2012 IL App (5th) 090481-U

NO. 5-09-0481

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Massac County.
	)	
v.	)	No. 08-CF-161
	)	
DOMINICK N. STEPPAN,	)	Honorable
	)	Joseph Jackson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant's speedy trial rights were not violated, prosecutorial misconduct in document production did not occur, counsel was not ineffective in not seeking a fitness hearing or in not seeking to bar a witness's statement from evidence, and the defendant's guilt of attempted murder was established beyond a reasonable doubt, the defendant's conviction is affirmed. The defendant is not entitled to a new sentencing hearing, but the judgment for aggravated discharge must be vacated and the judgment and mittimus must be corrected.

¶ 2 FACTS

¶ 3 Background

¶ 4 At approximately 11 p.m. on October 17, 2008, someone fired numerous shots into a second-story window of the home of Kevin and Connie Hambrick in Metropolis. In gathering information, the investigating officers learned that the defendant had made threatening phone calls to Kevin Hambrick earlier that day, and on that basis, the officers arrested the defendant.

¶ 5 On October 20, 2008, three felony charges were filed against the defendant stemming from the October 17, 2008, incident. The defendant was charged with the attempted first-degree murder of Kevin Hambrick, aggravated discharge of a firearm, and unlawful possession of a weapon by a felon. An indictment superseded the information and eliminated the unlawful possession charge. The case was tried before a jury in late April 2009. The defendant was convicted of both charges. On August 20, 2009, the defendant received a 50-year sentence of imprisonment.

¶ 6 Trial Testimony and Evidence

¶ 7 Testimony of Morgan Hambrick Siebert. She is Kevin Hambrick's niece, and she works with Connie and Kevin Hambrick at the Super Museum in Metropolis. On October 17, 2008, she answered a phone call, which she described as threatening to her uncle. The call came in to the Super Museum between 1 and 2 p.m. The man who called stated that he was going to "kick [her] uncle's ass" and demanded that she give him her uncle's telephone number. The man on the phone identified himself as Dominick. Later that day, another call came in from the same number (based on the caller identification), and she had her husband, who also works there, answer that call.

¶ 8 Testimony of Adam Siebert. He is married to Morgan Hambrick Siebert. They were both working at the Super Museum on October 17, 2008. He is familiar with the defendant. He answered a call from a Dominick while at work at between 2 and 3 p.m., who was looking for Kevin Hambrick, because the two of them were going to "have it out." Dominick angrily told Adam that he was not going to allow Kevin to ruin his good name. Adam testified that he tried, unsuccessfully, to find Kevin to tell him about these calls from Dominick.

¶ 9 Testimony of Connie Hambrick. Connie testified that she lived in a two-story home in Metropolis located two blocks from a Sonic restaurant. The home has large windows. Her

bedroom is in the front of the house, and the headboard of their bed is in front of two windows in her bedroom.

¶ 10 Early in the evening of October 17, 2008, Connie's husband had been involved in a heated telephone conversation with the defendant. Connie testified that she had known the defendant for about a year and that he was involved with and living with her sister, Mary Jo Mason. The defendant had been to her home about four or five times in that year. Later that evening, the defendant called again, and she answered the phone. She knew that the caller was the defendant from the caller identification, and she answered the call in order to keep her husband from answering, as he was still upset from the first call. This second call took place at about 9 p.m. During this conversation, the defendant told Connie that he planned to kill Kevin. She testified that he told her numerous reasons for wanting to kill Kevin–things that had happened in the past before he got involved with Mary Jo. He told Connie that he loved her and the children and that his dispute was only with Kevin. Connie assumed that the defendant had been drinking alcohol, because during the conversation, he slurred some of his words. She told her husband about the conversation.

¶ 11 At about 11:30 p.m., Connie had just finished taking a shower in the bathroom near her upstairs bedroom. Her husband was in bed watching television. Connie testified that by the time her shower was over, her husband had fallen asleep. Connie got into bed in a seated position and was turning on her alarm clock, when in her peripheral vision she saw a flash and then heard a gunshot. Connie screamed and pushed Kevin from the bed. She called a 9-1-1 operator. After they hung up the phone, and an officer arrived at their home, Connie called her mother and then her sister, Mary Jo. The phone call to Mary Jo occurred about 10 minutes after the shooting. Mary Jo did not answer her phone. She tried a couple of other times, but still got no answer. About 45 minutes after the shooting, Mary Jo returned the phone call.

¶ 12 Testimony of Kevin W. Hambrick. Kevin described his home as a two-story house in Metropolis next to a business called Bill's Barbecue. The defendant had been to his home the weekend before, and during that visit, the defendant talked about having a .40-caliber handgun that was kept in his girlfriend's purse. Kevin testified that he had spoken with the defendant on the telephone in the past, and so was familiar with the sound of his voice.

¶ 13 On October 17, 2008, at between 5 and 6 p.m., he received a call from the defendant that was threatening. The call centered on the defendant's claim that Kevin was telling Mary Jo Mason's daughter that the defendant was physically abusive to Mary Jo. The defendant told Kevin that he wanted to "kick his ass." Kevin testified that he had told Mary Jo's daughter, Cindy, that he thought it was possible that the defendant was being abusive to her mother. Kevin also asked Mary Jo if this had happened, and Mary Jo denied it. Kevin testified that after speaking with Mary Jo, he felt the matter was concluded as there was nothing more he could do. After the call from the defendant, the Hambrick family went on with their evening, with Kevin and Connie eventually retiring to their bedroom on the second floor. That night, the defendant called their home a second time. Connie answered the call, which ended when Connie hung up on the defendant. He and Connie were upset after the calls. He fell asleep while his wife was showering. He woke up to hearing his wife screaming that "Dominick is shooting up our house." He heard shots, and he himself began screaming at his children and the others in the home to get down on the floor. When the police arrived, he provided a statement and informed the officers that he thought that the defendant could have been the shooter based upon the two threatening phone calls that same evening, coupled with the fact that the defendant had told him one week earlier that he possessed a handgun.

