2012 IL App (1st) 102364-UB

SECOND DIVISION
Rule 23 Order filed July 31, 2012
Modified upon denial of rehearing September 18, 2012

No. 1-10-2364



---

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. 07 CR 19553 |
| | ) | |
| RICKEY MCGEE, | ) | Honorable |
| | ) | Mary Margaret Brosnahan, |
| Defendant-Appellant. | ) | Judge Presiding. |

---

JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

**O R D E R**

¶ 1 *HELD*: Defense counsel was not ineffective for not presenting a theory of self-defense where evidence did not support it and trial court's failure to ask defendant whether he agreed to defense counsel's tender of a second degree murder instruction was not grounds for reversal. Further, the trial court did not violate Supreme Court Rule 431(a) in denying defense counsel's request to directly question potential jurors about the *Zehr* principles, which court had already addressed, and defendant's seventeen-year sentence was proper.

¶ 2 Following a jury trial defendant, Rickey McGee, was convicted of second degree murder (720 ILCS 5/9-2 (West 2006)), in the shooting death of Dudley Vivetter, and was subsequently sentenced by the trial court to 17 years in prison. On appeal, defendant contends that his conviction should be reversed and the case remanded for a new trial because: (1) he received ineffective assistance of trial counsel where his attorney failed to present a theory of self-defense and argued during closing argument that someone else may have shot the victim; (2) the trial court erred by failing to ask defendant whether he agreed to defense counsel's tender of a second degree murder instruction, as required by *People v. Medina*, 221 Ill. 2d 394, 409 (2006); and (3) the trial court violated Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)), by refusing to allow defense counsel to directly question potential jurors about the *Zehr* principles during *voir dire*. Alternatively, defendant asserts that his sentence should be reduced to four years because the trial court erroneously used the victim's death, which was an element of the offense, as an aggravating factor. For the reasons set forth below, we affirm the trial court.

¶ 3 I. Background

¶ 4 The record shows that on March 16, 2006, at approximately 9 p.m., defendant shot and killed 22-year-old Dudley Vivetter at 2420 South State Street in Chicago, the site of the Harold Ickes Homes housing project, which was subsequently demolished in 2009. The shooting occurred after the victim and defendant, who knew each other for many years and had dealt drugs together, argued over money. Four of the victim's friends, namely, Antonio Smith, Clinte Smith, Mahdee McWilliams, and Devon Tall, witnessed the shooting. Defendant fled and was arrested on August 27, 2007, in Kankakee, Illinois, where he was being held under an alias on an

unrelated narcotics case. Defendant was charged by indictment with first degree murder of Vivetter (720 ILCS 5/9-1(A)(1) & (A)(2) (West 2006)); attempted first degree murder of the four witnesses (720 ILCS 5/8-4A/9-1(A)(1) & (A)(2) (West 2006); and aggravated discharge of a firearm (720 ILCS 5/24-1.2(A)(2) (West 2006)). The State dismissed the attempted first degree murder count and aggravated discharge of a firearm count before the trial commenced.

¶ 5 Prior to trial, defendant filed a motion to suppress videotaped statements he gave to the police, arguing that they were obtained in violation of his *Miranda* rights. The trial court did not rule on that motion because the State agreed not to introduce the videotapes in their case in chief. Defendant also disclosed evidence of violent acts committed by the victim and his friends that he planned to introduce at trial under *People v. Lynch*, 104 Ill. 2d 194 (1984), to show that they were the initial aggressors. The State argued that the *Lynch* material was inadmissible because they would not dispute that the victim was the initial aggressor and because they had dismissed the attempted murder and aggravated discharge of a firearm counts involving the victim's friends. The trial court declined to give a pretrial ruling on the *Lynch* material, finding that it would be premature to rule on its admissibility before the witnesses testified at trial.

¶ 6 At trial, Zackia Fitzgerald testified that she lived with her mother, sisters, and daughter in apartment 906 in the Ickes Homes. On March 16, 2006, at approximately 9 p.m., she was home with her four-year-old daughter when defendant came by to fix a DVD player in her mother's bedroom. A short while later, Clinte Smith, Antonio Smith, and Devon Tall came to the apartment with Fitzgerald's younger sister. They were sitting in the living room talking when Fitzgerald heard loud male voices coming from the bedroom. She then heard Antonio Smith tell

the men in the bedroom to leave the apartment, which they did. She said that Antonio stayed in the apartment for a few seconds but then he said that he was going to be nosey and went out into the hallway. Fitzgerald said she then heard a firecracker noise in the hallway. Shortly thereafter, Mahdee McWilliams came back into the apartment and told her that defendant had shot Vivetter. Fitzgerald testified that McWilliams was hysterical and kept saying "Rick just shot [Vivetter]" over and over. Fitzgerald said that McWilliams told her not to go into the hallway until she heard voices again. She said that when they eventually left the apartment, she walked toward the stairwell, looked down, and saw Vivetter laying face down on the eighth floor. Fitzgerald testified that she spoke to the police that night and several times afterwards, and that they showed her pictures of McWilliams, Tall, and Clinte Smith, all of whom she identified as being in her apartment on the night of the shooting. She stated that none of them had a weapon that evening.

