2018 IL App (2d) 150101-U
No. 2-15-0101
Order entered January 26, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-2719
DONALD FALLS,	)	Honorable Ronald J. White,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Because defense counsel's objection would have been futile, defendant failed to establish that counsel was ineffective by refraining from objecting to the admission of a receipt based on lack of chain of custody; defendant failed to established ineffective assistance of counsel where, based on the totality of the circumstances, a motion to suppress a witness's identification of defendant in a photo lineup would have been unsuccessful; trial court did not abuse its discretion by sentencing defendant to a term of life imprisonment for first-degree murder where it considered the appropriate mitigating and aggravated factors and the seriousness of the crime; defendant failed to establish that the 25-to-life firearm enhancement is unconstitutionally vague; and because there were at least two separate victims, the one-act, one-crime rule did not apply to defendant's convictions for first-degree murder and aggravated discharge of a firearm; trial court affirmed.

¶ 2 After a jury trial, defendant, Donald Falls, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2 (West 2010)) and sentenced to life imprisonment and a concurrent term of 15 years' imprisonment, respectively. Defendant argues that (1) the trial court erred by admitting into evidence a receipt without an adequate chain of custody being established, (2) he was denied effective assistance of counsel where defense counsel failed to object to the admission of a receipt and failed to move to suppress a witness's identification of defendant during a photo lineup, (3) his sentence for his murder conviction of natural life in prison was excessive, (5) the 25-years-to-life firearm sentencing enhancement is unconstitutionally vague, and (5) his sentence for his conviction for aggravated discharge of a firearm must be vacated on one-act, one-crime grounds. We affirm.

¶ 3 I. BACKGROUND

¶ 4 During the jury trial, Damen Cash testified as follows. On the evening of September 28, 2011, Cash was the backseat passenger behind the front passenger seat in a black car driven by Desiree Beach. Harold Anding, nicknamed "Black," owned the car and sat in the front passenger seat. They drove around Rockford for a while doing errands and eventually made a right turn on Prairie Street. At that point, Cash heard gunfire and "hit the floor" to avoid being shot. Cash heard gunshots, glass breaking, and Ms. Beach screaming. The gunshots lasted about 15 to 20 seconds. Cash stayed on the floor of the car the entire time of the shooting and did not see anything. After the shooting stopped Cash told Beach how to get to the hospital. Once they arrived at the hospital, Cash never saw Anding alive again.

¶ 5 Larry Blum, M.D., an expert in forensic pathology, testified that he performed an autopsy on Anding, who was 30 years old when he died, and that Anding died from multiple gunshot wounds. Blum also testified that 13 bullets were recovered from Anding's body and there were

48 separate gunshot wounds on his body, "that is, holes where bullets had either gone in or come out of Anding's body."

¶ 6 Detective David Cone of the Rockford Police department testified that 27 nine millimeter shell casings were recovered from the crime scene as well as one bullet and one bullet fragment.

¶ 7 Jaci Arbisi testified as follows. On September 28, 2011, Arbisi lived on Fourth Street in Rockford, "right next" to North Sixth Street and Prairie. At 5 p.m. on the day of the shooting, Arbisi was on her next-door neighbor's front porch when she heard four gunshots. She grabbed her cell phone, called 911, ran toward the direction of the gunshots, and heard 20 or more shots. Looking towards the direction of the gunshots—Prairie Street—she saw a gold vehicle stopped at the stop sign and "a black Lincoln behind it." A black man stood behind his car, in between the vehicles, yelling at the black vehicle "I'm going to kill you," and he started shooting again, towards the passenger side of the vehicle. Arbisi did not see the shooter's gun but knew that the shooter had a gun by the way "he had his hands out, both of them;" hands clasped together with arms straight out. No one shot back at the shooter. Then, the black vehicle moved in reverse. Arbisi testified that "[t]he female driver got out and started yelling, and the black shooter turned around and ran to his vehicle and got in and sped off." The black car's windshield was "all shot up."

