

No. 1-12-0590

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THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	
v.)	No. 09 CR 15598
)	
TORRANCE BARD,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 **Held:** Defendant's convictions were supported by sufficient evidence. The trial court's comments at sentencing did not warrant a new trial. Defendant is entitled to be resentenced based on the trial court's mistaken apprehension of the trial evidence at sentencing and the State's contention that consecutive sentencing was mandatory, but no finding of severe bodily injury was made. As a result, defendant's claim that he was deprived of counsel in connection with his motion to reconsider sentence is rendered moot.

¶ 2 Following a bench trial, defendant Torrance Bard appeals from his convictions of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) and aggravated assault

of an officer with a firearm (720 ILCS 5/12-2(a)(6) (West 2008)).¹ The trial court sentenced defendant to consecutive terms of 15 years' imprisonment for the aggravated battery conviction and 3 years' imprisonment for the aggravated assault conviction. On appeal, defendant argues that his convictions were not supported by sufficient evidence, that he is entitled to a new trial and resentencing based on the trial court's mistaken recitation of the trial evidence at the sentencing hearing, and that the trial court denied his right to counsel in ruling on his *pro se* motion to reconsider sentence without appointing counsel. We affirm in part, reverse in part, and remand for resentencing.

¶ 3

BACKGROUND

¶ 4 Defendant's bench trial occurred on October 4 and 24, 2011. At trial, David Butler testified that in August 2009, he was living on South Morgan Street in the City of Chicago. On August 16, 2009, shortly after 7 p.m., Butler was driving to the Citgo gas station at 103rd Street and Aberdeen in his white Impala. Butler testified that as he was turning right in order to head toward the gas station, he saw "a person hop out the [sic] car and start shooting at me." The shooter's car was parked about 15 to 20 feet in front of him. Butler testified that defendant got out of his car and pointed a gun at him, and Butler was surprised at first, but after the second gunshot Butler "just hopped out [of his car] and ran and I left the car, let the car go." Butler testified that he was able to see the face of the person who got out of the car in front of him and started shooting at him. Butler testified that once he realized he was being shot at, he got out of

¹Defendant was also convicted of aggravated discharge of a firearm, but this count was merged with the conviction of aggravated battery with a firearm.

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his car and started running away, traveling east on 103rd Street and then cutting through some houses. Defendant continued to shoot at him; Butler believed there were at least three more gunshots. Butler testified that he jumped over a couple of fences and then stopped when he arrived at a friend's house. Butler testified that he did not notice that he had been shot until he arrived at his friend's house and calmed down; he then noticed a sharp pain in his left leg and saw "a hole through and through on both sides" of his left calf. Butler testified that he called an ambulance and both the ambulance and police arrived. He was taken to the hospital, where he stayed for five or six hours.

¶ 5 Chicago police officer Heather Scherr and her partner Andrew Stewart both testified that on the evening of August 16, 2009, they were assigned to guard a crime scene at the Citgo gas station located at 103rd Street and Aberdeen in the City of Chicago. They were sitting in a marked Chicago police vehicle while monitoring a car that was going to be towed. Scherr and Stewart were in uniform.

¶ 6 Scherr testified that at approximately 7:18 p.m., she heard several gunshots coming from close behind her. She exited the police car with her weapon drawn and turned to look behind her. She testified that she saw defendant approximately 25 to 30 feet from her "standing in the middle of the street" and "[f]iring a weapon." Scherr testified that there was artificial lighting from the gas station and it was "still kind of light outside. It was still daylight."

¶ 7 Stewart also testified that he heard approximately five or six gunshots coming from "[v]ery close" behind him. He was in the driver's side of the police car, and he exited after hearing the shots and turned around to look. He saw "a male black [sic] standing in the middle

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of the street firing a weapon." Stewart testified that the man, who he identified as defendant, was in the middle of 103rd Street and approximately 30 to 40 feet away. Stewart testified that there was a wooden fence, but it did not obscure his view. Defendant was firing the weapon toward the east and he fired two or three times at that point.

¶ 8 Both Scherr and Stewart testified that they started to run toward defendant and announce that they were Chicago police officers. Scherr testified that she "started to run towards [defendant's] direction, and I announced my office." She stated, "Chicago Police, drop the gun." Scherr testified that she began shouting at defendant when she saw him with the weapon in his hand, and she estimated he was approximately 20 to 25 feet away as she was running toward him. She did not know whether he heard her. As she ran towards defendant, he continued to fire the gun in the same direction as when she first saw him. Similarly, Stewart testified that he approached defendant, yelled at him to drop the gun, and identified himself as the Chicago police.

