2018 IL App (1st) 151344-U

FOURTH DIVISION
October 25, 2018

No. 1-15-1344

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 03906
	)	
RENO SAUSEDA,	)	
	)	Honorable
Defendant-Appellant.	)	Joseph M. Claps,
	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt based on consistent and reliable eyewitness identifications; (2) defendant's trial counsel was not ineffective for failing to file a motion to suppress or call an expert witness on witness identifications; (3) the testimony about a rumor from an unknown woman was not hearsay and was admissible; (4) defendant failed to show prejudice in Detective Garcia's rebuttal testimony; (5) the firearm enhancement statute is constitutional; (6) defendant's sentence was not excessive; and (7) the mittimus is to be corrected to reflect the correct spelling of defendant's last name.

¶ 2 Following a bench trial, defendant Reno Sauseda was found guilty of the attempted first degree murder of Salomon Rebollar. The trial court subsequently sentenced defendant to 10 years with an additional 25 years for the firearm enhancement, for a total of 35 years in prison.

¶ 3 Defendant appeals, arguing that (1) the State failed to prove defendant guilty beyond a reasonable doubt where the identifications by the eyewitnesses were unreliable and unduly suggestive and the witnesses' testimony was incredible; (2) his trial counsel was ineffective for failing to move to suppress the suggestive identifications and to hire an expert to challenge the reliability of the identifications; (3) the trial court deprived defendant of a fair trial where it allowed hearsay testimony of out-of-court statements from an unknown witness and allowed Detective Roberto Garcia to testify in rebuttal about defendant's failure to provide an alibi during questioning; (4) this Court should reduce his sentence or remand for resentencing because the firearm enhancement is vague and his sentence of 35 years is arbitrary and excessive; and (5) defendant's mittimus should be corrected to reflect the correct spelling of defendant's last name.

¶ 4 The following evidence was admitted at defendant's August 2013 bench trial.

¶ 5 On June 12, 2010, Salomon Rebollar was 17 years old and had been a member of the La Raza gang since he was 14 years old. At around 4:30 a.m. that day, Rebollar was walking near 21st and Throop Streets with a friend when he observed a beige car driving south on Throop. There was a speed bump in the middle of the block with streetlights above it on the west side of Throop. When the beige car stopped near Rebollar, Rebollar approached the passenger side and said, "La Raza love." The passenger window was down and Rebollar could see the passenger had a neck tattoo and was wearing a hat. He then observed the barrel of a gun as the passenger shot him. Rebollar testified that he did not have a weapon. He identified defendant in court as the passenger. He had never seen defendant before that day.

¶ 6 Rebollar was struck in the forehead and the bullet exited the back of his head. After he was shot, Rebollar next remembered waking up in the hospital a few weeks later. He could not remember anything after he was shot. He remained in the hospital for a couple of months and then had physical therapy. As a result of the shooting, Rebollar has damage to his right side, including a limp and he cannot use his dominant right hand, he now uses his left hand. At trial, he still had problems with walking and memory.

¶ 7 On February 16, 2011, following his release from the hospital, Rebollar went to the police station and viewed a lineup. He signed a lineup advisory form. During the lineup, Rebollar identified defendant as the shooter. He denied that Detective Garcia suggested who to pick and Rebollar denied discussing his identification with anyone. He testified that he recognized defendant's neck tattoo, but he also recognized defendant's face.

¶ 8 On cross-examination, Rebollar testified that he had been on Throop Street from approximately 3:30 a.m. until the time of the shooting around 4:30 a.m. Other people were present on the street, including Gerardo Gallegos and his sister Aremy Santos, who was on the other side of the street. Rebollar remembered observing other cars that night, but he did not know the occupants of the beige car. He denied being told that someone named "Reno" was the shooter. When Rebollar viewed the lineup, he observed one person with a neck tattoo and testified that was how he knew it was him.

¶ 9 Gerardo Gallegos was parking his car on Cullerton Street around 4:30 a.m. on June 12, 2010. He then observed what looked like a silver Mercedes driving east on Cullerton Street towards Throop Street. Gallegos was on the passenger side of the car and the window was down 3 to 4 inches. Gallegos testified that the car stopped 5 feet from him and he saw the driver and passenger look at him. Gallegos continued to walk towards Throop and the car followed him.

When he reached the end of the block, the car slowed down so Gallegos was able to cross to the east side of Throop Street near Aremy Santos and Ruby Cervantes. As he crossed, Gallegos observed that the passenger was a light-complected male. He identified defendant in court as the passenger.

¶ 10 The car then turned right onto Throop Street, driving southbound. The car slowed for a speed bump in front of a school. The street was lit by streetlights. When the car reached 21st Street, Gallegos observed Rebollar and his friend run up to the car. He heard someone yell that defendant had a gun. Gallegos saw defendant point a gun out of the car window and shoot Rebollar. The car then turned left on 21st Street. Gallegos had never seen defendant before that night.

¶ 11 In July 2010, Gallegos spoke with the police and described the shooter as a light complected male Hispanic in his 20s or 30s, wearing a black shirt. In February 2011, Gallegos went to the police station, signed a lineup advisory form, and viewed a lineup alone. He identified defendant in the lineup and denied that he was told who to identify.

¶ 12 On cross-examination, Gallegos testified that when Rebollar ran up to the car, he attempted to open a door of the car. Gallegos admitted he was a member of the La Raza gang, which had been at "war" with the Latin Counts. Gallegos stated that Detective Garcia made suggestions to refresh his memory, but did not tell him things. He denied hearing from the neighborhood that "Reno did the shooting." Ruby Cervantes was at the police station at the same time as Gallegos to view a lineup, but Gallegos denied talking to her or anyone else about the shooting. On redirect, Gallegos denied being told to identify defendant.

