

Nos. 1-10-0249 & 1-10-1401, Consolidated.

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)
) Appeal from the
) Circuit Court of
 Plaintiff-Appellee,) Cook County
)
 v.) No. 08 CR 13627
)
 RAYMOND DANIELS,) Honorable
) Lawrence Edward Flood,
 Defendant-Appellant.) Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's convictions for attempted murder affirmed where the State proved beyond a reasonable doubt that defendant had the specific intent to kill and where the trial court's determination that defendant's sole alibi witness lacked credibility was supported by the record; the trial court lacked jurisdiction to consider defendant's untimely *pro se* motion for a new trial; the defendant's sentence is affirmed where he failed to show that the statutes upon which his enhanced sentences were based were facially invalid or unconstitutional as applied to defendant; and the mittimus was ordered to be corrected to reflect the actual number of days of defendant's presentencing incarceration.

¶ 2 Following a bench trial, defendant, Raymond Daniels, was convicted of two counts of attempted first degree murder and one count of home invasion. He was

sentenced to 117 years in prison which included 15 years plus a 25-year enhancement for personal discharge of a firearm that caused great bodily harm for each attempted murder conviction, and 12 years plus a 25-year enhancement for personal discharge of a firearm that caused great bodily harm for the home invasion conviction, with all terms to run consecutively. Defendant now appeals his conviction and his sentence. He raises the following issues: (1) the State failed to prove beyond a reasonable doubt that defendant had the specific intent to kill; (2) the trial court's finding that defendant's sole alibi witness lacked credibility was not supported by the record where the court did not accurately recall the witness's testimony; (3) the trial court incorrectly concluded that it lacked jurisdiction to consider defendant's *pro se* motion for a new trial; (4) the statutes upon which defendant's enhanced sentences were based are unconstitutional, both facially and as applied to him; and (5) this court should order the issuance of a corrected mittimus because defendant was entitled to 478 days credit but was awarded only 468 days. The State agrees with defendant on the last issue.

¶ 3

BACKGROUND

¶ 4

Defendant challenges the sufficiency of the evidence. Thus, we shall review the evidence that was adduced at trial. We first summarize the undisputed background facts.

¶ 5

On June 15, 2008, the Campbell family was having a Father's Day barbecue. Several family members were present, most of whom lived there, on the second floor of 7921 South Burnham in Chicago. These included Mary Campbell, Floyd Campbell, Ricky Campbell, Latricia Campbell, Teresa Campbell, as well as Teresa's sons, Jermaine

1-10-0249

Smith and Terrell Smith, and their younger cousins. At approximately 2 p.m., an individual kicked in the door to the home, shot Floyd Campbell and Terrell Smith, and left. Defendant was subsequently charged with the offenses of home invasion and attempted murder.

¶ 6

Cleo Brackins

¶ 7

Cleo Brackins testified that, on June 15, 2008, at approximately 2 p.m, he was standing outside 7921 South Burnham in Chicago, with his friend, Quentin, and four children who were playing. He testified that he saw a Chevy Astro van park at the home. Brackins made an in-court identification of defendant as the person who got out of the van. Defendant asked Brackins "who lived there, the name of the person he was looking for." Defendant asked for a specific person, and stated the last name, but Brackins he could not remember the name at trial. Defendant then knocked on the door and pulled a gun out of his waistband. Brackins "got the kids and ran in the house" to his left into Quentin's basement apartment. Brackins heard gunshots approximately five to seven minutes later and then heard the van as it "skidded off." Brackins ran to the back of the property and saw Terrell Smith laying down and bleeding from his upper body.

¶ 8

On July 9, 2008, Brackins met with Detective Maas at the police station and viewed a photo spread. Brackins testified that he identified defendant in the photo array as the person he saw with the gun. Brackins then made an in-court identification of defendant as the person he had identified previously.

¶ 9

Brackins admitted to his past "trouble with the law" which included three

1-10-0249

convictions: possession of cannabis; robbery; and possession of a controlled substance with intent to deliver.

¶ 10 *Teresa Campbell*

¶ 11 Teresa Campbell testified that, on June 15, 2008, as she was preparing a meal in the kitchen. She heard knocking or kicking at the front door, and went out the back door. When she heard several gunshots, she laid down on the top landing. She then went downstairs and heard the gunshots stop. Her son, Terrell Smith exited the back door, told her he had been shot, and showed her his arm. She also saw blood coming from his pants. She called 9-1-1 and the police responded quickly.

¶ 12 *Jermaine Smith*

¶ 13 On June 15, 2008, 16-year-old Jermaine Smith, looked out of his bedroom window at 7921 South Burnham and saw a white Astro van with green stripes that belonged to his "ex-auntie Tammy Brown." Jermaine made an in-court identification of defendant as the person who jumped out of the van, came through the gate toward his house, and kicked the door in. Jermaine ran to his grandmother's room and when he turned around he saw defendant standing at the top of the stairs holding a black gun. Jermaine stated that defendant "looked at me right in my eye." Jermaine's aunt, Latricia Campbell, was coming down the hallway, and Jermaine "grabbed her and shoved her" in his grandmother's room. Jermaine followed, and shut and locked the door. He then pushed the dresser over, ran to the bathroom with his aunt and his young cousin, and locked the bathroom door. He then heard six or seven gunshots and went to "check on

1-10-0249

people" after the gunshots stopped. He saw his uncle, Floyd Campbell, standing with blood on the front of his clothing on his chest, and saw his grandmother on the floor. He picked her up and went outside where he saw his brother Terrell with blood on the side of his body. Jermaine went to a next door neighbor's house where he remained until his family came home.