¶ 14 On direct examination, Kevin was asked about his criminal history. Kevin used to live in Las Vegas and was convicted of attempted auto burglary, possession of stolen property,

and grand larceny, all charges arising out of the same incident. He testified that the convictions were from 15 years ago and that he had not been convicted of any misdemeanors or felonies since that time. He moved to Metropolis in 2001.

¶ 15 On cross-examination, Kevin admitted to using drugs 20 years before, but denied current usage. Kevin denied that he sold drugs.

¶ 16 Testimony of D.M. D.M. is Connie's 14-year-old daughter. At the time of the shooting, she was in the living room on the couch. She was asleep when the shooting started. She testified that at first, she thought that the sounds she was hearing were firecrackers. She ran by the living room window in an effort to get to the stairs of the home, and she saw an outline of a man standing outside in their yard and saw sparks.

¶ 17 Testimony of L.H. L.H. is D.M.'s friend, and she was in the home that evening. They were downstairs watching a Harry Potter movie. She heard something outside that sounded like a firecracker, and she saw the outline of a man outside the home, with his arm extended and pointed towards the upper level of the home with "fire" coming out of a gun he was holding. She also ran to the stairs.

¶ 18 Testimony of Teri Duey. Teri is Connie Hambrick's daughter. She was present in the home on October 17, 2008. She testified about two phone calls that came into the home that evening. She recalled that her parents were arguing with the person on the other end of the calls–the defendant. The arguments involved a situation where Kevin Hambrick told the mother of Connie and Mary Jo that the defendant had beaten up Mary Jo. The defendant was upset with Kevin about this conversation. She answered the second phone call, after seeing the defendant's cell phone number appear on the caller identification, and handed the phone to her mother. Her mother became upset during the conversation, but she does not know what was said. Later that evening, she was sleeping and was awakened by the sound of gunshots into the home. She tried to call her aunt Mary Jo after the shooting. At first, Mary

Jo did not answer the phone. Eventually she did, and Teri asked her where she had been and why she had not answered the phone. Her aunt, Mary Jo, asked her if anyone was hurt or had been shot. Teri testified that before her aunt asked her these questions, she had not mentioned the shooting to her aunt. Her mother took the phone from her and continued the conversation.

¶ 19 Teri also testified about a conversation she had with the defendant in her home one week before the incident. He told Teri that her aunt Mary Jo carried a .40-caliber gun in her purse for him. Teri admitted that she never saw the gun, and she never asked her aunt if this statement was true.

¶ 20 Testimony of Dustin Duey. Dustin is married to Teri. They live with Connie and Kevin Hambrick. He testified about the phone calls that came into the home on October 17, 2008. The first call was taken by Kevin, who became angry during the conversation. At about 11:30 p.m., he was sitting on the couch in the living room playing a video game when shots were fired at the house. Initially, Dustin thought that the sounds he heard were firecrackers, but then he looked at the window in the living room, and from the lighting, he saw an outline of a figure outside the window with his hand raised and holding a gun. The light that was illuminating the figure was coming from the gun itself when the gun was fired. He testified that the figure was a male, but he could not make out specific details. He ran upstairs to make sure that his child and his wife (then his girlfriend) were unhurt.

¶ 21 Dustin confirmed that he was present during the conversation where the defendant stated that Mary Jo was carrying a .40-caliber gun in her purse. In this conversation, the defendant advised that when the .40-caliber gun is shot and a target is struck, the hole going in is small, but the damage inside is large. Dustin never saw this gun.

¶ 22 Testimony of Jordan Panell. Jordan was in Metropolis in the evening of October 17, 2008, near the Sonic restaurant. He was at the residence of Michael Labelle. The two men

were outside and talking at about 11 p.m. While they were talking, Jordan heard shots being fired. After the shooting, he saw a man running from the direction where the shots had been fired. The man ran to the Sonic restaurant. Jordan then went to the home that was being shot at, to see if everyone was okay. He was present when the police arrived on the scene.

¶ 23 Testimony of Michael Labelle. Michael confirmed the testimony of Jordan Panell. Michael's home was across the street and two houses down from the Hambrick house. At about 11 p.m. on October 17, 2008, Michael was out on his driveway talking with his friends when he heard a sound like a firecracker. Turning in the direction of the sound, Michael testified that he saw a man in a black hoodie aiming a gun upwards at a window of a house. He knew the children who lived in that home. Michael testified that he knew the man was shooting a gun because he was familiar with guns and could see "the fire" come out of the gun. After the man finished shooting, he began running behind the houses towards Michael's home and then turned away and walked in the direction of a Sonic restaurant.

¶ 24 Testimony of LeAnne Labelle. She is Michael's mother. She confirmed that there was a shooting at the Hambrick home that evening. She did not see the shooting, but she saw the man dressed in dark clothing first run and then walk away from the Hambrick home and turn to walk towards the Sonic restaurant.

