No. 1-09-0670

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FOURTH DIVISION
February 24, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 06 CR 4475 |
| | ) | |
| MICHAEL NIETO, | ) | The Honorable |
| | ) | Rosemary Higgins-Grant, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred in the judgment.

**ORDER**

*Held:* The trial court properly ruled to exclude *Lynch* evidence related to murder victim's conviction for aggravated unlawful use of a weapon.

Here, we consider the appeal of a young man convicted of first degree murder and aggravated battery with a firearm. After a jury trial, defendant Michael Nieto was convicted of those two charges, the jury also finding that he personally fired the weapon that killed Richard Soria and injured Israel Fernandez. The trial court sentenced defendant to consecutive sentences of 60 years for the murder and 18 years for aggravated battery with a firearm. Defendant appeals,

contending, *inter alia*, that the trial court erred in failing to admit evidence of a victim's conviction on a weapons charge, that his trial counsel was ineffective in failing to offer evidence related to his claim of self-defense, and that *voir dire* was fatally compromised by a failure to ask all prospective jurors whether they understood and accepted the so-called *Zehr* principles. For reasons detailed below, we affirm the trial court but correct the mittimus.

BACKGROUND

At age 17, Michael Nieto was a self-described member of the Latin Kings street gang. On July 14, 2005, he and three other gang members were riding in a black Ford Expedition in a residential neighborhood on Chicago's southwest side when they encountered a red Jeep Cherokee whose occupants taunted them by using a sign that was disrespectful of the Latin Kings. This action precipitated a chase through the neighborhood, which culminated when Nieto, who was a front-seat passenger in the Expedition, grabbed a gun from a hidden compartment and shot at the Cherokee, hitting Richard Soria fatally in the head and injuring Israel Fernandez.

Defendant was arrested about five months after the shootings and charged after being identified in a lineup. Prior to trial, defendant filed a motion *in limine* that sought to admit evidence of Soria's conviction of aggravated unlawful use of a weapon in order to prove his propensity for violence as part of defendant's theory of self-defense. The trial court denied the motion after learning that the weapons charge involved Soria dropping the weapon when being arrested, as opposed to using the weapon in a violent manner, as in the commission of a crime like robbery or battery.

Defendant's brother-in-law, Daniel Godinez, testified that defendant came to his home and told him that he had just "lit up some flakes" in a red Jeep. Godinez testified that this expression, in gang parlance, meant that defendant had shot rival gang members. Godinez added that defendant said the shooting happened after he and his friends were "false flagged" while driving and also boasted that one of the victims received a "dome shot," meaning that he was shot in the head.

The court and jury heard from several occupants of the two vehicles and an eyewitness who was helping his landlady push a food cart on a sidewalk near where the shooting took place. That witness, Abraham Garcia, testified that he saw a red Jeep Cherokee and then a black Ford Expedition coming toward him. He then saw the Expedition stop in the middle of the street as a front seat passenger began shooting at the Jeep. He further testified that he did not see anybody from the Jeep shoot and did not hear any shots from that vehicle. Timothy Novak, one of the passengers in the Expedition, testified that the driver of that vehicle, Raul Lopez, began chasing the red Jeep after those occupants flashed a disrespectful sign in their direction. Shortly thereafter, according to Novak, Nieto asked if there was a gun in the car, which prompted Lopez to grab a nine-millimeter handgun out of the top of the dashboard. Novak urged the driver to ram the Jeep, but then Nieto leaned out of the passenger window and began shooting at the Jeep, which was about 30 feet away. According to Novak, everybody in the Expedition was saying that the front seat passenger in the Jeep got a "dome shot" after seeing him slump in his seat after being shot. Novak also testified that he never saw a weapon in the Jeep and that their vehicle was never under fire from the Jeep and that he never heard any shots fired from the Jeep. An

evidence technician and a firearms expert also testified, detailing that no firearms evidence was obtained from the Jeep and that all eight shell casings recovered from the street came from the same weapon.

