2019 IL App (1st) 171147-U

SIXTH DIVISION
December 20, 2019

No. 1-17-1147

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. 14 CR 13953
	)	
MELVIN HARVEY,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for attempted first-degree murder and aggravated unlawful use of a weapon are affirmed. The evidence was sufficient to prove him guilty of attempted murder beyond a reasonable doubt. We reject defendant's claims that his trial counsel was ineffective for failing to impeach a State witness and that he was denied his right to a fair trial because of the State's opening and closing arguments. We vacate defendant's consecutive sentences and remand so the trial court may determine whether defendant inflicted severe bodily injury such that consecutive sentences must be imposed.

¶ 2 Following a bench trial, defendant Melvin Harvey was convicted of attempted first-degree murder (720 ILCS 5/8-4(a), 5/9-1(a)(1) (West 2014)) and aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1) (West 2014)). He was sentenced to consecutive terms of 26

years and 1 year of imprisonment. On appeal, he contends that (1) the State failed to prove him guilty of attempted murder beyond a reasonable doubt; (2) his trial counsel was ineffective for failing to impeach a State's witness; (3) he was denied his right to a fair trial because the prosecutor, during opening and closing arguments, misstated the evidence; and (4) the trial court erred in imposing consecutive sentences where the court made no finding that he inflicted severe bodily harm on the victim. We affirm Mr. Harvey's convictions, vacate his consecutive sentences, and remand so the trial court may consider the finding necessary to impose consecutive sentences.

¶ 3 I. BACKGROUND

¶ 4 Mr. Harvey was charged with four counts of attempted first-degree murder (720 ILCS 5/8-4(a); 720 ILCS 5/9-1(a)(1) (West 2014)), one count of aggravated battery (720 ILCS 5/12-3.05 (a)(1) (West 2014)), three counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)), one count of unlawful use of a weapon (UUW) (720 ILCS 5/24-1(a)(10) (West 2014)), and two counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1)/(3)(A-5), (C) (West 2014)). The charges arose from the July 9, 2014, shooting of David Johnson. Mr. Harvey waived his right to a jury trial and the case proceeded to a bench trial.

¶ 5 During opening statement, the State said that on July 9, 2014, at approximately 10:40 p.m., Chicago police officers "observed the victim David Johnson parked in his Ford Explorer," heard gunshots in the direction of the Explorer, and saw Mr. Harvey shooting into the vehicle with a handgun. Mr. Harvey was apprehended after a foot chase. The State asked that at the close of evidence that the court find Mr. Harvey guilty "because after he was placed in custody, there was an oral admission to the events that occurred that was given to the State's Attorney."

¶ 6 Officer Arroyo, of the Chicago Police Department, testified that on July 9, 2014, he was working with his partner, Officer Conroy, in the 7th District. At approximately 10:20 p.m., he

observed a dark-colored Ford Explorer parked near 65th Street and Damen Avenue. Officer Arroyo testified that he could not see if someone was inside the vehicle. As he drove by the Explorer and continued southbound on Damen Avenue, he heard approximately four to seven gunshots coming from behind him in a northwest direction. He drove one block south on Damen Avenue, made a "wide turn" and then began travelling north on Damen Avenue towards the Explorer. As he drove past the Explorer again, he noticed that the windows were broken out. Officer Arroyo's partner relayed a message on the police radio and Officer Arroyo drove into an alley west of Damen Avenue. The officers monitored the police radio and responded to the 6600 block of Seeley Avenue. There, Officer Arroyo saw that another police unit had a person in custody. He then went back to the Explorer and saw Mr. Johnson being placed on a stretcher. Officer Arroyo examined the Explorer and noticed that the windows had been shot out and there were bullet holes in the vehicle. He looked inside the Explorer and noticed bullet holes in the center console. He also observed shell casings on the sidewalk. On cross-examination, Officer Arroyo acknowledged that he never saw Mr. Johnson inside the Explorer.

