2016 IL App (1st) 140372-U

THIRD DIVISION
August 3, 2016

No. 1-14-0372

**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).

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IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 CR 13427 |
| | ) | |
| DARRELL HARRIS, | ) | The Honorable |
| | ) | Kenneth J. Wadas, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

**ORDER**

*HELD*: Defendant's convictions for home invasion while armed with a firearm, armed robbery while armed with a firearm, armed habitual criminal and residential burglary were proper where (1) the evidence (including initial and repeated identifications of him, physical evidence, additional testimony and stipulations) was sufficient to prove him guilty of these crimes beyond a reasonable doubt; (2) defense counsel was not ineffective for failing to cross-examine a witness about a pending contempt charge where this was already known to the trial court and amounted to reasonable trial strategy; (3)

defendant's conviction for residential burglary did not violate the one-act, one-crime rule; and (4) his sentence was neither improper nor excessive. However, defendant's conviction for UUWF is hereby vacated, as it did violate the one-act, one-crime rule.

¶ 1 Following a bench trial, defendant-appellant Darrell Harris (defendant) was convicted of home invasion while armed with a firearm, armed robbery while armed with a firearm, armed habitual criminal, residential burglary and unlawful use of a weapon by a felon (UUWF). He received sentences of 30 years each for the first three convictions, 15 years for his residential burglary conviction and 7 years for his UUWF conviction, all to be served concurrently. He appeals, contending that the State failed to prove him guilty beyond a reasonable doubt due to insufficient and unreliable identification testimony; that he was denied effective assistance of counsel when his defense attorney failed to cross-examine a particular witness about her pending charges; that several of his convictions violate the one-act, one-crime rule; and that the trial court made a substantial mistake during his sentencing hearing and/or that his sentence was excessive. He asks that we reverse all or some of his convictions outright; he alternatively asks that we grant him a new trial, or that we vacate his residential burglary and UUWF convictions, or that we remand his cause for a new sentencing hearing, or that we reduce his sentence. For the following reasons, we affirm but vacate his UUWF conviction.

¶ 2 BACKGROUND

¶ 3 Defendant's convictions stem from the armed home invasion, armed robbery and residential burglary of a basement apartment at 2819 West Monroe in Chicago shared by Darnell Pike, his fiancee Constance Williams and their friend Alvin Ivy in the early morning hours of June 26, 2009. The events from the apartment carried over into the street in the form of a

getaway, which resulted in a car accident between a stolen van seen leaving the scene of the home invasion and a stolen Jeep; the van flipped over and the Jeep burst into flames.[1]

¶ 4 Williams testified that at about 3:30 a.m. on the day in question, she was outside her basement apartment attempting to break up a fight between her adult children and Pike's cousin; Pike was caring for his cousin while she was getting her kids in her car to take them to her mother's home. As she was doing so, Pike went inside the apartment but then returned, stating he had just been robbed. Williams then saw two men run outside from the apartment's front door. First, she described that as the men ran out, one was carrying a tin can with a picture of a goose on it; this was a can that Pike kept locked in the closet of the couple's bedroom and contained the proceeds from Pike's neighborhood sale of Newport 100 cigarettes. The robber dropped the can, Ivy (who was now also outside) picked it up, and the robber stuck a gun in Ivy's side and demanded the can back. She then described that one robber had the can and the other had the gun and, after the can fell and was retrieved, one robber ran through a lot on the side of the apartment while the other ran to, and entered, a burgundy and beige-colored van parked across the street. She corrected herself again to describe that one robber dropped the can on his way out of the apartment, that he stuck the gun in Ivy's side upon Ivy's retrieval of it, and that this robber was the one who ran to the van on the street, while the other unarmed robber ran through the lot. She made an in-court identification at trial of defendant as one of the robbers.

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[1]Trayvon Roberts, a 13-year-old passenger in the Jeep, was killed when he remained trapped inside it. Defendant was charged with Roberts' first-degree murder in addition to his other charges, but the trial court found him not guilty based on disputed evidence as to how the car accident between the van and the Jeep occurred.

¶ 5 Williams further testified that, after this occurred, she put her kids in her car and proceeded to her mother's home. While driving, she saw the van in front of her and witnessed the collision between it and the Jeep. She stopped her car, got out and was able to see, amid the wreckage of the van, Pike's tin can and cigarettes. She drove back to her apartment, got Pike and went back to the crash site, where police were present. After initially speaking to police, the couple went home per their recommendation.

¶ 6 Williams recounted that later that morning, she went to the police station and spoke with detectives. She viewed two photo arrays. From the first, she identified one man as one of the robbers she saw coming out of her apartment; from the second, she identified another man as someone who was outside in front of her apartment but not having come out of it.[2] A few days later, Williams viewed a physical lineup in which she identified defendant as one of the robbers coming out of her apartment. She averred that while defendant was the robber who retrieved the dropped can, he was not the one who had the gun nor did he point a gun at Ivy. Williams stated that she never told police or the grand jury when she identified defendant that he had a gun.

¶ 7 On cross-examination, Williams testified that when she was outside the apartment with her children, she saw a young man out there as well, just standing around, but he did not have a gun. The record reveals this young man she identified was Marquis Lee. She recounted that

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[2]The record contains these photo arrays as two separate exhibits. One of them clearly contains Williams' initials and a circle around defendant's photo, and the other contains her initials and a circle around another man, Marquis Lee. (Lee, a teenager, was tried in juvenile court for charges related to the instant crimes; he is not a party to his appeal.) However, William's record testimony, at this point in her description of the events, is not specific as to which man she identified in the first array as a robber and in the second as someone simply outside her apartment.

after Pike ran outside saying he was robbed, she saw two other men run out of the apartment; one dropped the can, Ivy retrieved it, and the robber with the gun took it from him and ran to the van. Williams did not see where Lee went. She admitted that she told detectives that after the robber got into the van, she followed it; she did not see anyone else get inside it. After witnessing the crash, she saw the robber run through the alley. She went to the police station, made identifications from two photo arrays, and went home. She next averred that, a few days later, she saw a man walking down the street and she recognized him as one of the robbers. She found out from people in the neighborhood that his name was Bobby Earl.[3] Eventually, an assistant public defender and her investigator visited Williams at her home, whereupon she told them that Earl was the robber with the gun who escaped in the van. At a subsequent visit, Williams identified Earl's photo as the older of the two robbers running out of her apartment and Lee's photo as the younger man who had been standing outside.

¶ 8 On redirect examination, Williams stated that when she found out Earl's name, she called police and told them he was one of the robbers; however, she did not tell the grand jury this. She then clarified that two men robbed her apartment that evening, and she identified Earl as one and defendant as the other. At the conclusion of Williams' testimony, the State voluntarily dropped existing charges against her of indirect criminal contempt for the failure to appear in court. At the time of defendant's trial, Williams was in custody serving a seven-year sentence for delivery of a controlled substance. Williams stated for the record that she did not use drugs but only sold

[3]Bobby Earl has several different aliases, including Bobby Earl Scott, Bobby Scott and John Terry. For consistency's sake, we will refer to him as Bobby Earl.

them, and that at the time of the robbery, she had been selling only cigarettes.

¶ 9 Just as Williams, Pike testified that at 3:30 a.m. on the day of the robbery, he was outside with Williams helping his cousin who was fighting with Williams' adult children. Ivy was inside the apartment asleep. After caring for his cousin, Pike went inside the apartment, where he found two men standing in his bedroom. Pike described one man as older and holding a gun and the other as younger. The older man with the gun told Pike to open the closet door, which Pike did. The older robber took Pike's tin container, which had a picture of a chicken on it; Pike kept money he earned from selling cigarettes in the container, locked in the closet. The younger robber then went through Pike's pockets and took more money, both men ran outside and Pike followed. As they exited, one robber dropped some money but not the can, and Ivy attempted to pick it up, whereupon the older robber showed his gun and took that money back. Pike saw both men run together to the lot on the side of the apartment building, through the alley and jump into a white van with brown stripes. Pike stated that during these events, Williams was not outside; she had already departed the area with her children before Pike and the robbers ran outside.

¶ 10 Pike further testified that Williams returned to the apartment shortly thereafter and told him that his stuff was in the street a few blocks away. Pike called police and then walked to the scene of the van and Jeep crash. Amid the van's wreckage, Pike was able to identify his tin can of money and cigarettes and he told police officers at the scene that they belonged to him. Following his return home, police arrived at his apartment and took him to the hospital to make an identification. Pike stated that at the hospital's emergency room, he made two identifications. He identified a young man there as the younger robber who did not have the gun; this man was

Lee. At this point in his testimony, Pike was asked if the older robber was in court. Pike responded, "He's here but he's not in court."

