FIRST DIVISION
December 19, 2016

No. 1-14-1582

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 JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 09 CR 3267
	)	
RALPH GEIGER,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment

O R D E R

¶ 1 *Held*: Defendant's conviction and sentence are affirmed where the trial court did not err in admitting evidence of a prior conviction, the record did not support the defendant's claims of ineffective assistance of counsel, and the court did not rely on an improper factor or abuse its discretion in sentencing him.

¶ 2 After a jury trial, defendant Ralph Geiger was found guilty of first-degree murder and sentenced to 70 years' imprisonment: 45 years for the murder, plus a firearm sentencing enhancement of 25 years. On appeal, Mr. Geiger contends that: (1) the trial court erred in admitting into evidence his prior attempt murder conviction; (2) defense counsel was ineffective

in failing to use a peremptory challenge against a potential juror who was equivocal in answering whether he could be fair to Mr. Geiger at trial; (3) defense counsel was ineffective in failing to impeach a witness subpoenaed by the defense who did not testify consistently with his previous statements; and (4) the trial court erred in sentencing Mr. Geiger by improperly relying upon a factor inherent in the offense, and abused its discretion by sentencing Mr. Geiger to a term of 25 years above the minimum. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Mr. Geiger was charged with 12 counts of first-degree murder and 6 counts of armed robbery, under various theories, for the murder of Ryan Powers and for taking money from Ryan Powers and Melissa Richard on January 24, 2009. Mr. Geiger's trial began on December 2, 2013. We discuss the trial testimony and the pretrial motions to the extent necessary to review the issues on appeal.

¶ 5 A. Motion to Exclude Evidence of Mr. Geiger's Prior Conviction

¶ 6 Before trial, defense counsel filed a motion *in limine* to exclude evidence of Mr. Geiger's prior attempt murder conviction. On October 23, 2000, after being indicted as an adult, Mr. Geiger pled guilty to an attempt murder that he committed in early May 1999, when he was 16 years old. Mr. Geiger was sentenced to 7 years' incarceration and was released on April 15, 2005, at which point he began a term of mandatory supervised release. After being arrested for violating the terms of his parole in August 2005, Mr. Geiger was again incarcerated for about one year, and was fully discharged on September 26, 2008.

¶ 7 The trial court denied Mr. Geiger's motion *in limine*, under the test established in *People v. Montgomery*, 47 Ill. 2d 510 (1971), on the basis that Mr. Geiger was convicted of a felony as an adult, had been released from incarceration less than 10 years prior to his current trial, and

that, in the court's view, the prejudicial effect of this evidence did not outweigh its probative value. While at first the trial court considered only letting in the fact that Mr. Geiger had been convicted of a felony, it ultimately ruled that if Mr. Geiger testified, the State would be allowed to introduce the fact that he had been convicted of attempt murder. Defense counsel argued in an unsuccessful post-trial motion that the trial court's denial of his motion *in limine* was prejudicial error.

¶ 8 B. Jury Selection

¶ 9 After receiving the trial court's ruling on Mr. Geiger's prior conviction, defense counsel requested that the court ask the jury about that prior conviction during *voir dire*. During that process, juror Fitzroy Lewis stated that he had been held at gunpoint two years earlier and that his son was held at gunpoint in a separate incident. When asked if he could put those incidents aside, Mr. Lewis stated, "I will try." When asked whether or not anything about that experience would prevent him from being a fair and impartial juror, Mr. Lewis answered, "I think my personal experience," but when asked if he could be fair, he again said that he "will try" and when pressed further, stated: "[w]ell, it's fresh in my mind." The court then asked Mr. Lewis whether he can be a logical person "that can make a decision not based on sympathy or bias or prejudice but rather make [his] decision based on the evidence that [he will] hear in the courtroom," and Mr. Lewis responded, "I will try." Defense counsel did not ask Mr. Lewis any additional questions.

¶ 10 During the jury selection process, by the time Mr. Lewis was being discussed, defense counsel had used four of the seven peremptory challenges allowed, while only three of the twelve jurors had been selected to serve on the panel. Defense counsel moved for Mr. Lewis to be excused for cause and the trial court denied his motion. Defense counsel declined to use a

peremptory challenge to strike Mr. Lewis from the jury, and Mr. Lewis subsequently served as a juror.

¶ 11 C. Testimony Presented at Trial

¶ 12 At trial, Mr. Geiger admitted that he shot and killed Ryan Powers on the night of January 24, 2009. Mr. Geiger argued that he killed Mr. Powers in self-defense, while the State put forth evidence to contest that defense. To prove its case, the State presented testimony from four individuals who were present at the time of the shooting: Patrick Werner, Melissa Richard, Shawn Crowley, and Demetrius Jackson. The State also elicited testimony from Mr. Powers' mother and three police investigators who worked on this case. The defense presented the testimony of Mr. Geiger; Mr. Geiger's mother, Jacqueline Bartoszewski; and Brian Kadlec, who was inside the house when the shooting took place outside of it.

¶ 13 All of the witnesses who were present when Mr. Powers was killed on January 24, 2009, generally agreed as to the events leading up to the shooting. Mr. Werner, at the request of Michael Owca, had contacted Mr. Geiger to arrange for Mr. Geiger to sell Mr. Powers 10 pounds of cannabis. After being postponed one day, the exchange was to take place on January 24, 2009, at 14639 Kildare Avenue, Midlothian, Illinois, which was Mr. Jackson's house.

¶ 14 That night, Mr. Geiger and others arrived at 14639 Kildare in two vehicles. One vehicle, a gold Nissan driven by Mr. Owca, also contained Mr. Geiger, Mr. Werner, and Sixto Piris. The other vehicle was a green minivan, driven by an unidentified individual, which contained a cooler with the cannabis to be sold. When they initially arrived at 14639 Kildare, Mr. Piris did not like the location because it was a "dark, dead end block." After they agreed to move the deal to a different location, Mr. Owca drove the Nissan to a nearby KFC restaurant where Mr. Powers, who was driving a BMW, pulled alongside the Nissan. The other individuals in the

BMW included Ms. Richard, Mr. Powers' girlfriend who was in the front passenger seat, and Mr. Jackson and Mr. Crowley, who were in the backseat.

¶ 15 Once they were at the KFC restaurant, Mr. Powers said that there was too much police presence in the area and suggested they move to a different location. Mr. Geiger agreed to the location change and everyone drove to a nearby Brown's Chicken restaurant. The minivan holding the cannabis did not arrive at the KFC restaurant, instead driving down the block "for security reasons," but did drive to the Brown's Chicken restaurant. The driver of the minivan did not like the Brown's Chicken restaurant location, however, so the location was changed back to 14639 Kildare.

¶ 16 When everyone returned to 14639 Kildare, Mr. Powers backed the BMW into Mr. Jackson's driveway and kept it running. The Nissan and the minivan were both driven past Mr. Jackson's house to the end of Kildare where it became a dead-end, then were turned around and were parked near the house on the street. Mr. Owca parked the Nissan on the side of the street opposite Mr. Jackson's house, and the unidentified driver parked the minivan on the same side of the street as the house.