¶ 7 Officer Conroy was in the car with Officer Arroyo and his testimony was similar. He could not see "at the time when [the officers] initially passed" if the Explorer was occupied. After hearing the gunshots, Officer Conroy turned toward the direction of the gunshots and saw Mr. Harvey standing on the sidewalk on the west side of the street. Mr. Harvey, who was wearing all black, was pointing an object and Officer Conroy saw "muzzle flash" directed at the Explorer. Officer Conroy also saw two individuals outside the Explorer. The officers turned their vehicle around and, as they drove past the Explorer, Officer Conroy also observed the windows had been shot out. Shortly after hearing the shots, Officer Conroy identified Mr. Harvey, who was sitting in the back seat of a police car, as the person he had observed holding a firearm.

¶ 8 Both Officers Arroyo and Conroy identified several photographs as accurately representing the inside of the Explorer and the scene around it. These photographs showed that the front windows of the Explorer were shattered and there were bullet holes in the center console.

¶ 9 Officer Donahue testified that on July 9, 2014, he was on duty and working with his partner. At approximately 10:20 p.m., he heard a police radio message of shots fired in the vicinity of 66th Street and Damen Avenue. The message described a black man wearing a dark hooded sweatshirt. Officer Donahue identified Mr. Harvey as the person he then saw running southwest across 66th Street towards the west alley between Seeley and Hoyne Avenues. When Officer Donahue observed Mr. Harvey running, he saw him holding his waist area "as if possibly concealing a weapon." When Officer Donahue arrived at the alley, he observed Mr. Harvey lying face down on the ground.

¶ 10 Officer Reidy was working with Officer Donahue. He testified that he observed two people running from Seeley Avenue in a southwest direction. He identified Mr. Harvey as one of the people he observed running. He also saw Mr. Harvey lying on the ground with his hands up. Officers Reidy and Donahue took Mr. Harvey to 6500 South Damen Avenue for a "show up." Officer Reidy then returned to the alley where he had found Mr. Harvey on the ground. He stood on the hood of a police vehicle and looked over a wooden fence into a yard where he saw what appeared to be a handgun with a magazine. He waited for an evidence technician to recover the handgun.

¶ 11 On cross-examination, Officer Reidy testified one of the two individuals he saw running was wearing a lighter sweatshirt and the other had a "darker sweatshirt on or darker clothing." Officer Reidy and his partner stopped the individual wearing the darker clothing and Officer Reidy could not recall what happened to the person with the lighter clothing. Officer Reidy did not see

Mr. Harvey with a weapon and did not see him discard a weapon.

¶ 12 The parties stipulated that, if called, William Buglio, an evidence technician with the Chicago Police Department, would testify that he processed the crime scene on July 9, 2014, and recovered expended 9-millimeter shell casings near the Explorer and one expended 9-millimeter bullet from the front driver seat of the Explorer. Mr. Buglio also recovered a Taurus PT 92C 9-millimeter semiautomatic pistol in the backyard of 6602 South Seeley Avenue. The handgun contained one live 9-millimeter round in the chamber of the gun and 15 live 9-millimeter rounds in the magazine. Barry Earls, an evidence technician with the Chicago Police Department, compared the casings in the gun and the four expended casings that were recovered from the scene and testified that the four expended cartridge cases were fired from the Taurus pistol.

¶ 13 Assistant State's Attorney (ASA) Mikah Soliunas testified that she was on duty on July 10, 2014, and interviewed Mr. Harvey in the presence of Detective Donna Walsh at approximately 8:30 a.m. ASA Soliunas advised Mr. Harvey of his rights per *Miranda* and he agreed to speak to her. ASA Soliunas spoke to Mr. Harvey for approximately an hour and a half, then asked him if he would be willing to memorialize his statement in writing. Mr. Harvey agreed and ASA Soliunas typed his statement. ASA Soliunas did not read through the statement with Mr. Harvey and he did not sign the statement because he "declined to proceed any further." The State attempted to introduce the typed statement into evidence but the court sustained defense counsel's objection that the statement was inadmissible because it was unsigned and unverified.