¶ 11 Pike's direct testimony continued with his description of what occurred once he was at the police station. He stated that he viewed a photo array, wherein he picked out defendant's photo as the driver of the van. He also viewed a physical lineup, wherein he again picked out defendant as the driver of the van. Pike averred that he did not remember ever telling police defendant had a gun. However, he did tell the grand jury the older robber had a gun and identified two photos at that proceeding. He noted that he identified the younger robber as Lee, the same man he saw at the hospital, and that this robber was the one who took the money from his pockets but was not holding a gun. He also noted that he identified defendant to the grand jury as the older robber and driver of the van but did not remember telling the grand jury that defendant pointed a gun at him. Pike identified defendant in open court during his testimony as the driver of the van and stated that defendant did not have a gun at the time of the robbery.

¶ 12 On cross-examination, Pike clarified that it was the younger robber who dropped the money he had taken from Pike's pockets as the robbers ran out of the apartment; Ivy picked it up, but the older robber came back and took it from him. Pike then admitted that he never saw the driver of the van; he did not see who drove the van away from the robbery and stated he only saw the van's driver at the accident scene. After the robbery, Pike went inside the apartment to call police and, about 15 minutes later, Williams returned home, told him about the crash, and he went to the site and saw his stolen belongings. He reaffirmed that he identified the younger robber at the hospital and identified a photo of defendant at the station as the van's driver, but he

denied telling police as part of his statement that he had been at a party and was drinking that night. Pike also averred that a public defender and her investigator eventually came to his home, whereupon he told them that he had later discovered that Earl was one of the robbers and, during a second visit, Pike identified a photo of Earl, telling them he was the robber with the gun.

¶ 13 On redirect examination, Pike recounted that, although he did not see the driver of the van while at his apartment at the time the robbery took place, he arrived at the crash scene and saw the same white van with brown stripes, and saw defendant climbing out of its wreckage along with Earl. He did not tell this to police. He also averred that he discovered Earl was one of the robbers when someone from the neighborhood told him the day after the robbery that Earl had robbed him. Pike stated he told this to detectives, the state's attorney and the grand jury. At the time of defendant's trial, Pike was incarcerated, having been convicted of possession of a controlled substance.

¶ 14 Bobby Earl testified that at 3:30 a.m. on the day of the robbery, he and his wife were visiting her family at a home down the street from Williams and Pike's apartment. His wife was inside and he remained outside with several other men. While waiting for his wife, Earl walked to the corner and saw defendant walking to a van parked on the street, holding packs of cigarettes and a shopping bag. Earl had come to know defendant recently and generally from the neighborhood, and he had seen defendant driving the same van on other occasions. Earl identified defendant in open court. He stated that as defendant got into the driver's side of the van, he (Earl) went around to the passenger side because he wanted to buy some cigarettes. He averred that defendant told him to get in the van, as he needed to be on his way, but that he

would drop him off at another location. Defendant drove the two of them away and after a few minutes, they came to an intersection where another vehicle slammed into the van, causing it to flip. Earl was bleeding but was able to climb out of the van, whereupon someone he knew was coming down the street, saw him, and took him to the hospital.

¶ 15 On cross-examination, Earl admitted that he had been drinking that night and had used heroin; he stated he was drunk and high when he got into the van. He testified that he did not speak to police about the incident until almost a year later, when police approached him because forensic test results identified his blood in the van. Earl lied to police at first, telling them he had been in the van before the accident and suffered a nosebleed, but then told them the truth when they told him his blood was on the money from the robbery. At this point, Earl told police that defendant had been driving the van at the time of the accident and he identified defendant's photo to police. However, when asked in court if he was certain defendant was driving the van, Earl averred that he was "not certain" defendant was driving it that night but was only "assuming it was him" because he knew he "wouldn't have just jumped in the van with anybody."

¶ 16 On redirect examination, when asked if defendant was driving the van that night, Earl stated that it could have been him, "and then again it couldn't be because I wasn't sure of who I got in the van with because I was high, I was drinking, I was off heroin." He also explained, "I really can't tell you for certain that that's the man that got in the van with me." He averred that police showed him a photo of defendant, who they said the van belonged to, and asked whether this was who got in the van. Earl told police the photo reminded him of "who van it was" (*sic*) and that this was "what made [Earl] certain that that was his picture." At the time of defendant's

trial, Earl was in custody on an unrelated case.

¶ 17 Detective Michael Pietryla briefly testified that he arrived at the crash scene and saw the van flipped over. Inside it and amid the wreckage, he found several cartons of Newport 100 cigarettes with some inside a shopping bag and some outside it, money, a tin can containing money, a firearm, a wallet and a driver's license which was defendant's. Detective Pietryla put together a photo array for Williams and Pike at the police station that day. Williams identified defendant's photo as the robber with the gun at the apartment, and Pike also identified defendant's photo as one of the robbers. Detective Pietryla further testified that neither Williams nor Pike ever called or contacted him to tell him that they subsequently believed Earl was one of the robbers. Detective Pietryla also interviewed Earl about a year after the incident following the results of DNA testing of blood found in the van. He stated that Earl never told him, after clearly identifying defendant as the driver of the van that night, that he was too drunk or high to do so at that time.

¶ 18 Defendant presented the testimony of Jacqueline Jordan, the mother of his fiancee at the time of the robbery. She testified that, on the day in question, defendant had been living with her and her family. During the three days prior to the robbery, Jordan had allowed defendant to use her van to move the couple's things back and forth between her home and defendant's mother's home. Jordan stated that, at approximately 4 a.m. that morning, she was awakened by her dog barking outside. She went to the window and noticed that the van, which had been parked in front of their home, was missing. She woke her husband and told him, then called police to report the van stolen, and then went down to the basement where her daughter and defendant

were sleeping and told them. She averred that she had last seen the van at 11:30 p.m. after her husband parked it outside.

¶ 19 The parties entered into several stipulations. Among these, it was stipulated that Tyrell Hershaw, who was sitting in the back seat of the Jeep, would testify that Marquis Lee was sitting in the middle back seat of the Jeep at the time of the accident. It was also stipulated that the man Pike identified in the emergency room was Lee. Forensic investigator Hubert Rounds would testify that he investigated the crash scene and recovered a handgun, magazine, and cartridges from inside the van, along with a white plastic bag containing Newport cigarettes, a wallet, money, coins, a metal can and a set of keys from the van's ignition. Detective Thomas Crain would testify that he conducted the physical lineups which Williams and Pike viewed at the police station; during these, Williams identified defendant as the person she saw coming out of the apartment and holding a gun, and Pike also identified defendant as the robber with the gun. Assistant State's Attorney (ASA) Marilyn Alioto would testify that she presented Williams and Pike before the grand jury. Both identified defendant and signed photos of him stating that he was the robber with the gun, and both stated that defendant and Lee were the two robbers they saw. ASA Alioto would further testify that Pikes never told her that Earl was one of the robbers. In addition, as part of the evidence in this cause were two sets of photos of defendant and Lee that ASA Alioto presented to the grand jury. In one set, under Lee's photo was written "one of the guys that came out of Ms. Williams' residence" followed by Williams' signature, and under defendant's photo was written "person who put the gun in Alvin Ivy's side" followed by Williams' signature. In the other set, under Lee's photo was written "young guy" followed by Pike's

signature, and under defendant's photo was written "oldest guy with pistol in his hand" followed by Pike's signature.

¶ 20 Following closing arguments, the trial court found defendant guilty of home invasion while armed with a firearm, armed robbery while armed with a firearm, armed habitual criminal, residential burglary and UUWF.[4] In its colloquy, the court began by finding that Jordan's testimony was "not exactly helpful" to defendant, since she did not report the van stolen until after the robbery and crash had occurred, the keys were found in the van, and defendant had access to those keys and had been using the van for the prior three days. The court then turned to the physical evidence, stating that it "basically does not lie in this case," and recounted that an armed robbery occurred and the offenders drove off in the van, with "at least one" of the witnesses identifying the driver as defendant. It also found that "a significant piece of physical evidence *** corroborat[ing] the other witnesses" was the recovery of defendant's driver's license in the van. The court further commented that it "rel[ied]" on the testimony of the "three witnesses and *** the detective that testified they made positive identifications early in the game a couple of hours after the incident occurred," wherein "[t]hey said that the defendant was the gunman of the armed robbery and he fled in the van." The court concluded by stating that it believed defendant drove the van away from the armed robbery, at which point the accident occurred.