¶ 25 Testimony of Mary Jo Mason. Mary Jo is Connie Hambrick's sister and was dating the defendant at the time of the alleged events. On October 17, 2008, she drove home from work at about 10 p.m., to find that the defendant was in her home and was intoxicated. There was no gun in her home or in her vehicle. She denied ever carrying a gun in her purse. They left her home in her van and drove to a Sonic restaurant in Metropolis. She parked in the Sonic lot. The defendant left the vehicle briefly to urinate. They arrived back home at approximately 11:45 p.m. that evening.

¶ 26 This trial testimony differed from statements Mary Jo made to police more

contemporaneous with the events. She acknowledged that she had given three statements to police, with three different versions of the events of that night, all different from the testimony that she gave in court. Initially, Mary Jo told the police that neither she nor the defendant were in Metropolis that evening. Later she told police that the defendant took her van for a period of time that night, and she did not know where he went. Finally in a third statement, she told police that after she got home from work, she and the defendant drove to Metropolis where she dropped him off at a barbeque restaurant next door to the Hambrick home and waited for him at the Sonic restaurant at his direction. Mary Jo told the police that upon returning to the van that night, the defendant was out of breath. This third statement to police, which was recorded, was later admitted into evidence and played for the jury.

¶ 27 Testimony of Special Agent Tom Parks. Special Agent Parks works for the Illinois State Police and was involved in the arrest and interviews of the defendant in the early morning hours of October 18, 2008. Upon his arrest, the defendant was transported to the Johnson County sheriff's department. *Miranda* warnings were read to the defendant, and he agreed to talk with Agent Parks. In this first interview, he told the officer that he and Mary Jo did not leave town after she got off of work at 10 p.m. and that after a cigarette and beer run, they returned to their home. Later that evening, he went for a jog, and despite the fact that he had his cell phone with him, he stopped and used a pay telephone to call Mary Jo, who told him that police were at their home. When questioned about the logic of aspects of his story (the logic of using a pay phone when he had a cell phone in his pocket), the defendant got angry, and the interview ended. Later that night, he told the officers that he was ready to talk with them. He was re-Mirandized. He told the officers that he believed whoever shot up the Hambrick home was someone who had been cheated in a drug deal with Kevin Hambrick–who he claimed was a known drug dealer. This unnamed shooter was from Chicago, and the defendant explained that Kevin owed this man a lot of money. Eventually,

after a false report from the defendant about a firearm in his home (which was not there when the officers executed a search warrant), questioning ceased. The officer acknowledged that the defendant volunteered that he had been drinking earlier that night, and that he was on certain psychotropic medications, but testified that the defendant was coherent and did not in any way seem impaired.

¶ 28 Testimony of Rick Griffey. Officer Rick Griffey is a Metropolis police officer. On the night that the defendant was taken into custody and questioned, he participated by watching the defendant when the interviewing officers needed a break. He took the defendant outside for a smoke break along with Officer Eric Bethel. While outside smoking, the defendant attempted to engage the officers in conversation about the case. Officer Griffey told him he could not do so unless he wished to waive his rights again. The defendant said that he wanted to do so and continued to talk to the officers after signing the form containing the *Miranda* warnings. While on a subsequent smoke break, the defendant told Officer Griffey that he would not have shot at the house if he had known children were inside, and he raised his cuffed hands up over his head in a mimicry of shooting a gun. Officer Griffey testified that the defendant's actions constituted a nonverbal clue based upon his officer training–that his shot was up over his head rather than straight ahead. Officer Griffey testified that this nonverbal clue–that the defendant pretended to aim up over his head–was significant because the interviewing officers had not informed the defendant that the second floor of the Hambrick home had been targeted by the gunman.

¶ 29 Forensic Evidence. Officer Pete Sopczak of the Illinois State Police, the officer who processed the crime scene, recovered nine spent shell casings in the front yard of the Hambrick home. Officer Sopczak found two projectile holes in the window screen of the second floor bedroom and two holes in the window. Officer Sopczak found three more holes directly behind the Hambricks' headboard. Seven bullets went through the wall behind the

headboard. One bullet passed through the headboard and lodged in the center of a pillow. Some of the projectiles bounced off the bed and were found on the floor and on the windowsill. Two more bullet holes were in the master bathroom. One bullet made it through the wall in the master bedroom. He found a total of nine bullets inside the Hambrick home. He found a tenth bullet hole in the Hambricks' van, which was parked in the carport next to the house.

¶ 30 A firearms forensic expert employed by the Illinois State Police Crime Lab, Ronald Locke, testified that all nine shell casings were fired from the same firearm and that the firearm in question was a .40-caliber Hi-Point.

¶ 31 Testimony of Kim Brown. Kim is employed by Sonic as a general manager. She testified about how and where orders are placed, processed, and delivered at a Sonic. The Metropolis Sonic restaurant in question has a surveillance system with 13 cameras. The taped material is kept for 10 days. The tape is time-stamped but is one hour ahead of the actual time. Law enforcement officials asked her to create a copy of the recording of the time frame of the shooting.

¶ 32 Verdict and Sentence

¶ 33 On May 1, 2009, the jury returned verdicts of guilty on both counts–attempted murder and aggravated discharge of a firearm. On August 20, 2009, the court entered an amended judgment and sentenced the defendant to a term of imprisonment of 50 years.