¶ 14 ASA Soliunas was allowed, however, to describe her conversation with Mr. Harvey. She testified that Mr. Harvey was "sad" and "crying." Mr. Harvey told her that his best friend "Scooter" had been shot and killed. Mr. Harvey attended a neighborhood memorial service for him. Mr. Harvey was drinking alcohol and smoking cigarettes and cannabis. During the evening, some

people at the event saw a car drive by and said a person in the car had shot Scooter. Mr. Harvey looked up and saw a "small SUV like a Jeep and a smoke gray Dodge Charger." He left the area and decided to walk further north and west of the memorial. Along the route, he met a girl he used to date and walked her home. He decided that "he wanted to get a gun and go look for the person that had shot his friend, Scooter." He went to the home of a man he knew owned guns. Mr. Harvey told the man that some people were after him. The man eventually gave him a gun. Mr. Harvey described the gun as having a "long extended clip" but did not know the exact type of weapon. After receiving the gun, he returned to his aunt's house to get a "hoodie." He borrowed a hoodie from his cousin and returned to the area of the memorial service near 65th Street and Damen Avenue.

¶ 15 On his way, Mr. Harvey saw a vehicle that "he felt resembled one of the vehicles that he had seen earlier" that he had been told was occupied by the person who shot Scooter. It was a small SUV with a man sitting inside talking on the phone. Mr. Harvey walked up to the vehicle and fired twice into it. He saw people running and decided he should also run. He turned and fired two to three more times into the vehicle. He then ran southbound and west through a vacant lot in the vicinity of Seeley and Hoyne Avenues. As he was running, he tripped and fell. He heard police cars coming and he "knew he had been caught, so he just laid on the ground." When Mr. Harvey fell, the gun "flew through the air and landed by a fence."

¶ 16 Chicago Fire Department paramedic Diana Szala testified that at approximately 10:23 p.m. on July 9, 2019, she and her partner received a call of a shooting on the 6500 block of Damen Avenue. Ms. Szala and her partner arrived at the location at 10:28 p.m. There, Ms. Szala spoke with Mr. Johnson. Mr. Johnson was not seated inside the Explorer at that time. She treated Mr. Johnson for his gunshot wound and multiple abrasions on his arm and then transported Mr.

Johnson to Christ Medical Center.

¶ 17 Abbey Buskus, a registered nurse, who was working in the emergency room at Christ Medical Center on July 9, 2014, testified that at approximately 10:45 p.m., Mr. Johnson was admitted to the hospital with a gunshot wound to the right buttock.

¶ 18 The parties stipulated that, if called, (1) Detective Nathan Poole of the Chicago Police Department would testify he administered a gunshot residue test (GSR) to Mr. Harvey at Area South on July 10, 2014, at one minute after midnight; and (2) Robert Burke, a trace analyst employed by the Illinois State Police Crime Laboratory, would testify that he performed tests commonly accepted in the scientific community on the GSR kit submitted by Detective Poole and concluded, within a reasonable degree of scientific certainty, that Mr. Harvey may not have discharged a firearm. If Mr. Harvey did discharge a firearm, then the particles were removed and were not deposited or were not detected by the procedure. The parties also stipulated that Mr. Harvey was never issued a firearm owners identification card (FOID) nor a conceal carry license (CCL). The State's exhibits were admitted into evidence.

¶ 19 After hearing closing arguments, the court noted that it thought "the testimony of the State's Attorney *** was very believable and that alone probably is sufficient to convict [Mr. Harvey] on certain things and taking into account the other testimony of the events that actually happened." The court found Mr. Harvey guilty of attempted first-degree murder (count 2 in that he personally discharged a firearm) and AUUW (count 10 in that he did not have a valid license under the Conceal Carry Act). The court found Mr. Harvey not guilty of two counts of attempted first-degree murder (count 3 causing great bodily harm and count 4 causing permanent disfigurement) and UUW (count 9 in that the violation occurred within 1000 feet of Harper High School). The court merged attempted first-degree murder (count 1), aggravated battery (count 5

causing an injury to another person), and three counts of aggravated discharge into the attempted first-degree murder (count 2). The court also merged AUUW (count 11 for not possessing a FOID card) into the remaining AUUW (count 10).

