

No. 1-08-2467

**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).

FIFTH DIVISION  
January 21, 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. 07 CR 14810
	)	
DURRELL SMITH,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

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JUDGE EPSTEIN delivered the judgment of the court.  
Justices Joseph Gordon and Howse concurred in the judgement.

**ORDER**

**HELD:** Defendant's conviction and sentence affirmed. The State proved defendant guilty beyond a reasonable doubt of two counts of aggravated battery with a firearm, and the trial court did not err in denying defendant's motion for a continuance or imposing consecutive sentences.

Defendant, Durrell Smith, was convicted of two counts of aggravated battery with a firearm following a jury trial. He appeals claiming the State did not meet its burden of proof; that the trial court abused its discretion by denying his request for a continuance to locate a trial witness; and that the trial court erroneously sentenced him to two consecutive prison terms. For the reasons below, we affirm.

**BACKGROUND**

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In 2007 defendant was charged with two counts of attempted murder and two counts of aggravated battery with a firearm for the shootings of Cordero Murry and Devline Johnson. At defendant's trial, the State called seven witnesses.

Cordero Murry, 20 years old at the time of the shooting, testified that on June 20th, 2007, at approximately 11:30 p.m., he was standing on a porch when he heard his friend Pierre Madison arguing with defendant, known to him as "Dirty," about who had the most money. Cordero had known defendant for five years. As Cordero, and his two other friends, Devline Johnson and Demetrius Henderson, approached the young men, defendant asked them, "why ya'll walking down here for like y'all on something," before entering into a gray car and leaving. Defendant returned, about five or ten minutes later, with two other vehicles and approximately eight other young men. They all began talking, after which defendant reentered the gray car and left, saying, "I don't do no fighting, I shoot." Once defendant left, Cordero and Devline walked away, heading up the street. Shortly thereafter, Cordero's cousin, Ann Murry, drove in reverse up the street saying, "here they come." Cordero turned and saw three cars approaching. The cars stopped near him and defendant jumped out of the passenger side of what appeared to be a blue Mercedes-Benz or Maserati. Cordero did not see anyone else leave the cars. Defendant then walked up to Cordero and Devline, with his hand down to his side, gun in hand, saying, "Talk that sh\*t now, pussies." He raised the gun, aiming it at Cordero and Devline, although Madison, the only person with whom he had quarreled, was standing across the street. Cordero, who was approximately six feet away from defendant, turned and started to walk away. He heard a gunshot, started to run, but was struck by a bullet that went through the back of his neck and out the side of his neck. Cordero ran to his grandmother's house, and later

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his cousin, Latoya Murry, drove him to the hospital. Neither Cordero nor his cousin called the police. Nevertheless, Cordero spoke with a Chicago police officer at the hospital who asked him only whether defendant shot him. Cordero, who did not see defendant actually pull the trigger, answered that he had. Cordero later identified defendant as his shooter in a five-person lineup.

Jody Murry, 15 years old at the time of the shooting, testified that he saw defendant, "Dirty," arguing with Madison on the night of the shooting. Madison was a lifelong friend and Jody had met defendant two years before. Jody saw his cousin and roommate, Cordero, and Devline, a friend, try to break up the argument by pulling Madison back. Defendant responded by allegedly calling Cordero and Devline, "pussies, \*\*\* little ass boys." Defendant then entered a gray car, said he would return, and left. Five to seven minutes later, defendant returned with four other cars. People left the cars, started talking, and then agreed the argument was over. Defendant reentered the gray car, allegedly saying, "[I] don't fight, [I] shoot." He then drove off, to only return a third time, about 10 minutes later, in a blue car. Jody heard Ann Murry, his other cousin and roommate, yell "here they come, \*\*\* here comes Dirty them [*sic*]." Defendant drove around the block in the blue car, exited the passenger side, and headed towards Cordero and Devline. Defendant was the only person that left the cars. He then told Cordero and Devline, gun in hand, "Talk that sh\*t now, pussies," before firing. Jody, who heard five or six gunshots, saw fire coming out of the front of defendant's gun. Jody then saw Devline fall, heard him scream, and saw him crawl into a car. Cordero ran out of Jody's sight. Later Jody learned Cordero had been shot. Jody did not call or speak to the police until he was picked up for questioning on June 29, 2007. He told the police his version of the events and identified defendant as the shooter in a five person line-up.