¶ 17 All four occupants of the Nissan then exited the vehicle and walked towards the middle of the street where they stood for a short period of time. Meanwhile, Mr. Jackson and Mr. Crowley exited the BMW, while Mr. Powers and Ms. Richard stayed in it. The unidentified driver remained in the minivan. Mr. Geiger then approached the driver's side window of the BMW where Mr. Powers was sitting.

¶ 18 The salient differences in the testimony will be summarized to the extent necessary to discuss the issues raised on appeal.

¶ 19 1. The State's Case

¶ 20 Patrick Werner testified that when they returned to 14639 Kildare, after he and the other occupants of the Nissan walked to the middle of the street, he and Mr. Piris walked towards the minivan while Mr. Geiger approached the BMW and Mr. Owca stayed by the Nissan. Mr. Werner stated that when he was near the minivan, he heard a gunshot and saw a flash coming from the driver's side of the BMW. He looked back and saw Mr. Geiger standing at the driver's side of the BMW; he did not see any gun or the driver's hands. After hearing the first gunshot, Mr. Werner ran towards the minivan. Mr. Werner stated that he then heard more gunshots and saw the BMW accelerate out of the driveway and crash into other cars that were parked on the street. Mr. Werner and Mr. Piris got into the minivan and, after a "delay," Mr. Geiger joined them. Mr. Werner testified that Mr. Geiger was "slouched" in the minivan "with his hoody over him" and his hands were "in his coat" where Mr. Werner could not see them. The unidentified driver then drove the minivan away from Mr. Jackson's house. After driving for a few blocks, Mr. Geiger and Mr. Piris jumped out of the minivan, then Mr. Werner and the unidentified driver continued on to a house in Chicago that Mr. Werner did not recognize. Mr. Werner testified that he later received a phone call from Mr. Geiger, who told Mr. Werner to "stay there and lay low" and that he "messed up." Mr. Geiger also told Mr. Werner that he "got $4,000 that was thrown out the window of the BMW into the snow" and threatened Mr. Werner that he would be "popped" if he said anything. The next day, on January 25, 2009, Mr. Werner turned himself into the Midlothian Police Department where he was shown a photo array and identified Mr. Geiger. Two days later, he identified Mr. Geiger in a physical lineup at the Cook County courthouse located in Markham.

¶ 21 Melissa Richard testified that she was with Mr. Powers earlier on January 24, 2009, when

he received a phone call about the drug deal that would happen at Mr. Jackson's house that evening. After receiving that phone call, Mr. Powers drove with Ms. Richard in his BMW to Mr. Jackson's house, along with $10,000, which was bundled in "[t]wo packages with small and big bills." Ms. Richard testified that she sat in the passenger seat and Mr. Powers put the money "in between the middle of his legs." She stated that when they were at the KFC restaurant, Mr. Powers showed the money to the "heavy Mexican" who was a passenger in the Nissan. Ms. Richard also testified that neither she nor Mr. Powers had a gun that day, nor was there a gun in the BMW.

¶ 22 Ms. Richard testified that she was sitting in the front passenger seat of the BMW during the incident with Mr. Geiger. She stated that as Mr. Geiger was approaching the BMW, Mr. Powers told her that "[t]his doesn't feel right" and, at her suggestion, he gave her the money which she put under her sweater. When Mr. Geiger reached Mr. Powers' window, Mr. Powers rolled it down. Mr. Geiger asked to see the money and Mr. Powers refused. Mr. Powers did not get agitated, according to Ms. Richard. Mr. Geiger then yelled to the "heavy Mexican" who was standing in the street and asked him if he had already seen the money. Ms. Richard heard him reply, "[n]o," then Mr. Geiger turned back to the BMW and said "he didn't see the money." Ms. Richard testified that Mr. Geiger then pulled out a black gun from his hooded sweater and stuck it inside the window. She stated that when Mr. Powers saw the gun, he reached over to put the vehicle into "drive." Ms. Richard testified that Mr. Geiger fired three times at Mr. Powers as he tried to drive away. She stated that Mr. Powers did not threaten or pull a gun on Mr. Geiger, nor did she or anyone who had been in the BMW.

¶ 23 Ms. Richard testified that the BMW crashed into the cars that were parked along the street in front of it. As she was trying to get out of the vehicle after the crash, Mr. Geiger came

up to her, put a gun in her face, and said, "[g]ive me the money." Ms. Richard lifted her sweater and the bundles of money fell to the ground. Mr. Geiger picked up one of the bundles and ran towards the minivan. Ms. Richard then ran to Mr. Jackson's house, asked someone to call the police, and went back to the BMW where she stayed with Mr. Powers until emergency services arrived. Ms. Richard was taken to the Midlothian police station and was later released. The next day, the Midlothian police came to Ms. Richard's residence where she was asked to give a description of the shooter and pick out the shooter from a photo array. On January 27, 2009, Ms. Richard identified Mr. Geiger in a physical lineup.

¶ 24 At trial, Shawn Crowley stated that when everyone arrived back at 14639 Kildare, he and Mr. Jackson exited the BMW and headed to the minivan. Then, when Mr. Geiger began walking to the BMW, Mr. Crowley "walked back [to the BMW] with him." According to Mr. Crowley, after Mr. Geiger said to Mr. Powers that he needed to see the money, Mr. Crowley told Mr. Geiger that "his buddy already seen [*sic*] the money." Mr. Crowley testified that he then asked Mr. Piris to tell Mr. Geiger that he already saw the money, but Mr. Piris said that he had not.

¶ 25 Mr. Crowley testified that, at that point, he looked back at Mr. Geiger who "already had the gun in the window." Then, according to Mr. Crowley, Mr. Geiger "started shooting." Mr. Crowley initially testified he heard two or three gunshots, but during cross-examination, he testified to hearing five or six shots. When Mr. Geiger started shooting, Mr. Crowley was "[r]ight next to him," near the back door of the BMW, and he stated that Mr. Powers "didn't really move at all" before Mr. Geiger shot him. Mr. Crowley testified that, from his position, he could see Mr. Powers' legs, but not his hands, his feet, or the floorboard. However, Mr. Crowley also testified that he saw Mr. Powers' hands when he put them on the steering wheel. Mr. Crowley explained that right before Mr. Geiger started shooting, Mr. Powers was "sort of leaned

forward trying to grab the pedal, but on the car it has shifter pedals on the steering wheel. He leaned forward to put it in drive." Mr. Crowley testified that he did not have a gun that night, nor did Mr. Powers, Ms. Richard, or Mr. Jackson.

¶ 26 Mr. Crowley testified that he started running down the street when Mr. Geiger started shooting. He testified that he ran down Kildare towards the dead-end until he met up with Mr. Jackson, and the two men then returned to the BMW, which had crashed into cars parked on the street. By this point, the minivan and the Nissan, as well as all the original occupants of those cars, had left Mr. Jackson's house. Mr. Crowley opened Mr. Powers' car door and called his name, but did not touch him or take anything from the BMW. Mr. Crowley stated that on January 27, 2009, he identified Mr. Geiger in a physical lineup.