¶ 21 Defendant filed a posttrial motion for a new trial arguing, among other things, that the

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[4]As noted by the parties, defendant's armed habitual criminal conviction and UUWF conviction were based on his prior convictions for possession of a controlled substance with intent to deliver and possession of cannabis with intent to deliver.

witness testimony and physical evidence presented was insufficient to prove him guilty beyond a reasonable doubt. The trial court denied defendant's motion, stating that it would "stand on all [its] rulings" because, in addition to "prior statements where positive identifications were, in fact, made of the [d]efendant" by the witnesses in this cause, "there was a large amount of circumstantial evidence in [its] view that pointed in one direction only," at defendant, which "corroborated that testimony."

¶ 22 The cause then proceeded to sentencing. Defendant's mother testified at his hearing that, although "he made some bad choices back in the past," he changed his life around, taking care of his family, providing them with financial support and obtaining employment; he himself also became a father, went to college and was enrolled in business school. After the parties rested, the trial court began its colloquy by stating that it had "reviewed all the factors in aggravation and mitigation and reviewed the entire presentence investigation report." It then reviewed defendant's "extensive" criminal history and discussed several factors in both aggravation and mitigation. In issuing its decision, the following exchange occurred:

> "[THE COURT]: All right. On count four, that's home invasion with a firearm, 15 years in the Illinois Department of Corrections plus 15 years enhancement, 30 years IDOC. On count five, armed robbery, same kind of scenario, 15 plus 15, 30 years in the [IDOC]. These are all 50 percent cases.
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> [ASSISTANT PUBLIC DEFENDER]: Home invasion is 85 percent. Home invasion I believe is 85 percent.
>
> THE COURT: I thought they were all 50 percenters but if the home

> invasion is 85 percent, it is what it is. Armed habitual criminal, count six, same sentence, 30 years in the [IDOC]. Residential burglary on count seven, 15 years IDOC. Count eight merges into count seven. Unlawful use of weapons, class two felony, seven years in the [IDOC]. All counts to run concurrent."

¶ 23 ANALYSIS

¶ 24 Defendant presents four issues for review. We address each separately.

¶ 25 I. Sufficiency of the Evidence

¶ 26 Defendant's first contention on appeal is that, because the identification testimony in his cause was insufficient and unreliable, he was not proven guilty beyond a reasonable doubt. First, he asserts that the identifications of the robbers as older and younger were wholly inaccurate and he could not have fit either description as provided by the witnesses. Next, he cites to Williams' and Pike's disavowment of their initial identifications of the robbers and argues that the circumstances preceding these initial identifications were rife with the possibility of misidentification. And, he states that the trial court inherently based its determination of guilt on incorrect facts and conclusions which were unsupported by the evidence. As an alternative argument, defendant insists that, were we to uphold this identification evidence as sufficient, we must vacate his convictions for armed habitual criminal and UUWF, as there was no evidence to demonstrate that he actually possessed a gun. We disagree with his arguments.

¶ 27 When a criminal defendant challenges the sufficiency of the evidence used to convict him, the standard of review is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. See *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *People v. Hunley*, 313 Ill. App. 3d 16, 20 (2000). Courts of appeal will not retry the defendant. See *People v. Digirolamo*, 179 Ill. 2d 24, 43 (1997). Instead, the trial court, as the trier of fact in a bench trial, hears and sees the witnesses and, thus, has the responsibility to adjudge their credibility, resolve any inconsistencies, determine the weight to afford their testimony and draw reasonable inferences from all the evidence presented. See *People v. Steidl*, 142 Ill. 2d 204, 226 (1991); *Hunley*, 313 Ill. App. 3d at 21.

¶ 28 Further, we note that conflicts and inconsistencies in the testimony of witnesses do not create reasonable doubt, especially if those inconsistencies are minor. See *People v. Adams*, 109 Ill. 2d 102, 115 (1985) ("[m]inor inconsistencies in the testimonies do not, of themselves, create a reasonable doubt"); *People v. Bennet*, 329 Ill. App. 3d 502, 513 (2002) ("[i]nconsistency between certain eyewitnesses' testimony does not necessarily establish reasonable doubt"). Such discrepancies go only to the weight that is to be afforded to their testimony (see *People v. Hruza*, 312 Ill. App. 3d 319, 326 (2000)), which is for the trial court here as the trier of fact to determine, not the reviewing court (see *People v. Vasquez*, 313 Ill. App. 3d 82, 103 (2000)). See *People v. Robinson*, 30 Ill. 2d 437, 440 (1964) ("minor variations *** pointed to by defendant at most affect the credibility of the witnesses, a matter for the trial court's determination" in a bench trial); *People v. McPherson*, 306 Ill. App. 3d 758, 766 (1999) (judgment will not be reversed on appeal where testimony is merely conflicting); see also *People v. Deleon*, 227 Ill. 2d 322, 332 (2008) and *People v. Simon*, 2011 IL App (1st) 091197, ¶ 94 (it is in trial court's direct purview to adjudge credibility and resolve these inconsistencies, and a reviewing court may not substitute

its judgement in this regard). Moreover, absent any affirmative indication in the record to the contrary, it is presumed that the trial court considered only competent evidence in reaching its verdict. See *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977) (this is rebutted only with affirmative evidence in record); accord *Simon*, 2011 IL App (1st) 091197, ¶ 91. Ultimately, a conviction will not be overturned unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of guilt. See *People v. Brown*, 185 Ill. 2d 229, 247 (1998).

¶ 29 Based on the record before us, we find that the State proved defendant guilty of home invasion while armed with a firearm, armed robbery while armed with a firearm, armed habitual criminal, residential burglary and UUWF beyond a reasonable doubt.

¶ 30 Prior to trial, Williams and Pike identified defendant several times as the older robber with the gun who they saw in their apartment. Williams did so after viewing a photo array just hours after the incident containing defendant's photo, a physical lineup a few days later in which defendant participated, and before the grand jury. In each of these instances, Williams clearly identified defendant as the older robber with the gun. Likewise, Pike also identified defendant in the same manner, after viewing a photo array just hours after the incident, a physical lineup a few days later and before the grand jury, again clearly identifying him as the robber with the gun who drove the van away from the crime scene.

¶ 31 Obviously, defendant makes much of the fact that Williams and Pike, the two eyewitnesses to the robbery, "recanted" their identifications of defendant as the robber with the gun during their trial testimony. He notes, for example, that both Williams and Pike stated they discovered later that Earl was the older robber with the gun from others in their neighborhood,

and they insisted that they never told police from the outset that defendant was the robber with the gun.

¶ 32 However, any discrepancies or inconsistencies in Williams' and Pike's testimony, along with any credibility determinations, were, as noted above, exclusively for the trial court to decipher in light of the weight it would afford their testimony and the inferences it would draw from it in relation to the other evidence presented at trial. In its colloquy, the court reviewed Williams' and Pike's testimony, finding of particular importance that "they made positive identifications early in the game a couple of hours after the incident occurred" wherein they "said that defendant was the gunman of the armed robbery and he fled in the van." Clearly, the court considered Williams' and Pike's discrepancies, but believed their initial, and repeated, identifications of defendant were more credible.

¶ 33 More significant, the court reviewed and relied on the physical evidence presented which it explicitly stated, "basically does not lie in this case." Rather, it clearly supported Williams' and Pike's pretrial identifications of defendant as the robber with the gun. For example, amid the wreckage of the van, police recovered cartons of Newport 100 cigarettes, some inside a shopping bag and some outside it, money, Pike's tin can containing money, a gun, a wallet and defendant's driver's license. Jordan testified that defendant had access to the van and had been using it during at least the three days prior to the robbery. The court found this to be quite significant, stating that Jordan's testimony was "not *** helpful" to defendant. That is, the court noted that the keys were found in the van's ignition and defendant had access to those keys, as he had been using the van in the prior days. Also, it noted that, although Jordan called the police to report the

van stolen, she did so only after the robbery and accident had taken place. Interestingly, this evidence was corroborated by Earl, who testified that, although he had only recently met defendant, he knew him from having seen him drive the same van on other occasions in the neighborhood and, more specifically, on the day of the robbery and immediately before the accident, he saw defendant walking to the parked van holding packs of cigarettes and a shopping bag. This physical evidence  the gun found in the van to which defendant had the keys and access to drive, along with his belongings and driver's license, combined with Earl's testimony that he saw defendant at a time immediately after the robbery and before the accident with some of the proceeds from that crime (Pike's Newport 100 cigarettes and a shopping bag), as well as the subsequent recovery at the crash scene of Pike's tin can and the fact that Jordan did not report the van stolen until after the crime  all strongly support Williams' and Pike's initial identifications of defendant as the robber with the gun and, particularly, Pike's added identification of defendant as the robber with the gun who drove the van away from the crime scene.