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Devline Johnson, who had known defendant for three or four years, testified similarly to Cordero. He added that upon hearing Madison and defendant arguing about who had the most money, he walked over and tried to stop the argument by “grabbing” Madison and telling him to “chill out.” Devline said there was no immediate physical altercation. When defendant returned for the second time, Devline heard him say, “What’s up now, pussy,” before firing. Devline, who saw only defendant with a gun, heard about six gunshots, and was looking directly at defendant when defendant shot him in the left ankle. Devline fell to the ground, crawled to a friend’s car, and was driven to the hospital. He was hospitalized for three days. He received stitches, staples, three rods in his ankle, and a plate in his leg. He also suffered scarring, which he showed to the jury: a nine-inch scar on the outside of his left leg, a four-inch scar on the inside of his leg, and a four-inch scar on his shin bone. Devline also claimed that he needed to use crutches for five months after the shooting, and that at the time he testified at trial he was still unable to run or bend his ankle. Devline could not remember talking to the police at the hospital. He identified defendant in a lineup as the person who shot him.

Officer Thurman N. Cowan testified that he was one of the police officers assigned to investigate the shooting. He did not go to the scene of the shooting, but rather went directly to the hospital to interview Devline and Cordero. He arrived at approximately 12:20 a.m. on June 21, 2007, and spoke with Devline, who had a gunshot wound in left ankle. Devline was allegedly stable and awaiting surgery. In a 45-second conversation Devline told Officer Cowan that “Dirty” (defendant) shot him from area of the passenger side of the first car. Officer Cowan then spoke with Cordero, who had a gunshot wound to the neck. He confirmed, in a 1-minute conversation, that defendant

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fired shots from the passenger area of the first car. Neither Cordero nor Devline specified whether defendant was inside or outside of the car at the time of shooting.

Detective Jean Romic testified that she arrested defendant for the shooting on June 29, 2007. Officer Kenneth LeFlore, an evidence technician, identified his photographs of the crime scene as well four expended cartridge casings that he collected from the scene. Mandi Hornickel, a forensic scientist with the Illinois State Police, an expert in latent fingerprint identification, testified that she was unable to obtain any fingerprints from the casings, which was not unusual with discharged casings.

The State rested its case after calling these seven witnesses. Defense counsel requested a continuance, expressing surprise at the State's failure to call Madison, who was not in court:

“[DEFENSE COUNSEL]: It has come to my attention that the State will not be calling Pierre Madison. It is a surprise to me that they are not calling him and hence I did not have him under subpoena. I believe they have had him under subpoena. I believe he is under their subpoena now, and I would ask the Court to direct the State to have him here tomorrow.

THE COURT: Why haven't you served him? Are they trying this case for you?

[DEFENSE COUNSEL]: No.

THE COURT: This is your case.

[DEFENSE COUNSEL]: Judge, it was completely reasonable for me to assume that they're going to call a witness who is, number one, listed in their answer;

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number two, starts off the entire incident and then just now where is Pierre, where is Pierre. At this late hour I cannot get an investigator to track him down and serve him with a subpoena.

THE COURT: You've been telling me for two days that you have one possibly two witnesses.

[DEFENSE COUNSEL]: And that was on the assumption that they would call Pierre Madison.

THE COURT: Pierre was the other one?

[DEFENSE COUNSEL]: No. After I've learned this a minute ago --

THE COURT: Wait a minute. Wait a minute. You have been telling me for two days now that you have one possibly two witnesses. One of those witnesses was defendant you told me. Who is the other witness?

