2018 IL App (1st) 151747-U

No. 1-15-1747

Order filed August 22, 2018

Third Division

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 6569
	)	
ANDRE MILES,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for aggravated battery with a firearm over his contention that the State presented insufficient evidence to prove him guilty beyond a reasonable doubt and that the trial court abused its discretion in sentencing him to 15 years' imprisonment.

¶ 2 Following a jury trial, defendant Andre Miles was convicted of aggravated battery with a firearm (720 ILCS 12/3.05(e)(1)/(i) (West 2012)), and sentenced to 15 years' imprisonment. On appeal, defendant argues that the State failed to prove him guilty beyond a reasonable doubt

because the only evidence that he shot Chicago police officer Victor Portis was the incredible prior inconsistent statements of three witnesses, who disavowed those statements at trial. He also argues that the trial court abused its discretion in imposing sentence because it considered his refusal to accept guilt as an aggravating factor. We affirm.

¶ 3 On May 2, 2012, Chicago police officers investigated a shooting at a house on 103rd Place. There, as the officers gathered around the house, Officer Portis was shot by an occupant of the house. The officers eventually arrested five men, including defendant, who were inside the house. Defendant was subsequently charged by indictment with one count of attempted first degree murder of a peace officer, four counts of attempted first degree murder, one count of aggravated battery with a firearm, one count of aggravated discharge of a firearm, and two counts of unlawful use or possession of a weapon by a felon. Before trial, the State *nolle prossed* three of the four counts of attempted first degree murder and the court granted defendant's motion to sever the two counts of the unlawful use or possession of a weapon.

¶ 4 At trial, the State presented the testimony of numerous witnesses, including the four occupants of the house, three of whom had, shortly after the shooting, provided police with statements and testified before a grand jury. The State introduced their statements into evidence as prior inconsistent statements. Because defendant challenges the sufficiency of the evidence to sustain his conviction, we recount in detail the evidence presented at trial.

¶ 5 Portis testified that, a little before 5 p.m., on May 2, 2012, he and his partner Officer Dillard, assisted Officers Byrne and Skarupinski in an investigation of a shooting that had occurred the day before at a house on 103rd Place. Each officer wore plain clothes, including bulletproof vests, police "stars" around their necks, and holstered handguns. Portis carried a .45 caliber semiautomatic handgun loaded with 11 rounds of ammunition. Portis and Dillard parked

in an alley behind the house and met Skarupinski and Byrne on the east side of the house. Portis and Skarupinski stood in the back yard while Byrne and Dillard approached the back door. Through a window of the enclosed porch, Portis noticed, but could not actually see, a person inside the house. Portis then saw a flash, heard gunshots and breaking glass, and felt bullets hit him in the chest and right arm. Portis fired one shot at the window where he had seen the flash and took cover. Portis's bulletproof vest stopped the bullet to his chest, but not the bullet to his right arm. Dillard ultimately escorted Portis to an ambulance and he was transported to a hospital. Portis left his police star, vest, holster, and gun at the scene.

¶ 6 Dillard testified that, after the shooting, he returned to the front of the house and a man, later identified as Lorenzo Brown, Sr., exited the house and surrendered to the officers. Dillard explained the layout of the house, from the front of the house to the back, as a living room, dining room, kitchen, and enclosed porch. On the west side of the living room and dining room area, there was a small hallway connecting a north and south bedroom and there was a bathroom in the hallway between the two bedrooms. Dillard entered the house and found four men inside: Duane Dunlap and defendant lay face-down in the hallway and Charles Hunley and Lorenzo Brown Jr. lay in the north bedroom. Dillard arrested Brown Jr. and escorted him outside. Dunlap, Brown Sr., Hunley and defendant were also arrested.

¶ 7 Detective Henry Barsch testified that he responded to the shooting at the house. There, he observed a police star and a .45-caliber shell casing in the back yard. From inside a speaker in the living room of the house, evidence technicians recovered a .357-caliber revolver. In front of the bathroom door in the hallway, there was a bottle of bleach. In the kitchen, there was a bullet in the rear wall and another in the frame of the rear door. Inside the enclosed porch, the rear door-window was broken and there were muzzle flash marks on the door and glass. Barsch

instructed evidence technicians to test the hands of Brown Sr., Brown, Jr., Dunlap, and defendant for gunshot residue (GSR). Hunley's hands were not tested because he was being treated at a hospital. Defendant's shirt was also tested for GSR. The .45-caliber semiautomatic handgun and the .357 caliber revolver were sent for fingerprint and ballistics analysis. At the station, Barsch observed that Brown Sr., Brown Jr., and Dunlap were uninjured. Defendant had bruising and some cuts and scratches.