¶ 20 Mr. Harvey filed a motion for new trial, arguing that two of the counts of aggravated discharge should not be merged because the State nol-prossed those charges prior to trial. The court granted Mr. Harvey's motion as to the two merged charges but denied the rest of the motion.

¶ 21 At sentencing, the court heard arguments in mitigation and aggravation. In announcing sentence, the court noted that "the facts of the crime are the most aggravating factor" and there was "not really a great deal of mitigation." The court found "the crime itself is a very serious one" and "the legislature has provided [Mr. Harvey] a very severe penalty" for this offense. The court noted that Mr. Harvey had no prior criminal record and sentenced him to the minimum 26-year term for attempted first-degree murder (count 2), which included the six-year minimum sentence and the required twenty-year enhancement for personally discharging a firearm. The court also imposed a consecutive one-year term for AUUW (count 10). No specific explanation was provided for the consecutive sentence.

¶ 22 II. JURISDICTION

¶ 23 Mr. Harvey was sentenced on April 18, 2017, and timely filed his notice of appeal that same day. We have jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 (eff. Feb. 6, 2013) and 606 (eff. Dec. 11, 2014), governing appeals from final judgments of conviction in criminal cases.

¶ 24 III. ANALYSIS

¶ 25 A. Sufficiency of the Evidence

¶ 26 On appeal, Mr. Harvey first challenges the sufficiency of the evidence to sustain his

attempted first-degree murder conviction. Specifically, he argues that the State failed to prove beyond a reasonable doubt that he had the specific intent to kill where the evidence failed to show the vehicle he shot at was occupied or that the victim was seriously injured.

¶ 27 A verdict must be affirmed on appeal if, 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. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). This standard is applicable in all criminal cases regardless whether the evidence is direct or circumstantial. *People v. Herring,* 324 Ill.App.3d 458, 460 (2001); *People v. Campbell,* 146 Ill. 2d 363, 374-75 (1992). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Hutchinson,* 2013 IL App (1st) 102332 ¶ 27; *People v. Ortiz,* 196 Ill. 2d 236, 259 (2001). When considering the sufficiency of the evidence, it is not the reviewing court's duty to retry the defendant. *People v. Beauchamp,* 241 Ill. 2d 1, 8 (2011); *People v. Collins,* 106 Ill. 2d 237, 261 (1985). A reviewing court will only reverse a criminal conviction when the evidence is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *Beauchamp,* 241 Ill. 2d at 8; *People v. Collins,* 214 Ill. 2d 206, 217 (2005).

¶ 28 In order to sustain Mr. Harvey's conviction for attempted first-degree murder, the State was required to prove beyond a reasonable doubt that he (1) performed an act constituting a substantial step toward the commission of murder and (2) possessed the criminal intent to kill the victim. *People v. Petermon,* 2014 IL App (1st) 113536, ¶ 39; 720 ILCS 5/8-4 (West 2013); and 720 ILCS 5/9-1(a)(1) (West 2013).

¶ 29 Mr. Harvey challenges the element of specific intent. Whether a defendant had the specific intent to kill is a question of fact to be determined by the trier of fact. *People v. Valentin,* 347 Ill.

App. 3d 946, 951 (2010). Because intent can seldom be proved by direct evidence, the trier of fact may infer intent from the acts committed and the surrounding circumstances. *People v. Glazier*, 2015 IL App (5th) 120401, ¶ 15; *People v. Thomas*, 60 Ill. App. 3d 673, 676 (1978). Intent to kill may be established by proof of surrounding circumstances, including the use of a deadly weapon. *Petermon*, 2014 IL App (1st) 113536, ¶ 39. Such intent may be proven where the defendant fired a gun at or towards another person with malice or with a total disregard for human life. *Id.* We have found that "[t]he very act of firing a gun at a person supports the conclusion that the person doing so acted with an intent to kill." *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001). Courts have also considered the number of shots, range, and the general target area in assessing intent. *People v. Bryant*, 123 Ill. App. 3d 266, 274 (1984).