¶ 34 LAW AND ANALYSIS

¶ 35 Speedy Trial

¶ 36 The defendant was arrested on October 18, 2008. He argues that his 120-day speedy trial time period expired on February 25, 2009, but he was not brought to trial until April 27, 2009–189 days after his arrest.

¶ 37 Speedy trial right issues mandate *de novo* review. *People v. Crane*, 195 Ill. 2d 42, 52,

743 N.E.2d 555, 562 (2001) (constitutional rights); *People v. Cordell*, 223 Ill. 2d 380, 389, 860 N.E.2d 323, 330 (2006) (citing *In re Estate of Dierkes*, 191 Ill. 2d 326, 330, 730 N.E.2d 1101, 1103 (2000)) (statutory rights).

¶ 38 A defendant will be discharged from custody and have his charges dismissed, if his rights to a speedy trial are violated. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5(a) (West 2006).

¶ 39 Speedy trial rights are fundamentally guaranteed to all defendants pursuant to both the sixth and fourteenth amendments of the federal constitution. U.S. Const., amends. VI, XIV. The Illinois Constitution also guarantees speedy trial rights. Ill. Const. 1970, art. I, § 8. The constitutional right to a speedy trial is not based upon a specific time frame in which an accused must be brought to trial. *People v. Love*, 39 Ill. 2d 436, 442, 235 N.E.2d 819, 823 (1968).

¶ 40 The constitutional guarantee to a speedy trial has three purposes–to prevent an oppressive incarceration before trial, to minimize a defendant's concern associated with a public accusation, and to prevent undue interference with the defendant's ability to defend himself. *Smith v. Hooey*, 393 U.S. 374, 377-78 (1969); *People v. Tetter*, 42 Ill. 2d 569, 572, 250 N.E.2d 433, 435 (1969). To analyze and determine if a defendant's constitutional speedy trial rights have been violated, the court should consider four factors: (1) the length of the delay, (2) the reasons for the delay–whether the delay is attributable to the defendant or to the government, (3) the defendant's assertion of his speedy trial rights, and (4) the prejudice to the defendant resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Doggett v. United States*, 505 U.S. 647, 651 (1992); *People v. Bazzell*, 68 Ill. 2d 177, 182-83, 369 N.E.2d 48, 50 (1977).

¶ 41 In Illinois, there is an additional statutory speedy trial right by which an accused must be brought to trial within 120 days from the date on which the accused was taken into

custody unless delay is attributable to the accused. 725 ILCS 5/103-5(a) (West 2006).

¶ 42 The State argues that the defendant was not subject to the 120-day speedy trial provision because upon his arrest, he was placed on a parole hold for his resulting parole violation. The underlying case against the defendant was out of Cook County and involved a conviction for armed violence with a category I weapon for which he received a 21-year prison sentence. The State argues that because of this parole hold, the proper time limit is 160 days pursuant to the intrastate detainers statute. 730 ILCS 5/3-8-10 (West 2006).

¶ 43 Pursuant to statute, persons who are "committed to any institution or facility or program of the Illinois Department of Corrections" with charges pending in another county of the state are entitled to application of the general rules of the statutory speedy trial section (725 ILCS 5/103-5 (West 2006)). 730 ILCS 5/3-8-10 (West 2006). The intrastate detainers statute applies to defendants who are "incarcerated for a parole violation based on the activity which formed the basis for the criminal charges pending against him in this case." *People v. Williams*, 218 Ill. App. 3d 442, 443, 578 N.E.2d 313, 313 (1991).

¶ 44 The requirements of a speedy trial demand pursuant to the intrastate detainers statute are specific. The defendant must include the following in his demand:

> "a statement of the place of present commitment, the term, and length of the remaining term, the charges pending against him or her to be tried and the county of the charges, and the demand shall be addressed to the state's attorney of the county where he or she is charged with a copy to the clerk of that court and a copy to the chief administrative officer of the Department of Corrections institution or facility to which he or she is committed." 730 ILCS 5/3-8-10 (West 2006).

¶ 45 The record reflects that the defendant attempted to invoke speedy trial rights verbally on October 21, 2008. The record also supports the defendant's and the court's awareness of his parole violation status. The court advised the defendant that he would need to speak to

his public defender but that the speedy trial request had different requirements such as needing to be in a written format because of his parole hold status. The defendant's attorney was also aware of the applicability of the intrastate detainers statute, specifically requesting that the court direct the circuit clerk's office to prepare a certified copy of the docket sheet so that the defendant could inform the warden of his desire to invoke the intrastate detainers statute. The State contends that this request for the certified copy constituted the demand. However, the record contains no written speedy trial demand. If there was a written demand filed on January 6, 2009, after the request for the certified copy of the docket sheet was made on the record, a trial beginning on April 27, 2009, would clearly have been within the 160 days. However, we are not able to make that assumption.

¶ 46 The defendant argues on appeal that there were problems with discovery production and that this caused the delay. He argues that because the State produced discovery late in the process leading to trial, the delay resulting from the continuances of the January 20, 2009, and the March 9, 2009, trial settings should not have been attributable to him. The record reflects that the State produced a large amount of discovery materials on November 5, 2008. Four smaller supplemental productions were filed prior to the court's January 6, 2009, order setting a State discovery production cutoff of January 9, 2009. Between January 7, 2009, and January 9, 2009, additional small supplemental productions were filed. At a hearing held on January 13, 2009, defense counsel, with the defendant's approval, sought and obtained a continuance of the January 20, 2009, setting in order to give the defendant and his attorney time to review and process the additional discovery materials received. The defendant argues that the records were purposefully withheld by the State. However, there is nothing in the record to substantiate this claim. Even if the records were improperly withheld, the defendant does not explain his failure to follow the specific rules of the intrastate detainers statute.