¶ 34 In addition to its analysis of Williams' and Pike's credibility and its review of the physical evidence which it found supported their initial identifications of defendant as the robber with the gun, the court referred to the testimony of Detective Pietryla as further support for its determination of guilt. Detective Pietryla had created the photo arrays for Williams and Pike. He testified that, when Williams and Pike arrived at the station only hours after the robbery, they each viewed the photo arrays. In corroborating Williams' and Pike's initial identifications, Detective Pietryla stated that Pike identified defendant as one of the robbers and Williams identified defendant specifically as the robber with the gun. Detective Pietryla further testified,

directly refuting Williams' and Pike's trial testimony, that neither Williams nor Pike ever called or contacted him to tell him that they subsequently believed Earl was one of the robbers.

¶ 35 Moreover, the stipulations entered into by the parties at trial further corroborated Williams' and Pike's repeated pretrial identifications of defendant as the armed robber. As noted earlier, the parties stipulated that Detective Crain, the officer who conducted the physical lineups in this cause, would testify that during the lineup she viewed, Williams identified defendant as the man she saw coming out of her apartment holding a gun, and during the lineup he viewed, Pike also identified defendant as the robber with the gun. The parties further stipulated that ASA Alioto would testify, just as Detective Pietryla had, that neither Williams nor Pike ever told her that Earl was one of the robbers and, to the contrary, both Williams and Pike signed photos of defendant as the robber with the gun and presented them, along with their testimony confirming the same, to the grand jury. In fact, these photos of defendant were also admitted at trial, containing Williams' signature under the statement "person who put the gun in Alvin Ivy's side," and Pike's signature under the statement "oldest guy with pistol in hand." After viewing the trial court's analysis and considering the record before us, which supports the trial court's conclusion, we find no basis upon which to disturb its verdict here.

¶ 36 Defendant's arguments to the contrary are unavailing. For example, he makes much of the words used by Williams and Pike identifying one robber as "older" and the other as "younger." Stating that these witnesses "offered nothing else with which to evaluate the accuracy of their subsequent identifications" of defendant, he goes on to reason that he could not possibly fit either of these descriptions because, as among himself at 26 years old, Lee at 16 years old and

Earl at 50 years old who were also implicated in the robbery, he was neither "older" nor "younger" and, thus, could not have been the robber with the gun. However, defendant's assertion is tenuous, at best. First and foremost, defendant's statement that Williams and Pike "offered nothing else with which to evaluate the accuracy of their subsequent identifications" beyond their references to the robbers as older and younger wholly ignores the evidence in this cause. Again, Williams and Pike both identified defendant as the robber with the gun on repeated occasions to Detective Pietryla during the photo arrays, to Detective Crain during the physical lineups, to ASA Alioto and to the grand jury, and both signed their names identifying defendant's photo with the captions "person who put the gun in Alvin Ivy's side" and "guy with pistol in hand."

¶ 37 Moreover, defendant's focus on the terms "older" and "younger" is misplaced. It is true that, at times, Williams and Pike referred to one robber as older and the other as younger. However, these terms were then, and always were, merely relative and do not lend any credence to defendant's insistence that perhaps some confusion related to their use by these witnesses inherently renders their prior, repeated identifications of him as the robber with the gun insufficient or incredible. Rather, defendant ignores the entirety of the context of their use here. That is, defendant insists that because Earl was 50 years old at the time of the robbery, Lee was 16 years old and he was 26 years old, and because Williams and Pike identified Earl and Lee at trial as the robbers, he could not have been either the older or the younger robber. However, although defendant discounts Earl's testimony, the trial court found it to be credible and determined he was not one of the robbers. Again, this credibility determination was for the trial

court to make and it did so, in direct contradiction to defendant's current assertions. Removing Earl from consideration, then, this left 26-year-old defendant and 16-year-old Lee, thereby corroborating Williams' and Pike's initial identifications of defendant as the older robber with the gun.

¶ 38 Defendant next argues that Williams' and Pike's initial identifications of him as the older robber were the result of suggestive circumstances that could naturally have led to misidentification. He relates that, when Williams and Pike arrived at the crash scene, they could have seen defendant's driver's license amid the wreckage and their belongings and simply concluded that he was the older robber. He also hypothesizes that, because the van was parked near their apartment, and if he had been driving it earlier or on a different occasion, they may have seen him then and not because they observed him committing the robbery. However, defendant can present a multitude of scenarios, just as he attempted to do at trial; the critical point here is that the trial court heard the testimony and considered the evidence and found that it supported the conclusion that defendant was the armed robber. Defendant presents nothing concrete to the contrary. Again, the trial court considered the fact that defendant's driver's license was present at the crash, which occurred only minutes after the robbery. The robbery's proceeds were in the wrecked van along with a gun, and Williams and Pike identified the van as well as defendant as the robber with the gun who got in the van and drove away from the robbery. In addition, Jordan confirmed defendant had access to the van, Pike testified he saw defendant climbing out of the van's wreckage after the crash, and Earl corroborated this by testifying he was in the van with defendant immediately after the robbery and at the time of the crash. All this,

combined with the fact that the keys were in the van and it was not reported stolen until after the crash, supported the trial court's determination that Williams' and Pike's initial identifications of defendant as the armed robber were credible.

¶ 39 Finally, defendant asserts that the trial court based its determination of his guilt on incorrect facts and conclusions which were unsupported by the evidence. He cites to "conflicting versions" of Williams' and Pike's accounts of the robbery, as well as the trial court's failure to "adequately assess the evidence." Again, defendant's assertions miss the mark. The conflicts defendant recounts in Williams' and Pike's testimony are nothing more than minor variations of incidental events. For example, defendant highlights that Williams testified she saw the robbers come out of the apartment while Pike testified Williams had left and was not outside at that time; that Williams' and Pike's testimony did not agree with respect to who exited the apartment first (Pike or the robbers), the color of the van, or where the robbers fled after the robbery; and that Williams and Pike contradicted themselves and each other in relating the robbers' handling of the tin can. Yet, none of these disagreements are relevant to the main event the robbery itself. Both Williams and Pike were consistent in their testimony that two men, one of them with a gun, robbed their apartment and fled. They were also consistent with respect to their initial and repeated identifications of defendant as the robber with the gun, which were corroborated by the testimony of Detective Pietryla and Earl, as well as the stipulations agreed to by the parties from Detective Crain and ASA Alioto. The minor variations in Williams' and Pike's retelling of ancillary facts related to the crime do not create reasonable doubt but go only to the weight of their testimony which, again, was for the trial court to decipher here.

¶ 40 Defendant's attack on the trial court's assessment of the evidence is equally unavailing. He states that the court's conclusion that the two robbers got into the van is not supported by the evidence and otherwise necessarily precludes him from the robbery, and that the court did not consider the witnesses' unreliability as demonstrated by their statuses as convicted felons and their differing testimonies. As to the former assertion, that the court concluded the two robbers fled in the van is supported by the evidence presented and does not exonerate him. Pike testified that the robbers ran out of his apartment, to a vacant lot, through an alley and jumped into the van together. Williams testified that she saw the older armed robber get into the van and the other flee via the vacant lot. And Earl testified that he and defendant were the only two in the van. Now, defendant insists that because Lee was in the Jeep (and not the van) at the time of the crash, because the State prosecuted Lee as one of the robbers, and because the only DNA found in the van belonged to Earl, there inherently is reasonable doubt that defendant was one of the robbers. However, the court's conclusion is corroborated by Pike's testimony, as the prime eyewitness who encountered the robbers face-to-face, followed them out of the apartment and watched them flee. Clearly, the trial court accepted his testimony, and Earl's which placed defendant in the van, as credible; this was wholly within its purview to do. Also, it is not inconceivable that Lee fled with defendant after the robbery to the van and then exited the van and got into the Jeep. Regardless, whether Lee was prosecuted for the robbery and the outcome of that litigation is not germane to this cause, particularly where these were not codefendants nor shared any portion of their trials.

¶ 41 With respect to defendant's latter assertion, we must reiterate that it was the trial court

who heard and saw the witnesses testify and, as such it was that court's responsibility to adjudge their credibility, resolve any inconsistencies, determine the weight to afford their testimony and draw reasonable inferences from all the evidence presented. That there were discrepancies in Williams', Pike's and Earl's testimonies was only natural, as each viewed the incidents at hand from different perspectives. Moreover, the court was fully aware of the concerns related to these witnesses' character. Regardless of defendant's opinion that Williams, Pike and Earl were not stellar witnesses, this lends itself only to the weight to be afforded their testimony which, again, is within the purview of the trial court. Upon our review of this record before us, we find no affirmative indication therein to rebut the legal presumption that the trial court here considered only competent evidence in reaching its verdict.

