

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).

2012 IL App (4th) 100647-U

Filed 5/24/12

NO. 4-10-0647

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County,
LAKEITHAE S. ROBINSON,)	No. 09CF1674
Defendant-Appellant.)	
)	Honorable
)	Timothy J. Steadman,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justice McCullough concurred in the judgment.
Justice Appleton dissented.

ORDER

- ¶ 1 *Held:* (1) The trial court did not err in admitting a handgun and mask where those items were sufficiently linked to the crime and defendant.
- (2) The evidence presented at trial was sufficient to prove defendant guilty of attempt (first degree murder).
- (3) The trial court sufficiently instructed the jury regarding defendant's presumption of innocence.

¶ 2 In April 2010, a jury found defendant, Lakeithae S. Robinson, guilty of attempt (first degree murder) (720 ILCS 5/8-4(a), (c)(1)(D); 720 ILCS 5/9-1(a)(1) (West 2008)) and aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 2008)), but the trial court vacated the latter conviction pursuant to the one-act, one-crime rule. The jury also found, in a separate verdict form, "the allegation that the defendant personally discharged a firearm that proximately

caused great bodily harm to another person was proven."

¶ 3 In June 2010, the trial court sentenced defendant to 25 years' imprisonment for the offense of attempt (first degree murder) and to an additional 25 years' imprisonment on the basis of the jury's finding he had personally discharged a firearm that proximately caused great bodily harm to another person (see 720 ILCS 5/8-4(c)(1)(D) (West 2008)).

¶ 4 Defendant appeals, arguing (1) the trial court erred in admitting irrelevant evidence, (2) the evidence was insufficient to convict him beyond a reasonable doubt of attempt (first degree murder), and (3) the court erred where it failed to instruct the jury regarding defendant's presumption of innocence as to the allegation defendant personally discharged a firearm that proximately caused great bodily harm. We affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Testimony in the Jury Trial

¶ 7 1. *Michael Fonville*

¶ 8 During defendant's April 2010, jury trial, Michael Fonville testified he was driving late at night on June 16, 2009, on his way to his residence at 552 West Center Street, when he saw Tariq Abdullah, a 16-year-old friend of his younger brother. Fonville picked up Abdullah, who he knew as "D-Boy," and drove the rest of the way home. Fonville parked on the street, and he and Abdullah stayed in the vehicle, talking and smoking cannabis.

¶ 9 After approximately 30 to 45 minutes, the driver's door opened. Assuming it was his girlfriend, Fonville kept talking with Abdullah and did not immediately turn around. The individual who opened the door then aimed a semiautomatic handgun at the back of Fonville's head and indicated, in a male voice, this was a robbery.

¶ 10 Fonville turned to look, and saw a man in a dark-colored mask with a dark-colored handgun. Fonville did not keep his eyes on the man very long, and consequently he did not notice if the mask had eyeholes; he just noticed it was dark-colored and it covered most of the man's face. Fonville told the robber, " 'I ain't got nothing.' "

¶ 11 The following colloquy took place after the prosecutor asked Fonville what happened after he told the robber he had nothing:

"A. After—uh—after I noticed it was a robbery, you know, I'm faded back, and like everything just happened so fast, you know. I mean, it was shots fired, and I thought I was hit because, you know, I was like in the middle of a crossfire. I couldn't really tell you what exactly happened.

Q. You heard shots fired?

A. Basically, yeah.

Q. Could you tell where the shots were fired from?

A. No.

Q. After the shots were fired, what happened to the hand with the gun?

A. What happened to the hand with the gun? Like I say, the gun was in. I'm faded back. Shots fired. I'm—I'm just knowing I'm hit because, you know, the gun was like face value. I check myself. I'm not hit. You know what I mean? I look over here. He halfway out the car.

Q. And when you say he—

A. [Abdullah]. He halfway out the car. This guy that was here is no longer here. In the midst of me checking myself, look, he's no longer here. You know what I mean? So, it happened so fast, I couldn't be exact about who shot, what—what fired, or what.

Q. Did you see where [Abdullah] went as he's halfway out of the car?

A. He got out the car, and he stood over the car. After he stood over the car, that's when he told me he was hit. He never made it like out of the doorway of the car.

Q. Never got completely out of the door of the car?

A. I couldn't say. No, not completely out the car."

Fonville then testified he observed "the individual flee down the alley," which was "maybe, 20 feet" from the vehicle.

¶ 12 Fonville took Abdullah to Decatur Memorial Hospital because Abdullah said he had been hit in the legs. Fonville went back home because he thought the front door of his house was open and he was concerned the shooter might still be in the area and might endanger his girlfriend.

¶ 13 Upon returning to his residence, Fonville got down on the ground, on his hands and knees and, using the light from his cell phone, looked for the handgun Abdullah told him he dropped when he got shot. Fonville found the handgun, took it inside his house, and hid it in the basement, behind the clean-out door of the chimney, so Abdullah would not get in trouble for

possessing a firearm. "I figured that the guy had just saved me," Fonville testified. "So, I mean, I was going to save him." In talking with the police, however, Fonville learned Abdullah already had confessed to having a handgun. So, Fonville led police back to his house, and showed them where he had hidden Abdullah's handgun.

