

No. 1-14-1820

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IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 2012 CR 17902
)	
LAVALLE ARCHER,)	The Honorable
)	Thaddeus L. Wilson,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

HELD: Sufficient evidence was produced at trial to prove beyond a reasonable doubt that defendant had the requisite intent to support his convictions for attempted first degree murder, aggravated battery with a firearm and aggravated discharge of a firearm. In addition, pursuant to the circumstances presented, defendant's counsel was not ineffective for choosing not to argue provocation during his sentencing hearing.

¶ 1 Following a bench trial, defendant Lavalley Archer (defendant) was convicted of four counts of attempted first degree murder, one count of aggravated battery with a firearm and one

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count of aggravated discharge of a firearm. The trial court merged these counts into one count of attempted first degree murder and sentenced him to 31 years in prison. Defendant appeals, contending that the State failed to prove the requisite intent for his crimes beyond a reasonable doubt and that his trial counsel was ineffective for failing to argue provocation in mitigation at his sentencing hearing. He asks for several forms of relief, including that we outrightly reverse his convictions and discharge his sentence, or that we reverse and remand for a new trial; alternatively, he asks that, if we affirm the attempted murder convictions, we vacate his aggravated battery conviction, or, again, were we to affirm his convictions, we, at the very least, vacate his sentence and remand for resentencing pursuant to a Class 1 felony conviction. For the following reasons, we affirm.

¶ 2

BACKGROUND

¶ 3 Defendant's convictions stem from the nonfatal shooting of the victim, Jeremy Luckett, in an alley near the intersection of Chicago Avenue and Orleans Street in the early morning hours of August 25, 2012.

¶ 4 Spencer Clark testified that he was walking toward a gas station when he saw defendant, with whom he was acquainted. Defendant was in the passenger seat of an SUV and another man, whom Clark did not know, was in the driver's seat. Defendant told Clark to get in, which Clark did, and the group drove a short distance and then pulled over. Defendant rolled down the window and began talking to someone outside the SUV, but Clark, who was sitting in the back, could not see who it was. Clark was not paying attention to the conversation but soon realized it was mounting to "a situation," so he got out of the SUV. Upon his exit, he saw that defendant

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had been talking to Lanetta Lockett, whom he knew to be Jeremy's sister. Lanetta was in a group that included Jeremy and their other sister. Clark knew Jeremy and his family and, upon Lanetta's request, Clark told defendant that they were "good people." Clark went over to speak with Jeremy, who was quietly leaning on the wall of the alley, apart from the two groups. Afterwards, Clark saw defendant get out of the SUV and he saw Jeremy go into the alley. Clark heard one gunshot, saw Jeremy laying on the ground and watched the SUV drive away, whereupon police arrived. Clark further testified that he did not see the shooting, nor did he see defendant with a gun. He could not remember telling detectives that defendant shot Jeremy, but he did remember telling them that Jeremy was running away when he was shot, that he (Clark) ran to help Jeremy, that the offender fled, and that the offender was defendant.

¶ 5 Jocelyn Lockett, Jeremy's sister, testified that she and Lanetta met Jeremy and their cousin at the gas station. Jeremy was walking a bit ahead of the rest of this group when an SUV approached the girls and asked about drugs. The girls told the SUV's occupants, which included defendant in the front passenger seat, that they did not know anything about drugs, but defendant "kept being persistent." Jeremy walked over to the girls, told them not to talk to strangers and pulled them away from the car. The SUV then drove away and went back to the gas station. Jocelyn noted that Jeremy was "upset" at the girls for talking to a stranger, so he walked away from the group. The group followed him and met up with him again at the corner of the alley. The SUV came back around and approached the group, and defendant again asked about drugs. Jeremy again tried to usher the girls away from the SUV, whereupon defendant became "upset" with Jeremy and the two exchanged words. Jocelyn recounted that, at this point, she was

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standing near the SUV when she saw defendant, who was still seated therein, show a gun to Jeremy through his opened window. Jocelyn stated that the gun was in defendant's waistband, and he showed it by raising his shirt and placing his hand on it. Lanetta intervened and told Jeremy that, while defendant would probably not shoot at girls, they should leave now; Jeremy began to walk away down the alley. As Jeremy did so, Jocelyn saw defendant jump out of the SUV, take out his gun, move toward the alley and begin firing "directly where" Jeremy had run. Jocelyn described that Jeremy tried to "dodge the bullets," but once defendant had fired the fourth shot, Jeremy yelled that he had been hit. Defendant then ran back to the SUV and, before he fully got in it, he put the gun in Jocelyn's face, pointing it at her from about three feet; the driver then drove the SUV away. Jocelyn further testified that neither Jeremy nor anyone in their group had any weapons. Jocelyn ran into the alley to help Jeremy, and then saw a police car with two female officers arrive "[a]lmost immediately."