¶ 7 Next, Antonio Smith testified that in March 2006, he lived at 5546 South Emerald in Chicago, but stayed with his mother and sister who lived at the Ickes Homes. He said that Dudley Vivetter was his friend and that they sometimes sold drugs together. On the evening of March 16, 2006, he was drinking with Mahdee McWilliams in the lobby of the building when Devon Tall and Vivetter came into the lobby. Antonio's brother Clinte also arrived and the five men went up to the ninth floor to hang out in apartment 906, where Lavita Johnson and her daughters Zackia and Zakina Fitzgerald lived. Smith said that Vivetter was going up to the apartment 906 because Tall had called him and told him that defendant was there and that the two men were having a dispute over money. Smith said that when they got to the apartment, Vivetter went into the bedroom and began to argue with defendant. Lavita asked them to leave

and when they would not, Antonio went into the bedroom and told them to go out in the hallway because they were using foul language while children were in the apartment.

¶ 8 Antonio testified that Vivetter went into the hallway and was followed by defendant, McWilliams, Clinte Smith and Devon Tall. Antonio said that as defendant was leaving the apartment he stopped in front of McWilliams with his hand in the front pocket of his hooded sweatshirt and looked him up and down. Antonio told McWilliams and the other men that he thought defendant had a gun but they disagreed, saying "he ain't got one." Antonio said that neither he nor the other men had a gun or any other weapon. After the other men left the apartment, Antonio waited 10 to 15 seconds and then followed them out because he said he was worried defendant had a gun. Antonio was walking to the end of the hallway when he saw defendant push Vivetter and then saw Vivetter punch defendant in the face. Defendant bounced against the wall, pulled a gun out of his pocket, and shot Vivetter in the left side of the chest. Antonio testified that the gun was a silver .380-caliber semiautomatic handgun with a black handle, which he had seen defendant holding a week earlier. Antonio said that he then ran down the back stairs and to the next building to tell Vivetter's family what happened. He did not talk to the police that night but spoke with them the next day, while they were meeting with Vivetter's family. He said he told the police what he saw the night before, identified defendant as the shooter, and told them that Clinte Smith, Tall, and McWilliams were also witnesses. On cross-examination, Antonio said that he did not tell the police that defendant shot at him, Clinte Smith, or Devon Tall. He also stated that as defendant and Vivetter left the apartment, Vivetter was between himself and the elevator and one staircase but was not blocking the second staircase.

¶ 9 Clinte Smith testified that in March 2006, he was living at the Ickes Homes with his sister and that he knew defendant and saw him frequently around the housing project. He also knew Dudley Vivetter, with whom he sold drugs. On March 16, 2006, at approximately 9 p.m., he entered the lobby of the Ickes Homes through the back door and saw his brother, Antonio Smith, Vivetter, Devon Tall, and Mahdee McWilliams. Vivetter told him he was going to go to the ninth floor to talk to defendant about money defendant owed him. Clinte said he got on the elevator with Vivetter and that they smoked marijuana on the way up. The other men took the stairs, and they all went into apartment 906. Clinte testified that Vivetter went into the bedroom to talk to defendant. After a few minutes, Antonio told defendant and Vivetter to take it outside, and he saw Vivetter leave followed by defendant, then McWilliams, Tall, Clinte, and Antonio Clinte testified that defendant had his back to the wall and Vivetter was two or three feet in front of him. He then saw defendant reach inside his sweatshirt pocket, pull out a silver .380 and shoot Vivetter. Clinte ran down the back stairs and out of the building, where he stayed for about five minutes before going back inside to check on Vivetter. He found Vivetter on the eight floor lying face down. Clinte stayed there until the ambulance took Vivetter away and then went to his mother's house. He said he did wait around to talk to the police because he did not want to get a bad reputation. He eventually spoke to the police in September 2006, while he was in custody on another case. He identified defendant as the man who shot Vivetter from a police photo.

¶ 10 On cross-examination, Clinte said that he never saw Vivetter push or punch defendant and that he first saw the gun when he came around the corner in the hallway. He said that his brother told him and the others that he thought defendant had a gun, but they disagreed. He also

testified that after defendant shot Vivetter, he and the other men ran and defendant chased them firing four or five more shots and shouting "you bitch ass niggas want to help or something."

¶ 11 Mahdee McWilliams testified that on March 16, 2006, he was hanging out with friends at the Ickes Homes when Vivetter came into the lobby at approximately 9 p.m. The men decided to go up to the ninth floor to hang out. McWilliams said that when they entered apartment 906, Vivetter went into the bedroom to talk to defendant. He said that he did not know what they were talking about but that the conversation got loud, and Antonio told them to step outside because there were children in the apartment. McWilliams testified that Vivetter walked out of the apartment first and was followed by defendant. Antonio told McWilliams that defendant might have a gun but McWilliams said he did not believe it. McWilliams went out into the hallway and was followed by Tall, Clinte, and Antonio. McWilliams said he was about six to eight feet from where defendant and Vivetter were standing in the hallway and that the two men talked for about 10 to 15 seconds when defendant shoved Vivetter. Vivetter then punched defendant in the face. McWilliams said defendant fell back against the wall, then pushed off the wall, pulled a gun out of the pocket of his hooded sweatshirt with his right hand and shot Vivetter on the left side of the chest. McWilliams testified that the gun was silver with a black handle. McWilliams said that after he heard the gunshot, he saw defendant coming toward him and ran down the back stairs to the seventh or eighth floor. He then switched to the front stairway because defendant was chasing him. While running away, he ran into Tall, who was also fleeing from the defendant, and they bumped heads. McWilliams said he then went back up to the ninth floor and ran back into apartment 906 and told Zackia Fitzgerald to lock the door and

call the police because Vivetter "just got shot" and that defendant "just shot him." About 15 to 20 minutes later, McWilliams left the apartment and walked toward the back stairs, where he saw Vivetter lying on the ground. He heard a commotion and saw the paramedics arrive. McWilliams left the scene and went home without talking to the police. McWilliams first spoke to the police on September 11, 2006, while he was in custody on an unrelated case. The police showed him a photograph of defendant, and he identified him as the man who shot Vivetter. He said that on the night Vivetter was shot none of the men had any kind of weapon.