¶ 42 As we noted at the outset, ultimately, a conviction will not be overturned unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of guilt. And, it is well established that the testimony of even a single witness, if it is positive and the witness is credible, is sufficient to convict. See *People v. Brown*, 388 Ill. App. 3d 104, 108 (2009). Having concluded that the trial court's determination of defendant as the robber with the gun was, indeed, amply supported by Williams' and Pike's initial and repeated identifications of him as such, the physical evidence presented, and the additional testimony and stipulations of Earl, Detective Pietryla, Detective Crain and ASA Alioto, we find that defendant was proven guilty of home invasion while armed with a firearm, armed robbery while armed with a firearm, armed habitual criminal, residential burglary and UUWF beyond a reasonable doubt.

¶ 43 II. Ineffective Assistance of Counsel

¶ 44 Defendant's next contention on appeal is that he was denied effective assistance of counsel because defense counsel failed to cross-examine Williams about her pending charge for indirect criminal contempt for failing to appear. He asserts that Williams' pending charge went straight to her bias, motive and interest in testifying; he claims that, because any refusal on her part to testify would have subjected her to additional time in custody, and because the State was essentially "forcing" her to testify, she clearly believed she needed to do so in a manner favorable to the State, namely, identifying him as one of the robbers. Defendant concludes that his defense counsel's failure to specifically cross-examine her on these points during trial was an unsound strategy and amounted to complete ineffectiveness so as to warrant a new trial. We disagree.

¶ 45 The law regarding claims of ineffective assistance of counsel is well established. These are examined under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); the defendant must demonstrate both that his trial counsel's performance was deficient and that this deficient performance substantially prejudiced him. See *People v. Enis*, 194 Ill. 2d 361, 376 (2000). To demonstrate performance deficiency, the defendant must establish that trial counsel's performance fell below an objective standard of reasonableness. See *People v. Enoch*, 122 Ill. 2d 176, 202 (1988). Meanwhile, to demonstrate sufficient prejudice, the defendant must show that there is a reasonable probability that, but for his trial counsel's unprofessional errors, the result of the proceedings would have been different. See *Enoch*, 122 Ill. 2d at 202. A reasonable probability is one sufficient to undermine the confidence in the outcome. See *Enis*, 194 Ill. 2d at 376 (trial counsel's deficient performance must have rendered the result of the trial unreliable or fundamentally unfair).

¶ 46 In addition, " 'there is a strong presumption that the challenged action of counsel was the product of sound trial strategy and not of incompetence' " (*Steidl*, 142 Ill. 2d at 240, quoting *People v. Barrow*, 133 Ill. 2d 226, 247 (1989)), and falls "within the 'wide range of reasonable professional assistance' " (*Steidl*, 142 Ill. 2d at 248, quoting *People v. Franklin*, 135 Ill. 2d 78, 116-17 (1990)). Significantly, we note that simple errors of judgment or mistakes in trial strategy do not make defense counsel's representation ineffective. See *People v. West*, 187 Ill. 2d 418, 432 (1999). In fact, trial tactics encompass matters of professional judgment and we will not order a new trial for ineffective assistance based on these claims. See *People v. Reid*, 179 Ill. 2d 297, 310 (1997). Specifically, decisions regarding witness testimony, cross-examination and impeachment are matters of trial strategy and lie solely with defense counsel, except if counsel's "strategy" was so unsound that she failed to meaningfully test the case against the defendant. See *West*, 187 Ill. 2d at 432; accord *People v. Lacy*, 407 Ill. App. 3d 442, 463 (2011) (citing *People v. Smith*, 177 Ill. 2d 53, 92 (1997), and *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997), and noting that manner in which to cross-examine witness directly involves exercise of professional judgment meriting judicial deference and will only be considered ineffective if objectively unreasonable).

¶ 47 Ultimately, in evaluating counsel's effectiveness, we look at the totality of counsel's representation. See *People v. Eddmonds*, 101 Ill. 2d 44, 69 (1984). Again, the defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to succeed on his claim of ineffective assistance of trial counsel. See *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996) (failure to prove either prong renders ineffective assistance claim untenable); *People v. Albanese*,

104 Ill. 2d 504, 525-27 (1984). If it is determined that he did not suffer prejudice, whether trial counsel's performance was constitutionally deficient need not be decided. See *People v. Brooks*, 187 Ill. 2d 91, 137 (1999); accord *Lacy*, 407 Ill. App. 3d at 457 (where the defendant has not suffered prejudice, examination of performance prong is not even warranted); see also *People v. Graham*, 206 Ill. 2d 465, 476 (2003) (reviewing court may reject ineffective assistance claim without reaching performance prong if it is determined the defendant has not satisfied the prejudice requirement).

¶ 48 Based upon our thorough review of the record before us, we find that what occurred in the instant cause and, namely, defense counsel's decision not to further point out Williams' criminal contempt charge on cross-examination, did not amount to ineffective counsel resulting in prejudice. Moreover, the record affirmatively demonstrates that defense counsel in no way performed deficiently during defendant's trial.

¶ 49 Pursuant to the record, Williams' contempt charge occurred accordingly. Originally, she was subpoenaed to testify at trial. However, she failed to appear, and the prosecutor filed a contempt petition against her and a warrant was issued for her arrest.[5] At a subsequent court date, Williams appeared, and it was explained to the court that Williams had been on house arrest; however, Williams did not stay and did not speak to the prosecutor, so her contempt warrant was allowed to remain in effect. By the next court date, Williams was in custody and her attorney appeared on her behalf; at a subsequent court date, the court ordered Williams to return

[5]Pike and Earl were also subpoenaed to testify and failed to appear, and contempt petitions and arrest warrants were filed against them as well.

on the next date and stay in contact with her attorney. Williams' attorney explained to the court that she was being evaluated for inpatient drug treatment and required an order to attend and testify at defendant's trial. Following some pretrial proceedings, and while discussing the trial schedule, the prosecutor told the court that Williams was now in rehab and that she would need to be "writ[ted]" into court. Later, and immediately after Williams testified at defendant's trial, her attorney approached the trial court to ask if any action would be taken with regard to the contempt petition. Acknowledging she had testified, the State withdrew the charge and the trial court released her of this matter.

¶ 50 Turning now to defendant's ineffectiveness claim, the record here is clear that on cross-examination, defense counsel elicited several salient points from Williams in an attempt to aid his theory of the case, which was witness misidentification. First, defense counsel focused on Williams' history of drugs to attack not only her credibility, but also her ability to identify the robbers. For example, defense counsel spent quite a bit of time addressing Williams' reason for being outside the apartment at 3:30 a.m. on the day in question. Williams had testified she was out there preventing a fight and getting her children in the car to go to her mother's home. However, defense counsel pointed out that Williams was arrested for selling drugs outside the apartment only three months after the robbery and, upon her release, was taken into custody again for selling drugs. And, as defense counsel prodded her about her drug use at the time of the robbery, Williams denied this but finally admitted that she had been selling cigarettes at the time of the robbery. Defense counsel also went further to note that, pursuant to her third and current offense for which she was in custody, she was receiving drug treatment, thereby inferring

the possibility she had been an addict at the time of the robbery.

¶ 51 Defense counsel then attacked Williams' view of the robbers, citing several inconsistencies in her testimony such as who ran out of the apartment first, who was holding the tin can of money, and who had the gun. From this, Williams recanted her pretrial identification of defendant and instead testified at one point that he had just been standing outside the apartment, was not one of the robbers and did not have a gun. Defense counsel also questioned Williams about what she told police, resulting in inconsistencies with respect to whether she followed the van and whether she saw the accident. Defense counsel then highlighted Williams' testimony that she called police and told them that Earl was one of the robber. And, defense counsel elicited testimony from Williams affirming that while defense counsel was investigating this cause, she met with Williams and Williams twice positively identified for her Earl as the robber with the gun.

