

2015 IL App (1st) 131971-U
No. 1-13-1971
Order Filed September 18, 2015

SIXTH DIVISION

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	No. 10 CR 14138
v.)	
)	
JEROME DAMPIER,)	
)	Honorable
Defendant-Appellant.)	Anna Helen Demacopoulos,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's convictions and sentences for first degree murder, attempted first degree murder, and armed habitual criminal were upheld where (1) the identification testimony was reliable and sufficient to establish beyond a reasonable doubt that the defendant was the shooter; (2) the trial court did not abuse its discretion when it granted the State's motion *in limine* to exclude drug evidence and redacted the drug reference from the certified copy of medical examiner's report because the drug evidence was not relevant to the charged offenses; (3) the defendant's intent to kill was a reasonable inference from the evidence; (4) the predicate felony required for the defendant's armed habitual criminal conviction was not void; (5) the felony-murder count was constitutionally and legally sufficient, but assuming it was error to instruct the jury on felony murder, the plain-error doctrine did not require that the error be reviewed because it was not a structural error, and the evidence was not closely balanced; and (6) the defendant failed to establish that defense counsel's failure to file a motion to dismiss the felony-murder count of the indictment and his failure to request separate verdict forms denied him the effective assistance of counsel.

¶ 2 On August 10, 2010, the defendant, Jerome Dampier, was indicted and charged with multiple counts of first degree murder, attempted first degree murder, aggravated discharge of a firearm, aggravated unlawful use of a weapon, unlawful use of a weapon by a felon, and armed habitual criminal. The indictment arose from an incident in which Lydell Williams (Lydell) was shot and killed, and shots were fired at Michael A. Williams (Michael A.), Lydell's brother.

¶ 3 Following trial, the jury returned a general verdict finding the defendant guilty of the first degree murder of Lydell, guilty of the attempted murder of Michael A. and guilty of armed habitual criminal. The jury found that the defendant personally discharged a firearm during the commission of the offenses. The trial court sentenced the defendant to a total of 90 years' imprisonment.

¶ 4 On appeal, the defendant raises the following issues: (1) the identification evidence was insufficient to prove him guilty of the offenses beyond a reasonable doubt; (2) the trial court erred when it granted the State's motion *in limine* to preclude the jury from considering that 12 packets of a substance containing cocaine (the cocaine) were found in Lydell's anus and

redacted the reference to the cocaine evidence from the certified copy of the medical examiner's report; (3) the State failed to prove beyond a reasonable doubt that the defendant was guilty of the attempted first degree murder of Michael A.; (4) the defendant's armed habitual criminal conviction must be reversed because one of the predicate felonies was void; (5) the trial court erred when it gave the jury the felony-murder instruction because it was legally and constitutionally insufficient; and (6) the defendant was denied the effective assistance of trial counsel. After reviewing the record on appeal in light of the issues raised by the defendant and the applicable law, we affirm the defendant's convictions and sentences.

¶ 5

BACKGROUND

¶ 6

I. Facts

¶ 7

On June 23, 2010, members of the Williams family gathered for an impromptu party at the home of Tina Williams on Center Street in Harvey, Illinois (the Williams house). Attending the party were Tina's brothers, Lydell and Michael A., Tina's sons, Marcel and Michael L. Williams (Michael L.), Tina's nephew, Dontae Williams, and family friends, Nathan Tate (Nate) and Nashaun Davis (Nashaun). Shortly after 1 a.m. on June 24, 2010, as the party guests were leaving, a Cadillac drove down Center Street and stopped in front of the Williams house. After a few minutes, the Cadillac continued down Center Street and turned right on 152nd Street. Within a few minutes, the Cadillac returned and drove past the Williams house and turned right on 152nd Street. As Lydell and Michael A. walked to the corner of Center and 152nd Streets to investigate, a man came around the corner firing shots at them. After the man stopped shooting, he ran back in the direction of where the Cadillac had turned right.

¶ 8 Lydell was shot once in the back and died at the scene. None of the shots fired at Michael A. struck him. On July 13, 2010, witnesses viewed a photo array and identified the defendant as the shooter. Following his arrest on July 14, 2010, the defendant was identified as the shooter in a lineup. The defendant's pretrial motions to quash his arrest and to suppress his identification were denied.

¶ 9 II. Pretrial Proceedings

¶ 10 The State sought to preclude the defendant from mentioning or eliciting testimony regarding the cocaine found on Lydell's body during the autopsy. The State maintained that there was no evidence that Lydell's death was in any way drug-related. Therefore, the cocaine was not relevant to the case and would only serve to discredit Lydell. Defense counsel responded that the State offered no evidence of a motive for the defendant to kill Lydell. But the fact that Lydell had the cocaine concealed in his body in addition to a gun found on his person when he was shot was relevant since it supported the defense theory that someone from the drug world shot Lydell. Defense counsel questioned why, if the cocaine was not relevant, the State had it inventoried and tested. Questioned by the trial court, defense counsel acknowledged that there were no witnesses to testify that Lydell was in possession of cocaine at the time he was shot.

¶ 11 The trial court granted the State's motion to preclude the defense from referring to the cocaine evidence. The court agreed to reconsider the issue if the relevance of the cocaine evidence could be established or if defense counsel presented additional case law.

¶ 12 Prior to trial, the State advised the trial court and the defendant that it would be proceeding on the following counts of the indictment: count 1 – intentional and knowing first degree murder; count 5 – strong probability of death or great bodily harm first degree

murder; count 9 – felony murder; count 13 - attempted first degree murder of Michael A.; and count 16 – armed habitual criminal. As to count 16, the parties agreed not to refer to the predicate felonies by name.

¶ 13 Following *voir dire*, the State requested that the reference to the cocaine found in Lydell's body be redacted from the medical examiner's certified report of the autopsy findings. Defense counsel argued that the report would no longer be certified if a redaction was allowed and that a redaction would violate the doctrine of completeness. The trial court disagreed and ordered the redaction.

¶ 14 Prior to the presentation of evidence, the defendant renewed his objection to the preclusion of any mention or reference to the cocaine evidence concealed in Lydell's body. Defense counsel argued that the cocaine and his possession of a gun indicated that Lydell was a drug dealer. As a result, Lydell might have had ongoing disputes with the individuals selling drugs or buying drugs from him. In addition, in 1994, Lydell was convicted of the delivery of a controlled substance.

¶ 15 The trial court rejected defense counsel's argument, finding that in the absence of any other evidence to support the relevancy of the cocaine, the defendant's argument was too tenuous. Depending on the evidence presented at trial, the court agreed that the defendant could raise the issue again. In addition, the trial court clarified that the defendant could still argue that someone other than the defendant shot Lydell.

¶ 16 III. Jury Trial

¶ 17 The defendant's challenge to the sufficiency of the evidence is based on the conflicts between and inconsistencies in the eyewitnesses' identification testimony. The testimony pertinent to the identification of the defendant as the shooter is set forth below.

¶ 18 A. For the State

¶ 19 1. *Michael A. Williams*

¶ 20 a. Direct Examination

¶ 21 Michael A. was 39 years old and lived with his fiancée and four children in Chicago. He was employed doing packaging at a warehouse. Michael A. acknowledged that he had two felony convictions.

¶ 22 On June 23, 2010, Dontae drove Michael A., Lydell and Nate in Michael A.'s car¹ to Tina's house in Harvey. There they joined Marcel, Michael L. and Nashaun for a family party. The group socialized and had drinks. Michael A. had a "few" cups of vodka, but he denied being intoxicated.

¶ 23 Shortly after 1 a.m. on June 24, 2010, a group consisting of Michael A., Lydell, Dontae, Nate and Nashaun left the party to return to the Buick which was parked across the street from the Williams house. A car, which looked to Michael A. like a Cadillac, pulled up in front of the Williams house. Michael estimated that the Cadillac was 10 to 15 feet from where he was standing by the curb. There were three or four people in the Cadillac. The male driver, who remained seated in the Cadillac, spoke to Nashaun and then to Dontae. As Michael A. walked closer to the Cadillac, he saw Dontae and the driver shaking hands. The Cadillac pulled away and turned right at the stop sign at the end of the block. There was sufficient lighting from the street lights and the porch light for Michael A. to see the driver's face. He made an in-court identification of the defendant as the driver of the Cadillac.