¶ 14 Jermaine subsequently spoke to the police about what happened. On July 2, 2008, he was shown a photo array. Jermaine admitted he could not point anybody out as the shooter, but also stated "I didn't recognize him from a picture. I know him from a face and up close." On July 8, 2008, Jermaine viewed a physical lineup at Area Two police headquarters where he identified defendant as the person who did the shooting. Jermaine testified that he picked defendant out right away in the physical lineup because he recognized defendant when he saw him in person.

¶ 15 *Terrell Smith*

¶ 16 Terrell Smith testified that, on June 15, 2008, at approximately 1 or 1:30 p.m., he was in his room and saw a white van with green stripes park across the street from his house. He then heard somebody "kick in" the front door to the apartment. Terrell ran towards the back door in the kitchen and tried to unlock it because he heard gunshots. The first shot he heard hit the china cabinet. Terrell tried to "duck and dodge" the bullets coming towards him. The second shot hit him in the left arm; the third and fourth shots went through the back door. The fifth shot hit Terrell in his back and his hip, an area in which he now has permanent screws. Terrell testified that he was "facing towards the

1-10-0249

door," was not able to see the person who shot him, and did not believe anybody else was there. He further stated: "I was trying to get out. I didn't see nothing. Wasn't paying attention at all." He subsequently had surgery at Northwestern [Memorial] Hospital where he remained for six days.

¶ 17

Floyd Campbell

¶ 18

Floyd Campbell testified that he was in charge of the barbecue on June 15, 2008. Floyd was in the kitchen cooking, just prior to 2 p.m., when a man came in and "started shooting at the house." Floyd identified defendant in court as the man who had broken down the door and entered his home. Floyd first saw defendant at the end of the hallway coming towards the kitchen. He saw defendant holding a gun in his outstretched right hand. Defendant did not say anything and just started shooting. Floyd was shot in his stomach and his right shoulder, and fell down. After Floyd fell to the floor, he heard no more shots. He was taken to the hospital where he remained for five days. He suffered internal bleeding and required surgery on his arm. Floyd testified that he had never met defendant before the shooting.

¶ 19

While in the hospital, Detective Maas came to see Floyd to ask him what had happened. Floyd told Detective Maas that he did not get a good look at the person who shot him. On June 24, 2008, a detective came to Floyd's house and showed him a photo spread comprised of five pictures. The detective asked Floyd if he could identify any of the individuals as the one who shot him. Floyd testified as follows: "I said I don't know. Maybe might be him because kind of hot and sunny, and I was cooking, smoke and all

1-10-0249

that in my eyes. Person just came in shooting. I blanking on out." Floyd chose the person who was in the upper right hand corner of the photo spread. Floyd testified: "That's who you thought done it my mind because it's like hot. Like I said, I was barbecuing." The photo array, entered into evidence as Defendant's Group Exhibit Number 1 shows that the individual's photo chosen by Floyd was not that of defendant.

¶ 20 On July 8, 2008, Floyd met with Detective Maas at Area 2 police headquarters to view a physical lineup. Floyd identified defendant in the physical lineup as the person who shot him. Floyd testified that when he picked defendant out of the physical lineup as the person who shot him, he realized that the person he had picked in the photo array was not the shooter.

¶ 21 Floyd testified that, after he had spoken to the detectives in the hospital and after he had viewed the photo array, he spoke to family members about the incident. Although his brother, Ricky Campbell, had told Floyd who had done the shooting, Ricky had not given Floyd a picture of the person.

¶ 22 *Ricky Campbell*

¶ 23 Ricky Campbell testified that, on June 15, 2008, he lived at 7921 South Burnham in Chicago. At the time, he was married to Tammy Campbell who lived at 5245 South Homan in Chicago. Defendant had lived there with her until he moved out in April or May 2008. The two were divorced in September 2008. In late March 2008, Ricky had had an encounter with defendant at Tammy's place of employment when he saw defendant driving the 2006 burgundy Malibu that Ricky had bought his wife. She was

1-10-0249

exiting the passenger side.

¶ 24 Ricky Campbell further testified that, in addition to the 2006 Malibu, he had bought Tammy a Chevrolet Safari white van with a green stripe and green interior. On June 15, 2008, while standing in the window of his home with his son and his nephew, Jermaine Smith, Ricky saw the van parked across the street. He saw defendant and two other people get out of the van and walk toward his building. Ricky quickly got out of the window and started talking to his nephew. Ricky testified that he heard "a thump on the door like somebody kicking the door." Ricky ran to his sister, Teresa Campbell's room. While he was in her room, he heard approximately six or seven gunshots. "After everything was over with," Ricky came out of the room and saw his brother, Floyd standing in the hallway covered with blood. Ricky also saw his mother, Mary Campbell on the floor. After making sure she his mother was not hurt, he went toward the back. He saw his nephew, Terrell Smith, laying shot and bleeding. Ricky Campbell testified that he then "went down to Danny['s] car, jumped in his car, [and] left the house."

¶ 25 On July 8, 2008, Ricky met with Detective Maas at the police station, viewed a physical lineup, and identified defendant in the lineup. Ricky then made an in-court identification of defendant as the person he picked out of the lineup.

¶ 26 On cross-examination, Ricky Campbell admitted that, some time after the encounter with defendant at Tammy's workplace, he received an order of protection against him to stay away from Tammy. Ricky Campbell denied that, prior to his divorce from Tammy, he learned that she had a relationship with defendant or that she had moved

in with defendant. He testified that Tammy had told him that defendant was a friend.

¶ 27 *Detective Neil Maas*

¶ 28 Detective Neil Maas testified that, on June 15, 2008, he and his partner, Detective Richard Bocian, were assigned to investigate the shootings of Floyd Campbell and Terrell Smith. Detective Maas testified regarding the course of the investigation. Several individuals, including Cleo Brackins, identified defendant from the photo array as the individual who was at 7921 South Burnham at the time of the incident. Detective Maas also testified regarding the physical lineup that took place on July 8, 2008. Floyd Campbell identified defendant as the person who shot him. Both Jermaine Smith and Ricky Campbell identified defendant as the individual each had seen at 7921 South Burnham. Before viewing the lineup, Ricky Campbell told Detective Maas that defendant was the individual who came to his house on the day in question.