¶ 9 However, as Scherr continued to announce her office and run towards defendant, "[h]e turned and pointed his weapon in my direction." Scherr testified that she was about 20 to 25 feet from him and getting closer as she ran, and there was nothing between her and defendant when he pointed the gun in her direction. Scherr indicated that defendant was holding the weapon with two hands. She testified that defendant was about 20 feet from her at the time he pointed his weapon at her; she was still near the gas station area and defendant was on the other side of a fence near the gas station. She was able to see his face when he turned and pointed the gun at

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her.² At that point, Scherr fired her weapon once. She testified that she did this because she was "[i]n fear of [her] life and [her] partner's safety." Scherr testified that when she fired her weapon, defendant "immediately dropped his weapon" and then ran away, and she pursued him until she lost sight of defendant after he turned the corner on Carpenter.

¶ 10 According to Stewart, as he was moving toward defendant and announcing his office, defendant "turn[ed] and point[ed] the gun in our direction." Stewart was about 25 feet away at that point and he was able to see defendant's face. Stewart testified that defendant had his "hand raised with the gun pointed in our direction." Stewart testified that he stopped and went for cover because defendant was pointing the gun at them. Stewart also testified that after Scherr fired the round, defendant "threw the gun to the ground and fled eastbound on 103rd Street," and Scherr pursued defendant while Stewart guarded defendant's gun.

¶ 11 Scherr communicated the description and location of defendant over her police radio. She then heard over the radio that defendant had been spotted on a garage or in a gangway, and she went to the location where she heard other officers yelling and she identified defendant. Stewart also heard over the radio that defendant had been detained, and he later identified defendant in the back of a police car. At trial, Stewart identified the gun that defendant possessed.

¶ 12 Officer Delgado testified that on August 16, 2009, at 7:20 p.m., he was working with his partner and they responded to the police radio broadcast regarding shots fired near 103rd Street

²Scherr also identified defendant at trial.

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and Aberdeen. In the west alley of Carpenter north of 103rd Street, Delgado spotted someone crouched down on the roof of a garage. Delgado identified defendant at trial as the man he saw. Delgado testified that defendant was bent over and had his hands in his waistband; Delgado thought he had a gun. Delgado exited the police car and ordered defendant to show his hands, but defendant kept his hands by his waistband and jumped on to the roof of another garage, and then jumped off into a yard. The officers ran over to the chain link fence enclosing the yard and Delgado's partner ordered defendant to show his hands. His partner fired one shot in defendant's direction, but did not hit him. Defendant then threw his hands out to his sides and ran out of the gangway, where he was detained by two other officers. Delgado testified that there was artificial lighting in the alley.

¶ 13 Following defendant's apprehension, Butler went to the police station and viewed a lineup on August 17, 2013, at about 2:35 a.m. Butler testified that he picked defendant out of the lineup. Butler also identified defendant at trial. Butler testified that, prior to the day he was shot, he knew defendant through a mutual friend; he had known defendant for about one year and he had purchased drugs from him in the past. Butler denied that he had a business transaction with defendant earlier on the day of the shooting, but he indicated that he purchased marijuana from defendant three days before the shooting. Butler admitted that he had prior convictions of possession of a controlled substance, aggravated unlawful use of a weapon, and possession of cannabis with intent to deliver.

¶ 14 Also on August 17, 2009, Chicago police detective Brian Forberg interviewed defendant. According to Forberg, after he advised defendant of his constitutional rights, defendant stated

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that Butler "had robbed him earlier in the day and that he was—he knew—he had a general idea of where Butler hung out or where he lived. He went to that area and drove around for a while. At some point, he saw Butler in traffic and went after him." Defendant told Forberg that he was driving a burgundy car, and at some point he realized that he was in front of Butler's car, so "he jumped out of his car and started firing at Mr. Butler and then he continued—as Butler jumped out of his own car, which ended up crashing into the burgundy vehicle, he continued after him shooting at him." Forberg testified that defendant also told him that "when he was returning to his car, he saw that the police had arrived on the scene or were there. He saw a police officer, and he dropped his—he dropped a silver gun in the middle of the street, a silver .45 caliber, and he ran." Forberg testified that defendant told him that he ran through some yards and onto some garage roofs, but when he saw that the police were pursuing him to that location, he jumped off of the roof and gave up. Forberg testified that he asked defendant "if he was just trying to scare" Butler, but defendant "laughed and said, you know what I was trying to do." Forberg testified that defendant denied shooting at or pointing the gun at the police during the incident.