¶ 6 On cross-examination, Jocelyn admitted she did not remember the color of the SUV or of the gun. In describing her first view of defendant's gun in the SUV, she stated she was five-feet, five-inches tall and was standing about two or three feet from the closed passenger side door. In describing the actual shooting, Jocelyn noted that, while her brother ran deep into the alley upon seeing the gun, defendant only took a few steps from the SUV toward the alley before shooting; she confirmed that defendant did not run into the alley after Jeremy nor did he stand over him and shoot after Jeremy fell to the ground. Jocelyn admitted she did not run when she saw the gun because she did not feel she "was in danger," as she did not believe "a guy would do that to a girl." She further explained that Jeremy was initially more upset with her and Lanetta for talking

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to strangers than with defendant for approaching the girls.

¶ 7 Jeremy testified that he did not remember much about the incident. He had been drinking that night. He remembered meeting up with Lanetta, Jocelyn and their cousin, being shot in the leg while in the alley and not having any weapons on him during the incident. He also remembered being taken by ambulance to the hospital where doctors performed surgery and inserted rods and pins in his leg. Jeremy stated he did not remember seeing Clark that evening, speaking to police or identifying defendant as the shooter. However, the State entered into evidence a six-picture photo array that had been presented to Jeremy at the hospital on which Jeremy had circled defendant's photo and initialed it, as well as a lineup photo spread advisory form which contained Jeremy's signature. Jeremy admitted that, during the investigation into the shooting, he signed a victim's refusal to prosecute form, explaining he did so because he did not know who shot him.

¶ 8 Officer Tiffany Nard testified that she and her partner were on routine patrol in plain clothes in an unmarked car driving toward the intersection of Chicago Avenue and Orleans Street when she heard three to five gunshots. She saw a crowd standing near the mouth of the alley. She testified that when she and her partner arrived, the shots "were still going" and she saw defendant holding a gun aimed at "the beginning point of the alley" and shooting. When defendant stopped shooting, he jumped into the passenger side of the SUV behind him and drove away. Officer Nard clarified that "all of this was happening simultaneously;" she saw the crowd and defendant shooting, she and her partner drove towards them, defendant got into the SUV and drove away, she and her partner stopped and got out of their car, officer Nard saw Jeremy shot

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and lying on the ground in the alley about 10 to 15 feet from where defendant had been standing, and she called for emergency services. Officer Nard further testified that she and her partner then got back in their car and pursued the SUV with lights and sirens, but it refused to stop. Officer Nard and her partner received assistance and the SUV was eventually curbed. On cross-examination, Officer Nard averred that her partner prepared the report of the incident and, although officer Nard radioed that she saw defendant shooting a gun while it was happening, this was not contained in the written report. She further revealed that she had seen defendant about an hour before the shooting with Jeremy, but this was also not in the report.

¶ 9 Officer Musgraves testified that he was on patrol with his partner in plain clothes in an unmarked car near the area when they received information that shots had been fired and a vehicle had fled the scene. He then saw the SUV pass them and assisted officer Nard and her partner to curb it. When the vehicle stopped, officer Musgraves approached it from its passenger side, whereupon he observed defendant reaching underneath the passenger seat. Once defendant was detained and removed from the SUV, officer Musgraves searched underneath the passenger seat and discovered a black .40 caliber handgun lying on top of a metal lockbox. There was 1 round in its chamber and 9 rounds in its magazine; the magazine could hold 15 rounds. Defendant was arrested and taken to the police station. Officer Musgraves mirandized him, and defendant described that he had had an altercation with the victim during which the victim reached into his waistband as if to imply he had a gun. Officer Musgraves further testified that defendant recounted he pulled out his gun at this point, fired one shot into the air, and then fired three to four shots down the alley.

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¶ 10 Detective Michael Bell testified that he questioned defendant about the incident.

