

No. 1-12-1449

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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. 10 CR 15443
)	
JACK McGEE,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant failed to establish that his counsel was ineffective for allegedly failing to perfect impeachment, and that the sole aggravating factor considered by the trial court in fixing his sentence was a fact implicit in the offense for which he was convicted.
- ¶ 2 Following a jury trial, defendant Jack McGee was convicted of attempted first degree murder and sentenced to 17 years' imprisonment plus an additional 25 years for personally discharging a firearm, for an aggregate of 42 years. On appeal, McGee contends that he was denied effective assistance of counsel where his trial attorney failed to introduce impeachment

evidence. McGee also contends that the trial court erred in imposing a sentence above the statutory minimum by improperly considering in aggravation a factor inherent in the offense.

We affirm.

¶ 3 McGee was charged with various crimes including attempted first degree murder where he personally discharged a firearm causing great bodily harm in the August 1, 2010, shooting of his girlfriend, Kiara Mitchell. According to the State's key witnesses, Mitchell and Daniel Brown, McGee intentionally shot Mitchell during an argument. McGee, however, testified that the shooting was an accident.

¶ 4 According to Daniel Brown's written statement to police and an assistant State's Attorney taken on August 2, 2010, Brown saw McGee and Mitchell on 122nd and Halsted Streets on July 31, 2010. At about 10:30 p.m., Mitchell and McGee arrived at his apartment, which was located at 11843 South Sangamon Street in Chicago. The three decided to go grocery shopping, and, as they were leaving, Brown heard Mitchell and McGee arguing about their relationship. McGee stated that he was going to take Mitchell to his mother's house. Brown tried to put Mitchell on a bus, but then decided against it and the three continued to the grocery store. After buying groceries, they walked back to Brown's apartment. During the walk, McGee pulled a gun out of his waistband, pointed it at Mitchell, and threatened to shoot her if she did not come with them. Brown told McGee that he was not going to shoot anyone, McGee returned the gun to his waistband, and they walked to Brown's residence. Brown made a pizza while McGee and Mitchell continued arguing. Mitchell stated that she wanted to leave, and in response, McGee told her she was not going anywhere. McGee pulled the gun from his waistband and shot Mitchell. Mitchell had blood squirting from the side of her neck. McGee told Brown "I am going to come back and shoot you if you trick on me."

After Mitchell was shot, Brown grabbed the gun from McGee, wiped it off, dropped it, and ran out of the apartment to call 9-1-1. When the police arrived, Brown told them what happened.

¶ 5 At a preliminary hearing, Brown testified similarly to his statement to police, with some variations. He testified that on their way to the grocery store McGee and Mitchell were arguing about their relationship, but, on cross-examination, Brown indicated that they only started arguing on the return trip. During their walk back to Brown's apartment, McGee fired a shot into the air. Later, when Mitchell got up to leave Brown's apartment, Brown saw McGee shoot her. Brown was not sure where she was shot, but he thought the bullet struck her head. Blood was squirting from what Brown thought was the right side of Mitchell's head. When McGee went to Mitchell's side, Brown took the gun away from him and Mitchell kicked it underneath the bed.

¶ 6 Brown testified to the events of July 31, 2010, at McGee's trial. He testified that on July 31, 2010, he, McGee, and Mitchell walked to his grandmother's house at 122nd and Halsted Streets to smoke and drink before going to his apartment. At about 11 p.m., Brown, McGee, and Mitchell walked to the grocery store. McGee and Mitchell were arguing during the walk, but Brown did not know the subject of the argument. After shopping, they started to walk back to Brown's residence when McGee pulled out a gun, pointed it at Mitchell, and stated, "Bitch, I'll kill you." McGee placed the weapon back in his waistband. Brown never saw McGee hand the weapon to Mitchell, but he did see it in her purse. The three returned to Brown's apartment, and, as Brown was watching television, Mitchell attempted to leave. McGee retrieved the gun from his waistband, pointed it at Mitchell's face, and shot once. Mitchell fell to the floor, Brown picked up the gun, and pointed it at McGee. Brown asked McGee why he shot Mitchell, and then he dropped the gun, left the apartment, and called the police from a nearby storefront.

¶ 7 On cross-examination, Brown stated that his attention was focused on the television and that he did not become aware of what happened until after he heard the gunshot. He also testified on cross-examination that he saw McGee point the gun at Mitchell's face and fire. On redirect, Brown reiterated that he saw McGee shoot Mitchell.