¶ 13 Ruby Cervantes testified that she had a pending theft case, but had not received any promises or threats in exchange for her testimony. At around 4 a.m. on June 12, 2010, Cervantes

was dropped off by a taxi near 21st Street and Throop Street. She walked over to talk to her friends, Gallegos and Aremy Santos. While there, she observed a beige Malibu or BMW drive slowly past them from Cullerton Street and drive south on Throop Street. The car stopped at the speed bump and proceeded slowly over the speed bump. There were streetlights above the speed bump. She saw the driver and passenger as they past. She called out, "What['s] up," to the car and both occupants looked at her. She identified defendant in court as the passenger. She had never seen him before that night and did not know his name. As the car drove away, Cervantes heard one gunshot and observed a body on the street. The car turned onto 21st Street. She ran to the body and saw that it was Rebollar.

¶ 14 On June 16, 2010, Detective Garcia came to her house and showed her a photo array. She signed an advisory form before viewing the array. No other witnesses were present when she viewed the array. She identified defendant as the shooter. Later in February 2011, Cervantes went to the police station and viewed a lineup. She identified defendant in the lineup.

¶ 15 On cross-examination, Cervantes admitted that she did not see the shooting. She denied picking the man she heard was the shooter, but that she identified the man she had observed in the car. She described the passenger to police as a light-complected, male Hispanic. Cervantes denied speaking with Santos about the shooting. She described the car as a Malibu or BMW based on the car body. On redirect, Cervantes testified that she did not know anyone named "Reno," and did not know who "Reno" was.

¶ 16 Aremy Santos is Rebollar's sister. At around 3 a.m. on June 12, 2010, she was standing on Throop Street between 21st Street and Cullerton Street waiting for Rebollar. When Cervantes arrived later, the two women talked outside near a school on Throop Street. There is a speed bump on Throop Street with streetlights above it. While outside talking with Cervantes, Santos

observed a small, beige, four-door vehicle drive down Throop Street toward 21st Street. She denied that the vehicle had tinted windows. There were two people inside the car. As the car was going over the speed bump, Cervantes called out, "what's up." The occupants of the car then turned and looked at them. Santos described the passenger as light complected, with a hat on, black shirt, and tattoos on his neck. She identified defendant as the passenger in the vehicle. Santos denied ever seeing defendant before June 12, 2010 and she did not know his name at that time.

¶ 17 As the car proceeded down Throop Street, Santos saw it stop and she observed her younger brother Rebollar run to the car on the passenger side. She did not see anything in Rebollar's hands, but as he approached the car, Santos saw Rebollar reach toward the car. Santos then saw a gun and a flash. Santos testified that she could tell it was the passenger who fired the gun. The car then made a left on 21st Street. Santos ran to the corner to try to obtain the car's license plate number, but was unsuccessful. She observed her brother on the ground, bleeding heavily.

¶ 18 A few days later, Santos was walking around where the shooting occurred and had a conversation with a woman who lived in the neighborhood, but Santos did not know her name. Santos told the woman her brother had been shot and the woman asked what the shooter looked like. After Santos gave a description, the woman said she thought she knew who did it and the person had been "bragging" about it. Santos testified that the woman gave her a name. At this point, defense counsel objected. The prosecutor withdrew the question and then asked if after talking to this woman Santos provided a name to the police, Santos said she did. She told them "just Reno." Santos had never heard of that person and denied looking him up on "Facebook or anything like that."

¶ 19 On June 16, 2010, Santos viewed a photo array at the police station with Detective Garcia. She identified defendant in the photo array. In February 2011, Santos viewed a lineup at the police station and identified defendant as the shooter.

¶ 20 Santos testified that Rebollar was in a coma for a month and was released from the hospital two months after the shooting. She took him to physical and speech therapy after his release. Prior to the shooting, Santos stated that Rebollar was right-handed, but now he uses his left hand because his right side is impaired.

¶ 21 Detective Roberto Garcia was assigned to investigate Rebollar's shooting on June 13, 2010. At that time, he went to the hospital to check on Rebollar's condition and learned Rebollar was in critical condition and would remain in that condition for several months. On June 15, 2010, Detective Garcia interviewed Santos about the shooting. She described the shooter as light complected male Hispanic wearing a white shirt and the car was beige with four doors and tinted windows. Santos also told him that she was closer to the driver and she did not tell him that she saw Rebollar approach the vehicle. Detective Garcia also had a conversation with Santos about a possible suspect. Santos learned some information from speaking to a person on the street about her brother's shooter. This person told Santos that Santos's description sounded like an individual with the nickname of "Reno" from near 17th Street and Loomis Street. After speaking with Santos, Detective Garcia prepared a photo array which he showed to Santos and later Cervantes. After signing advisory forms, both women separately identified defendant as the shooter. Detective Garcia testified that he used the name "Reno" and the geographical parameters in the database to generate defendant's photo for the array.

¶ 22 Detective Garcia did not investigate further until February 2011 because he was waiting for Rebollar to recover in order to interview him. On February 16, 2011, Detective Garcia

arrested defendant. The detective interviewed Rebollar at his house. Rebollar described the shooter as a male Hispanic. Rebollar did not tell Detective Garcia that he did not see the shooter's face or that he saw the shooter's neck tattoos. Later, Rebollar and Santos came to the police station. Both Rebollar and Santos reviewed and signed a lineup advisory form, then separately viewed a lineup and identified defendant. The next day, Cervantes and Gallegos separately reviewed and signed the lineup advisory form, viewed a lineup, and identified defendant.

¶ 23 Following Detective Garcia's testimony, the State rested. Defendant moved for a directed finding, which the trial court denied.