¶ 27 Demetrius Jackson testified that after everyone returned to 14639 Kildare, he and Mr. Crowley exited the BMW and walked towards the minivan. Mr. Jackson stated that he was standing in the street along the curb, about 15 to 20 feet away from Mr. Geiger and Mr. Powers, during the confrontation about whether Mr. Piris had seen the money. According to Mr. Jackson, after Mr. Piris said he had not seen the money, Mr. Geiger asked for the money once more, and then Mr. Jackson saw Mr. Geiger pull out a gun, point it into the car, and fire. Mr. Jackson explained that he saw Mr. Powers lean forward towards the shifter in his BMW when Mr. Geiger fired. After seeing the first shot, Mr. Jackson began to run down the block. He heard four or five gunshots in total. When Mr. Jackson returned to the BMW, he opened Mr. Powers' car door and took his foot off the accelerator to stop the wheels from spinning, but stated that he did not take anything from the BMW. Mr. Jackson testified that he did not have a gun that night, nor did Mr. Powers, Ms. Richard, or Mr. Crowley. Mr. Jackson also identified Mr. Geiger in a physical lineup.

¶ 28 The State also presented testimony from Investigator Lukasik from the Cook County Sheriff's Police Department who investigated the scene of Mr. Powers' death. Investigator Lukasik testified that, after speaking with the Midlothian police officers who were present, he and his partners "process[ed] the scene for possible evidence." Investigator Lukasik described the evidence recovered from the scene, which included a spent cartridge casing from a ".40 Smith and Wesson" which was "in the street close to the mouth of the driveway;" a "package of money wrapped in a rubber band" found near the crashed BMW in the amount of $5,000; a spent cartridge casing found inside the BMW, which had the same manufacturer and caliber stamp as the first casing; and multiple fragments of projectiles and deformed projectile jackets found inside the BMW. The investigator also noted that there were several holes in the center console and CD player of the crashed vehicle. Investigator Lukasik made no mention of recovering any gun from the scene at 14639 Kildare or from inside the BMW and, based on the evidence at the scene and in the vehicle, he believed that there was only one firearm involved. Investigator Lukasik also testified that on January 27, 2009, he processed the motel room where Mr. Geiger was apprehended, and recovered several items of clothing; a cell phone; and a stack of money totaling $2,201 from a bag inside of a garbage can, mostly consisting of $20- and $10-dollar bills.

¶ 29 Investigator Leyden testified that at the time of the incident, he was assigned to the South Suburban Major Crimes Task Force and investigated the death of Mr. Powers. On January 27, 2009, at about 2 p.m., he received information placing Mr. Geiger at a motel room in Cicero; Investigator Leyden and other officers went to the motel that afternoon and apprehended Mr. Geiger.

¶ 30 The State's final witness was Investigator Blue, an evidence technician from the Cook

County Sheriff's Police Department who was present for the autopsy of Mr. Powers. During his testimony, Investigator Blue reviewed photographs taken during the autopsy and identified two wounds to the "upper left side" and "lower right side" of Mr. Powers' back. Investigator Blue also testified about a close-up photograph of the jacket Mr. Powers was wearing; the photograph showed "burning particles surrounding the hole" which was consistent with stippling, which he explained was "the burning that [a fired weapon] leaves behind from the gases and gun powders when they make contact with a surface at close range."

¶ 31 2. Mr. Geiger's Case

¶ 32 Testifying in his own defense, Mr. Geiger stated that on January 21 or 22, 2009, his parents gave him $2,500 for "rent and deposit on a new apartment" because his old apartment had mold and his family needed a different place to live. Later during the trial, Mr. Geiger's mother Jacqueline Bartoszewski took the stand and corroborated this testimony, stating that she and her husband gave Mr. Geiger this amount in $100- and $20-dollar bills. Mr. Geiger admitted that he brokered drug deals by buying cannabis at a low price and selling it for a profit.

¶ 33 Mr. Geiger testified that on the evening of January 24, 2009, when he, Mr. Werner, Mr. Owca, and Mr. Piris drove to 14639 Kildare, he brought a loaded pistol with him. He stated that he did this "[f]or [his] security, secure [his] drugs, and because they all got [*sic*] guns." As Mr. Geiger was being asked about the progression of the evening, he stated that by the time everyone agreed to move the deal from the KFC restaurant to the Brown's Chicken restaurant, neither he nor anyone in his group had seen the money involved in the deal.

¶ 34 When everyone arrived back at 14639 Kildare, Mr. Geiger testified, he told Mr. Piris and Mr. Werner to get the cannabis from the minivan while he approached the BMW. Mr. Geiger stated that his gun was in his right jacket pocket and he kept his hands in his pockets because it

was cold. When Mr. Geiger arrived at the BMW, he asked Mr. Powers to show him the money, but Mr. Powers said he had already shown the money to Mr. Piris. Mr. Geiger asked Mr. Piris if he had seen the money and Mr. Piris said he had not.

¶ 35 Mr. Geiger testified that, at this point, Mr. Powers seemed to be "frustrated" and "angry." According to Mr. Geiger, Mr. Powers said in frustration that he "moves 50 to 100 pounds a week" to which Mr. Geiger said that it did not seem like it, meaning that Mr. Powers seemed unprofessional. Mr. Powers became "[a]ggressive" and said to Mr. Geiger, "you don't know who you [are] f*** with." Then Mr. Powers "[r]eached under his seat and pulled out a semi automatic chrome gun." Mr. Geiger stated that "because [he] was standing outside the vehicle, [he] could see directly inside" that Mr. Powers "was pulling for the gun." Mr. Geiger testified that he thought Mr. Powers was going to shoot him, so Mr. Geiger "reacted and shot [Mr. Powers]" in order "to defend [himself]," afraid that if he did not fire, "[he] would be dead." He saw Mr. Powers raising the gun at him and stated that he "reacted in a split second and shot." Mr. Geiger believed that he fired two or three times, but was not absolutely sure. Mr. Geiger testified that it was not his intent to kill or rob Mr. Powers or anyone else on January 24, 2009. Instead, he stated, he fired his gun with the intention of saving himself from harm.

¶ 36 Mr. Geiger testified that after firing those shots, the BMW "drove off" and crashed into two parked cars. Mr. Geiger ran from the BMW and did not approach it again. Mr. Geiger testified that he did not take anything from the BMW or from Ms. Richard and instead ran to the minivan. He "jumped in" the minivan and the unidentified driver drove off along with Mr. Werner and Mr. Piris. Mr. Geiger testified that when the minivan reached the intersection of Cicero Avenue and 147th Street, he exited the vehicle and brought his gun with him. After seeking refuge in a restaurant bathroom, he called a friend for a ride back to Chicago, then called

his wife and told her to leave the house, bring their children and his parents' money, and meet him at a hotel. Mr. Geiger stated that between then and when he met his family at the hotel, he threw his gun into the Chicago River. On January 27, 2009, Mr. Geiger was arrested in the hotel room, where police found about $2,200 in a garbage can.

¶ 37 Brian Kadlec took the stand for the defense in response to a subpoena followed by a rule to show cause. The defense had called Mr. Kadlec in the hopes of having him testify that he had seen Ms. Richard and Mr. Jackson enter the house at 14639 Kildare after the shooting, to support the defense theory that one of them may have taken Mr. Powers' gun into the house. However, Mr. Kadlec, whose testimony is discussed in some detail in reference to the argument that defense counsel's cross examination of him was inadequate, did not provide that hoped for testimony.