Defendant told him that he had a verbal altercation with Jeremy at the gas station before the shooting during which Jeremy implied he had a gun in his waistband. After defendant left the gas station, he saw Jeremy walking down the street. Defendant told Detective Bell that Jeremy then approached the SUV and began "talking s**t," so defendant got out, Jeremy began to run, and defendant shot at him. Detective Bell stated that defendant indicated he did so because he felt "fronted off" by Jeremy in front of his friend (the driver of the SUV) and he "had a reputation to uphold." Detective Bell further testified that he also spoke multiple times with Jeremy. During their first interview, which took place in the emergency room a few hours after the shooting, Jeremy recounted that he was leaving the gas station when a man pulled up and began talking to the girls; Jeremy told the girls not to talk to him because he was a stranger, and a verbal altercation ensued during which the man implied he had a handgun in his waistband and then drove away. Detective Bell also related that Jeremy told him that the same vehicle pulled up to the group a second time to continue the verbal altercation, whereupon the man exited, chased after Jeremy down the alley and fired at him five times. At their second interview, which took place later on the day of the shooting at the hospital, Detective Bell presented Jeremy with a police advisory form which Jeremy signed, as well as with a photo array; Jeremy viewed it, positively identified defendant's photo as the man who shot him, circled his picture and signed it. Detective Bell further testified he interviewed Clark, who stated that defendant shot Jeremy as Jeremy was running away.

¶ 11 On cross-examination, detective Bell averred that during their first meeting in the

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emergency room, Jeremy did not know the identity of the man who shot him. Detective Bell also confirmed that only 5 shell casings were found and 10 live rounds remained in the recovered gun; the casings were recovered approximately 10 feet into the alley and Jeremy's blood was a "good distance down the alley" from the casings.

¶ 12 Defendant testified that his friend drove him to the gas station that evening to drop him off at its food mart. When they arrived, defendant got out of the SUV and saw two young women. He asked for one of them for her name, whereupon a man yelled to her not to speak to strangers. Defendant stated that the man, who was standing near the door to the food mart, was "upset" so defendant got back into the SUV and had his friend drive to a different gas station. On their way, defendant saw Clark; the driver pulled over at the edge of an alley so Clark could get to the SUV. Defendant recounted that as they waited, he saw a group of people coming from the gas station toward the SUV, with one of them the man who had yelled at the woman walking in front of the group with a gun in his hand pointed at him. Defendant told his friend to pull away, but his friend was not paying attention, so defendant "had to make a decision;" he grabbed a gun he had on the side of the door, opened the door, stood between the door and the SUV and fired. He described that he "pulled the trigger about three times, up and down, toward the ground, away from" himself, and that the victim ran away down the alley. Defendant averred that he then got back in the SUV and his friend drove away. Defendant testified that his intent in shooting the gun "was to scare" the victim away so they would have "a chance to get away from the scene." He also testified that he "shot out of fear" and "was scared," and "[t]hat's why [he] did what [he] did," believing that the victim "was going to shoot [them] up." Defendant did not see the victim

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fall to the ground, nor did he keep shooting until he fell. He admitted that, while he did not intend to shoot in the victim's direction, he did shoot at the ground between him and the victim "down toward the alley."

¶ 13 Following the close of testimony, the trial court found defendant guilty on all counts. In its colloquy, it noted at the outset defendant's defense of self defense and defense of others and acknowledged his testimony that he did not intend to shoot anyone but only shot his gun into the ground out of fear for his life and safety, as the victim was pointing a gun at him. However, after reviewing the evidence presented, the court concluded that defendant "was seen shooting at Jeremy Lockett several times while Jeremy fled down that alley," that defendant "intended to shoot at Jeremy Lockett," and that defendant "did so with the intent to kill Jeremy Lockett." The court further found that "[d]efendant's actions constituted a substantial step towards the commission of first degree murder" "by personally discharging a firearm" "in the direction of Jeremy Lockett."