¶ 47 Having failed to follow the statutory requirements to make a formal speedy trial request pursuant to the intrastate detainers statute, the issue raised by the defendant is without merit.

¶ 48 Proof of Guilt of Attempted Murder Beyond a Reasonable Doubt

¶ 49 The defendant argues that the State failed to prove his guilt of attempted murder beyond a reasonable doubt because the gunshots mostly hit the ceiling of the bedroom with no evidence that the shots were specifically aimed at a person. The defendant argues that rather than an attempt to kill someone, the gunshots were more akin to distressing and frightening those who occupied the home in question.

¶ 50 The standard of review applicable to this issue is whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt upon viewing the evidence in the light most favorable to the State. *People v. Schott*, 145 Ill. 2d 188, 203, 582 N.E.2d 690, 697 (1991) (citing *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

¶ 51 To prove the defendant guilty of attempted first-degree murder, the State must prove that the defendant performed an act constituting a substantial step toward the commission of the murder, and that the defendant possessed the specific intent to kill. See *People v. Brown*, 341 Ill. App. 3d 774, 781, 793 N.E.2d 75, 80-81 (2003).

¶ 52 Without citation, the defendant argues that a person cannot be found guilty of attempted murder for shooting into the ceiling of a house. We find that the case of *People v. Washington*, 257 Ill. App. 3d 26, 628 N.E.2d 351 (1993), provides guidance in cases where the defendant shoots into a home. In *People v. Washington*, a person inside the home was struck and killed by a bullet that ricocheted into the victim's chest. *Id*. at 29, 628 N.E.2d at 353. The court held that murder can be supported by intent that is not specific and that the defendant's action in shooting into a home showed knowledge of a strong probability of death

or great bodily harm. *Id*. at 35-36, 628 N.E.2d at 357. In finding that the mental state supported a murder conviction, the court stated:

> "Such conduct goes beyond mere recklessness and illustrates more than just a conscious disregard of a substantial and unjustifiable risk. [Citation.] Intentionally and deliberately firing a shotgun at an occupied home is an act which a person is presumed to know 'create[s] a strong probability of death or great bodily harm to *** another.' " *Washington*, 257 Ill. App. 3d at 36, 628 N.E.2d at 357 (quoting Ill. Rev. Stat. 1991, ch. 38, par. 9-1(a)).

¶ 53 The defendant attempts to distinguish this case by the fact that the defendant in *Washington* had just seen people in the doorway of the home and therefore knew that people were inside the home. The defendant implicitly argues that, in contrast, he did not know that there were people in the Hambrick home on Friday, October 17, 2008, at 11 p.m., and therefore the same mental state is lacking.

¶ 54 We disagree with the defendant's analysis. The shooting occurred on a Friday evening at 11 p.m. The room into which the defendant was aiming was illuminated by lamps. Kevin Hambrick's van was parked in the driveway. The defendant was familiar with the Hambricks and with their home. He knew that the Hambricks had children and that the children lived in their home. Additionally, the defendant had been calling all day attempting to locate Kevin, and when he did finally locate Kevin, he threatened him. While the defendant may not have been pointing the gun directly at a human target, the defendant's actions constituted a clear and conscious disregard of safety and the creation of a substantial risk of resulting death or great bodily harm. We find that the defendant's mental state and his actions on the evening of October 17, 2008, support the jury's conviction of attempted murder beyond a reasonable doubt.

¶ 55 Prosecutorial Misconduct

¶ 56 The defendant next alleges that he was denied a fair trial due to prosecutorial misconduct. At issue was the prosecutor's alleged knowledge of a misstatement made during the testimony of Kevin Hambrick. The misstatement involved the date of Kevin's criminal convictions. Kevin testified that his convictions dated back 15 years. It appears from the uncertified criminal information both parties possessed that the convictions were 13 years old–a 2-year difference. The defendant alleges that the misconduct involved the prosecutor's failure to correct this misstatement of fact. The defendant also alleges that his attorney was not able to effectively impeach Kevin Hambrick with these convictions because the prosecutor did not provide the criminal history of the witness as required by Supreme Court Rule 412(a)(vi) (eff. Mar. 1, 2001).

¶ 57 Initially, we struck this issue from the defendant's brief, but consider it now at the direction of the supreme court by way of a supervisory order.

¶ 58 At trial, Kevin Hambrick testified that 15 years before, he was convicted of attempted auto burglary, possession of stolen property, and grand larceny. The three crimes arose from the same incident. During cross-examination by defense counsel about the age of the crimes, there was confusion about when Hambrick was released from prison and when he moved to Illinois. This confusion was based upon the fact that defense counsel did not have certified copies of these Nevada convictions. Outside of the jury's hearing, the prosecutor informed the judge that the convictions at issue occurred in 1996, which would have been 13 years before, rather than the 15 years to which Hambrick testified. Although the prosecutor informed the court of the date of the convictions, the prosecutor did not specifically correct this alleged misstatement of fact.

¶ 59 The defendant argues prosecutorial misconduct because Supreme Court Rule 412(a)(vi) imposes an obligation on the State to obtain and disclose criminal histories of

potential witnesses for impeachment purposes. The defendant claims that the State's failure to comply with this rule cost him the ability to impeach Hambrick.