¶ 15 The parties stipulated that a Para-Ordinance Model .45-caliber semiautomatic pistol was recovered in the street, along with eight expended shell casings. The casings were all fired Winchester .45-caliber automatic cartridge casings. Police also recovered a fired bullet and fired bullet jacket fragment from 103rd Street, and a fired bullet from underneath a car on 103rd Street.

¶ 16 This evidence was analyzed by a firearms identification expert, who determined that the fired cartridge cases and bullets had been fired from the .45-caliber pistol. In addition, at the

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crime scene, Forberg found a white Impala that had crashed into the rear bumper of a burgundy vehicle along 103rd Street near the Citgo gas station.

¶ 17 Gunshot residue tests were performed on defendant and Butler, and defendant's test detected the presence of gunshot residue on the back of both his right and left hands. The forensic scientist who analyzed the tests indicated that defendant had either discharged a firearm, was in close proximity to a firearm when it was discharged, or contacted an item with gunshot residue. There was no gunshot residue found on Butler's hands.

¶ 18 Defense counsel moved for a directed finding of not guilty after the prosecution rested. Defendant was initially charged with attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm in the direction of a vehicle, aggravated unlawful use of a weapon by a felon, unlawful use of a weapon by a felon, and two counts of aggravated assault against a police officer, and the trial court granted defendant's motion except as to the charges of aggravated battery with a firearm, aggravated discharge of a firearm, and aggravated assault. The defense rested without presenting evidence.

¶ 19 In closing, the prosecution argued that the injury to Butler's calf, the number of shots fired, the gunshot residue evidence, and the other firearms evidence all related to the gun that the police saw defendant possess, and this evidence and defendant's confession showed that he was guilty. Regarding aggravated assault, the prosecution argued that when defendant turned around as the officers yelled at him to drop his gun, the gun was pointed in their direction. The defense argued that there was no nexus between Butler's injury and the gunshots.

¶ 20 The trial court held that, based on the physical and testimonial evidence presented, "the

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State has met its burden of proof beyond a reasonable doubt" as to aggravated battery with a firearm, aggravated assault of an officer with a firearm, and aggravated discharge of a firearm.

Defense counsel subsequently moved for a new trial, but the trial court denied the motion.

¶ 21 Defendant's sentencing hearing occurred on November 21, 2011, and the parties presented aggravation and mitigation evidence. The trial court sentenced defendant to consecutive terms of 15 years' imprisonment for the conviction of aggravated battery with a firearm and 3 years' imprisonment for the conviction of aggravated assault of an officer with a firearm, and merged the aggravated discharge of a firearm conviction with the aggravated battery with a firearm conviction.

¶ 22 Defendant subsequently filed a *pro se* motion to reconsider sentence on December 14, 2011, arguing that he asked his counsel to file a motion for reconsideration, but he failed to do so and defendant believed he had been abandoned by his counsel. On January 13, 2012, the court denied the motion. This timely appeal followed.

¶ 23 ANALYSIS

¶ 24 I. Sufficiency of the Evidence

¶ 25 On appeal, defendant challenges his conviction of aggravated assault of a police officer on two grounds, arguing that he did not act knowingly as he was merely reacting involuntarily and instinctively when he turned and pointed his gun after being surprised by Scherr, and that the State did not prove that defendant knew he was assaulting a police officer.

¶ 26 "When a defendant challenges the sufficiency of the evidence in a criminal case, it is not the function of a reviewing court to retry the defendant." *People v. Boykin*, 2013 IL App (1st)

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112696, ¶ 6 (citing *People v. Collins*, 106 Ill. 2d 237, 261 (1985)). "Instead, determination of the weight to be given to witnesses' testimony, their credibility, and the reasonable inferences to be drawn from the evidence are the responsibility of the fact finder." *People v. Steidl*, 142 Ill. 2d 204, 226 (1991). Accordingly, this court "will not substitute its judgment for that of the trier of fact on issues of the weight of evidence or credibility of witnesses." *Boykin*, 2013 IL App (1st) 112696, ¶ 6, citing *People v. Phelps*, 211 Ill. 2d 1, 7 (2004). This is also true when a criminal defendant elects a bench trial, because the trial court has "a superior opportunity to assess the testimony" firsthand. *People v. Garmon*, 19 Ill. App. 3d 192, 195 (1974). "[T]he proper standard of review is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Boykin*, 2013 IL App (1st) 112696, ¶ 6 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A defendant's conviction " 'will not be set aside on review unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt.'" *Steidl*, 142 Ill. 2d at 226 (quoting *People v. Jimerson*, 127 Ill. 2d 12, 43 (1989) and *Collins*, 106 Ill. 2d at 261).