¶ 12 Chicago police detective David March testified that on March 16, 2006, he and his partner were assigned to investigate a shooting at 2420 South State Street. They found Vivetter's body laying in the eighth floor stairwell, and at the time, thought the shooting occurred on the eighth floor. They searched for firearms evidence but did not find anything. The also canvassed the seventh, eighth, and ninth floor for witnesses but no one came forward with information. The next day, March met with Antonio Smith about two miles from the scene of the shooting because Antonio did not want to be seen talking to the police. March showed Antonio a photo of the defendant, and Antonio identified him as the man who shot Vivetter. March put out an investigative alert on defendant. On cross-examination, March said that he first learned that the shooting occurred on the ninth floor while talking to Smith and that Smith did not tell him that anyone else had witnessed the shooting or that defendant shot at anyone other than Vivetter.

¶ 13 Medical Examiner Kendall Crowns testified that he performed the autopsy on Vivetter, who died of a single gunshot wound to the chest. The wound exhibited contact range firing, which means that the shooter pressed the gun tightly against the body. He opined that at the time

it was fired, the gun was up against the left chest and slightly tilted downwards.

¶ 14 Chicago Police Detective Raymond Schnoor testified that on March 17, 2006, he was assigned to continue the investigation of the Vivetter murder. He and his partner went to the eighth floor of the building, where they believed the shooting occurred. They also went to apartment 307 and spoke with Vivetter's sister, Latrice Vivetter, and her cousin, Melissa Green. While they were there, Antonio Smith came to the apartment to talk to them. The officers then followed Antonio to the ninth floor, where Antonio described what happened and told Schnoor that defendant shot Vivetter. He did not tell the officers that anyone else had been present during the shooting or that before the shooting, he believed defendant had a gun. He told Schnoor that he had been with defendant and Vivetter in apartment 906 just before the shooting. He also told Schnoor that the gun defendant used was a .380 silver handgun and that it was the same gun he had seen defendant with a week earlier.

¶ 15 Schnoor then went to apartment 906 and spoke to Lavita Johnson, who told him that on the night of the shooting, defendant was in her apartment fixing her DVD player, but she was not home. In March 19, 2006, Schnoor returned to the building and was on the ninth floor looking for witnesses when he was approached by a man named Alvin Johnson, who handed him a .380 cartridge casing, wrapped in a napkin, and told him that he found it on the ninth floor. Schnoor and his partner continued to look for firearm evidence on the ninth floor and in the two stairwells. They found several bullet holes but nothing that could be traced to the shooting. Schnoor took the .380 cartridge casing to the police station and inventoried it.

¶ 16 On May 18, 2006, Schnoor spoke with Zackia Fitzgerald, who told him about the events

leading up to the shooting and about the men in her apartment that night, whom she subsequently identified in photographs. On September 11, 2006, Schnoor was notified that Mahdee McWilliams was in custody and went to speak to him. He showed McWilliams a photo array and McWilliams identified defendant as the man who shot Vivetter. On September 12, 2006, Schnoor spoke with Clinte Smith, who also was in custody. Clinte gave a description of the shooting and identified defendant as the shooter from a photo array. Schnoor said that an arrest warrant for defendant was issued on June 1, 2007. On August 27, 2007, Schnoor learned that defendant was located in Kankakee, Illinois under a different name.

¶ 17 Bryan Mayland, a forensic scientist with the Illinois State Police, testified that he received a fired bullet from the Chicago Police Department and determined that it was fired from a .380-caliber gun. The parties stipulated that the bullet came from the medical examiner's office, where it was taken out of Vivetter's body. Mayland also testified that he received one fired cartridge case and determined that it was a Winchester brand, .380 auto caliber fire cartridge case. He said that the bullet he received would fit in the cartridge case but that he could not say whether the bullet recovered from Vivetter's body came from the recovered cartridge case.

¶ 18 The parties stipulated that Antonio Smith testified before the grand jury on May 31, 2007, and stated that the gun he saw defendant use was a .380-caliber and was the same gun he had seen defendant with the week before, but that he did not testify that he saw defendant push Vivetter. It was also stipulated that on June 18, 2007, McWilliams testified before the grand jury that Vivetter and defendant were arguing over money and drugs.

¶ 19 The State rested, and defense counsel made a motion for a directed finding of acquittal,

which the trial court denied. The defense rested without presenting any witnesses.