¶ 14 The cause then proceeded to sentencing. In aggravation, the State reminded the court about the facts of the cause, including that defendant fired multiple shots in a crowded area at the victim. In mitigation, defendant's sister and father testified on his behalf, stating that he has "been through some things" having grown up in Cabrini Green and losing his mother at 12 years old, but that he is a great help to his grandmother and nieces and nephews; that he is a good father to his own two small children; and that his family is very religious and supportive of him. Defendant also presented letters and certificates he earned while in jail, as well as his PSI indicating he had no criminal history, completed high school, is employed and is raising his

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children. Additionally, defendant addressed the court, apologizing to the victim and his family and reiterating that he never intended to injure anyone and acted only out of fear. In sentencing him, the court noted that it "considered the evidence at trial, the gravity of the offense, the presentence investigation report, financial impact of incarceration, all evidence, information and testimony in aggravation and mitigation, any substance abused issues and treatment, the potential for rehabilitation, the possibility of sentencing alternatives, the statement of *** defendant and all hearsay presented and deemed relevant and reliable." It then merged all the counts into one count of attempted first degree murder and sentenced defendant to 31 years in prison.

¶ 15

ANALYSIS

¶ 16

I. Sufficiency of Evidence

¶ 17 Defendant's first contention on review is that the State failed to prove his guilt beyond a reasonable doubt. Addressing all the counts for which he was charged and convicted, he asserts that there was insufficient evidence of intent to kill necessary to sustain his conviction for attempted first degree murder, that there was insufficient evidence of intent to sustain his conviction of aggravated battery with a firearm, and that there was insufficient evidence of intent to sustain his conviction for aggravated discharge of a firearm. We disagree.

¶ 18 We note, again for the record, that although defendant was found guilty on these multiple counts, the trial court merged all of them into one count of attempted first degree murder.

However, since defendant challenges on appeal the sufficiency of the evidence with respect to each crime for which he was convicted, and since the State responds accordingly, we, too, will examine this issue with respect to each crime.

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¶ 19 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 trier of fact 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. 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).

¶ 20 We begin with defendant's conviction for attempted first degree murder. A person commits this crime when, with the specific intent to kill, he commits any act which constitutes a substantial step toward the commission of murder. See 720 ILCS 5/8-4 (West 2012); *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39 (State must establish beyond reasonable doubt that the defendant perform substantial step toward murder and possessed criminal intent to kill). The intent to kill is a question of fact to be determined by the trier of fact and may be inferred from the surrounding circumstances which include the nature of the attack and the use of a deadly weapon, as well as from the act itself which has the natural tendency to destroy another's life. See *People v. Johnson*, 368 Ill. App. 3d 1146, 1162 (2006); accord *People v. Valentin*, 347 Ill. App. 3d 946, 951 (2004); see also 720 ILCS 5/8-4 (West 2012); *Petermon*, 2014 IL App (1st)

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113536, ¶ 39 (also relevant is the defendant's voluntariness or willingness to commit the act).

While the act of firing a gun, with nothing more, is generally insufficient to prove intent to kill, this element may, indeed, be proven where the surrounding circumstances demonstrate that the defendant fired a gun at or towards another person with either malice or a total disregard for human life. See *Petermon*, 2014 IL App (1st) 113536, ¶ 39, citing *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001). Accordingly, the very act of firing a gun at a person supports the conclusion that the defendant acted with an intent to kill. See *Petermon*, 2014 IL App (1st) 113536, ¶ 39, citing *Ephraim*, 323 Ill. App. 3d at 1110.

¶ 21 The evidence presented in the instant cause overwhelmingly supports defendant's conviction for attempted first degree murder beyond a reasonable doubt. It is undisputed that defendant fired a gun several times and that Jeremy was shot in the leg. Clark testified that when the two groups met at the alley, defendant was in the SUV while Jeremy was standing away from the two groups, quietly leaning against the wall. Clark then saw defendant get out of the SUV and Jeremy go into the alley, whereupon shots were fired. Corroborating this, Jocelyn testified that, when defendant jumped out of the SUV, he took out his gun from his waistband, moved toward the alley and began firing at least four shots "directly where" Jeremy had run. In addition, officer Nard stated that, as she and her partner were driving toward the intersection near the alley, she saw defendant amid a crowd holding a gun pointed at the mouth of the alley and shooting it toward the inside of the alley, where she discovered Jeremy shot and lying on the ground. Both officer Musgraves and detective Bell testified that defendant admitted as much to them, namely, that he pulled out his gun following an altercation with Jeremy and fired several shots into the

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alley where Jeremy had run. And, the forensic evidence supported the witnesses' testimony: Jeremy was found lying 10 to 15 feet within the alley, 5 shell casings were found at the mouth of the alley, and defendant's gun was missing 5 rounds. From all this, when viewed in the light most favorable to the prosecution, we conclude that any rational trier of fact could have found defendant guilty of attempted first degree murder beyond a reasonable doubt.