¶ 14 On cross-examination, defendant's trial counsel asked Fonville if he could tell whether the shots were fired from the gun that was right in front of him. Fonville explained, "I can't say, you know, like I stated toward him, I can't say who shot who, who—who fired what, you know?" Once Fonville realized it was a robbery, he took pains not to look at the robber, because "[p]eople don't like to be looked at" and everything happened so fast.

¶ 15 *2. Joe Patton*

¶ 16 Detective Joe Patton and other police officers obtained a consent to search the 552 West Center Street residence. He accompanied Fonville to the basement, and Fonville showed him where the loaded Lorcin .25-caliber semiautomatic handgun was hidden. A thorough search of Fonville's residence turned up no other firearms.

¶ 17 *3. Tariq Abdullah*

¶ 18 According to Abdullah's testimony, Fonville stopped on the street to pick him up on June 16, 2009. Abdullah testified Fonville parked in front of his house, and they remained in the vehicle, chatting and puffing on "blunts." Approximately two or three minutes later, a man brandishing "[a] random gun just came into the driver's side of the car." Abdullah could not see the man's head. He could see the man only from the chest to the waist, but the flesh of the man's arm was "darker-colored," and he was wearing black clothing. According to Abdullah's testimony, the man was wielding a semiautomatic handgun with a silver barrel. The man with

the handgun said, " 'Lay it down,' " which they understood to mean this was a robbery. His voice sounded somewhat muffled. Abdullah told the man with the handgun, " 'Leave. He ain't own nothing.' " He did not leave, and so Abdullah pulled a handgun out of his shorts pocket and fired twice at the man, in the direction of the driver's doorway. The hand that had been pointing the handgun through the doorway withdrew, and Abdullah jumped out of the vehicle "to run." However, as Abdullah was getting out of the vehicle, and before he could turn around, he was shot four times: twice in the right leg, once in the left thigh, and once in the left foot.

¶ 19 The prosecutor asked Abdullah:

"Q. Were you able to see the gun that fired the shots that hit you?

A. No.

Q. How long after you were hit was it before you got back into the car?

A. After I caught the last shot to the foot climbing back into the car."

The prosecutor then asked Abdullah:

"Q. How long were you out of the car between the time you got out and the time you got hit and got back in?

A. I would say almost immediately."

¶ 20 Abdullah told Fonville, " 'I'm hit. Take me to the hospital.' " On the way to Decatur Memorial Hospital, Abdullah asked Fonville, " 'Where's the gun?' "—referring to his own handgun, which he had fired and dropped upon being shot when getting out of the vehicle.

Fonville promised he would go back and retrieve it. Abdullah identified People's exhibit No. 7, a Lorcin .25-caliber semiautomatic handgun, as his handgun. He also was shown a photograph of a cell phone lying on the street, between the curb and the passenger side of Fonville's vehicle. He identified the cell phone as his, testifying he dropped it when the bullets struck him as he was getting out of the vehicle.

¶ 21 On cross-examination, defendant's trial counsel asked Abdullah:

"Q. And then, you stated that you were—you didn't get shot while you were in the car. Correct? You were getting out—or, got out of the car when you got shot?

A. Yes.

Q. And, then you immediately went back in. Correct?

A. Yes.

Q. Is that when you dropped your cell phone is when you got shot?

A. Yes.

Q. And you hadn't even made it to the end of the car before you got shot, had you?

A. No.

Q. And you got shot four different—four different wounds. Correct?

A. Yes.

Q. Do you remember hearing four shots being fired?

A. I remember—yeah, after—I heard more than that.

Q. You heard more than four shots?

A. Yeah.

Q. I mean, you're trying to get out of the car rather quickly.

Correct?

A. Right.

Q. And you got back in the car quickly?

A. Yes. Pulled myself in.

* * *

Q. *** Did you recognize at all the person that shot you?

A. No. Didn't see him."

¶ 22

4. *Erin St. Pierre*

¶ 23

A police officer, Erin St. Pierre, testified she was dispatched to the 500 block of West Center Street at 11:22 p.m. on June 16, 2009, in response to a report of shots fired. She approached West Center Street from the south, via an alley, and saw a black object lying in the alley, just south of West Center Street.

¶ 24

St. Pierre got out of her squad car and approached this object in the alley. It appeared to be "made out of a shirt material like an undershirt." She further described this cloth as follows:

"[I]t was raised a little bit from the ground, not yet having settled.

Over a period of time, everything settles down. It was not wet. I

knew it to have been raining that morning. So, I knew that object to

have been dropped there sometime throughout the day. I also observed that it did not have any gravel or dirt, and it had not yet been driven over in any way."

She returned to her car and carefully drove around this piece of cloth just in case it turned out to be important evidence.