¶ 38 D. Sentencing

¶ 39 The jury found Mr. Geiger guilty of first-degree murder, that he acted with the intent to cause death or great bodily harm to Mr. Powers, and that he personally discharged a firearm that proximately caused Mr. Powers' death. The jury found Mr. Geiger not guilty of armed robbery, and not guilty of first-degree murder on the basis that he killed Mr. Powers with a firearm during the commission of armed robbery. On March 7, 2014, the trial court sentenced Mr. Geiger to 45 years' imprisonment, plus 25 years for the firearm sentencing enhancement, for a total of 70 years' imprisonment. Mr. Geiger's motion to reconsider his sentence was denied on April 22, 2014.

¶ 40 Mr. Geiger timely filed his notice of appeal on May 9, 2014. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6), and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of

conviction in a criminal case. (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 41 ANALYSIS

¶ 42 On appeal, Mr. Geiger argues that (1) the trial court abused its discretion by admitting evidence of Mr. Geiger's prior attempt murder conviction; (2) defense counsel was ineffective by failing to use a peremptory strike against a juror who gave equivocal answers during *voir dire*; (3) defense counsel was ineffective for failing to impeach Mr. Kadlec's testimony; and (4) the trial court erred in sentencing by improperly using an inherent part of the offense as an aggravating factor and by imposing an excessive sentence. Each of these arguments in addressed in turn.

¶ 43 A. Admission of Mr. Geiger's Prior Conviction

¶ 44 Mr. Geiger first argues that the trial court erred, under *People v. Montgomery*, 47 Ill. 2d 510 (1971), when it admitted his prior attempt murder conviction to impeach him. Under *Montgomery*, a prior conviction may be admissible to attack a witness' credibility if: (1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statements regardless of the punishment; (2) less than 10 years have elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516. To determine whether the probative value of admitting the prior conviction outweighs the danger of unfair prejudice, the trial court must conduct a balancing test. *People v. Mullins*, 242 Ill. 2d 1, 14-15 (2011). In conducting this test, "the trial court should consider, *inter alia*, the nature of the prior conviction, the nearness or remoteness of that crime to the present charge, the subsequent career of the person, the length of the witness' criminal record, and whether the crime was similar to the one charged." *Id.*

¶ 45 Mr. Geiger acknowledges that the State satisfied the first two requirements of the *Montgomery* test. However, Mr. Geiger contends that the trial court abused its discretion in its application of the third *Montgomery* prong because (1) the court failed to conduct the necessary balancing test; (2) Mr. Geiger's prior conviction had little or no probative value because it was committed when Mr. Geiger was a juvenile and 14 years prior to the current case; (3) the prior conviction had little or no probative value because the prior crime did not involve dishonesty; and (4) the prejudicial effect of admitting Mr. Geiger's prior attempt murder conviction into his murder trial was so substantial that it outweighed any probative value.

¶ 46 "The determination of whether a witness' prior conviction is admissible for purposes of impeachment is within the sound discretion of the trial court." *Id.* at 15. "In reviewing for an abuse of discretion, '[t]he question is not whether the appellate court agrees with the circuit court, but whether the circuit court acted arbitrarily, without employing conscientious judgment, or whether in view of all the circumstances the court exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted.' " *People v. Lozano*, 316 Ill. App. 3d 505, 514 (2000) (quoting *Moffitt v. Illinois Power Co.*, 248 Ill. App. 2d 752, 758 (1993)).

¶ 47 Mr. Geiger argues that, rather than conducting a balancing test, "[t]he trial court engaged in the type of reflexive, summary admission of a defendant's prior conviction that the Illinois Supreme Court cautioned against." However, the record shows that the court stated that it would determine "whether or not the prejudicial effect will outweigh the probative value of whether or not the actual crime itself of the attempt murder conviction is going to be admissible" and was briefed by the parties on both the applicable law and the facts of the case before it. The court ruled after taking a recess to review the case law cited. Although the court did not specifically

cite the factors in the *Montgomery* balancing test, our supreme court has "rejected any notion that the *Montgomery* balancing test is not properly performed unless the trial court explicitly states that it is doing so in the record." *Mullins*, 242 Ill. 2d at 16. As in *Mullins*, "it was 'clear from the trial judge's comments that [s]he was aware of the *Montgomery* balancing test' " (*id.* (quoting *People v. Atkinson*, 186 Ill. 2d 450, 462-63 (1999))) and that the test was applied.

¶ 48 Mr. Geiger argues that there was no probative value in his prior conviction because he was 16 years old, a juvenile, when he committed the prior attempt murder. However, the State points out, and Mr. Geiger does not disagree, that his prior conviction was an adult conviction, not a juvenile adjudication. Although the Illinois Supreme Court has held that a juvenile adjudication is typically not admissible against a testifying defendant (*People v. Villa*, 2011 IL 110777, ¶ 41), the court was addressing juveniles who had been adjudicated delinquent under the Juvenile Court Act, not juveniles who had been tried as adults.

¶ 49 Mr. Geiger cites *Roper v. Simmons*, 543 U.S. 551 (2005), and *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012), which, he argues, implicitly support his argument that convictions have less probative value if they are committed by a minor, even if that minor was tried as an adult. Mr. Geiger argues that using the reasoning from those cases—that juveniles have not fully matured whereas adults have—the trial court abused its discretion in admitting the prior attempt murder conviction.

¶ 50 Both *Roper* and *Miller* discussed the proper imposition of punishment on juveniles, tried as adults, under the eighth amendment to the United States Constitution (U.S. Const., amend. VIII); *Roper* held that the eighth amendment does not allow these defendants to be sentenced to death (*Roper*, 543 U.S. at 574-75), while *Miller* held that the eighth amendment prohibits the imposition of a life sentence without the possibility of parole for these defendants (*Miller*, 567

U.S. at __, 132 S. Ct. at 2472-73). *Roper* and *Miller* both discuss how people develop and mature with time. See *Miller*, 567 U.S. at __, 132 S. Ct. at 2464-68; *Roper*, 543 U.S. at 571-74. The Supreme Court also cited *Roper* when it held that a child's age "properly informs" a *Miranda* custody analysis in *J.D.B. v. North Carolina*, 564 U.S. 261, 272-77 (2011).

¶ 51 We do not disagree with the defendant that the age that the witness was at the time of his earlier conviction may be relevant to the probative value of a prior conviction under the *Montgomery* analysis. However, neither *Roper* nor *Miller* holds or even suggests that a prior conviction lacks any probative value or is necessarily inadmissible for impeachment purposes because the witness was under the age of 18 years at the time he committed the prior offense. Thus, Mr. Geiger's age at the time of his attempt murder conviction does not render that conviction inadmissible for impeachment purposes.

¶ 52 Mr. Geiger next argues that his prior conviction had minimal probative value because it was remote in time from his testimony at the trial. Mr. Geiger acknowledges that evidence of the prior conviction fell within the *Montgomery* ten-year timeframe, which is measured from his release from incarceration. The prior crime was committed 14 years before this trial and Mr. Geiger was released from incarceration for that prior conviction approximately eight-and-a-half years before this trial. Again the age of the prior conviction, which was well within the time parameters set forth in *Montgomery*, did not render it inadmissible.

