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2017 IL App (3d) 130397-U

Order filed January 11, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0397
DEMETRIOUS D. JONES,	)	Circuit No. 11-CF-415
Defendant-Appellant.	)	Honorable Clark Erickson, Judge, presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Presiding Justice Holdridge and Justice McDade concurred in the judgment.

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ORDER

¶ 1 Held: The appellate court held: (1) defendant did not receive an unfair trial, nor did his counsel provide ineffective assistance, where the media broadcast of his trial captured conversations between him and his counsel but his counsel did not object to further broadcasting or request a mistrial and defendant was not prejudiced by the broadcasting; (2) defendant did not receive an unfair trial (a) where the attempted murder jury instruction failed to specify the victim, or (b) by the manner in which the trial court responded to a question from the jury during jury deliberations; (3) the trial court did not abuse its discretion in sentencing defendant; and (4) the aggravated unlawful use of weapon (AUUW) statute is facially unconstitutional in violation of the Second Amendment, and defendant's AUUW conviction is vacated.

¶ 2 Following a jury trial, defendant, Demetrious Jones, was convicted of the first degree murder of Marcus Sanders (720 ILCS 5/9-1(a) (West 2010)), attempt (first degree murder) of Dewitt Holbrook (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), and aggravated unlawful use of weapon (AUUW) (720 ILCS 5/24-1.6(a)(2)(3)(A) (West 2010)), for which he was sentenced to consecutive 55-year and 28-year terms of imprisonment and a concurrent 5-year term of imprisonment, respectively. On appeal, defendant argues that: (1) he received ineffective assistance of counsel and an unfair trial because the news media’s audio feed captured conversations between him and his attorneys, which he claims was an impediment to their ability to communicate with each other; (2) he was denied a fair trial because (a) the attempted murder jury instructions did not specify to which victim the instruction applied, and (b) the trial court responded improperly to the jury’s question of whether substantial bodily harm that could result in death constituted an intent to kill; (3) the trial court abused its discretion in sentencing him; and (5) his AUUW conviction must be reversed because the AUUW statute has been found to facially unconstitutional. We affirm defendant’s convictions of first degree murder and attempted murder, and we vacate defendant’s AUUW conviction.

¶ 3 **FACTS**

¶ 4 Defendant was charged with the August 2, 2011, first degree murder of Marcus Sanders and attempted murder of Dewitt Holbrook. In count I of the charging instrument, the State alleged that defendant committed first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) in that defendant, without lawful justification and with the intent to kill Marcus Sanders, shot Marcus Sanders with a handgun, causing the death of Marcus Sanders. In count II, the State alleged that defendant committed first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) in that defendant, without lawful justification, shot Marcus Sanders about the body with a handgun, knowing such

act created a strong probability of death or great bodily harm, causing the death of Marcus Sanders. In count III, the State alleged that defendant committed attempted first-degree murder (720 ILCS 5/8-4 (West 2010)) in that defendant, with the intent to commit first-degree murder, performed a substantial step toward the commission of the first degree murder by shooting Dewitt Holbrook about the legs with a handgun. In count IV, the State alleged that defendant committed aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2010)) in that he committed a battery, knowingly and without legal justification, causing injury to Dewitt Holbrook in that defendant shot Dewitt Holbrook about the legs with a handgun. In count V, the State alleged that defendant committed aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(2)(3)(A) (West 2010)) in that defendant knowingly carried on or about his person a firearm while upon a public way, at a time when he was not on his own land or in his own abode or fixed place of business, and the firearm was uncased, loaded and immediately accessible, and defendant had previously been convicted of a felony.

¶ 5 At the initial pretrial hearing, the prosecutor indicated that the State's evidence would prove defendant discharged a firearm during the commission of the alleged crimes, making him eligible to receive a firearm enhancement to his sentence. He was also admonished that he would be given consecutive sentences if he was found guilty of both first-degree murder and attempted first-degree murder. Prior to jury selection, the State specified that defendant was charged with AUUW as a Class 2 felony because defendant was a felon at the time of the incident. Defendant stipulated to his prior felony conviction as alleged in count V. The trial court indicated that defendant's stipulation was accepted.

¶ 6 During jury selection on October 22, 2012, the trial court read the Bill of Indictment to the potential jurors. The reading of the indictment included the trial court informing potential

jurors that defendant was charged in counts I and II with the first degree murder of Marcus Sanders and that defendant was charged in count III with the attempted first degree murder of Dewitt Holbrook.