¶ 25 After overhearing a witness tell another police officer the shooter had been wearing a black mask with holes cut out for the eyes, St. Pierre returned to the cloth in the alley, photographed it, and picked it up with latex gloves. She testified, "When I lifted it up, it looked like—um—a shirt sleeve that someone had torn or cut from their shirt, and so, it still had it[s] cylindrical form and then looked like somebody had either stabbed it with scissors or cut it to make eyeholes with it." She put the mask in an evidence bag, labeled the bag, and locked the bag in her squad car.

¶ 26 St. Pierre then walked farther south down the alley, to see if she could find anything else. When she reached the next street, she turned east, walked 25 yards, and found a semiautomatic handgun, a Colt .38-caliber Government Pocket Light, silver-colored, lying in the grass. A round was in the chamber and the hammer had been cocked back. According to St. Pierre, the handgun was ready to be fired. She photographed the handgun where it lay and then removed the magazine and a cartridge from the chamber. St. Pierre noted although the grass was wet, the handgun was dry.

¶ 27 On cross-examination, St. Pierre testified she had "talked with some people about possibly seeing somebody running." However, the record does not reveal who these two witnesses were who purportedly saw two men running after the shooting began.

¶ 28

5. *Steve Kennedy*

¶ 29 A police officer, Steve Kennedy, testified he was responding to a report of shots fired at 500 West Center Street at 11:20 p.m. on June 16, 2009. Instead of going to that address, however, he went to Decatur Memorial Hospital because an off-duty police officer who was working at the hospital as a security guard had called in with the news "two people had been shot and brought into [Decatur Memorial Hospital] immediately following officers being detailed to 500 West Center."

¶ 30 Upon arriving at the hospital, Kennedy learned the two persons who had been shot were defendant and Abdullah. Kennedy spoke with Abdullah and photographed his gunshot wounds. He also spoke with defendant and photographed his gunshot wound: it was to the lower left torso.

¶ 31 Defendant told Kennedy he had been walking down Monroe Street, on his way from Roosevelt Apartments to the Monroe Quick Stop, when he got shot. It was a distance of six blocks from Roosevelt Apartments to the Monroe Quick Stop, and defendant was unable to be more specific as to the location of the shooting.

¶ 32 The prosecutor asked Kennedy:

"Q. What did [defendant] indicate he knew concerning who he claimed had shot him?

A. Nothing.

Q. What did [defendant] indicate he saw of the person that shot him?

A. Nothing.

Q. What did [defendant] indicate he knew concerning how the individual shot him had appeared?

A. That, I don't recall.

Q. What description of [defendant's] shooting was [defendant] able to give you?

A. Not a whole lot."

¶ 33 When asked by Kennedy how he got to the hospital, defendant initially answered he had walked there. Afterward, Kennedy watched video footage of the entrance to the emergency department. Then he returned to defendant's hospital room, told him he watched the video, and again asked him how he got to the hospital. This time, defendant said "[h]e flagged somebody down that he didn't know, and he was able to get a ride to the hospital."

¶ 34 Kennedy collected defendant's clothing. His pants were black jeans, and his shirt was a white undershirt. Kennedy did not recall if the undershirt had a bullet hole in it. The clothes were bloody.

¶ 35 On cross-examination, defense counsel asked Kennedy:

"Q. Um—you said that he—when—he said nothing about who shot him or where he was shot at. You asked him those questions. Correct?

A. Yes, I did.

Q. Didn't he respond that he didn't know who shot him?

A. Yes.

Q. Okay. So, it's not that he didn't say nothing. It's that he

just did not know who had shot him, did he?

A. Correct."

Defendant told Kennedy he did not know anyone named Tariq Abdullah.

¶ 36

6. David Pruitt

¶ 37 A police officer, David Pruitt, testified he executed a search warrant on Fonville's vehicle on June 17, 2009, at 2:39 a.m. The vehicle was parked on the north side of the street in the 500 block of West Center Street, facing west. In the interior and on the exterior of the vehicle was a reddish liquid that looked like blood. The police found a green leafy substance, possibly cannabis, on the front seat. A liquor bottle was between the front passenger seat and the front passenger side door. No firearms, ammunition, or shell casings were found inside the vehicle. The vehicle also had no bullet holes.

¶ 38 On the street, near the rear passenger side of the vehicle, between the vehicle and the curb, Pruitt found a cell phone and a white disposable lighter. These items, which he photographed, were lying next to what appeared to be splashes of blood.

¶ 39 That night, the police also found a Luger 9-millimeter shell casing on the driveway. While the police returned the next morning and found a second Luger 9-millimeter shell casing on the driveway, they did not find any shell casings from either a .38-caliber handgun or a .25-caliber handgun.

¶ 40

7. Vickie Reels

¶ 41 Vickie Reels was a forensic scientist who specialized in the examination of firearms and footwear. She testified the Lorcin .25-caliber handgun was in firing condition and when she received the handgun, the magazine had six unfired cartridges in it. She did not know

how many cartridges the magazine could hold.