[DEFENSE COUNSEL]: Darnell Clark. And then the other one --

THE COURT: No, no. Wait a minute. That's what I'm trying to get at, [counsel]. I've asked you a number of times over the last two days how many witnesses do you have and you've told me one, possibly two. Meaning one possibly your client. That we would have to discuss that. I've never heard about this third witness.

[DEFENSE COUNSEL]: Because Judge, until one minute ago I believed the State would call him as a witness.

[PROSECUTOR]: He was making assumptions.

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[DEFENSE COUNSEL]: Literally one minute ago.

THE COURT: I don't know what you are going to do between now and tomorrow morning.

[DEFENSE COUNSEL]: Judge, then I'm going to seek a continuance.

THE COURT: Your request for a continuance is denied. They're under no obligation to call people, every person on their list of witnesses.

[DEFENSE COUNSEL]: Judge, if they have him under subpoena, then what is the harm of me calling him? And I believe they to have him under subpoena unless they are going to represent to this court that he's not.

THE COURT: They don't have to make any representations about who they're going to call. They've filed an answer to discovery, they've disclosed all of their witnesses, they gave you what they were obligated to give you under Supreme Court Rule 412. And beyond that, they have no obligations.

[DEFENSE COUNSEL]: Okay. Judge, on that logic I should have subpoenaed every one of the State's witnesses then, right?

THE COURT: Well, absolutely. That's correct.

\* \* \*

This case is 07 CR 14810. It has been pending in various forms in permutations either in a branch court or in the Criminal Division of the Circuit Court since shortly after June 29, 2007. The discovery has been complete for months. We have endeavored to set this case for trial on a many occasions. We've had it set for

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trial, in fact on many occasions and here at 5:07 p.m. on the second or the first full day of trial, the first day of evidence, you are now suggesting to me that you haven't [*sic*] able to subpoena a witness. Your request for a continuance is denied."

The trial court then recessed for the evening, continuing the trial to the next day. Meanwhile, defense counsel attempted to subpoena Madison by serving Madison's grandmother, with whom Madison resided. The next morning, Madison did not appear in court. Defense counsel renewed his motion for a trial continuance, and moved for rule to show cause against Madison, each of which were denied:

"[DEFENSE COUNSEL]: If -- Judge, would you like me to proffer Mr. Madison's testimony?

THE COURT: Yeah.

[DEFENSE COUNSEL]: I would be happy to. If called to testify Pierre Madison would testify -- One moment, please. -- that he had an argument with Durell [*sic*] Smith, that he doesn't recall what they were arguing about, that he didn't think that the argument was too serious and didn't worry about it, that he identified on June 29, 2007, Durell Smith as the person who shot Cordero and Devline.

He will go on to testify that he did not want to identify Durell Smith as he had not been there to witness the shooting. He said that he did not know who had shot them. He said that he only identified Durell Smith after repeatedly being harassed by a detective who kept telling him that he knew that Pierre had seen Durell shoot them. He said that he got tired of being yelled at and threatened so he finally said, okay, if

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that is what I got to do to get of here then, yes, I saw Durell Smith shoot Cordero and Devline. He said that he was later allowed to leave but does not plan to go to court to testify against him because he does not know who did shoot them. That would be the sum and substance of his testimony.

\* \* \*

THE COURT: [H]ere's what I find, you have known about this witness and his statement since March of '08. First of all his statement is not that someone else shot Cordero Murry and Devline Johnson. His statement is he didn't see who shot Cordero Smith -- Cordero Murry and Devline Johnson. So I think it's very important for the reader of this record to keep that in mind.

Secondly, he makes some claim about being harassed by some detective but in the report there is no indication that -- who that detective is and there's certainly no examination of any of the other witnesses in this case who saw the lineup on the same date that they were in any way harassed or no indication about who even conducted the lineups.

Third, the Supreme Court Rules, Rule 413, Subsection D under Defenses, requires you to provide the State with the names and last know[n] addresses of persons you intend to call as witnesses together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements and any record of prior criminal conviction known to you and you failed to do that.

