2018 IL App (1st) 160919-U
No. 1-16-0919
Order filed April 10, 2018
Second Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 19152
	)	
JUAN ALVAREZ,	)	Honorable
	)	Clayton Jay Crane and
Defendant-Appellant.	)	Alfredo Maldonado,
	)	Judges, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and 31-year sentence for attempt first degree murder are affirmed over his contentions that: (1) the State failed to prove beyond a reasonable doubt that he intended to kill the victim and failed to disprove his claim of self defense; (2) the trial court impermissibly limited his cross-examination of two State witnesses; and (3) the sentencing court failed to consider whether he was eligible to be sentenced as a Class 1 offender.

¶ 2 Defendant Juan Alvarez was convicted of attempt first degree murder and sentenced to a Class X term of 31 years' imprisonment. Alvarez's sentence included a mandatory 25-year enhancement based a finding that he personally discharged a firearm and caused great bodily

harm to the victim. On appeal, Alvarez contends that: (i) the State failed to prove him guilty of attempt first degree murder beyond a reasonable doubt and failed to disprove that he acted in self-defense; (ii) the trial court erred when it impermissibly limited his cross-examination of two State witnesses; and (iii) the sentencing court failed to consider whether he was entitled to be sentenced as a Class 1 offender because the evidence showed that he was acting under a sudden and intense passion resulting from serious provocation by the victim.

¶ 3 We affirm. Viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could conclude that Alvarez intended to kill or cause great bodily harm to the victim. As to Alvarez's claim of self-defense, the evidence, including his signed, hand-written statement, negates his claim. Regarding the trial court's alleged limitations on the scope of Alvarez's cross-examination of a witness and the victim, we find the trial court did not abuse its discretion, and Alvarez had the opportunity to question both of them on the matters allegedly limited. Finally, Alvarez failed to preserve his eligibility to be sentenced as a Class 1 offender in a postsentencing motion, and does not argue that we may review the claim as plain error. In any event, the evidence did not show that Alvarez was entitled to be sentenced as a Class 1 offender.

¶ 4 Background

¶ 5 Alvarez was charged by indictment with four counts of attempt first degree murder and one count of aggravated battery with a firearm of Oscar Humberto Acosta. Alvarez waived his right to a jury trial, and the case proceeded to a bench trial. The pertinent testimony follows.

¶ 6 Bernardina Torres testified that, on September 16, 2012, she was working as a bartender at Johnny's Lounge. Alvarez was sitting near the back of the bar drinking a beer when a man Torres knew as El Catracho (the victim, Acosta) entered with a friend. The men were talking

loudly and swearing, "trying to get everyone's attention." About 35 minutes after arriving, Acosta, who did not have anything in his hands, approached Alvarez as if "to like fight with him." Torres testified that Acosta had no reason to walk so close to Alvarez.

¶ 7 Alvarez bent down and retrieved a small gun out of his boot. Alvarez then pointed the gun at Acosta, who started to walk backward and attempted to shield himself with his hand. When Acosta was 11 to 12 feet away, Alvarez shot him. Acosta opened the front door and ran out. Alvarez then turned to Acosta's friend, asked him "what, you want some too?" and then ran out of the bar. Torres, who did not follow Alvarez outside, heard another gunshot.

¶ 8 On a later date, Torres went to a police station to view a physical line-up. After signing a line-up advisory form, she identified Alvarez as the shooter.

¶ 9 On cross-examination, Torres testified that, after entering the bar, Acosta looked at Alvarez and said "What the f***, f***. What's up?" In response, Alvarez told Torres "[t]ell him I don't want trouble I came here for a drink. That's it. I don't want any trouble." When Acosta later approached Alvarez, Acosta had his hands in the air "like he wanted trouble, like he wanted to fight" and asked "What's up, f***[?] Are you afraid[?]"