¶ 24 Michael A. was still on the street-side of the curb talking with his nephews when the Cadillac returned. Though Michael alternated between watching the Cadillac and talking to

¹We will refer to Michael A.'s car as "the Buick."

his nephews, he observed the Cadillac proceed to the same stop sign. Just before it turned right again, Michael A. observed the Cadillac's brake lights illuminate. Lydell and he decided to walk to the corner where the Cadillac turned right to see what was happening. Before they reached the corner, Michael A. saw the defendant running around the corner towards them firing a gun. Lydell and Michael A. ran in different directions. The defendant fired three or four shots at Lydell. Michael A. sought cover behind the Buick. Through the window of the Buick, he saw Lydell running through a yard. He stood up and motioned to Lydell, who looked like he was about to fall. The defendant saw Michael A. and turned toward him. The two men were about 15 feet apart. Michael A. saw the defendant's face and observed a shiny object in his hand. The defendant said to him, "I'm on you now," and fired one shot at Michael A. At one point, the defendant and Michael A. were about 4 feet apart, looking at each other; the defendant then pursued him around the Buick. The defendant fired one more shot at Michael A. and then stopped. Michael A. started calling out names to see if everyone was safe. He located Lydell who had been shot and died at the scene.

¶ 25 Michael A. left the scene of the shooting to drive to Chicago to get his mother and his fiancée. On his way there, he stopped to tell some Chicago police officers about the shooting. The police drove him back to the scene. Michael A. also spoke to the Harvey police at the scene of the shooting.

¶ 26 On July 15, 2010, Michael A. met with Detective Crocker of the Harvey police department and viewed a lineup. He identified a photograph of the lineup he viewed and in which he identified the defendant as the individual who shot Lydell. His identification was based on his recognition of the defendant's face. Michael A. had never seen the defendant prior to the shooting.

¶ 27 Michael A. identified a photograph showing a street light. His Buick had been parked under the street light. The street light was working at the time of the shooting.

¶ 28 Michael denied that Lydell or he was carrying a gun at the time of the shooting. Neither Lydell nor he threatened the defendant prior to the shooting. Michael A. feared for his life as the defendant fired the shots at him.

¶ 29 b. Cross-Examination

¶ 30 Michael A. identified photographs of the scene, and acknowledged the trees had foliage on them. He drank three cups of straight vodka at the party.

¶ 31 Michael A. did not think the Cadillac stopped when it came down Center Street the second time, and he lost sight of the Cadillac when it turned right at the corner. Michael A. acknowledged that the street light was further down the block than he had stated, but only slightly further. When the shooting started, Michael A. wanted to get away and was not concerned about observing the defendant's face.

¶ 32 Later on the morning of the shooting, Michael A. was taken to the Harvey police station where he was interviewed by Officer Rife. Michael A. described the shooter as 6 feet, 210 pounds, driving a green older model Cadillac and firing a black revolver. Michael A. did not know the name of the shooter until the police told him after the lineup. Michael A. spoke with Commander Neil of the Harvey police, but he did not recall describing the defendant's car to him as a green Pontiac Bonneville.

¶ 33 c. Redirect Examination

¶ 34 Michael A. explained that the foliage on the trees did not block out all the light from the street lights. He could still see with the light from the streetlight.

¶ 35 2. Marcel Williams

¶ 36 a. Direct Examination

¶ 37 On June 23, 2010, there was a party at the Williams house on Center Street where 14-year-old Marcel lived with Tina, his mother, and his brothers and sisters. His uncles, Michael A., Lydell and Dontae² attended the party along with family friends, Nate and Nashaun.

¶ 38 Around 1:15 a.m. on June 24, 2010, Marcel was standing on the porch as his uncles and their friends were leaving. A four-door gray-colored Cadillac pulled up in front of the Williams house. There were two males in the front seat and two females in the back seat. One of the males exited the Cadillac from the driver's side. Marcel identified the defendant as the driver; he had seen the defendant in the neighborhood for a couple of months but did not know his name. Nashaun and Dontae approached the defendant and began talking to him, but Marcel could not hear what they were saying. The defendant returned to the Cadillac and drove to the end of the block and turned right.

¶ 39 After saying good-bye to the group leaving the party, Marcel went inside. He was looking out the window when he saw the Cadillac driving down Center Street a second time. Marcel went back outside and stood with his brother, Michael L., on the porch. The Cadillac proceeded to the end of the block and again turned right. Marcel watched as Lydell and Michael A. walked toward the corner where the Cadillac turned right. Marcel saw the defendant coming around the corner, facing Lydell and Michael A. The defendant had a weapon in his hand and began shooting at Lydell as he ran back toward the Williams house. The defendant began chasing and shooting at Michael A. The defendant then ran back toward the corner. A man, whom Marcel identified as Buck, came out of the house on the corner,

² Marcel referred to Dontae as his "uncle" but he is more accurately described as Marcel's cousin.

and asked the defendant what he was doing. The defendant replied, " 'Finish these n-----s off. They don't know who they f-----g with.' " Buck returned to his house, and the defendant left the scene. Marcel then saw Michael A. with Lydell, who was on the ground.

¶ 40 On July 13, 2010, Marcel was shown a group of eight photographs by Detective Crocker of the Harvey police department. From the photographs, he identified the defendant as the man who shot Lydell. On July 15, 2010, Marcel identified the defendant in a lineup as the shooter.

¶ 41 Marcel acknowledged that he had delinquency petitions pending against him in juvenile court alleging residential burglary and criminal trespass to a motor vehicle. He denied that any promises were made to him with regard to those petitions.

¶ 42 b. Cross-Examination

¶ 43 Marcel described the defendant as wearing a white T-shirt and a red flat-billed baseball cap, resting just above his eyebrows. He did not see a weapon or observe the defendant flash any gang signs while in conversation with Nashaun and Dontae. The defendant did not exit the Cadillac the second time it drove past the Williams house. As the Cadillac turned right at the corner, Marcel saw its brake lights illuminate before it went out of sight.

¶ 44 Marcel learned that the shooter's first name was Jerome from people in the neighborhood. While Marcel acknowledged that the defendant was the only individual in the photo array wearing a white T-shirt, he maintained that he selected the defendant's photograph because he recognized his face.

¶ 45 3. *Michael L. Williams*

¶ 46 a. Direct Examination

¶ 47 In 2011, Michael L. was convicted of aggravated unlawful use of a weapon. At the time of trial, he was incarcerated in the Illinois Department of Corrections.

¶ 48 In June 2010, Michael L. resided with his mother, brothers and sisters in Harvey, Illinois. On June 23, 2010, family and friends had gathered at the Williams house for a party. Michael L. drank some vodka, but he was not intoxicated. At 1:15 a.m. on June 24, 2010, he was standing on the porch when a grayish Cadillac containing four people stopped in front of the Williams house. The driver exited the Cadillac and walked back to the trunk area. Dontae and Nashaun walked over to the driver and stood there talking to him.

¶ 49 From the street lights and the porch light, Michael L. could see the driver's face, and he identified the defendant as the driver of the Cadillac. For a month prior to June 24, 2010, Michael L. had seen the defendant driving around the neighborhood and at different houses.

¶ 50 Dontae and Nashaun told the defendant they were leaving, and the defendant got back in the Cadillac. The Cadillac proceeded down Center Street to 152nd Street and turned right. Michael A. told Michael L. that he was leaving and to lock up the house. Nate, Nashaun and Lydell were already seated in the Buick. Michael A. was standing by the curb, and Dontae was standing outside the Buick when the Cadillac returned. The defendant pulled the Cadillac up next to the Buick and spoke to Nashaun. The defendant then drove the Cadillac down Center Street to 152nd Street and turned right.