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[DEFENSE COUNSEL]: I'm sorry, Judge. I don't mean to interrupt the court.

THE COURT: Go ahead.

[DEFENSE COUNSEL]: I believe it says of any witness. At this time Bill Dorsh is not a witness.

THE COURT: No. It's the names and last known addresses of persons you intend to call as witnesses, I'm reading it. Here's word for word, the names and last known address of persons he intends to call as witnesses.

[DEFENSE COUNSEL]: Judge, I have no intent to call him unless Pierre Madison comes off his statement that he made to Bill.

THE COURT: I am not talking about Dorsh. I'm talking about Madison.

[DEFENSE COUNSEL]: Judge, my answer says any person named in the police reports.

THE COURT: But you had an obligation to turn over to them the report containing a summary of his statement and here it is 10:25 in the morning, when we were supposed to be go to jury at 9:30, and you still have not turned it over because you say that you haven't formulated an intent to call him as a witness.

\* \* \*

You had an obligation under these rules as early as sometime the day after March 18th to turn that document over to the prosecution and here at the last minute you're asking me to delay these proceedings to allow you to file a rule to show cause why he should not be held in contempt of court. You're asking me, I assume, to issue

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a warrant for his arrest when you haven't even served him personally, you haven't followed the rules of discovery, you haven't taken the time to subpoena him until last night when you know that since March 18th that that is what he's going to say.

Your request for leave to file a rule to show cause is denied. Are you asking for a continuance.

[DEFENSE COUNSEL]: I am Judge.

THE COURT: Your request for a continuance is denied. I find that you violated the rules of discovery. I find that you have for some reason, perhaps strategic or otherwise, delayed subpoenaing this witness until the night before he was -- before you wanted him to testify and once the subpoena was issued it wasn't even properly served, it was served on his grandmother, not him.

\* \* \*

I find that had this witness been so important to you that you would have subpoenaed him long before last night. I find that for whatever reason you are trying to delay these proceedings, I don't know if that's strategic or if it's designed for some other reason, but I am not going to permit you to do it.

Your request for a continuance is denied. Your request for a rule to show cause is denied."

Defendant then rested, calling the absent Madison as his sole witness.

The jury acquitted defendant of two counts of attempted first degree murder, but convicted him of two counts of aggravated battery with a firearm. The trial court sentenced defendant to two

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consecutive six-year prison terms. Defendant filed a motion to reconsider, which was denied. He now appeals claiming the State did not meet its burden of proof; that the trial court's denial of a trial continuance was an abuse of discretion; and that the State's evidence was insufficient to support consecutive sentences.

## ANALYSIS

### A. The State Met Its Burden of Proof

Defendant maintains the State did not prove him guilty beyond a reasonable doubt because out of the 20 or more people at the scene of the shooting the State called only three witnesses at trial, who were repeatedly impeached, and did not have any corroborating physical evidence. "On review, a criminal conviction will not be set aside on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt." *People v. Tye*, 141 Ill. 2d 1, 13 (1990).

"In assessing whether the evidence against a defendant was sufficient to prove guilt beyond a reasonable doubt, a reviewing court must view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. [Citation.] A defendant's conviction should not be set aside on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt about the defendant's guilt." *People v. Carini*, 254 Ill. App. 3d 1, 9 (1993).

While there may have been 20 or more witnesses to the shooting here, the State was not required to

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call each of them to testify in order to prove its case. “An identification by even one credible witness who had a good opportunity to view defendant under circumstances which would permit a positive identification is sufficient to sustain a verdict of guilty.” *People v. Rodriguez*, 89 Ill. App. 3d 941, 944 (1980). Here, Devline, Cordero, and Jody identified defendant as the shooter.