¶ 8 On cross-examination, Barsch could not remember if he reported the reason why Hunley's hands were not tested for GSR. He also could not remember if he reported that there was a camouflage shotgun next to the revolver inside the speaker.

¶ 9 Abdalla Abuzanat, an evidence technician, testified that he was assigned to Portis's shooting and processed the scene. In the back yard, Abuzanat found a .45-caliber cartridge case near a police star, badge, and holster. Inside a speaker in the living room, he found a revolver next to a shotgun. The revolver contained six fired cartridge cases and was swabbed for DNA. On the hallway floor in front of the bathroom, Abuzanat found an empty bleach bottle. In the kitchen, he recovered a bullet from the frame of the door between the kitchen and the enclosed porch. Abuzanat recovered another bullet from inside the rear wall of the enclosed porch.

¶ 10 Sergeant Marvin Otten testified that he was assigned to investigate Portis's shooting and arrived on the scene about 5:15 p.m. There, he recovered Portis's gun, which contained 10 live rounds. At the police station, he inventoried the gun and Portis's bulletproof vest. Otten administered GSR tests to all of the occupants of the house, except for Hunley. Defendant's T-shirt was sent to the Illinois State Police crime lab for analysis. Defendant had cuts and bruises on his upper body.

¶ 11 Mary Wong, a forensic scientist with the Illinois State Police, testified that GSR tests administered to the hands of Brown Sr., Brown Jr., Dunlap, and defendant were negative for GSR. Defendant's T-shirt tested positive for GSR and Wong concluded that the T-shirt had either been in the presence of a discharged firearm or it came into contact with items that had come into contact with primer GSR. Wong could not determine whether or not there was bleach present on the shirt.

¶ 12 The parties stipulated that, if called, Tracy Konior, a forensic scientist specializing in the area of firearms identification, would testify that that she received a .45-caliber semiautomatic handgun, a .357 magnum revolver, a fired bullet, and a bullet fragment recovered in this case. She determined that the bullet had been fired from the .45-caliber semiautomatic handgun. Konior could neither identify nor eliminate the .357 magnum revolver as having fired the bullet fragment.

¶ 13 Michael Cox, a latent print examiner from the Illinois State Police, testified that no prints suitable for comparison were recovered from the revolver or the fired bullet casings. The parties stipulated that, if called, Lynette Wilson, a forensic scientist, would testify that she tested the swab from the revolver and found a mix of at least four different DNA profiles, none of which were suitable for comparison to defendant's DNA standard.

¶ 14 Brown Jr. testified that in 2012 he was adjudicated delinquent of theft and, in 2015, he was convicted of possession of a controlled substance. In March 2012, he was 15 years old and Hunley, his cousin, was about 17. About noon, on March 2, 2012, Brown Jr. and Dunlap, his friend from grade school, visited his father, Brown Sr., at the house on 103rd Place. The house belonged to Brown Jr.'s uncle, Lamont Brown. When Brown Jr. and Dunlap arrived at the house, Brown Sr., Hunley and defendant were at the house. Prior to the date in question, Brown Jr. had

been familiar with defendant for a couple of days. Brown Jr., Hunley, and Dunlap, played video games in the north bedroom. Brown Jr. never saw Dunlap look through a window or hear him say anything about the police.

¶ 15 When the shooting started, Brown Jr. and Hunley were in the north bedroom and Brown Sr. was in the shower. Brown Jr. did not know where Dunlap or defendant were inside the house. Brown Jr. did not see defendant carrying anything or washing his hands. He also did not see Brown Sr. on the telephone. After the shooting, police entered the house and beat everyone who was inside the house. When the men were escorted outside by police, Brown Jr. saw stains on defendant's shirt. After being advised of his *Miranda* rights at the police station, Brown Jr. agreed to speak to Assistant State's Attorney (ASA) Brian Boersma, who memorialized his statement in writing. Brown Jr. signed the statement.