¶ 29 During the course of the investigation, Detective Maas interviewed defendant. Detective Maas testified that defendant told him that he was not involved in the shooting and that, on the day of the incident, he was at a shopping mall at 159th and Kedzie in Markham, and was also at a casino in Elgin. Detective Maas did not check the security cameras at either location.

¶ 30 At the close of the State's case, defendant moved for a directed finding of not guilty which was denied. Defendant called Detective Bocian to the stand and questioned him regarding the course of the investigation. Defendant then called his alibi witness Tammy Brown.

1-10-0249

¶ 31

Tammy Brown

¶ 32

Tammy Brown testified that, on June 15, 2008, she was legally married to Ricky Campbell, and defendant was her boyfriend. Brown, who was then living with defendant and his sister, had filed for divorce on June 5, 2008. Brown has a daughter, but she and Ricky Campbell had no children together. She testified that there were no contested issues in their divorce.

¶ 33

According to Brown, on the day of the shooting, she spent the entire day with defendant. She testified that the two were shopping at 159th and Kedzie at around noon. They returned home at approximately 1 p.m. Brown stated that, after arriving home, she and defendant went to the police station at 111th and Hermosa to make a report against Ricky Campbell because he had violated an order of protection by calling her daughter.

¶ 34

After making the report, Brown and defendant went to the Grand Victoria casino in Elgin. She testified that she did not remember how long she was at home before she left for the casino but that it was "long enough to get dressed." Brown stated that defendant was home with her and he was also getting dressed. She testified that they stayed at the casino for a couple of hours and then went to a friend's house at 75th and Luella. After staying there for 30 to 40 minutes, they drove to defendant's sister's home at Devon and Washtenaw while it was still light outside.

¶ 35

During cross examination, Brown stated that, while shopping with defendant on June 15, 2008, she bought a pair of flip flops, paying cash at Payless Shoe Store. She admitted that when she had talked to the police detectives about her activities on June 15,

1-10-0249

2008, she did not give them receipts for her shopping activities or tell them what stores she and defendant went to, but she maintained that the detectives had not asked her. Brown also conceded that she and Ricky Campbell were the only two people who had keys to the white van with green stripes that they owned. Brown stated, however, that the van was in the shop on June 15, 2008 and that "the caliper up under the thing, the catalytic converter, whatever, was messed up." She stated that she did not know the name or telephone number of the repair shop, how to contact the shop, who ran the shop, or when the van was taken to the repair shop. She testified that the problem with the van arose when defendant was driving it and he had taken it to the repair shop. Brown admitted that she had been convicted of felony theft.

¶ 36

Detective Neil Maas

¶ 37

Detective Neil Maas testified in rebuttal that he interviewed Brown on July 8, 2008. According to Detective Maas, although Brown had told him that she had been with defendant on the day of the shooting and was shopping at a mall in Markham, she could not tell him where in Markham. She was unable to tell him what time they went to the mall, what stores they went to, whether she or defendant purchased anything at the mall, or what time she and defendant left the mall. Brown also told the detective that she and defendant went to the Grand Victoria casino but was unable to say what time they arrived, what time they left, or if they played any games. She was not able to tell him where she and defendant were at 2 p.m. Detective Maas also testified regarding his conversation with Brown regarding her white van with green stripes. However, the trial

1-10-0249

court sustained defendant's objection to testimony regarding the van, and stated that it would consider only the testimony "regarding the location and things of that nature."

¶ 38 Detective Maas stated that he was unable to view video footage from the mall or the casino because Brown did not provide him with sufficient information to properly investigate the alibi she was providing for defendant. During defendant's cross examination, Detective Maas testified that he did not think that Tammy Brown told him she went to the police station on June 15, 2008 to make out a report against Ricky Campbell.

¶ 39 At the conclusion of the trial, the court took the case under advisement. On July 31, 2009, the court found defendant guilty of all charges. The court further stated:

"And the basis for my ruling as far as the attempt murder charges are the evidence that I heard indicated that on the date of this shooting that the defendant, and it was clear from the evidence that it was the defendant that kicked in the door at this location and fired the shots that struck both Floyd Campbell and Terrell Smith. The injuries that were testified to were extensive injuries.

It was clear from the witness' testimony, and there was an identification of the defendant by more than one witness. And I am taking into account the identification made at the physical lineup, and there was some discrepancies between a photo I.D. and a Physical lineup I.D., but I am basing my ruling on the physical lineup. It clearly identified the defendant as being at the scene, being part of the shooting.

1-10-0249

Additionally, the Astro van, there was extensive testimony regarding the observation of the Astro van with the green stripes, the defendant coming out of the Astro van prior to going into the building. Testimony puts a gun in his hand from witnesses on the scene and also, you know, identifies him as the shooter.

I heard the testimony of [Tammy] Brown, the defense witness in this case. And quite frankly I didn't find her very credible. She was able to testify to the extent – to extensively, rather, to where you were on that particular day, but in prior interviews closer to the time of the incident when interviewed by the detective, she wasn't able to provide that information.

It was clear that she owned the Astro van with green stripes. That was testified to. She said that the Astro van was in the shop yet she was not able to identify the shop where the Astro van was nor what type of repairs it was in for.

So, taking all the evidence into consideration, I find that the State has met its burden as to all counts in the indictment. And that deals with the attempted murder as charged regarding Terrell Smith and Floyd Campbell and also the home invasion.

Again, it was clear to me. When you look at the pictures of how the door was kicked in, that it certainly met the elements for the home invasion charge."

Okay. So that's the ruling of the court."

The court also stated it was making a specific finding that defendant personally discharged the firearm.