¶ 52 From all this, it is clear that defense counsel had a viable, and valiant, trial strategy when it came to cross-examining Williams. She was, essentially, forced to walk a tightrope hovering between Williams' pretrial identifications and her trial testimony. Defense counsel attacked Williams' credibility with respect to her *pretrial* identifications of defendant as the robber, *i.e.*, her ability to view the crime, her mental state, etc. She did so by underscoring Williams' drug convictions and possible use at the time of the crime, as well as shedding some light on her testimonial inconsistencies, her ability to view the robbery and her later realization that Earl was the robber with the gun. At the same time, however, it would have been strategic suicide if defense counsel continued to further press the issue by questioning Williams' credibility

regarding her *trial* testimony in a general sense, which included her in-court recantation of her prior identifications of defendant, by highlighting her contempt charges. First, because this was a bench trial, and because it had been this very trial court who had issued Williams' contempt warrant, it was clear that the court already fully knew, first hand, Williams' situation. See *Brown*, 185 Ill. 2d at 258 (trial judge, as the trier of fact, is presumed to know the law and to have considered only competent, admissible evidence in reaching its determination on the merits). More critically, defense counsel could not completely obliterate Williams' general credibility because she needed the trial court to believe Williams' in-court recantation testimony that Earl, and not defendant, was the robber with the gun, was true. Attacking Williams by cross-examining her about her pending criminal contempt charge would have only compromised defense counsel's attempt to have the trial court believe that her pretrial identifications were mistaken while her trial recantation testimony was true. Obviously, defense counsel needed to distance herself from Williams in certain respects (her repeated pretrial identifications of defendant), but at the same time needed Williams as her star witness (her trial recantation of defendant as the robber with the gun). Choosing, as defense counsel did, to attack Williams in some respects but then stopping short of reminding the trial court of Williams' pending criminal contempt charge (of which it already knew anyway), cannot be said in this situation to have been unsound trial strategy amounting to prejudice supporting a claim of ineffective assistance of counsel.

¶ 53 Consequently, having determined, for all these reasons, that defense counsel’s representation did not prejudice defendant in any way, we need not examine the performance

prong of the test for ineffective assistance. See *Graham*, 206 Ill. 2d at 476; *Brooks*, 187 Ill. 2d at 137. However, even if defendant could somehow show sufficient prejudice here (which he cannot), he still could not demonstrate this other required prong of *Strickland*, since, based on our thorough review of the record, there is nothing therein to even remotely indicate that his counsel performed deficiently.

¶ 54 Defense counsel clearly advocated unrelentingly on defendant's behalf. Even before pretrial proceedings had begun, defense counsel and her investigator conducted an investigation into this cause, meeting with several witnesses multiple times, including Williams, to develop a trial strategy. She also participated vigorously in pretrial matters, filing multiple motions and arguing extensively for them, including a motion to suppress statements and a motion in *limine*, and she even obtained a buccal swab from Earl and had it tested for DNA matching. During trial, she presented a cohesive opening argument, raising a clear defense theory of misidentification which she reiterated throughout the proceedings. She thoroughly cross-examined the State's three occurrence witnesses, poking holes in and eliciting contradictory testimony to the point that two of them (Williams and Pike) recanted on the stand their pretrial identifications of defendant as the robber with the gun and the third (Earl) now alleged he was so drunk and high at the time of the incident he was no longer certain defendant was the driver of the van. Defense counsel raised numerous objections when appropriate, focused the trial court's attention on the recantations which were in defendant's favor, moved for directed verdict and presented a convincing closing argument in line with her theory on the case. She even presented the testimony of Jordan, which provided defendant with an alibi and questioned his access to the

van that night. Following trial, defense counsel continued to zealously represent defendant when, after securing an acquittal on the greatest of the charges against him (first degree murder), she filed a motion for a new trial arguing several legal points including those at issue herein, litigated on his behalf at his sentencing hearing by presenting a witness in mitigation, filed a motion to reconsider sentence and filed a notice of appeal.

¶ 55 Ultimately, and in addition to our review of the totality of defense counsel's representation of defendant (see *Eddmonds*, 101 Ill. 2d at 69), which we find to have been both thorough and zealous, we hold that defendant received effective representation, and any claim to the contrary, particularly regarding defense counsel's strategic decision not to further cross-examine Williams regarding her contempt charge, is without merit in light of the record in this cause.

¶ 56 III. One-Act, One-Crime

¶ 57 Defendant's third contention for review involves two claimed violations of the one-act, one-crime rule. First, defendant asserts that his convictions for UUWF and armed habitual criminal were based on the same act of possessing a firearm and, thus, his UUWF conviction must be vacated. Second, defendant asserts that his convictions for residential burglary and home invasion while armed with a firearm were based on the same act of unlawfully entering the apartment and, thus, his residential burglary conviction must be vacated.

¶ 58 As a threshold matter, the State points out, and defendant concedes, that he failed to properly preserve this issue for review in that he did not raise it in a posttrial motion. See *Enoch*, 122 Ill. 2d at 186; accord *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (both trial objection and

written posttrial motion raising issue are required to preserve error for review). Defendant, however, raises this issue under the second prong of the plain error analysis and the State concedes it is reviewable thereunder. See *People v. Nunez*, 236 Ill. 2d 488, 493 (2010) (because they implicate integrity of judicial process, forfeited one-act, one-crime arguments are reviewable under second prong of plain error rule).

¶ 59 In addition, the State concedes that defendant was convicted of both armed habitual criminal and UUWF based on the same physical act, namely, the possession of one gun. Accordingly, upon this concession, we need not further review this portion of his claim. Defendant's UUWF conviction is hereby vacated. See, *e.g.*, *People v. Bailey*, 396 Ill. App. 3d 459 (2009) (vacating UUWF conviction as it was based on same act as act forming basis of armed habitual criminal offense).

¶ 60 This leaves defendant's one-act, one-crime contention regarding his convictions for residential burglary and home invasion while armed with a firearm. He relies principally on *People v. McLaurin*, 184 Ill. 2d 58 (1998), to state that his residential burglary conviction must be vacated because both of these convictions were carved from the same physical act of entering the apartment.

¶ 61 Our state supreme court set forth the one-act, one-crime doctrine in *People v. King*, 66 Ill. 2d 551 (1977). Briefly, that case concluded that a defendant may not be convicted of multiple offenses when those offenses are all based on precisely the same physical act. See *King*, 66 Ill. 2d at 566. Following *King*, our courts have explained that the one-act, one-crime doctrine involves a two-step analysis. See *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v.*

*Rodriguez*, 169 Ill. 2d 183, 186 (1996). First, and since multiple convictions cannot be based on precisely the same physical act, a court is required to determine whether a defendant's conduct consists of a single physical act or of separate acts. See *Rodriguez*, 169 Ill. 2d at 186. An "act" is "any overt or outward manifestation which will support a different offense" (*King*, 66 Ill. 2d at 566), and, as our state supreme court has noted, a defendant may still be convicted of two offenses when a common act is part of both offenses (see *Rodriguez*, 169 Ill. 2d at 188). This is because " '[a]s long as there are multiple acts ***, their interrelationship does not preclude multiple convictions.' " *Rodriguez*, 169 Ill. 2d at 189 (quoting *People v. Myers*, 85 Ill. 2d 281, 288 (1981)). Second, and only after it determines the defendant committed multiple acts, does the court move to the second step of the analysis to determine whether any of the offenses were lesser-included offenses. See *Rodriguez*, 169 Ill. 2d at 186; accord *Miller*, 238 Ill. 2d at 165.

¶ 62 Defendant is correct that in *McLaurin*, our state supreme court found the offenses of home invasion and residential burglary had been carved from the same physical act of that defendant's entering the dwelling of the victim and, thus, it vacated his residential burglary conviction pursuant to a first-step *King* analysis. See *McLaurin*, 184 Ill. 2d at 105. However, cases subsequent to *McLaurin* have questioned that decision, for various reasons. For example, *McLaurin* did not address the fact that the home-invasion offense required the additional physical act of causing injury to a person in the dwelling. See *McLaurin*, 184 Ill. 2d at 105; see also *People v. Price*, 2011 IL App (4th) 100311, ¶ 27. Instead, its decision in this respect was rendered without much legal rationale to support it. Also, and more significantly, *McLaurin*'s holding as to home invasion and residential burglary was completely inconsistent with its earlier

holding in the same decision as to intentional murder and home invasion. See *McLaurin*, 184 Ill. 2d at 105; see also *Price*, 2011 IL App (4th) 100311, ¶ 28. With respect to those crimes, the defendant similarly asserted that his convictions resulted from the same physical act, namely, having set a fire. See *McLaurin*, 184 Ill. 2d at 105. In noting that "multiple convictions *** are permitted where a defendant has committed several acts, despite the interrelationship of those acts," the *McLaurin* court this time, after a much more thorough legal analysis, flipped its reasoning on its head to conclude that these two offenses were not carved from the same physical act of setting the fire because the home invasion offense involved an additional physical act of entering the victim's dwelling. *McLaurin*, 184 Ill. 2d at 105.