¶ 51 As Michael A. and Lydell walked toward the corner of Center Street and 152nd Street, the defendant came around the corner with a gun in his hand. The defendant pointed the gun in the direction of Lydell and began shooting. Michael L. heard three shots and saw Lydell fall to the ground. As Michael A. ran toward the Buick, the defendant chased after him, firing three shots at him. After he stopped shooting, the defendant walked down the middle

of Center Street towards the corner. A man named Buck appeared, and while Michael L. could not recall the defendant's exact words, he described the defendant's tone of voice as loud and angry, telling Buck to " '[s]hoot for him, finish him.' " The defendant then left the scene.

¶ 52 On July 13, 2010, Michael L. identified the defendant in a photo array as the man he saw shoot Lydell. On July 15, 2010, he identified the defendant in a lineup. In both identifications, Michael L. maintained that he was "100 %" sure the defendant was the man who shot Lydell.

¶ 53 b. Cross-Examination

¶ 54 Michael L. did not recall what the defendant was wearing. A second man exited the Cadillac and told the defendant to get back in the Cadillac. The defendant complied, and the Cadillac proceeded down Center Street, turning right at the corner of Center Street and 152nd Street. Michael L. did not recall what the second man or the two other passengers looked like.

¶ 55 Michael L. did not tell the police the defendant's name at the time of the shooting. On July 13, 2010, Detective Cocker told him the police had a suspect and asked him to view a photo array. Both Marcel and he made an identification of the shooter from the photo array. Before he identified the defendant in the lineup on July 15, 2010, Michael L. knew that the police had a suspect in custody.

¶ 56 c. Redirect Examination

¶ 57 Michael L. did not recall what the defendant was wearing at the time of the shooting so the fact that the defendant was wearing a white T-shirt in the photo array and an orange shirt

in the lineup made no difference to him in identifying the defendant. Neither his family nor the police instructed him to identify the defendant as the shooter.

¶ 58 d. Re-Cross Examination

¶ 59 Michael L. acknowledged that the defendant was the only person who appeared in both the photo array and the physical lineup.

¶ 60 4. *Dontae Williams*

¶ 61 a. Direct Examination

¶ 62 On June 23, 2010, Dontae drove Michael A., Lydell and Nate in the Buick to the Williams house on Center Street in Harvey. They arrived around 11 p.m. Michael L. and Marcel were there. Later, Nashaun arrived.

¶ 63 By 1 a.m. on June 24, 2010, Dontae, Lydell, Michael A., Nate and Nashaun were leaving the party. Michael L. and Marcel were standing on the grass by the curb. A silver or gray Cadillac containing two males and two females stopped in the middle of the street in front of the Williams house. The driver was a male and was wearing white T-shirt and a red hat. As the driver exited the Cadillac, Dontae asked Marcel who the driver was and was he "okay." The driver walked to the back of the Cadillac and started talking to Nashaun. As Dontae walked past, the driver asked him " 'What's up, Big Homie?' " and he replied, " 'What's up?' " The driver and he stood approximately an arm's length apart and shook hands. Dontae could see the driver's face and identified him as the defendant. The defendant's red hat did not cover his face. Prior to June 24, 2010, Dontae had seen the defendant in the area but had never interacted with him and did not know his name.

¶ 64 After shaking hands with the defendant, Dontae walked over to the Buick, which was parked across the street. Nashaun and the defendant continued to talk, and Dontae's uncles

and cousins also continued their conversations. Dontae had no problem seeing everything that was going on; the Buick was parked under a street light, and the porch light and the lights from inside the house were on as well. Dontae told the group they should get going and walked to the back of the Cadillac. Another male exited the Cadillac and spoke to the defendant. Dontae then approached the defendant telling him he was leaving and that the defendant should leave too because there had been a lot of police activity around the Williams house. Dontae told him that he would " 'get with him later,' " to which the defendant replied " 'Okay, big man. I will holler at you later.' " Dontae was trying to get everyone, including his own family and friends, out of the area to avoid trouble with the police. The defendant returned to the Cadillac and drove down Center Street, turning right at the corner.

¶ 65 Dontae retrieved the keys to the Buick, and Lydell, Nashaun and Nate got in. While Dontae waited for Michael A., he saw the lights of the Cadillac as it drove down Center Street again. The defendant pulled the Cadillac up next to the Buick. Dontae was about three feet from the defendant and was able to see his face since both vehicles were illuminated by the street light. The defendant spoke to Nashaun who appeared not to remember who the defendant was. When she was reminded that they had just been talking, Nashaun told the defendant she was going home with her "uncles." Dontae again warned the defendant about the police and that he would meet up with the defendant later. The defendant replied, " 'All right, for show, Big man, I am going to holler at you.' " Dontae acknowledged that those might have not been the defendant's exact words.

¶ 66 The Cadillac passed the Williams house but slowed down in front of the next house before proceeding to the corner and turning right again. Dontae saw Lydell and Michael A.

walking towards the corner. Nashaun said something and as Dontae turned toward her, he heard three gunshots. Dontae turned back around and saw the defendant pointing a gun at Michael A., who was between two cars. When Michael A. jumped up, the defendant began shooting at him. Dontae could see sparks hitting the ground just inches away from Michael A.'s foot. Dontae thought the gun was a revolver because it had a longer barrel.

¶ 67 When the defendant stopped shooting, Dontae yelled at him asking why he was shooting at them. The defendant's response was " 'F--k y'all n-----s.' " Michael A. tried to chase the defendant who was backing away. A man came out of a white house walking in the middle of Center Street towards them. The man asked the defendant what he was doing, and the defendant responded " 'Man, help me kill these n-----s.' " The man told the defendant he was on his own and refused to help him. The defendant then pointed the gun at Dontae telling him that if he got into the Buick, " 'I am going to shoot your ass.' " Dontae told him that he would just have to shoot him and began to chase the defendant who ran back around the corner from where he had come. Dontae then began to look for Lydell and Michael A. When he located them, Michael A. was holding Lydell who then succumbed to his wound.

¶ 68 On July 13, 2010, Dontae met with Detective Crocker at the Harvey police station. He was shown a photo array and identified the defendant's photograph as the man he saw shooting on June 24, 2010. On July 15, 2010, Dontae went to the Harvey police department to view a lineup. Neither the police nor any of his family members told him which person to identify. Dontae identified the defendant in the lineup as the shooter because he recognized his face, not because of the orange shirt he was wearing.

¶ 69 b. Cross-Examination

¶ 70 Dontae had two vodka and juice drinks at the party. Prior to the shooting incident, he had seen the defendant driving down Center Street.

¶ 71 After the shooting, Dontae was taken to the Harvey police station. He described the shooter to the police as a black male, with a light complexion, braids, 6 feet, 1 inch tall and weighing 220 pounds. He did not mention a name to the police because he did not know the defendant's name at the time of the shooting. Dontae told the police the shooter was wearing a red hat, but he did not know if the police wrote that down. The shooter was taller than Dontae who was 5 feet 9 inches tall.

¶ 72 At the time Dontae viewed the lineup on July 15, 2010, he had heard the defendant's name from people around the neighborhood. The defendant was the only individual who was in both the photo array and the lineup.

¶ 73 c. Redirect Examination

¶ 74 Dontae identified the defendant as the shooter because he saw the defendant shooting at Lydell and Michael A. He shook hands with and spoke to the shooter, knew what he was wearing and saw his face very clearly. Dontae did not wear glasses and had no trouble with his vision. When Dontae described the defendant to police, he estimated the shooter's height, saying he was just a little taller than the witness.

¶ 75 Dontae had seen people who were highly intoxicated. He had previously witnessed Nashaun when she was intoxicated. When he saw her at the party, she had been drinking and had more to drink before leaving the party. When Nashaun did not know who the defendant was, she was highly intoxicated and Dontae had to remind her that she had just talked to him.

¶ 76 *5. Summary of the Police Officers' Testimony*

¶ 77 Illinois State Trooper Peter Watson, a crime scene investigator, photographed the scene of the shooting at 2 a.m. on June 24, 2010. He acknowledged that the photographs were taken with both a built-in flash and a flash attachment. He further acknowledged that the area was dimly lit, and there was insufficient light for him to take the photographs without using a flash. However, Trooper Watson explained that to the camera, the scene may appear darker than it actually was. He did not recover a weapon or any ballistics evidence from the scene. Trooper Watson could see the faces of the other police officers at the scene. He did not determine whether he could see the face of another officer standing at the corner of Center and 152nd Streets from where the Buick was parked.