¶ 24 Gloria Luna testified for the defense. She was defendant's former girlfriend and mother of his child. Luna stated that defendant was released from jail on June 11, 2010, and she saw him at his grandmother's house around 5:30 p.m. They went to a friend's house near 17th Street and Loomis Street until 10 p.m. when they returned to defendant's grandmother's house. They went to sleep together around 3 a.m. Luna awoke the next morning around 9 a.m. and defendant was still in bed. She testified that she would have noticed defendant leave the bed during the night. She remembered the date because it was the day of a rally for the Chicago Blackhawks. She admitted that she was still close with defendant and had a tattoo of his name. She did not want anything bad to happen to him, but she testified that she was not lying. She admitted on cross-examination that she did not tell the police or anyone else about defendant being with her at the time of the shooting until immediately before trial.

¶ 25 In rebuttal, the State recalled Detective Garcia. Detective Garcia testified that he interviewed defendant on February 16, 2011. Defense counsel objected to Detective Garcia's testimony that it was not rebuttal. The trial court warned the prosecutor that the testimony was

close to violating defendant's fifth amendment rights. The court overruled the objection after the prosecutor stated that the testimony related to defendant's waiver of his right to remain silent.

¶ 26 Detective Garcia testified that after he gave defendant his *Miranda* warnings, defendant agreed to speak with him. Detective Garcia spoke with defendant on multiple occasions and he did not provide an alibi for the time of the shooting. According to the detective, defendant denied involvement in the shooting in all interviews.

¶ 27 Following closing arguments, the trial court took the case under advisement. At the next hearing, the trial court found defendant guilty of attempted first degree murder. The court made the following findings.

> "In a nutshell, the defense called a witness, Gloria Luna, as the alibi witness that [defendant] was in bed with her the night or the morning hours and he could not have been the person who shot [Rebollar].
>
> In *** comparison [to] four eye witnesses *** that *** identified *** [defendant.]
>
> Nowhere in the record is there any connection between these four witnesses who all testified that they have never seen [defendant] before that night, didn't know what he looked like, never saw a picture of him until they were shown these photographs in a photo spread. All four witnesses independently picked out [defendant] and then identified him. And that is in contrast to the alibi.

> So it really comes down to whether I believe the four witnesses or the alibi witness. The alibi witness indicated in her testimony that she went to, I believe, it was his grandmother's house, [defendant's] house and spent the night there. He is the birth father of her child and their relationship today is just birth mother and birth father, no longer boyfriend and girlfriend.
>
> But for unexplained reasons, she told no one, including the police that he was, in fact, was with her and could not have committed this offense.
>
> When I judge this testimony, I believe that the four eye witnesses testified clearly and convincingly in identifying [defendant] as the person who fired the gun."

¶ 28 Defendant filed a motion for a new trial, which the trial court denied. At sentencing, the court sentenced defendant a term of 10 years with a mandatory 25 year enhancement for personally discharging a firearm that caused great bodily harm, for a total sentence of 35 years.

¶ 29 This appeal followed.

¶ 30 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt because the eyewitnesses' identifications were unreliable, their testimony was incredible, and the identification procedures were unduly suggestive. The State maintains that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt and the identifications were positive, consistent, corroborative and reliable.

¶ 31 When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-

30 (2000). Rather, our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

¶ 32 The reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who observed and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Id*. Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 33 Defendant contends that the identifications by Rebollar, Gallegos, Cervantes, and Santos were insufficient to establish defendant's guilt beyond a reasonable doubt. Specifically, defendant asserts that the witnesses had a limited opportunity to view the shooter, their identifications were based on an out-of-court statement from an unknown woman that "Reno" from near 17th Street and Loomis Street was bragging about the shooting, Detective Garcia created a photo array using the information from the out of court statement that was too limited in scope, and defendant was the only individual in the photo array and lineup with a neck tattoo.

¶ 34 "The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the charged offense." *People v. Lewis*, 165 Ill. 2d 305, 356 (1995).The testimony of a single witness, if it is positive and the witness is credible, is sufficient to convict.

People v. Smith, 185 Ill. 2d 532, 541 (1999). Illinois courts consider identification testimony under the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). *Id.* Those factors include: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Id.*

¶ 35 Here, four eyewitnesses identified defendant in a lineup and two eyewitnesses identified defendant in a photo array. Santos and Cervantes testified consistently that they were standing on Throop Street at around 4 a.m. on June 12, 2010 when a light colored car turned from Cullerton Street onto Throop Street. The car moved slowly over a speed bump and a streetlight was above the speed bump. Cervantes called out to the car, "What's up," and both the driver and the passenger looked in their direction. Both women described the passenger as a male Hispanic with a light complexion. Santos testified that the passenger was wearing a hat and a black shirt and had neck tattoos, while Detective Garcia stated that Santos's description indicated a white shirt and the detective did not include neck tattoos in his testimony regarding Santos's statement.

¶ 36 The women heard a gunshot and observed the vehicle turn left onto 21st Street. Santos testified that she saw Rebollar run toward the passenger side of the vehicle.

¶ 37 Both women identified defendant in a photo array four days after the shooting. They also identified defendant in a lineup in February 2011. Both women testified that they had never seen defendant before and did not know his name. Neither knew anyone named "Reno."

¶ 38 Gallegos observed defendant from the car window on Cullerton Street. The car turned right onto Throop Street, but yielded for Gallegos to cross the street to stand near Santos and

Cervantes. He described the passenger to the police as a male Hispanic with a light complexion in his 20s or 30s and wearing a black shirt. He observed Rebollar and a friend run up to the car and then the passenger shot Rebollar. He did not know anyone named "Reno" and had never seen defendant before that day. He identified defendant in a lineup.