¶ 40 On October 29, 2009, the trial court denied defendant's motion for a new trial and held defendant's sentencing hearing. The court sentenced defendant to to 117 years in prison which included 15 years plus a 25-year enhancement for personal discharge of a firearm that caused great bodily harm for each attempted murder conviction, and 12 years plus a 25-year enhancement for personal discharge of a firearm that caused great bodily harm for the home invasion conviction, with all terms to run consecutively. Defendant now appeals both his conviction and his sentence.

¶ 41 ANALYSIS

¶ 42 I. Conviction

¶ 43 *Standard of Review*

¶ 44 A criminal conviction will not be set aside on review unless the evidence is “so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt.” *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). When considering a challenge to the sufficiency of the evidence, the question for a reviewing court is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560, 573 (1979); *People v. Phelps*, 211 Ill. 2d 1, 7 (2004). It is not the function of a reviewing court to retry a defendant. *People v. Ward*, 215 Ill. 2d 317, 322 (2005). It is the responsibility of the trier of fact, and not this reviewing court, to determine witness credibility, the weight to be given the testimony,

and the reasonable inferences to be drawn from the evidence. See, e.g., *People v. Agnew-Downs*, 404 Ill. App. 3d 218, 228 (2010). This is especially true where the evidence is conflicting. *People v. Mullen*, 141 Ill. 2d 394, 403 (1990). The standard for reviewing the sufficiency of the evidence in a bench trial is the same as in a jury trial. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009). In a bench trial, it is for the trial judge, sitting as the trier of fact, to make the determinations of witness credibility, the weight to be given the testimony, and the reasonable inferences to be drawn from the evidence. *Id.* at 228. "Although due process requires the State to prove every element of an offense beyond a reasonable doubt [citation], the State may properly rely on certain [permissive] presumptions or inferences in proving those elements. [Citation.]" *People v. Woodrum*, 223 Ill. 2d 286, 308 (2006); see also *People v. Roberson*, 401 Ill. App. 3d 758, 772-73 (2010) (noting State may properly rely on inferences in proving elements of a criminal offense beyond a reasonable doubt). Applying these principles to the instant case, we conclude that there was sufficient evidence, if believed by the trier of fact, to support defendant's conviction.

¶ 45

Specific Intent to Kill

¶ 46

Defendant first argues that the State failed to prove that he had the specific intent to kill where the evidence at most showed that he "burst into a house and non-fatally shot *** two people whom he had no reason to harm." He further asserts that this court should reduce his convictions for attempted first degree murder to aggravated battery convictions.

1-10-0249

¶ 47 "In order to support a conviction for attempt (murder), the State must establish beyond a reasonable doubt that: (1) the defendant performed an act constituting a 'substantial step' toward the commission of murder, and (2) the defendant possessed the criminal intent to kill the victim."

People v. Green, 339 Ill. App. 3d 443, 451 (2003). Intent is a state of mind and is therefore difficult to establish by direct evidence. *People v. Parker*, 311 Ill. App. 3d 80, 89 (1999).

Specific intent to kill may be inferred from the surrounding circumstances including the character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries. *Id*; *People v. Brown*, 341 Ill. App. 3d 774, 781 (2003). "Evidence that the defendant fired a gun, coupled with nothing more, is generally not sufficient to prove a specific intent to kill." *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001). However, firing a gun at another person may be considered as one of several surrounding circumstances. *People v. Homes*, 274 Ill. App. 3d 612, 622 (1995).

¶ 48 Defendant contends that "Floyd's description of the shooting reflected a chaotic affair, not a measured, deliberate attempt to kill anyone." Defendant notes that, although Floyd was shot twice, "he did not say that the shooter had specifically targeted him." Defendant characterizes Floyd's description of the shooting "as disordered, unfocused mayhem as opposed to an attempted killing." This characterization, according to defendant, was underscored by Terrell Smith's account of the shooting. Defendant acknowledges that Terrell was also shot twice. Nonetheless, defendant contends that Terrell's testimony did "not establish that the shooter meant to shoot him" because Terrell

did not see the shooter or whether he was aiming at him. Assuming *arguendo* that these factors could support an inference that the shooter lacked the intent to kill, "the decision as to which of competing inferences to draw from the evidence is the responsibility of the trier of fact." *People v. Green*, 339 Ill. App. 3d 443, 452 (2003). We conclude that defendant's guilt was established beyond a reasonable doubt.

¶ 49 "The conduct after the purported attempt is among the surrounding circumstances that one may look to in trying to determine if there was intent to kill at the time of the substantial step." *Parker*, 331 Ill App. 3d at 90. Defendant contends that "[t]he shooter's failure to kill Floyd and Terrell fatally further underscores the lack of intent to kill." In support of this contention, he cites *People v. Mitchell*, 105 Ill. 2d 1 (1984).

¶ 50 In *Mitchell*, the defendant severely beat her 17-month-old child but then put her to bed. The next morning, after the child became unconscious, the defendant placed a cool cloth on the child's head and took her to the hospital. The Illinois Supreme Court noted that, once the elements of attempted murder are complete, abandonment of the intent to kill is no defense to the crime. Nonetheless, the court concluded that, considering all of the circumstances, the evidence in *Mitchell* was insufficient to establish proof beyond a reasonable doubt that the defendant possessed the requisite intent to kill. *Id.* at 10.

¶ 51 We agree with the State that *Mitchell* is distinguishable. In analyzing *Mitchell*, this court noted that the supreme court "found the following three factors determinative in overcoming the inference of intent to kill: (1) the defendant attempted to revive the child after inspecting the injuries; (2) the defendant took her child to the hospital; and (3)

1-10-0249

the defendant could easily have killed the child had she intended to do so." *Parker*, 311 Ill. App. 3d at 91. By contrast, defendant here fled the scene and certainly took no action to assist the victims nor did he take them to the hospital. As to the third factor, the record does not support the claim that defendant could easily have killed the victims if he so intended where the evidence shows each victim was shot more than once even as he tried to escape being struck by bullets. Although the shooter made a hasty retreat after he finished shooting, it cannot be said that he could easily have killed the victims if he had wanted to, or whether, for that matter, he knew that they were still alive.