¶ 63 Cases subsequent to *McLaurin* have repeatedly ignored that portion dealing with its scant home invasion/residential burglary analysis (finding a one-act, one-crime violation) and have instead focused on its more reasoned holding regarding intentional murder/home invasion (not finding a one-act, one-crime violation). This includes *People v. Peacock*, wherein the court noted home invasion's two elements of unauthorized entry of a dwelling and the intentional injury to a person therein, found that each element is just as much a physical act as the other, and held that multiple convictions were proper based on interrelated acts rather than precisely the same physical act. See *Peacock*, 359 Ill. App. 3d 326, 332-33 (2005) (offense may consist of more than one act; home invasion's two elements of unauthorized entry and intentional injury of person therein are, essentially, two acts and their interrelationship does not preclude multiple convictions). Likewise, and more applicable here, is *Price*, where the court followed *McLaurin*'s holding as to intentional murder/home invasion to recognize that home invasion consisted of two

separate physical acts, and the fact one act was the same as another crime (residential burglary) did not mean the two crimes (home invasion and residential burglarly) were carved from the same physical act. See *Price*, 2011 IL App (4th) 100311, ¶ 30. The *Price* court stated, clearly and succinctly, that:

> "Since the home invasion and residential burglary convictions shared only the act of entry, and home invasion required the additional act of causing injury to a resident, we find home-invasion and residential burglary are not carved out of the same physical act."

*Price*, 2011 IL App (4th) 100311, ¶ 30, citing *Rodriguez*, 169 Ill. 2d 183. And, our own holding in *People v. Lee*, 2012 IL App (1st) 101851, further supports this line of legal reasoning. There, again, our court was called to determine whether convictions for home invasion and residential burglary violated the one-act, one-crime rule, and determined they did not. See *Lee*, 2012 IL App (1st) 101851, ¶ 54. Comparing the charges, we noted that for residential burglary, the State was required to prove that the defendant knowing and without authority entered the victims' dwelling with the intent of committing robbery, theft, or arson; however, the charges for home invasion required the State to prove that the defendant committed the additional act of intentionally hurting the victims in their home. See *Lee*, 2012 IL App (1st) 101851, ¶ 54. Relying on *Price* and distinguishing *McLaurin*, we held that the convictions for residential burglary and home invasion were not predicated upon the same physical act and, thus, did not violate the one-act, one-crime rule. See *Lee*, 2012 IL App (1st) 101851, ¶ 54.

¶ 64 In the instant cause, the charges for residential burglary in the indictment against

defendant required the State to prove that he "knowingly and without authority, entered the dwelling place of Darnell Pike *** with the intent to commit therein a theft." However, the charges for home invasion while armed with a firearm, as set forth in the indictment, required the State to prove that defendant "without authority, knowingly entered [Pike's] dwelling place *** and remained in such dwelling place until he knew that one or more persons were present therein, and he[,] while armed with a firearm, used force or threatened the imminent use of force, upon Darnell Pike within such dwelling place." Defendant is correct that the home invasion and residential burglary share the act of entry. However, and quite clearly, home invasion required the additional act of intentionally causing injury or threatening the imminent use of force against Pike in his home. Because of this added act, home invasion and residential burglary cannot be said to have been carved out of, or predicated upon, the same physical act here. Therefore, any concern regarding a one-act, one-crime violation as raised by defendant with respect to these two crimes is inapplicable, and both his convictions for home invasion while armed with a firearm and residential burglary stand.[6]

¶ 65 IV. Sentencing

¶ 66 Defendant's final contention for review is two-fold. First, he argues that, when the trial court sentenced him, it was operating under a misapprehension of law and had received misinformation from defense counsel regarding the percentages of his time to be served, resulting

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[6]Defendant does not go on to argue that residential burglary is a lesser-included offense of home invasion. Accordingly, we need not engage in a second-step *King* analysis. See *Price*, 2011 IL App (4th) 100311, ¶ 30 (where the defendant argues a one-act, one-crime violation only pursuant to the first step of *King*, review of concerns regarding the second step is not warranted).

in an inappropriate sentence which, even though it was within the correct sentencing range, requires a new sentencing hearing. Alternatively, he argues that, in light of the relevant circumstance of this cause and his background, his sentence is excessive and violates the dual sentencing purposes of appropriate punishment and restoring an offender to useful citizenship. However, based upon our review of his sentencing hearing, we, for the final time, disagree.

¶ 67 As a threshold matter, defendant concedes that he failed to properly preserve this issue for review in that defense counsel did not object at the sentencing hearing and did not raise it in the motion to reconsider sentence. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010); accord *People v. Walsh*, 2016 IL App (2d) 140357, ¶ 16 (failure to object during a sentencing hearing and to file a motion to reconsider sentence citing the objections results in the waiver of a claim of sentencing error). However, defendant argues that review is warranted under both prongs of the plain error analysis, as well as pursuant to ineffective assistance of counsel. First, with respect to plain error, the State agrees that sentencing errors that are raised for the first time on appeal are reviewable under plain error (see *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010); *People v. McCain*, 248 Ill. App. 3d 844, 850 (1993) (challenges to the propriety of a defendant's sentence involve his fundamental right to liberty, thereby meriting plain error review if otherwise waived)), but insists that defendant cannot show such error. In this context, the burden is on the defendant to specifically assert that the evidence at his sentencing hearing was closely balanced or that any of the alleged errors deprived him of a fair sentencing hearing. See *Ahlers*, 402 Ill. App. 3d at 734 (to succeed under plain error in sentencing context, the evidence at that hearing must have been closely balanced or the error "was sufficiently grave" that it rendered the hearing

fundamentally unfair). Absent error, there can be no plain error (see *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010), citing *Herron*, 215 Ill. 2d at 187; see also *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)), and, as we discuss in more detail below, we find no error here. See *People v. Walker*, 232 Ill. 2d 113, 124 (2009) (plain error rule does not apply if a clear and obvious error did not occur).

¶ 68 Moreover, we further fail to find any support for defendant's argument that waiver should be excused, and full review is merited, because his counsel was ineffective for failing to raise his claims of trial court misapprehension in his motion to reconsider sentence. Briefly, just as with any ineffective assistance claim, to analyze whether sentencing counsel was ineffective, the standard set forth in *Strickland* applies. See *Price*, 2011 IL App (4th) 100311, ¶ 34. Thus, again, the burden is on defendant to show both that his counsel's performance failed to meet an objective standard of competence and that this deficient performance resulted in prejudice such that, but for counsel's error, the result of the proceeding would have been different. See *Strickland*, 466 U.S. at 687-88; *People v. Evans*, 186 Ill. 2d 83, 93 (1999). His failure to prove either prong renders his ineffective assistance claim untenable (see *Sanchez*, 169 Ill. 2d at 487), and, where he has not suffered prejudice, an examination of the performance prong is not even warranted (see *Lacy*, 407 Ill. App. 3d at 457). In the instant cause, defendant cannot establish the requisite prejudice because, for the reasons set forth at length herein, there is no reasonable probability that, had his sentencing counsel objected to and filed a motion to reconsider citing the alleged errors he asserts now on appeal, there would have been a different outcome. See, *e.g.*, *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 48; *Price*, 2011 IL App (4th) 100311, ¶ 38. There

is simply nothing in the record to indicate that the trial judge, upon the presentation of a motion to reconsider defendant's sentence, would have reduced his sentence in any way. See, *e.g.*, *Kelley*, 2013 IL App (4th) 110874, ¶¶ 45-47; *Price*, 2011 IL App (4th) 100311, ¶¶ 37-38.

¶ 69 The law regarding sentencing is well established. The trial court has broad discretionary powers to determine a defendant's sentence. See *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Its decision merits great deference because the trial judge is in the best position to make a reasoned judgment, weighing factors such as its direct observations of the defendant and his character. See *Fern*, 189 Ill. 2d at 53; see also *Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *Price*, 2011 IL App (4th) 100311, ¶ 36 (trial court's sentence must be based on particular circumstances of each case, including the defendant's credibility, age, demeanor, moral character, mentality, social environment and habits). A reviewing court must not substitute its judgment with respect to sentencing for that of the trial court merely because it would have weighed factors differently or desires to invoke clemency. See *Fern*, 189 Ill. 2d at 53 (reviewing court "must proceed with great caution" in deciding whether to modify sentence); *People v. Hayes*, 159 Ill. App. 3d 1048, 1052 (1987); accord *People v. Coleman*, 166 Ill. 2d 247, 258 (1995) (trial court's decision with respect to sentencing "is entitled to great deference"). Nor is a reviewing court to focus on a few words or comments from the sentencing court but, rather, must consider the record as a whole and the sentencing court's decision within that context. See *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 15. Ultimately, a sentence imposed by the trial court will not be altered absent an abuse of discretion. See *Stacey*, 193 Ill. 2d at 209-10; accord *Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *Price*, 2011 IL App (4th)

100311, ¶ 36.