¶ 7 Defendant's jury trial took place from October 23 to 29, 2012, and was open for media coverage under the Illinois Supreme Court's guidelines for extended media coverage. During opening statements, the prosecutor indicated that on the day of the incident, without justification, defendant pulled out a .25 caliber handgun and shot at Marcus Sanders and Dewitt Holbrook. The prosecutor stated, "Marcus Sanders lay dead and Dewitt Holbrook had been shot several times." The prosecutor explained that the evidence would show that defendant fired a handgun at Holbrook's legs several times and Holbrook would testify about his injuries. The prosecutor also indicated that defendant fatally shot Sanders in the chest. The prosecutor indicated that several people called 9-1-1 and ambulance personnel came to the scene, "but it was too late to save Marcus." The prosecutor also indicated, "an autopsy was performed on Marcus Sanders."

¶ 8 At the end of the second day of the proceedings, on October 24, 2012, defense counsel received a note from the trial court clerk with a message from defense counsel's law office that indicated people in her office who had been watching the broadcast of the trial could hear defendant's two attorneys speaking with each other and to defendant during breaks in the proceedings. The following morning, on October 25, 2012, defendant's attorney brought the issue to the trial court's attention and indicated that she did not realize that the trial would be broadcasted during breaks. Defendant's attorney told the trial court that she wanted to make a record of the incident but was not moving for a mistrial. On October 26, 2012, defendant's counsel informed the court that the media was still televising what she was saying to defendant. The trial court stated that it had informed the media per the Illinois Supreme Court guidelines

that there was to be no recording of any kind during recesses and that conferences between the attorneys and their client were not to be televised. See Policy for Extended Media Coverage in the Circuit Court of Illinois 1.1(a) (prohibiting audio pickup, broadcasting, or recording of an in-court conference between attorneys and their client, between co-counsel, between attorney and opposing counsel, or between attorneys and the judge). The trial court indicated that there was no "really big compromise [of the trial]" because the jury was out of the courtroom during recesses and was not supposed to be watching the broadcast of the trial.

¶ 9 During the trial, Glenda Sanders, the mother of Marcus Sanders, testified that on the day of the incident she spoke with Marcus at 4:33 p.m. on the phone. Marcus had told her that he had spent the day at a barbeque with a friend and was going over to his girlfriend's home. Glenda never spoke with Marcus again.

¶ 10 Holbrook testified that he was 24 years old. He had previously been convicted of two drug related crimes and had been released from prison on April 1, 2011, about four months before the incident at hand. On the day of the incident, Sanders and Holbrook had gone to Holbrook's grandmother's home for a barbeque. They left the barbeque and were riding around in a tan Chevrolet Blazer with the windows down. Holbrook was riding in the front passenger seat while Sanders drove. Holbrook saw two people riding around on bicycles, who Holbrook later recognized as his cousin, Timothy Hayes, and defendant.

¶ 11 Holbrook testified, "They had said ya'll bitch ass niggers or something," but at that point he and Sanders did not recognize Hayes or defendant so they kept driving. Holbrook and Sanders saw Hayes and defendant again at the intersection of Greenwood and Bourbonnais. After Sanders stopped the vehicle, defendant approached Holbrook on the passenger side. Holbrook asked defendant who he was talking to. Defendant said, "[Y]a'll bitch ass." Holbrook

said to defendant that defendant did not even know them. Defendant punched Holbrook in the face through the open car window. Holbrook got out of the vehicle and knocked defendant to the ground. Defendant reached for a chrome gun in his pocket as he fell. Holbrook put his hands in the air, backed away, and indicated that he did not want any problems. Holbrook testified that he and Sanders were not armed. Defendant said, "fuck y'all" and began shooting at Holbrook's legs. Holbrook heard eight shots as he returned to the vehicle and Sanders drove off. Defendant continued to shoot as they drove away. Sanders jumped from the driver's side of the vehicle as it was still moving and ran into an alley. The vehicle hit a parked car. Holbrook exited the vehicle to check on Sanders. Holbrook noticed blood coming from his own legs. Holbrook did not notice any injuries on Sanders, and Sanders was able to speak with Holbrook. Holbrook ran back to the car.