¶ 8 Arbisi testified that she saw the shooter's face, he wore a red shirt, and "was a few inches taller than me, and I'm five-five." Over the red shirt the shooter wore "a brown, tan jacket, [a] hoodie." The female driver and the passenger of the black car were black. Arbisi did not see anyone else in the black car. It was daylight. Arbisi's view of the shooter was unobstructed. Arbisi did not see anything that indicated the models of the cars.

¶ 9 Later, in the early hours of September 29, 2011, two police officers showed Arbisi a photo lineup at her home. After being shown People's Exhibit 4B, Arbisi testified that she

recognized it as the photo lineup she was shown on September 29, because she had "initialed the ones that was not the suspect" and "circled and signed and dated and timed that one that I thought was the suspect." Arbisi confirmed that the man she identified in the photo lineup was the man who shot at the black vehicle.

¶ 10 The trial court admitted into evidence the photo lineup, People's Exhibit 4B, without objection by defense counsel. The trial court published the photo lineup to the jury without objection by defense counsel.

¶ 11 During cross-examination, Arbisi testified as follows. She originally described the shooter's car as a Honda Civic. She saw the shooter fire shots into a window on the passenger side of the black car. When the police arrived the two cars were gone. Arbisi described the shooter to a police officer as a black man, wearing a red shirt, but she did not tell the officer that the shooter was wearing a tan or brown jacket.

¶ 12 Defense counsel showed Arbisi the photo lineup, People's Exhibit 4B. When police detectives showed Arbisi the photo lineup she originally identified defendant, or photo number three. At one point Arbisi told one of the detectives, Detective Darin Spades or "Solis," that the shooter could be a different suspect in the lineup, or photo number four. Spades then told Arbisi that it is sometimes helpful to cover the photos of men that she had eliminated. Spades gave Arbisi pieces of paper and allowed her to cover the photos of those she had eliminated, and Arbisi covered photos two and five. Defense counsel gave Arbisi pieces of paper, and she demonstrated her actions in the courtroom. Arbisi testified that, after looking for a while, she told the detectives that she had a problem because the man in photo number three wore a red shirt and she remembered that from the crime scene. A detective gave Arbisi a piece of paper to cover the clothing of defendant, depicted in photo number three. In the courtroom defense counsel gave Arbisi a piece of paper, and she demonstrated her action. Arbisi testified that she

identified defendant again as the shooter. She stated that the person she identified as the shooter in the photo lineup was the only person wearing a red shirt, and during the photo lineup, she could not get the red shirt out of her head even when she covered up the shirts depicted in the photos with paper.

¶ 13 On redirect examination Arbisi testified that when she first identified defendant as the shooter during the photo lineup, the fact that he wore a red shirt was not "important at all." What was important was defendant's face. Arbisi testified that defendant was wearing a blue shirt in court and she identified him, again, as the shooter.

¶ 14 Caleb Olson and Christopher Willis testified as follows. Olson lived in the upstairs apartment on North Sixth Street in Rockford, and Willis lived in lower apartment. On the day of the shooting, just before 5 p.m., Olson and Willis were home; they heard gunshots and went to their windows to look outside. Olson and Willis saw two cars on the street: a tan car parked at the stop sign at Prairie Street, and a black car parked behind the tan car. Olson only saw the trunk and back bumper of the tan car and described it as an older, later 1990s Toyota Corolla. Willis described it as "tannish or brownish," a late 1990s Camry or Volvo.

¶ 15 Olson and Willis also testified as follows. The man from the tan vehicle got out of his car and shot at the black car from in between the two cars. Willis testified that the shooter had a black gun with an extended ammunition clip. Willis described the shooter as an Africa-American man, kind of stocky, 20 to 25 years old, with short hair and a medium complexion, wearing a tan zip-up hooded jacket and blue jeans, and probably 5'7" to 5'8" tall. Olson heard at least 15 gunshots and Willis estimated that he heard about 20 to 25 gunshots. Both Olson and Willis described the shooting as happening very fast, 30 seconds to one minute. After the shooting Olson went outside and saw that the black car had holes in the windshield and

hood on the passenger side. Olson and Willis could not identify the shooter when they were shown a photo lineup.