¶ 52 The evidence was sufficient to establish that defendant intended to kill Floyd and Terrell. Floyd saw defendant's right arm outstretched with a gun in his right hand as he began shooting. Defendant shot Floyd in his stomach with one bullet and his right shoulder with another bullet, after which Floyd fell to the floor of the kitchen. As Terrell attempted to unlock the back door in the kitchen sitting area, defendant shot him in the arm with one bullet and in the buttocks and hip area with another bullet. We agree with the State that, contrary to defendant's characterization of his shooting as "disordered, unfocused mayhem," Terrell's testimony described the shooter's action in which a rational trier of fact could conclude that defendant was taking aim at him as he tried to escape. Terrell testified that defendant's first shot at him hit a nearby china cabinet. The next shot hit him in the arm. The next two shots went through the door through which Terrell was attempting to escape. The fifth shot wounded him in the back near his buttocks and hip. Although both Floyd and Terrell survived the shootings, under the applicable

standard of review, there is ample evidence to support an inference that defendant intended to kill them at the time he began shooting at them. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime of attempted murder, including the specific intent to kill, beyond a reasonable doubt.

¶ 53 *Eyewitness Identification Testimony*

¶ 54 Defendant also argues that the identification evidence was weak. Defendant notes that several of the witnesses, including Floyd Campbell, failed to identify him from the photo array, and that Terrell Smith testified that he was not able to see the person who shot him. Defendant argues that an identification from the photo array, due to its "proximity to the event" would have been "inherently more reliable than Floyd [Campbell]'s trial identification." The State counters that multiple witnesses identified defendant by either seeing him commit the shootings, or by seeing him with a gun just prior to the attack, which supported the inference that defendant was the shooter.

¶ 55 The identification testimony of a single eyewitness is sufficient for a conviction even in the presence of contradictory alibi testimony, "provided that the witness had an adequate opportunity to view the accused and that the in-court identification is positive and credible." *People v. Slim*, 127 Ill. 2d 302, 307 (1989). In assessing identification testimony, a reviewing court cannot substitute its judgment for that of the trier of fact on questions involving witness credibility. *People v. Negron*, 297 Ill. App. 3d 519, 530 (1998). Any conflicts in the testimony are to be resolved by the trier of fact. *People v.*

Collins, 106 Ill. 2d 237, 261-62 (1985). The trier of fact is not required to accept the defendant's alibi testimony over a positive identification. *People v. Louisville*, 241 Ill. App. 3d 772, 776 (1992). In a bench trial, it is the role of the trial judge, as trier of fact, to determine the credibility of witness' identification testimony. See, e.g., *People v. Jefferson*, 183 Ill. App. 3d 503 (1989). As the trial court stated, more than one witness identified defendant. Several eyewitnesses positively identified defendant as the shooter in the line-up or at the time of trial. We conclude that the State proved that defendant was the shooter beyond a reasonable doubt.

¶ 56 *Trial Court's Credibility Determination Regarding Defendant's Alibi Witness*

¶ 57 Defendant next argues that he is entitled to a new trial because the trial court's determination that his sole alibi witness – his girlfriend Tammy Brown – was not credible was based on the court's erroneous belief that she had been unable to recall an important detail. Specifically, the trial court stated:

"I heard the testimony of [Tammy] Brown, the defense witness in this case. And quite frankly I didn't find her very credible. She was able to testify to the extent – to extensively, rather, to where you were on that particular day, but in prior interviews closer to the time of the incident when interviewed by the detective, she wasn't able to provide that information.

It was clear that she owned the Astro van with green stripes. That was testified to. She said that the Astro van was in the shop yet she was not able to identify the shop where the Astro van was nor what type of repairs it was in for."

1-10-0249

Thus, the trial court expressed two bases for its determination that Tammy Brown was not a credible witness: (1) the general basis that when interviewed by the detective closer to the time of the incident, she wasn't able to provide information as to where she was on that particular day, but then was able to testify extensively at the time of trial; and (2) her testimony regarding the Astro van and her inability to identify the shop or the type of repairs that the van was in the shop for.

¶ 58 Each party focuses on a different basis. Defendant focuses on the second reason stated by the trial court and correctly notes that Tammy Brown *did* recall at trial why her van had been in the shop. She testified that "the caliper up under the thing, the catalytic converter, whatever, was messed up." Defendant also correctly notes that no evidence was admitted that she had not recalled this fact at her earlier interviews. The State concedes that the trial court sustained defendant's objection to the testimony regarding the van, but focuses on the first basis provided by the trial court when it found Brown incredible. The State contends that the trial court actually based its credibility determination on the fact that she remembered more details at trial than she had remembered at prior interviews closer to the time of the crime.

¶ 59 It is the responsibility of the trier of fact, and not this reviewing court, to determine witness credibility, the weight to be given the testimony, and the reasonable inferences to be drawn from the evidence. See, *e.g.*, *People v. Agnew-Downs*, 404 Ill. App. 3d 218 (2010). Nonetheless, in general, a judgment should be reversed if a trial judge does not recall important facts that are in evidence and does not consider the crux

1-10-0249

of the defense when entering judgment. See *People v. Mitchell*, 152 Ill. 2d 274, 321 (1992); *People v. Simon*, No. 1-09-1197 (Ill. App. May 27, 2011); *People v. Carodine*, 374 Ill. App. 3d 16, 29 (2007); *People v. Morgan*, 44 Ill. App. 3d 730, 734 (1976); *People v. Bowie*, 36 Ill. App. 3d 177, 179 (1976).