¶ 8 Kiara Mitchell testified that prior to July 31, 2010, she had been dating McGee for about two years. That day she was at Brown's apartment with McGee and Brown. At about 11 p.m., the three of them went to a grocery store. At about the time they left the house, McGee placed a gun in Mitchell's purse. On the way, Mitchell and McGee began arguing, but she could not recall what they were arguing about. During the argument, McGee removed the gun from Mitchell's purse and placed it in his waistband. The three entered the grocery store, but Mitchell and McGee exited while Brown was still inside. Mitchell and McGee began arguing again, and McGee pointed the gun at Mitchell's knee. McGee then put the gun back in his waistband and Mitchell and McGee rejoined Brown in the store. They all left together and started walking back to Brown's apartment. On the way, Mitchell and McGee resumed arguing, McGee pulled out the gun and pointed it at her face, and then fired the gun towards the sky. McGee placed the gun in Mitchell's purse, and the three entered Brown's apartment where the argument resumed.

¶ 9 After telling McGee to retrieve the gun from her purse, Mitchell went to the bathroom, and then stood in the kitchen yelling at McGee that she wanted to leave. In response, McGee pulled out the gun from his pocket, aimed it at her head, and shot her in the neck. Mitchell acknowledged on cross-examination that in her previous statements to police, she indicated that McGee shot her after she put on her shoes, and that after she told McGee to get his gun, he took it out, cocked it, and shot her. McGee picked up and dragged Mitchell to Brown's bedroom where he told her to tell the police the shooting was an accident. An ambulance arrived and

Mitchell was taken to the hospital. While Mitchell was at a rehabilitation center recovering from her injuries she spoke with Kason Lewis, but denied telling him that the shooting was an accident. Mitchell was in a wheelchair at the time of trial and could not move her legs due to the injuries incurred from the shooting.

¶ 10 Officer Roger Pinel testified that when he arrived at the scene, McGee told him that someone was shot upstairs. At that same time, another individual approached police and stated that McGee was the shooter. McGee was then taken into custody. When the officers went upstairs, Pinel saw the victim on the bed with a gunshot wound to her throat. Defendant led Pinel to a window and told him to look down next to the building to see the gun. Pinel went downstairs and guarded the gun until an evidence technician recovered it. McGee later tested positive for gunshot residue.

¶ 11 Kurt Murray, a forensic scientist, testified that he tested the gun recovered at the scene. It had three safety features that were all in working condition. During a "single action trigger pull," where the hammer of the gun is already pulled back, it took at least five pounds of pressure in order for the gun to fire. During a "double action trigger pull," where the trigger is pulled before the hammer is back, at least 17 pounds of pressure were needed for the gun to fire.

¶ 12 McGee testified that on July 30, 2010, he and Mitchell slept over at Brown's apartment. The next morning, Brown, Mitchell, and McGee went to Brown's grandmother's house and started drinking alcohol and smoking marijuana. At about 9 p.m. that same evening, they returned to Brown's residence, and then went to the grocery store. While they walked to the store, Mitchell had McGee's gun in her purse. After shopping, they left to return to Brown's apartment. During the walk, McGee never took a gun from Mitchell's purse, pointed it at her, or fired off a round. When they arrived at Brown's apartment during the early morning hours of

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August 1, they ate pizza and watched television. Mitchell and McGee were not arguing, although they did have small disagreements.

¶ 13 Mitchell got up to use the bathroom, took McGee's gun out of her purse, and handed it to him. McGee asked Mitchell if she wanted to leave, and she said no. McGee told Mitchell that they should get some cigarettes, and he picked up his gun. When he attempted to hand Mitchell the gun, it fired striking Mitchell. McGee did not know how the gun went off. He dropped the gun, which Brown immediately picked up and pointed at him. According to McGee, he instructed Brown to put down the gun and call the police.

¶ 14 After retrieving the gun from Brown, McGee wiped his fingerprints off of it, and tossed it out of the window in order to prevent further accidents. McGee also picked up Mitchell, placed her on the bed, rubbed her face with a wet towel, and told her the shooting was an accident, but denied instructing her to repeat that to police. When McGee heard the police arrive, he went downstairs and told them that his friend was shot by accident. He was arrested when Brown told the police that McGee was the shooter. After showing the police where the gun was located, he was taken to the station where he was interviewed and gave a videotaped statement.

¶ 15 On cross-examination, after the State played a portion of his videotaped interview, McGee acknowledged that he told police that he carried the gun in his pocket on the walk back from the store and that he put the gun into Mitchell's purse before arriving at Brown's apartment. McGee also acknowledged that he initially told police that nobody shot Mitchell, and that the gun simply went off. He further admitted telling police that Mitchell discharged the gun after touching it.