¶ 16 On April 15, 2012, Officer Justin Carder of the Charleston, Illinois, police department received a report from a towing business that a black male "got into one of their tow trucks without permission" and drove it. Carder was near the location that dispatch had reported that the suspect had driven the tow truck. A black male who matched the description provided by dispatch ran towards Carder. Carder identified defendant in court as the man he saw running toward him that day. As defendant ran, Carder identified himself to defendant as a police officer and told defendant to stop. Defendant turned toward Carder and then ran off. When defendant turned toward Carder, an item fell out of the pocket of defendant's pants. Carder ran after defendant and advised him to stop "multiple times." Carder caught defendant about two blocks away after Police Sergeant Kenneth Pollum arrived and blocked the street with his squad car. Carder and Pollum placed defendant in custody and put him in handcuffs. They also searched defendant for identification but found none.

¶ 17 Carder testified that defendant told the officers that his name was Tedrick R. Johnson with a birth date of December 22, 1988. Carder ran that name and birth date through dispatch and was "advised that it was clear and valid." Pollum placed defendant in the squad car, and Carder retraced his and defendant's path because Carder saw an "item come out of [defendant's] pocket" and "wanted to see what it was." Carder eventually found the item, which was defendant's Illinois state driver's license with his photo and name; Donald Falls. After running defendant's name through dispatch, Carder learned that defendantg had an outstanding warrant for murder in Rockford.

¶ 18 Sergeant David Lee of the Rockford police department testified as follows. Lee learned that on April 15, 2012, defendant was taken into custody by the Charleston police. Winnebago

County sheriff deputies then transported defendant and his property to the Winnebago County public safety building in Rockford (public safety building). On April 20, 2012, at the public safety building, Lee looked at defendant's property, which included defendant's wallet. Lee "located a receipt in [defendant's] wallet." After Lee was shown what was marked as People's exhibit No. 35, he stated "[t]hat is the receipt that I recovered that day. It's a receipt from Warshawsky's Muffler Shop." Lee also testified that the receipt was recovered from defendant's wallet. Lee knew the wallet and receipt belonged to defendant because the officers or deputies from the Winnebago County sheriff's department told Lee that the items were defendant's property and handed the items to Lee. When the prosecutor asked Lee how he was able to recognize the receipt as being the same one that Lee recovered from defendant's wallet, Lee replied: "Because I placed it into evidence and it was placed into this envelope here, and I have my initials on here, and it's got the case number that's associated with it." Lee testified that the envelope also had the time that he sealed the evidence bag. The receipt appeared to be in the same or substantially the same condition as when he collected it on April 20, 2012.

¶ 19 At this point in the proceedings, the State moved to admit the receipt into evidence. The trial court asked defense counsel if he objected and defense counsel replied, "[t]o admittance, no." The trial court admitted the receipt, "without objection."

¶ 20 Over defense counsel's objection, Lee testified that he observed defendant's phone number on the Rockford and Charleston police reports and the muffle shop receipt. Over defense counsel's objections, Lee stated defendant's phone number as listed on those documents. Over defense counsel's continued objection, Lee also testified that the muffler shop receipt indicated that it was for a 1992 BMW 325i. The receipt was dated August 12, 2011.

¶ 21 At this point, the following colloquy occurred:

"MR. KASATZKY [Defense Counsel]: There is another issue here, and this may be a little more subtle in regards to this. They have been allowed, in regards to People Exhibit No. 35, a wallet of [defendant] - - there was no wallet inventoried and testified by Charleston. He's all of a sudden testifying that he received a wallet. It is hearsay that it was his wallet.

THE COURT: Well, it's been recovered. He received it.

MR. KASATZKY: It has not been recovered, though.

THE COURT: Wait. You have the wallet. It's been testified to. They opened it up and it had the defendant's information so it's - -

MR. KASATZKY: No, they did not say that it - -

THE DEFENDANT: They - -

MR. KASATZKY: Donald, enough.

THE COURT: It's in. It's in. You should have made the objection at that time.

MR. KASATZKY: Well, I did, actually. And, in regards to the wallet, not a receipt - - I wasn't talking about a receipt. I was talking about a wallet. They're talking about a wallet, and there is no information at all regarding a wallet from Charleston. And - -

THE COURT: What is your objection?