¶ 27 Initially, we note that defendant asserts that the facts are not in dispute and this issue therefore involves a question of law subject to *de novo* review. In support, defendant cites cases wherein the facts were undisputed and the question was whether those facts constituted an element of the charged offense. See *People v. Smith*, 191 Ill. 2d 408, 411 (2000), and *In re Ryan B.*, 212 Ill. 2d 226, 231 (2004). However, it is clear from defendant's argument that he is, in actuality, challenging the trial court's evaluation of the evidence, *i.e.*, whether it showed

defendant's intent and knowledge. As stated, we defer to the trial court's assessment of the credibility of the witnesses, weight accorded the evidence, and inferences drawn.

¶ 28 In order to prove the offense of assault, the prosecution must show that defendant "without lawful authority, ***engage[d] in conduct which place[d] another in reasonable apprehension of receiving a battery." 720 ILCS 5/12-1 (West 2008). Aggravated assault consists of the elements of assault in addition to one of several aggravating factors, which, in the present case, was that defendant knew the individual assaulted to be a peace officer engaged in official duties. 720 ILCS 5/12-2(a)(6) (West 2010). Thus, the mental state required for aggravated assault "is that of knowledge[,] " which is generally demonstrated through circumstantial evidence. *People v. Sedlacko*, 65 Ill. App. 3d 659, 663 (1978). "A person knows, or acts knowingly or with knowledge of *** [t]he nature or attendant circumstances of his conduct *** when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists." 720 ILCS 5/4-5(a) (West 2008).

¶ 29 Defendant maintains that he was "startled and surprised" by the officers' arrival, which caused him to involuntarily point his weapon at Scherr, and that he did not know the individuals approaching him were police officers. However, we must view the evidence adduced at trial in the light most favorable to the prosecution. Significantly, Scherr and Stewart testified that they were in uniform and in a marked Chicago police car at the gas station near where defendant started shooting. Further, Scherr testified that there was still some daylight and there was also artificial lighting from the gas station. In addition, both officers testified that they shouted at

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defendant to drop his gun and identified themselves repeatedly as Chicago police officers as they ran toward him. Scherr was approximately 20 to 25 feet from defendant, and as she continued to run toward him and announce her office, defendant "turned and pointed his weapon" in her direction, and Scherr fired her weapon once out of fear for her and Stewart's safety. Stewart was also about 25 feet from defendant and he ran for cover upon seeing that defendant had his "hand raised with the gun pointed in [their] direction." Scherr testified that defendant held the gun with two hands when he pointed it at her.

¶ 30 Based on this evidence, it was not unreasonable for the trial court to infer that defendant was aware that the individuals approaching him were police officers and that his actions were intentional. In addition to being in uniform, the officers repeatedly and loudly announced their office and ordered defendant to drop the gun, they were in proximity to a marked police car, there was adequate lighting in the area, they were swiftly coming closer to defendant, and Scherr had her weapon drawn. The evidence did not indicate that defendant merely reflexively turned in their direction with the gun pointed. Rather, defendant held the gun in both hands and pointed it at Scherr, and, despite the officers' repeated commands, he dropped the weapon only after being fired upon by Scherr. As additional evidence that defendant knew he was being approached by the police, Forberg testified that defendant told him that as he returned to his car after shooting at Butler, "he saw that the police had arrived on the scene or were there. He saw a police officer, and he dropped his-he dropped a silver gun in the middle of the street *** and he ran."

¶ 31 Having reviewed the State's evidence presented at trial and the trial court's findings, we conclude that defendant's conviction of aggravated assault of a police officer with a firearm was

supported by sufficient evidence. The trial court's findings were not so improbable or unsatisfactory as to create a reasonable doubt regarding defendant's guilt. It was not unreasonable for the trial court to determine that defendant's actions, in turning toward the police officers and pointing his pistol at them, were intentional, and that defendant knew that they were, in fact, police officers. Moreover, we defer to the trial court's assessment of the credibility of the witnesses regarding the officers' observations of defendant's actions and the inferences to be drawn from their testimony. *Garmon*, 19 Ill. App. 3d at 195.

¶ 32

II. New Trial

¶ 33 Defendant next argues on appeal that he is entitled to be retried on the aggravated assault charge because the trial court's remarks during sentencing indicated that it had misconstrued the evidence in finding him guilty of this offense.