¶ 22 Defendant insists that several circumstances argue against a finding of specific intent to kill. First, he attacks Jeremy's credibility and reluctance as a witness and notes that Jeremy reported to police he did not know the identity of his shooter. Next, he attempts to discredit Clark, Jocelyn and officer Nard, stating the first did not see anything relevant to the incident, the second admitted she was not scared of defendant and that it was Jeremy who was "upset" during the incident, and the last provided completely inconsistent testimony which conflicted with her own police report. Finally, defendant cites to his own testimony negating any intent to harm or kill Jeremy, his own fear and desire to get away from the situation, and a lack of evidence showing that he aimed the gun at Jeremy, chased him down the alley or fired all his bullets at him as, in defendant's characterization, would someone who truly had the intent to kill.

¶ 23 We reject defendant's arguments. First and foremost, again, evidence of a defendant's firing a gun a single time is sufficient to support the inference of intent to kill. See *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 41. Moreover, the trial court here heard and saw the witnesses, including Clark, Jocelyn and officer Nard, adjudged their credibility and resolved any inconsistencies it found duties all within its own purview and which we may not overtake. See *Steidl*, 142 Ill. 2d at 226; *Hunley*, 313 Ill. App. 3d at 21. Finally, neither motive nor method are

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elements of the crime of attempted first degree murder. See 720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012).

¶ 24 The fact remains that defendant shot a gun several times at Jeremy. While Jeremy may not have known it was defendant who shot him, multiple witnesses, including a police officer, saw this incident and readily identified defendant as the offender; their testimony corroborated each other. Defendant admitted he shot the gun and that he did so in the direction "down toward the alley" between himself and Jeremy. Detective Bell testified that defendant further admitted that he shot Jeremy because he felt "fronted off" by him and he (defendant) "had a reputation to uphold." Physical evidence recovered from the scene supports these accounts, with 5 shell casings found at the mouth of the alley, Jeremy's blood found 10-15 feet inside the alley, and defendant's own gun missing 5 live rounds. That defendant was able to hit Jeremy from that distance after firing only 5 shots rather than an entire magazine of bullets goes less to his lack of aim or intent and more to Jeremy's speed in running away, defendant's ability to hit a moving target, and the fact that police with sirens and flashing lights arrived almost immediately at the intersection. Based on all this, defendant's assertions of lack of intent to commit attempted first degree murder wholly fail.

¶ 25 We turn next to defendant's conviction for aggravated battery with a firearm. Similar to his first argument, defendant insists there was insufficient evidence of his intent to sustain a conviction for this crime, as the State failed to show that he had the conscious purpose to discharge his gun at Jeremy in order to cause him injury. Again, he cites his own testimony stating that his intent was only to scare Jeremy and afford himself an escape from the situation, a

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lack of testimony to rebut his mental state, and the fact that he did not chase Jeremy into the alley or shoot all of the bullets in his gun. Again, we disagree.

¶ 26 A person commits aggravated battery with a firearm when he "knowingly *** [d]ischarges a firearm *** and causes any injury to another person." 720 ILCS 5/12-3.05(e)(1) (West 2012). While this is not a specific intent crime, it does have an intent element and requires at least a "knowing" mental state. See *People v. Brown*, 2015 IL App (1st) 134049, ¶ 44. Thus, in the instant cause, the State was required to prove beyond a reasonable doubt that defendant was "consciously aware" that his conduct was practically certain to cause great bodily harm. See *People v. Steele*, 2014 IL App (1st) 121452, ¶ 23, citing *People v. Vazquez*, 315 Ill. App. 3d 1131, 1122 (2000); accord *People v. Willett*, 2015 IL App (4th) 130702, ¶ 51; 720 ILCS 5/4-4 (West 2012) (defining criminal intent as having the "conscious objective or purpose" to accomplish result or engage in conduct described by statute which defines the offense). Again, the surrounding circumstances are key to proving this intent. See *Steele*, 2014 IL App (1st) 121452, ¶ 23.