¶ 70 As the crux of his misapprehension of law argument here, defendant jumps upon a short dialog had between the sentencing court and defense counsel. The court was examining all the counts, convictions and enhancements for which defendant was eligible, discussing each crime. After addressing home invasion with a firearm and armed robbery, and noting that these incurred 15 year sentences plus 15 year enhancements, the court briefly commented that these were "all 50 percent cases." Defense counsel interrupted to state she "believe[d]" home invasion was a crime to be served at 85%. In response, the court stated that while it had "thought they were all 50 percenters," if home invasion were at 85%, then "it is what it is." The court then continued in its laundry list of defendant's crimes, noting that for armed habitual criminal, he was to receive the "same sentence, 30 years," 15 years for residential burglary and 7 years for UUWF.

¶ 71 Later, when the trial court denied defendant's motion for reconsideration of his sentence, the following exchange took place:

> "[DEFENSE COUNSEL]: Judge, just so we're clear you don't decide 85 percent or 50 percent. That would be decided by the Illinois Department of Corrections.
>
> THE COURT: Whatever the law provides.
>
> [DEFENSE COUNSEL]: Whatever it is, it is.
>
> THE COURT: Right."

¶ 72 Defendant cites two misstatements here: that home invasion is to be served at 85%, and that the IDOC is to determine the percentage of sentencing time a defendant is to serve. He

corrects these to note that home invasion is to be served at 50% time (see 730 ILCS 5/3-6-3(a)(2)(iii) (West 2008)), while armed habitual criminal is to be served at 85% time (see 730 ILCS 5/3-6-3(a)(2)(ii) (West 2008)); and statute, not the IDOC, determines what percentage of time a defendant is to serve. From its colloquy, he asserts that the court clearly only intended that he be incarcerated for 15 years, but he will actually be serving 25.5 years, and he concludes that the court did not properly consider truth-in-sentencing or the actual length of his incarceration in fashioning a proper and accurate sentence.

¶ 73 However, while defendant's corrections of the misstatements are noteworthy, his inferences therefrom remain unsupported. That is, there is no indication anywhere in the record that the trial court intended he serve only 15 years in prison and, more significantly, the result of any perceived misunderstanding here is, based on the circumstances, inconsequential.

¶ 74 First, the trial court's colloquy shows it found it completely irrelevant whether defendant would serve his sentences at 50% or 85%. It stated that it "thought" home invasion with a firearm, armed robbery and armed habitual criminal "were all 50 percenters" but, when it was pointed out that they might not be and that the court did not get to decide this, it stood unwaveringly the court did not change its decision but instead firmly stated "it is what it is" and, upon reconsideration, reaffirmed that the sentences were to follow "[w]hatever the law provides." Clearly, then, it did not matter to the court what it or any counsel in the case believed regarding time-served percentages because it declared that defendant's sentence in this respect was to follow the law.

¶ 75 Moreover, and contrary to defendant's assertions, nowhere in the record did the court

even remotely suggest that it intended defendant serve only 15 years. In direct contradistinction, the court was explicit when it spoke that each of his crimes of home invasion while armed with a firearm, armed robbery and armed habitual criminal would result in 30 years' imprisonment, precisely due to enhancement factors. For example, the court began by stating that defendant's home invasion with a firearm conviction amounted to "15 years in the [IDOC] plus 15 years enhancement, 30 years IDOC." It then noted that his armed robbery conviction presented the "same kind of scenario, 15 plus 15, 30 years" and, similarly, that armed habitual criminal was the "same sentence, 30 years." Obviously, while the court noted the underlying 15 year terms, it never ignored the enhancements at play. The record is clear, then, that in each of these instances, when the trial court was sentencing defendant, it was well-aware of the actual length of his sentence and it left any truth-in-sentencing concerns to the operation of law.

¶ 76 In addition, with respect to these particular circumstances, any confusion in percentages was otherwise irrelevant here. Again, the court handed down 30 year sentences irrespective of the applicable time-served percentages. Also, the misstatement between home invasion and armed habitual criminal was nothing more than a minor transference. Whether his home invasion conviction was to be served at 85% and his armed habitual criminal conviction was to be served at 50% as the trial court and defense counsel initially misstated, or whether this was to be vice versa as defendant now points out, the key is that one of these crimes was to be served at 85% and the other at 50%. With the trial court sentencing him to 30 years for both, and with the sentences to run concurrently, any initial misstatement (which the trial court corrected when it deferred to the law) was inconsequential, as defendant's ultimate sentence would remain the

same. Therefore, we find no reason to remand for a new sentencing hearing.

¶ 77 Nor do we find defendant's argument that we must reduced his sentence because it is excessive to be persuasive. In determining an appropriate sentence for a defendant, the sentencing court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2008). When such factors have been presented to the court, it is presumed that they have been considered, absent some contrary indication. See *People v. Sutherland*, 317 Ill. App. 3d 1117, 1131 (2000); see also *People v. Cord*, 239 Ill. App. 3d 960, 969 (1993) (when mitigating factors have been presented, it is presumed court considered them in fashioning sentence and burden rests with the defendant to prove that court failed to do so). The sentencing court is not required to recite or assign a value to each factor in mitigation or aggravation that forms part of the record. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 14; *People v. Hindson*, 301 Ill. App. 3d 466, 476 (1998). And, "[t]he weight that the trial judge accords each factor in aggravation and mitigation, and the resulting balance that is struck among them, depends on the circumstances of the case." *Sutherland*, 317 Ill. App. 3d at 1131. For example, while it is true that a sentencing court is to keep in mind the "objective of restoring the offender to useful citizenship" (Ill. Const. 1097, art. 1, § 11), it is not required to give that more weight than the seriousness of the crime, protection of the public and punishment. See *People v. Harris*, 294 Ill. App. 3d 561, 569 (1998). Nor is it required to do this with a defendant's rehabilitative potential (see *People v. Wilburn*, 263 Ill. App. 3d 170, 185 (1994)), his youth (see *People v. Hoskins*, 237 Ill. App. 3d 897, 900 (1992)), or his lack of a criminal history (see *People v. Tijerina*, 381 Ill. App. 3d 1024, 1041 (2008)). Ultimately, a sentence within the prescribed

statutory range is presumed to be appropriate and will not be deemed excessive unless the defendant affirmatively shows that his sentence varies greatly from the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. See *Fern*, 189 Ill. 2d at 54; accord *Stacey*, 193 Ill. 2d at 210.

¶ 78 In the instant cause, the trial court stated that it "reviewed all of factors in aggravation and mitigation and reviewed [defendant's] entire presentence investigation report." It then literally recited a laundry list of these statutory factors and, with respect to several of them, addressed whether and how they applied here. In mitigation, the court was quick to recount defendant's mother's testimony at the sentencing hearing and her description regarding his turnaround since his days as a juvenile offender. However, the court could not overlook several factors in aggravation. To this extent, it noted that defendant had an "excessive" and "extensive prior criminal history," starting from when he was a juvenile. While this was mostly related to drugs, one of his adjudications dealt with possession of a stolen vehicle and defendant "had weapons charges in his background." The court also believed, from this past of drugs and weapons, defendant was on the course toward more violence; not only did the court find it likely that "he might commit another crime," but it also noted that the crimes for which he was convicted here were "definitely [an] elevation in the types of crimes that he's committed in the past." Particularly, the court further commented that defendant's instant crimes "did cause or threaten serious harm" and explicitly mentioned that the sentence it fashioned was "necessary to deter others from committing" them.

¶ 79 From all this, we find no excessiveness or disproportionality. A variety of factors

were presented to and discussed by the trial court in fashioning its sentence for defendant. Undeniably, these included those he now points to appeal, including his youth, background and rehabilitative potential. However, the court found more weighty those factors in aggravation such as his criminal past, the instant offenses, and the elevation between the two. The court's attempt at balancing these competing interests is obvious in the record and, that its decision was not one favorable to defendant, alone, cannot support the conclusion that the sentence it rendered was excessive. The fact remains that defendant, while armed with a gun, broke into Pike's home, waited until Pike was inside, robbed him at gunpoint in his bedroom and then fled the scene. Therefore, based on all this, we reject defendant's arguments regarding the court's alleged failure to consider his rehabilitative potential and other mitigating factors and its imposition of an inappropriately disparate sentence and find, instead, that his sentence, which was properly within the applicable sentencing range for the crimes charged, was, contrary to his contention, not excessive in light of the circumstances presented.

¶ 80 CONCLUSION

¶ 81 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court, vacating only defendant's conviction for UUWF in light of the one-act, one-crime rule.

¶ 82 Affirmed in part, vacated in part.