¶ 53 In support of his argument that his prior conviction did not have probative value because it did not involve testimonial deceit, Mr. Geiger relies on *People v. Williams*, 161 Ill. 2d 1 (1994) ("the 1994 *Williams*"). In that case, the Illinois Supreme Court cautioned trial courts against "allowing the State to introduce evidence of virtually all types of felony convictions for the purported reason of impeaching a testifying defendant." *Id.* at 38-39. The court further stated that

"[t]he *Montgomery* rule does not *** allow for the admission of evidence of any and all prior crimes. The focus of *Montgomery* was on crimes which bear upon the defendant's truthfulness as a witness." *Id.* at 39. Mr. Geiger argues that because his prior conviction does not suggest dishonesty or deceit and because it "barely fit[s] inside the [10-year] window," there is no probative value in the admission of the prior conviction.

¶ 54 While this caution to the trial courts in the 1994 *Williams* case was significant, as the State correctly points out, our supreme court later clarified its position on the admission of prior convictions for impeachment purposes that did not involve dishonesty, stating that "this court in [the 1994] *Williams* was expressing concern about the indiscriminate admission of all prior felony convictions for impeachment purposes absent application of the critical balancing test mandated by *Montgomery*." *Williams*, 173 Ill. 2d 48, 82 (1996) ("the 1996 *Williams*"). In the 1996 *Williams* case, the court stated that the 1994 *Williams* case "does not alter the three-prong rule set forth in *Montgomery*" which allows for the admission into evidence of prior convictions for impeachment purposes where those crime are punishable by death or imprisonment in excess of one year, even if the crime did not involve dishonesty or false statement. *Id.* at 81-82. Thus, the fact that Mr. Geiger's prior conviction was for a crime of violence, rather than one of dishonesty, does not render that prior conviction inadmissible.

¶ 55 To support his position, Mr. Geiger also compares this case to *People v. Adams*, 281 Ill. App. 3d 339 (1996). In that case, the defendant's prior conviction for aggravated battery was admitted in his trial where he was being charged with attempt murder, armed violence, and aggravated battery. *Id.* at 340-41. On appeal, we reversed the trial court, finding that "the probative value relating to credibility was minimal by comparison with the prejudice due to the admission of the prior *** convictions" and that, "under the rationale of *Montgomery* and [the

1994] *Williams*," the defendant's prior convictions were improperly admitted. *Id.* at 345. In *Adams*, the court based its decision in large part on whether the prior convictions themselves concerned the defendant's truthfulness. *See id.* (stating that the court "fail[ed] to see much relevance regarding [the defendant's] prior conviction and his testimonial credibility in the instant case"). However, as noted above, since *Adams* and the 1994 *Williams* case on which it relied, our supreme court has clarified that if a prior offense was punishable by death or imprisonment in excess of one year, the offense need not also involve dishonesty or a false statement in order to be admissible for impeachment purposes. *Williams*, 173 Ill. 2d at 81-83.

¶ 56 Mr. Geiger also argues that his prior conviction should not have been admitted because it was for an offense that was so similar to his charged offense that the jury was highly likely to view the prior conviction as evidence of a propensity to commit the crime charged. The record shows that the trial judge was well aware of this concern since she initially considered admitting only the fact that Mr. Geiger had a previous felony conviction. However, this use of the "mere-fact" admission of prior convictions for impeachment, while perhaps useful in minimizing prejudicial impact, was found to be an impermissible alteration of the *Montgomery* rule in *People v. Atkinson*, 186 Ill. 2d 456, 461 (1999). Instead, the *Atkinson* court directed trial courts to weigh similar crimes under the *Montgomery* balancing factors, noting that "trial courts should be cautious in admitting prior convictions for the same crime as the crime charged. Nonetheless, similarity alone does not mandate exclusion of the prior conviction." *Id.* at 463.

¶ 57 The court in *Atkinson* suggested that mitigating actions taken by the trial court can help diminish a prior conviction's prejudicial effect. *Id*. at 463 ("the trial court instructed the jury to consider defendant's prior burglary convictions only for the purpose of assessing defendant's credibility as a witness, and not as evidence of his guilt of the offense charged"). This is exactly

what the judge did in this case. Not only did the judge issue a limiting instruction to the jury after the trial ended, but she also told the jury before *voir dire* began that Mr. Geiger had previously been convicted of attempt murder, that it "may be considered *** only as it may effect [*sic*] [his] believability as a witness," and that any juror who could not "listen to all of the evidence before determining the weight to be given to such testimony" should raise their hand. No potential juror indicated that they would have a problem using evidence of the prior conviction for the correct purpose.

¶ 58 Because the trial court conducted the required *Montgomery* balancing test, did not abuse its discretion in applying *Montgomery*, and took proper steps to mitigate any prejudicial effect, we do not find that the trial court acted improperly when it allowed the State to impeach Mr. Geiger with his prior conviction for attempt murder.

¶ 59 B. Ineffective Assistance of Counsel

¶ 60 Mr. Geiger next argues that his counsel was ineffective at two different times during trial: first, when his counsel failed to use a peremptory challenge against a juror who gave equivocal answers during *voir dire* as to whether he could be fair to Mr. Geiger and, second, when his counsel failed to impeach Brian Kadlec, who had been called as a witness by the defense, when his testimony became affirmatively damaging. We find that neither of these incidents support Mr. Geiger's claim that he did not receive the effective assistance of counsel.

¶ 61 To determine whether a defendant received ineffective assistance of counsel, a reviewing court uses the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction *** has two components. First, the defendant must show that counsel's

> performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

The Illinois Supreme Court has stated that "[i]n demonstrating *** that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). The second prong of the *Strickland* test requires the defendant to "show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. A defendant must satisfy both requirements in order to succeed on a *Strickland* claim. *Id.*

¶ 62 We first consider whether Mr. Gieger's counsel was deficient. When determining whether counsel was deficient, hindsight should not factor into our decision; as the Court cautioned in *Strickland*:

> "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

We will address the two points at which Mr. Geiger claims defense counsel was ineffective in

turn.

¶ 63 1. Ineffective Counsel During *Voir Dire*

¶ 64 Mr. Geiger first argues that his counsel was ineffective in failing to use a peremptory challenge to remove juror Fitzroy Lewis from the jury. Although defense counsel argued, as Mr. Geiger characterizes it, "vociferously" to the court that Mr. Lewis should be excused for cause, the court denied his request. Defense counsel then elected not to use a peremptory challenge against Mr. Lewis, and Mr. Lewis was impaneled. Mr. Geiger contends that the failure to use a peremptory challenge rendered his performance deficient. However, generally speaking, "defense counsel's conduct during jury *voir dire* involves matters of trial strategy that generally are not subject to scrutiny under *Strickland*." *People v. Metcalfe*, 202 Ill. 2d 544, 562 (2002).

¶ 65 The record demonstrates that, before Mr. Lewis was discussed during *voir dire*, defense counsel had already used four of the seven peremptory challenges allowed and only three of twelve jurors had been impaneled. Therefore, if defense counsel had struck Mr. Lewis, the defense would have been left with just two peremptory challenges while nine jurors had yet to be impaneled. It is certainly conceivable that defense counsel believed it was best to impanel Mr. Lewis in order to save the peremptory challenges for use against more biased potential jurors to follow.