¶ 16 Kason Lewis, a convicted felon, testified on behalf of McGee that he was a friend of both McGee and Mitchell and that he saw Mitchell at a rehabilitation center in July of 2011. At the

center, Mitchell told him that McGee accidentally shot her in the throat while they were drinking and partying.

¶ 17 Following closing arguments, the jury found McGee guilty of attempted first degree murder during which he personally discharged a firearm that caused great bodily harm, aggravated domestic battery, and aggravated battery.

¶ 18 At sentencing, the State tendered Mitchell's victim impact statement in aggravation. The State also emphasized the extent of the harm Mitchell suffered due to McGee's conduct, noted that he was a gang member and drug user, and requested that the court impose a significant sentence. In mitigation, the defense presented numerous witnesses who testified to McGee's good character and potential. Defense counsel also argued that McGee saved Mitchell's life by staying with her and comforting her after she was shot, and requested that the court impose the minimum sentence. In allocution, McGee stated that he would never intentionally hurt anyone and requested that the court be lenient.

¶ 19 In imposing its sentence, the trial court stated that it considered all of the factors in aggravation and mitigation. In particular, in mitigation, the trial court found McGee did not have a significant criminal background, and his imprisonment would be a hardship to his family. In considering the factors in aggravation, the trial court found that McGee's conduct caused serious physical harm as Mitchell will be in a wheelchair for the rest of her life. The trial court then merged the aggravated battery counts into the attempted murder count and sentenced McGee to 42 years' imprisonment, which included the 25-year firearm enhancement. McGee's motion to reconsider sentence was denied and he timely appealed.

¶ 20 On appeal, McGee contends that he was denied his constitutional right to the effective assistance of trial counsel. In particular, he maintains that trial counsel was ineffective for failing to impeach Brown with his multiple prior inconsistent statements.

¶ 21 Counsel is ineffective when: 1) counsel's performance falls below an objective standard of reasonableness; and 2) the deficient performance prejudiced the defendant to such an extent that he was denied a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* at 696.

¶ 22 "[T]he decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). The decisions that counsel makes regarding matters of trial strategy are "virtually unchallengeable." *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007), quoting *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). In fact, even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Id.*

¶ 23 In this case, McGee's ineffective assistance claim centers on trial counsel's decision not to impeach Brown with various discrepancies in his written statement to police, his testimony at the preliminary hearing, and his trial testimony. McGee contends that Brown's statement to police and preliminary hearing testimony contradicted his trial testimony regarding: (1) Brown's attempt to put Mitchell on a bus while they were walking to the store; (2) McGee's threats to

shoot Brown if he disclosed the truth that the shooting was deliberate; (3) Brown's recovery of the gun after McGee shot Mitchell; (4) the commencement and substance of the argument between Mitchell and McGee; (5) the beginning of the argument between Mitchell and McGee when they were back at Brown's apartment; (6) Brown's belief as to where Mitchell was shot; (7) and how Mitchell, Brown, and McGee met on the night in question. McGee now contends that had trial counsel impeached Brown with his previous statements, the jury would have found Brown to be an incredible witness, and, in turn, rejected the State's theory that McGee intentionally shot Mitchell. We disagree.

¶ 24 Where there is an ineffective assistance of counsel claim for defense counsel's failure to impeach, it is imperative to put the value of the potentially impeaching material in perspective. *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989). Counsel is not ineffective for failing to impeach a witness based on prior statements with minor variances and inconsistencies with regard to collateral matters. See *Id.* at 35-37 (finding counsel effective after failing to impeach the State's witnesses with inconsistent statements where the value of their inconsistent testimony was not great); *People v. Steidl*, 142 Ill. 2d 204, 242 (1991) (finding counsel effective after failing to impeach witness who originally did not name the defendant as the killer, but did place the defendant in the company of other offenders on the night in question). A review of McGee's complaints regarding Brown's statements shows that the value gained by impeaching him on those matters would have been minimal because the inconsistencies failed to exonerate McGee and concerned minor matters that would not have furthered the defense theory at trial that the shooting was an accident. Accordingly, trial counsel's decision not to impeach Brown on collateral matters was based on sound trial strategy.

¶ 25 Nevertheless, McGee points to a portion of the record that he believes indicates that defense counsel intended to impeach Brown with his previous statements, but could not find the impeaching testimony in the transcripts and thus never carried through with the impeachment.

The following colloquy occurred between defense counsel, Brown, and the court:

"Q: And do you remember – you gave many statements in this case. As a matter of fact, you gave an official statement when you testified before a grand jury – I'm sorry, for a preliminary hearing before a judge, just like this judge here, right? Do you remember that?