¶ 34 In a bench trial, it is presumed that the trial court considered only competent evidence. *People v. Devalle*, 182 Ill. App. 3d 1, 3 (1989) (citing *People v. Robinson*, 30 Ill. 2d 437 (1964)). However, "this presumption is overcome if it affirmatively appears from the record that the improper evidence was considered by the court." *Id.* "A trial judge sitting as the trier of fact is limited to the record before him, and it is a denial of due process of law for the court to consider matters outside the record. [Citation.] Similarly, the trial judge must consider all the matters in the record before deciding the case." *People v. Bowie*, 36 Ill. App. 3d 177, 179-80 (1976). A defendant is deprived of a fair trial "[w]here a record affirmatively indicates *** that the trial judge did not remember or consider the crux of the defense when entering judgment." *Id.*

¶ 35 In conjunction with this claim, defendant asserts that this court should address this issue

despite the fact that it was not raised below because it constituted plain error and because his counsel rendered ineffective assistance in failing to correct the trial court.

¶ 36 Generally, an issue must be preserved for review by an objection and a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, under the plain error doctrine, appellate review of a forfeited error is permitted if a defendant demonstrates that "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). In either case, "[t]he first step of plain-error review is to determine whether any error occurred." *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 37 In addition, according to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), in order for defendant to prove a claim of ineffective assistance of counsel, he must show that "counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Henderson*, 2013 IL 114040, ¶ 11. Failure to establish either prejudice or deficient performance "precludes a finding of ineffective assistance of counsel," and this court need not determine whether counsel's performance was deficient if defendant fails to prove that he suffered any prejudice. *Id.*; *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 38 In the present case, on October 24, 2011, the last day of defendant's bench trial, after the close of the evidence and the parties' arguments, the trial court held that, based on the testimonial and physical evidence presented, the State had proven beyond a reasonable doubt that defendant committed aggravated battery of Butler with a firearm, aggravated discharge of a firearm, and aggravated assault of a police officer with a firearm. The trial court stated:

"Having heard the evidence, the testimony, reviewed the photographs as well as the physical evidence, that being the recovered shell casings, the fired bullet which was recovered, Mr. Butler's testimony that he suffered a gunshot wound through and through to his thigh [sic] as he fled from the Defendant after being shot at while he sat in his car, the officers who observed the shooting, the Defendant turned with his handgun, Officer Scherr's testimony of her reasonable apprehension of being shot at, at the very least a battery, the gunshot residue, the State has met its burden of proof beyond a reasonable doubt based on the physical and testimonial evidence."

¶ 39 Nowhere in the trial court's ruling did it misstate the facts or misconstrue the evidence. Indeed, the trial court's findings at the end of defendant's trial accurately reflected the evidence that defendant, after shooting at Butler, "turned with his handgun" toward Scherr and placed her in reasonable apprehension of receiving a battery. Thus, the trial court did not misconstrue or inaccurately recall the evidence in finding defendant guilty of aggravated assault of a police officer with a firearm. Accordingly, the trial court's statement does not support that it convicted defendant based on a misapprehension of the evidence. Moreover, as discussed previously, the State proved beyond a reasonable doubt that defendant was guilty of aggravated assault of a

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police officer with a firearm.

¶ 40 We note that, in support of his argument that the trial court found him guilty based on a misconstruction of the evidence, defendant relies solely on the trial court's statements at the sentencing hearing on November 21, 2011. After hearing aggravation and mitigation evidence at the sentencing hearing, the trial court stated:

"This Court has considered factors in aggravation and mitigation, criminal history, social history and the facts of this case.

Time and time again being convicted of guns and drugs, as you stated, I gave you an opportunity with a horrific criminal history dating back to 2000. I gave you probation and while on probation for resisting a police officer, *you opened fire into a vehicle and when that was said and done, you turned and fired upon Chicago police officers in full uniform.*

The sentence on count three, charge of aggravated battery with a firearm, you are sentenced to 15 years Illinois Department of Corrections. *I believe consecutive sentencing is called for not only because it's a separate act upon shooting on police officers but for the protection of society.* Your sentence is three years Illinois Department of Corrections on count seven. That is consecutive. You will receive credit for the time you have been in custody." [Emphasis added.]

¶ 41 Based on the above statement, it is apparent that the trial court mis-spoke at the sentencing hearing because there was no evidence presented that defendant actually shot at the police officers. However, we note that the trial court's statements at sentencing came 28 days

after the trial occurred. The last day of defendant's bench trial and the day the trial court found him guilty was October 24, 2011. The sentencing hearing occurred on November 21, 2011. As stated, the trial court's statements and findings at the conclusion of the trial accurately reflected the evidence.