The jury also heard testimony about a statement that defendant gave to Chicago police detective Michael O'Donnell. In an early part of this statement, defendant said that an occupant of the Jeep had shot at the Expedition. Shortly after this occurred, they lost track of the Jeep, only to catch up with them later when defendant said that someone in the Jeep had a gun out the window and that one of his friends told him that he should shoot. He complied, saying that he was merely attempting to shoot out the doors of the Jeep. Later in the interview, defendant was told that a witness from the street and his friends had already been interviewed and that they did not support his version that "these guys in the other car" shot in his direction. In response to this, defendant initially said, "If these guys are saying that, I'll go with them." In response, the detective said, "No, no, no, no, no, no, no, no, no, no. What I do not want you to do is tell a lie, okay." The detective went on to add that he would not look good if he tried to make up a story to try to help himself. He then asked defendant directly, "So my point is now, you know, if they shot you a month ago, whatever, but that day did they shoot at you or not?" Defendant replied, "No."

Finally, the jury heard the testimony of a police officer who arrested Lopez approximately seven months later while driving the Expedition. He took a photo of the vehicle, which shows a hole in its hood.

In defendant's case-in-chief, he attempted to offer the testimony of a Chicago police

detective who apparently had a conversation with a police officer from Hammond, Indiana. In that conversation, the Hammond officer told the Chicago detective that the Expedition in question was seen in Hammond the day after the shooting in question and that it had a hole in its hood. The trial court sustained the State's objection that the testimony would be inadmissible hearsay and granted its motion *in limine* to bar the detective's testimony. The defense did not attempt to offer the testimony of the Hammond police officer.

The only witness who actually testified for the defense, a Chicago police officer, testified that approximately one week before the shooting in question, he responded to a call in the same neighborhood and arrested Mr. Soria after seeing him throw bottles at oncoming traffic while yelling gang slogans. The defense then rested.

During closing argument, the State argued that the evidence was strong for a conviction of first degree murder and that there was no evidence other than defendant's statement that would support the self-defense theory. Defense counsel responded by claiming that there was evidence of provocation and self-defense, while also commenting that there was bullet damage to the Expedition. This prompted two comments in the State's rebuttal. First, the prosecutor argued that the only evidence in the case about Mr. Soria's temperament indicated that his "weapon of choice" was a bottle and, attempting to deflect any importance in that evidence, asked the jury to "give [her] a break." Next, the prosecutor suggested that the Expedition was not located for seven months after the shooting and that there was not "any evidence that any" marks came from any gun from the victims' car. Neither argument drew an objection from the defense.

After the jury returned its verdict of guilty on all counts, the trial judge held a sentencing

hearing which included testimony about defendant "accidentally" shooting and killing his younger brother with a handgun in the months after the Soria killing before he was arrested. After considering all of the testimony and the pre-sentence investigation, the court commented that defendant "did not indicate *** significant rehabilitation potential" and sentenced defendant to consecutive sentences of 35 years for the murder, 25 years for personally discharging the weapon that killed Soria, and 18 years for aggravated battery with a firearm for injuring Israel Fernandez.

ANALYSIS

In his opening brief on appeal, defendant claimed that the trial judge violated certain principles of Supreme Court Rule 431(b), (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007), but by the time the reply brief was filed, our supreme court issued its opinion in *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, among other things, the supreme court held that a trial court's failure to comply with that rule is subject to the rule of forfeiture. In his reply brief, defendant "acknowledges that *Thompson* effectively forecloses the argument he raised in his opening brief as he did not contend that the evidence was closely balanced." As a result, we will not discuss the jury selection issue initially raised, other than to indicate our agreement with defendant's position that the evidence was not closely balanced.

The main issue on appeal concerns defendant's contention that certain rulings of the trial court effectively foreclosed his opportunity to meaningfully pursue a theory of self-defense. This argument is raised in several areas, each of which merits separate discussion.