¶ 78 William Wujek was employed by the Illinois State Police as a crime scene investigator. He witnessed the autopsy performed on Lydell Williams and identified the bullet removed from Lydell's back. Detective Jeffrey Crocker of the Harvey police received the bullet from Investigator Wujek and resealed the bullet in an evidence bag.

¶ 79 On July 14, 2010, Harvey Police Officer Bischoff located the defendant sitting in a maroon Buick in front of 89 East 148th Street in Harvey. After confirming his identity, Officer Bischoff called for backup, and the defendant was taken into custody. At the time of his arrest, the defendant was not wearing a red hat and did not have a weapon or bullets.

¶ 80 B. For the Defendant

¶ 81 Nathan Lashore Tate was the only witness to testify for the defense.

¶ 82 1. *Direct Examination*

¶ 83 On June 23, 2010, Nate was driven to the party at the Williams house in the Buick with Lydell, Michael A. and Dontae. He met Nashaun for the first time at the party. There were over 10 people at the party, drinking and socializing. Nate had a 22-ounce beer.

¶ 84 Shortly after 1 a.m. on June 24, 2010, he was standing on the front porch preparing to leave, when he saw a Cadillac pull up. He denied telling the grand jury that he was standing on the curb when the Cadillac pulled up and denied telling the police that he was standing by the curb or walking toward the street when a white Cadillac arrived on the scene. Nate observed four or five black males exit the Cadillac. The driver was wearing a white T-shirt, blue jeans and a red baseball cap. Nate could not see his face. He described the lighting conditions as "fair." He did not tell the grand jury that the lighting was "low."

¶ 85 After the four black males exited the Cadillac, three of them stood around while the driver talked to Nashaun. While Nate remained on the porch, Lydell and Michael A. were talking to the driver and the other men. After the Cadillac left, Nate walked to the Buick and got in as did Lydell and Nashaun. Lydell then got out of the car trying to persuade Dontae and Michael A. to get in the Buick so they could leave. The Cadillac returned passing the Williams house. It slowed down and then kept going down Center Street. The driver had the red hat on, but Nate could not see his face. He could not see if anyone else was in the car. After about 30 seconds, Nate heard gunshots but did not see any of the shooting.

¶ 86 *2. Cross-Examination*

¶ 87 Nate had problems with his night vision but did not wear glasses. He could not see the faces of the men who got out of the Cadillac. Michael A., Dontae and Nashaun were closer to the Cadillac when it pulled up the first time. Dontae talked to and shook hands with the man wearing the red hat. When the Cadillac drove down Center Street the second time, Nate was trying to shake off Nashaun who was grabbing at him. After the shooting stopped, Nate saw the man in the red hat walking backwards holding his arm out. Nate could not see if the man was holding a gun. After the man left, Nate saw Lydell on the ground.

¶ 88

C. The Verdict

¶ 89

After the defendant chose not to testify, closing arguments were presented, and the trial court instructed the jury. The jury returned a verdict finding the defendant guilty of the first degree murder of Lydell Williams and the attempted first degree murder of Michael A. Williams. The jury found that in committing the offenses, the defendant was armed with a weapon. The jury also found the defendant guilty of armed habitual criminal.

¶ 90

D. Amended Motion for a New Trial

¶ 91

In support of a new trial, the defendant renewed his argument that granting the State's motion *in limine* to preclude the jury from hearing that cocaine was concealed in Lydell's body and redacting the reference from the medical examiner's report were errors. The defendant maintained that, as a result, he was prevented from arguing that someone else had a motive to kill Lydell, leaving him with nothing to counter the State's suggestion in closing argument that the defendant's motive was his perceived disrespect in his encounter with Nashaun. The trial court denied the amended motion for a new trial.

¶ 92

E. Sentencing

¶ 93

The trial court sentenced the defendant to 90 years' imprisonment as follows: 35 years' imprisonment on the first degree murder conviction (counts 1 and 5) plus 25 years' imprisonment for discharging a firearm resulting in Lydell's death; 10 years' imprisonment on the attempted first degree murder conviction (count 13) plus 20 years' imprisonment for discharging a weapon, to be served consecutively to the sentence imposed on count 1; and 10 years' imprisonment on the armed habitual criminal conviction, to be served concurrently with the sentence imposed on the attempted first degree murder conviction.

¶ 94 The trial court denied the defendant's motion to reconsider sentence. This appeal followed.

¶ 95 ANALYSIS

¶ 96 I. Sufficiency of the Identification Evidence

¶ 97 The defendant contends that in the absence of a motive and the inconsistent and unreliable identification testimony, the State failed to prove beyond a reasonable doubt that he was the shooter.

¶ 98 A. Standard of Review

¶ 99 A challenge to the sufficiency of the evidence necessary to sustain a conviction requires the reviewing court to determine whether, after considering 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. Moore*, 375 Ill. App. 3d 234, 238 (2007). This standard applies whether the evidence is direct or circumstantial. *Moore*, 375 Ill. App. 3d at 238.

¶ 100 It is not this court's function to retry the defendant. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). As a reviewing court, we will not substitute our judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses unless the evidence is " 'so palpably contrary to the verdict or so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of [the defendant's] guilt.' " *People v. Rodriguez*, 312 Ill. App. 3d 920, 932 (2000) (quoting *People v. Abdullah*, 220 Ill. App. 3d 687, 693 (1991)).

¶ 101 B. Discussion

¶ 102 The State has the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. *Rodriguez*, 312 Ill. App. 3d at 933. The defendant maintains that reasonable doubt exists as to his identification as the shooter because (1) the lighting in the area was dim and obscured by foliage, (2) several of the witnesses had been drinking alcohol, (3) although the witnesses recognized the defendant as the shooter, they did not immediately inform the police that they recognized him, and (4) the witnesses provided inconsistent and/or inaccurate descriptions of the shooter.

¶ 103 "The adequacy of defendant's identification raises a question of the credibility of the witnesses which is a matter for the jury to decide, sitting as triers of fact with superior opportunity not only to hear the testimony of the witnesses but to observe their demeanor while on the witness stand." *People v. Carter*, 132 Ill. App. 2d 572, 580 (1971). The trier of fact must also resolve the conflicts or inconsistencies in the evidence. *Tenney*, 205 Ill. 2d at 428.

¶ 104 A conviction cannot be sustained beyond a reasonable doubt if the identification of the accused is vague or doubtful. *Rodriguez*, 312 Ill. App. 3d at 934. Deference to the trier of fact on the credibility of witnesses and the weight of the evidence issues does not excuse a reviewing court from its duty to carefully consider the evidence, whether in the context of a bench trial (*People v. Scott*, 337 Ill. App. 3d 951, 957 (2003)) or a jury trial (*People v. Kilgore*, 59 Ill. 2d 173, 177-78 (1974) (the jury verdict was reversed where the identification evidence was insufficient to establish the defendant's guilt)).

¶ 105 In assessing the reliability of eyewitness testimony, the court considers the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972). "Those factors include (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention,

(3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation." *People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007) (citing *Neil*, 409 U.S. at 199-200).

¶ 106 The defendant argues that the area where the shooting took place was too dimly lit for any of the witnesses to make positive identifications of him as the shooter. He points out that the shooting took place shortly after 1 a.m. and that Trooper Watson had to use a double flash when he photographed the scene two hours later.

¶ 107 Michael A., Michael L. and Dontae testified that they were able to see the shooter with the lighting from the Williams house and the street light which illuminated both the Buick and the Cadillac. Michael A. denied that the foliage on the trees obscured the light from the street light. Both Michael A. and Dontae testified that they saw the shooter's face more than once. Trooper Watson testified that he was able to view the faces of the officers he was working with while photographing the scene. He explained that the scene may have photographed darker because of what the camera perceived the light level was, not because the area was actually that dark.

