216-B (holding that pursuant to Aguilar, a Class 2 AUUW conviction was void *ab initio*). What is more, competent counsel should have been aware that the Seventh Circuit Court of Appeals had enjoined enforcement of both the Illinois UUW and AUUW statues as a Second Amendment

violation, more than a year before the defendant testified. See *Moore v. Madigan*, 702 F. 3d 933, 942 (7th Cir. 2012).

¶ 157 Nevertheless, even though we are troubled by counsel's failure to at least attempt to object to the introduction of the AUUW conviction as impeachment evidence on the basis of *Aguilar*, we find that the defendant cannot meet his burden in establishing the prejudice prong of *Strickland*, so as to succeed on his ineffective assistance of counsel claim.

¶ 158 To establish prejudice the defendant must show that but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Clendenin*, 238 Ill. 2d at 317. "A reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 159 In the present case, because of the overwhelming nature of the evidence presented at the defendant's trial we find that there was no reasonable probability that but for the introduction of the prior AUUW conviction for purposes of impeachment, the outcome of the proceeding would have been different. As already articulated in detail above, three individual eyewitnesses (including the victim, a by-stander and a police officer) identified the defendant as the shooter. Two of those identifications took place within an hour after the shooting, and all were made within 24 hours. The victim testified and the surveillance video introduced at trial corroborated the victim's testimony that immediately before the shooting, the defendant was at a near-touching distance to the victim. That surveillance video also fully corroborated the testimony of all three witnesses as to what transpired at the scene. Although it is true that the defendant claimed to be somewhere else during the shooting, his testimony as to his whereabouts, namely that he was

mistakenly arrested while robbing the SUV under which he was found, was, at best, tenuous, particularly since the arresting officer's testimony regarding what the defendant was doing under the SUV when he was arrested contradicted that of the defendant. As such, there was no reasonable probability that the exclusion of the prior AUUW conviction for purposes of impeachment would have affected the outcome of his trial. Accordingly, we conclude that the defendant has failed in his burden to demonstrate prejudice under *Strickland*.

¶ 160 In doing so, we have considered the decision in *People v. Naylor*, 229 Ill. 2d 584 (2008) relied upon by the defendant and find it inapposite. In that case, the court found that improper admission of a prior conviction was prejudicial to the defendant, requiring reversal because the trial was "a contest of credibility." *Naylor*, 229 Ill. 2d at 606-07. In coming to this conclusion, the court in *Naylor* explained that at trial two officers testified that the defendant sold them heroin, while the defendant testified that he had left his apartment to pick up his son from school when he was mistakenly swept up in a drug raid. *Naylor*, 229 Ill. 2d at 607. The court further noted that since there was no extrinsic evidence corroborating or contradicting either version of events, the trial court's finding of guilty necessarily involved the court's assessment of the credibility of the two officers against that of the defendant. *Naylor*, 229 Ill. 2d at 607. Accordingly, the court held that "[a]rguably, defendant's erroneously admitted incompetent prior conviction was the State's *only* successful attack on the defendant's testimony." *Naylor*, 229 Ill. 2d at 607. The same is not true here. As already explained above, unlike in *Naylor*, there was extrinsic evidence corroborating the identifying witnesses' testimony and contradicting the defendant's version of events. The overwhelming evidence at trial established that the defendant was positively identified by three eyewitnesses (including the victim, who testified that it was the defendant who shot him). The collective testimony of the three eyewitnesses as to what

transpired during the shooting was corroborated by the surveillance video, and the arresting officer's testimony as to what the defendant was doing when he was arrested contradicted that of the defendant. Accordingly, *Naylor* does not apply.