First and most fundamentally, defendant claims that the trial court erred when it denied his motion *in limine* to admit evidence related to the victim's conviction for aggravated unlawful use of a weapon some time before he was killed. The court heard argument on this motion, during which it was stated that the conviction in question involved the victim being arrested and during the process of the arrest, he attempted to drop a gun. Defendant sought to admit this testimony pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984). The trial court's decision to admit *Lynch* evidence is reviewed for an abuse of discretion. *People v. Nunn*, 357 Ill. App. 3d 625, 630 (2005).

In *Lynch*, the defendant was tried for murder and convicted of manslaughter after he claimed self-defense. *Lynch*, 104 Ill. 2d at 197. In that case, defendant shot and killed a man who had accompanied a person who had threatened his son's life. *Lynch*, 104 Ill. 2d at 198. Defendant testified that the victim in that case made a sudden move toward him while reaching beneath his coat. *Lynch*, 104 Ill. 2d at 198. Thinking that the victim had a gun, the defendant pulled his own gun and fired. *Lynch*, 104 Ill. 2d at 199. Shortly after the shot, police were called and, during the interim, the victim's friend was left alone with the body. *Lynch*, 104 Ill. 2d at 199.

At trial in *Lynch*, the defendant sought to introduce evidence that the victim had three separate battery convictions. *Lynch*, 104 Ill. 2d at 199. The trial judge heard argument which revealed that the defendant was unaware of these convictions, but that the defendant believed that the victim was at the meeting as "muscle" for his aggrieved friend. *Lynch*, 104 Ill. 2d at 199. Ultimately, the trial court ruled that the defendant's lack of knowledge of the convictions

precluded their admission into evidence. *Lynch*, 104 Ill. 2d at 199. Our supreme court took a different view, reasoning that the evidence should have been admitted despite defendant's lack of knowledge because "evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened." *Lynch*, 104 Ill. 2d at 200. Our supreme court held that "when the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence, regardless of when he learned of it." *Lynch*, 104 Ill. 2d at 200.

In *Lynch*, our supreme court went to some lengths to cite the circumstantial evidence that supported the theory that the victim was the aggressor, since he "made a threatening remark, and went for the defendant at close quarters, reaching behind his back. The evidence does not exclude the possibility that [the victim] was reaching for a weapon, which [his friend] later removed. *** The defendant was entitled to have the jury judge the reasonableness of his behavior in light of all the relevant facts." *Lynch*, 104 Ill. 2d at 201.

The facts of the case *sub judice* are sufficiently distinguishable that we are persuaded that the trial court did not abuse its discretion in denying the admission of this conviction. Defendant urges that there was "conflicting" evidence here, as there was in *Lynch*, but it is not of a remotely similar degree to warrant admission of the victim's conviction of the gun possession charge. In fact, to the extent that there is "conflicting" evidence about the victim being the aggressor here, it only appeared within defendant's statement to the police after he was arrested months after this incident. As previously mentioned above, defendant initially claimed that an occupant of the

Jeep had fired on his vehicle earlier in the chase and later was observed holding a gun outside a window. He told the police detective that this prompted him to shoot at the direction of the Jeep, in an attempt to shoot at the doors of the vehicle. Later in the same interview, however, defendant recanted that version of events and affirmatively stated "no" when asked whether anybody in the Jeep fired at his vehicle before defendant shot at the Jeep.

There is absolutely no evidence that the interviewing detective tricked, enticed or coerced defendant into recanting the earlier version of events. Much to the contrary, the detective went out of his way to tell defendant to only tell the truth, telling him "no" ten times regarding whether he should lie to the state's attorney during the interview that was to come. The detective truthfully told defendant that a witness from the street and at least one occupant of his vehicle had stated that there were no shots fired from the Jeep, but this hardly strikes us as being in any way inappropriate or coercive. Occupants of the Jeep also confirmed that no shots were fired from that vehicle.