¶ 66 To support his argument, Mr. Geiger cites *Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006). In *Virgil*, the defendant was charged with assault against an elderly person. *Id.* at 601. Two jurors clearly stated during *voir dire* that they could not be fair and impartial to the defendant. *Id.* at 602-04. However, defense counsel did not use a peremptory challenge against those jurors, nor did counsel argue they should be struck for cause, and those jurors were impaneled. *Id.* at 604. On appeal, the Fifth Circuit reversed and remanded, finding counsel's performance to be

"objectively unreasonable" where the jurors had "unequivocally expressed bias against [the defendant]." *Id.* at 614. Mr. Geiger's case is easily distinguishable. Mr. Lewis did not say that he could not be a fair and impartial juror, but rather explained that he would "try." This equivocation, in itself, does not require Mr. Lewis to be removed as a potential juror. See *People v. Reid*, 272 Ill. App. 3d 301, 307-09 (1995) (citing cases that "stand for the proposition that a juror's state of uncertainty [regarding the ability to be impartial] does not necessarily mean the juror is unqualified to serve"). Further, defense counsel moved for Mr. Lewis to be struck for cause. Only after the trial court refused to strike Mr. Lewis for cause did counsel decide not to use a peremptory challenge; again, it is reasonable to believe that counsel felt a strategic need to save those challenges for use against jurors who may have been more unequivocally biased against Mr. Geiger.

¶ 67 Mr. Geiger also argues that *People v. Manning*, 241 Ill. 2d 319 (2011), *Metcalfe*, 202 Ill. 2d 544 (2002), and *People v. Bowman*, 325 Ill. App. 3d 411 (2001), all cited in the State's brief, support the theory that defense counsel's performance was objectively unreasonable in choosing not to use a peremptory challenge against Mr. Lewis. In each of those cases, the court rejected the defendant's ineffective assistance claim and found that the decision to not use a peremptory challenge against a juror was a strategic decision that did not fall below an objective standard of reasonableness. *Manning*, 241 Ill. 2d at 336-37; *Metcalfe*, 202 Ill. 2d at 561-62; *Bowman*, 325 Ill. App. 3d at 427-28. Mr. Geiger, however, contends that those cases suggest the opposite conclusion should be reached here. The difference, he argues, is that in those cases defense counsel did not move to strike the equivocal or biased jurors for cause, unlike here, where Mr. Geiger's counsel moved to strike Mr. Lewis for cause, which demonstrated that he knew of Mr. Lewis's potential to prejudice the jury.

¶ 68 Defense counsel's motion to strike Mr. Lewis for cause clearly shows that Mr. Geiger's counsel believed him to be an undesirable juror. However, it is also reasonable to believe that defense counsel did not want to use one of its three remaining peremptory challenges on Mr. Lewis when there might be even more undesirable potential jurors to come. This is a reasonable tactic and, as such, Mr. Geiger's argument does not overcome the strong presumption that his counsel was effective under *Strickland*.

¶ 69 Furthermore, we decline to rule that the denial of defense counsel's request that a juror be struck for cause inherently creates an obligation for counsel to subsequently use a peremptory challenge. Such a ruling could create a disincentive for defense counsel to utilize the important tool of challenging jurors for cause and thereby undermine, rather than protect, defendants' rights under the sixth amendment. See *Strickland*, 466 U.S. at 697 ("Courts should strive to ensure that ineffectiveness claims do not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.").

¶ 70 Because Mr. Geiger's counsel was not deficient during *voir dire*, it is unnecessary to determine whether that alleged deficiency so prejudiced Mr. Geiger as to deny him a fair trial. See *Strickland*, 466 U.S. at 697 (suggesting that a reviewing court may address whichever prong of the *Strickland* test that would allow it to most easily dispose of an ineffectiveness claim).

¶ 71 2. Ineffective Counsel During Mr. Kadlec's Testimony

¶ 72 Mr. Geiger next argues that his counsel was ineffective for failing to impeach Brian Kadlec with prior inconsistent statements. The State argues that defense counsel was not ineffective because it was reasonable, given the circumstances at trial, to believe that he was acting strategically when he decided to cease his questioning of Mr. Kadlec. We agree with the State and, again, find that defense counsel's performance was not deficient.

¶ 73 Mr. Kadlec was called as a witness by the defense. However, when Mr. Kadlec did not testify as expected, the defense wanted to put in evidence of his prior testimony, either to impeach him or for substantive purposes. Section 115-10.1 of the Code of Criminal Procedure of 1963 provides that, in order to use the prior inconsistent statement of a witness testifying at trial as substantive evidence, a party must show that the statement either (1) "was made under oath," or (2) involved an event that the witness had personal knowledge of and was signed by the witness, acknowledged by the witness at the current proceeding, or recorded electronically. 725 ILCS 5/115-10.1(c) (West 2014). Mr. Geiger makes no argument that Mr. Kadlec's prior statements should have been admitted as substantive evidence; rather, he argues that he should have been able to impeach Mr. Kadlec's credibility with the prior statements. For a party to use a prior statement to impeach its own witness, however, the party must show that the witness's trial testimony "ha[d] damaged its position." *People v. Leonard*, 391 Ill. App. 3d 926, 933 (2009).

¶ 74 We now provide a more detailed account of what occurred at trial with regards to Mr. Kadlec's testimony, to the extent necessary to address the fact-intensive nature of each party's arguments.

¶ 75 Mr. Kadlec was called by the defense to support Mr. Geiger's theory that Mr. Powers was carrying a gun during the incident of January 24, 2009. Mr. Kadlec testified that, on that date, he lived at 14639 Kildare along with Mr. Jackson, and that he was home and heard gunshots coming from outside the house that evening.

¶ 76 According to defense counsel, Mr. Kadlec was expected to testify consistent with the statements he gave to police officers the night of the shooting and to counsel and counsel's investigator the morning of trial: that he saw Mr. Jackson and Ms. Richard enter the house at 14639 Kildare after Mr. Powers was shot. Defense counsel stated that he would have used this

testimony to argue that either Mr. Jackson or Ms. Richard took Mr. Powers' gun from the BMW and hid it inside the house, supporting Mr. Geiger's theory that he killed Mr. Powers in self-defense. However, at trial, Mr. Kadlec testified on direct examination that he did not remember anyone entering the house after Mr. Powers was shot.

¶ 77 When defense counsel sought to impeach Mr. Kadlec with his prior statements to the police, the State objected, and this led to the first of two sidebars during Mr. Kadlec's testimony. During the sidebar, defense counsel stated that he intended to elicit the memorialized statements Mr. Kadlec gave to police officers the night of the shooting that Mr. Jackson and Ms. Richard came into the house at 14639 Kildare. The trial court ruled that defense counsel could "cross examine" Mr. Kadlec with what he said to the police because it was memorialized in a police report and it was inconsistent with his testimony. However, the court further ruled that the police statement was not admissible as substantive evidence and defense counsel was "stuck with" the answer Mr. Kadlec provided because the statement to the police was not under oath, not written by the witness, and the testimony was "merely disappointing" and not "affirmatively damaging."