¶ 108 The defendant then argues that Michael A.'s, Michael L.'s and Dontae's identifications were unreliable because the three men admitted consuming alcohol at the party. The defendant relies on *People v. Di Maso*, 100 Ill. App. 3d 338 (1981). In that case, the victim, who was also the key witness, had been drinking alcohol the night he was attacked. The reviewing court held that the jury should have been allowed to consider evidence that on prior occasions, the victim's drinking resulted in blackouts since it could be inferred from that evidence that drinking affected his perceptual capabilities. *Di Maso*, 100 Ill. App. 3d at 343.

¶ 109 Both Michael A. and Michael L. denied they were intoxicated. We have not located any evidence in the record to support the defendant's assertion in his brief that Dontae was intoxicated. Apart from the witnesses' consumption of alcohol, the defendant does not identify any physical or other indications that Michael A., Michael L. or Dontae was impaired by their alcohol consumption at the time of the shooting or how the consumption of alcohol affected them adversely on prior occasions. The defendant's argument is based on speculation rather than facts.

¶ 110 The defendant argues that the witnesses' identifications of the shooter were unreliable. The defendant points out that Michael A. acknowledged the following: he was not paying close attention to what was happening prior to the shooting; at the time of the shooting, he was running away from the shooter; and he described the shooter as 6 feet, 1 inch tall whereas the defendant was 5 feet, 9 inches tall. In addition, Michael A. was the only witness who testified that the driver of the Cadillac did not exit the car, and Michael A. did not recognize that the shiny object in the shooter's hand was a gun, even though he and the shooter were only 15 feet apart.

¶ 111 The defendant further points out that Michael L. did not recall that the shooter wore a red hat. Marcel's testimony that he was inside the Williams house looking out when the Cadillac pulled up the second time was contradicted by the other witnesses who stated that Marcel was outside talking to his relatives. Dontae was distracted by his conversation with Nashaun in the backseat of the Buick and insisted that the shooter was 6 feet, 1 inch tall and 220 pounds while the defendant was 5 feet, 9 inches tall and weighed 205 pounds.

¶ 112 To constitute a positive identification, an eyewitness must have had an adequate opportunity to observe the offender; however, there is no requirement that the observation

take place under ideal circumstances or that it last for more than a brief period of time.

People v. Zarate, 264 Ill. App. 3d 667, 673 (1994). Moreover, " '[t]he presence of discrepancies or omissions in a witness' description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made.' "

People v. Tomei, 2013 IL App (1st) 112632, ¶ 50 (quoting *People v. Magee*, 374 Ill. App. 3d 1024, 1032 (2007)). In *Tomei*, conflicting testimony as to whether the defendant was wearing a hat did not undermine the reliability of the identification testimony. *Tomei*, 2013 IL App (1st) 112632, ¶ 50. In *People v. Johnson*, 114 Ill. 2d 170 (1986), the supreme court found no substantial discrepancy where the witness estimated that the defendant was 6 feet to 6 feet, 2 inches tall whereas the defendant was 5 feet, 9 inches tall. The witness' only opportunity to view the defendant upright was while she was crawling on the ground. *Johnson*, 114 Ill. 2d at 189.

¶ 113

In this case, Michael A. viewed the defendant seated in the Cadillac and when the defendant began shooting at him. In neither instance was Michael A. in the best position to give an accurate description of the defendant's height. While Dontae was 5 feet, 9 inches tall, and described the shooter as taller than he was, Dontae also saw the defendant close up, shook hands with him and talked with him. Michael L. testified that he did not recall anything about what the shooter was wearing. The conflicting testimony as to where Marcel was standing when the Cadillac appeared the second time does not impair his identification of the defendant as the shooter. Marcel testified that when the Cadillac drove down Center Street the first time and stopped in front of the Williams house, he was standing on the porch and viewed the defendant as he exited the Cadillac.

¶ 114 The defendant argues the witnesses' failure to inform the police immediately after the shooting that they recognized the shooter discredited their identifications of him as the shooter. The defendant points out that Marcel, Michael L. and Dontae acknowledged that they had seen the defendant in the neighborhood prior to the shooting and that Michael L. admitted knowing his first name prior to the shooting.

¶ 115 " 'It is a general principle of evidence that the failure to assert a fact when it would have been natural to assert it amounts in effect to an assertion of the non-existence of that fact. [Citation.] The omission, that is, the failure to assert a fact, is *prima facie* inconsistent conduct which unexplained has the tendency to discredit a witness.' " *People v. Hughes*, 17 Ill. App. 3d 404, 410 (1974) (quoting *People v. King*, 10 Ill. App. 3d 652, 655 (1973)).

¶ 116 The defendant relies on *Hughes*. In *Hughes*, the reviewing court found substantial reasons for doubting the witnesses' identification of the defendant as the assailant, and reversed his conviction. One eyewitness to the murder failed to inform the police at the scene that she witnessed the murder and that she knew the assailant and where he lived. In addition, she viewed the lineup twice before she identified the defendant as the assailant. *Hughes*, 17 Ill. App. 3d at 410. The other witness failed to mention that the man he identified as the assailant participated in both of the fights that preceded the murder, and he was uncertain when he identified the defendant as the assailant in a lineup. *Hughes*, 17 Ill. App. 3d at 410-411.

¶ 117 In contrast to the witnesses in *Hughes*, prior to the shooting, the witnesses in the present case had only seen the defendant in the neighborhood. They had no contact with the defendant and did not know where he lived. Michael L. knew the defendant's first name was "Jerome," only because he had heard it from people in the neighborhood. Moreover, the

witnesses were subjected to thorough cross-examination on their failure to inform the police that they had previously seen the defendant. The witnesses' omissions were before the jury whose duty it was to judge their credibility. Finally, Michael A., Michael L., Marcel and Dontae made positive identifications of the defendant as the shooter in the photo array and/or in the lineup and at trial.

¶ 118 The defendant's challenge to his conviction for the first degree murder of Lydell Williams is based solely on the identification testimony of the witnesses. We have carefully reviewed that testimony, and in doing so, we have considered all of the discrepancies in the identification evidence asserted by the defendant. We are satisfied that there was nothing doubtful, vague or uncertain about the witnesses' identification of the defendant as the shooter. We conclude that the identification evidence was sufficient for the jury to find that the defendant was the shooter beyond a reasonable doubt.

¶ 119 II. Motion *in Limine*

¶ 120 The defendant contends that the trial court erred when it granted the State's motion *in limine* to preclude the defendant from revealing to the jury that Lydell had cocaine concealed in his body at the time he was shot.

¶ 121 A. Standard of Review

¶ 122 Evidentiary motions, such as motions *in limine*, are matters for the trial court's discretion, and as a reviewing court, we will not disturb a trial court's evidentiary ruling absent an abuse of discretion. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 123

B. Discussion

¶ 124

The defendant argues that the preclusion of the evidence that Lydell had cocaine concealed in his body when he was shot denied the defendant the opportunity to present a defense. The defendant asserts that the evidence was closely balanced and points to the State's failure to present evidence of a motive on the part of the defendant to shoot Lydell. The defendant theorizes that the cocaine evidence was relevant because it provided a motive for someone involved in the drug trade to shoot Lydell. The cocaine evidence also explained why the members of the Williams family were reluctant to cooperate with the police, since they may have been aware of Lydell's involvement in the drug trade. Possibly they were afraid of the authorities or of the real shooter and therefore identified the defendant as the shooter. The defendant maintains that the cocaine evidence was relevant to establish that someone other than the defendant had a motive to shoot Lydell and therefore was admissible under Rules 401, 402 and 404(b) of the Illinois Rules of Evidence (Ill. Rs. Evid. 401, 402, 404(b) (eff. Jan. 1, 2011)).

¶ 125

At the outset, we disagree with the defendant that the evidence was closely balanced. The defendant's only challenge to the evidence was his identification as the shooter. In light of the positive identification by four witnesses of the defendant as the shooter and our rejection of the alleged deficiencies in those identifications, the evidence was more than sufficient to support the jury's guilty verdict. As for the lack of motive, the defendant concedes that the State was not required to prove that the defendant had a reason for shooting Lydell since motive is not an element of the crime of murder.