The testimony of the police officers who inspected the Jeep and the scene of the occurrence found no evidence of a gun or any shell casings that differed from the weapon that was used to kill Soria and injure Fernandez. In short, the only conflict that exists in this record is the product of the two different versions that the defendant told the police and all of the circumstantial and physical evidence is inconsistent with the self-defense version that he recanted. Defendant also relies on *People v. Bedoya*, 288 Ill. App. 3d 226, 239 (1997), where we held that the trial court's refusal to admit evidence of the victim's past acts of violence deprived the jury of evidence that would have assisted it in resolving the question of who was the

initial aggressor. In that case, the defendant, an off-duty Milwaukee police officer, was convicted of first degree murder when his gun went off during an altercation with a bouncer at a Chicago lounge, fatally wounding the bouncer. *Bedoya*, 288 Ill. App. 3d at 234. Defense counsel raised the theory of self-defense and attempted to introduce evidence that the victim was previously convicted on three counts of aggravated battery. *Bedoya*, 288 Ill. App. 3d at 235. Those convictions arose when police officers responded to a domestic violence call at the victim's home, where they learned from the victim's then-pregnant wife that he had "punched her in the head and shoved her across the room." *Bedoya*, 288 Ill. App. 3d at 235. When the officers attempted to apprehend the victim, he was "very irate," pointed a gun at them, and threatened to kill them. *Bedoya*, 288 Ill. App. 3d at 235. When confronted by the officers, the victim resisted by "punching, shoving, and kicking the police officers." *Bedoya*, 288 Ill. App. 3d at 235. The trial court determined that the defendant could not introduce this evidence because his claim that the gun fired accidentally during the struggle precluded a theory of self-defense. *Bedoya*, 288 Ill. App. 3d at 236.

In reversing the trial court, this court held that the defendant's claim that the gun fired accidentally did not preclude him from raising self-defense. *Bedoya*, 288 Ill. App. 3d at 237, citing *People v. Robinson*, 163 Ill. App. 3d 754, 768. We then noted that the defendant claimed throughout the trial that the victim was the aggressor in their confrontation. *Bedoya*, 288 Ill. App. 3d at 237. Because the evidence regarding who was the initial aggressor was both incomplete and conflicting, "[t]he evidence concerning [the victim's] prior acts of aggravated battery, especially because they involved police officers, was clearly relevant to the issue of who

was the first aggressor in this instance." *Bedoya*, 288 Ill. App. 3d at 237-38.

The present case is distinguishable from *Bedoya*, which involved an altercation between the defendant police officer and a victim who had previously been convicted on three counts of aggravated battery involving police officers. In *Bedoya*, this court determined that the evidence regarding who was the initial aggressor was both incomplete and conflicting, and therefore, evidence of those prior convictions was clearly relevant as to who the first aggressor was. Here, as previously discussed, the evidence as to who was the initial aggressor is not conflicting. "*Lynch* evidence may be properly excluded where *** there was no conflict concerning who was the aggressor." *People v. Jackson*, 293 Ill. App. 3d 1009, 1014 (1997) (citing *People v. McGee*, 213 Ill. App. 3d 458, 470 (1991)). Also, evidence of the victim's conviction for aggravated unlawful use of a weapon for dropping a gun is not "clearly relevant" to his propensity for violence. This court has repeatedly held that "[a] conviction for unlawful use of a weapon is not particularly probative of a violent character." *People v. Trimble*, 131 Ill. App. 3d 474, 477 (1985); see also *People v. Cruzado*, 299 Ill. App. 3d 131, 137 (1998); *People v. Costillo*, 240 Ill. App. 3d 72, 82 (1992). In fact, aggravated unlawful use of a weapon is an offense that prohibits a large number of nonviolent offenses. *Trimble*, 131 Ill. App. 3d at 477. Under these circumstances, the trial court did not abuse its discretion by refusing to allow defendant to introduce evidence of the victim's previous conviction for aggravated unlawful use of a weapon.