¶ 16 During his testimony, Brown Jr. identified his signed written statement and two signed photographs: one of a man and one of a gun. He denied that his mother was present during his statement and that she had consented to him giving the statement. Brown Jr. was handcuffed while speaking to Boersma and denied that he told Boersma otherwise. He acknowledged that he was not threatened while giving the statement and told that to Boersma. Brown Jr. had smoked marijuana an hour prior to his arrest and was "high" during the interview. He was unsure if he told Boersma that he was high. Boersma spoke to him and his mother outside the presence of police and Brown Jr. "probably told" Boersma he had been treated well by detectives. Brown Jr. was presented with his statement to Boersma in court, acknowledged that he had signed it, but denied making a majority of the statements in it.

¶ 17 On cross-examination, Brown Jr. testified that, at the station, police threatened to charge him with attempted murder. After he provided the officers with his statement, he was released a day or two later, along with Brown Sr., Hunley, and Dunlap.

¶ 18 ASA Brian Boersma testified that, on March 2, 2012, he, in the presence of Detective John Otto, talked to Brown Jr., who, because he was only 15 years old, was joined by his mother. Brown Jr. told him that, on the day of the shooting, he was eating in the dining room of the house, and Hunley and Dunlap were playing video games. Brown Jr. heard Dunlap say there were police in front of the house and Brown Sr. tell Dunlap to stop looking through the window. Brown Jr. then heard gunshots inside the house. He got on the ground and crawled to the bedroom that his father was in. He saw defendant, who was carrying a gun, walk from the back of the house. Brown Jr. identified a photograph of the gun defendant was carrying. He said Brown Sr. was on the phone and defendant was moving throughout the house, but did not see where defendant went inside the house. Brown Jr. said that, before the shooting, he did not see any stains on defendant's shirt, but, after the shooting, saw what looked like bleach stains on his shirt. Brown Sr. eventually opened the door to the house and allowed the police to enter. Outside the presence of detectives, Brown Jr. stated that police treated him well. Brown Jr. said he was not handcuffed, was not under the influence of drugs or alcohol, and his mother was present during the statement.

¶ 19 Boersma handwrote Brown Jr.'s statement and, after reviewing it with him, Brown Jr. signed the statement. Brown Jr. did not tell Boersma that he smoked marijuana about an hour before he gave the statement, that police had hit him, or that police threatened him. Boersma testified that Brown Jr. did not appear to be under the influence of drugs.

¶ 20 Dunlap testified that in 2007 he was adjudicated delinquent of theft and, in 2014, he was convicted of battery. He had failed to appear on a subpoena in this case and, at the time of his testimony, was in custody for indirect contempt. He was familiar with Brown Jr. and Hunley from the neighborhood. On March 2, 2012, he, Brown Jr. and Hunley walked to the house on 103rd Place. Brown Sr., who was the only other person in the house, was in the front room. Dunlap, Hunley, and Brown Jr. played video games in a bedroom. Dunlap did not look through a window or see police cars outside. He did not hear anything unusual, notice any weapons, or see a man at the back door. The police arrived at the house and transported the men to a police station. Dunlap did not recall whether anything happened inside the house prior to them going outside. He acknowledged that there were a lot of police officers present. He was taken to the police station and kept in a holding cell. He could not recall if he spoke to anyone at the police station.

¶ 21 Dunlap initially testified that he did not recall giving a written statement to police. He identified the signature on the bottom of all, except two, pages of his handwritten statement as his signature. He also identified his signature on a photograph, but he testified that he did not recognize the man in the photograph. Dunlap recognized his signature on a photograph of a gun, but did not recall if he identified that gun in a written statement.

¶ 22 Dunlap then testified that he had made a statement to police and identified it in court. He acknowledged that he had agreed to give the statement and wanted to cooperate. The State presented Dunlap with defendant's photograph again and he testified that he had been presented with the photograph during his statement and had identified the man pictured as the shooter. He could not recall who he identified the man to be. When the State again presented him with the photograph of the gun, Dunlap testified that, in his statement, he had identified it as the gun he

saw the man from photograph shooting. He also acknowledged that in his statement he said that: the man in the photograph was in the house during the shooting; as he was playing video games with his friends, he looked through a window, saw a police car and asked why there was a police car outside the house; the man in the photograph shot a gun through the window at the top of the back door in the kitchen; when the man started shooting, he lied on the floor and heard five or six shots; the man went into the bathroom and he heard water running and smelled bleach; and, when the man was in the bathroom, Brown Sr. opened the door and allowed police inside the house.