¶ 60 Defendant concedes that he has forfeited review of this issue but contends that review is warranted under the plain error doctrine. In a criminal case, a forfeited issue may still be raised on appeal under Supreme Court Rule 615(a) (134 Ill. 2d R. 615(a)), which provides:

“Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.”

Thus, where a defendant forfeits review, the reviewing court can consider an issue under the doctrine of plain error. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The plain-error rule, however, is not a general savings clause that preserves review of all errors affecting substantial rights. *People v. Herrett*, 137 Ill. 2d 195 (1990). Plain-error applies only

“when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

Before a defendant is entitled to application of the plain-error doctrine, the court must consider whether any error occurred at all. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 61 Defendant argues that "it was a clear and obvious error for the trial court to dismiss Tammy's credibility and her alibi testimony based on its inaccurate recollection of evidence." We conclude that the trial court did not commit the error complained of by defendant. Although it is true that the trial court erroneously stated that Ms. Brown "was not able to identify the shop where the Astro van was nor what type of repairs it was in for," this was not the sole basis for the trial court's finding that she was not credible. Instead, the trial court noted Ms. Brown's ability to testify extensively at trial as to "where you were on that particular day, but in prior interviews closer to the time of the incident when interviewed by the detective, she wasn't able to provide that information." Having determined no error occurred in the first instance, there can be no plain error.

¶ 62 II. *Pro Se* Motion for a New Trial

Defendant next argues that the trial court erred in denying defendant's *pro se* motion for a new trial. On December 4, 2009, the trial court ruled that it lacked jurisdiction to consider the motion because defendant had already filed a notice of appeal. See *People v. Bounds*, 182 Ill. 2d 1, 3 (1998) (filing of notice of appeal divests circuit court of jurisdiction, and appellate court's jurisdiction attaches *instanter*). Defendant notes that Supreme Court Rule 606(b) (eff. March 20, 2009) states "[w]hen a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no

1-10-0249

effect and shall be stricken by the trial court." Thus, he contends that the trial court had jurisdiction over his *pro se* motion and should have conducted an inquiry into his allegations of ineffective assistance of counsel.

¶ 63 The State counters that Rule 606 applies only to timely filed posttrial motions and argues that "[t]he record *** is silent as to the date defendant filed his *pro se* motion for a new trial." As the State correctly notes, "the copy of the motion defendant submitted with the record is not file stamped and appears to be missing pages, including a page with defendant's signature." The State also notes that "[n]o notice of filing or notice of motion is included in the record." Thus, the State argues that the record here is silent as to the date defendant filed his *pro se* motion for a new trial.

¶ 64 The Illinois Supreme Court "has long held that in order to support a claim of error on appeal the appellant has the burden to present a sufficiently complete record." *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001), citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

Defendant, however, contends that "the records of the clerk of the circuit court show that it received and docketed Daniels' motion on Tuesday, December 1, 2009." Defendant makes this assertion without citation to the record. Thus, the State responds that "there is nothing in the record supporting those facts." The State argues that this court must, therefore, presume that the trial court's conclusion that it lacked jurisdiction was correct. The State, citing *Foutch*, notes that "[i]t is the burden of the appellant to present a complete record and any doubts arising from an incomplete record must be resolved against the appellant."

¶ 65 Interestingly, the record is not silent on this matter and defendant's failure to provide the citation to the record is perplexing. This court has noted that Supreme Court Rule 341(h)(7) requires that an appellant's brief include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities *and the pages of the record relied on*. (Emphasis in original.) *People v. Karim*, 367 Ill. App. 3d 67, 93 (2006). "[I]t is neither the function nor the obligation of this court to act as an advocate or search the record for error [Citation]." (Internal quotation marks omitted.) *People v. Karim*, 367 Ill. App. 3d 67, 93-94 (2006). Nonetheless, our review of the record shows that it contains a certified statement from the clerk of the circuit court as what its electronic records show, along with a printout. The printout indicates that, on December 1, 2009, the court received defendant's motion for a new trial and assigned the hearing date. Nonetheless, the deadline for filing a timely posttrial motion was Monday, November 30, 2009, because October 29, 2009 was the date on which the trial court entered its final order denying defendant's motion for a new trial and sentencing defendant.

¶ 66 Defendant concedes that December 1, 2009 is past the due date. Nonetheless, citing only a vacated 2002 case, he asserts that "because [he] was incarcerated during this period and thus could not have hand-delivered his motion, it is clear that he mailed his motion on or prior to the due date." Defendant apparently seeks to invoke the "date of mailing" rule that was "enunciated in *Harrisburg-Raleigh Airport Authority v. Department of Revenue*, 126 Ill. 2d (1989), and by Supreme Court Rules 373 and 612(t)."

1-10-0249

See *People v. White*, 333 Ill. App. 3d 777, 780 (2002). "Under the date of mailing rule, if a notice of appeal is received after the due date, the time of mailing is deemed to be the time of filing." *Id.* Defendant has failed to adequately address how the "date of mailing" rule applies here.

¶ 67 More recently, this court provided a detailed and thorough analysis of the date of mailing rule, as well as its application to posttrial motions filed in the trial court. See *People v. Tlatenchi*, 391 Ill. App. 3d 705 (2009). In *Tlatenchi*, an incarcerated defendant was relying upon the date of mailing to constitute the date of filing her *pro se* motion to withdraw her guilty plea. It was undisputed that her motion was due on March 23, 2006. The envelope containing the motion was post-marked March 24, 2006 and the motion was file-stamped by the clerk of the court on March 27, 2006. As the court noted, however, "the 'proof of service' attached to defendant's motion state[d] that defendant placed the motion in the prison mail system on March 15, 2006, which [was] within the 30-day filing period and would therefore render defendant's motion timely." *Tlatenchi*, 391 Ill. App. 3d at 710. The *Tlatenchi* court explained that Supreme Court Rule 12, entitled "Proof of Service in the Trial and Reviewing Courts; Effective Date of Service," governed the manner by which the defendant had to prove she mailed her motion. *Tlatenchi*, 391 Ill. App. 3d at 710-11. Therefore, the court reasoned, "in order to prove that she deposited her motion in the prison mail system, the rule requires defendant to file, along with her motion, an affidavit stating the time and place of mailing, the address on the envelope, and the fact that proper postage was prepaid." *Tlatenchi*, 391 Ill. App.