¶ 30 After viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have concluded that Mr. Harvey had the requisite intent to kill. Mr. Harvey's own statement made clear that he had obtained a gun in order to look for the person who had shot his friend and that he shot into the Ford Explorer after seeing a man sitting in the driver seat, talking on the phone. This was confirmed by testimony from the police including Officer Conroy's testimony about seeing Mr. Harvey with his arms extended and muzzle flashes coming from his hand. The paramedic testified that she treated Mr. Johnson for a gunshot wound. The photographic evidence as well as the witness testimony show that the Explorer sustained considerable damage as a result of Mr. Harvey shooting into the vehicle. The evidence presented, and the reasonable inferences to be drawn therefrom, were sufficient for the trier of fact to conclude that Mr. Harvey had the intent to kill and thus sustain his conviction for attempted first-degree murder.

¶ 31 We are not persuaded by Mr. Harvey's arguments that intent to kill was negated because he only fired four shots while the gun had other unused bullets and because the only gunshot wound

to Mr. Johnson was in the buttocks. We have held that firing a single shot is sufficient to infer intent to kill. *People v. Stanford,* 2011 IL App (2d) 090420, ¶ 41. We have also recognized that poor marksmanship is not a defense to attempted murder. *People v. Teague,* 2013 IL App (1st) 110349, ¶ 27. In short, the evidence was sufficient to sustain this conviction.

¶ 32 B. Ineffective Assistance of Counsel

¶ 33 Mr. Harvey also contends that his trial counsel was ineffective for failing to impeach ASA Soliunas's testimony with the type-written statement that she had prepared for Mr. Harvey to sign. Ms. Soliunas testified that Mr. Harvey told her he got a gun to look for the person who killed his friend, but this statement was not included in the type-written statement. Other inconsistencies included discrepancies in whether he already had the gun when he met the girl he walked home.

¶ 34 To establish a claim of ineffective assistance of counsel a defendant must establish that (1) his attorney's performance was objectively unreasonable and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Courts indulge a strong presumption that counsel's conduct is the result of strategic choices rather than incompetence. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007).

¶ 35 Our supreme court has held "[g]enerally, the decision of whether or not to cross-examine or impeach a witness is a matter of trial strategy which cannot support a claim of ineffective assistance of counsel." *People v. Franklin*, 167 Ill.2d 1, 22 (1995). Here trial counsel's decision not to impeach ASA Soliunas with the complained-of discrepancies from the written statement appears to be trial strategy. When the prosecutor concluded her direct examination of ASA Soliunas, she moved to admit the unsigned statement into evidence. Defense counsel objected, on the basis that the statement was an "unsigned, unverified statement of [his] client" and it was

"hearsay and inadmissible." Defense counsel acknowledged that ASA Soliunas's oral statement "would be admissible as an admission by party opponent." The court agreed with defense counsel and sustained the objection, thus barring the admission of the entire unsigned statement into evidence.

¶ 36 During cross-examination, defense counsel marked ASA Soliunas's notes as a defense exhibit and refreshed her memory, for example, regarding the location of the gun when Mr. Harvey fell. Defense counsel avoided any use of the type-written statement.

¶ 37 Given this record, it appears that defense counsel made a strategic decision to impeach ASA Soliunas with her notes from the interview, rather than the statement, in an effort to keep the statement out of evidence. *People v. Manning*, 182 Ill.2d 193, 216-17 (1998). As we have recognized, if the defendant on cross-examination opens the door to a particular subject, the State on redirect examination can then question the witness to clarify or explain the subject brought out during cross-examination, even where this elicits evidence that is otherwise inadmissible. *People v. Liner*, 356 Ill. App. 3d 284, 292-93 (2005). Had defense counsel relied on the statement to impeach ASA Soliunas, he may very well have risked the State admitting portions of the otherwise inadmissible written, but unsigned, statement into evidence. Under these circumstances, we cannot say that counsel's strategy not to impeach ASA Soliunas with Mr. Harvey's type-written statement was so unsound that it amounted to ineffective assistance. *Perry*, 224 Ill. 2d at 341-42.