¶ 39 Rebollar testified that around 4:30 a.m. on June 12, 2010, he was with a friend on Throop Street near 21st Street. He observed a beige car traveling south on Throop Street. There were streetlights above the car. As the car drove near him, he ran up to the passenger side and yelled, "La Raza love." The car window was down and he was able to see inside the car. He had never seen the passenger before. The passenger then raised a gun and shot him. Rebollar admitted that he did not get a good look at defendant's face. He identified defendant as the shooter in a lineup in February 2011, but admitted that he recognized defendant's neck tattoos. He also testified that he recognized defendant's face.

¶ 40 In reviewing the evidence in the light most favorable to the State and based on the consistent testimony from the four eyewitnesses, we find the *Biggers* factors to have been satisfied in this case. Each of the witnesses described their opportunity to view defendant at or near the time of the shooting. While it was night, each of the witnesses testified that streetlights were on and allowed them to see defendant. Santos, Cervantes, and Gallegos observed the occupants of the car prior to the shooting. The testimony of all four witnesses was consistent as to their location on the street and the travel of the car from Cullerton Street to Throop Street and then left onto 21st Street after the shooting. None of the witnesses recognized the passenger from before that night, did not know his name, and did not know anyone named "Reno." Their descriptions were consistent as well for a male Hispanic with a light complexion. While Santos and Rebollar mentioned defendant's neck tattoos in their testimony, their identifications were not

based solely on defendant's tattoos. Santos and Cervantes identified defendant in a photo array four days after the shooting. All four witnesses identified defendant in separate viewings of a lineup. None of the witnesses recognized the passenger nor did they know anyone named "Reno." The testimony does not show that the out-of-court statement impacted the identifications in any way. The trial judge, as the fact finder, heard all of the testimony regarding the identifications and descriptions and found that the witnesses "testified clearly and convincingly" in identifying defendant. When viewing the evidence in the light most favorable to the State, we find that any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. None of defendant's arguments are sufficient to undermine the trial judge's finding. For these reasons, we find that the State sufficiently proved defendant guilty beyond a reasonable doubt.

¶ 41 Next, defendant contends that his trial counsel was ineffective for failing to move to suppress the witness identifications based on the use of suggestive techniques and for failing to hire an expert witness to challenge the reliability of the identifications. The State responds that counsel was not ineffective under either challenge.

¶ 42 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Id.* at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 43 "A defendant is entitled to reasonable, not perfect, representation, and mistakes in strategy or in judgment do not, of themselves, render the representation incompetent." *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). "In recognition of the variety of factors that go into any determination of trial strategy, courts have held that such claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review." *Id.* at 330-31 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Strickland*, 466 U.S. at 689).

¶ 44 In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Id.* at 697.

¶ 45 Defendant first asserts that his trial counsel was ineffective for failing to file a motion to suppress the witness identifications based on suggestive identification techniques. In order to prove ineffective assistance of counsel, defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Giles*, 209 Ill. App. 3d 265, 269 (1991). A decision that involves a matter of trial strategy will typically not support a claim of ineffective representation. *People v. Simmons*, 342 Ill. App. 3d 185, 191 (2003). The question of whether to file a motion to suppress evidence is traditionally considered a matter of trial strategy. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000). "[I]n order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome

would have been different had the evidence been suppressed." *People v. Henderson*, 2013 IL 114040, ¶ 15.

¶ 46 Specifically, defendant argues that both the photo array and lineup procedures were unduly suggestive because of the "striking difference" between the fillers and defendant. Both the array and lineup featured five Hispanic-looking men, but only defendant had a visible neck tattoo. According to defendant, "[t]his placed a spotlight" on defendant that increased the likelihood of misidentification and suggested he was the perpetrator. He also contends that because Detective Garcia conducted both the photo array identifications and the lineups, there is a greater likelihood that the identifications were tainted.

¶ 47 Illinois courts use a two-part test to determine whether an identification procedure comports with due process. First, " 'the defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law.' " *People v. Jones*, 2017 IL App (1st) 143766, ¶ 28 (quoting *People v. Moore*, 266 Ill. App. 3d 791,797 (1994)). "That analysis 'involves an inquiry into both the suggestiveness of the identification and the necessity of the suggestive identification.' " *Id*. (quoting *People v. Follins*, 196 Ill. App. 3d 680, 688 (1990)). "Second, if the defendant establishes that the confrontation was unduly suggestive, the burden shifts to the State to demonstrate that, 'under the totality of the circumstances, the identification *** is nonetheless reliable.' " *Id*. (quoting *Moore*, 266 Ill. App. 3d at 797). "To make that determination, courts consider ' "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." ' " *Id*. (quoting *People v. Manion*, 67 Ill. 2d 564, 571

(1977), quoting *Biggers*, 409 U.S. 188, 199 (1972)). An identification should be suppressed only when it is so unnecessarily suggestive that there is a substantial likelihood of misidentification. *People v. Peterson*, 311 Ill. App. 3d 38, 48 (1999).

¶ 48 In this case, any motion to suppress the identifications would have been futile. The photo array presented separately to Santos and Cervantes showed five black and white photographs of Hispanic males with a similar complexion and age, dark hair and eyes, with similar haircuts and minimal facial hair. While it is true that defendant was the only individual with a neck tattoo, Detective Garcia testified that the description given by Santos did not include a neck tattoo and Cervantes did not testify that she observed a neck tattoo. Similarly, the lineups included five Hispanic men with a range of complexions, including some with a complexion lighter than defendant. The individuals appear to be of similar age and all had short or closely shaven hair. The men were seated with their arms on their lap with their palms facing upward. Again, although defendant was the only individual with neck tattoos, other individuals in the lineup had visible tattoos on their arms.