¶ 42 The .38-caliber handgun had eight unfired cartridges in its magazine, and was in operating condition. A semiautomatic handgun such as this one ejected the spent cartridges as it was fired. Reels did not know how many rounds the magazine of the Colt could hold, but she testified magazines for this type of handgun typically hold 8 to 10 rounds. Reels also explained the recovered 9-millimeter shell casings could not have been fired from either the Colt .38-caliber handgun or the Lorcin .25-caliber handgun because those were different calibers of handgun from a 9-millimeter handgun.

¶ 43 *8. Kelly Biggs*

¶ 44 Kelly Biggs, deoxyribonucleic acid (DNA) analyst for the Illinois State Police, testified she swabbed the Lorcin .25-caliber handgun as well as the Colt .38-caliber handgun and its magazine, in an attempt to collect DNA evidence. She also swabbed the inside and the outside of the shirt sleeve (*i.e.*, the mask from the alley).

¶ 45 The parties stipulated Amanda Humke, another DNA analyst for the Illinois State Police, received the swabs from Biggs to develop a DNA profile from them. The swab taken from the outside of the sleeve contained a mixture of DNA: a major DNA profile and a minor DNA profile. The major DNA profile from the outside of the sleeve matched the DNA profile from the inside of the sleeve. Humke found insufficient DNA on the Colt handgun with which to develop a profile. Humke compared Fonville's DNA standard to DNA she found on the Lorcin handgun and to the DNA she found on the inside and the outside of the sleeve. Fonville's DNA did not match any of those profiles.

¶ 46 Biggs testified she compared Abdullah's DNA standard to the DNA profiles found

on the inside and the outside of the sleeve and on the Lorcin handgun. Abdullah's DNA matched the DNA found on the Lorcin handgun but did not match any of the DNA on the sleeve. While the parties stipulated there was insufficient DNA on the Colt handgun for comparison, Biggs testified Abdullah could be excluded from being the contributor of the DNA on the Colt.

¶ 47 Biggs explained a mixture of DNA, such as that found on the outside of the shirt sleeve, resulted from more than one person's leaving DNA on the object. Humke determined at least three individuals, possibly more, deposited DNA on the outside of the shirt sleeve. "Major profile" was the term given to the DNA most prevalent in the mix. The fact a person's DNA was the major DNA profile, however, did not necessarily mean the person had more extensive physical contact with the object than the contributor of the minor DNA profile.

¶ 48 *9. Jennifer Aper*

¶ 49 Jennifer Aper, another DNA analyst for the Illinois State Police, testified she compared defendant's DNA standard with the DNA profiles developed by Humke. According to Aper, the DNA profile from defendant matched the major DNA profile from the outside of the shirt sleeve and also matched the DNA profile from the inside of the shirt sleeve. Aper agreed, though, just because defendant's DNA matched the major profile, it did not necessarily follow he had handled the sleeve more than the other contributors of DNA.

¶ 50 *B. Jury Verdict and Sentence*

¶ 51 On April 30, 2010, the jury found defendant guilty of both attempt (first degree murder) and aggravated battery with a firearm. The jury also found, in a separate verdict form, defendant personally discharged a firearm during the attempt (first degree murder) and thereby caused great bodily harm to another person. Before sentencing, however, the trial court vacated

the aggravated battery with a firearm conviction because it was based on the same physical act as the conviction of attempt (first degree murder) (see *People v. Miller*, 238 Ill. 2d 161, 165-76, 938 N.E.2d 498, 501-07 (2010)).

¶ 52 On June 18, 2010, the trial court sentenced defendant to 25 years' imprisonment for attempt (first degree murder). The court also imposed an additional 25-year prison term on the basis of the jury's finding defendant discharged a firearm and thereby caused great bodily harm to another.

¶ 53 On June 23, 2010, defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 54 This appeal followed.

¶ 55 II. ANALYSIS

¶ 56 On appeal, defendant argues (1) the trial court erred in admitting irrelevant evidence, (2) the evidence was insufficient to convict him beyond a reasonable doubt of attempt (first degree murder), and (3) the court erred where it failed to instruct the jury regarding defendant's presumption of innocence.

¶ 57 A. Admission of Evidence

¶ 58 Defendant argues the trial court erred in admitting irrelevant evidence. Specifically, defendant contends the court erred in admitting into evidence a shirt sleeve used as a mask and a .38-caliber handgun where those items were not sufficiently linked to the crime or defendant. We disagree.

¶ 59 The admission of evidence is within the sound discretion of the trial court. *People v. Becker*, 239 Ill. 2d 215, 234, 940 N.E.2d 1131, 1142 (2010). We will not reverse an

evidentiary ruling by the trial court absent a clear abuse of that discretion. *Becker*, 239 Ill. 2d at 234, 940 N.E.2d at 1142. An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful or unreasonable, or where no reasonable person would agree with the position of the trial court. *Becker*, 239 Ill. 2d at 234, 940 N.E.2d at 1142. The test for the admissibility of evidence is whether it fairly tends to prove the particular offense and whether what is offered as evidence tends to make the question of guilt more or less probable, *i.e.*, whether it is relevant. *People v. Caffey*, 205 Ill. 2d 52, 114-15, 792 N.E.2d 1163, 1202 (2001). A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or its possibly unfair prejudicial nature. *Caffey*, 205 Ill. 2d at 114-15, 792 N.E.2d at 1202.