¶ 78 Defendant concedes on appeal that, at this point in Mr. Kadlec's testimony, the trial court's ruling about using the statement as substantive evidence was "probably correct" because the testimony was likely not "affirmatively damaging," since Mr. Kadlec had only stated that he could not remember as opposed to asserting contradictory testimony. The State also concedes on appeal that the court's ruling was wrong in part, where the court would not allow counsel to impeach Mr. Kadlec with what he said to the police and stated that defense counsel would be "stuck" with Mr. Kadlec's answer.

¶ 79 During the first sidebar, defense counsel also advised the trial court that, the morning of Mr. Kadlec's testimony, Mr. Kadlec told defense counsel and counsel's investigator that he saw

Mr. Jackson and Ms. Richard enter the house at 14639 Kildare. The court ruled that defense counsel could not question Mr. Kadlec about those statements because they were not memorialized and because the State had no notice that the defense intended to use them.

¶ 80 After resuming direct examination, Mr. Kadlec testified that he did speak to police after Mr. Powers was shot, but that he was unable to recall what he told the police that night:

> "Q. And then you told [the police] after you heard the shots that [Mr.] Jackson came running in the house followed by [Ms.] Richard who told them [Mr.] Powers had been shot? Do you recall telling the police that that night?
>
> A. I don't. Five years ago I don't."

¶ 81 Defense counsel then began to question Mr. Kadlec about his bias against Mr. Geiger and how he was only in the courtroom testifying because he had been subpoenaed and had received a rule to show cause, forcing him to testify. However, the court repeatedly sustained objections to defense counsel's questions during this testimony and, at one point, questioned whether defense counsel knew what "sustained" meant. Shortly afterwards, defense counsel requested a second sidebar because he felt that he was being improperly limited in his examination of Mr. Kadlec. During that sidebar, defense counsel argued that he should be allowed to expose Mr. Kadlec's "motive and bias" against the defense by impeaching him with statements he made to counsel and counsel's investigator that morning. The judge ruled that defense counsel could ask about the subpoena and rule to show cause, but not about any conversations between counsel, the investigator, and Mr. Kadlec. Upon resuming direct examination, defense counsel asked Mr. Kadlec about the subpoena and rule to show cause, and Mr. Kadlec stated that he was testifying only because he would be arrested if he did not appear.

¶ 82 Cross-examination was as follows:

> "Q. Mr. Kadlec, did you ever see Demetrius Jackson with a gun on the night of January 24th, 20–
>
> * * *
>
> A. No.
>
> Q. Did you ever see Melissa Richard with a gun on the night of January 24th, 2009?
>
> A. No.
>
> Q. Did anyone ever bring a gun to hide in your house?
>
> A. No."

¶ 83 On re-direct examination, Mr. Kadlec reaffirmed the statements he made on cross-examination and then went further, stating that no one walked into the house at all that night:

> "Q. *** Do you remember if Demetrius Jackson had a gun on the night of January 24, 2009, after you heard shots in your driveway?
>
> A. Yes, I remember, and the answer is no.
>
> Q. Very good. So you do remember that night?
>
> A. Yes. I remember no one had a gun when they walked in the house.
>
> Q. Pardon me?
>
> A. No one walked in with a gun.
>
> Q. No one walked in with a gun, but they walked in, didn't they?

* * *

Q. They did walk in, didn't they?

* * *

A. No."

¶ 84 Throughout direct and re-direct examination, the State made 19 objections to defense counsel's questions, 13 of which were sustained. At one point, Mr. Kadlec stated that he could not answer a question because he "heard nothing but yelling" from defense counsel.

¶ 85 Mr. Geiger argues on appeal that, even if Mr. Kadlec's initial testimony on direct examination was not affirmatively damaging, it became so on cross- and re-direct examination, and his counsel was ineffective for his failure to renew his request to impeach Mr. Kadlec with his prior statements after Mr. Kadlec testified on re-direct examination that no one had entered the house.

¶ 86 We first note, however, that it is highly speculative that counsel would have been allowed to put those prior statements into evidence, even after Mr. Kadlec's re-direct examination. The judge had stated during both sidebars that defense counsel would not be able to put into evidence the inconsistent statements, but that counsel could confront Mr. Kadlec with the inconsistent statement to the police investigators. While these sidebars occurred before Mr. Kadlec testified on re-direct examination that no one had entered the house, and thus before it was clear that his testimony was "affirmatively damaging," it is not at all clear that, even after Mr. Kadlec's re-direct examination testimony, defense counsel would have been able to present impeachment evidence. The trial court had said that defense counsel was "stuck" with Mr. Kadlec's testimony and it is unclear what, if anything, would have persuaded her to change her mind.

¶ 87 Moreover, even if we were to assume that Mr. Kadlec's testimony on re-direct

examination would have persuaded the trial court to allow defense counsel to present evidence of Mr. Kadlec's prior inconsistent statements, this does not support Mr. Geiger's claim of ineffective assistance. The Supreme Court has cautioned that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *** The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Thus, we must examine Mr. Geiger's ineffective assistance claim in context.

¶ 88 Throughout Mr. Kadlec's testimony, the jury witnessed 19 objections by the State—13 of which were sustained, two sidebars that had the clear effect of limiting what defense counsel could ask Mr. Kadlec, defense counsel "yelling" at his own witness, and the judge questioning whether defense counsel knew what "sustained" meant. It was not unsound trial strategy to end the questioning of Mr. Kadlec before the witness damaged Mr. Geiger's case any further and preventing further rebuke from the judge in front of the jury.

¶ 89 In addition, defense counsel had already accomplished much of what he could by putting into evidence the prior inconsistent statements to impeach Mr. Kadlec. Mr. Kadlec had already been confronted with his prior statement to the police that, after he heard the shots, Mr. Jackson came running in the house, followed by Ms. Richard who told them that Mr. Powers had been shot. Mr. Kadlec had already given inconsistent responses about people entering the house and had acknowledged that he did not want to testify for the defense. Accordingly, Mr. Kadlec's credibility had already been undermined.

¶ 90 Though defense counsel failed to renew his request to put into Mr. Kadlec's prior inconsistent statements into evidence after Mr. Kadlec testified on re-direct examination,

considering the context of Mr. Kadlec's entire examination, counsel did not make "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

¶ 91 Again, because we do not find that Mr. Geiger's counsel was deficient during Mr. Kadlec's testimony, it is unnecessary to determine whether that alleged deficiency so prejudiced Mr. Geiger as to deny him a fair trial. See *Strickland*, 466 U.S. at 697.

¶ 92 Sentencing

¶ 93 Lastly, Mr. Geiger argues that the case should be remanded for resentencing because the trial court impermissibly relied on a factor inherent in the offense, the death of the victim, in determining his sentence. In the alternative, Mr. Geiger argues that the court abused its discretion by imposing a sentence that is excessive in light of mitigating factors.