¶ 49 "The law does not require that lineups and photographic arrays shown to a witness include near identical or look alikes of the witness's descriptions. The court must look to the totality of the circumstances surrounding the identification to determine whether due process is violated." *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010) (citing *People v. Johnson*, 149 Ill. 2d 118, 147 (1992)). "Participants in a lineup need not be physically identical." *People v. Simpson*, 172 Ill. 2d 117, 140 (1996). Police are not required to find matching clothing for all participants. *Peterson*, 311 Ill. App. 3d at 49. Further, any difference in appearance goes to the weight of the identification, not to its admissibility. *Id.*

¶ 50 We find that defendant has failed to establish that the identifications were unduly suggestive. The filler individuals in both the photo array and lineup were similar in ethnicity, age, complexion, hair, and build. The lack of neck tattoos from other individuals goes to the weight of the identification.

¶ 51 Moreover, we reject defendant's contention that because Detective Garcia conducted the photo array identifications and the lineups, the identifications were tainted. There is nothing in the record to suggest that Detective Garcia acted improperly. Defendant cites to a 2015 amendment to the Code of Criminal Procedure of 1963 requiring lineups and photo arrays to be conducted using an independent administrator or an automated computer program. See 725 ILCS 5/107A-2 (West Supp. 2015). However, this statute was not enacted until approximately four years after the lineups had been conducted. Defense counsel could not be ineffective for failing to file a motion to suppress premised on a statute that did not exist at the time the lineups were conducted.

¶ 52 Since defendant has not shown that the lineup and photo arrays were unduly suggestive such that a motion suppress would have been meritorious, defendant has failed to show that his trial counsel was ineffective for failing to file a motion to suppress identifications.

¶ 53 Defendant also contends that his trial counsel was ineffective for failing to call an expert witness to testify about the reliability of witness identifications. "Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel." *People v. Reid,* 179 Ill. 2d 297, 310 (1997). "As matters of trial strategy, such decisions are generally immune from claims of ineffective assistance of counsel." *Id.* "The only exception to this rule is when counsel's chosen trial strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing." *Id.* "Counsel's failure to call an expert

witness is not *per se* ineffective assistance, even where doing so may have made the defendant's case stronger, because the State could always call its own witness to offer a contrasting opinion." *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005).

¶ 54 Defendant cites to the Illinois Supreme Court's recent decision in *People v. Lerma*, 2016 IL 118496. In that case, the supreme court recognized that scientific research concerning the reliability of eyewitness identifications is "well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony." In *Lerma*, the defendant filed a pretrial motion *in limine* to allow an expert to testify on the topic of memory and eyewitness identification. *Id*. ¶ 8. The defendant's motion stated the expert would identify and explain "several 'common misperceptions' that exist concerning the accuracy and reliability of eyewitness identifications." *Id*. The expert's testimony would include "the following scientifically documented findings, all of which are beyond the common knowledge of the average layperson: that the witness's level of confidence does not necessarily correlate to the accuracy of the identification; that numerous factors can undermine the accuracy of an eyewitness's identification, including the stress of the event itself, the presence of a weapon, the passage of time, the 'forgetting curve,' the wearing of partial disguises such as hoods, exposure to postevent information, nighttime viewing, and suggestive police identification procedures; that eyewitnesses tend to overestimate time frames; and that cross-racial identifications tend to be less reliable than same-race identifications." *Id*. The trial court denied the defendant's motion. *Id*. ¶ 10. The supreme court found the case before it was "the type of case for which expert eyewitness testimony is both relevant and appropriate" because the State's case rested "100% on the reliability of its eyewitness identifications" and "several of the factors [the expert] identified as potentially contributing to the unreliability of eyewitness testimony *** are either present or possibly present in this case." *Id*. ¶ 26. The *Lerma*

court held the trial court abused its discretion because it denied the defendant's request "to present relevant and probative testimony from a qualified expert that speaks directly to the State's only evidence against him, and [did] so for reasons that are both expressly contradicted by the expert's report and inconsistent with the actual facts of the case." *Id.* ¶ 32.

¶ 55 While the supreme court in *Lerma* recognized that expert testimony is only necessary when the subject is both particularly within the witness's experience and qualifications and is beyond that of the average juror's, and when it will aid the jury in reaching its conclusion (*id.* ¶ 23 (citing *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993)), we point out that the present case was a bench trial.

¶ 56 Significantly, *Lerma* was decided in 2016, more than two years after defendant's trial had concluded. At the time of defendant's trial in 2013, Illinois case law recognized that: (1) trial counsel has broad leeway in deciding whether to call a particular witness or to pursue a given strategy, and (2) the Illinois Supreme Court had previously considered and rejected arguments related to expert witnesses on identifications on at least two occasions. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 54 (citing *People v. Enis*, 139 Ill. 2d 264, 285-91 (1990) and *People v. Enis*, 194 Ill. 2d 361, 391-93 (2009)). The *McGhee* court acknowledged that "the trend in Illinois is to preclude expert testimony on the reliability of eyewitness identification on the ground that it invades the province of the jury as trier of fact." *Id.* The reviewing court declined to find ineffective assistance of counsel for failing to call an expert witness for eyewitness identification. *Id.* ¶ 55. The court observed that it was "unaware of, and defendant has not offered, any Illinois cases in which an attorney has been deemed ineffective for failing to offer, or a trial court has been found to have abused its discretion for refusing to allow, expert testimony on this subject." *Id.*

¶ 57 While *Lerma* has changed the trend in Illinois regarding eyewitness identification, we cannot say that defense counsel's trial strategy to adhere to prevailing Illinois case law at the time of trial was deficient. Accordingly, we decline to find that trial counsel was ineffective for this reason. Additionally, given the identification from four eyewitnesses, we cannot say that there was a reasonable probability the result of the proceeding would have been different to support a claim of ineffective assistance under the prejudice prong.

¶ 58 Defendant next argues that the trial court denied him his right to a fair trial. Specifically, defendant contends that the trial court erred in (1) admitting hearsay evidence of out-of-court statements from an unknown woman to Santos identifying the shooter as someone named "Reno," and (2) allowing Detective Garcia to testify in rebuttal that defendant did not provide an alibi during questioning in violation of his right to remain silent. Defendant admits that these alleged errors were not raised in his posttrial motion for a new trial, but asks this court to review them as plain error or that his trial counsel was ineffective for failing to preserve the errors.