¶ 10 Acosta testified that, on September 16, he and his friend, Mario Barrios, went to Johnny's Lounge, where they saw Alvarez sitting near the back of the bar and looking at them. Acosta began to approach Alvarez to ask him why he was looking at them, but, after he was approached by the bar's owner, he returned to the front of the bar. Eventually, Barrios told Acosta that he wanted to go home, and Acosta went to use the restroom. After he left the restroom, Acosta saw Alvarez, who asked him "What?" Acosta responded by saying "What's up?" Alvarez then pointed a gun at Acosta and shot him five to six times in the stomach. Acosta ran out of the

building to look for help. Alvarez followed Acosta outside of the bar and shot him one or two more times in the back. Acosta displayed his gunshot wounds in open court, and testified that, after the shooting, he was in the hospital for 18 days and underwent multiple surgeries to repair his stomach and arm. While hospitalized, Acosta viewed a police conducted photo-array and identified a photograph of Alvarez as the man who shot him.

¶ 11 On cross-examination, Acosta testified that he had been drinking for a couple of hours before he arrived at Johnny's Lounge. He denied saying anything to or swearing at Alvarez when he saw him "leering" at him and Barrios. Acosta acknowledged that he told a detective that he had shouted at Alvarez, but explained that he had asked Alvarez "what are you looking at," and did not swear at him or insult him. Acosta stated that, after he left the restroom, he only asked Alvarez "what's up?" in response to Alvarez having said something to him first.

¶ 12 Mario Barrios testified that he and Acosta saw Alvarez "leering" at them after they entered the bar. Acosta went to confront Alvarez, but returned to the front of the bar after having a conversation with the owner. Barrios later told Acosta that they should leave, and Acosta went to use the restroom. Barrios then started talking to the girl behind the bar, who eventually told him that Acosta had run out of the bar. Barrios turned around and saw Alvarez chasing after Acosta. Barrios then opened the front door of the building and heard gunshots. He saw Acosta running across the street and Alvarez running back towards the bar with a gun in his hand. When Alvarez pointed the gun at him, Barrios ran across the street toward Acosta. The next day, Barrios viewed a physical line-up and identified Alvarez as the man who shot Acosta.

¶ 13 On cross-examination, Barrios explained that he and Acosta had been at another bar before going to Johnny's Lounge. Barrios did not have a beer at the first bar and Acosta only had

one beer there. Barrios denied that he and Acosta were yelling and swearing when they arrived at Johnny's Lounge. He also denied telling a detective that Acosta had yelled "what are you looking at" to Alvarez or that, after Acosta left the restroom, Acosta had waved him back to the area near Alvarez and asked Alvarez "what are you looking at?" He testified that Acosta was not acting in a belligerent manner, and did not call Alvarez a "f***."

¶ 14 Detective Rueben Velasquez testified that, on September 16, he was assigned to investigate the aggravated battery with a firearm of Acosta. At the scene, Velasquez spoke with witnesses and learned the identity of the shooter. The next day, Velasquez arrested Alvarez at his place of employment and compiled a photo-array containing his photograph. Velasquez then went to the hospital to interview Acosta. After signing a line-up advisory form, Acosta identified a photograph of Alvarez as the man who had shot him. Velasquez then returned to the police station, where he interviewed Alvarez. After waiving his *Miranda* rights, Alvarez told Velasquez that Acosta did not threaten him at the bar, that neither Acosta nor Barrios had a weapon at the time of the shooting, and that he shot Acosta three to five times. On September 19, 2012, Velasquez reinterviewed Alvarez in the presence of Assistant State's Attorney Logan and a detective, who acted as a Spanish interpreter. Alvarez's responses were memorialized in a handwritten statement, which Alvarez signed. The statement was admitted into evidence and read into the record by Velasquez.

¶ 15 In the statement, Alvarez stated that, at 9:40 p.m. on September 16, 2012, a Hispanic male inside Johnny's Lounge "shrugged his shoulders, threw his hands up in the air, looked at [defendant] and asked [him], Why are you looking at me?" Alvarez then decided to leave the bar, walked outside, and saw the same man standing outside. The man asked him "[n]ow what are

you going to do?" Alvarez stated that he got angry, retrieved a gun out of his waistband, and fired the gun at the man four or five times. Alvarez stated that, before he shot the man, he saw that the man had nothing in his hands. Alvarez then ran through an alley and threw the gun away.