¶ 23 Dunlap was unsure if in his statement he said that the man had a revolver in his hand and that the man ran into the bedroom and tried to hide a gun. ASA Robert Schwarz memorialized Dunlap's statement. Dunlap corrected and signed the statement. He testified that police and Schwarz treated him well. His handcuffs were removed when he gave the statement. He was not under the influence of drugs or alcohol when he gave the statement.

¶ 24 About 10 days after giving his statement, Dunlap spoke to ASA Wendy Cornejo and testified before a grand jury. He told the grand jury that, on the day of the shooting, he, Brown Jr., and Hunley were playing video games in the front bedroom of the house. He did not recall if he told the grand jury that, while they were playing video games, the man in the photograph entered the house through the front door. Dunlap identified a photograph of the man that entered the house before the shooting. The man walked to the kitchen, looked through the window, and had a black object in his hand. Dunlap looked through the living room window, saw a police car, and asked why a police car was outside. Brown Sr. told Dunlap not to worry about it. The man in the kitchen was by the back door, had a gun in his hand, and started shooting. Dunlap identified a

photograph of the gun the man was shooting. He told the grand jury that Cornejo treated him well, he had not been threatened, and he was not under the influence of drugs or alcohol.

¶ 25 Dunlap identified the photograph of the man he had identified before the grand jury as the shooter, but testified the man was not in the courtroom.

¶ 26 On cross-examination, Dunlap testified that he did not recall if, prior to his written statement, he talked to Detective John Otto. He did not recall if he told Otto that: he saw police cars in front of the house or asking why they were there; he saw another man place a gun inside a speaker; the man came into the front bedroom; and the shooter used a specific type of weapon. Dunlap told Otto that he saw the shooter wash his hands. Dunlap also did not recall speaking to Detectives Otto and Murphy later that evening. He could not remember if he told the detectives that: the gun used in the shooting had been small; he was not sure it was a revolver; and the shooter had washed his hands with bleach.

¶ 27 ASA Robert Schwarz testified that he spoke to Dunlap in the presence of Detective Murphy. During their conversation, Dunlap identified a photograph of the suspect and a photograph of a gun. Outside of the presence of detectives, Dunlap told Schwarz that, after police realized he was a witness, they uncuffed him and treated him well. Dunlap told Schwarz he was not under the influence of drugs or alcohol and agreed to give a handwritten statement.

¶ 28 In the statement, Dunlap said that, on the date in question, he, Brown Jr., and Hunley arrived at the house about 4 p.m. Dunlap saw a police car in front of the house and Brown Sr. told him not to worry about it. The man in the photograph ran into the back bedroom and tried to hide a revolver. The man left the bedroom and placed the revolver inside a speaker. Schwarz reviewed the written statement with Dunlap, who signed it.

¶ 29 Brown Sr. testified that, in March 2012, he was living with his brother, Lamont Brown, in the house on 103rd Place. Defendant, whom Brown Sr. identified in court, resided in the basement of the house and was a "[v]ery close friend of the family." On the day of the shooting, Brown Sr., Brown Jr., Hunley, and Dunlap were in the house. Brown Sr. was not familiar with Dunlap and did not know how he had arrived at the house. As Brown Jr., Hunley, and Dunlap were playing videogames in the front bedroom, Brown Sr. was in the shower. Brown Sr. did not see Dunlap at the living room window. He heard someone say policemen were outside, but he could not remember if he responded. Brown Sr. heard one gunshot and thought someone was shooting at the house, which was a frequent occurrence. He got dressed and found everyone in the hallway. Defendant did not have anything in his hands. Brown Sr. did not see anyone in the kitchen. The police were outside the house.

¶ 30 Brown Sr. called 911, and, after learning that an officer had been shot, informed the operator that he and the occupants of the house were surrendering. He opened the front door of the house and lied down. Police entered the house, beat everyone inside, handcuffed them and transported them to the police station.

¶ 31 At the station, police treated Brown Sr. as if he "had killed someone" and kept him alone in a room. When he arrived at the station he was handcuffed, but, after speaking to the police, he was not under arrest. He could not recall whether he was interviewed by a detective or an ASA. An unidentified man, who was not a police officer, took his handwritten statement and reviewed it with him. The man presented Brown Sr. with a photograph and Brown Sr. identified it as a photograph of defendant. Brown Sr. identified a second photograph of a gun with which he was familiar. Brown Sr. recalled speaking to the unidentified man without detectives present, but did not recall what was said because he was "just trying to go home." He testified that the

unidentified man treated him "alright." He did not recall stating that he remained at the police station voluntarily or that he gave a written statement because he wanted to do so. He testified that he had made the statement to the man voluntarily, but he was high on marijuana at the time and told the man he was high. Brown Sr. reviewed the handwritten statement, signed it, and was then free to leave. He could not recall stating that he was treated well by police and the unidentified man, who took his statement. Brown Sr. could not recall what he said in his statement.