¶ 20 On May 27, 2010, defense counsel informed the court that "[a]fter consulting with my client, we have decided to ask for a second degree [murder] instruction." He also stated that he would not be asking for a self-defense instruction. In making his argument, defense counsel stated that "the evidence would show based on the prosecution's witnesses that Dudley Vivetter punched Rickey McGee shortly before the shooting, and there were four other people present, the testimony shows, that were drug dealers who dealt drugs with Rickey McGee. Therefore, the jury might reasonably conclude that he was under attack by five people and had an unreasonable belief that he had to defend himself. The trial court agreed to give the instruction, stating:

> "Based upon the case law when dealing with giving any lesser included offenses, it's clear that if there is evidence, however slight is the language, that the court should give it. So, I believe that the evidence in the record, it may be slight, but that's ultimately for the fact finder to determine what that means. I will give that instruction."

¶ 21 During closing, defense counsel argued, in part, that Vivetter was accidentally shot by Mahdee McWilliams, who tried to come to Vivetter's aid while he was fighting with defendant.

¶ 22 Following closing arguments, the jury found defendant guilty of second degree murder. Defendant filed a motion for a new trial, which the trial court denied. At the sentencing hearing, the State presented a victim impact statement from Vivetter's cousin, and defense counsel presented defendant's daughter and his cousin's husband as mitigating witnesses. After hearing evidence in aggravation and mitigation and defendant's allocution, the trial court sentenced defendant to 17 years' imprisonment. Defendant filed a motion to reconsider his sentence,

arguing that the court "improperly considered in aggravation matters that are implicit in the offense." The trial court denied defendant's motion. This appeal followed.

¶ 23 II. Analysis

¶ 24 On appeal, defendant first contends that he received ineffective assistance of counsel because his attorney failed to present a theory of self-defense. The State asserts that defense counsel's decision not to pursue a self-defense theory but instead to argue a theory of second degree murder based on defendant's unreasonable belief that he had to use deadly force in self-defense was an exercise of sound trial strategy and did not prejudice defendant.

¶ 25 The sixth amendment to the Constitution "recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An accused is entitled to "reasonably effective assistance," and the touchstone for judging claims of ineffective assistance is whether an attorney's conduct renders the trial results undependable. *Id*. at 687. The standard for an ineffective assistance claim has two prongs. *Strickland,* 466 U.S. at 687 (adopted by *People v. Albanese*, 104 Ill. 2d 504 (1984)). First, a defendant must demonstrate that counsel's performance was deficient by showing that "counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. Second, a defendant must also demonstrate prejudice by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In determining whether a defendant has received ineffective assistance of counsel, a reviewing court may review either prong first, and the court

need not consider both prongs of the standard if a defendant fails to show one prong. *Id.* at 697.

¶ 26 Under the first prong, counsel is afforded wide latitude when making tactical decisions and the law presumes that counsel will faithfully fulfill his or her role envisioned by the sixth amendment. *Id*. at 688-89. Hence, counsel's assistance must fall "outside the wide range of professionally competent assistance" considering all the circumstances. *Id*. at 690. Further, choices of trial strategy are virtually unchallengeable because such a choice "is a matter of professional judgment to which a review of counsel's competency does not extend." *People v. Cundiff*, 322 Ill. App. 3d 426, 435 (2001). "Trial strategy includes an attorney's choice of one theory of defense over another." *People v. Campbell*, 264 Ill. App. 3d 712, 732 (1992).

¶ 27 Defendant contends that the evidence strongly supported a claim of self-defense and therefore, there was a reasonable probability that he would have been acquitted if his trial counsel had argued that he shot Vivetter in self-defense. The elements of self-defense are: (1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable. *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Once a defendant raises the affirmative defense of self-defense, the State then has the burden of proving beyond a reasonable doubt that he did not act in self-defense. *Id.* at 224. If the State negates any of the elements of self-defense, the defendant's claim must fail and the trier of fact must find him guilty of either first or second degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 128 (1995). A person commits the offense of

second degree murder when he commits the offense of first degree murder and was acting under a sudden and intense passion resulting from serious provocation or unreasonably believed that circumstances existed that would excuse his actions as a justifiable use of force. 720 ILCS 5/9-2 (West 2008).

¶ 28 Here, defendant asserts that the evidence showed that Vivetter, who was much larger and more than 20 years younger than defendant, was angry at defendant over a drug debt, stalked him to the ninth floor, led him into the hallway, and punched him in the face, while four friends and drug-dealing partners approached. Defendant contends that these circumstances led him to believe reasonably that it was necessary to use force to prevent his own imminent death or great bodily harm. Defendant asserts that the fact that the jury found him guilty of second degree murder rather than first degree murder, even though his attorney presented no evidence of self-defense, shows that the evidence of self-defense was strong and that the jury would likely have found that the use of force was justified.

¶ 29 After a careful review of the briefs and record, we are not persuaded by defendant's argument. First, based on the evidence presented at trial, the State could negate several elements of a claim of self-defense, namely that defendant had an objectively reasonable belief that a danger existed that required the use of force applied, where defendant shot an unarmed man. The evidence showed that defendant walked past two exits on his way from Fitzgerald's apartment to the area where he shot Vivetter and that Vivetter was not standing between defendant and the nearest exit in the lobby. If defendant felt his life was in danger, he could have attempted to use one of those exits. Further, although defendant claims that the fact that Vivetter punched him in

the face, in the presence of four of Vivetter's friends, led defendant to believe reasonably that it was necessary to use force to prevent his own imminent death or great bodily harm, the evidence showed that neither Vivetter nor his friends were armed. Hence, if defendant did believe that he needed to use self-defense, that belief was not reasonable. Thus, based on the evidence at trial, defense counsel's decision not to present a theory of self-defense was not objectively unreasonable.