¶ 59 To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). Supreme Court Rule 615(a) states that "[a]ny 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." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows 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 *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the supreme court has held that the plain error rule is a narrow and limited exception to the general rule of forfeiture. *Id*.

¶ 60 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that both claims can be reviewed under both prongs of plain error. However, "[t]he first step of plain-error review is to determine whether any error occurred." *Id*. We will review defendant's claims to determine if there was any error before considering it under plain error. Both plain error analysis and ineffective assistance of counsel require a showing of prejudice. See *People v. White*, 2011 IL 109689, ¶ 134 ("It is clear in this case, having reviewed the record, that defendant cannot show prejudice. There is no reason to go further for purposes of either an ineffective assistance analysis or one founded upon the closely balanced prong of plain error. Both analyses are evidence-dependent and result-oriented.").

¶ 61 First, defendant contends that testimony from Santos and Detective Garcia about Santos's conversation with an unknown woman in the neighborhood near the shooting was inadmissible hearsay and does not fall within an exception to the hearsay rule. It is axiomatic that a defendant is guaranteed the right to confront witnesses against him by the confrontation clauses of both the United States and Illinois Constitutions. U.S. Const, amend. VI; Ill. Const. 1970, art. I, § 8.

¶ 62 The hearsay rule generally prohibits the introduction of an out-of-court statement used to prove the truth of the matter asserted. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007). "Hearsay statements are excluded from evidence primarily because of the lack of an opportunity to cross-examine the declarant." *People v. Peoples*, 377 Ill. App. 3d 978, 983 (2007). Additionally, pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), the Illinois Supreme Court has held under that the confrontation clause of the United States Constitution "a testimonial statement of a witness who does not testify at trial is never admissible unless (1) the witness is unavailable to testify, and (2) the defendant had a prior opportunity for cross-examination." *People v. Stechly*, 225 Ill. 2d 246, 279 (2007) (citing *Crawford*, 541 U.S. at 53-54). However, the *Stechly* court observed that the United States Supreme Court has "made clear that the confrontation clause has *no* application to *non* testimonial statements." (Emphasis in original.) *Id*. (citing *Davis v. Washington*, 547 U.S. 813, 821 (2006)). The Illinois Supreme Court found that "those 'witnesses' whom the confrontation clause gives a defendant the right to confront are those who bear 'testimony,' *i.e.*, solemn declarations for the purpose of establishing or proving some fact germane to the defendant's prosecution." *Id*. at 280-81. More recently, the United States Supreme Court held "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Ohio v. Clark*, ___ U.S. ___, 135 S. Ct. 2173, 2182(2015). "However, an out-of-court statement that is offered for a purpose other than to prove the matter asserted is not hearsay and does not implicate the confrontation clause." *People v. Whitfield*, 2014 IL App (1st) 123135, ¶ 25.

¶ 63 "[A] law enforcement officer may testify about statements made by others, such as victims or witnesses, when such testimony is offered not to prove the truth of the matter asserted,

but instead to show 'the investigative steps taken by the officer leading to the defendant's arrest.' " *People v. Risper*, 2015 IL App (1st) 130993, ¶ 39 (quoting *People v. Pulliam*, 176 Ill. 2d 261, 274 (1997)). "This is not an exception to the hearsay rule; it is a relevant basis for admission of the testimony other than the truth of the matter asserted in those statements and, as such, is not hearsay in the first instance." *Id.* "The relevance of the testimony lies in explaining to the jury how a law enforcement investigation led to the defendant. Without such testimony, a jury might not understand how an officer got from point A to point C; it might appear to the jury that the officer had less than a valid basis for considering the defendant to be a suspect." *Id.* "Because it is not hearsay, testimony recounting the steps taken in a police investigation does not violate defendant's sixth amendment right to confront the witnesses against him." *Id.* ¶ 40.

¶ 64 Here, Santos testified about her conversation with an unknown woman in the neighborhood about the shooting. During this testimony, defense counsel objected when the prosecutor asked Santos if the woman told her the name of the person bragging about the shooting. After a discussion, the prosecutor withdrew the question. The prosecutor then asked Santos if after speaking with this woman, she provided a name to the police. Santos answered that she did and the name provided was, "Just Reno." No objection was made by defense counsel to this testimony. Defendant also complains that the error was "compounded" when Detective Garcia testified about the information provided to him from Santos. Detective Garcia testified that Santos disclosed the name "Reno," a Latin Count near 17th Street and Loomis Street. The trial court questioned Detective Garcia about his process to obtain defendant's photo and the detective responded that he entered "Reno" with geographical information and only defendant's photo was yielded from the search.

¶ 65 According to defendant, the testimony about a rumor from an unknown woman amounted to hearsay because it was offered for the truth of the matter asserted, *i.e.*, "an out-of-court identification of [defendant] that unfairly bolstered the otherwise weak identifications of the other witnesses." The State maintains that the testimony was admissible nonhearsay because it was not admitted for the truth of the matter asserted, but instead to offer descriptive variables to aid the police investigation. Contrary to defendant's argument, the State argues that the testimony did not identify him or go to his identity.

¶ 66 We find the decision in *Peoples*, 377 Ill. App. 3d 978, to be instructive. There, the defendant asserted that testimony from a police detective violated the confrontation clause. The detective testified that he interviewed a codefendant and following his conversation with the codefendant, he attempted to identify the defendant in the computer database by entering a first name and that he "lived or had been arrested in the immediate area of the crime." The defendant's name and address resulted from the search and his photo was subsequently placed in a photo array. *Id*. at 981-82. The defendant argued that this testimony included the inadmissible hearsay statement from the codefendant of details of another person involved in the crime. The defendant also asserted that his counsel could not cross-examine the codefendant and the testimony bolstered a witness's account of the offense. *Id*. at 982.