¶ 16 On cross-examination, Velasquez testified that the hand-written statement was written by ASA Logan, and that neither of his interviews with Alvarez had been videotaped or audio-recorded. Velasquez acknowledged that Barrios told him that, when he and Acosta entered the bar, Acosta had yelled at Alvarez and asked him what he was looking at. Barrios also told Velasquez that Acosta had gone near Alvarez, waved Barrios over to him, and again asked Alvarez "what are you looking at?" Velasquez further testified that he had interviewed Acosta, and that Acosta told him that he asked Alvarez "what are you looking at" on two separate occasions.

¶ 17 Glenn Manguerra testified that, on September 16, 2012, he was working as an evidence technician for the Chicago police department. At 10:09 p.m., he received an assignment to process the scene of the shooting. Inside the bar, he saw a fired bullet and droplets of blood near the front of the building. He also located five cartridge casings on the floor and on a stool located near a jukebox. He inventoried the fired bullet and the cartridge casings, entered them into the CPD computer system, and placed them into storage.

¶ 18 In his defense, Alvarez testified that Acosta was already in the bar when he and his brother-in-law arrived. They sat "halfway down the bar" while Acosta sat at the corner of the bar, near the front entrance. Alvarez then "started to look side to side" and looked at Acosta, which made Acosta upset. Alvarez told a bartender that he was going to leave the bar because he did not want any problems. He then looked up, and saw that Acosta was no longer inside the bar.

When Alvarez walked outside of the bar Acosta was standing in front of the building and asked him "what the hell [defendant] was f*** doing in there?" Alvarez told Acosta to calm down and that Acosta and his friend were not going to "mess" with him. Alvarez testified that Acosta replied "you're not going to mess with me either" and placed his hand near his waistband. Alvarez then shot Acosta. As Acosta ran away across the street, Alvarez turned to leave and saw Barrios and the owner of the bar standing in the doorway.

¶ 19 On cross-examination, Alvarez testified that he shot Acosta five times in the stomach. He stated that he had been carrying his gun in his waistband, and denied carrying his gun in his boot. He did not fire the gun while he was inside the bar. He acknowledged that he did not see a gun or a weapon in Acosta's hand when he pulled out his gun, and that Acosta did not swear at him inside the bar, or call him a "f***." Alvarez did not intend to kill Acosta and he had previously been robbed at Johnny's Lounge. Finally, when he gave his statement to the detectives and the ASA, nobody read the statement to him in Spanish and he would not have signed the statement had it been read to him.

¶ 20 In rebuttal, Joaquin Mendoza testified that he was working as a homicide detective in the early morning hours of September 19, 2012. At 2:50 a.m., he acted as a Spanish translator while Detective Velasquez and ASA Logan interviewed Alvarez. Mendoza testified that he had no prior knowledge of the details of the case. Before Alvarez signed and initialed each page of the statement, Mendoza read the statement to him in Spanish. Mendoza testified that Alvarez never stated that he saw Acosta reach toward his waistband.

¶ 21 After closing arguments, the trial court found Alvarez guilty as charged. In announcing its ruling, the court noted that Acosta and his friend were "loud, obnoxious, and not the best

patrons in this bar" and that, as a result of Alvarez's actions, the victim suffered great bodily harm. The court also noted that Torres was the "best" witness in this case and that she "favored" Alvarez in her testimony. The court pointed out, however, that even in Torres's testimony it was clear beyond a reasonable doubt that Alvarez was guilty on all counts.

¶ 22 At sentencing, defense counsel, in arguing for the minimum sentence, pointed out that Alvarez had come to America in 1991 and had no criminal history before this incident. In aggravation, the State read Acosta's impact statement into the record, which detailed how his injuries had restricted his job prospects and that he could no longer afford physical therapy. The State requested the maximum sentence. In allocution, Alvarez denied that he shot Acosta inside of the bar.

¶ 23 The trial court merged all of the counts into the attempt first degree murder count and sentenced Alvarez to a Class X term of 31 years' imprisonment. Alvarez's sentence included a mandatory 25-year enhancement based on a finding that the victim suffered great bodily harm. See 720 ILCS 5/8-4(c)(1)(D) (West 2012).