MR. KASATZKY: Well, he's testifying he got a wallet from the Charleston Police Department. Charleston Police Department didn't say that they gave him a wallet. He just - - he got a receipt of it. It hasn't been connected to [defendant].

THE COURT: Well the wallet is there. There is information that's been testified to. The officer said he received something, and he looked inside, and recovered what he recovered. So, your objection is overruled on this issue.

MR. KASATZKY: Okay."

¶ 22 Lee continued to testify as follows. After searching the Illinois Secretary of State's database, Lee determined that a tan, 1992 four-door BMW 325i, was registered to Latricia Falls of Rockford. The State also presented a certified copy of a vehicle abstract for a tan 1992 BMW 325i, registered to Latricia Falls with a purchase date of August 3, 2011. The vehicle was never recovered. Lee further testified that Latricia visited defendant four times while he was in jail.

¶ 23 Jonathon Spates testified as follows. At the time of trial, Spates was in federal custody on a federal drug conspiracy conviction and a separate charge of possession of firearm in furtherance of drug trafficking crimes. Spates also had a prior Class X drug conviction in Illinois from 2007, as well as a prior conviction for conspiracy to commit armed robbery in 2007 and a prior conviction for conspiracy to commit armed robbery in 2005. Spates served time in prison for those crimes. Spates entered into an agreement with the federal prosecutor to offer cooperation and substantial assistance. Spate's federal sentence was originally 190 months. Pursuant to Spate's agreement, he testified against two other individuals on two separate occasions. In 2014, his sentence was reduced from 190 months to 145 months, which is less than the minimum sentence. At the time of the trial, Spates had not received any consideration for testifying in defendant's case and had not been promised anything. Spates admitted that he hoped he would be eligible for a further reduction in his sentence but that it was up to the federal prosecutor and judge to decide.

¶ 24 Spates further testified that he met defendant in 2007. From the spring of 2009 through August 2011, Spates and defendant were good friends and they spent time together every day. Around August 2011 Spates saw defendant in Rockford with a 9mm handgun with an extended clip. Defendant told Spates that the handgun held about 30 rounds of ammunition. Also, around August 2011 while defendant and Spates drove around Rockford, defendant pointed at a brown

house on Longwood and said he was "gonna kill the dude" that lived there. Defendant told Spates that the guy's name was "Black" and that defendant fronted "Black" eight pounds of marijuana, but "Black" did not pay defendant and told defendant he had been robbed. Defendant told Spates that he tried to give "Black" another chance by giving him $12,000, because "Black" said he could get marijuana for a cheaper price. Defendant told Spates that he and "Black" went to a house to make the purchase, defendant gave the money to "Black," and "Black" went into the house but never came back out to the car. Defendant told Spates, "I'm goin' kill [Black] when I catch him. He think I'm a bitch, he try to play me." In mid-October 2011, defendant called Spates and told Spates that there was a warrant out for his arrest. Defendant also told Spates, "I got him." When Spates questioned defendant, he replied, "[y]eah, I got that bitch ass n****r. I shot him like 11 times." Defendant told Spates he shot "Black" with the nine millimeter gun with the extended clip. Defendant also told Spates that a female saw the shooting, so he was hiding out in Chicago and was going to shoot the female witness when he caught her. Spates testified that defendant had a late 80's or early 90's gold BMW or Mercedes. Defendant told Spates that the car was in the name of a female cousin.

¶ 25 Natalie Sterling, a compliance analyst for Neustar, a company that handles subpoenas, warrants, and court orders for Cricket Communications, a cell-phone or wireless provider, testified as follows. Sterling reviewed the subscriber and phone records of defendant and Anding, or "Black's," cell phones. According to the phone records, on the day of the shooting a call was made from defendant's phone at 4:51 p.m. and defendant received a call at 5:04. Both calls were transmitted from a cell tower located about one mile east of the scene of the shooting and about one mile west of defendant's home. Also, on the day of the shooting, Anding received a call at 4:23 p.m. from the same cell tower as defendant's calls.