¶ 30 In addition to not being able to establish that his trial counsel's performance was deficient, defendant also cannot establish prejudice under *Strickland* because he cannot show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 688. As noted, above, the undisputed evidence at trial showed that after Vivetter punched defendant in the face, defendant immediately reached into his pocket, pulled out a gun and shot Vivetter in the chest, killing him. There was no evidence that Vivetter or any of his friends were armed. The evidence also showed that there were means for defendant to leave the scene, through two exit doors he passed on the way from the apartment to where he shot Vivetter, negating an argument that the use of force was necessary and objectively reasonable. Therefore, because the evidence did not support a claim of self-defense, and at best supports a claim that defendant has an unreasonable belief that self-defense was necessary, there is not a reasonable probability that the result of the proceeding would have been different had his counsel raised a theory of self-defense. *Id.*

¶ 31 Defendant also argues that his lawyer was ineffective for arguing for the first time in closing that Mahdee McWilliams or one of Vivetter's other friends who witnessed the shooting

may have accidentally shot Vivetter. Defendant asserts that such an argument cannot be deemed sound trial strategy in light of the evidence that he shot Vivetter. Defendant contends that had his trial counsel performed effectively by arguing self-defense rather than distracting the jury with the argument that Mahdee McWilliams was the shooter, there is a reasonable likelihood that he would have been acquitted.

¶ 32 The evaluation of counsel's conduct cannot properly extend into areas involving the exercise of professional judgment, discretion or trial tactics. *People v. Franklin*, 135 Ill. 2d 78, 119 (1990) (finding that defendant was not denied his sixth amendment right to counsel where defense counsel made disparaging remarks about him in closing argument in an effort to appeal to the jury's sense of morality). Here, in closing argument, trial counsel suggested that the forensic evidence and inconsistencies in the eyewitnesses' testimony supported a finding that someone other than defendant was the shooter. In doing so, trial counsel tried to cast doubt on the witnesses' testimony and veracity and exploit weaknesses in the State's evidence. This position was a matter of trial strategy. The fact that the strategy was not successful does mean that defense counsel was ineffective. Further, defendant has failed to show that he was prejudiced by his counsel's closing argument because, as discussed above, it is unlikely that the outcome of the trial would have been different absent this closing argument. *Strickland,* 466 U.S. at 688. Therefore, defendant has failed to establish that his defense counsel was deficient or that he was prejudiced by his counsel's performance.

¶ 33 The second issue raised by defendant involves jury instructions. Defense counsel submitted jury instructions on first and second degree murder. Defendant contends that the trial

court was required to determine whether he agreed to the issuance of a second degree murder instruction, citing *People v. Medina*, 221 Ill. 2d 394, 409 (2006), which held that where a lesser-included offense instruction is tendered, the trial court should ask defense counsel, in defendant's presence, whether counsel has informed defendant of the potential penalties associated with the lesser offense and that the court also must ask defendant whether he agrees with the tender. Defendant concedes that he failed to preserve this issue for review but asks this court to review the issue under the plain-error doctrine. In *People v. Herron*, 215 Ill. 2d 167 (2005), our supreme court held that the plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Id.* at 187. However, before conducting a plain error analysis, we must determine whether an error in fact occurred. *People v. Sims*, 192 Ill. 2d 592, 621 (2000).

¶ 34 In *Medina*, the supreme court noted that the decision whether to tender a lesser included offense instruction ultimately belongs to the defendant. *Medina*, 221 Ill. 2d at 403-04. (Citing *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994). The court reasoned that "if the defendant chooses to submit a lesser-included offense instruction, he is acknowledging, indeed arguing, that the evidence is such that a rational jury could convict him of the lesser-included offense, and he is exposing himself to potential criminal liability, which he otherwise might avoid if neither the trial judge nor the prosecutor seeks the pertinent instruction." *Medina*, 221 Ill. 2d at 405. "Consequently," the court concluded, "when a lesser-included offense instruction is tendered, we believe the trial court should conduct an inquiry of defense counsel, in defendant's presence, to

determine whether counsel has advised defendant of the potential penalties associated with the lesser-included offense, and the court should thereafter ask defendant whether he agrees with the tender." *Id.* at 409 (in *Medina*, no lesser included instructions was tendered, thus the court concluded that no inquiries were necessary).

¶ 35 The State asserts that there is no rationale for extending the reasoning used in *Medina* regarding lesser *included* offenses to a tender of instructions on second degree murder, which is a lesser *mitigated* offense. This issue was recently addressed by the appellate court in *People v. Wilmington*, 2011 Ill. App. (1st) 72518 B. In *Wilmington*, the appellate court held that "in the absence of a clear statement from our supreme court, we will treat the tender of a lesser mitigated offense instruction in a manner consistent with the tender of a lesser included offense instruction." Therefore, the court concluded, "under *Medina*, the circuit court erred in not questioning defense counsel in Wilmington's presence regarding the tender of the lesser mitigated offense instruction and also by not asking Wilmington whether he agreed with the tender." *Id.*[1] However, the *Wilmington* court further noted that in the context of admonishments related to guilty pleas, the supreme court has noted that the failure to properly admonish the defendant is not reversible error unless real justice has been denied or the defendant was prejudiced by the error. *Id.* (citing *People v. Whitfield*, 217 Il. 2d 177, 195 (2005). The *Wilmington* court concluded that giving a second degree instruction without ascertaining whether defendant agreed with its tender did not prejudice defendant or render the proceedings unfair because it is extremely unlikely that the jury would have returned a verdict of not guilty

[1] The Illinois Supreme Court has granted a petition for leave to appeal.

had the instruction not been given, where the defendant acknowledged shooting the victim and critical details of his statement were independently corroborated. *Id*.