¶ 27 As we have already discussed, the evidence in the instant cause was sufficient to prove that defendant was consciously aware that his conduct of shooting a gun at Jeremy was practically certain to cause great bodily harm. Clark testified that, after getting in defendant's SUV, he heard defendant having a conversation with someone outside it. Although he did not hear what was said, Clark believed "a situation" was escalating between defendant and the other person, so he got out of the car. When he realized he knew who the other person was, Clark attempted to reassure defendant that Lanetta and her group, including Jeremy, were "good

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people." Jocelyn corroborated Clark when she testified that, although Jeremy was "upset" at her and Lanetta for speaking to defendant because he was a stranger, defendant became "upset" at Jeremy for interrupting the conversation and verbal altercations between the two took place.

Clearly, animosity between defendant and Jeremy was evident, and mounting. Jocelyn further testified that she saw defendant, through the open car window, pull up his shirt and demonstrate to Jeremy that he had a gun in his waistband. As Jeremy, who had already separated himself from the group, turned to walk away down the alley, defendant jumped out of the SUV, took the gun out of his waistband, moved toward the alley and fire "directly where" Jeremy had run.

Defendant's fourth shot hit Jeremy, who tried to dodge the bullets, in his leg. Defendant admitted he shot his gun, officer Nard also witnessed him do so, and the forensic evidence corroborates all accounts that defendant stood at the mouth of the alley and shot inside it where Jeremy was found lying on the ground. That defendant testified he meant only to scare Jeremy and did not chase him or empty his gun do little to support his claim here in light of the circumstances presented. Again, when viewed in the light most favorable to the prosecution, we find, as the trial court did, that there was sufficient evidence to establish that defendant committed aggravated battery with a firearm.¹

¹Defendant alternatively argues a violation of the one-act, one-crime rule, asserting that, if we were to affirm his attempted murder convictions, then his aggravated battery with a firearm conviction must be vacated because it is based on the same act as the attempted murder convictions. However, in the instant cause, the trial court explicitly stated for the record that all of defendant's counts/convictions merged into one count of attempted first degree murder. It was upon this one count, and this one count only, that defendant was sentenced. Accordingly, any concerns regarding the one-act, one-crime rule do not come into play here. See *People v. Gwinn*, 366 Ill. App. 3d 501, 521 (2006) (where trial court merged counts into one conviction and only issued sentence as to that one conviction, the defendant was barred from mounting a one-act,

¶ 28 Finally with respect to sufficiency of the evidence, defendant challenges his conviction for aggravated discharge of a firearm, again asserting that the State failed to prove intent beyond a reasonable doubt because it did not show that defendant intended to shoot the gun at Jeremy. A person commits aggravated discharge of a firearm when he "knowingly or intentionally *** discharges a firearm in the direction of another person." 720 ILCS 5/24-1.2(a)(2) (West 2012). Just as with the other crimes mentioned herein, aggravated discharge of a firearm requires a knowing mental state. See *Brown*, 2015 IL App (1st) 134049, ¶ 44; see, e.g., *People v. Williams*, 293 Ill. App. 3d 276, 279-80 (1997). Defendant asserts that this element was not proven because no witness testified that he aimed and discharged the gun in Jeremy's direction. However, Jocelyn clearly testified that she saw defendant fire his gun into the alley "directly where" Jeremy was. Moreover, although defendant denied aiming at Jeremy, he admitted during his testimony that, following one shot into the air, he pointed the gun at the ground between the two of them when he shot the next three times, and, specifically, that the gun was pointed "away from" himself and "down toward the alley" where Jeremy was. Most significantly, Jeremy was shot in the leg with a bullet from defendant's gun after moving away from defendant and going into the alley. From all this, a rational trier of fact could clearly have found that defendant knowingly discharged a firearm in Jeremy's direction. Accordingly, we find no basis to reverse defendant's conviction.

¶ 29 II. Ineffective Assistance of Counsel

¶ 30 Defendant's second, and final, contention on appeal is that he was denied the effective

one-crime rule violation).

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assistance of counsel because his counsel did not argue provocation during his sentencing hearing. He asserts that he "testified credibly" as to facts supporting such a defense, and his counsel's failure to present this to the trial court in mitigation at sentencing, which would have reduced his conviction and sentence from a Class X felony to a Class 1 felony, fell below the basic reasonable standards of performance. He further asserts that, but for this, the outcome of his sentencing hearing would have been "dramatically" different. We disagree.