¶ 38 C. Prosecutor's Opening Statement and Closing Argument

¶ 39 Next, we address Mr. Harvey's argument that he was denied a fair trial because the prosecutor misstated the evidence during opening statement and closing argument. Specifically, Mr. Harvey argues that the prosecutor stated in her opening statement that the "police officers

observed the victim David Johnson parked in his Ford Explorer" when Mr. Harvey fired several rounds into the vehicle. Mr. Harvey also argues that in her closing argument, the prosecutor argued that there were "red droplets" visible in one of the photographs of the Explorer's interior, that Mr. Johnson identified Mr. Harvey as the shooter, and Mr. Harvey was the only person wearing a black hoodie. Mr. Harvey asks that we remand the matter for a new trial based on the prosecutor's statements.

¶ 40 Mr. Harvey concedes that he did not object to the State's opening statement and closing argument at trial, nor did he include the issue in his posttrial motion. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion."). He argues, however, that we may review his claim under either prong of the plain error doctrine, which allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) 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.* ¶ 19. A reviewing court conducting plain-error analysis must first determine 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). Here, we find no reversible error.

¶ 41 It is well-settled that "every defendant is entitled to a fair trial free from prejudicial comments by the prosecution." *People v. Young*, 347 Ill. App. 3d 909, 924 (2004). "The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). An opening statement can include a discussion of the

expected evidence and reasonable inferences from the evidence, and reversible error occurs only where the prosecutor's opening remarks are attributable to deliberate misconduct on the part of the prosecutor and result in substantial prejudice to the defendant. *Id*. Reversible error will only be found if the defendant demonstrates that the improper remarks were so prejudicial that had the remarks not been made, the trier of fact could have returned a contrary verdict. See *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007).

¶ 42 During her opening argument, the prosecutor argued that the police officers observed "the victim David Johnson parked in his Ford Explorer." Mr. Harvey maintains that this was error because the State did not prove that Mr. Johnson was in the Explorer, that the police observed him in the Explorer, or that the vehicle belonged to Mr. Johnson.

¶ 43 The record shows that during her closing argument, the prosecutor corrected herself and pointed out that it was Mr. Harvey who placed Mr. Johnson in the Explorer, not the police officers. The prosecutor's remark was not attributable to deliberate misconduct nor could it have resulted in substantial prejudice. There is no dispute that Mr. Johnson was shot.

¶ 44 Mr. Harvey argues that in closing argument, the prosecutor stated that Mr. Johnson told the paramedic that Mr. Harvey shot him. He points out that this language was stricken by the court during the paramedic's direct testimony, but the prosecutor included the language in her closing argument. Mr. Harvey also argues that the prosecutor erred in arguing that there were red droplets visible in the photographs of the Explorer presented to witnesses when there were not, that Mr. Harvey was the only person wearing a black hoodie, and that ASA Soliunas was familiar with the area because her grandmother lived in the area when in fact it was the ASA's grandfather who resided in the area.

¶ 45 Some of these statements were true. Mr. Harvey was the only person in a black hoodie.

The rest were minor, unimportant discrepancies. None of them created substantial prejudice against Mr. Harvey such that a verdict of guilt resulted from them. *James*, 2017 IL App (1st) 143036, ¶ 46. This is especially so where, as here, Mr. Harvey was found guilty after a bench trial. *People v. Taylor*, 344 Ill. App. 3d 929, 937 (2003) ("In a bench trial, a trial judge is presumed to know the law, and this presumption is rebutted only when the record affirmatively shows the contrary."). The record shows that in finding Mr. Harvey guilty, the court did not rely on the prosecutor's statements in either the opening or closing, but specifically noted that ASA Soliunas's testimony alone was sufficient to convict. ASA Soliunas testified that Mr. Harvey admitted shooting into the Explorer because he believed it contained the person that shot his friend. After the shooting, Mr. Harvey fled and was apprehended a short time later. Mr. Harvey's version of events to ASA Soliunas was corroborated by the officers, who were near the scene of the shooting and apprehended Mr. Harvey. Additionally, Officers Conroy, Reidy, and Donahue testified that Mr. Harvey was wearing dark clothing while Officer Reidy testified that the second person running with Mr. Harvey was wearing lighter clothing. Given this record, Mr. Harvey was not prejudiced by the complained of remarks. Since we have found that no error occurred, there can be no plain error. See *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010) ("[w]ithout reversible error, there can be no plain error").