¶ 67 The reviewing court reasoned that "if an out-of-court statement made by [codefendant] was offered for the purpose of proving that defendant was the gunman, the confrontation clause protects defendant's right to cross-examine [codefendant], because the confrontation clause prohibits the use of hearsay evidence." *Id*. at 983. The court concluded the testimony was not offered for its truth, but to show the course of the police investigation leading to defendant's arrest and was not hearsay, nor did it violate *Crawford*. *Id*. at 986.

¶ 68 Moreover, as the State observes, the trial court "carefully tailored the challenged testimony to comply with the course of investigation doctrine" by having the prosecutor rephrase so that Santos testified about the name given to Detective Garcia rather than what the unknown woman told Santos. We find the facts in the present case distinguishable from *In re Jovan*, 2014 IL App (1st) 103835, relied on by defendant. In that case, a bicycle was stolen and a civilian witness searched online to see if the bicycle was listed for sale. After finding a matching listing, the witness recorded the listed phone number and searched for the corresponding address. The trial court permitted the witness to testify about her search steps. *Id.* ¶¶ 26-28. On appeal, the reviewing court held that the testimony was inadmissible hearsay and that the witness was a layperson conducting a private investigation. The court noted that course of investigation exception does not apply to laypersons, but the testimony exceeded that exception as well. *Id.* ¶ 29-30. In contrast, Santos did not testify about the substance of her conversation with the woman, but that as a result of the conversation she provided a first name to Detective Garcia.

¶ 69 We conclude that the testimony regarding the rumor from an unknown woman was not presented for the truth of the matter asserted, *i.e.*, defendant committed the shooting. Similarly, the out-of-court conversation between Santos and the woman was not testimonial and does not implicate defendant's rights under the confrontation clause. The woman's statement was not a declaration to prove a fact germane to defendant's prosecution. Rather, the information was used to further the police investigation. Defendant was not implicated as the perpetrator until Santos and Cervantes identified him separately in a photo array. The testimony regarding this conversation was not used as substantive evidence, but to explain how the police investigation led to defendant. Since we find no error occurred in the admission of this testimony, it follows

that there was no plain error, nor could it support a claim of ineffective assistance of trial counsel.

¶ 70 Defendant also asserts that he was prejudiced by Detective Garcia's rebuttal testimony. Specifically, he contends that Detective Garcia's testimony in rebuttal that defendant did not provide an alibi during multiple interviews violated his right to remain silent under *Doyle v. Ohio*, 426 U.S. 610 (1976).

¶ 71 In *Doyle*, the United States Supreme Court "held that since a defendant's silence after being informed of his right to remain silent is 'insolubly ambiguous', and in light of the implied assurance given in the *Miranda* warnings that silence will carry no penalty, 'it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.' " *People v. Bock*, 242 Ill. App. 3d 1056, 1072 (1993) (quoting *Doyle*, 426 U.S. at 617-18). The Illinois Supreme Court has held that it is error to comment on a defendant's postarrest silence, even if he did not remain silent yet did not incriminate himself. See *People v. Herrett*, 137 Ill. 2d 195, 214 (1990). However, the *Herrett* court went on to say that "a comment upon a defendant's post-arrest silence, while improper, is not an error of such magnitude as to clearly deprive the defendant of a fair trial." *Id*. at 215. The Illinois Supreme Court has held that *Doyle* violations are subject to a harmless error analysis. *People v. Hart*, 214 Ill. 2d 490, 517 (2005).

¶ 72 The Illinois Supreme Court "has recognized at least five factors for a court to consider in determining whether a *Doyle* violation is harmless beyond a reasonable doubt: (1) the party who elicited the testimony about defendant's silence; (2) the intensity and frequency of the references to the defendant's silence; (3) the use that the prosecution made of defendant's silence; (4) the trial court's opportunity to grant a mistrial motion or to give a curative jury instruction; and (5)

the quantum of other evidence proving the defendant's guilt." *Id*. at 517-18 (citing *People v. Dameron*, 196 Ill. 2d 156, 164 (2001)). "In a bench trial, the trial court is presumed to have considered only competent evidence in reaching its verdict, unless that presumption is rebutted by affirmative evidence in the record." *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91 (citing *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977)).

¶ 73 During rebuttal, the State recalled Detective Garcia as a witness and asked if he interviewed defendant. The State intended to rebut defendant's alibi witness Luna by showing that after waiving his *Miranda* rights, defendant spoke with police, but never disclosed an alibi for the time of the shooting. Defense counsel objected at the start of the questioning. The trial court then inquired about the testimony the prosecutor was seeking from the detective. The court recognized that this testimony would be close to violating defendant's fifth amendment rights, observing that defendant did not have to say anything. The court ultimately overruled the objection "for whatever value it might have."

¶ 74 We find that any error in this testimony was harmless. The complained-of testimony was elicited in rebuttal by the State. This testimony was not discussed during closing arguments by the State. Significantly, the trial court in its findings did not reference the rebuttal testimony. Rather, the trial court explicitly stated, "So it really comes down to whether I believe the four witnesses or the alibi witness." The court discussed the potential bias of the alibi witness and failure to come forward as well as the four eyewitnesses and their testimony. If the testimony was error, the record supports that the trial court only considered competent evidence in reaching its decision. Thus, even if the testimony was error, defendant has failed to establish how he was prejudiced by its admission. Accordingly, we conclude defendant cannot show either plain error or ineffective assistance of counsel.