¶ 24 Analysis

¶ 25 Sufficiency of the Evidence

¶ 26 On appeal, Alvarez first contends that the evidence at trial was "too vague and inconclusive to establish beyond a reasonable doubt that [he] intended to kill the injured [victim] rather than merely protecting himself from an attack." He also argues that the State's evidence was insufficient to prove beyond a reasonable doubt that he did not shoot Acosta in self-defense.

¶ 27 The due process clause of the fourteenth amendment protects defendants against conviction in state courts except on proof beyond a reasonable doubt of every fact necessary to

constitute the charged crime. *People v. Brown*, 2013 IL 114196, ¶ 48; *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). When ruling on a challenge to the sufficiency of the evidence, a reviewing court "'is not required to search out all possible explanations consistent with innocence or be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. On the contrary, we must ask, after considering all of the evidence in the light most favorable to the prosecution, whether the * * * evidence [in the record] could reasonably support a finding of guilt beyond a reasonable doubt.'" *People v. Grant*, 2014 IL App (1st) 100174-B, ¶ 24 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 116-17 (2007)). In doing so, we draw all reasonable inferences from the record in favor of the prosecution, and "'[w]e will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.'" *People v. Lloyd*, 2013 IL 113510, ¶ 42 (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)).

¶ 28 A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act which constitutes a substantial step toward the commission of the offense. 720 ILCS 5/8-4 (West 2012). As relevant here, a person commits the offense of first degree murder when, without legal justification, he or she kills another individual while intending to kill or do great bodily harm to the individual, or knowing that his or her actions will cause death to the individual. 720 ILCS 5/9-1(a)(1) (West 2012).

¶ 29 Alvarez does not dispute that he shot Acosta. Rather, he claims that the evidence presented was insufficient to prove beyond a reasonable doubt that he intended to kill Acosta.

¶ 30 Because of the mental element of an offense, criminal intent usually is proven through circumstantial evidence, and a conviction may be sustained on circumstantial evidence alone.

People v. Murphy, 2017 IL App (1st) 142092, ¶ 10. In a case based on circumstantial evidence, the trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances if all the evidence considered collectively satisfies the trier of fact beyond a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). The act of repeatedly firing a gun directly at a person supports the conclusion that the shooter acted with an intent to kill. See *People v. Teague*, 2013 IL App (1st) 110349, ¶ 26.

¶ 31 After viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could conclude that Alvarez intended to kill or cause great bodily harm to Acosta. The record shows that, after Acosta cursed at Alvarez and approached him "like he wanted trouble, like he wanted to fight," Alvarez reached into his boot, retrieved a gun, and shot Acosta from 11 or 12 feet away. Torres testified that Acosta was not holding anything in his hands when he approached Alvarez. She also testified that, after shooting Acosta, Alvarez turned to Barrios and asked him "what, you want some too?" Alvarez then followed Acosta outside of the bar, and Torres heard one more gunshot. Alvarez told Detective Velasquez that Acosta did not threaten him at the bar and that neither Acosta nor Barrios had a weapon at the time of the shooting. In his testimony, Alvarez acknowledged that he did not see a gun or a weapon in Acosta's hand before the shooting. In his signed, hand-written statement, Alvarez stated that, after Acosta asked him "what are you going to do," he became angry, retrieved a gun out of his waistband, and fired the gun at Acosta four of five times. See *Teague*, 2013 IL App (1st) 110349, ¶ 26 (firing firearm at person supports conclusion that person doing so acted with intent to kill). The parties stipulated that Acosta sustained seven gunshot wounds, which required him to undergo multiple surgeries. See *People v. Medrano*, 271 Ill. App. 3d 97, 103 (1995) (specific intent to kill may be

inferred from character or nature of assault, accompanying circumstances use of deadly weapon). This evidence, and the reasonable inferences from the evidence, was sufficient to establish that Alvarez intended to kill Acosta beyond a reasonable doubt and to sustain his conviction for attempt first degree murder.