¶ 60 The record reflects that the State provided Hambrick's criminal information to the defendant's attorney before trial. According to the State's brief, they produced database printouts of Kevin Hambrick's convictions. These printouts, however, do not meet the "proof of the conviction" requirement for impeachment purposes. *People v. Pecoraro*, 175 Ill. 2d 294, 309, 677 N.E.2d 875, 883 (1997). From the record, we are not able to determine when the records were provided to the defendant's attorney, but the production apparently occurred before February 24, 2009. On that date, the defendant's attorney sought to continue the March 9, 2009, trial setting for at least 30 days in order to obtain certified copies of these convictions. Because of the age of these Nevada convictions, the records had been moved to a storage warehouse. The State did not object to the continuance, and the case was continued for more than 30 days to its April 27, 2009, trial date. By that trial setting, the defendant's attorney still had not received the certified records. However, she did not request another continuance. Defense counsel also never sought assistance from the prosecution in obtaining the records from Nevada. However, whether or not the prosecutors could have sped up the process and aided the defendant's attorney in obtaining the records is not known.

¶ 61 We glean from the transcribed trial record of argument in chambers that defense counsel wanted to impeach Kevin Hambrick with these convictions in a way that suggested that he was a drug dealer. Counsel admitted that she did not know if he had been convicted of a drug offense and acknowledged that he had never been convicted of a drug offense in Illinois. Despite the tenuous connection between his Nevada convictions and her theory, she asked Kevin Hambrick additional questions about his convictions and then about his drug usage and whether or not he sold drugs.

¶ 62 We find that there was no prosecutorial misconduct in this situation. The State

provided the information as required by Supreme Court Rule 412(a)(vi). If the defendant's intent was to formally impeach Kevin Hambrick, it was incumbent upon his attorney to obtain the certified copies of those convictions and judgments. Without the certified copies, there is no evidence that Kevin Hambrick misrepresented the number of years since his felony convictions in Nevada. If this area of impeachment was critical to the defendant's case, counsel could have sought another continuance of the trial setting and made further efforts to obtain the certified copies. Regardless, Kevin Hambrick's convictions were made known to the jury, and defense counsel was even able to suggest that he was a drug dealer, which corroborated Mary Jo Mason's testimony that he dealt drugs and had cheated her in a drug purchase.

¶ 63 Failure to Conduct Medical Exam for Fitness or for Defense to Crime

¶ 64 The defendant argues that his attorney's failure to seek a medical exam amounted to a due process violation warranting a reversal of his conviction. The State counters that the defendant has not overcome the presumption of fitness and that his attorney was not ineffective for failing to pursue an insanity defense on his behalf.

¶ 65 Based on the presentence investigation report prepared after the defendant's conviction, it is apparent that the defendant was on three psychotropic medications before trial and was on two of these medications during the trial. The defendant was taking clonazepam, lithium, and Geodon pursuant to a prescription by a Dr. Cecil. These medications were administered to the defendant when he was held at the Massac County Detention Center. The intake medication log verifies that these drugs were being administered to the defendant but that from April 27, 2009, through April 30, 2009, the dates of the defendant's jury trial, the Geodon medication was refused. The presentence investigation report also details mental health treatment that the defendant has received over the years. After a 1999 voluntary admission, the defendant was diagnosed as bipolar, manic

with psychosis, alcohol dependent, and with having an antisocial personality disorder.

¶ 66 On the last day of trial, the court admonished the defendant as to his rights in light of his election to not testify at trial. During this admonishment, the defendant referenced psychotropic drugs:

"MR. STEPPAN: Well, your Honor, I take psychotropic medications, and I haven't had my medications for three days. And I wouldn't feel comfortable on the stand. No. I do not want to testify. Even though my psychotropic medications were offered to me in the detention center, in order to go through this trial–if I would have taken the medication, I would have been at the table, I mean, with my head foggy. I mean, my head wouldn't have been clear, so–

***

THE COURT: Now, Mr. Steppan, regarding the psychotropic medication, what medication are you on?

MR. STEPPAN: I'm on 900 milligrams of Lithium; 800 [*sic*] milligrams of Geodon, 40 in the morning, 40 in the evening; and 3 milligrams of Klonopin, a milligram and a half in the morning, a milligram and a half at night. I've taken all my psych meds as prescribed except the Geodon.

***

MR. STEPPAN: Well, I take [Geodon] at night. I just don't take it in the morning to come to court. Otherwise I have racing thoughts. My attention span isn't as–you know, I was trying to be as straight as possible throughout the trial. So–

THE COURT: So you think that not taking the Geodon is in your best interest during the mornings of trial?

MR. STEPPAN: Well, I'm not going to go as far as saying that, but I will say that it probably wouldn't have helped. ***

***

THE COURT: You understand what's going on?

MR. STEPPAN: Right. Right.

THE COURT: And you think that–you're not under the influence of any alcohol or drugs?

MR. STEPPAN: No, sir. No, sir. ***

***

THE COURT: And you said the medication has been offered to you?

MR. STEPPAN: Yes, sir.

THE COURT: And would you want to take some now and testify after lunch?

MR. STEPPAN: No, not really, sir. ***

***

THE COURT: And that there's nothing impairing your ability to–

***

THE COURT: –hear and understand what's going on.

MR. STEPPAN: No, sir."