¶ 42 The circumstances in the case at bar are similar to those presented in *Devalle*, where the defendant argued that he was entitled to a new trial because the trial court considered facts not in evidence, *i.e.*, that defendant did not surrender and made comments to the police about the shooting. *Devalle*, 182 Ill. App. 3d at 3. This court held that it did not affirmatively appear from the record that the trial court considered any incompetent evidence in convicting the defendant because the comments at issue were made approximately three months after the trial court found the defendant guilty, and there was sufficient evidence to support defendant's conviction regardless of the trial court's comments. *Id.* at 3-4.

¶ 43 Here, although the trial court mis-spoke at sentencing in the present case, we do not find that this violated defendant's due process rights with respect to receiving a fair trial as far as the trial court's verdict was concerned. The trial court's findings at the conclusion of defendant's trial reflected an accurate appraisal of the evidence. Because the trial court did not misapprehend the evidence with respect defendant's guilt at trial, defendant's due process rights were not violated. As such, defendant has not shown that any error occurred to review under the plain error doctrine. *Lewis*, 234 Ill. 2d at 43. We likewise conclude that defendant's related contention that his trial counsel was ineffective for failing to object and correct the court is meritless. "An attorney is not required to make futile motions to avoid charges of ineffective assistance of

counsel." *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000).

¶ 44 III. Sentencing

¶ 45 A. Consecutive Sentences

¶ 46 In a related claim, defendant contends that he should be resentenced because the trial court's remarks during the sentencing hearing demonstrate that, in imposing consecutive sentences, the trial court based its decision on materially false information, *i.e.*, that defendant shot at the officers. Similar to his last claim, defendant also asserts that this constituted plain error and that his counsel rendered ineffective assistance in failing to object and correct the trial court's misapprehension of the evidence during sentencing.

¶ 47 Although defendant did not properly preserve this claim by a timely objection and inclusion in a motion to reconsider sentence, we initially note that courts have concluded that "because improper imposition of consecutive sentences may violate a defendant's fundamental rights, we do not *** find the issue has been waived by failure to preserve it in the trial court." *People v. Williams*, 335 Ill. App. 3d 596, 598 (2002). See also *People v. Ross*, 303 Ill. App. 3d 966, 984 (1999) (although the defendant waived his claim of sentencing error, the court reviewed the claim because reliance upon an improper factor in sentencing implicated a fundamental right).

¶ 48 Further, in reviewing the trial court's sentence, we "grant great deference to the trial court's sentencing decision, and we will not substitute our judgment for that of the trial court unless we find an abuse of discretion." *Williams*, 335 Ill. App. 3d at 598.

"However, if the sentencing judge relies on an improper factor or makes comments

indicating he did not consider the statutory factors, a defendant is entitled to a new sentencing hearing. [Citation.] Even if the sentencing judge considered an improper factor, remand for resentencing is necessary only if the consideration resulted in a greater sentence. [Citation.] In determining whether the trial court improperly imposed a sentence, this court will not focus on isolated statements but instead will consider the entire record. [Citation.]" *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30.

¶ 49 As set forth above, at the sentencing hearing in the case at bar, the trial court stated, "you turned and fired upon Chicago police officers in full uniform," and that "I believe consecutive sentencing is called for not only because it's a separate act upon shooting on police officers but for the protection of society." Although the trial court mentioned defendant's criminal history and the protection of society, the record supports that it was particularly troubled by the notion that defendant had fired upon uniformed police officers. The trial court repeatedly referred to its belief that defendant fired upon the officers in justifying the sentences imposed. Given the trial court's statement that consecutive sentencing was appropriate because defendant shot at police officers, there is no question that it used this factor in justifying the consecutive sentences.

¶ 50 We disagree with the State's assertion that the trial court's statement was supported by the record and that it was not the basis for the consecutive sentences. Considering the record before this court, we cannot say that this erroneous perception of the evidence was given insignificant weight, as it undoubtedly resulted in a greater sentence. *Walker*, 2012 IL App (1st) 083655, ¶ 30. See also *Ross*, 303 Ill. App. 3d at 984-85 (noting that the court would reverse and remand for resentencing where the trial court's statement at the sentencing hearing that the shooting was

gang-related was contrary to the evidence and was discussed more than any other factor, and noting that where a trial court mentions an incorrect factor, the case must be remanded unless it appears that the improper factor was insignificant in the trial court's decision); *People v. Holloman*, 304 Ill. App. 3d 177, 185 (1999) (Remanding for resentencing where the trial court referred to an erroneous drug trafficking conviction contained in the defendant's presentence report, and relied on this conviction and other convictions in determining the sentence).