¶ 12           Witnesses for the State testified that one of two males on a bicycle shot at Sanders's vehicle as it drove up the street. The other male on a bicycle rode up to the driver's side. One witness testified that the shooter chased one of the occupants of the vehicle to the alley and shot at him. Sanders died from a gunshot wound to the chest. Six .25-caliber bullet casings were found around the scene of the incident and, based on witnesses' tips, the police recovered a .25-caliber pistol from a trash can. The shell-casing and the bullet that killed Sanders were identified as having been fired from the recovered .25-caliber pistol.

¶ 13           Defendant was arrested and interviewed by police. In the interview, defendant indicated that Holbrook did not like him. When Sanders and Holbrook saw defendant, Sanders told Holbrook to beat defendant's ass. Holbrook exited the vehicle, and defendant reached for his pocket. Holbrook returned to the vehicle and then emerged with a .380 handgun and asked, "What's up now?" Defendant thought if he turned to run then Holbrook would shoot him in the

back. Defendant told police he fired a .22-caliber handgun two or three times at Holbrook's legs because defendant did not want to kill Holbrook. Defendant said that he did not know how Sanders was shot. During a phone call to his mother, defendant indicated that it was either Holbrook or him and he did not know how Sanders was shot. Defendant told his mother that he only fired at Holbrook because he thought Holbrook was going to shoot him.

¶ 14 The jury was instructed that the charges against defendant were contained in the Bill of Indictment, which was “the formal method of charging the defendant with offenses or offense and placing him on trial.” The trial court instructed the jurors that to sustain the charge of first degree murder, the State must prove “defendant performed the acts which caused the death of Marcus Sanders or another” and he when he did so “he intended to kill or do great bodily harm to Marcus Sanders or another, or he knew that such acts would cause death to Marcus Sanders or another, or he knew that such acts created a strong probability of death or great bodily harm to Marcus Sanders or another” and defendant was not justified in using the force which he used. The jurors were instructed to find defendant guilty of attempted murder if they determined that defendant performed an act which constituted a substantial step toward killing "an individual" and did so with the intent to kill "an individual" but that defendant was not justified in using the force which he used.

¶ 15 In closing arguments, the prosecutor stated, “The case against the defendant for the death of Marcus Sanders is a first degree murder case.” The prosecutor also stated that, with respect to first degree murder, the first proposition is that defendant performed acts which caused the death of Marcus Sanders, defendant’s acts of shooting Marcus Sanders caused his death, and he either intended to kill or do great bodily harm to Marcus Sanders or he knew such acts would cause death to Marcus Sanders or such acts created a strong probability of death or great bodily harm.

The prosecutor additionally indicated, “Now the second charge in this case is attempt first degree murder.” The prosecutor explained that a defendant may be convicted of attempted first degree murder if the State proved that he, with the intent to kill, performed an act which constituted a substantial step toward the killing of that individual. The prosecutor argued that defendant was proven guilty of attempted first degree murder because the State had proven defendant “tried to kill Dewitt Holbrook back on August 2nd.” The prosecutor further argued, “The defendant’s repeated shooting of Dewitt Holbrook constitutes a substantial step towards the attempt first degree murder of Dewitt Holbrook.” The prosecutor continued by stating:

“Dewitt Holbrook has three bullets that are still inside of him as a result of the defendant’s actions. As you saw in this case, it only took one of those bullets to kill Marcus Sanders. Three of those bullets went inside Dewitt Holbrook’s body and remain there today—up until the day when he testified on the witness stand. \*\*\*

\*\*\* Dewitt Holbrook had a total of eight bullet wounds, entrance wounds and exits wounds, mostly to the legs but one in the hand. He had to be taken to the emergency room for treatment. \*\*\* He stayed in the hospital over night and he testified that when it rains out those three bullets hurt and cause him pain. You know that’s not gonna get better with age.

\*\*\*

\*\*\* The defendant was the only one who was armed. The defendant was the only one doing any shooting. The defendant had a monopoly on fire power that day [that] cost Marcus Sanders his life, almost cost Dewitt Holbrook his life.”

¶ 17 During deliberations, the jurors sent a note to the court asking, "[O]n the charge of attempt first degree murder, if bodily harm is substantial and could result in death, then does that constitute or mean the same thing as intent to kill?" Upon the agreement of both parties, the trial court replied to the jurors that they had heard the evidence and had been instructed as to the applicable law, and no other answer would be given to their inquiry.