Shortly after the preceding exchange, the court revisited the issue of the defendant's decision not to testify. The following occurred:

"THE COURT: Mr. Steppan, the last time we were in here, we had a discussion about it being your decision and your decision alone whether to testify or not.

MR. STEPPAN: I just want it on the record that I take psych meds, and I had no fitness hearing before trial. That's all I want on the record.

THE COURT: And the medication was offered to you?

***

MR. STEPPAN: I can't function with the medication or without it. Not in these proceedings, I can't.

THE COURT: You can't function with the medication?

MR. STEPPAN: I can't function with the medication during these proceedings or without the medication.

THE COURT: Okay. And you had indicated that you did understand what was going on throughout the trial; is that correct?

MR. STEPPAN: Whatever you say, Judge.

THE COURT: No. That's my question to you, Mr. Steppan. Did you understand what was going on during the trial? Has there been anything going on that you don't understand?

MR. STEPPAN: Yeah, a lot.

THE COURT: Have you had an opportunity to discuss that with your attorney?

MR. STEPPAN: No.

***

THE COURT: [to defense counsel] Does he understand he has an absolute right to testify in your opinion?

***

MRS. SHANER: As far as I know, your Honor. I don't know if he's had any problems, psychotic problems, between the time I talked to him and now. I can't say one way or the other on that."

¶ 67 After the presentence investigation report was filed with the court on June 18, 2009, the defendant asked his appointed attorney to seek a fitness hearing before sentencing. The defendant's attorney did not, but did file a motion to withdraw as his attorney, stating:

"I filed that motion because Mr. Steppan had asked me to file a motion for a fitness examination prior to the Sentencing Hearing. I believe that the motion clearly states why I didn't believe it was necessary to file a motion for a fitness hearing prior to sentencing."

The written motion to withdraw is not a part of the record on appeal, and so we do not know the reasons the defendant's appointed trial attorney did not want to seek a fitness hearing before he was sentenced. Defense counsel then informed the court that the defendant was asking her to withdraw that motion and to proceed with his representation at sentencing. The court confirmed with the defendant that this was his request regarding representation at that hearing. In his extensive handwritten entry on the record sheet on the date of sentencing, Judge Jackson wrote:

"The court observed [defendant] thruout [*sic*] the jury selection, trial and posttrial proceedings and [defendant] *** appeared rational, coherent and *** participated in his defense."

¶ 68 The State cannot prosecute a defendant who is found to be mentally unfit to stand trial. *People v. Shum*, 207 Ill. 2d 47, 57, 797 N.E.2d 609, 615 (2003). A defendant is generally presumed to be fit to stand trial. 725 ILCS 5/104-10 (West 2006). The presumption of fitness is rebutted and a defendant may be considered "unfit" to stand trial if the defendant is not able to understand the trial proceedings and is unable to assist in his defense. *People v. Burton*, 184 Ill. 2d 1, 13, 703 N.E.2d 49, 55 (1998); *People v. Redd*, 173 Ill. 2d 1, 23, 670 N.E.2d 583, 594 (1996). The mere taking of psychotropic medication shall not result in a presumption that the defendant is unfit to stand trial. 725 ILCS 5/104-21(a) (West 2006). The fitness issue does not turn solely upon the administration of psychotropic medication, but requires a *bona fide* doubt of the defendant's fitness to stand trial. *People v. Jamison*, 197 Ill. 2d 135, 151-52, 756 N.E.2d 788, 796-97 (2001); *People v. Wiggins*, 312

Ill. App. 3d 1113, 1115, 728 N.E.2d 772, 774 (2000). In determining whether or not a *bona fide* doubt exists, the trial court considers irrational behavior, the defendant's courtroom demeanor, and any prior medical opinion on the issue. *People v. Easley*, 192 Ill. 2d 307, 319, 736 N.E.2d 975, 986 (2000). The defendant bears the burden of proof that there is a *bona fide* doubt of his fitness to stand trial. *People v. Hanson*, 212 Ill. 2d 212, 221-22, 817 N.E.2d 472, 477 (2004).

¶ 69 We have thoroughly reviewed the record and conclude that the trial court judge questioned the defendant about his understanding of the trial and later documented his findings as to the defendant's mental state in his June 23, 2009, sentencing order. The judge inquired about the defendant's medications and asked if he wanted to take the one medication he had earlier refused. He was repeatedly asked if he had understood the proceedings during trial, and he answered affirmatively. The trial court did not conclude that there was a *bona fide* doubt to the defendant's fitness to stand trial. Nothing that the defendant did, as detailed in the record, or that he has argued on appeal supports a contrary conclusion.

¶ 70 The defendant contends that his attorney was ineffective for not seeking a fitness hearing and/or for not pursuing an insanity defense. Constitutionally competent assistance is measured by a test of whether the defendant received "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on an ineffective-assistance-of-counsel claim, "[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." *Id.* at 694. The term "reasonable probability" has been defined to mean "a probability sufficient to undermine confidence in the outcome." *Id.*

¶ 71 To establish ineffective assistance of counsel in the context of failing to request a fitness hearing, "a defendant must show that facts existed at the time of trial that would have raised a *bona fide* doubt of [defendant's] ability 'to understand the nature and purpose of the

proceedings against him or to assist in his defense.' " *People v. Harris*, 206 Ill. 2d 293, 304, 794 N.E.2d 181, 189 (2002) (quoting 725 ILCS 5/104-10 (West 1998)).