1-10-0249

3d at 712. The court held that where the defendant's proof of service was unsworn, her motion to withdraw her guilty plea was untimely.

As the *Tlatenchi* court noted: "In almost every case in which the appellate courts of this state have found that a posttrial motion was timely filed based upon the "date of mailing" rule, the courts have relied upon a notarized proof of service that recited a timely mailing date."

Tlatenchi, 391 Ill. App. 3d at 716; see also *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209 (2009) (explaining that party can only take advantage of date of mailing rule with respect to notice of appeal if it files proper proof of mailing as required by Supreme Court Rule 12(b)(3) because "[i]f there is no proof of mailing on file, there is nothing in the record to establish the date the document was timely mailed to confer jurisdiction on the appellate court").

We conclude that defendant has failed prove that he mailed his motion by November 30, 2009, and cannot invoke the date of mailing rule because he failed to provide the trial court with any proof of service as required by Supreme Court Rule 12. Thus, the trial court lacked jurisdiction to consider defendant's *pro se* motion for a new trial.

¶ 68 Having determined that the trial court did not have jurisdiction over defendant's *pro se* motion for a new trial, we need not address the State's alternative arguments that the trial court lacked authority to inquire into defendant's post-trial allegation of ineffective assistance of counsel where defendant's trial counsel was privately retained, not court-appointed, or that the motion lacked merit.

¶ 69 **III. Sentence**

Defendant next raises a constitutional issue regarding his sentence and argues that his

1-10-0249

sentence must be reduced. He argues that the statutes under which he was sentenced are facially unconstitutional and, alternatively, are unconstitutional as applied to him.

¶ 70 Defendant was convicted of three separate offenses and was sentenced for each.

All three offenses were Class X felonies. A sentence upon a conviction of a Class X felony "shall be a determinate sentence of not less than 6 years and not more than 30 years." 730 ILCS 5/5-4.5-25(a)(West 2008). Defendant was sentenced under two statutes, both of which required the trial court to impose enhanced sentences. See 720 ILCS 5/8-4(c)(1)(D) (West 2008) and 720 ILCS 5/12-11(a)(5), c (West 2008).

The statute pertaining to the attempt (murder) offenses states:

"the sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that

* * *

an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court. 720 ILCS 5/8-4(c)(1)(D) (West 2008).

The statute regarding defendant's conviction for home invasion states, in relevant part:

"(a) [a] person *** commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present *** and

1-10-0249

(5) [p]ersonally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person within such dwelling place,

(c) A violation of subsection (a)(5) is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/12-11(a)(5),(c) (West 2008).

¶ 71 Defendant correctly notes that review of the constitutionality of a sentencing statute begins with the presumption that the statute is constitutional. *People v. Miller*, 202 Ill. 2d 328, 335 (2002). "To overcome this presumption, the party challenging the statute must clearly establish that it violates the constitution." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). This court "defer[s] to the legislature on sentencing issues as it is institutionally more capable of fashioning appropriate sentences." *People v. Coleman*, 399 Ill. App. 3d 1150, 1157 (2010).

¶ 72 Defendant first contends that the statutes creating the 25-years-to-life firearm enhancements are facially invalid. It is well settled that a party challenging the facial validity of a statute "must establish that no set of circumstances exists under which the Act would be valid." See, e.g., *People v. Greco* 204 Ill. 2d 400, 407 (2003). "The fact that the statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an

1-10-0249

'overbreadth' doctrine outside the limited context of the First Amendment." *In re C.E.*, 161 Ill. 2d 200, 211 (1994), quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707(1987).

¶ 73 The State notes that defendant has made no attempt to meet this standard for showing that the statutes here are facially invalid. Defendant responds that this failure "does not undermine the core of [his] facial challenge, and the remainder of the State's brief demonstrates that it has grasped the nature of [his] challenges." While that may be true, Supreme Court Rule 341 (eff. July 8, 2008) requires the appellant's argument to contain "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Supreme Court Rule 612(I) (eff. September 1, 2006) makes Rule 341 applicable to criminal appeals. A party's failure to comply with Rule 341 is grounds for this court disregarding the party's arguments on appeal. *Burmac Metal Finishing Co. v. West Bend Mut. Ins. Co.*, 356 Ill. App. 3d 471, 478 (2005).

¶ 74 In his opening brief, although defendant attempted to make a facial constitutional challenge, he failed to argue that the statutes were "invalid in all circumstances." In his reply brief, defendant contends that the "confluence" of the statutes allow multiple enhancements and are therefore "invalid in all circumstances." He asserts that the multiple enhancements serve no valid purpose and "enable an absurd result" that could not have been contemplated by the legislature. He also notes that "the California law that served as the model for the Illinois firearm enhancements did not allow the imposition of

1-10-0249

multiple enhancements on a single defendant." He argues that a single enhancement gives the court the option of imposing a life sentence and allowing multiple enhancements limits the sentencing judge's discretion with respect to the minimum permissible sentence.