¶ 51 The State contends that resentencing is nevertheless unnecessary because consecutive sentences were mandatory pursuant to section 5/5-8-4(d)(1) of the Uniform Code of Corrections, because "[o]ne of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(d)(1) (West 2008).³ The State asserts that defendant inflicted "severe bodily injury" on Butler. However, the trial court made no finding at all regarding severe bodily injury.

¶ 52 Unless it is clearly evident from the record, it is not this court's role to determine, for the first time on appellate review, whether defendant inflicted severe bodily injury. *Williams*, 335 Ill. App. 3d at 601; *People v. Deleon*, 227 Ill. 2d 322, 332 (2008) (holding that a finding of severe bodily injury is a question of fact reviewed under the manifest weight standard, and indicating that the reviewing court must "give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses" and it will "not substitute its judgment for that of the trial court regarding the

³Aggravated battery with a firearm is a Class X felony. 720 ILCS 5/12-4.2(b)

credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn.")⁴

¶ 53 Based on *Williams*, whether Butler's injury in this case constituted severe bodily harm is open to debate. The *Williams* court held that severe bodily injury "requires a degree of harm to the victim that is something more than that required to create the aggravated battery offense," but that "[n]ot all gunshot wounds are severe just because they are gunshot wounds," and the trial court must consider the extent of harm in each case. *Williams*, 335 Ill. App. 3d at 599-601. As noted in *Williams*, "[s]everal reported decisions deal with a determination of severe bodily injury for consecutive sentencing purposes":

Cases finding the existence of severe bodily injury include: *People v. Johnson*, 149 Ill. 2d 118, 594 N.E.2d 253 (1992) (victim shot in the shoulder, in the hospital the next day); *People v. Kelley*, 331 Ill. App. 3d 253, 770 N.E.2d 1130 (2002) (victim shot twice in the right arm, hospitalized for three days); *People v. Austin*, 328 Ill. App. 3d 798,767 N.E.2d 433 (2002) (victim shot in the back and grazed on the side of the head near his left ear, injuries that required overnight hospitalization); *People v. Amaya*, 321 Ill. App. 3d 923, 748 N.E.2d 1251 (2001) (one victim shot in the stomach, the other in the back; both required surgery and a lengthy hospital stay, the bullet remaining in one victim

⁴Along the same lines, we note that we granted defendant's motion to cite additional authority with respect to *People v. Bailey*, 2013 IL 113690, ¶ 30- ¶ 35. Although that case did not involve a determination of severe bodily injury for consecutive sentencing purposes, it is nonetheless instructive because the supreme court held that it was not the proper role of a reviewing court to make a specific finding on appeal that a murder was exceptionally brutal and heinous so as to warrant a natural life sentence, even though the evidence may have supported such a finding.

at the time of trial); *People v. Primm*, 319 Ill. App. 3d 411, 745 N.E.2d 13 (2001) (victim shot in the back of his left thigh, taken to the hospital); *People v. Strader*, 278 Ill. App. 3d 876, 663 N.E.2d 511 (1996) (victim struck by three bullets from defendant's rifle, one of them removed surgically); *People v. Townes*, 94 Ill. App. 3d 850, 419 N.E.2d 604 (1981) (victim's face was 'beaten up,' eye almost swollen closed, x-rays ordered by doctors to investigate possible bone damage).

Cases finding a failure to prove severe bodily injury include: *People v. Jones*, 323 Ill. App. 3d 451, 752 N.E.2d 511 (2001) (bullet grazed victim's right cheek bone, receiving a band-aid from a doctor but no other medical attention); *People v. Rice*, 321 Ill. App. 3d 475, 747 N.E.2d 1035 (2001) (one bullet struck victim in the hand, another in the hip, taken to hospital where he remained for two days); *People v. Murray*, 312 Ill. App. 3d 685, 728 N.E.2d 512 (2000) (victim suffered gunshot wound to the right foot with an open fracture to the big toe, treated and released within two-and-one-half hours after the shooting); *People v. Durham*, 312 Ill. App. 3d 413, 727 N.E.2d 623 (2000) (victim's gunshot wound described as a mark, 'like a small nick or cut'); *People v. Ruiz*, 312 Ill. App. 3d 49, 726 N.E.2d 704 (2000) (victim police officer suffered gunshot wound to knee, wound barely visible, went to a meeting before seeking medical treatment); *In re T.G.*, 285 Ill. App. 3d 838, 674 N.E.2d 919 (1996) (not enough for 'great bodily harm' under the aggravated battery statute where victim suffered three stab wounds to the chest, felt only the first stab, had three bloody wounds)." *Williams*, 335 Ill. App. 3d at 600-01.