Defendant also complains that the State took advantage of the trial judge's exclusion of the gun charge when it argued, on rebuttal, that Mr. Soria's "weapon of choice" was a bottle, since the jury heard only about the bottle throwing incident related above and did not hear about

the gun conviction. As an initial observation, the prosecutor's comment was inappropriate, given the fact that the parties were aware of the gun conviction. Making the "weapon of choice" argument was unfair, because the prosecutor knew full well that defense counsel could not inform the jury of the gun charge. But, the argument in question was made without objection at trial, giving the trial court no opportunity to correct any error. To preserve an issue for appellate review, a defendant must both object at trial and present the same issue in a written posttrial motion. *People v. Harris*, 394 Ill. App. 3d 28, 37 (2009). Defendant did not object to this claimed error at trial, and therefore, has forfeited his challenge to the prosecutor's closing remarks.

Defendant next contends that his trial counsel was ineffective for failing to call an officer from the Hammond police department to testify regarding the possible bullet hole in the hood of defendant's vehicle, the Expedition. To determine whether a defendant received ineffective assistance of counsel, we apply the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, defendant must show both that: (1) counsel's representation was so deficient as to fall below an objective standard of reasonableness, and (2) the deficient performance so prejudiced defendant as to deny him a fair trial. *People v. Perry*, 224 Ill. 2d 312, 341 (2007). If either prong of the *Strickland* test is not met, defendant's claim must fail. *Perry*, 224 Ill. 2d at 342.

Under the first prong, there is a strong presumption that trial counsel's action or inaction resulted from sound trial strategy. *Perry*, 224 Ill. 2d at 341-42. To overcome this strong presumption, defendant must demonstrate trial counsel's decision was so unreasonable and

irrational that no reasonably effective defense attorney faced with similar circumstances would pursue that strategy. *People v. King*, 316 Ill. App. 3d 901, 916 (2000). When reviewing a claim for ineffective assistance of counsel, "a reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *Perry*, 224 Ill. 2d at 344.

When defendant began his case-in-chief, he attempted to call a Chicago police officer who had a conversation with a Hammond, Indiana police officer who told him that the Expedition was seen in Hammond the day after Mr. Soria was killed and it was known to have a hole in the hood. The trial court properly ruled that any such testimony would be inadmissible hearsay and the officer never testified. At trial, the only evidence that the jury had about the condition of the Expedition came from a photograph that was taken seven months after the incident when it was recovered during the arrest of its owner. Facially, this could be said to be consistent with a theory of self-defense, but a close examination of the record does not reveal any evidence that was consistent with the Expedition actually being struck by a bullet during this incident. Defendant never made any such revelation during his statement that was heard by the jury. None of the other "participants" in the chase and shooting testified that the Expedition was ever fired upon, much less hit.

In this context, it is reasonable that defense counsel chose not to call the Hammond police officer who allegedly would have testified about a hole in the hood of the Expedition. Even if true, this would not tend to prove that the hole was caused during this chase, because there was no evidence of any shots hitting the vehicle. The jury could logically have concluded that the

hole was already present on the Expedition when this chase and shooting occurred or that it happened after this incident, but there was simply no evidence that the Expedition was struck by a bullet during the chase that cost Mr. Soria his life. Therefore, we decline to say that defense counsel's representation fell below an objective standard of reasonableness for failing to get this evidence before the jury in any form. In view of our disposition of the first prong of the *Strickland* analysis, we need not address whether defendant suffered prejudice as a result of defense counsel's alleged deficiencies. *People v. Rodriguez*, 312 Ill. App. 3d 920, 926 (2000).

In a related context, however, defendant claims reversible error in the State's argument in which it was stated that the only evidence of a bullet hole was from a photograph taken seven months after this shooting. This argument did not draw an objection from the defense and it merits mentioning that the argument is factually correct. Unlike the argument about the choice of weapon related above, the prosecutor's comments about the photograph were not inappropriate, because defense counsel was allowed to argue that the bullet hole came from a gun fired from the Jeep (even though there was no evidence of that occurring) and the jury considered but rejected the claim of self-defense.