¶ 18 The jury found defendant guilty of first degree murder, attempted first degree murder, aggravated battery with a firearm, and AUUW. Defendant filed a motion for new trial, arguing that he was denied a fair trial due to confidential communications between himself and his attorneys being broadcasted by the media during the trial and breaks. Defendant argued that despite his counsel's repeated complaints, the problem was not alleviated for three days and the problem inhibited his attorneys' communications with him and there was a great risk that the public and jurors were aware of the attorney-client communications. At the hearing on the motion, defense counsel argued defendant was prejudiced because she was placed in the uncomfortable situation of having to be careful of how long she talked with defendant and deciding whether to talk to him at all, which made their communications uncomfortable and limited. The trial court granted defendant leave to obtain a copy of the trial broadcast and supplement his motion with specific conversations that had been broadcasted.

¶ 19 Defendant filed an amended motion for new trial with the same argument that he was denied a fair trial due to confidential communications between himself and his attorneys being broadcasted. In support of the amended motion, defendant submitted affidavits of his defense counsel and her administrative assistant. Defense counsel's assistant attested that she had watched the live broadcast of the trial while performing her "secretarial duties" and she heard defense counsel's communications with defendant repeatedly broadcasted during breaks, even

after she made multiple phone calls to courthouse personnel notifying them of the situation. The affidavit of defense counsel indicated that she reviewed a recording of the trial broadcast and could hear conversations she held with defendant during breaks and the "conversations that were broadcast over the television amounted to 'small talk' " and were not of trial strategy or of any admissions made by defendant.

¶ 20 At the hearing on the motion, defendant's counsel indicated that she had reviewed the trial broadcast tapes and "at no point was [she] talking trial strategy with [defendant]," but she believed defendant was prejudiced because her communications with him were "uncomfortable and more limited than they would be if [she] was just sitting at the counsel table without [the conversations] being picked up and broadcast on T.V." Defense counsel indicated that she had met with her client at the jail almost every morning so she did, in fact, have "private time to talk about the case." The trial court continued the matter so defense counsel could review recordings of the trial and specify what had been broadcast. Several months later, defense counsel indicated she reviewed the recordings and nothing confidential had been revealed and at no point were she and defendant discussing trial strategy, although there were some inadvertent recordings of casual comments made between her and defendant. The trial court found the broadcast did not affect defendant's right to a fair trial and denied defendant's motion for new trial.

¶ 21 In sentencing defendant, the trial court noted that defendant made no statement in allocution for the court to consider. The trial court also noted that the mandatory statutory minimum for the aggregated consecutive sentences was 71 years so that consideration of defendant's potential for rehabilitation at age 86 "seem[ed] like something of an unnecessary exercise," but the court would consider defendant's potential for rehabilitation because it was

required to do so. The trial court noted defendant committed the offenses in this case when he was 19 years old, reviewed defendant's criminal history, and considered defendant's social history. The trial court noted that the State's recommendation of a 100-year sentence may have a minimal deterrence value above the 71-year minimum mandatory sentence, where the 71-year mandatory minimum sentence would have defendant in prison until he was 86 years old. The trial court sentenced defendant on the murder count to 30 years of imprisonment, with 25 years of an additional mandatory enhancement for the use of a firearm. The trial court noted the need to deter others from committing this type of a “senseless” crime and using firearms in the commission of crimes. The trial court sentenced defendant to 8 years of imprisonment on the attempted murder count, with 20 years of an additional mandatory enhancement for his use of a firearm. The trial court found that the aggravated battery with a firearm sentence merged with defendant attempted first degree murder sentence. The trial court also sentenced defendant to a concurrent term of 5 years of imprisonment on the AUUW count. Defendant filed a motion for the court to reconsider the sentence, which the trial court denied. Defendant appealed.

¶ 22

#### ANALYSIS

¶ 23

On appeal, defendant argues: (1) he received ineffective assistance of counsel and an unfair trial because the news media’s audio feed captured conversations between him and his attorneys, which he claims was an impediment to their ability to communicate; (2) he was denied a fair trial because (a) the attempted murder jury instruction did not specify to which victim the instruction applied, and (b) the trial court responded improperly to the jury’s question of whether substantial bodily harm that could result in death constituted an “intent to kill”; (3) the trial court abused its discretion in sentencing defendant; and (4) the AUUW conviction must be reversed

because the AUUW statute was found to be unconstitutional. We affirm defendant's convictions in part and vacate in part.