¶ 32 Claim of Self-Defense

¶ 33 Nevertheless, Alvarez claims that his conviction should be reversed because the State failed to disprove his claim of self-defense. The affirmative defense of self-defense requires evidence that (i) force is threatened against a person, (ii) the person is not the aggressor, (iii) the danger of harm was imminent, (iv) the threatened force was unlawful, (v) the person actually and subjectively believed a danger existed that required the use of the force applied, and (vi) the person's beliefs were objectively reasonable. *People v. Cacini*, 2015 IL App (1st) 130135, ¶ 44. Once the defense has been properly raised, the State bears the burden of proving, beyond a reasonable doubt, that the defendant did not act in self-defense. *Id. ¶* 49. "If the State negates *any one* of the self-defense elements, the defendant's claim of self-defense must fail." (Emphasis in original.) *Id.* ¶ 44. (quoting *People v. Jeffries*, 164 Ill. 2d 104, 128 (1995)). The trier of fact determines whether the testimony and evidence support a self-defense claim, and, as noted, we will not reverse a trier of fact's conclusions unless the evidence is so improbable or unsatisfactory as to raise a reasonable doubt of guilt. *People v. Bennett*, 2017 IL App (1st) 151619, ¶ 33.

¶ 34 Alvarez argues that his testimony that Acosta made "threatening and intimidating" remarks and gestures, coupled with his testimony that Acosta reached for his waistband,

establish self-defense. He maintains that the State's evidence, which was "rife with inconsistencies and discrepancies," did nothing to disprove his version of events. We disagree.

¶ 35 Even assuming that Alvarez properly raised a claim of self-defense, the State met its burden of proving beyond a reasonable doubt that Alvarez did not act in self defense. In his hand-written statement, Alvarez negates an element of his self-defense claim—that he actually and subjectively believed a danger existed that required the use of the force applied. As mentioned, according to Alvarez's statement, after Acosta asked him "what are you going to do," he became angry, retrieved a gun out of his waistband, and fired the gun at Acosta four of five times. This evidence alone suffices to defeat Alvarez's self-defense claim. See *Cacini*, 2015 IL App (1st) 130135, ¶ 44 (If State negates any one of self-defense elements, defendant's claim of self-defense fails).

¶ 36 In addition, Torres testified that the shooting occurred inside of the building, and that Alvarez shot Acosta as he was retreating from him. See *People v. Greene*, 160 Ill. App. 3d 1089, 1097 (1987) ("Even if the victim had been the initial aggressor, the right of self-defense does not permit," use of force in retaliation or revenge of initial aggressor after initial aggressor retreats). Again, in announcing its ruling, the trial court determined that Torres was the "best" witness in this case. See *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 30 (trial court as trier of fact responsible for credibility determinations); *People v. Rudell*, 2017 IL App (1st) 152772, ¶ 24 (reviewing court will not substitute its judgment for that of trier of fact on questions of witness credibility). The testimony of evidence technician Glenn Manguerra, who testified that five cartridge casings were found inside the building supports Torres's testimony and contradicts that of Alvarez, who claims that the shooting happened outside the building.

¶ 37 Moreover, Alvarez's claim that he saw Acosta reach for his waistband before he shot him was contradicted by his own signed, hand-written statement in which he stated that Acosta did not threaten him and did not have anything in his hands at the time of the shooting. Detective Mendoza testified that Alvarez did not tell detectives or the ASA that, before the shooting, Acosta reached for his waistband. Therefore, even if Alvarez properly raised a claim of self defense, this evidence negated his claim beyond a reasonable doubt.

¶ 38 Scope of Cross-Examination

¶ 39 Alvarez next contends that the trial court abused its discretion by limiting the scope of his cross-examinations of Torres and Acosta. In setting forth this argument, Alvarez concedes that he did not raise these claims in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve issue for review on appeal requires both trial objection and written posttrial motion raising issue). Nonetheless, he contends that we may review his claim: (i) "in the interests of justice at the discretion of the court;" (ii) because his trial counsel was ineffective for failing to preserve the claims; and (iii) under either prong of plain error.