¶ 126

A defendant is entitled to all reasonable opportunities to present evidence tending to create doubt of his guilt, but the evidence must be relevant and material in order to be

admissible. *People v. Mikel*, 73 Ill. App. 3d 21, 30 (1979). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). Evidence which is not relevant is not admissible. Ill. R. Evid. 402 (eff. Jan.1, 2011). Evidence of other crimes is not admissible to prove the character of a person, but it may be admissible as proof of motive. Ill. R. Evid. 404(b)(eff. Jan.1, 2011). A trial court may exercise its discretion to reject evidence which is remote, uncertain or speculative. *People v. Kraybill*, 2014 IL App (1st) 120232, ¶ 42 (evidence is speculative if an insufficient nexus exists to connect the offered evidence to the crime).

¶ 127

A defendant in a criminal case may offer evidence tending to show that another individual committed the offense, but such evidence is inadmissible as irrelevant if it is too remote or speculative. *Kraybill*, 2014 IL App (1st) 120232, ¶ 46. In *People v. Morgan*, 142 Ill. 2d 410 (1991), *rev'd on other grounds*, *Morgan v. Illinois*, 504 U.S. 719 (1992), the defendant argued that an unknown person may have killed the victim, a known drug dealer, during a drug deal gone wrong. The sole basis for the argument was the fact that there was a great deal of drug traffic in the area where the victim's body was found. The supreme court found the evidence too speculative and upheld the trial court's ruling barring the evidence. *Morgan*, 142 Ill. 2d at 460. In *People v. Bruce*, 185 Ill. App. 3d 356 (1989), the defendants sought to introduce evidence that the victims were involved with drugs and may have been murdered by someone also involved with drugs. The trial court granted the State's motion to bar the evidence, which consisted of rumors gathered during a police investigation and the information that several named individuals may have disliked the victims. The reviewing

court upheld the trial court's ruling, finding the evidence uncertain, remote and having little or no probative value. *Bruce*, 185 Ill. App. 3d at 365.

¶ 128 The defendant maintains that the analysis in *People v. Lillard*, 200 Ill. App. 3d 173 (1990), demonstrates why the jury should have been informed that cocaine was found in Lydell's body. During an argument over money owed for the purchase of a radio, the defendant shot the decedent. Prior to trial, the State made an oral motion *in limine* to preclude testimony that cocaine was found in the decedent's pockets. At trial, the defendant raised a justification defense, arguing that from the decedent's reference to himself as "Big Daddy Caine," and from the cocaine and the money found on him, it could be inferred that the decedent was a drug dealer and was selling drugs. Since the defendant and the decedent had argued over the presence of drugs in the house they shared, the defendant maintained that the evidence explained his action in shooting the decedent and supported his justification defense. *Lillard*, 200 Ill. App. 3d at 179. The trial court found that, without more, the drugs were not relevant merely because the decedent possessed them. The court stated it would not preclude the reference to the drugs or the money if a proper foundation was established, and if the drugs were relevant to the defense. *Lillard*, 200 Ill. App. 3d at 179.

¶ 129 On the defendant's appeal from his murder conviction, the reviewing court upheld the preclusion of the drug evidence. The court determined that the trial court did not prevent the defendant from presenting his defense that he was protecting his home from the decedent's drug-selling activities. It was the defendant's failure to lay a foundation for the admission of the evidence, *i.e.*, the defendant did not testify that the decedent was a drug dealer, that the decedent and he argued over the decedent's wish to turn the house into a cocaine distribution center or that the decedent was selling drugs and therefore, the defendant thought the

decendent was armed with a weapon at the time the defendant shot him. *Lillard*, 200 Ill. App. 3d at 180.

¶ 130 The defendant maintains that unlike the defendant in *Lillard*, he established a foundation for the admission of the cocaine evidence with the facts that Lydell had concealed the cocaine in his body, that a gun was found on his body after he was shot, and he had a prior drug conviction. We disagree. In the present case, the defendant offered no testimony or evidence that Lydell was selling drugs on June 23 or 24, 2010, that he had ongoing disputes with other drug dealers and/or his customers or that he was involved in a territorial dispute with other drug dealers. In the absence of such evidence, the defendant failed to establish a foundation for the admission of the cocaine on the basis that it was relevant evidence.

¶ 131 We are mindful that our supreme court cautioned against granting the State's motion *in limine* " 'if the result would be, for all practical purposes, an evisceration of the defendant's theory of the case.' " *People v. Blue*, 205 Ill. 2d 1, 22 (2001) (quoting *People v. Prevo*, 302 Ill. App. 3d 1038, 1050 (1999)). The defendant's theory that Lydell was a casualty of the violence inherent in the drug trade was, at best, peripheral to the defendant's misidentification defense. The trial court did not abuse its discretion in granting the State's motion *in limine*.

¶ 132 We also find no abuse of discretion by the trial court in redacting the mention of the cocaine evidence from the medical examiner's report. The defendant maintains that the trial court's redaction violated the rule of completeness. The rule of completeness has its origins in the common law and has been codified in Rule 106 of the Illinois Rules of Evidence (Ill. R. Evid. 106 (eff. Jan. 1, 2011)). *People v. Craigen*, 2013 IL App (2d) 111300, ¶ 42. Rule 106 provides that " 'When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other

writing or recorded statement which ought in fairness to be considered contemporaneously with it.' " *Craig*, 2013 IL App (2d) 111300, ¶ 42 (quoting Ill. R. Evid. 106 (eff. Jan. 1 2011)). While Rule 106 differs in some respects from the common law rule, admissibility still depends on whether the remainder of the writing, recording or statement is necessary to prevent the trier of fact from being misled. *Craig*, 2013 IL App (2d) 111300, ¶ 45.

¶ 133 In this case, the admission of the redacted portion of the medical examiner's report would not have assisted the jury in evaluating or understanding the cause of Lydell's death. Redacting the reference to the cocaine evidence from the medical examiner's report would not have misled the jury as to the cause, namely a gunshot wound, of Lydell's death. "Simply because a writing or recorded statement is related to an admitted writing or recorded statement, or pertains to the same subject matter, does not mean it satisfies the requirements for admissibility under Rule 106." *Craig*, 2013 IL App (2d) 111300, ¶ 46.

¶ 134 Finally, the trial court's rulings did not deny the defendant his constitutional right to present a defense. The trial court explained to defense counsel that its rulings did not prevent the defendant from arguing that someone other than the defendant was the shooter.

¶ 135 We conclude that the trial court did not abuse its discretion when it granted the State's motion *in limine* and precluded any reference to the cocaine concealed in Lydell's body and ordered the redaction of the reference to the cocaine from the medical examiner's report.

¶ 136 III. Attempted First Degree Murder of Michael A. Williams

¶ 137 The defendant contends that the State failed to prove beyond a reasonable doubt that he possessed the intent to kill Michael A.

¶ 138 A. Standard of Review

¶ 139 In reviewing the sufficiency of the evidence necessary to sustain a conviction for attempted murder, we view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 28.

¶ 140 B. Discussion

¶ 141 "To support a conviction for attempted murder, the State must establish beyond a reasonable doubt that: (1) the defendant performed an act constituting a 'substantial step' toward the commission of murder, and (2) the defendant possessed the criminal intent to kill the victim." *Petermon*, 2014 IL App (1st) 113536, ¶ 39. Intent is a state of mind and difficult to establish by direct evidence. *People v. Parker*, 311 Ill. App. 3d 80, 89 (1999). The specific intent to kill is usually inferred from the surrounding circumstances including the character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries. *Parker*, 311 Ill. App. 3d at 89. The specific intent to kill may be inferred where the defendant, of his own volition, commits an act, the natural result of which is the death of another person. *Petermon*, 2014 IL App (1st) 113536, ¶ 39. While the act of firing a gun, without more, is not sufficient to prove the specific intent to kill, circumstances demonstrating that the defendant acted with malice or a complete disregard for human life when he discharged a firearm at another person support the conclusion that the defendant possessed the specific intent to kill. *Petermon*, 2014 IL App (1st) 113536, ¶ 39.