¶ 161 The defendant also contends that trial counsel was ineffective for failing to challenge the introduction of his prior convictions under *Montgomery*. He asserts that under *Montgomery*, evidence of a prior conviction is not admissible for impeachment purposes if a period of over ten years has elapsed since the date of conviction or release from confinement, whichever is the later date, and the probative value of admitting the conviction outweighs any danger of unfair prejudice. *People v. McCoy*, 2016 IL App (1st) 130988, ¶ 64 (citing *Montgomery*, 47 Ill. 2d at 516). With respect to his prior 1999 armed robbery conviction, the defendant argues that the State's reference to a 2006 discharge-date of MSR was not the operative date for measuring the ten-year period, for purposes of *Montgomery*. Rather, he asserts that because he was arrested on the armed robbery charge on April 22, 1998, and served five years of this ten-year sentence, he was released in the Spring of 2003, which was more than ten years before his December 2013 testimony. The defendant therefore argues that trial counsel was ineffective for failing to object to the introduction of his armed robbery conviction for impeachment purposes. In addition, he peripherally asserts that both his AUUW conviction (irrespective of its voidness) and his 1999 Iowa convictions for terrorism and possession of a controlled substance were unrelated to testimonial deceit and too remote to be probative rather than prejudicial, so that counsel's failure to argue their prejudice under *Montgomery* constituted incompetence.

¶ 162 However, we need not determine whether counsel's conduct was deficient, since the defendant cannot meet his burden in establishing prejudice under *Strickland*. Our supreme court has repeatedly held that we may "dispose of an ineffective assistance of counsel claim by

proceeding directly to the prejudice prong" without making a determination as to the counsel's performance. *Hale*, 2013 IL 113140, ¶ 17; see also *Albanese*, 104 Ill. 2d at 527. As already fully explained above, the defendant cannot meet the prejudice prong, since the evidence of his guilt at trial was overwhelming.

¶ 163 2. Failure to Impeach Officer Soraparu

¶ 164 The defendant nonetheless also asserts that he was denied his constitutional right to effective representation when trial counsel failed to impeach Officer Soraparu with an inconsistent police report. The defendant concedes that his trial counsel cross-examined Officer Soraparu regarding why the officer did not recover the defendant's hoodie, but argues that counsel failed to confront the officer with impeaching statements from the police report, which failed to note both the existence of the hoodie and the officer observing the defendant removing that hoodie. Accordingly, the defendant contends that counsel failed to present "impeachment by omission" evidence that would necessarily have discredited the officer's testimony and impacted the outcome of his trial. For the reasons that follow, we disagree.

¶ 165 Our courts have repeatedly held that the decision whether to cross-examine or impeach a witness is generally a matter of trial strategy that will not support a claim of ineffective assistance of counsel. *Clay*, 379 Ill. App. 3d at 481.

¶ 166 The purpose of impeachment is to attack the credibility of the witness and not to show the truth of the impeaching material. *People v. Acklin*, 208 Ill. App. 3d 616, 624 (1990); see also *People v. Salgado*, 263 Ill. App. 3d 238, 247 (1994). Under the rule for impeachment by omission it is permissible to use prior silence to discredit a witness' testimony if: (1) it is shown that the witness had an opportunity to make a statement, and (2) under the circumstances, a

person normally would have made the statement. *People v. Clay*, 379 Ill. App. 3d 470, 481 (2008).

¶ 167 In the present case, the defendant faults his trial attorney for not using a police report to impeach Officer Soraparu. It has long been held that a police report may be used for impeachment purposes, but not as substantive evidence. *People v. Wilder*, 356 Ill. App. 3d 712, 724 (2005) (citing *People v. Shief*, 312 Ill. App. 3d 673, 680 (2000). What is more, our courts have repeatedly held "the testimony of a police officer cannot be impeached by the contents of a police report which he neither prepared nor signed." *People v. Currie*, 84 Ill. App. 3d 1056, 1060 (1980); see also, *e.g.*, *People v. Gomez*, 107 Ill. App. 3d 378, 382 (1982) ("it is well established that a police report which an identifying officer neither prepared nor signed does not constitute grounds for impeachment"); *People v. Beard*, 271 Ill. App. 3d 320, 331 (1995) (police report can only be used to impeach report's author); *People v. Gagliani*, 210 Ill. App. 3d 617, 629 (1991) (same).