¶ 40 The plain error doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and (i) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant or (ii) 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. Nowells*, 2013 IL App (1st) 113209, ¶ 18. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Id*. at ¶ 19. A reviewing court conducting plain error analysis first determines whether

an error occurred, as "[w]ithout reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). We find no error.

¶ 41 A defendant has a federal and state constitutional right to confront the witnesses against him or her. U.S. Const., amends. VI, XIV; Ill. Const.1970, art. I, § 8. This right includes cross-examining witnesses to show any interest, bias, prejudice or motive to testify falsely. *People v. Klepper*, 234 Ill. 2d 337, 355 (2009). Generally, a trial court "retains wide latitude to impose reasonable limits [on cross-examination] based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or of little relevance." *Id.* A reviewing court need not isolate a particular limitation of cross-examination to determine whether reversible error has occurred. *Id.* at 355-56. Rather, a reviewing court views the record in its entirety and determines whether the complained-of limitation created a substantial danger of prejudice by depriving the defendant of the ability to test the truth of the witness's direct testimony. *Id.* at 356. The scope of cross-examination rests with the sound discretion of the trial court, and a reviewing court will disturb its ruling only where a clear abuse of discretion results in manifest prejudice to the defendant. *People v. Velez*, 2012 IL App (1st) 101325, ¶ 62.

¶ 42 Alvarez first claims that the trial court erred by sustaining the State's unspecified objection to trial counsel's question to Torres regarding what Acosta said when he first arrived at the bar and was "being rowdy." Alvarez argues that the answer to this question would have been important to show that Acosta, rather than Alvarez, was the initial aggressor. He maintains that it was improper for the trial court to allow the State to elicit Torres's general description of what Acosta said when he entered the bar and then restrict him from asking Torres about the specifics.

¶ 43 Viewing the record in its entirety, we find that the trial court did not abuse its discretion in allegedly limiting the scope of Alvarez's cross-examination of Torres. Stated differently, the complained-of limitation did not prejudice Alvarez because he was allowed to question Torres about the specifics of Acosta's comments. Indeed, he elicited the specific comments. The record shows that, no more than two transcript pages after the trial court sustained the complained of objection, this exchange took place:

"[DEFENSE ATTORNEY]: [Acosta] was bothering people?

A. No one paid him any attention, but he was trying to get attention and no one paid him any.

Q. Did [Acosta] ever say anything to the defendant?

A. The defendant looked over to the door and [Acosta], like their eyes met, and he said, What's up; what do you want.

Q. Who said that?

A. [Acosta]. With swear, but I don't know if I can repeat that.

Q. You can swear.

A. What the f***, f***. What's up.

Q. Okay.

A. Sorry.

Q. And after [Acosta] directed that at the defendant, did the defendant say anything back to [Acosta]?

A. No. He just repeated, Tell him I don't want any trouble. I came here for a drink. That's it. I don't want no trouble with anyone."

Thus, not only did defense counsel have the opportunity to ask for specifics about what Acosta said to Alvarez when he entered the bar, Torres testified that Alvarez reacted peacefully in the face of Acosta's behavior. In light of this record, we find that the trial court did not improperly limit Alvarez's opportunity to cross-examine Torres.

¶ 44 Alvarez also claims that the trial court erred when it sustained certain objections by the State and limited his cross-examination of Acosta regarding whether: (i) he physically confronted Alvarez; (ii) he made threatening remarks to Alvarez; and (iii) he testified truthfully at trial.

¶ 45 Again, we find Alvarez's claim belied by the record. During Alvarez's cross-examination of Acosta this exchange took place:

> "[DEFENSE ATTORNEY]: And when you arrived at Johnny's Bar, you were causing a disturbance; correct?
>
> A. It was not a disturbance.
>
> Q. You were yelling obscenities, correct?
>
> A. No.
>
> ***
>
> Q. You called the defendant a f***, correct?
>
> A. No, not at all.
>
> Q. You called the defendant a f*** twice, correct?
>
> A. No, I don't remember that. When I was coming from the bathroom and he said, What, I was already heading out to go home.