¶ 36 Similarly, in this case, even if the trial court erred in giving the second degree instruction without ascertaining whether defendant agreed with its tender, an issue that is currently before our supreme court, this error did not prejudice defendant or render the proceedings fundamentally unfair, where defense counsel said in defendant's presence that he was asking for a second degree murder instruction after having discussed the matter with defendant and where the evidence made it extremely unlikely that the jury would have returned a verdict of not guilty had the instruction not been given. Indeed, it is apparent from the record in this case that had defense trial counsel failed to ask that the jury be instructed as to second-degree murder, the jury very likely would have convicted the defendant of first-degree murder. Therefore, any error by the circuit court was not so fundamental that it rendered the proceedings unfair or challenged the integrity of the judicial system.

¶ 37 Defendant next asserts that the trial court violated Illinois Supreme Court Rule 431(a) by refusing to allow his attorney to directly question potential jurors during *voir dire* about the principles set forth in *People v. Zehr*, 103 Ill. 2d 472 (1984). In *Zehr*, our supreme court held that "essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him." *Id.* at 477. In response to *Zehr*, Supreme Court Rule 431(b) was amended in 1997 to provide that, if requested by the defendant, the trial court was required to ask

jurors, individually or in a group, whether they understood and accepted the *Zehr* principles. Ill. S.Ct. R. 431(b) (eff. May 1, 2007). In 2007, Rule 431(b) was amended again to impose "an affirmative *sua sponte* duty on the trial court to ask potential jurors in each and every case whether they understand and accept the *Zehr* principles." *People v. Graham*, 393 Ill. App. 3d 268, 273 (2009). Rule 431(b) currently provides as follows:

> "The court shall ask each potential juror, individually or in a group, whether that juror, understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S.Ct. R. 431(b) (eff. May 1, 2007).

¶ 38 The trial court has discretion to decide whether to allow lawyers to conduct supplemental *voir dire* of prospective jurors. Illinois Supreme Court Rule 431(a) provides, in relevant part:

> "The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit the parties to supplement the

> examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges." Ill. S. Ct. R. 431(a) (eff. May 1, 2007).

¶ 39 In *People v. Garstecki*, 234 Ill. 2d 430 (2009), our supreme court recently addressed defendant's argument that the trial court erred in denying his attorney's request to pose supplemental questions directly to the entire venire during *voir dire*. In *Garstecki*, the defendant was convicted of driving under the influence of alcohol and argued on appeal that, pursuant to the 1997 amendments to Supreme Court Rule 431, the trial court was required to allow his attorney to participate in *voir dire*. *Id.* at 432. Our supreme court held that Rule 431 "clearly mandates" that the trial court consider: (1) the length of the examination by the court; (2) the complexity of the case; and (3) the nature of the charges. *Id*. at 444. The trial court must then determine, based on those factors, whatever direct questioning by the attorneys would be appropriate. *Id*. Trial courts may not simply dispense with attorney questioning whenever they want. *Id*. Instead, " 'the trial court is to exercise its discretion in favor of permitting direct inquiry of jurors by attorney.' " *Id.* (quoting *People v. Allen*, 313 Ill. App. 3d 842, 847 (2000)). However, our supreme court also noted the limits of its decision, stating that it was not excluding the possibility that a trial court could properly determine, after considering the above factors, that no attorney questioning would be necessary. *Id.*

¶ 40 Our supreme court then decided that the trial court had complied with Rule 431(a), because it inquired about the questions that the attorneys wanted to ask, explained that those questions that the attorneys wanted to ask addressed areas that the court was already going to

cover, and inquired whether the case would be complex. Defense counsel agreed that the case did not involve complex issues, and the trial was indeed "an exceedingly simple one," involving only the testimony of the two officers about the traffic stop and arrest, with no issue concerning blood or breath testing. *Garstecki*, Ill. 2d at 444. Further, the trial court allowed the attorneys to ask follow-up questions directly of the eight prospective jurors of concern. Thus, our supreme court found that the court did as the rule mandated–"it considered the appropriate factors and allowed whatever supplemental questioning it deemed appropriate for the case." *Id*. at 445.