¶ 24

#### I. Media Coverage

¶ 25

Defendant argues that he was denied a fair trial in that he was denied the effective assistance of counsel because his conversations with his attorney were recorded and broadcasted by the media, which defendant claims impeded his and his attorney's ability to communicate with one another. Defendant contends the trial court should have terminated the media coverage when it became apparent that the media was violating the Illinois Supreme Court's guidelines pertaining to media coverage in the courtroom. Defendant argues that after the trial court was notified of the issue, the broadcast of his conversation with his attorney continued, which he claims was an impediment to his ability to confer with his attorney during trial and resulting in a violation of his right to effective assistance of counsel and due process. In support of his argument, defendant cites *United States v. Durham*, 287 F.3d 1297, 1305-06, 1309 (11th Cir. 2002) (defendant's fear of triggering his stun belt impeded effective communication with counsel) and *People v. Knuckles*, 165 Ill. 2d 125, 136 (1995) (violation of attorney-client privilege may deny a defendant effective assistance of counsel and a fair trial).

¶ 26

The issue of whether a defendant was denied a fair trial due to the procedures implemented by a trial court for media coverage in the courtroom is a matter of first impression in Illinois. We agree with the parties' contention that the appropriate standard of review of the trial court's procedures pertaining to media coverage in the courtroom is for an abuse of discretion. See *In re Extended Media Coverage in the Circuit Courts of Illinois on an Experimental Basis*, M.R. 2634 (Ill. Jan. 24, 2012); [http://www.illinoiscourts.gov/supremecourt/Policies/Pdf/Extended\\_Media\\_Coverage.pdf](http://www.illinoiscourts.gov/supremecourt/Policies/Pdf/Extended_Media_Coverage.pdf).

(providing that extended media coverage is subject to the authority of the presiding judge). The Illinois Supreme Court’s policy for extended media coverage provides:

“The [media] coverage shall be subject, at all times, to the authority of the judge presiding at the proceeding. Extended media coverage shall not be distracting or interfere with the solemnity, decorum and dignity of the court making decisions that affect the life, liberty or property of citizens. Nothing in this policy shall limit or restrict the power, authority or responsibility otherwise vested in the chief judge of the circuit; and the judge presiding to: (a) control the conduct of any proceeding; (b) maintain decorum and prevent distractions; (c) guarantee the safety of the courtroom, including any party, witness, or juror; and (d) ensure the fair and impartial administration of justice in the pending cause.”

[http://www.illinoiscourts.gov/supremecourt/Policies/Pdf/Extended\\_Media\\_Coverage.pdf](http://www.illinoiscourts.gov/supremecourt/Policies/Pdf/Extended_Media_Coverage.pdf).

¶ 27 In this case, after defense counsel was notified that her attorney-client conversations were being recorded and broadcasted by the media, defense counsel did not object to the continued recordings and did not move for a mistrial. In fact, defense counsel specifically stated, “I’m not moving for a mistrial.” After the second day of trial, defense counsel informed the trial court that the media was still picking up what she was saying to defendant during breaks, but she did not make any motions regarding the issue and made no objection to further media coverage of the trial. Defense counsel also did not indicate that her client was being prejudiced or that her communications with defendant were hampered due to the media broadcast. It was not until after the trial concluded and defendant had been found guilty that defendant filed a motion for a new trial on the basis of the media broadcast. Therefore, defendant has forfeited this issue for

review. See *People v. Enoch*, 122 Ill.2d 176, 185 (1988) (to preserve an issue for an appeal, a defendant must object at trial and include it in his written posttrial motion).

¶ 28 The plain error doctrine permits a reviewing court to consider a forfeited error if either: (1) the evidence is closely balanced and the jury's guilty verdict may have resulted from the error, regardless of the seriousness of the error; or (2) the error was so fundamental that the defendant was denied a fair trial and the error must be remedied to preserve the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Adams*, 2012 IL 111168, ¶ 21; Illinois Supreme Court Rule 615(a) (plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court). However, before we consider whether the plain-error exception applies to the forfeiture rule, we must determine whether any error occurred. *People v. Glasper*, 236 Ill. 2d 173, 203-204 (2009).

¶ 29 Here, defense counsel knew her attorney-client communications were being recorded and broadcasted by the media, but she did not make any objection or motion pertaining to continued media coverage. With no objection or motion from defense counsel and no indication that the communications between counsel and defendant were being hampered, the trial court did not abuse its discretion by proceeding with the trial with media coverage. Thus, there was no error to review under the plain error doctrine.