¶ 26 During closing argument the prosecutor noted that witnesses saw a gold or tan foreign car at the scene of the shooting and that a receipt in defendant's wallet linked him to such a car.

¶ 27 Defense counsel argued that only Arbisi identified defendant as the shooter and that she was manipulated by the identification process. Counsel also argued that Spates was not a reliable witness because he testified in exchange for a reduced sentence and that the 1992 BMW did not match the witnesses' description of a late 1990's Honda or Toyota.

¶ 28 The jury found defendant guilty of first degree murder of Anding, personally discharging a firearm that proximately caused death, and aggravated discharge of a firearm for firing into an occupied vehicle. The jury found defendant not guilty of attempt murder of Beach and Cash and aggravated discharge of a weapon for firing in the direction of Beach and Cash.

¶ 29 On January 8, 2015, defendant filed a motion for a new trial. On January 27, 2015, the trial court denied defendant's motion for a new trial and, after hearing and considering factors in mitigation and aggravation, sentenced defendant to life imprisonment for the first degree murder conviction and a concurrent sentence of 15 years imprisonment for the aggravated discharge of a firearm conviction.

¶ 30 On January 27, 2015, defendant filed a motion to reconsider sentence, which the trial court denied the same day. Defendant filed a notice of appeal on January 27, 2015.

¶ 31 II. ANALYSIS

¶ 32 A. Admission of Evidence

¶ 33 Defendant argues that the trial court erred by admitting the muffler shop receipt into evidence because the State failed to establish a chain of custody. However, defendant failed to properly preserve this issue for appeal. A defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review. *People v.*

Enoch, 122 Ill. 2d 176, 186 (1988)). If a defendant fails to satisfy either prong of this test, his challenge is considered waived on appeal. *Id.* Our supreme court explained:

> "This rule is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level." *People v. Woods,* 214 Ill. 2d 455, 470 (2005).

¶ 34 Defendant contends that he preserved this issue because he objected to the admission of the wallet that contained the receipt. The record indicates that defendant indeed objected to the wallet, but not the receipt. Defendant explained his objection to the court by stating,"[a]nd in regards to the wallet, not a receipt - - I wasn't talking about a receipt. I was talking about a wallet." Further, when the State moved to admit the receipt into evidence and the trial court asked defense counsel if he objected, defense counsel replied, "[t]o admittance, no." Accordingly, because defendant failed to object at trial to the admission of the receipt, this issue is waived. See *id.* at 470.

¶ 35 B. Ineffective Assistance of Counsel

¶ 36 Defendant argues that he was denied effective assistance of counsel because defense counsel failed to object to the admission of the muffler shop receipt based on lack of foundation.

¶ 37 Illinois courts evaluate ineffective-assistance-of-counsel claims under the test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). See *People v. Albanese,* 104 Ill. 2d 504, 525-27 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability that, but for defense counsel's unprofessional errors, a different result would have been achieved. *Strickland,* 466 U.S. 668 at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

Mere conjecture and speculation is not sufficient to establish this probability. *People v. Gosier*, 165 Ill. 2d 16, 24, (1995). Because a defendant's failure to establish either part of the *Strickland* test will defeat an ineffectiveness claim, a court need not address both components of the inquiry if the defendant makes an insufficient showing on one component. *Strickland*, 466 U.S. at 697. Accordingly, a court considering a claim of ineffective assistance "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697.

¶ 38 Here, there is no merit behind the objection that defendant asserts trial counsel should have made, and an objection would not have prevented the admission of the muffler shop receipt based on a lack of foundation. Evidentiary rulings are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009). As noted above, the party seeking to introduce an object into evidence must lay an adequate foundation in one of two ways: (1) by a witness identifying the object; or (2) by a chain of possession. *People v. Woods*, 214 Ill. 2d 455, 466 (2005). If the object " has readily identifiable and unique characteristics, and its composition is not easily subject to change," then the proponent of the evidence lays an adequate foundation by having a witness testify that the object being admitted is the same object recovered and that it is in substantially the same condition as when it was recovered. *Id.* If, however, the object is "not readily identifiable or may be susceptible to tampering, contamination or exchange," then the proponent of the evidence must establish a chain of custody to prove that the object being admitted is the same object that was recovered. *Id*. at 467 (heroin). See *People v. Alsup*, 241 Ill. 2d 266, 274 (2011) (cocaine and heroin). Once the State has established this

prima facie case, the burden shifts to the defendant to show actual evidence of tampering, alteration, or substitution. *Alsup*, 241 Ill. 2d at 274-75.