A. Yes.

Q. Now, you testified that – Give me a moment, Judge.

THE COURT: All right.

MS. ANDERSON [defense attorney]: I should have marked this. I apologize to the Court. I'm sorry for the delay.

THE COURT: All right. Take a minute.

MS. ANDERSON: I'll come back to that Judge."

This isolated exchange does not show that counsel failed to adequately cross-examine Brown. Instead, the record shows that defense counsel's cross-examination of Brown spanned almost 20 pages, and defense counsel elicited testimony from Brown that he was concentrating on the television and not on the shooting. We thus find that this excerpt regarding counsel's reference to Brown's preliminary hearing testimony was insufficient to show that counsel was ineffective. The record also shows that defense counsel did impeach Brown regarding his inconsistent account of whether Mitchell was shot in the side of the head or whether Brown saw McGee aim the gun at Mitchell's face and pull the trigger. The fact that defense counsel did, in fact, cross-examine Brown regarding certain inconsistent statements strongly supports the conclusion that defense counsel's failure to cross-examine him on other inconsistencies was the product of deliberate trial strategy.

¶ 26 McGee likewise cannot show that he was prejudiced by counsel's performance where Brown's testimony was corroborated by Mitchell, the victim in this case. Mitchell testified, similarly to Brown, that she and McGee were arguing leading up to the shooting in question. During the arguments, McGee pointed the gun at Mitchell's knee, and then at her face. McGee also fired the gun towards the sky during their return to Brown's residence. After Mitchell, McGee, and Brown returned to Brown's apartment, Mitchell announced that she wanted to leave. In response, McGee pulled the gun from his pocket, aimed it at her head, and shot her in the neck. Following the shooting, McGee instructed Mitchell to tell the police the shooting was an accident. Mitchell's testimony, by itself, was enough to convict defendant of attempted murder. See *People v. Baldwin*, 256 Ill. App. 3d 536, 542 (1994) ("[t]he positive testimony of a single witness is sufficient to convict beyond a reasonable doubt").

¶ 27 Of course, if the jury believed Mitchell, as they were entitled to do, that after the shooting McGee told her to tell police it was accidental, such conduct evinces consciousness of guilt. *People v. Ehlert*, 211 Ill. 2d 192, 240 (2004). McGee's own admission that he wiped the gun off after the shooting and threw it out the window supports the same inference. Moreover, the physical evidence contradicted any notion that the gun went off accidentally where the State's expert testified that all of the safety mechanisms were operating properly and that significant force was required to fire the weapon, thus refuting any claim that the discharge was accidental. We thus find that McGee cannot show that the outcome at trial would have been different had defense counsel attempted to impeach Brown with his prior statements.

¶ 28 In reaching this conclusion, we find McGee's argument that Mitchell's testimony was of questionable credibility, and inconsistent with Brown's testimony, unpersuasive. McGee points out that although Mitchell testified that McGee discharged the gun twice that evening, the gun

was only found to have a single spent shell in its barrel casing. McGee also indicates that despite Mitchell's testimony at trial that he shot her after she stepped out of the bathroom and began yelling at him, she was impeached on cross-examination with previous statements she made that McGee shot her after she put on her shoes, and that McGee picked up the gun, cocked it, and fired it at her. Moreover, McGee maintains that the accounts of Brown and Mitchell differed regarding the walk to and from the grocery store. Similar to our conclusions regarding Brown's testimony, we find any inconsistencies in Mitchell's testimony minor, and also find that the testimony of Mitchell and Brown are consistent with each other on the material aspects of the incident. Furthermore, it was for the jury to determine the credibility of the witnesses, and it clearly found the State's witnesses more credible than the defense witnesses. We see no reason in the record to upset the jury's verdict finding that the shooting was intentional. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009) (a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses).

¶ 29 McGee finally contends that the trial court used a factor inherent in the offense of attempted first degree murder as an aggravating factor at sentencing. McGee specifically maintains that the court relied on the seriousness of the harm inflicted upon the victim, a factor which was inherent in the offense of attempted first degree murder. McGee urges this court to reduce his 42-year sentence to the statutory minimum of 31 years.