¶ 168 A review of the arrest reports attached to the defendant's motion for a new trial, upon which the defendant's ineffective assistance of counsel argument is based, reveal that Officer Soraparu did not prepare those reports. The documents list a "reporting officer" and at the bottom the person who "printed" the document, neither of whom are Officer Soraparu. Accordingly, trial counsel could not have used the arrest report to impeach Officer Soraparu's testimony.

¶ 169 What is more, any impeachment by omission would not have minimized Officer Soraparu's credibility. At trial, Officer Soraparu testified that when he first saw the defendant, the defendant was wearing a dark-colored hoodie, long black baggy shorts and a white T-shirt. This testimony was corroborated by the video surveillance footage of the shooter. Officer Soraparu

further testified that during his pursuit of the defendant, he observed the defendant removing the black hoodie. On cross-examination, the officer was asked about the hoodie and why he did not recover it, to which he responded that the defendant had ditched it in the vacant lot through which he was fleeing, and the officer had assumed someone else would recover it. Under this record, the defendant cannot establish that the use of another officer's arrest report excluding the mention of the hoodie would have had a reasonable probability of affecting the outcome of his trial. See *e.g.*, *Wilder*, 356 Ill. App. 3d at 724.

¶ 170 In reaching this conclusion, we have considered the decision in *People v. Williams*, 329 Ill. App. 3d 846, 853-56 (2002), and find the defendant's reliance upon it misplaced. In that case, two eyewitnesses gave testimony that conflicted with their earlier statements to police. *Williams*, 329 Ill. App. 3d at 853-56. Defense counsel cross-examined the witnesses, but they did not admit that their statements to the police were inconsistent with their trial testimony. *Williams*, 329 Ill. App. 3d at 854–55. Rather than calling the officers at trial to prove up the impeachment, defense counsel agreed to a stipulation that the witnesses spoke to police, but the stipulation mentioned nothing about the inconsistencies. *Williams*, 329 Ill. App. 3d at 856. The reviewing court found the cross-examination and the stipulation were inadequate substitutes for the live testimony of the police officers. *Williams*, 329 Ill. App. 3d at 856–57.

¶ 171 *Williams* differs greatly from the facts of this case. In *Williams*, the witnesses refused to admit they made inconsistent statements and counsel failed to prove that they did through the testimony of officers. Moreover, in *Williams* the impeachment evidence challenged the credibility of both eyewitnesses. In the present case, the testimony of the remaining two eyewitnesses, Rogers and Davis, remained unchallenged, and their credible account of the shooting would have been sufficient alone to support a guilty verdict. See *People v. Petermon*,

2014 IL App (1st) 113536, ¶ 30 ("the testimony of even a single witness is sufficient to convict where the witness is credible and viewed the accused under conditions permitting a positive identification to be made."). Accordingly, we conclude that the defendant cannot establish that he was denied effective representation.

¶ 172 F. Sentencing Issues

¶ 173 On appeal, the defendant next contends that the trial court committed reversible error when it ordered that his 45-year attempt murder sentence (20 years' for the attempt murder and 25 years for the firearm enhancement), and his 20-year armed habitual criminal sentence had to be served consecutively. The defendant specifically argues that the trial court: (1) erroneously believed that consecutive sentencing was mandatory; and (2) improperly used the same factor of "severe bodily injury" to enhance his sentence twice (once for the personal discharge of the firearm which caused great bodily harm and the second time to require consecutive sentences). For the reasons that follow, we disagree.

¶ 174 Pursuant to section 5-8-4 (d)(1) of the Illinois Unified Code of Corrections (Code of Corrections) (730 ILCS 5/5-8-4(d)(1) (West 2012)) consecutive sentence terms are mandatory where one of the offenses for which the defendant is convicted is, *inter alia*, a Class X offense, and the defendant has inflicted "severe bodily injury."

¶ 175 It is undisputed here that both the offense of attempt first-degree murder and the offense of armed habitual criminal are Class X felonies. See 720 ILCS 5/8-4(c)(1) (West 2012) ("the sentence for attempt to commit first degree murder is the sentence for a Class X felony"); see also 720 ILCS 5/24–1.7 (West 2012) ("Being an armed habitual criminal is a Class X felony."). As such, if the defendant inflicted "severe bodily harm" during the commission of either offense, the trial court had no choice but to impose mandatory consecutive sentences.