Defendant claims, however, that Cordero, Devline, and Jody’s testimony should be disregarded as unconvincing and contrary to human experience because none of them explained why defendant supposedly shot Cordero and Devline instead of Madison, who was standing only a few houses away from them. According to defendant: “There was no evidence presented at trial to indicate that Cordero and Devline even spoke to defendant that night. Further, there was no evidence that there were any prior altercations between Cordero, Devline, and defendant. The argument that night was solely between defendant and Pierre Madison.” It is true that “[w]here the State’s evidence is improbable, unconvincing and contrary to human experience, we have not hesitated to reverse the judgments of conviction.” *People v. Dawson*, 22 Ill. 2d 260, 265 (1961). Reversal is unwarranted here, however, for although defendant’s motive was not established, the State was not required to prove *why* defendant shot Cordero and Devline in order to convict him of aggravated battery with a firearm. The State merely had to “prove beyond a reasonable doubt that [defendant] intentionally discharged a firearm while committing a battery, causing an injury to another person.” *People v. White*, 293 Ill. App. 3d 335, 338 (1997). “A battery is committed when one intentionally or knowingly causes bodily harm to another without legal justification.” *People v. Burdine*, 362 Ill. App. 3d 19, 23 (2005). Here, three witnesses testified that defendant, in response to a trivial argument, aimed a gun at Cordero and Devline, said something to the effect of, “Talk that sh\*t now,

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pussies,” and fired. Devline was looking directly at defendant when defendant shot him in the left ankle, and Devline, Cordero, and Jody each identified defendant as the shooter in an in-person lineup. The State’s evidence sufficiently established that defendant, whatever his motive, intentionally shot Devline and Cordero.

While there were certainly some inconsistencies in the witnesses’ testimony:

“To the extent that testimony is conflicting, it is the province of the trier of fact to resolve the conflict and decide which witness or witnesses will be believed. [Citation.] Conflict in testimony does not in itself establish a reasonable doubt of defendant’s guilt. [Citation.] Discrepancies in testimony, such as those argued by defendant [here], do not destroy the credibility of the witnesses but go only to the weight to be afforded to their testimony. [Citation.] When the trier of fact renders a decision based upon credible and substantial evidence which is sufficient to convict, the verdict may not be set aside merely because of minor inconsistencies, such as those in the case at bar, which the trier of fact properly chose to resolve in favor of the State. [Citation.] It is sufficient if all the evidence, taken together, satisfies the trier of fact beyond a reasonable doubt of the accused’s guilt. Proof of guilt beyond a reasonable doubt does not require proof beyond any possibility of a doubt.” *People v. Hine*, 88 Ill. App. 3d 671, 676 (1980).

The fact that Devline, Cordero, and Jody were all friends and relatives does not create reasonable doubt; it is merely a factor that the jury may weigh in assessing the weight and credibility of their testimony. We find the evidence here, viewed in the light most favorable to the State, sufficient to

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support defendant's convictions.

B. The Trial Court Did Not Err in Denying a Trial Continuance

"It is well settled that the granting or denial of a continuance is a matter resting in the sound discretion of the trial court, and a reviewing court will not interfere with that decision absent a clear abuse of discretion." *People v. Walker*, 232 Ill. 2d 113, 125 (2009).

"In reviewing the denial of a request for a continuance sought to secure the presence of a witness, the factors to be considered are: (1) whether defendant was diligent; (2) whether defendant has shown that the testimony was material and might have affected the jury's verdict; and (3) whether defendant was prejudiced." *People v. Ward*, 154 Ill. 2d 272, 307 (1992).

The trial court properly addressed these factors here, establishing both lack of diligence by defense counsel and the relative insignificance of the proffered testimony. Defense counsel chose not to subpoena Madison before trial. That choice, which he later regretted, apparently, falls well short of establishing diligence, especially as this was an older case that had been set for trial on several prior occasions. That defense counsel apparently thought that the State would call Madison to testify is no excuse for depending on them to do so.

Furthermore, Madison's testimony, as proffered by defense counsel, was insignificant:

"If called to testify Pierre Madison would testify -- One moment, please. -- that he had an argument with Durell [*sic*] Smith, that he doesn't recall what they were arguing about, that he didn't think that the argument was too serious and didn't worry about it, that he identified on June 29, 2007 Durell Smith as the person who shot

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Cordero and Devline.