¶ 142 The defendant maintains that the State's evidence showed only that he sought to intimidate Michael A. The defendant points to Dontae's testimony that the defendant fired the shots at Michael A.'s feet and that the two shots, one from 15 feet away and the other from 4 feet away did not strike Michael A. While the defendant acknowledges that poor

marksmanship is not a defense to attempted murder (*People v. Teague*, 2013 IL App (1st) 110349, ¶ 27), he points to the testimony of the witnesses that he was able to fire a fatal shot into Lydell from a greater distance and while Lydell was running away from him. From this evidence, the defendant reasons that he could have killed Michael A. if he wanted to and the fact that he did not negated the specific intent element of attempted murder.

¶ 143 The defendant's recital of the evidence ignores other evidence from which his specific intent to kill Michael A. was a reasonable inference. Michael A. testified that after shooting at Lydell, the defendant saw Michael A. and said, " 'I'm on you now,' " and fired at him. The defendant then proceeded to chase Michael A. around the Buick firing a second shot. Dontae testified that a man emerged from the house on the corner, and the defendant asked the man to help him " 'kill these n - - - s.' "

¶ 144 The trier of fact determines if the requisite intent to kill exists, and we will not disturb that determination on appeal unless there is reasonable doubt of the defendant's guilt. *Petermon*, 2014 App (1st) 113536, ¶ 39. Viewing the evidence in the light most favorable to the State, we conclude that the evidence establishing that the defendant possessed the specific intent to kill Michael A. was sufficient for the jury to find the defendant guilty of the attempted first degree murder of Michael A. beyond a reasonable doubt.

¶ 145 IV. Armed Habitual Criminal

¶ 146 The defendant contends that his armed habitual criminal conviction must be reversed because the State failed to prove one of the elements of the offense beyond a reasonable doubt.

¶ 147 A. Standard of Review

¶ 148 A claim that a judgment entered on a criminal conviction and sentence is void presents a question of law, which we review *de novo*. *People v. Rodriguez*, 355 Ill. App. 3d 290, 293-94 (2005).

¶ 149 B. Discussion

¶ 150 An armed habitual criminal conviction requires that the State prove beyond a reasonable doubt that the defendant received, sold, possessed, or transferred any firearm after having been convicted a total of two or more times of any combination of the offenses listed in the statute. See 720 ILCS 5/24-1.7 (West 2010). The defendant had prior convictions for residential burglary and aggravated unlawful use of a weapon (AUUW), both of which were predicate felonies for an armed habitual criminal conviction. 720 ILCS 5/24-1.7(a)(2) (West 2010).

¶ 151 The defendant contends that his conviction for AUUW is void under the supreme court's decision in *People v. Aguilar*, 2013 IL 112116. In *Aguilar*, the supreme court ruled that a conviction under the Class 4 form of AUUW (720 ILSC 5/24-1.6(a)(1), (a)(3)(A) (West 2008)) violated the right to bear arms under the second amendment to the United States Constitution and must be reversed. *Aguilar*, 2013 IL 112116, ¶ 22. Since his AUUW conviction was void, the defendant maintains that the State failed to prove one of the two predicate felonies necessary for his armed habitual criminal conviction.

¶ 152 The defendant acknowledges that in *People v. Burns*, 2013 IL App (1st) 120929, *appeal allowed*, No. 117387 (Ill. May 28, 2014) (table), this court held that possession of firearms by a felon (Class 2 form of AUUW) is conduct which falls outside of the protections of the second amendment. *Burns*, 2013 IL App (1st) 120929, ¶ 27; *Aguilar*, 2013 IL 112116, ¶ 26. This court rejected the defendant's constitutional challenge and upheld the defendant's

conviction under the enhanced penalty applicable when AUUW was committed by a felon. See *Burns*, 2013 IL App (1st) 120929, ¶ 27.

¶ 153 The defendant argues that *Burns* was wrongly decided. We note that the fourth district disagreed with our analysis in *Burns* and found that AUUW when committed by a felon was void. See *People v. Gayfield*, 2014 IL App (4th) 120216-B, ¶ 31 (appeal pending, No. 118099 (September 2014 Term)). We are not bound to follow the decisions of our sister districts. *Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 829 (2010) (this court is not bound to follow the decision of another district when our own district has made a determination contrary to that of another district). The supreme court has granted leave to appeal in *Burns*, and until a ruling in *Burns* is announced, we will continue to adhere to our decision in that case.

¶ 154 We conclude that the defendant's AUUW conviction is not void and that his armed habitual criminal conviction is valid.

¶ 155 V. Felony Murder

¶ 156 The defendant contends that the trial court erred when it instructed the jury that the defendant could be convicted of first degree murder based on felony murder.

¶ 157 A. Standard of Review

¶ 158 Generally, the trial court's decision to issue a tendered jury instruction is reviewed for an abuse of discretion. *People v. Cotton*, 393 Ill. App. 3d 237, 256 (2009). However, in *People v. Davison*, 236 Ill. 2d 232 (2010), our supreme court determined that whether an offense served improperly as the predicate felony for a first degree felony-murder conviction presented a question of law to which *de novo* review applied. *Davison*, 236 Ill. 2d at 239.

¶ 159 B. Forfeiture

¶ 160 The defendant did not object to the first degree murder instruction or to the verdict forms at trial, and he did not raise any error based on the instructions in his amended posttrial motion. A defendant forfeits review of an alleged error in jury instructions if he does not object to the instruction or offer an alternative instruction, and does not raise the error in a posttrial motion. *Cotton*, 393 Ill. App. 3d at 256.

¶ 161 Nonetheless "a defendant does not waive substantial defects in criminal jury instructions by failing to timely object to them where the interests of justice require." *Cotton*, 393 Ill. App. 3d at 256; Illinois Supreme Court Rule 451(c) (eff. July 1, 2006). Rule 451(c) is coextensive with the plain error rule set forth in Illinois Supreme Court Rule 615(a) (eff. Aug. 27, 1999), and the two rules are construed identically. *Cotton*, 393 Ill. App. 3d at 256. In accordance with both rules, our first step in the analysis is to determine if error occurred in the giving of the instruction. *Cotton*, 393 Ill. App. 3d at 256.

¶ 162 At trial, the State proceeded on counts 1, 5, and 9 of the indictment charging different theories of first degree murder. Count 9 charged that the defendant committed felony murder in that he shot and killed Lydell Williams with a firearm during the commission of a forcible felony, namely, aggravated discharge of a firearm.

¶ 163 The jury received the following instruction:

"To sustain the charge of first degree murder, the State must prove the following propositions:

First Proposition: That the defendant performed the acts which caused the death of Lydell Williams; and

Second Proposition: That when the defendant did so,
he intended to kill or do great bodily harm to Lydell Williams or another;

or

he knew that his acts would cause death to Lydell Williams or another;

or

he knew his acts created a strong probability of death or great bodily harm to Lydell Williams or another;

or

he was committing the offense of Aggravated Discharge of a Firearm, to wit: Michael A. Williams.

If you find from your consideration of all the evidence that each one of these propositions has been proven beyond a reasonable doubt, you should find the defendant guilty."

¶ 164 The defendant maintains that since the discharge of a firearm was inherent in the charge that he murdered Lydell, it could not serve as the predicate felony for a charge of felony murder. *People v. Morgan*, 197 Ill. 2d 404 (2001). In *Morgan*, the supreme court held that the defendant could not be convicted of first degree murder based on felony murder as charged in the indictment. The felony murder counts alleged that the murders took place while the defendant was committing aggravated discharge of a firearm. Since discharging the weapon resulted in the deaths of the victims, the jury should not have been instructed that the defendant could be convicted of first degree murder on a felony-murder theory. *Morgan*, 197 Ill. 2d at 447-48.