¶ 32 On March 15, 2012, Brown Sr. spoke to a woman, who identified herself as a prosecutor, and he agreed to testify before a grand jury. Brown Sr. told the grand jury that he was not under the influence of alcohol or drugs when he spoke with detectives and that he spoke with them voluntarily. Brown Sr. did not recall telling the grand jury that he spoke with ASA Robert Schwarz and that Schwarz treated him well, that he spoke to him voluntarily, or that he was not under the influence of drugs or alcohol. At trial, Brown Sr. denied the specifics of his grand jury testimony.

¶ 33 On cross-examination, Brown Sr. testified that, two nights before the shooting in question, shots were fired at the house. He never saw defendant carrying a gun or washing his hands. Brown Sr. would not be able to identify the gun in the shooting of the officer because he did not see the shooter or the gun used in the shooting. He did not see defendant run inside a bedroom and lie down on the floor. He was not free to leave the police station until he provided the officers with his statement.

¶ 34 ASA Schwarz testified that he spoke to Brown Sr. in the presence of Detective James Braun. Outside the presence of detectives, Brown Sr. told Schwarz that the police were initially a little rough but, after they determined that he was not involved in the shooting, they uncuffed

him and treated him well. He told Schwarz that he was not under the influence of drugs or alcohol and agreed to give a handwritten statement.

¶ 35 In the statement, Brown Sr. said that, on the date in question, he was inside the house with Brown Jr., Hunley, Dunlap, and defendant, who was in the kitchen. Dunlap looked through the living room window and asked why a police car was in front of the house. Brown Sr. told Dunlap not to worry about it. Brown Sr. was in the shower when he heard three gunshots. He exited the bathroom and saw defendant in the kitchen. He also saw smoke and broken glass. Brown Sr. asked defendant what was "wrong with [him]" and defendant told him that someone was in the back of the house with a gun. Brown Sr. saw defendant, carrying a gun, walk out of the kitchen. Brown Sr. identified the gun in a photograph. After the shooting, Brown Sr. called 911. As he did so, defendant was sitting next to him on the floor. He told defendant to wash his hands so that he and Brown Jr. could leave the house. Brown Sr. said he had been treated well by police and by Schwarz and that he was not under the influence of drugs or alcohol. After he reviewed the statement with Schwarz, he signed it.

¶ 36 ASA Wendy Cornejo testified that she spoke with Brown Sr. and Dunlap on separate occasions, reviewed their handwritten statements with them, and presented their testimonies to the grand jury. Brown and Dunlap told her that the police treated them well. Cornejo identified transcripts of Dunlap's and Brown Sr.'s grand jury testimony and confirmed they were accurate.

¶ 37 Brown Sr. testified before the grand jury that when he heard gunshots and exited the shower, he saw Dunlap run from the kitchen and heard him say that someone in the house had a gun. Defendant then ran out of the kitchen holding a gun, which Brown Sr. identified in photograph. Brown Sr. asked defendant what he had done and defendant said there was someone outside with a gun. Brown Sr. looked in the back of the house and saw a police officer. He did

not tell the 911 operator that defendant had shot someone because defendant was next to him, and he was worried about his safety and Brown Jr.'s safety. Brown Sr. told defendant to wash his hands so that Brown Sr. could leave the house with Brown Jr. As soon as defendant went to the bathroom to wash his hands, Brown Sr. exited the house through the front door. The police treated him well.

¶ 38 Hunley testified that he was on probation for a 2012 possession of firearm conviction. On March 2, 2012, he was 16 years old. Shortly before 5 p.m., he was at his uncle Lamont Brown's house on 103rd Place. He arrived at the house by himself. His uncle, Brown Sr., his cousin, Brown Jr., and Brown Jr.'s friend, Dunlap, were already there. Hunley was playing videogames by himself in the front bedroom of the house. Brown Sr. was in the shower and Brown Jr. and Dunlap were in the front room. He heard gunshots and then the police came in and started beating everyone inside the house. He saw Dunlap being beaten by police officer in the other room. Hunley's head and face were bleeding. He was escorted out of the house by police.