¶ 39 In the case at bar, we determine that the State established a sufficient foundation for admission of the muffler shop receipt through witness identification. At trial, Sergeant Lee testified that the receipt introduced by the State without objection by defense counsel was the same receipt he had placed into an evidence bag in April 20, 2012. The receipt was dated, had a description of a car, a BMW 325i, and the name of a repair shop. Lee testified that it looked the same as it did when he placed it in the evidence envelope after having received it and defendant's wallet from the Charleston police. Defendant now argues that counsel was ineffective for failing to object to the introduction of the receipt on the ground that the State could not show a sufficient chain of custody. However, as mentioned above, the State did not need to show a chain of custody because the receipt was readily identifiable and its composition was not easily subject to change. See *Woods*, 214 Ill. 2d at 466. See also *People v. Arbo*, 213 Ill. App. 3d, 823 (1991) (chain of custody evidence was not needed where the trial court admitted envelopes and receipts based on identification testimony). Because defense counsel's objection would have been futile, defendant cannot establish that counsel acted unreasonably by refraining from objecting to the admission of the receipt based on lack of chain of custody. See *People v. Lawton*, 212 Ill. 2d 285, 303 (2004) (It is axiomatic that a defense counsel will not be deemed ineffective for failing to make a futile objection).

¶ 40 Defendant also argues that he was denied effective assistance of counsel because defense counsel failed to move to suppress Arbisi's identification of defendant in a photo lineup. To prevail on a claim that his trial counsel was ineffective for failing to file a motion to suppress a pretrial lineup identification, a defendant bears the burden of showing that the motion to suppress would have been granted and that the trial outcome would have been different if the evidence had

been suppressed. *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010). A witness's pretrial identification of an accused will not be suppressed unless the identification procedure employed was unnecessarily suggestive and there was a substantial likelihood of irreparable misidentification such that he was denied due process. *Id.*

¶ 41 Defendant asserts that the photo lineup was impermissibly suggestive because he was the only person wearing a red shirt, Arbisi described the offender as wearing a red shirt, and the detectives encouraged Arbisi to continue looking at the photo lineup after she expressed doubt.

¶ 42 In *United States v. Wade*, 388 U.S. 218 (1967), the United States Supreme Court addressed the issue of unnecessarily suggestive lineup procedures. Situations in which an accused is prejudiced by the lineup procedures may include:

> "that all in the lineup but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance to the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect." *Wade*, 388 U.S. at 233.

¶ 43 A court must look to the totality of the circumstances surrounding the identification to determine whether due process is violated. *People v. Johnson*, 149 Ill. 2d 118, 147 (1992). "The theme running through all [the *Wade* court's] examples is the strength of suggestion made to the witness. Through some specific activity on the part of the police, the witness is shown an individual who is more or less spotlighted by the authorities." *Id.*

¶ 44 Here, while defendant was the only one wearing a red shirt, there is no indication that this was by design. Defendant cannot establish improper influence here where he simply wore his

own clothing in the photo lineup. See *id*. at 148. In addition, the photographic array included five photographs of other men of the same approximate age, skin tone, and short dark hair. Further, although the detectives asked Arbisi to continue looking at the photo lineup after she expressed doubt, she had already identified defendant. There is nothing to indicate that detectives made a suggestion to Arbisi in identifying defendant either in the photographic array or in the courtroom. See *id*. at 147-48. Accordingly, based on the totality of the circumstances, we determine that a motion to suppress Arbisi's identification of defendant in the photo lineup would have been unsuccessful in this case.