¶ 30 Alternatively, defendant argues his counsel was ineffective for not sufficiently bringing the issue pertaining to the media broadcasting his attorney-client conversations to the trial court's attention. An attorney renders ineffective assistance of counsel when his or her representation falls below an objective standard of reasonableness and defendant is prejudiced by his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill.2d 504, 525-26 (1984).

¶ 31 Under an ineffective assistance of counsel argument, even if defense counsel were truly hindered in communications and she failed to object to the recordings or failed to move for a mistrial, there appears to be no indication that defendant was prejudiced. At most, defense counsel's awareness of the broadcasting made her feel uncomfortable and more reserved in her conversations with defendant. There is no indication that any confidential attorney-client conversations were compromised. The jurors were not privy to any of the "small talk" conversations that were captured by the media. Thus, defendant was not prejudiced by the continued media coverage of his trial and was not denied effective assistance of counsel.

¶ 32 II. Jury Instruction and Jury Question

¶ 33 A. Attempted Murder Jury Instruction.

¶ 34 Defendant argues that he was denied a fair trial because the attempted murder jury instruction and verdict form failed to reference the alleged victim, Dewitt Holbrook. Defendant argues that the jury was being instructed to find him guilty of attempted murder if it found that he intended to kill either Sanders or Holbrook because there was no reference to a specific victim in the jury instruction or verdict form. The State argues that defendant forfeited review of this issue and that the issue cannot be reviewed for plain error because the alleged error in the instruction was not so serious as to deny defendant a substantial right and the evidence was not closely balanced in this case.

¶ 35 Jury instructions should explain the correct principles of law applicable to the evidence so the jury can reach a correct conclusion according to the law and evidence. *People v. Valadovinos*, 2014 IL App (1st) 130076, ¶ 23. The instructions must not be misleading or confusing. *Id.* When a jury does not receive proper guidance through instructions, it cannot perform its constitutional functions and violates a defendant's right to a fair trial. *Id.*, (citing

*People v. Pollock*, 202 Ill. 2d 189, 212 (2002)). A reversal is required when an instructional error creates a serious risk that defendant was incorrectly convicted because jurors did not understand the applicable law, so as to severely threaten the fairness of the trial. *Valadovinos*, 2014 IL App (1st) 130076, ¶ 23 (citing *People v. Durr*, 215 Ill. 2d 283, 299 (2005)). Where jury instructions are unclear or ambiguous, a reviewing court may look to opening statements and closing arguments for clarification. *Valadovinos*, 2014 IL App (1st) 130076, ¶ 23.

¶ 36 Generally, jury instructions are reviewed for an abuse of discretion. *Id.* ¶ 24.

¶ 37 However, where the issue is whether the jury instructions accurately explained the applicable law, the standard of review is *de novo*. *Id.*

¶ 38 Defendant acknowledges that he did not preserve the issue of the attempted murder jury instruction for review on appeal. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (a reviewing court will not consider a jury instruction error if defendant did not object or offer an alternative instruction at trial and did not raise the matter in a posttrial motion). However, Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013) provides an exception in that criminal jury instructions containing “substantial defects” are not waived by a failure to make timely objection thereto where the interests of justice so require. The purpose of Rule 451(c) is to allow the correction of “grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed” and is coextensive with the plain error clause of Supreme Court Rule 615(a). *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); see also Illinois Supreme Court Rule 615(a) (plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court).

¶ 39 In reviewing for plain error, the evidence was not closely balanced as to the attempted-murder of Holbrook. The evidence showed that defendant pulled out a gun and started shooting

directly at Holbrook without justification. Defendant also continued to shoot at Sanders and Holbrook's vehicle as Sanders drove away. Holbrook received multiple gunshot wounds as a result of the shooting. Here, there was strong evidence as to defendant's attempted murder of Holbrook.

¶ 40 As for the second prong of the plain-error analysis, an erroneous omission of a jury instruction rises to the level of plain error when the omission creates a serious risk that jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial. *Sargent*, 239 Ill. 2d at 191. Our Supreme Court has indicated, “[t]his standard is a difficult one to meet.” *Id.* A jury instruction that omits or misdescribes an element is not a structural error. *People v. Watt*, 2013 IL App (2d) 120183, ¶ 39.