¶ 39 After the State rested its case, defendant moved for a directed finding, which the trial court denied.

¶ 40 Rodney Jackson testified that, in March 2012, he lived six or seven houses away from the house on 103rd Place. There had been recent shootings in the neighborhood. On March 2, 2012, Jackson saw Hunley and two young men, with whom he was not familiar, walk through an alley and into the back yard of the house on 103rd Street. Defendant was not one of the three men he saw. Jackson called the police and they responded three to five minutes later. Jackson lost sight of the officers as they approached the house.

¶ 41 Hunley was recalled as a witness and testified that he was transported to the police station, where he invoked his right to an attorney. He was then transported to a hospital.

¶ 42 The parties stipulated that, if called, Detective Matthew Weber would testify that, after the shooting, Brown Jr. and Hunley were found in the front bedroom and Dunlap and defendant were in the hallway between the two bedrooms. The parties also stipulated that, if called, Detective Otto would testify that he interviewed Hunley and Dunlap. Hunley said that he walked to the front door, heard a gunshot, and heard Brown Jr. say the police were at the house. Defendant then ran with a gun through the house. Otto would testify that his general progress reports from the interview did not mention that, before the shooting, Dunlap looked through the window and saw police cars or that he told Brown Sr. about seeing the police cars. The progress reports also did not note that Dunlap saw defendant place a gun inside a speaker, wash his hands, or enter into the same bedroom as Dunlap. Otto's report noted that Dunlap saw defendant run into the bathroom and that Dunlap smelled bleach.

¶ 43 Lashun Harris, defendant's sister, testified that she and defendant had made plans for him to move in with her prior to the shooting.

¶ 44 The jury found defendant guilty of aggravated battery with a firearm and not guilty of attempted first degree murder and attempted first degree murder of a peace officer.

¶ 45 At sentencing, the State asked the court to impose the maximum sentence of 30 years' imprisonment based on defendant's criminal history, the egregious nature of the offense, and a need for deterrence. Defense counsel asked that the court impose a sentence closer to the minimum because defendant was a diagnosed paranoid schizophrenic, had strong familial support, and did not have a criminal history of violent offenses. In allocution, defendant apologized to Portis by stating "I just want to say I'm sorry, you know what I'm saying, for all the things that happened to you. You, your family and you, too."

¶ 46 In announcing sentence, the trial court discussed several factors in mitigation and aggravation. In mitigation, the court noted that defendant's criminal history was "old" and comprised largely of nonviolent offenses. The court also noted that defendant had strong familial support. In aggravation, the court pointed out that the most significant factor was defendant's conduct during the shooting, which included shooting at Portis several times, hitting him twice, and injuring him. The court explained that the need to deter gun crimes also weighed heavily in its sentencing decision. The court stated that defendant's mental health history was not "a defense" in this particular case" because a doctor's pretrial report indicated that defendant never admitted to shooting Portis. The court also stated:

> "[T]o the extent that [defendant] has said he was sorry, I think that probably does some good for [Portis], being the kind of man that [Portis] is. Does it go so far as to be a full acceptance of responsibility? I question that.
>
> I don't think the sort of evidence also by the report of [the doctor] which is less than a year old, the defendant doesn't really ever seem to accept responsibility for what he did here. He placed himself in that house with those individuals, his choice. Nobody put him in that house with those individuals who ultimately testified in this case. The house was a repository for at least two weapons on the day in question, ***."

¶ 47 The court also stated that "as much as I think [Portis] appreciates the fact that the defendant is sorry for what happened to him and his family, there is still not what I would consider to be a complete acceptance of responsibility on the part of [defendant]." It explained that defendant never said that he made an error and had thought he had been acting in self-

defense, but, in fact, there was evidence that he tried to conceal the fact he was the shooter by washing his hands with bleach.

¶ 48 After expressly stating that it had considered the aggravating and mitigating factors argued by the parties, and those in the presentence investigation report, the court sentenced defendant to 15 years' imprisonment.