¶ 75 In support of his argument that the statutes are facially unconstitutional, defendant cites *Vine Street v HealthLink, Inc.*, 222 Ill. 2d 276, 282 (2006) and contends that "these statutes, taken together, therefore enable an absurd result that the legislature could not have contemplated in enacting them." *Vine Street* stands for the general proposition that "when undertaking the interpretation of a statute, we must presume that when the legislature enacted a law, it did not intend to produce absurd, inconvenient or unjust results." *Id.* Apart from the reference to this general proposition, defendant has provided no authority in support of his argument that the statutes are facially invalid. He has failed again to even attempt to show that "no set of circumstances exists under which the Act would be valid." *Jackson*, 199 Ill. 2d at 301. As the party challenging the constitutionality of the statute, defendant has failed to establish that the statutes are facially invalid.

¶ 76 Defendant also argues that the statutes are unconstitutional as applied to him. The State notes that defendant committed three separate offenses and that the sentences the trial court imposed were within the permissible statutory ranges. Defendant concedes that the enhancements "have been upheld on an individual basis as neither cruel nor degrading." See *People v. Sharpe*, 216 Ill. 2d 481, 524 (2005) (approving firearm

1-10-0249

enhancements for attempt murder); *People v. Hill*, 199 Ill. 2d 440, 452-59 (2002) (approving firearm enhancements for home invasion). He notes, however, that when combined with the statute mandating consecutive sentences (see 730 ILCS 5/5-8-4(d)(1) (West 2008) (requiring consecutive sentences for offenses where the defendant inflicts serious bodily injury)), the imposition of three 25-years-to-life enhancements added a minimum of 75 years to his sentence and, therefore, subjected him to a mandatory minimum sentence of 93 years for a non-fatal shooting and home invasion. He also argues that "multiple enhancements in this case were simply redundant where just one allowed a sentence of natural life."

¶ 77 In support of his argument that the multiple firearm enhancements resulted in a sentence that rendered the statutes unconstitutional as applied to him, defendant cites *People v. Miller*, 202 Ill. 2d 328 (2002). In *Miller*, a fifteen-year-old juvenile was tried as an adult and convicted of two counts of first-degree murder based upon accountability. The trial court found that the statutorily mandated sentence of natural life imprisonment was unconstitutional as applied to the defendant and sentenced him instead to a term of 50 years in prison. The Illinois Supreme Court affirmed and held that section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1996)) was unconstitutionally disproportionate "as applied" to the defendant due to the convergence of several factors. As the court explained:

"a mandatory sentence of natural life in prison with no possibility of parole grossly distorts the factual realities of the case and does not accurately represent

1-10-0249

defendant's personal culpability such that it shocks the moral sense of the community. This moral sense is particularly true, as in the case before us, where a 15-year-old with one minute to contemplate his decision to participate in the incident and stood as a lookout during the shooting, but never handled a gun, is subject to life imprisonment with no possibility of parole - the same sentence applicable to the actual shooter.” *Miller*, 202 Ill. 2d at 341.

Miller is distinguishable. As the supreme court subsequently noted, its opinion in *Miller* was based on "a rare convergence of several factors." *People v. Huddleston*, 212 Ill. 2d 107, 130-31 (2004). As the State correctly notes, none of these factors are present in the instant case.

Defendant was 36 years old when he came to the Campbell's family home, kicked in the door and began shooting multiple times at family members when they tried to escape. He was the actual shooter, not a juvenile with "passive accountability" who never handled a gun and acted only as a lookout.

¶ 78 Nonetheless, defendant claims that his sentence was "so wholly disproportionate to the offense as to shock the moral sense of the community." The proportionate penalties clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const.1970, art. I, §11; see also *People v. Huddleston*, 212 Ill. 2d 107, 129 (2004). Defendant asserts that the record demonstrates that he has "significant rehabilitative potential" because he was earning \$80 per day, working seven days a week as a mover, and was providing financial support for his

1-10-0249

daughter. As the State notes, however, defendant acknowledges his six prior felony convictions. These include a 1992 conviction for armed robbery where throughout the offense defendant pointed a loaded gun at the stomach of his seven-month pregnant victim. Defendant received a 25 year sentence in the case. The State contends that the sentence "appears to have only increased his violent tendencies as demonstrated by his outrageously dangerous and violent actions in the instant case." Moreover, as the State notes, the Illinois Supreme Court has made it clear that " 'there is no indication in our constitution that the possibility of rehabilitating an offender was to be given greater weight and consideration than the seriousness of the offense in determining a proper penalty.' [Citation.]" *Huddleston*, 212 Ill. 2d 107, 129 (2004). We conclude that 720 ILCS 5/8-4(c)(1)(D) (West 2008) and 720 ILCS 5/12-11(a)(5), c (West 2008) are constitutional as applied to this defendant.

¶ 79

IV. *Mittimus*

Defendant next argues, and the State concedes, that his *mittimus* must be corrected. Defendant was in custody for 478 days from arrest until sentencing, but the trial court awarded defendant only 468 days' credit. Remandment is unnecessary since this court, pursuant to Supreme Court Rule 615(b)(1) has authority to directly order the clerk of the circuit court to make the necessary corrections. See, e.g., *People v. Calhoun*, 404 Ill. App. 3d 362, 391 (2010). Accordingly, we order the circuit court to issue a corrected *mittimus* reflecting 478 days' credit for the time defendant spent in presentencing custody.

¶ 80

CONCLUSION

1-10-0249

Based on the foregoing, we affirm defendant's convictions for attempted murder where the State proved beyond a reasonable doubt that defendant had the specific intent to kill and where the trial court's determination that defendant's sole alibi witness lacked credibility was supported by the record. We also conclude that the trial court lacked jurisdiction to consider defendant's untimely *pro se* motion for a new trial. Defendant has failed to show that statutes upon which his enhanced sentences were based were facially invalid or unconstitutional as applied to defendant. We order the mittimus corrected to reflect the actual number of days of defendant's presentencing incarceration.

¶ 81 Affirmed; mittimus corrected.