¶ 41 In this case, defense counsel argued that in order to explore potential biases, he wanted to ask *Zehr*-related questions that were more detailed than required by Rule 431(b). The trial judge denied his request, stating that only she would ask questions about the *Zehr* principles to the extent required by *Zehr* and its progeny, stating that she did not want a "15 minute conversation with each juror" and that counsel could ask follow-up questions on *Zehr* issues only if the jurors responded equivocally about their understanding or acceptance of the principles. Defense counsel raise the issue again during *voir dire*. The court again stated that it would allow counsel to ask follow-up questions but would not allow him to "go over the same things that I have already gone through." Then, proceeding with *voir dire* in groups of 20 potential jurors, the trial court read the *Zehr* principles, asked the potential jurors to raise their hands if they did not understand each principle and if they did not accept each principle. No one raised their hand. After the trial judge reiterated the *Zehr* principles with each panel of prospective jurors, defense counsel was permitted to conduct questioning of the venire. Defense counsel again objected to not being able to question individual jurors about the *Zehr* principles that had already been

addressed by the trial judge. In response the judge said, "just so the record is clear, of course, had any of those individuals raised their hands and had problems either accepting or understanding those principles, that would have been wide open for you to talk about." Defense counsel then exercised all of his peremptory challenges and raised the issue in his motion for a new trial. The trial court denied that motion stating,

> "First of all, I want to talk about the [*Zehr*] issue and I would say that, counsel, your argument that jurors didn't have an opportunity to respond to the [*Zehr*] questioning is inaccurate. In fact, pursuant to the rule itself, Rule 431, as well as all the recent case law that has come out on [*Zehr*], it is all right to ask the jury as a group. *** With respect to the [*Zehr*] issue, I find that it is wholly without merit."

¶ 42 On appeal, defendant argues that the trial court erred by failing to explicitly consider the complexity of the case, the nature of the charges against defendant, in addition to the length of the examination, as required by Rule 431(a) and *Garstecki*, before denying defense counsel's request to question the venire about the *Zehr* principles. Defendant contends that this constituted reversible error because jurors' knowledge and acceptance of the *Zehr* principles are essential to their qualifications as jurors and effective *voir dire* is the only practical way to root out "prejudice against any of these basic guarantees." *Zehr,* 103 Ill. 2d at 477. We disagree.

¶ 43 The trial court questioned each venireperson as to whether he or she understood and accepted all four *Zehr* principles and allowed them an opportunity to respond. Therefore, the trial court clearly adhered to Rule 431(b) and what is required by *Zehr* and its progeny. We also note that the trial judge did not deny defense counsel the opportunity to question individual jurors

directly. She allowed the questioning until defense counsel asked to repeat questions to individual jurors regarding the *Zehr* principles. We find no error in the refusal of the trial court to allow defense counsel to question prospective jurors as to the *Zehr* principles when they had already been asked by the trial judge. Rule 431(a) provides that the trial court "may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper ***." Here, the trial court explained the *Zehr* principles to the jurors in a group, as permitted by *Zehr* and its progeny, and asked them to raise their hand if they did not understand or accept any of those principles. She indicated that she would allow defense counsel to further question individual jurors who indicated an issue with any of the principles. However, she deemed it unnecessary and improper to supplement her questioning of the venire regarding the *Zehr* principles absent any such issue. In light of the language of Rule 431(a) and the requirements of *Zehr* and its progeny, we find that the trial court did not err in denying defense counsel's request to question the potential jurors individually regarding the *Zehr* principles.

¶ 44 Lastly, defendant contends that his seventeen-year prison sentence is improper because the trial court erred in considering Vivetter's death, which was an element of the offense, as an aggravating factor. A defendant with a second degree murder conviction faces a statutory guidelines range of four to 20 years. 730 ILCS 5/5-4.5-30 (West 2008). In this case, the court imposed a 17-year sentence after holding a sentencing hearing in which it tracked the factors in mitigation and aggravation listed in 730 ILCS 5/5-5-3.1 (West 2008) and 730 ILCS 5/5-5-3.2 (West 2008), respectively. Defendant asks this court to reduce his sentence to four years, the

statutory minimum, or remand for a new sentencing hearing.

¶ 45 It is improper for a court to use a necessary element of an offense of a conviction as an aggravating factor at sentencing. *People v. Conover*, 84 Ill. 2d 400, 404 91981). This improper use of a single fact is referred to as "double enhancement." Although the imposition of a sentence is a matter within the trial court's discretion (*People v. Patterson*, 217 Ill. 2d 407, 448 (2005)), determining whether a court made a double enhancement error involves a question of law and thus is reviewed *de novo. People v. Chaney*, 379 Ill. App. 3d 524, 527 (2008).

¶ 46 Defendant relies on *People v. Salvidar*, 113 Ill. 2d 256 (1986), to argue that it is improper to consider the occurrence of a death in a conviction for second degree murder because death is inherent in the offense. In *Salvidar*, our supreme court addressed whether it was improper for a sentencing judge to consider, as a factor in aggravation, that defendant's conduct threatened serious harm. *Salvidar*, 113 Ill. 2d at 260. The defendant in *Salvidar* had been convicted of voluntary manslaughter. The court stated:

> "Sound public policy demands that a defendant's sentence be varied in accordance with the particular circumstances of the criminal offense committed. Certain criminal conduct may warrant a harsher penalty than other conduct, even though both are technically punishable under the same statute. Likewise, the commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the

> *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*" (Emphasis in original.) *Id.* at 269.

¶ 47 In *Salvidar*, supreme court held that the sentencing court erred in considering, as a factor in aggravation, that defendant's conduct threatened serious harm to the victim because "the circuit court focused primarily on the end result of the defendant's conduct, *i.e.,* the death of the victim, a factor which is implicit in the offense." *Id.* at 272. The supreme court stressed that the circuit court's findings were "not directed at the degree or gravity of the defendant's conduct, *i.e.,* the force employed and the physical manner in which the victim's death was brought about or the nature and circumstances of the offense." *Id.* at 271-72.