¶ 49 On appeal, defendant first contends that there was insufficient evidence to prove him guilty of aggravated battery with a firearm beyond a reasonable doubt. "When a defendant challenges the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). A reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Young*, 128 Ill. 2d 1, 49 (1989). "This standard of review applies in all criminal cases, whether the evidence is direct or circumstantial." *People v. Gilliam*, 172 Ill. 2d 484, 515 (1996). We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of defendant's guilt. *Hall*, 194 Ill. 2d at 330. It is the function of the jury to assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. *Gilliam*, 172 Ill. 2d at 515. We will not substitute our judgment for that of the trier of fact on questions involving the weight to be assigned the evidence or the credibility of the witnesses. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

¶ 50 Here, defendant does not argue that the State failed to satisfy the elements of the offense of aggravated battery with a firearm. Rather, he argues that the evidence presented was insufficient to establish his guilt because it consisted primarily of the out-of-court statements and

grand jury testimony of several witnesses, who were initially considered and treated as suspects and, thus, pressured to name the shooter. Defendant maintains that these statements lacked the necessary indicia of reliability where they were inconsistent with one another and each witness disavowed their statement at trial. Defendant further points out that his fingerprints and DNA were not on the weapon that was allegedly used in the offense, his hands and clothing did not test positive for GSR, and he did not admit his involvement in the offense.

¶ 51 We initially note that this complained-of evidence, including the prior inconsistent statements of Brown Sr., Brown Jr., and Dunlap were presented to the jury and fully explored during trial. Given its ruling, the jury resolved these inconsistencies in favor of the State and determined that the witnesses were telling the truth when they made their prior statements to police, prosecutors, and/or the grand jury. See *People v. Morrow*, 303 Ill. App. 3d 671, 677 (1999); *People v. McBounds*, 182 Ill. App. 3d 1002, 1014 (1989) (trial court found witnesses' prior inconsistent statements more trustworthy than their trial testimony); *People v. Zizzo*, 301 Ill. App. 3d 481 (1998) (a reviewing court may infer that the jury found the prior statement to be more trustworthy). Given this record, defendant's argument is essentially asking this court to substitute its judgment for that of the trier of fact on matters involving the weight to be assigned the evidence and the credibility of the witnesses. As mentioned, this we cannot do.

¶ 52 Moreover, prior inconsistent statements are admissible under section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 2012)). *Morrow*, 303 Ill. App. 3d at 677. If a prior statement is properly admitted pursuant to section 115-10.1, a "finding of reliability and voluntariness is automatically made. Accordingly, no additional analysis is needed. * * * [I]t is the jury's decision to assign weight to the statement and to decide if the

statement was indeed voluntary, after hearing the declarant's inconsistent testimony." *People v. Pursley*, 284 Ill. App. 3d 597, 609 (1996).

¶ 53 After viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could conclude beyond a reasonable doubt that defendant was guilty of aggravated battery with a firearm. In their statements, Brown Sr., Brown Jr. and Dunlap stated that, shortly after the shooting, they saw defendant holding a gun. In his statement, Brown Sr. said that, after he heard gunshots, he saw defendant in the smoke-filled kitchen with a gun in his hand. Brown Sr. identified the gun in a photograph. In his grand jury testimony, Brown Sr. testified that, when he heard gunshots and exited the shower, he saw Dunlap run from the kitchen and heard him say that someone in the house had a gun. Defendant then ran out of the kitchen holding a gun. Brown Sr. asked defendant what he had done and defendant said there was someone outside the house with a gun. Brown Sr. looked in the back of the house and saw a police officer. Dunlap identified a photograph of defendant and testified that he shot a gun through the window at the top of the back door in the kitchen. In his statement, Dunlap said that the man tried to hide the gun, a revolver, in a bedroom and then placed it inside a speaker. Defendant's shirt had either been in the presence of a discharged firearm or it came into contact with items that had come into contact with GSR. Further, Brown and Dunlap's statements indicating that defendant washed his hands in the bathroom and Dunlap's statement that he smelled bleach, when combined with the unattributed discoloration of defendant's shirt after the shooting, show defendant tried to conceal that he had fired a gun and, thus, showed defendant's consciousness of guilt. See, *e.g.*, *People v. Rojas*, 359 Ill. App. 3d 392, 404 (2005) (quoting *People v. Gambony*, 402 Ill. 74, 80 (1948)). This evidence, and the reasonable inferences therefrom, was sufficient to support defendant's conviction.

¶ 54 In reaching this conclusion, we are not persuaded by defendant's reliance on *People v. Parker*, 234 Ill. App. 3d 273 (1992), and *People v. Arcos*, 282 Ill. App. 3d 870 (1996). Here, unlike in *Parker* and *Arcos*, the credibility of the witnesses' prior statements was not called into question. In addition, unlike in *Parker* and *Arcos*, in this case there was other evidence indicating that defendant shot Portis, which, as mentioned, included the presence of GSR on defendant's shirt.