Defendant lastly contends that his 78 year sentence is excessive because he was 17 years old at the time of the offense. This court gives great deference to a trial court's judgment regarding sentencing, because the trial judge, having observed the defendant and the proceedings, is in a far better position to determine an appropriate sentence. *People v. Fern*, 189 Ill. 2d 48, 53 (2000). This court will not disturb the trial court's sentencing decision absent an abuse of discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). Furthermore, a sentence within

statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Fern*, 189 Ill. 2d at 54. A trial court is also not required to enumerate each factor considered in arriving at a sentence. *People v. Houston*, 363 Ill. App. 3d 567, 577 (2006).

On this issue, defendant contends that his 78 year sentence is the functional equivalent of a life sentence and effectively negates any possibility of restoring him to useful citizenship. Defendant also contends that the trial court failed to acknowledge mitigating evidence of defendant's chaotic and transient childhood. There is no dispute that this young man represents a rather tragic figure and that the arc of his life has been unredeemably sad. The loss of life suffered by Mr. Soria is also something difficult to fathom, given how senseless his killing was. There is, however, a presumption that the sentencing judge considered the mitigating evidence made available, absent some indication to the contrary other than the sentence itself. *People v. Benford*, 349 Ill. App. 3d 714, 735 (2004). Furthermore, rehabilitative potential is not entitled greater weight than the seriousness of the offense or the imposition of punishment. See *People v. Hopkins*, 363 Ill. App. 3d 971, 988 (2005).

We note that defendant does not dispute that his sentence falls within the statutory limits. Defendant was convicted of first degree murder, which carries a sentence of 20 to 60 years. See 730 ILCS 5/5–8–1(a)(1)(a) (West 2006). Defendant was subject to the firearm enhancement, which carries a mandatory sentence of 25 years, to run consecutively. See 730 ILCS 5/5–8–1(a)(1)(d)(iii) (West 2006). Defendant was also convicted of aggravated battery with a firearm of Israel Fernandez, a class X felony, which carries a sentence of 6 to 30 years. See 720

ILCS 5/12–4.2(b) (West 2006). Defendant received consecutive sentences of 60 years for the murder plus the firearm enhancement and 18 years for aggravated battery with a firearm. Accordingly, defendant's 78 year sentence was within the statutory limits.

Prior to sentencing defendant, the trial court stated, "I have listened to the testimony of the witnesses, and I have seriously considered the presentence investigation that was written and developed. *** I took into consideration argument that were made by both by the State and the defense." The court discussed factors in mitigation, including defendant's "young age" and his "considerable remorse for his brother's death and regret at what he considered to be an accidental shooting." The trial court also considered evidence in aggravation, including evidence that defendant was a known gang member, that he was charged with shooting his brother, albeit accidentally, some time after the instant offenses, and that he lied to police that his brother was shot by rival gang members.[1] The trial court determined that defendant's "character and attitude as displayed over the course of his life does not indicate to me significant rehabilitative potential."

In support of his argument, defendant points to his sentence and mitigating evidence that was already presented to the trial court. In light of this, and after a careful review of the record, we find nothing to indicate that the trial court failed to consider mitigating evidence of

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[1] While defendant disagrees with the trial court's characterization that he "blamed" his brother for the fact that he lied to police, the record indicates that defendant did in fact lie to the police about who shot his brother, regardless of the origin of that fabrication.

defendant's age and childhood. As such, the trial court did not abuse its discretion in sentencing defendant.

CONCLUSION

In sum, the evidence of defendant's guilt of first degree murder was overwhelming and he was appropriately convicted despite his claim of self-defense. The defendant was allowed to pursue his theory of self-defense and was not prejudiced by the trial court's rulings on the victim's conviction of a weapons charge. Furthermore, defense counsel was not ineffective in failing to call the Hammond police detective who would have testified that the Expedition had a bullet hole in it when observed the day after this shooting. For the reasons stated above, we affirm the trial court in all respects, but correct the mittimus to reflect a single conviction for first degree murder on Count 5, and a sentence of 60 years on count 5. Defendant's conviction for aggravated battery with a firearm under count 4 and the sentence of 18 years should remain intact.

Affirmed; mittimus corrected.