¶ 94 A trial court has "broad discretionary powers in sentencing" and a sentence should be reversed only when it abuses that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). In fulfilling this duty, the court must hear evidence in aggravation and mitigation so that the sentence is levied "in an informed manner." *People v. Devin*, 93 Ill. 2d 326, 345-46 (1982). A reviewing court will uphold the trial court's sentence so long as the trial court "neither ignores relevant mitigating factors nor considers improper factors in aggravation." *People v. Roberts*, 338 Ill. App. 3d 245, 251 (2003). A court may generally not use a single factor "both as an element of a defendant's crime *and* as an aggravating factor justifying the imposition of a harsher sentence than might otherwise have been imposed." (Emphasis in original.) *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992). However, a defendant's claim that the trial court considered improper factors in sentencing must "affirmatively demonstrate error" to overcome the "rebuttable presumption that the sentence was proper." *People v. Burnette*, 325 Ill. App. 3d

792, 809 (2001). Further, the reviewing court "should not focus on a few words or statements of the trial court. Rather, the determination of whether or not the sentence was improper must be made by considering the entire record as a whole." *People v. Ward*, 113 Ill. 2d 516, 526-27, (1986). The question of whether a trial court relied on an improper factor in imposing a sentence is reviewed *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 95 Here, Mr. Geiger was convicted of first-degree murder and the jury found that during the commission of that offense, he personally discharged a firearm that proximately caused death to another person. The sentencing range for first-degree murder is 20 to 60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). In addition, at the time Mr. Geiger was sentenced, subsection 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections provided that "if, during the commission of [first-degree murder], the person personally discharged a firearm that proximately caused *** death to another person, 25 years or up to a term of natural life *** shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). Therefore, pursuant to that statute, Mr. Geiger received a firearm sentencing enhancement. The trial court ultimately sentenced Mr. Geiger to 45 years' imprisonment for the murder, plus 25 years for the firearm sentencing enhancement, for a total of 70 years' imprisonment.

¶ 96 Mr. Geiger's first argument is based the trial court's statements during the sentencing hearing that "[t]here are plenty of factors in aggravation" and that Mr. Geiger "did cause serious harm. Clearly, Mr. Powers is now deceased." Mr. Geiger argues that this demonstrates that the court improperly relied upon Mr. Powers' death as an aggravating factor, where his death is an inherent element of the offense for which he was convicted. He further asserts that the court must have relied on Mr. Powers' death in sentencing him because "[t]here was nothing particularly aggravating" about the offense to warrant the sentence he received.

¶ 97 We first note that throughout the sentencing hearing, during which the trial court explained in detail the aggravating and mitigating factors that weighed upon Mr. Geiger's sentence, the court made no further mention of Mr. Powers' death and did not indicate it was relying on his death as an aggravating factor. Further, it is clear from the record that the court relied on other aggravating factors in sentencing Mr. Geiger. At the sentencing hearing, the court heard a victim impact statement read by Mr. Powers' father, which also included a statement written by Mr. Powers' son about the loss of his father. In addition, the court properly considered Mr. Geiger's history of prior criminal activity (see 730 ILCS 5/5-5-3.2(a)(3) (West 2012)), which includes several offenses for which he was prosecuted as a juvenile and as an adult. The court also properly considered the need to deter others from committing the same crime, noting that courts have an "obligation to send a message that this conduct is not acceptable in our society," even if that message is only conveyed through friends of Mr. Geiger, Mr. Powers, and others involved in the trial. It is appropriate for the court to impose a more severe sentence if "necessary to deter others from committing the same crime." 730 ILCS 5/5-5-3.2(a)(7) (West 2012). We conclude, after reviewing the record, that the trial court did not improperly consider a factor in aggravation that was inherent in the crime of murder.

¶ 98 Even if we were to assume the trial court's comment signified that it did consider Mr. Powers' death in aggravation, we would not be persuaded that his sentence should be reversed. The rule prohibiting a trial court's consideration of an improper aggravating factor "should not be applied rigidly." *People v. Burnette*, 325 Ill. App. 3d 729, 809 (2001). Where the record demonstrates the weight placed on the improperly considered factor "was so insignificant that it did not lead to a greater sentence," the trial court's sentence will not be disturbed. *People v. Bourke*, 96 Ill. 2d 327, 333 (1983).

¶ 99 We find guidance in *People v. Beals*, 162 Ill. 2d 497 (1994), in which the Illinois Supreme Court also determined that the defendant was properly sentenced for murder. Nearly identical to the present case, the trial court in *Beals* began its analysis of factors in aggravation by noting that the first factor involved whether the defendant "caused or threatened serious harm," then stated: "Well, we all know that [the defendant's] conduct caused the ultimate harm. It caused the loss of a human life." *Id.* at 509. Our supreme court considered the other aggravating factors relied upon by the trial court, including the victim's young age, "the fact that the offense was drug related, the need to punish and deter the defendant, as well as the need to protect society from the defendant," to conclude that "any weight that the trial court placed on the fact that the defendant's conduct caused the ultimate harm was insignificant, and did not result in a greater sentence." *Id.* at 510. We find the same reasoning applies with equal force here, where it is clear that the trial court relied on the other aggravating factors explained above to determine Mr. Geiger's sentence, which is well within the statutory range for first-degree murder.

¶ 100 Mr. Geiger next argues that, even if the trial court did not rely on an improper factor in deciding his sentence, it abused its discretion by imposing a "*de facto* life sentence" and Mr. Geiger asks this court to reduce his sentence. A trial court's sentencing decision is "entitled to great deference and weight." *People v. Latona*, 184 Ill. 2d 260, 272 (1998). As a trial court is "in a better position to determine the punishment to be imposed than the courts of review," its sentence will not be altered absent an abuse of discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). "A sentence will be deemed an abuse of discretion where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 101 Mr. Geiger argues that several mitigating factors require a reduced sentence. He first points to his job as a machine operator which he held for two years "despite his criminal record, which made it difficult to get a job." He also points to written statements by his aunt, cousin, and wife, who described him as "a good father and provider for his family." Additionally, at the sentencing hearing, Mr. Geiger expressed his remorse to Mr. Powers' family for their loss and stated, "I know no matter what I say, I can't bring back your son or your father." Mr. Geiger contends that because "there was precious little in the way of aggravation" to weigh against these mitigating factors, the record does not support the trial court imposing a "*de facto* life sentence."

¶ 102 The trial court, when discussing how Mr. Geiger held a job and provided for his family for two years, explained that it "[was] taking [that] into consideration as mitigation." Mr. Geiger notes that the court then stated: "But the same way that I can take that in mitigation, I can take it in aggravation, too. Which means, [Mr. Geiger] knows better. He knew better. He had the ability to be a productive member of society. He is the one that chose not to." Mr. Geiger argues that, rather than consider his work history in mitigation, the court improperly held this against him.

¶ 103 When imposing a sentence, "[w]hile the trial court cannot ignore evidence in mitigation, it may determine the weight to attribute to mitigating evidence." *People v. Powell*, 2013 IL App (1st) 111654, ¶ 35. Unless there is evidence to the contrary, "where mitigation evidence is before a court, it is presumed that the court considered that evidence." *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶ 44. The court explicitly stated that all mitigating factors were taken into account in reaching its decision. The existence of mitigating factors does not require the trial court to impose the minimum sentence. *People v. Garibay*, 366 Ill. App. 3d 1103, 1109 (2006).

¶ 104 The court's sentence of 45 years' incarceration was far short of the maximum in the statutory range of 20 to 60 years for first-degree murder. The court then imposed an additional

25 years for the firearm enhancement, the minimum required by statute. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). This was not "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense" (*People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). After balancing all aggravating and mitigating factors, we find that it was not an abuse of discretion for the trial court to impose this sentence.

¶ 105 CONCLUSION

¶ 106 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 107 Affirmed.