¶ 176 The transcript of the proceedings below reveals that in imposing consecutive sentences, the trial court explained:

> "I think the State has correctly pointed out, as I have in my notes, that it is mandatory consecutive, and that is if it inflicted severe bodily harm, and I think having your body pierced with five bullets and some of you r intestines taken out and severe scarring, which were shown on the stand, and I believed [the victim] also testified to a bullet still remaining inside his body, that is severe bodily harm. That is consecutive sentencing."

¶ 177 We find nothing erroneous in this reasoning, and conclude that the trial court properly found that consecutive sentences were mandatory. 730 ILCS 5/8-4(d) (West 2012).[6]

¶ 178 The defendant nonetheless contends that the consecutive sentences constituted an improper double enhancement because the same factor, namely "severe bodily injury" was used both to mandate such consecutive sentencing and to impose the 25-year enhancement to the defendant's attempt murder sentence. According to the defendant, absent such an improper double enhancement, the court could have sentenced him up to a maximum of 55 years' (*i.e.*, between 6 and 30 years' for either Class X felonies, plus the additional 25 years' for the discharge of the firearm which caused the great bodily harm.). We disagree.

¶ 179 As already discussed above, an impermissible double enhancement occurs when either: (1) a

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[6] We note that the decision in *People v. Ramirez*, 2015 IL App (1st) 130022, relied on by the defendant for the proposition that not all attempt murder convictions with "great bodily harm" mandate consecutive sentences, has since been vacated by our supreme court. See *People v. Ramirez*, 50 N. E. 3d 1136.

single factor is used both as an element of an offense and as a "basis for imposing 'a harsher sentence than might otherwise have been imposed' "; or (2) "the same factor is used twice to elevate the severity of the offense itself." *Phelps*, 211 Ill. 2d at 12–13 (quoting *Gonzalez*, 151 Ill. 2d at 83-84). Whether a defendant has been subjected to an improper double enhancement is reviewed *de novo*. *Phelps*, 211 Ill. 2d at 12.

¶ 180 Our appellate courts have previously rejected the argument that the 25-year sentence enactment for first-degree murder is a double enhancement, holding that firearm use is not implicit in the offense of first-degree murder. See *People v. Thompson*, 354 Ill. App. 3d 579, 592 (2004). The rationale has been that in enacting that enhancement, it was the legislature's intent to curb gun-crimes. See *People v. Butler,* 2013 IL App (1st) 120923, ¶ 36 (The purpose of the firearm-add-on provisions is "to promote public health and safety, and to impose severe penalties that will deter the use of firearms in the commission of felonies.") Accordingly the 25-year firearm enhancement provision is triggered not by the death of the victim itself, but rather by the personal discharge of the firearm that caused that death. See *Thompson*, 354 Ill. App. 3d at 592; see also *People v. Sawczenko–Dub*, 345 Ill. App. 3d 522, 537–39 (2003) (it is the use of the firearm to cause the death of the victim that triggered the enhancement, not the death itself); *People v. Bloomingburg*, 346 Ill. App. 3d 308, 325-26 (2004) (it is the manner of death, that it occurred as a result of a discharge of a firearm, rather than the fact of death, that is the focus of the enhancing provision).

¶ 181 The same rationale applies to an attempt murder charge. It is the defendant's personal discharge of the firearm that triggers the 25-year enhancement of the attempt murder charge, not the "great bodily harm" to the victim that was caused by the defendant's personal discharge of the firearm. As such, the defendant's sentence for attempt murder including the additional 25 years'

for the personal discharge of the firearm and the court's order requiring that that sentence be served consecutively with the armed habitual criminal sentence does not constitute a double enhancement. Rather, it is "the discretionary act of a sentencing court in fashioning a particular sentence tailored to the needs of society and the defendant, within the available parameters," which "is a requisite part of every individualized sentencing determination." *People v. Thomas*, 171 Ill. 2d 207, 224-45 (1996).

¶ 182 III. CONCLUSION

¶ 183 For the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 184 Affirmed.