¶ 31 Briefly, to establish ineffective assistance at sentencing, a defendant must show that his counsel's performance at the sentencing hearing fell below an objective standard of reasonableness, and the deficient performance so prejudiced the defense as to deny him a fair sentencing hearing. See *People v. Perez*, 148 Ill. 2d 168, 186 (1992), citing *Strickland v. Washington*, 466 U.S. 668 (1984). If a claim of ineffectiveness may be disposed of on the ground of lack of sufficient prejudice, we need not consider whether counsel's representation was constitutionally deficient. See *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); accord *Strickland*, 466 U.S. at 697. To satisfy the prejudice prong, the defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *People v. Enoch*, 122 Ill. 2d 176, 202 (1988); accord *Strickland*, 466 U.S. at 694.

¶ 32 Therefore, here, to establish prejudice, defendant would have to show that, had counsel argued that defendant was provoked by Jeremy during the incident, a reasonable probability exists that he would have received a lesser sentence. Defendant has not met that burden.

¶ 33 As the parties point out, pursuant to statute:

"[i]f the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony" rather than a Class X felony. 720 ILCS 5/8-4(c)(1)(E) (West 2012).

The parties further note that the category of "serious provocation" that would fit the instant cause is "mutual quarrel or combat." See *People v. Harris*, 2013 IL App (1st) 110309, ¶ 13 (this is one of four categories of serious provocation identified by our supreme court). Mutual combat is "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *People v. Austin*, 133 Ill. 2d 118, 125 (1989); see also *People v. Young*, 248 Ill. App. 3d 491, 506 (1993). The defendant is required to show that the victim's alleged provocation "must cause the same passionate state of mind in an ordinary person under the same circumstances." *Austin*, 133 Ill. 2d at 126. Slight provocation is not enough; the provocation must be proportionate to the manner in which the defendant retaliated. See *Austin*, 133 Ill. 2d at 126-27 (if defendant attacks victim with violence out of all proportion to provocation, crime is murder, especially if deadly weapon is used).

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¶ 34 There simply was no evidence of serious provocation in the instant cause upon which defendant's counsel could have formed any basic, cohesive argument for a reduction in the class of his felony. First and foremost, the record reveals that the trial court had already considered defendant's allegations of self-defense and defense of others when it found him guilty at trial. Clearly, the court dismissed defendant's insinuation that Jeremy provoked him in any way. Nor was there any evidence to support this. Clark indicated that "a situation" was arising during which he had to calm defendant by telling him that Jeremy and his sisters were "good people." Jocelyn testified that both Jeremy and defendant became "upset" during the situation; yet, she made clear that Jeremy was upset at his sisters for speaking to a stranger while, conversely, defendant was directly upset at Jeremy for interrupting the conversation and then shot him. Both Clark and Jocelyn also recounted that at the time of the shooting, Jeremy had already separated from the two groups, was standing by the wall of the alley and then began walking down the alley away from defendant. Officer Nard and the forensic evidence corroborated this, as Jeremy was some 10 to 15 feet away from defendant when defendant began shooting at him. Provocation here, if any, was wholly disproportionate to the manner in which defendant retaliated. An argument to the contrary, based on these facts, at best would have been futile for defendant's counsel to make and, perhaps at worst, would have reminded the trial court immediately before rendering its sentence of the baselessness of defendant's actions in light of what occurred.

¶ 35 Ultimately, at defendant's sentencing hearing in the instant cause, the trial court made clear that it "considered the evidence at trial, the gravity of the offense, the presentence

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investigation report, financial impact of incarceration, all evidence, information and testimony in aggravation and mitigation, *** the potential for rehabilitation, the possibility of sentencing alternatives, the statement of *** defendant and all hearsay presented and deemed relevant and reliable.” The court weighed all this after it heard defendant’s sister and his father speak, as well as defendant himself who, incidentally, did reiterate to the trial court that he shot Jeremy out of fear, thereby essentially presenting the provocation defense he now asserts was never heard.

However, the trial court did not find that provocation was an applicable consideration in light of the circumstances presented, and instead sentenced him to 31 years in prison. We cannot say that the trial court erred in this respect, even were we to have considered imposing a lesser sentence, as defendant has presented nothing more than mere speculation that, had counsel argued provocation, the trial court would have imposed a lesser sentence.

¶ 36 Accordingly, we find no reasonable probability that had counsel presented this argument, the trial court would have sentenced him pursuant to a different classification and would therefore have been more lenient in its sentencing. Without such prejudice, defendant’s claim of ineffective assistance of counsel must fail.

¶ 37 CONCLUSION

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

¶ 39 Affirmed.