¶ 60

1. *The Mask*

¶ 61 In this case, the trial court found the mask was relevant where circumstantial evidence showed it could have been worn by defendant during the commission of the crime. We agree. Fonville testified the assailant was wearing a mask. The mask was found in an alley close to the scene of the shooting. The shooter ran down the alley where the mask was found. The mask was found by police a short time after the shooting. St. Pierre testified the alley was one that had traffic going through it. However, no vehicle had yet run over the mask. She also testified it had been raining earlier that day. While the ground was wet, the gun was dry. The fact no water or dirt was on the mask when it was recovered suggests it had been dropped recently. Significantly, defendant's DNA was found on the mask. As a result, the trial court did not err in finding the mask relevant.

¶ 62

2. *The Handgun*

¶ 63 Defendant argues the trial court erred in admitting the .38-caliber handgun where it was not sufficiently linked to the crime. The State argues defendant has forfeited any admissibility argument with regard to the gun because he failed to object at trial or otherwise preserve the alleged error in a posttrial motion. Defendant concedes he failed to preserve the error but urges this court to nonetheless consider his claim under the plain-error doctrine because the evidence was closely balanced.

¶ 64 The supreme court has held the plain-error doctrine allows a reviewing court to consider unpreserved error when "a clear or obvious error occurred" and (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) "that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). However, before determining whether plain error occurred, we must first determine whether any error occurred at all. *People v. Owens*, 372 Ill. App. 3d 616, 620, 874 N.E.2d 116, 118 (2007).

¶ 65 A weapon is admissible if it is connected both to the crime and to the defendant. *People v. Free*, 94 Ill. 2d 378, 415, 447 N.E.2d 218, 236 (1983). Although the weapon need not be the exact weapon used in the crime, the evidence must show the weapon was at least suitable for the commission of the crime. *Free*, 94 Ill. 2d at 415-16, 447 N.E.2d at 236; *People v. Walker*, 253 Ill. App. 3d 93, 108, 624 N.E.2d 1353, 1364 (1993) (proof of the connection may be circumstantial). Even when the weapon's connection to the defendant is tentative, the defendant may point out the weakness of its probative value but cannot bar its admission. *People v. Bragg*,

277 Ill. App. 3d 468, 480, 659 N.E.2d 1378, 1387 (1995).

¶ 66 In this case, both Fonville and Abdullah testified the assailant brandished a semiautomatic handgun. Abdullah testified the gun was silver. A short time after the shooting, police recovered a silver Colt .38-caliber semiautomatic handgun within a few blocks of the incident. The .38-caliber handgun was suitable for the commission of the offense because it was of the general type described by the victims, *i.e.*, a semiautomatic handgun. In addition, circumstantial evidence connected the handgun to defendant. Testimony established there were two persons shooting, Abdullah and the robber. Police recovered and identified Abdullah's gun, a Lorcin .25-caliber handgun. The .38-caliber handgun was found in the direction the assailant fled and within approximately 25 yards of the alleyway where the mask with defendant's DNA was found. The .38-caliber handgun was found with a round in the chamber and the hammer cocked back, *i.e.*, it was ready to be fired. Like the mask, the handgun was also dry, despite the fact the grass underneath it was wet, suggesting it had been recently dropped. As a result, the .38-caliber handgun was relevant. Accordingly, the trial court did not err in admitting the .38-caliber handgun. Because we find no error occurred, we do not reach the issue of plain error.

¶ 67 B. Sufficiency of the Evidence

¶ 68 Defendant argues the evidence was insufficient to convict him beyond a reasonable doubt of attempt (first degree murder). Specifically defendant contends (a) no one identified him as the assailant and (b) the State failed to establish he personally discharged the firearm.

¶ 69 "When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond

a reasonable doubt." *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006). This standard of review applies when reviewing the sufficiency of evidence in all criminal cases, including cases based on direct or circumstantial evidence. *People v. Pollock*, 202 Ill. 2d 189, 217, 780 N.E.2d 669, 685 (2002). "Circumstantial evidence alone is sufficient to sustain a conviction where it satisfies proof beyond a reasonable doubt of the elements of the crime charged." *Pollock*, 202 Ill. 2d at 217, 780 N.E.2d at 685. The trier of fact has the responsibility to resolve conflicts in witnesses' testimony, determine whether witnesses are credible, and draw reasonable inferences from all the evidence presented. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178, 217 (2006). A court of review will not overturn the verdict of the fact finder "unless the evidence is so unreasonable, improbable[,] or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 947 (2004).