Q. And when you exited the bathroom, you once again asked the defendant, What are you looking at, f***; correct?

A. No. No."

¶ 46 Defense counsel also confronted Acosta with statements that he made to Detective Velasquez:

"Q. And when you were interviewed by Detective Velasquez while you were in Mount Sinai Hospital, you told Detective Velasquez that you had—when you initially saw the defendant that you had shouted across the bar, What are you looking at. Did you say that to Detective Velasquez when he interviewed you in Mount Sinai?

A. Yeah, but just in the form like going like this. That's what it means.

Q. So now you're saying that you did say something to the defendant to the effect of, What are you looking at; right?

[STATE'S ATTORNEY]: Objection.

THE COURT: Sustained. You can rephrase the question.

Q. Sir, were you lying when you said that you never said anything to the defendant or are you lying now when you said that you said, What are you looking at?

[STATE'S ATTORNEY]: Objection.

THE COURT: Sustained. You can rephrase the question.

***

[DEFENSE ATTORNEY]: Sir, did you say the words out of your mouth, What are you looking at?

A. Just once I asked him what he was looking at, but that was it.

Q. And you also called him a f*** when you said that, correct?

[STATE'S ATTORNEY]: Objection, asked and answered.

THE COURT: Overruled.

A. I don't know that.

Q. You don't remember now?

A. That, no.

Q. So now you've gone from not remembering to whether or not you called him a f*** to not calling him a f***?

[STATE'S ATTORNEY]: Objection.

THE COURT: Sustained."

¶ 47 Defense counsel then asked Acosta about what took place after he had come out of the restroom:

Q. Did you ask the defendant on a subsequent time after initially asking him what he was looking at, did you ask him again, What are you looking at?

A. Uh-huh. Yes.

***

Q. You had positioned yourself closer the second time you asked him what he was looking at, correct?

A. No. I just turned when I was going to the bathroom, but then when I was done, he said, What.

Q. And when you approached the defendant while you were by the bathroom, you had your hands raised in the air and you were shouting obscenities at the defendant; correct?

A. No, not at all."

¶ 48 After viewing the entire record, we find that the trial court did not improperly limit Alvarez's opportunity to cross-examine Acosta. Rather, Alvarez had the opportunity to ask Acosta whether he physically confronted Alvarez, made threatening remarks to him, and if he was testifying truthfully at trial. In addition, Alvarez also impeached Acosta with his statement to Detective Velasquez. Although the trial court sustained the State's objections to the form of particular questions, or because a question had already been asked and answered, the trial court allowed defense counsel to rephrase the questions and continue to cross-examine Acosta. Given this record, we cannot say that the trial court's alleged limitation created a substantial danger of prejudice by depriving Alvarez of the ability to test the truth of Acosta's direct testimony. So the alleged limitation of Alvarez's cross-examination was not an abuse of discretion.

¶ 49 As we find no error in the trial court's actions, we find no plain error. Thus Alvarez's claim that the court improperly limited the scope of his cross-examinations is forfeited. Alvarez argues that his trial counsel was ineffective for failing to preserve this claim. But, because we found no error in the court's actions, Alvarez is unable to establish that he was prejudiced by trial counsel's failure to preserve the issue by objecting to it and including it in a posttrial motion. See *Glasper*, 234 Ill. 2d at 216 (finding defendant could not demonstrate prejudice prong of *Strickland* test where court found no plain error); see also *People v. Stewart*, 365 Ill. App. 3d

744, 750 (2006) ("An attorney's performance will not deemed ineffective for failing to file a futile motion").

¶ 50 Sentencing

¶ 51 Finally, Alvarez contends that the sentencing court erred when it failed to expressly consider whether to sentence him as a Class 1 offender under section 8-4(c)(1)(E) of the Criminal Code of 2012 (720 ILCS 5/8-4(c)(1)(E) (West 2012)). Section 8-4(c)(1)(E) provides that a defendant found guilty of attempt murder may be sentenced as a Class 1 offender if defendant proves by a preponderance of the evidence that he or she acted under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill. 720 ILCS 5/8-4(c)(1)(E) (West 2012).

¶ 52 In setting forth this argument, Alvarez acknowledges that trial counsel did not expressly request this sentencing reduction at his sentencing hearing, but maintains that the "request was implicit, and should have been abundantly clear to the sentencing court, based upon his decision to advance a self-defense theory as the central focus of his defense at every stage of the proceedings."