He will go on to testify that he did not want to identify Durell Smith as he had not been there to witness the shooting. He said that he did not know who had shot them. He said that he only identified Durell Smith after repeatedly being harassed by a detective who kept telling him that he knew that Pierre had seen Durell shoot them. He said that he got tired of being yelled at and threatened so he finally said, okay, if that is what I got to do to get of here then, yes, I saw Durell Smith shoot Cordero and Devline. He said that he was later allowed to leave but does not plan to go to court to testify against him because he does not know who did shoot them. That would be the sum and substance of his testimony.”

This evidence, if admitted, would have simply first established an identification of defendant as the shooter for the sole purpose of then impeaching that identification. In no way would this have undercut the testimony of the three witnesses who did identify defendant at trial, each of whom were confronted, and were not successfully impeached. We cannot say that defendant was prejudiced by the exclusion of Madison’s testimony. The trial court did not abuse its discretion in denying defendant’s motion for a trial continuance. We affirm defendant’s conviction.

#### C. Defendant’s Sentence Is Affirmed

“A trial court’s sentencing decision is entitled to great deference and will not be disturbed absent a showing of abuse of discretion.” *People v. Primm*, 319 Ill. App. 3d 411, 425 (2000). Section 5-8-4(a) of the Unified Code of Corrections mandates consecutive sentences where “one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony

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and the defendant inflicted severe bodily injury.” 730 ILCS 5/5-8-4(a) (West 2008). Defendant was convicted of two counts of aggravated battery with a firearm—Class X offenses. *People v. Lee*, 213 Ill. 2d 218, 228 (2004). He maintains “the trial court erred in holding that Devline Johnson suffered a severe bodily injury,” the trial court’s basis for imposing consecutive sentences. We disagree.

The severity of a victim’s injury for purposes of section 5-8-4(a), “being factual in nature, is best left to the trier of fact. In this case, the trial court was in the best position to evaluate all the relevant factors and determine whether or not the injuries were severe.” *People v. Austin*, 328 Ill. App. 3d 798, 808 (2002). We agree with the trial court that Devline was severely injured. He was shot in the ankle and was hospitalized for three days. He underwent surgery, during which doctors placed three rods and a plate in his leg. He received multiple stitches and staples in his leg. He needed to use crutches for five months after the shooting, and as of the time of his testimony at trial he still could not run or bend his ankle.

Defendant maintains, however, that because the only evidence at trial regarding the alleged severity of Devline’s injuries was his own testimony, consecutive sentences were inappropriate. According to defendant:

“[W]hen consecutive sentences are mandated, such as in the present case, there must be more evidence than the testimony of the victim to establish severe bodily harm. Mr. Johnson is not a doctor and his testimony that rods and a plate were put in his ankle is simply hearsay. Further, there was no proof that he was actually on crutches for five months or that he can no longer run. Surely, some medical evidence must be presented to validate the imposition of a mandatory consecutive sentences.”

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Defendant did not, however, object to Devline's testimony when it was offered, forfeiting his purported hearsay claim. *People v. Thomas*, 137 Ill. 2d 500, 524 (1990). As for the medical evidence, section 5-8-4 does not on its face require such evidence and defendant does not cite, nor are we aware of, any authority imposing such a requirement. To the contrary, in *People v. Williams*, 335 Ill. App. 3d 596, 599-601 (2002), we affirmed a trial court's finding of severe bodily injury with respect to one of three victims despite the noted absence of any medical testimony or hospital records at trial regarding the victims' injuries. The testimony here was sufficient to sustain defendant's sentence, which we affirm.

#### CONCLUSION

Defendant's conviction and sentence are affirmed. The State proved him guilty beyond a reasonable doubt of two counts of aggravated battery with a firearm. The trial court did not err in denying defendant's motion for a trial continuance or imposing consecutive sentences.

Affirmed.