¶ 41 In this case, the omission of Holbrook's name from the attempted murder jury instruction did not create a serious risk that the jurors incorrectly convicted defendant of attempted murder. During *voir dire*, opening statements, and closing arguments, the jurors were informed that the victim of the first-degree murder charge was Sanders, who had died, and the victim of the attempted murder charge was Holbrook, who had been shot multiple times but had survived and testified at trial. In fact, during jury deliberations, the jurors asked, in reference to the charge of attempted murder, whether bodily harm that was substantial and that could result in death constituted an intent to kill. The jurors' question about substantial injuries that did not actually result in death indicates the jurors were applying the attempted murder instruction to Holbrook, who had been injured but did not actually die. Therefore, the omission of Holbrook's name in the jury instruction was not a “substantial defect” to satisfy the waiver exception in Rule 451(c) or Rule 615(a).

¶ 42

## B. Question from the Jury

¶ 43

Defendant also argues that he was denied a fair trial because the trial court responded improperly to the question from the jury of whether substantial bodily harm that could result in death constituted an “intent to kill” for the purpose of finding defendant guilty of attempted murder. Defendant argues that intent to do substantial bodily harm that could result in death is insufficient to support an attempted murder conviction because a specific intent to kill is the “pivotal element” of attempted murder. Defendant does not dispute that the parties had agreed with the trial court that the proper response to the jurors’ question was to give no response other than that they had been instructed on the law. Defendant argues the response was improper and we should review the alleged error for plain error. In the alternative, defendant argues his trial counsel rendered ineffective assistance because she did not object to the erroneous response to the jurors’ question. The State argues that defendant cannot complain about the response to the jurors’ question when his counsel invited any error that may have occurred because she had agreed that the trial court should not respond to the question. The State also argues that defendant’s counsel did not provide ineffective assistance because, even if there was error, defendant was not prejudiced by the error where the evidence of defendant’s guilt of attempted murder was overwhelming.

¶ 44

Defendant has forfeited this issue for review and, thus, we may only review this issue pursuant to the plain error doctrine. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (unpreserved errors may only be reviewed when a clear or obvious error occurs and the evidence is closely balanced or the error is so serious that it affects the fairness of defendant’s trial and challenged the integrity of the judicial process). However, in this case, we conclude that no clear or obvious error occurred by the way the trial court responded to the jurors’ question.

¶ 45 Generally, jurors are entitled to have their inquiries answered, and a trial court has a duty to instruct the jury when jurors have posited an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. *People v. Childs*, 159 Ill. 2d 217, 228-29 (1994). However, a trial court may, in its own discretion, properly decline to answer a jury's inquiries where the instructions are readily understandable and sufficiently explain the relevant law, further instruction would serve no useful purpose or could potentially mislead the jury, when the inquiry from the jury involves a question of fact, or if giving an answer would cause the trial court to express an opinion which would likely direct a verdict one way or the other. *Id.*

¶ 46 Here, there was no error by the trial court deciding not to respond to the jury's request for clarification of the phrase "intent to kill" where the instructions explained the relevant law and further instruction could have misled the jury. *Cf. id.* (holding the trial court was not entitled to refuse to answer the jury's explicit inquiry that indicated the jurors were confused as to whether they could find defendant guilty of armed robbery and manslaughter instead of armed robbery and murder, after the jury had been instructed regarding murder during the commission of a crime but no verdict forms were submitted regarding felony murder). In this case, the trial court's response to the inquiry about attempted murder referred jurors back to the attempted murder instruction, which provided "a person commits the offense of attempt first degree murder when he without legal justification and with the intent to kill an individual does any act which constitutes a substantial step toward the killing of an individual" and further provided that the killing that was attempted "need not have been accomplished." The instructions also indicted that to sustain the charge of attempted murder the State must have proven, beyond a reasonable doubt: (1) defendant performed an act that constituted a substantial step toward the killing of an

individual; (2) defendant did so with intent to kill an individual; and (3) defendant was not justified in using the force in which he used. Thus, the answer to the jurors' question was provided within the jury instructions. Consequently, defendant was not denied a fair trial by the trial court responding to the jurors' inquiry in the manner in which it did.

¶ 47

### III. Sentencing

¶ 48

Defendant argues the trial court abused its discretion in sentencing him to 12 years more than the aggregate mandatory minimum for murder and attempted murder where the trial court had noted that the minimum sentence would sufficiently punish defendant in that he would be in prison until he was 86 years old. The State contends the trial court properly considered factors in mitigation and aggravation and did not err in sentencing defendant.