¶ 30 McGee concedes that he waived this issue on appeal by failing to include this specific issue in his motion to reconsider sentence. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1998). A forfeited argument regarding sentencing, however, may be reviewed for plain error. *People v. Freeman*, 404 Ill. App. 3d 978, 994 (2010), citing *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

In order to obtain relief under the plain error doctrine, a defendant must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545. In the sentencing context, a defendant must then show either that (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. *Id.* Under both prongs of the doctrine, the defendant has the burden of persuasion. *Id.*

¶ 31 Here, McGee failed to satisfy his burden to establish plain error. McGee was eligible for life in prison because he committed attempted first degree murder by personally discharging a firearm causing "great bodily harm." See 720 ILCS 5/8-4(a) (West 2012); 720 ILCS 5/9-1(a)(1) (West 2012). The sentencing range derives from the combination of the 6- to 30-year range for the Class X felony of attempted first degree murder (730 ILCS 5/5-4.5-25(a) (West 2012)), with the mandatory addition of a 25-year to natural life term for committing this crime by firing a firearm and causing great bodily harm (720 ILCS 5/8-4(c)(1)(D) (West 2012)). Therefore, the sentencing range applicable to this offense was 31 years to life in prison. Accordingly, the 42-year sentence imposed represents 11 years over the minimum and 19 years less than the maximum for the Class X felony, combined with the minimum mandatory 25-year statutory enhancement.

¶ 32 In fashioning a sentence, a trial court cannot consider a factor that is an element of the offense as an aggravating factor. See *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). "The rule that a court may not consider a factor inherent in the offense is not meant to be applied rigidly because sound public policy dictates that a sentence be varied in accordance with the circumstances of the offense." *People v. Cain*, 221 Ill. App. 3d 574, 575 (1991)." *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2008). A trial court is not required to articulate its reasoning for the sentence imposed (*People v. Jones*, 2014 IL App (1st) 120297, ¶ 55) and "the reviewing

court should not focus on a few words or statements made by the trial court, but is to consider the record as a whole." *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007). Further, a trial court is not obligated to give greater weight to mitigating factors than to the seriousness of the offense and the presence of mitigating factors neither requires a minimum nor precludes a maximum sentence. *Jones*, 2014 IL App (1st) 120297, ¶ 55.

¶ 33 From the 10-page transcript of the court's ruling, McGee contends the court improperly considered only the serious bodily harm to Mitchell in imposing more than the minimum sentence. In imposing sentence, the court meticulously enumerated and commented on each statutory factor in mitigation and aggravation. 730 ILCS 5/5-5-3.1 (mitigation), 5-5-3.2 (aggravation) (West 2012). Regarding the statutory aggravating factor of whether McGee's "conduct caused or threatened serious harm," (730 ILCS 5/5-5-3.2(a)(1) (West 2012)), the court commented "certainly it did" and explained that Mitchell was now confined to a wheelchair for life. The court also found that McGee did not have a significant criminal history but observed that he had a minor background with domestic batteries noted in the presentence investigation report. Throughout its comments, the court referenced the tragedy for both Mitchell and her family as well as McGee and his family that resulted from McGee's decision to carry and use a gun. The court also explained:

"I don't mean to belittle the seriousness of the act by saying it was a stupid decision, I mean that does seem to even belittle the act, itself. I mean, the jury, based on the evidence, I thought appropriately found that what you did was an intentional act, and it wasn't an accident, it had been building throughout the course of the evening, but, you know, in that split second, you made a decision that's put you where you're at today. Again, I don't buy that you were a good samaritan at the scene. That's not what the evidence showed. You didn't run at that time, but there was another individual who would have called 911, the eye-witness that we heard from who was present there. *** The evidence showed quite clearly that you made a decision at that moment to take out

the gun and pull the trigger and basically turn everybody's life upside down. *** [T]he point is it is a horrible thing that happened because of your action and the choice that you made couldn't have be[en] more serious."

¶ 34 McGee faults the trial court for acknowledging that his conduct caused serious harm to Mitchell because she was confined to a wheelchair for the rest of her life and had endured many surgeries and procedures. But when the court's comments are placed in context, it is apparent that the court did not improperly impose sentence based solely on the great bodily harm element of the offense. Rather, the court's comments focused not on the *fact* of great bodily harm—the element of the offense—but on the *extent* of the injuries suffered by Mitchell, which she must endure for the rest of her life. For sentencing purposes, a trial court may properly draw a distinction between great bodily harm from which a victim has recovered and great bodily harm resulting in permanent and disabling injuries. Further, McGee's arguments regarding the presence of mitigating factors is simply an invitation to re-weigh the factors considered by the trial court, which is not the function of a reviewing court. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010).

¶ 35 We further reject McGee's claim that trial counsel was ineffective for not objecting at the sentencing hearing to the court's consideration of the alleged improper aggravating factor where, for the reasons stated above, said claim would not warrant a different sentencing result.

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 37 Affirmed.