¶ 70 The First District stated the standard for an attempt (first degree murder) conviction as follows:

¶ 71 "The offense of attempted murder is shown when the State proves, beyond a reasonable doubt, that the defendant, with the specific intent to kill, commits *any act* which constitutes a substantial step toward the commission of murder. [Citations.] The question of a defendant's intent is one of fact to be determined by the trier of fact [citation], and can be inferred from the surrounding circumstances such as the character of the attack, use of a deadly weapon, and the severity of injury. [Citation.] Intent can also be inferred from an act,

'the direct and natural tendency of which is to destroy another's life.'

[Citation] *** [A] deadly weapon is defined as any instrument that is used or may be used for the purpose of an offense and that is capable of producing death. [Citation.]." (Emphasis in original.) *People v. Valentin*, 347 Ill. App. 3d 946, 951, 808 N.E.2d 1056, 1061 (2004).

¶ 72 In this case, the evidence presented was sufficient to prove defendant was the one who fired the gun at Abdullah. The undisputed testimony at trial established Fonville and Abdullah were sitting in Fonville's vehicle when a black male wearing a mask opened the driver's side door and attempted to rob them with a semiautomatic handgun. Abdullah testified the gun was silver. Abdullah pulled out his own gun and fired shots at the man's torso, which was the only part of his body exposed in the door frame of the vehicle. The robber returned fire and then retreated down a nearby alley.

¶ 73 Testimony established after Abdullah was struck by gunfire Fonville took him to the hospital. Within minutes of Abdullah's arrival at the hospital, defendant arrived with a gunshot wound of his own to his lower left torso. Abdullah testified he shot at the man's lower torso because it was all that was exposed to him. When asked by Officer Kennedy, defendant was unable to specify the location of his shooting. Defendant was also unable to tell Kennedy who he thought had shot him. Defendant initially told Kennedy he walked to the hospital. However, after Kennedy told defendant he watched video footage of the entrance to the emergency room, defendant said "[h]e flagged somebody down that he didn't know, and he was able to get a ride to the hospital."

¶ 74 In addition, police recovered a mask from the same alley the assailant reportedly

fled. Fonville, who saw the gunman flee down the alley, did not report seeing two men running; nor did Abdullah. The mask was recovered a short time after the shooting took place. Officer St. Pierre testified although it had been raining earlier that day, the mask was dry. There was also no dirt found on the mask, despite St. Pierre's testimony traffic came through that alley. Expert testimony established the defendant's DNA had been found on that mask. A reasonable jury could conclude the mask was used by defendant during the robbery and dropped by defendant as he fled the scene after being shot by Abdullah.

¶ 75 Further, police recovered a silver .38-caliber semiautomatic handgun within approximately 25 yards of the alleyway where the mask was found. Abdullah testified the gun used in the robbery was silver. Like the mask, the gun was also dry while the grass was wet, suggesting it had been recently dropped. The testimony established there were only two persons shooting at the time of the robbery, *i.e.*, Abdullah and the assailant. Police found Abdullah's .25-caliber handgun in Fonville's residence. Police found the .38-caliber handgun near the scene with a round chambered and its hammer cocked back ready to be fired.

¶ 76 While the dissent relies on a theory of a potential third shooter, no evidence was presented to establish that possibility. To begin, the testimony presented showed only Abdullah and the robber were shooting at the time of the robbery. Moreover, nothing in the record before us on appeal suggests a third person was involved in the shooting. On cross-examination, St. Pierre testified she had "talked with some people about possibly seeing somebody running." However, not only was no testimony presented from these "witnesses," the record does not even reveal who they were or why they were running. It is more reasonable to conclude people were running away after hearing gunfire because they were scared than to assume they were involved

in the shooting. Further, neither Fonville nor Abdullah ever suggested a second person was present. In fact, Fonville testified he saw a single person flee through the alley following the shooting. Moreover, both the State and defendant proceeded on a theory only one person was involved in the attempted murder.

¶ 77 Further, the fact police found 9-millimeter shell casings and not .38- or .25-caliber casings does not require the jury to conclude there was a third shooter. If anything, it would have required the jury to conclude Abdullah did not fire his .25-caliber handgun when it was undisputed he did. If we were to speculate, we could take Fonville's act of initially hiding Abdullah's gun to protect him and infer he also picked up what he thought were all the shells from the scene, missing two unrelated 9-millimeter shell casings. The fact police did not recover .25-caliber casings could also be explained by the fact Fonville moved his vehicle from its original location after the shooting when he took Abdullah to the hospital. Thus, the area searched by police may not have been in the exact location of the vehicle during the shooting. In any event, the jury could have reasonably concluded the 9-millimeter shell casings were unrelated to this incident.

¶ 78 Viewing the evidence in the light most favorable to the State, as we must, the evidence in this case was not so unreasonable, improbable, or unsatisfactory that it created a reasonable doubt of defendant's guilt. See *People v. Wheeler*, 226 Ill. 2d 92, 115, 871 N.E.2d 728, 740 (2007) ("a conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt"). The evidence presented was sufficient to find defendant guilty of attempt (first degree murder) as well as the allegation he personally discharged a firearm causing great bodily harm to Abdullah.