¶ 72 An insanity defense is an affirmative defense which must be presented during trial. 720 ILCS 5/6-2(e) (West 1996). The decision to present an insanity defense falls under the purview of trial strategy, and matters of trial strategy are generally immune from ineffective-assistance claims. See *People v. Smith*, 195 Ill. 2d 179, 188, 745 N.E.2d 1194, 1200 (2000); *People v. Cundiff*, 322 Ill. App. 3d 426, 435, 749 N.E.2d 1090, 1098 (2001); *People v. Adamcyk*, 259 Ill. App. 3d 670, 677, 631 N.E.2d 407, 412 (1994).

¶ 73 With respect to the defendant's claim of ineffective assistance of counsel, the defendant does not explain in what manner his attorney's representation fell below the required objective standard of reasonableness. The defendant also does not explain or argue that the outcome would have been different had a fitness hearing been held, or an insanity defense raised. We will not make assumptions about how the outcome could have been different *sua sponte*.

¶ 74 We find that there was no due process violation by counsel's failure to seek a medical exam or to pursue an insanity defense.

¶ 75 Failure to Seek a Hearing on Voluntariness of Mary Jo Mason's Statement

¶ 76 The defendant argues that he was denied a fair trial due to the ineffective assistance of his attorney who did not seek a separate hearing outside of the presence of the jury to determine if earlier statements given by Mary Jo Mason to police were voluntary.

¶ 77 Mary Jo Mason testified at trial. She had previously given three statements to police. She was cross-examined about the factual differences between her trial testimony and the inconsistencies contained in the three statements. Mary Jo's final statement to police was recorded and preserved on a compact disc which was admitted into evidence and played for the jury over the defendant's objections as to authenticity. Defense counsel did not object to

the statement on the basis that the statement was the product of intimidation and thus, not a voluntary statement. Mary Jo stated during this interview that her answers were voluntary. After the interview was played for the jury, and in the defense case, Mary Jo Mason was recalled to the stand to testify. Mary Jo then claimed that the interview the jury heard had been coerced by intimidation.

¶ 78 Generally, if a statement is determined to be involuntary, the statement cannot be used as substantive evidence, or as impeachment. See *People v. Newman*, 30 Ill. 2d 419, 424, 197 N.E.2d 12, 14 (1964).

¶ 79 Admissions of a prior inconsistent statement are governed by statute. "[E]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if (a) the statement is inconsistent with his testimony at the *** trial, and (b) the witness is subject to cross-examination concerning the statement, and (c) the statement *** (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and *** (B) the witness acknowledged under oath the making of the statement *** in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought ***." 725 ILCS 5/115-10.1 (West 2006). Reliability of a statement admitted pursuant to this statute is inherent, as the legislature drafted the requirements for reliability and voluntariness in this test for admission. *People v. Barker*, 298 Ill. App. 3d 751, 760-61, 699 N.E.2d 1039, 1045 (1998).

¶ 80 By the time that Mary Jo Mason claimed that the third statement she provided police was the product of coercion, the voluntariness of that statement had already been established through its admission. Given the fact that Mary Jo Mason did not claim that she felt intimidated until after her initial testimony in the trial and the admission of the statement, we fail to see how defense counsel could have known to attack the voluntariness of the statement before it had been admitted. Even if somehow this failure amounted to trial counsel error,

the defendant fails to adequately establish that the outcome would have been different. The trial testimony provided by Mary Jo placed the defendant at the Sonic restaurant which was geographically very close to the Hambrick house right at the time of the shooting. Mary Jo stated that the defendant left the vehicle for a brief period of time. Given these facts, coupled with the defendant's threats and his claim that he had a gun which matched the caliber of the bullets recovered from the scene, the defendant fails to establish that there is a reasonable probability that he would have been acquitted if the recorded statement was kept out of evidence.

¶ 81 Entitlement to a New Sentencing Hearing

¶ 82 The defendant contends that judgment was never entered on his jury verdict and that, therefore, he is entitled to a new sentencing hearing. Judgment is defined as an adjudication of guilt, including the pronouncement of sentence. 730 ILCS 5/5-1-12 (West 2006).

¶ 83 The original judgment and sentence entered by the court on June 30, 2009, contained an enhanced sentence of an additional 20 years. Pursuant to a motion to reconsider that sentence, the trial court entered an amended judgment and sentence on August 20, 2009. Although the trial judge did not utter the specific words that he was entering judgment on the jury's verdict, the orders did so in a written form. We do not find that it is necessary to remand this case to the jury in order to have the words verbalized at another hearing.

¶ 84 Judgment for Aggravated Discharge Must Be Vacated

¶ 85 The defendant was convicted of both attempted murder and aggravated discharge. Judgment was entered on the jury verdicts. His sentence of 50 years was for attempted murder. There was no separate sentence imposed for the aggravated discharge conviction. The defendant argues that where no sentence is entered on a conviction, the judgment is a partial judgment, and therefore must be vacated. The State concedes this issue.

¶ 86 Therefore, pursuant to our authorization under Supreme Court Rule 366(a)(5) (eff.

Feb. 1, 1994)), we vacate the partial judgment for aggravated discharge and order the judgment order and the mittimus to be corrected to reflect this order.

¶ 87 CONCLUSION

¶ 88 For the foregoing reasons, the judgment of the circuit court of Massac County is hereby affirmed in part and vacated in part, and the mittimus is corrected.

¶ 89 Affirmed in part and vacated in part; mittimus corrected.