¶ 53 The State responds that Alvarez has forfeited this claim by failing to raise it in a postsentencing motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (both trial objection and written posttrial motion raising issue are required to preserve the issue for appellate review).

¶ 54 Alvarez does not argue that we may review the claim for plain error. Rather, in his reply brief, he argues, citing *People v. Wilbourn*, 2014 IL App (1st) 111497, ¶ 9, that "sentencing issues are regarded as matters affecting a defendant's substantial rights and are thus excepted from the doctrine of waiver." But, this court has recently declined "to short cut the plain error

analysis" by applying this principle. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 62; See also *People v. Rathbone*, 345 Ill. App. 3d 305, 310-11 (2003) ("it is not a sufficient argument for plain error review to simply state that because sentencing affects the defendant's fundamental right to liberty, any error committed at that stage is reviewable as plain error"); *People v. Hanson*, 2014 IL App (4th) 130330, ¶¶ 28-29 (noting this court has declined to automatically apply the plain error doctrine to forfeited sentencing claims). Because Alvarez has failed to preserve the claim in a postsentencing motion, and does not argue that we may review the claim as plain-error, the claim is forfeited.

¶ 55 That said, Alvarez argues that trial counsel was ineffective for failing to preserve this claim. Ineffective assistance of counsel involves a defendant showing that: (i) trial counsel's performance was objectively deficient; and (ii) defendant was prejudiced, meaning "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The failure to establish either prong of the *Strickland* test defeats the claim. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 56 Alvarez cannot establish ineffective assistance of counsel as the evidence did not support a Class 1 sentence. *People v. Bowen,* 2015 IL App (1st) 132046, ¶ 28 (counsel not required to make futile motions to provide effective assistance). The "sudden and intense passion" and "serious provocation" language of section 5/8-4(c)(1)(E) mirrors that of the second degree murder statute (720 ILCS 5/9-2 (West 2012)), and this court has interpreted the "serious provocation" language of the attempt statute to have the same meaning as it has in the second degree murder statute. *People v. Harris*, 2013 IL App (1st) 110309, ¶ 13. In the context of

second degree murder, Illinois courts have held that serious provocation may arise from: (i) substantial physical injury or substantial physical assault; (ii) mutual quarrel or combat; (iii) illegal arrest; and (3) adultery with the offender's spouse. *People v. Tijerina*, 381 Ill. App. 3d 1024, 1031 (2008).

¶ 57 In making his argument, Alvarez does not specify a category, only that Acosta made several physical and verbal threats toward him. Because there was no evidence of substantial physical injury or assault, illegal arrest, or adultery before the shooting, we determine whether Alvarez and Acosta engaged in mutual quarrel or combat. The record shows that they did not.

¶ 58 Mutual quarrel or combat involves a fight or struggle which both parties enter into willingly or where two persons, on a sudden quarrel and in hot blood, mutually fight on equal terms. See *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 35. Nothing in this record indicates that Acosta and Alvarez came in to contact with each other. As Torres testified, Acosta approached Alvarez with his hands in the air "like he wanted trouble, like he wanted to fight" and asked him "What's up, f***[?] Are you afraid[?]" She also testified that Acosta had nothing in his hands and started to back away from Alvarez after Alvarez pulled a gun from his boot and pointed it at him. In his handwritten statement, Alvarez said that he shot Acosta after Acosta asked him "what are you going to do."

¶ 59 Illinois courts have noted that "[w]ords, in and of themselves, no matter how vile, can never constitute serious provocation" and "must be accompanied by mutual combat so serious that it mitigates against finding the defendant guilty" of the greater offense. *People v. Garcia*, 165 Ill. 2d 409, 429-30 (1995). Given that the evidence did not show that Alvarez was acting under a sudden and intense passion resulting from serious provocation, he was not entitled to be

sentenced as a Class 1 offender. Hence, counsel was not ineffective for failing to argue that the trial court should sentence Alvarez as a Class 1 offender.

¶ 60 Affirmed.