¶ 79

C. Presumption of Innocence

¶ 80 Defendant argues the trial court erred in failing to instruct the jury on defendant's presumption of innocence. Specifically, defendant contends his right to due process was violated where the court failed to give the jury Illinois Pattern Jury Instruction, Criminal, No. 28.02, at 147-48 (4th ed. supp. 2009) (hereinafter, IPI Criminal 4th) as to the allegation he personally discharged a firearm. We disagree.

¶ 81 We initially note defendant forfeited this issue on appeal by failing to object at trial. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988); *People v. Patterson*, 347 Ill. App. 3d 1044, 1054, 808 N.E.2d 1159, 1167 (2004). Nonetheless, because the proper instruction of the jury implicates a defendant's right to a fair trial (*People v. Layhew*, 139 Ill. 2d 476, 486, 564 N.E.2d 1232, 1236 (1990)), we will address the merits of this issue. See *People v. Casillas*, 195 Ill. 2d 461, 473-74, 749 N.E.2d 864, 873-74 (2000) (in which the supreme court addressed the defendant's claim he was denied a fair trial by the trial court's failure to give Illinois Pattern Jury Instructions, Criminal, No. 2.03 (3d ed. 1992) (hereafter IPI Criminal 3d), despite the defendant's failure to object).

¶ 82 IPI Criminal 4th No. 2.03 provides the following:

"[The] defendant is presumed to be innocent of the charges[s] against him. This presumption remains with [him] throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.

The State has the burden of proving the guilt of [the]

defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. [The] defendant is not required to prove his innocence." IPI Criminal 4th No. 2.03, at 73 (2000).

Similarly, IPI Criminal 4th No. 28.02 (supp. 2009) provides:

"The State has alleged [the defendant personally discharged a firearm that proximately caused great bodily harm to another person.] The defendant is presumed to be innocent of [this] allegation[.]. This presumption remains with [the defendant] throughout every stage of the trial and during your deliberation on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that the allegation[] [is] proven.

The State has the burden of proving the allegation(s) beyond a reasonable doubt and this burden remains on the State throughout the case.

[The] defendant is not required to disprove [the] allegation(s)." IPI Criminal 4th No. 28.02, at 147-48 (supp. 2009).

¶ 83 In *Casillas*, 195 Ill. 2d at 474, 749 N.E.2d at 874, the trial court failed to *sua sponte* give the jury IPI Criminal 3d No. 2.03, regarding the State's burden of proof and the defendant's presumption of innocence. However, the supreme court held "the trial court's failure to give [IPI Criminal 3d No. 2.03] does not automatically result in a finding that defendant's constitutionally protected right to a fair trial has been violated." *Casillas*, 195 Ill. 2d at 474, 749 N.E.2d at 874.

Instead, the *Casillas* court reaffirmed and applied a totality-of-the-circumstances test, which the court had adopted in *Layhew*, 139 Ill. 2d at 486, 564 N.E.2d at 1237. Under that test, to determine whether a defendant received a fair trial, a court must "look to all the circumstances[,] including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming[,] and any other relevant factors." *Casillas*, 195 Ill. 2d at 474, 564 N.E.2d at 874. The supreme court concluded the defendant was not denied a fair trial by the trial court's failure to give IPI Criminal 3d No. 2.03. The *Casillas* court reasoned the court's failure to do so was harmless beyond a reasonable doubt under the totality-of-the-circumstances test. The court specifically noted the jury was adequately informed about the burden of proof and the presumption of innocence. *Casillas*, 195 Ill. 2d at 479, 749 N.E.2d at 877.

¶ 84 In this case, the jury was adequately informed about the burden of proof and, in particular, the fact defendant did not have to prove his innocence, *i.e.*, he was not required to disprove the allegations. Prior to deliberations, the trial court instructed the jury as follows:

"The law that applies to this case is stated in these instructions, and it is your duty to follow all of them. You must not single out certain instructions and disregard others [(see IPI Criminal 4th No. 1.01, at 3 (2000))].

* * *

The defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are

convinced beyond a reasonable doubt that he is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence [(IPI Criminal 4th No. 2.03, at 73 (2000))].

* * *

The fact that a Defendant did not testify must not be considered by you in any way in arriving at your verdict [(see IPI Criminal 4th No. 2.04, at 77 (2000))].

* * *

If you find the defendant is guilty of Attempt (First Degree Murder), you should then go on with your deliberations to decide whether the State has proved beyond a reasonable doubt the allegation that the defendant personally discharged a firearm that proximately caused great bodily harm to another person [(IPI Criminal 4th No. 28.04, at 171 (supp. 2009))]."