¶ 165 "The court must examine the factual context surrounding the murder in order to determine if the forcible felony can serve as the predicate felony for felony murder." *Cotton*, 393 Ill. App. 3d at 256. The jury was instructed that it could find the defendant guilty of first

degree murder based on a felony-murder theory, if it found that the murder of Lydell Williams occurred while the defendant was committing the offense of aggravated discharge of a firearm by shooting at Michael A. Therefore, in the present case, the predicate felony of aggravated discharge of a firearm had an independent felonious purpose other than the murder of Lydell.

¶ 166 We conclude that the trial court did not err in instructing the jury on felony murder. Even assuming the trial court erred when it instructed the jury that it could convict the defendant of first degree murder based on felony murder, the defendant failed to establish that either prong of the plain-error analysis required that we consider the error. The error did not amount to a structural error requiring automatic reversal. *People v. Davis*, 233 Ill. 2d 244, 273 (2009). Under the remaining prong of the plain error rule, the defendant must establish that the evidence was so closely balanced that the error threatened to tip the scales of justice against him. *Davis*, 233 Ill. 2d at 274. The evidence in this case, that the defendant pursued Lydell shooting at him until Lydell fell fatally wounded, clearly established that the defendant was guilty of intentional and/or strong probability first degree murder. The evidence was not closely balanced, and any error in instructing the jury on felony murder was harmless. *Davis*, 233 Ill. 2d at 275.

¶ 167 VI. Ineffective Assistance of Counsel

¶ 168 The defendant contends that defense counsel's failure to move to dismiss the felony murder count of the indictment and failing to request separate verdict forms for each charged theory of first degree murder denied him the effective assistance of counsel.

¶ 169 A. Standard of Review

¶ 170 "Where the facts surrounding the ineffective assistance claim are undisputed and the claim was not raised below, this court's review is *de novo*." *People v. Wilson*, 392 Ill. App. 3d 189, 197 (2009).

¶ 171 B. Discussion

¶ 172 We apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine if a defendant has been denied his right to the effective assistance of counsel. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11. The defendant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *McGhee*, 2012 IL App (1st) 093404, ¶ 11. "The performance prong is satisfied if 'counsel's performance was objectively unreasonable under prevailing norms,' and the prejudice prong is satisfied if there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' (Internal quotation marks omitted.)" *McGhee*, 2012 IL App (1st) 093404, ¶ 11 (quoting *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010)). Both prongs of the *Strickland* test must be satisfied, or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 173 1. *Dismissal of the Felony-Murder Count of the Indictment*

¶ 174 The defendant claims that defense counsel's failure to seek dismissal of count 9 of the indictment charging him with felony murder (the felony-murder count) constituted a deficient performance. We disagree.

¶ 175 If filing a motion to dismiss the indictment would be futile, the failure to file such a motion does not establish that counsel's performance was deficient. *People v. Holmes*, 397 Ill. App. 3d 737, 741 (2010). The issue is whether there was a reasonable probability that

had defense counsel filed a motion to dismiss the indictment, the trial court would have granted the motion. *Holmes*, 397 Ill. App. 3d at 741.

¶ 176 "An indictment is a formal charge and not a trial on the merits. Therefore, it does not require the degree and quality of proof necessary for a conviction." *People v. Bragg*, 126 Ill. App. 3d 826, 831 (1984). In ruling on a motion to dismiss an indictment, the court will not consider the adequacy or sufficiency of the evidence unless the evidence is wholly incompetent or inadequate. *People v. Young*, 220 Ill. App. 3d 488, 493 (1991). It is unnecessary that evidence be presented on each element of the offense charged in the indictment, as long as there is some evidence relative to the charge. *Young*, 220 Ill. App. 3d at 493. The guilt or innocence of the defendant is established at trial. *Bragg*, 126 Ill. App. 3d at 831.

¶ 177 In *People v. Spann*, 332 Ill. App. 3d 425 (2002), the reviewing court found defense counsel ineffective for failing to challenge the counts of an indictment that were defective in substance. The counts failed to reference the correct statutory provision and failed to include the language providing for the enhanced penalty. Had counsel moved to dismiss the indictment, the defendant's criminal liability would have been reduced. *Spann*, 332 Ill. App. 3d at 441-42.

¶ 178 The defendant argues that the felony-murder count was defective because there was no evidence that he had a felonious purpose independent from killing Lydell in committing the offense of aggravated discharge of a firearm. *Morgan*, 197 Ill. 2d at 446-47. We disagree.

¶ 179 The felony-murder count alleged that the defendant was guilty of first degree murder for causing the death of Lydell Williams while in the course of committing a forcible felony, namely, aggravated discharge of a firearm. Unlike *Spann*, the defendant's challenge raises a

question of proof rather than a substantive deficiency. Moreover, *Spann* was a bench trial. In this case, the jury was instructed that it could find the defendant guilty of first degree murder based on felony murder only if Lydell's death was the result of the defendant's discharge of a firearm at Michael A.

¶ 180 Since the felony-murder count was not defective, there was no reasonable probability that the trial court would have granted a motion to dismiss. Therefore, defense counsel's performance was not deficient for failing to file such a motion.

¶ 181 Even if defense counsel's failure to seek the dismissal of the felony-murder count constituted a deficient performance, the defendant cannot establish that there was a reasonable probability that the result of the trial would have been different. The evidence was more than sufficient for the jury to find the defendant guilty of intentional and/or strong probability first degree murder in connection with Lydell's death. Since the defendant could not satisfy both prongs of the *Strickland* test, his claim of ineffective assistance for defense counsel's failure to move to dismiss the felony-murder count of the indictment fails.

¶ 182 *2. Separate Verdict Forms*

¶ 183 The defendant claims that defense counsel's performance was deficient for failing to request separate verdict forms. The defendant relies on *People v. Smith*, 233 Ill. 2d 1 (2009).

¶ 184 In separate cases, the defendants in *Smith* were charged with first degree murder under different theories including felony murder and also with the predicate felonies underlying the felony-murder charge. The defendants' requests for separate verdict forms were denied. The juries returned general verdicts of first degree murder and further found the defendants guilty of the predicate felonies. The defendants were sentenced on their first degree murder convictions and on the predicate felonies, which were to be served consecutively to their

sentences for first degree murder. *Smith*, 233 Ill. 2d at 5. On review, the supreme court noted that a felony-murder conviction would not have supported a separate conviction for the predicate felony. *Smith*, 233 Ill. 2d at 17-18. The court held that where the jury was instructed on different theories of first degree murder and specific findings by the jury could result in sentencing consequences favorable to the defendant, it was an abuse of discretion to deny a request for separate verdict forms. *Smith*, 233 Ill. 2d at 23.

¶ 185 Contrary to the defendant's argument, the general verdict in this case did not have sentencing ramifications for him. The defendant was not convicted of aggravated discharge of a firearm, the predicate felony for the felony murder charge against him.

¶ 186 Moreover, this court has held that defense counsel's decision to proceed with a general verdict form rather than request separate verdict forms was a matter of trial strategy and would be considered objectively reasonable where the law did not mandate that counsel request separate verdict forms. *People v. Calhoun*, 404 Ill App. 3d 362, 383 (2010). In the present case, the defendant claimed he was misidentified by Michael A. and the other eyewitnesses. Requesting separate verdicts would not have aided his defense of misidentification and may have weakened his defense in the eyes of the jury by suggesting that the defendant may have been the shooter but did not commit all the charged offenses. Defense counsel's decision to present the general verdict form rather than risk weakening the misidentification defense with separate verdict forms was sound trial strategy. *Calhoun*, 404 Ill. App. 3d at 384.

¶ 187 The defendant failed to establish that defense counsel's failure to request separate verdict forms constituted a deficient performance under the first prong of the *Strickland* analysis.

Therefore, we need not proceed to the prejudice prong of this claim. *Calhoun*, 404 Ill. App. 3d at 384.

¶ 188 We conclude that the defendant was not deprived of his constitutional right to the effective assistance of counsel.

¶ 189 CONCLUSION

¶ 190 For all of the foregoing reasons, the defendant's convictions and sentences are affirmed.

¶ 191 Affirmed.