¶ 48 Defendant contends that similarly, in this case, the trial court relied "solely and expressly" on the fact that Vivetter died. We disagree. First, we note that, as defendant asserts, the trial court did mention Vivetter's death. However, it did so in the context of addressing the mitigating factor listed in 730 ILCS 5/5-5-3.1(a)(1), that "defendant's criminal conduct neither caused nor threatened serious physical harm to another," stating:

> "Number one, whether or not the Defendant's criminal conduct neither caused nor threatened serious physical harm to another. Obviously, in this case that doesn't apply because a life has been lost so certainly there's nothing –nothing more egregious or serious that could happen in our criminal justice system.

¶ 49 Although the court mentioned that defendant's actions resulted in death this alone is not grounds for a new sentencing hearing, for as this court has held, a judge is not required to refrain from any mention of factors that constitute elements of an offense. *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982). The court also did not rely solely on the fact that Vivetter died, but also on the serious physical harm he caused, stating "when you pull out a gun during the course of a confrontation and shoot somebody, that 's got to be the ultimate point of your actions which is causing or threatening serious physical harm. And when you're taking it out and shooting someone that's right in front of you, I think more than a threat you would know that you're going to be causing serious physical harm to somebody."

¶ 50 Further, contrary to defendant's assertion, this was not the sole aggravating factor that the trial court found applied in this case. In applying mitigating factor (a)(7), which corresponds to aggravating factor (a)(3), whether defendant has a prior history of delinquency or criminal activity, the court stated:

> "While there has been some evidence that the defendant has some periodic employment, it's based upon the testimony as well as the presentence investigation. It also shows that the defendant has a significant criminal background and some of it is fairly recent. There are Class four and Class two felony offenses narcotics related from 1989 and then there is the 2002 Class four possession case as well as the 2006 Class one delivery of a controlled substance case. So, he does have a background. It is significant with the class one and class two felony and I find that it is recent. *** [H]e was free of *** felony convictions from '89 through '02 although there was a [violation of probation]

in there. So I'm taking into account that there was a span where he wasn't engaged in criminal activity but it started up again in '02."

¶ 51 Therefore, the court considered defendant's employment as a partially mitigating factor but also noted that defendant's criminal activity was "significant" and "recent."

¶ 52 Additionally, unlike in *Salvidar*, the trial court considered many factors in making its decision. The transcript of its ruling is lengthy and addresses defendant's presentence investigation report, his past criminal conduct, statutory factors in aggravation and mitigation, his credibility, demeanor, and rehabilitative potential, the nature and circumstances of the offense, deterrence, the hardship to his family, and the provocation that caused the crime. This was in addition to the arguments of counsel, victim impact statements, and defendant's own statement.

¶ 53 We find that, although the sentencing court mentioned that the degree of harm caused by defendant's actions, the court's ruling shows that it properly analyzed this factor in terms of the degree of force defendant used in committing the offense, as opposed to the outcome of defendant's action, the victim's death. The sentencing court considered the brutality of defendant's conduct and the circumstances of the crime, which is proper under *Salvidar*. The record shows the sentencing court did not improperly focus on the victim's death in making its decision. Rather, the court considered many factors in light of the facts and circumstances of this particular case in crafting a proper sentence. The other statutory factor in aggravation which the court considered—defendant's past criminal activity–is sufficient to support the sentence.

¶ 54 In a petition for rehearing, defendant's appellate counsel asserts that "the opinion

misstates a number of the most crucial facts related to McGee's claim," citing a sentence at paragraph 30: "the undisputed evidence at trial showed that defendant punched Vivetter in the face" just before he shot and killed Dudley. As mentioned in the petition for rehearing, in paragraphs 8, 11, 28, and 29, our dispositional order correctly recited the fact that the victim punched the defendant. Their names were inadvertently transposed in paragraph 30. This typographical error played no part in our decision.

¶ 55 Appellate counsel's petition further asserts that, "This court incorrectly states that 'there was no evidence that Vivetter or any of his friends were armed.' Para.30. This completely ignores Rickey's pretrial, videotaped statement in which he told police that Antonio and Mahdee actually were armed with baseball bats." This court did not "ignore" the contents of defendant's videotaped statement. The contents of the videotaped statement were never admitted into evidence. Prior to trial, defendant's trial counsel filed a motion to suppress statements requesting:

> "1. That the Court conduct a pre-trial hearing to determine if the statements were made after a knowing and intelligent waiver by Ricky McGee, and[;]
>
> 2. That the Court conduct a pre-trial hearing to determine if the second statement was made pursuant to an interrogation which occurred after the defendant had invoked his right to counsel, and[;]
>
> 3. That this Court suppress as evidence any and all communications, confessions, statements, admissions, gestures, tests, inculpatory or exculpatory, written and oral, made

by him during his interrogations in this case."

¶ 56 The record clearly spells out that, in response to the motion to suppress, the State agreed that it would not introduce the videotaped statement into evidence in their case in chief and would only seek to introduce it if the defendant testified. The defendant did not testify, and the contents of the videotaped statement were never admitted into evidence for consideration by the jury. Consequently, appellate counsel misstates the record by characterizing as "bluntly wrong," "this Court's statement that 'there was no evidence that Vivetter or any of his friends were armed."

¶ 57 III. Conclusion

¶ 58 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 59 Affirmed.