¶ 85 These instructions, taken collectively, were sufficient to admonish the jury of defendant's presumption of innocence and the State's burden of proof regarding the discharge-of-a-firearm allegation. In addition, the trial court specifically admonished the prospective jurors during *voir dire* the presumption of innocence remained with defendant throughout every stage of his trial *and* during deliberations. The court repeated this admonishment to the jury prior to its deliberation. Moreover, for the reasons previously stated, the evidence was sufficient to find

defendant guilty beyond a reasonable doubt. Based on the totality of the circumstances, in this case, we conclude the court's failure to instruct the jury regarding IPI Criminal 4th No. 28.02 constituted harmless error and did not deny defendant a fair trial.

¶ 86

III. CONCLUSION

¶ 87 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 88 Affirmed.

¶ 89 JUSTICE APPLETON, dissenting:

¶ 90 I respectfully dissent and would reverse defendant's conviction.

¶ 91 One can only speculate as to who shot Abdullah: defendant or someone who was with defendant. According to the State's own evidence, two men were seen running from the scene of the shooting. Fonville did not see who shot Abdullah. Abdullah did not see the shooter either. Neither Fonville nor Abdullah testified to who actually shot Abdullah, apparently because neither of them knew. One cannot assume that defendant was the shooter, because the evidence suggests he had help—armed help—in the robbery.

¶ 92 To be sure, the presence of defendant's DNA on the mask, together with the gunshot wound to his lower left torso (which, according to Abdullah's testimony, was in the area of the body exposed to Abdullah's aim from where he sat in the front passenger seat), strongly suggests that defendant was the masked man who opened the driver's door and commanded Fonville and Abdullah, at gunpoint, to "lay it down." But the issue is whether defendant himself committed the overt act of shooting Abdullah, for purposes of the offense of attempt (first degree murder).

¶ 93 Abdullah denied he was shot while inside the car. Abdullah fired two shots at the masked man, *i.e.*, defendant, as the masked man was standing in the driver's doorway, but there appears to be no evidence that the masked man fired back at that point. No bullet holes were found inside the car. The masked man merely retreated; the hand holding the pistol withdrew.

¶ 94 Did the masked man (defendant) then dash around the Lincoln, to the passenger's side, arriving there in time to shoot Abdullah as he "jumped" out of the car? Maybe, but that is difficult to visualize. Notwithstanding his abdominal wound, defendant would have had to move

with amazing speed and agility, considering that Abdullah "quickly" "jumped out" of the car just as soon as he fired two rounds at the masked man standing in the driver's doorway and that Abdullah was shot before he even got completely out of the car and turned around. It would be easier to infer that someone already was there, waiting for him.

¶ 95 One can only speculate as to who actually shot Abdullah. Given all the evidence, there is a strong possibility that two pistols were used in the failed robbery: a Luger 9-millimeter pistol, which left two shell casings on the driveway, and the Colt .380-caliber pistol, which was dropped about 25 feet from the alley. While, it is theoretically possible that the 9-millimeter pistol was fired on Fonville's driveway in some unrelated incident, and it is theoretically possible that a person who had nothing whatsoever to do with the failed robbery just happened to drop a loaded and cocked pistol near the same alley in which the masked man shed his mask. But theoretical possibility is not probability. Because it is illegal to discharge firearms within city limits, firing a 9-millimeter pistol on Fonville's driveway, in a residential neighborhood, presumably would have been an extraordinary occurrence. One does not typically find loaded and cocked pistols scattered on the ground.

¶ 96 The more probable, the more natural, inference is that someone shot Abdullah with a 9-millimeter pistol as Abdullah was "jumping" out of the car. The passenger's side of the car faced the driveway, where the empty 9-millimeter shell casings were found. Perhaps not all of them were found.

¶ 97 As for the Colt .380-caliber pistol, it would make sense to infer that defendant, the masked man, used that pistol and that when fleeing, he first dropped the mask and then the pistol. Evidently, because the magazine of this pistol could hold no more than 10 cartridges and because

8 cartridges were in the magazine and a ninth cartridge was in the chamber, this pistol was fired, at the most, only once—if it was fired at all. The Colt probably was not the pistol from which the five or more rounds were fired at Abdullah, because (1) no .380-caliber shell casings were found and (2) it would have made no sense to put a fresh magazine into the pistol, while on the run, only to dispose of the pistol a moment later.

¶ 98 I agree we are supposed to look at all the evidence in a light most favorable to the prosecution (*People v. Sizuenzo-Brito*, 235 Ill. 2d 213, 224 (2009)), but that does not mean we should speculate in favor of the prosecution (*People v. Ehlert*, 211 Ill. 2d 192, 210 (2004)). I conclude it would be impossible for any rational trier of fact to deny the uncertainty, the reasonable doubt, that exists as to who actually pulled the trigger to shoot Abdullah. The totality of the evidence raises the strong possibility that not one but two armed men converged on the Lincoln Town Car. It is anybody's guess which of these two men shot Abdullah. On the evidence before us, it is impossible to resolve that question. For that reason, I would reverse defendant's conviction.