¶ 49

A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence is an abuse of discretion where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *Id.* A reviewing court gives great deference to the trial court's sentence because the trial court had the opportunity to observe the defendant and the proceedings and weigh factors such as defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id.* at 212-13.

¶ 50

In this case, defendant's sentence of 86 consecutive years of imprisonment for murder and attempted murder was on the lower-end of the sentencing range where he was facing an aggregate of 71 to 135 years of imprisonment for on the murder and attempted murder charges, which included the firearm enhancements on each charge. The trial judge's comments indicate that he considered defendant's criminal history as an aggravating factor. Defendant did not make a statement in allocation. As mitigating factors, the trial court considered defendant's

social history and potential for rehabilitation. The trial court specifically stated that he was sentencing defendant above the statutory minimum sentence due to defendant's criminal history and the need to deter others from this type of crime and deter others from using firearms. The sentencing judge properly considered the applicable factors and it is not the duty of the reviewing court to reweigh those factors. *Id.* at 214-15. Our review of the record indicates the trial court did not abuse its discretion in sentencing defendant.

¶ 51 IV. Aggravated Unlawful Use of a Weapon (AUUW)

¶ 52 Defendant argues that his conviction for AUUW must be vacated because the statute was held to be unconstitutional in *People v. Aguilar*, 2013 IL 112116 (holding that section 24-1.6(1)(A)(1), (a)(3)(A) of the AUUW statute was facially unconstitutional under the second amendment of the United States Constitution, where the statute prohibited the carrying of any uncased, loaded and immediately accessible firearm outside of the home). The State argues that defendant's conviction was not unconstitutional because he was convicted and sentenced under the Class 2 felony form of the AUUW because he was a convicted felon at the time of the charge, and was not convicted and sentenced under the Class 4 felony form of the offense that had been found unconstitutional in *Aguilar*. See 720 ILCS 5/24-1.6(d)(1), (d)(3) (West 2010) (providing that AUUW is a Class 4 felony, but AUUW is a Class 2 felony if committed by a person who has been previously convicted of a felony); *Aguilar*, 2013 IL 112116.

¶ 53 When a statute is declared facially unconstitutional, the statute is said to be "void *ab initio*," meaning the statute was "constitutionally infirm from the moment of its enactment and, therefore, is unenforceable." *People v. McFadden*, 2016 IL 117424, ¶ 17. When a criminal statute is declared facially unconstitutional, a defendant may not be prosecuted under it. *Id.* ¶ 19.

The void *ab initio* doctrine renders a facially unconstitutional statute unenforceable and any conviction under a facially unconstitutional statute is subject to vacatur. *Id.* ¶ 20.

¶ 54 In this case, defendant was convicted under the AUUW statute as a Class 2 felony. See 720 ILCS 5/24-1.6(a)(2), (a)(3)(A), (d) (West 2010). The Illinois Supreme Court in *People v. Burns* acknowledged that it was inappropriate for it to have limited its holding in *Aguilar* of facial constitutional invalidity to a “so-called Class 4 form” of the offense of AUUW because no such offense exists. *People v. Burns*, 2015 IL 117387, ¶ 22. The Illinois Supreme Court in *Burns* explained that the elements of the offense of AUUW are contained in subsection (a) of the statute and, to obtain a conviction, “the State need not prove anything more.” *Id.* ¶ 23. The Illinois Supreme Court further explained in *Burns* that the “sentence” subsection of the statute provides that the offense of AUUW was a Class 4 felony and increased to a Class 2 felony if the person committing the offense is a felon, but the sentencing provision does not create separate and distinct offenses, nor does it transform the offense of AUUW offense into a different form. *Id.* ¶ 24. As enacted, section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute does not include as an element of the offense that the offender has a prior felony conviction. *Id.* ¶ 30. Consequently, in following *Aguilar* and *Burns*, we conclude the offense of aggravated unlawful use of a weapon (AUUW) as set forth in section 24-1.6(a)(1), (a)(3)(A) is facially unconstitutional, regardless of the applicable penalty as a Class 4 or Class 2 felony. Thus, defendant’s AUUW conviction must be vacated.

¶ 55 CONCLUSION

¶ 56 The judgment of the circuit court of Kankakee County is affirmed as to defendant’s convictions for first-degree murder and attempted first-degree murder. Defendant’s conviction and sentence for aggravated unlawful use of weapon is vacated.

¶ 57

Affirmed in part and vacated in part.