¶ 46 D. Sentencing

¶ 47 Lastly, Mr. Harvey contends that he was improperly sentenced to consecutive terms. The State responds that the trial court properly sentenced Mr. Harvey to consecutive terms under section 5-8-4(d)(1) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4(d)(1) (West 2014)), which provides that the court shall impose consecutive sentences when "[o]ne of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony

and the defendant inflicted severe bodily injury."

¶ 48 Initially, however, the State argues that Mr. Harvey has forfeited this issue on appeal since he did not object at trial or in his post-trial motion. Mr. Harvey acknowledges that he failed to raise the issue regarding improper imposition of consecutive sentences in the trial court, but argues that we should review the issue pursuant to the plain error doctrine.

¶ 49 The improper imposition of consecutive sentences may violate a defendant's fundamental rights and we therefore may review whether the imposition of consecutive sentences constitutes plain error. *People v. Murray*, 312 Ill. App. 3d 685, 692 (2000). A reviewing court conducting plain-error analysis must first determine whether an error occurred, as "[w]ithout reversible error, there can be no plain error." *McGee*, 398 Ill. App. 3d at 794.

¶ 50 Mr. Harvey's conviction for attempted first degree murder is a Class X offense, but there was no finding by the trial court that Mr. Johnson suffered severe bodily injury as required by section 5-8-4(d)(1). The State asks us to make that finding based on the record. However, there was no testimony either from the victim or about his injuries. Not all gunshot wounds are "severe bodily injury." *People v. Austin*, 328 Ill. App. 3d 798, 808 (2002). Rather, we "look at the extent of the harm done by the gunshot in the particular case." *People v. Williams*, 335 Ill. App. 3d 596, 599 (2002).

¶ 51 As a reviewing court, we rely on the trial court's findings and have reversed consecutive sentences where, as in this case, there was no finding that the victim suffered great bodily injury. *People v. Alvarez*, 2016 IL App (2d) 140364. See also *People v. Deleon*, 227 Ill. 2d 322, 332 (2008) (a reviewing court will "give deference to the trial court as the finder of fact" as to whether there was "great bodily injury.").

¶ 52 As in *Alvarez*, there is no finding for this court to review or defer to under *Deleon*. See

Alvarez, 2016 IL App (2d) 140364, ¶ 27 (the trial court's "isolated comment about the 'seriousness' of the [victim's] injuries cannot serve as a basis for upholding the court's imposition of consecutive sentences"). "Without findings to review, we must not engage in our own assessment of the facts and the evidence to determine whether consecutive sentences were required under section 5-8-4(d)(1) of the Code." *Id.* ¶ 28 (relying on *Deleon* for the proposition that great deference should be given to the trial court as finder of fact and the reviewing court will not substitute its judgment for the trial court's on issues regarding witness credibility, the weight given to evidence, or the inferences to be drawn).

¶ 53 Because the trial court did not make a factual finding of severe bodily injury as required by section 5-8-4(d)(1) to impose consecutive sentences, Mr. Harvey has established plain error under the second prong. Accordingly, we vacate Mr. Harvey's consecutive sentences and remand to the trial court to determine whether he inflicted severe bodily injury on Mr. Johnson.

¶ 54 IV. CONCLUSION

¶ 55 In sum, for the reasons stated above, we affirm Mr. Harvey's convictions for attempted first-degree murder and AUUW. We vacate the imposition of consecutive sentences and remand to the trial court to determine whether Mr. Harvey inflicted severe bodily injury as to require the imposition of consecutive sentences.

¶ 56 Affirmed in part; vacated in part; and remanded with directions.