¶ 55 Defendant next argues that the trial court erred where, prior to imposing sentence, it considered his failure to admit guilt as a factor in aggravation. Defendant concedes that he did not preserve this issue by filing a motion to reconsider sentence in the trial court but asserts we can consider the issue under the plain error doctrine.

¶ 56 Generally, a sentencing issue is forfeited unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 18. However, forfeited claims related to sentencing may be reviewed for plain error. *Id.* (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). In the sentencing context, the plain error doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and either (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Nowells*, 2013 IL App (1st) 113209, ¶ 19. A reviewing court conducting plain error analysis must first determine whether an error occurred because, absent error, there can be no plain error. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 57 Although in imposing a sentence a trial court may consider the defendant's lack of remorse, or his veracity on the witness stand, as both bear on the defendant's rehabilitative

potential, it cannot not rely on the defendant's continued claims of innocence as an aggravating factor when fashioning that defendant's sentence. See, *e.g.*, *People v. Ward*, 113 Ill. 2d 516, 526 (1986); *People v. Byrd*, 139 Ill. App. 3d 859, 866 (1986); *People v. Speed*, 129 Ill. App. 3d 348, 349 (1984). The purpose of this rule is to protect a defendant's right of appeal or his prospects of postconviction relief, which might be threatened by rewarding a defendant's admission of guilt following trial. *Speed*, 129 Ill. App. 3d at 349.

¶ 58 In determining whether a sentence was improperly influenced by the defendant's failure to admit guilt following trial, reviewing courts focus on whether the trial court indicated, either expressly or impliedly that there would be better treatment on sentencing if the defendant abandoned his claim of innocence. *Byrd*, 139 Ill. App. 3d at 866; *Speed*, 129 Ill. App. 3d at 349. If the court indicated that a failure to admit guilt justified a lengthier sentence, then the sentence likely was improperly influenced by the defendant's persistence in claiming his innocence. However, if the record shows that the court only referenced the factor of remorsefulness as it bore upon defendant's rehabilitative potential, then its reference thereto is not reversible error. *Speed*, 129 Ill. App. 3d at 349; see also *People v. Coleman*, 135 Ill. App. 3d 186, 188 (1985).

¶ 59 Here, we do not find that the court implicitly or explicitly imposed a harsher sentence because defendant failed to accept responsibility for shooting Portis. The record, when read as a whole, shows that the court's statements indicate that its discussion of defendant's failure to accept responsibility at sentencing was focused on its consideration of other sentencing factors, including his rehabilitative potential. See *Ward*, 101 Ill. 2d at 454. The court first mentioned defendant's failure to admit guilt to explain it did not consider defendant's paranoid schizophrenia to be a mitigating factor because, if his actions were a mistake attributable to his paranoia, then there would be no reason to deny that he committed the offense altogether. The

subsequent instances of the court's reference to defendant's failure to admit guilt were in the context of the court's commentary regarding how the proceedings affected Portis and whether defendant expressed genuine remorse for his actions. Stated differently, there is no indication that the court relied on defendant's failure to admit guilt to impose a harsher sentence. In light of the foregoing, we find the court's discussion of defendant's failure to admit guilt bore only upon his rehabilitative potential and was not used to justify a stricter sentence. As such, we find no error by the court and thus no plain error to excuse defendant's procedural default of his sentencing challenge in this case. *Walker*, 232 Ill. 2d at 124.

¶ 60 Nevertheless, defendant analogizes the facts in this case to those in *Byrd* and *Speed* where the reviewing courts found that the trial courts improperly considered defendant's denial of guilt as an aggravating factor at sentencing. However, for reasons already discussed, we find that the remarks made by the trial court in the instant case were distinguishable from those held to be improper in *Byrd* and *Speed*. Here, unlike those cases, the trial court's statements did not expressly state or otherwise imply that defendant would have received a more lenient sentence had he admitted his guilt prior to trial or not elected to proceed with a jury trial. Rather, our review of the record shows that the trial court's comment on defendant's failure to accept responsibility was made in reference to his potential for rehabilitation.

¶ 61 In sum, we find that there was sufficient evidence to prove defendant guilty of aggravated battery with a firearm and that defendant's right to challenge his sentence on the basis of the court's discussion of his failure to admit guilt is forfeited.

¶ 62 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 63 Affirmed.