¶ 75 Next, defendant argues that 25-to-life firearm enhancement is unconstitutionally vague and his total sentence of 35 years was arbitrary and excessive. Specifically, defendant contends that section 8-4(c)(1)(D) of the Criminal Code of 2012 (720 ILCS 5/8-4(c)(1)(D) (West 2012)) is unconstitutionally vague because the broad sentencing range fails to appropriately guide judges, and encourages arbitrary and discriminatory sentencing. Thus, defendant claims that his sentence enhancement of 25 years is void, and he requests that this court strike the sentence enhancement as unconstitutional.

¶ 76 This court has previously reviewed the same arguments and found that the firearm enhancement statute is not unconstitutionally vague. *People v. Sharp*, 2015 IL App (1st) 130438, ¶¶ 141-142, appeal denied, No. 119084 (May 27, 2015); *People v. Butler*, 2013 IL App (1st) 120923, ¶ 35, appeal denied, No. 116420 (Sept. 25, 2013); *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 121, appeal denied, No. 116832 (Jan. 29, 2014); *People v. Brown*, 2017 IL App (1st) 142197, ¶ 80, appeal denied, No. 122647 (Nov. 22, 2017). We held that the firearm enhancement statute is not unconstitutionally vague because the sentencing range (from 25 years to life imprisonment) and the standards for imposing the enhancement (during the commission of an attempted first degree murder and the personal discharge of a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death) are clear and definite. See *Sharp*, 2015 IL App (1st) 130438, ¶ 141. We see no reason to depart from these well-reasoned decisions and further note that the Illinois Supreme Court denied the defendants' petitions for leave to appeal in each of these decisions.

¶ 77 Defendant also asserts that the trial court abused its discretion in imposing a total sentence of 35 years. According to defendant, the sentence imposed was arbitrary and excessive

because the court did not adequately take into consideration defendant was 19 years old at the time of the shooting and Rebollar's aggressive conduct by approaching the car.

¶ 78 "It is well established that a trial court has broad discretionary authority in sentencing a criminal defendant." *People v. Evans*, 373 Ill. App. 3d 948, 967 (2007). "An appellate court typically shows great deference to a trial court's sentencing decision since the trial court is in a better position to decide the appropriate sentence." *Id*. "Accordingly, a trial court's sentencing decision is not overturned absent an abuse of discretion." *Id*. "In determining an appropriate sentence, the trial judge is further required to consider all factors in aggravation and mitigation which includes defendant's credibility, demeanor, general moral character, mentality, social environments, habits, and age, as well as the nature and circumstances of the crime." *Id*. "If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." *People v. Starnes*, 374 Ill. App. 3d 132, 143 (2007) (citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999)).

¶ 79 Here, defendant was convicted of the attempted first degree murder of Rebollar and that he personally discharged a firearm causing great bodily harm. Defense counsel argued before the trial court for defendant to be sentenced as a Class 1 offender pursuant to section 8-4(c)(1)(E) of the Criminal Code of 2012 (720 ILCS 5/8-4(c)(1)(E) (West 2014)).

¶ 80 Section 8-4(c)(1)(E), which became effective January 1, 2010, provides:

> "[I]f the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant

> endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony[.]" 720 ILCS 5/8-4(c)(1)(E) (West 2014).

¶ 81 "[T]he Illinois Supreme Court has recognized that 'for purposes of reducing first degree murder based on serious provocation, the " 'only categories of serious provocation which have been recognized are: "substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse; but not mere words or gestures or trespass to property." [Citation.]' " ' " *People v. Lauderdale*, 2012 IL App (1st) 100939 (quoting *People v. Sutton*, 353 Ill. App. 3d 487, 491 (2004), quoting *People v. Chevalier*, 131 Ill. 2d 66, 71 (1989), quoting *People v. Crews*, 38 Ill. 2d 331, 335 (1967)). "A slight provocation is not enough, because the provocation must be proportionate to the manner in which the accused retaliated. The crime is murder when a defendant attacks a victim with violence out of all proportion to the provocation." *Id*. ¶ 26 (quoting *Austin*, 133 Ill.2d at 126-27).

¶ 82 There is no evidence of serious provocation by Rebollar proportionate to defendant's actions in this case. Rebollar admitted to approaching the vehicle and yelling a gang slogan, "La Raza love." No physical assault occurred nor did Rebollar possess a weapon. Therefore, we find that section 8-4(c)(1)(E) was not applicable in defendant's case.

¶ 83 Defendant further contends that even if the evidence was not sufficient to warrant a reduction for serious provocation, the trial court should have considered the circumstances as mitigation before imposing a sentence. Defendant received a sentence only four years longer than the minimum sentence possible for attempted first degree murder, a Class X felony, subject

to the firearm sentence enhancement, a 10-year sentence plus the 25-year enhancement. 730 ILCS 5/5-4.5-25(a) (West 2014) (Class X felony has a sentencing range of 6 to 30 years); 720 ILCS 5/8-4(c)(1)(D) (West 2014). The sentence imposed fell within the required statutory range. Moreover, the 10-year sentence was at the low end of the applicable range before the imposition of the mandatory firearm enhancement. Accordingly, the trial court did not abuse its discretion in imposing defendant's sentence.

¶ 84 Finally, defendant asks this court to order the mittimus to correct the spelling of his last name. The mittimus issued in this case misspelled defendant's last name as "Saucedo," rather than the correct spelling of "Sauseda." The State agrees that mittimus should be corrected to reflect the correct spelling of defendant's name. We agree. Pursuant to Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967)) and our authority to correct a mittimus without remand (*People v. Bowen*, 2015 IL App (1st) 132046, ¶ 68), we direct the clerk of the circuit court to correct the mittimus to reflect defendant's name as "Reno Sauseda."

¶ 85 Based on the foregoing reasons, we affirm defendant's conviction and sentence. The mittimus is corrected as ordered.

¶ 86 Affirmed; mittimus corrected.