¶ 54 In *Williams*, the court found that there was "no question" that one victim suffered severe

bodily injury where "the gunshot wound to her left arm resulted in emergency surgery and a hospital stay of 19 days." *Williams*, 335 Ill. App. 3d at 601. However, the court reversed and remanded for resentencing with respect to two other aggravated battery convictions where the victims suffered through-and-through gunshot wounds to their legs, but did not receive immediate medical attention, one victim spent five or six hours at the hospital, and the other was released immediately after being treated. *Id.*

¶ 55 We therefore decline to make a finding of severe bodily harm on appeal, and we remand this case for resentencing. The trial court imposed consecutive sentences, but clearly misspoke in stating that defendant shot at the police. Although the prosecutor argues that consecutive sentencing was mandatory regardless of the trial court's mistake, there was no appropriate finding of severe bodily injury to mandate consecutive sentences. Thus, on remand, the trial court's consideration may also include a determination regarding the severe bodily injury issue.

¶ 56 In ruling, we acknowledge the State's reliance on *Deleon*, 227 Ill. 2d 322 in arguing that consecutive sentencing was mandatory. However, unlike the present case, the trial court in *Deleon* specifically found that the bodily injury inflicted was severe and that consecutive sentencing was therefore required, and the defendant challenged that finding on appeal and our supreme court reviewed the issue under the manifest weight standard. *Deleon*, 227 Ill. 2d at 331-33. Here, as stated, there was no finding of severe bodily injury to review on appeal.

¶ 57 **B. Right To Counsel**

¶ 58 Defendant also contends on appeal that he was deprived of his right to counsel when the trial court ruled on his *pro se* motion to reconsider sentence without first appointing counsel.

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Defendant asserts that he was deprived of counsel at a critical stage of criminal proceedings because any claims of sentencing error are waived if not raised in a motion for reconsideration of sentence.

¶ 59 In defendant's December 14, 2011, *pro se* motion to reconsider sentence, he alleged that he was deprived of the effective assistance of counsel because he believed his attorney was going to file such a motion but did not do so, and he believed he had been abandoned by his attorney. On January 13, 2012, the trial court considered defendant's motion at a hearing in which defendant was present without representation by counsel. The trial court indicated that it had considered his motion and the facts in aggravation and mitigation in sentencing him, and that:

"Your criminal history, as I stated then, goes back 11 years. The Court took your social history and your criminal history into consideration. Based on the facts of the case and the criminal and social history, the Court finds that the sentence is not unreasonable."

¶ 60 Given our resolution of defendant's contention that the trial court misconstrued the evidence in determining his sentences and the fact that we are remanding this case for resentencing, we find the question of whether he was deprived of counsel to be moot. However, we note that as far as whether moving for reconsideration of sentence constitutes a critical stage, the Second, Third, and Fourth Districts of the Illinois Appellate Court have all held in the affirmative. See *People v. Brasseaux*, 254 Ill. App. 3d 283, 288 (1996) (holding that "a hearing on a motion to reconsider sentence is a 'critical stage' of the criminal proceedings since substantial rights of the defendant may be affected" and that a defendant was therefore entitled to the appointment of counsel in preparing and arguing the motion); *People v. Owens*, 384 Ill. App.

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3d 670, 671-73 (2008) (Finding that, where the defendant's counsel was permitted to withdraw at the end of the sentencing hearing without consulting the defendant about filing a motion to reconsider sentence, counsel's performance was deficient and violated defendant's right to counsel at a critical stage, which prejudiced the defendant by waiving for appellate review any claims of sentencing error); and *People v. Williams*, 358 Ill. App. 3d 1098, 1104-05 (2005) (Where the defendant filed a *pro se* motion for reduction of sentence and application for the appointment of counsel, but no counsel was appointed and the trial court denied the motion by docket entry, the Appellate Court, Fourth District, held that the defendant was entitled to, and denied, counsel because the motion was required to preserve any sentencing issues for appeal and thus constituted a critical stage of the criminal proceedings).

¶ 61

CONCLUSION

¶ 62 For the reasons stated, we affirm defendant's convictions, vacate his sentences and remand for resentencing.

¶ 63 Affirmed in part; vacated in part, cause remanded with directions.