¶ 45 Defendant also cites section 725 ILCS 5/107A-5(c) (West 2014) (repealed by p.a. 98-1014, § 15, eff. Jan. 1, 2015), of the Code of Criminal Procedure of 1963, to support his argument. Section 107A-5 of the Code of Criminal Procedure provided:

> "(c) Suspects in a lineup or photo spread should not appear to be substantially different from 'fillers' or 'distracters' in the lineup or photo spread, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect." 725 ILCS 5/107A-5(c) (West 2014) (repealed by P.A. 98-1014, § 15, eff. Jan. 1, 2015).

¶ 46 The statute provides no indication that a violation of section 107A-5(c) requires suppression of identification testimony regarding the photo lineup. See *Faber*, 2012 IL App (1st) 093273, ¶¶ 47-49. Therefore, trial counsel's decision not to file such a motion was a matter of professional judgment and does not support defendant's claim of ineffective assistance of counsel. See *Gabriel*, 398 Ill. App. 3d at 348.

¶ 47 Defendant's reliance on *People v. Smith*, 232 Ill. App. 3d 121 (1992), and *People v. Maloney*, 201 Ill. App. 3d 599 (1990), to support his argument is misplaced. In *Smith*, the appellate court affirmed the trial court's suppression of witnesses' in-court identification of

defendant as the offender. The appellate court reasoned, in part, that after the three witnesses identified the defendant in a lineup, police "officers told each of them that they picked the right man, [which] bolstered the witnesses' identifications of defendant in their own minds. *Smith*, 232 Ill. App. 3d at 130. In this case, we are not reviewing whether the trial court erred by suppressing a witnesses' in-court identification. Further, the record does not indicate that police officers bolstered Arbisi's identification of defendant. Thus, *Smith* is distinguishable from this case.

¶ 48 In *Maloney*, all the suspects in the lineup wore clean well-pressed clothing, shoes, socks and wristwatches and were "well-groomed," except the defendant. *Maloney*, 201 Ill. App. 3d at 606-07. The defendant wore a "wrinkled, dark brown and/or extremely soiled [night]shirt, *** wrinkled blue slacks," shoes but no socks, no wristwatch, was "unkempt," and his hair was "uncombed." *Id*. at 607. In this case, although defendant is the only one wearing a red shirt, the other men in the photo lineup, generally appear similar to defendant: they are wearing similar casual shirts of various colors, have different but informal hair, and appear to be of similar age to defendant. Therefore, *Maloney* is distinguishable.

¶ 49 C. Sentence For First-Degree Murder Conviction

¶ 50 1. Excessive Sentence

¶ 51 Defendant urges this court to vacate his sentence for his conviction of first-degree murder and to reduce his sentence, arguing that his sentence of natural life is excessive because the trial court failed to consider his potential for rehabilitation, lack of a violent criminal background, and other mitigating factors. Defendant notes that he has strong family ties, had earned his GED, and had some work history.

¶ 52 The State argues that the trial court did not abuse its discretion in sentencing defendant because it considered all factors in aggravation and mitigation, and the sentence was permissible under the relevant statutes.

¶ 53 Under Illinois Supreme Court Rule 615(b)(4), a reviewing court may reduce the punishment imposed by the trial court. Ill. S. Ct. R 615(b)(4) (eff. Jan. 1, 1967). However, where a trial court's sentencing determination is within the statutory range for a criminal offense, a reviewing court has the power to disturb the sentence only if the trial court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A trial court is granted such deference because, having observed the defendant and the proceedings, it has the opportunity to weigh factors such as the defendant's demeanor, general moral character, mentality, social environment, habits, and age, whereas the reviewing court must rely on the cold record. *Alexander*, 239 Ill. 2d at 212-13 (citing *People v. Fern*, 189 Ill, 2d 48, 53 (1999)); see also 730 ILCS 5/5-5-3.1 (West 2014) (providing mitigating factors). Therefore, a sentence will be deemed an abuse of discretion where it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Alexander*, 239 Ill. 2d at 212 (citing *Fern*, 189 Ill. 2d at 54).

¶ 54 The sentencing range for first-degree murder is 20 to 60 years. 730 ILCS 5/5-4.5-20(a) (West 2010). However, because the jury found that defendant "personally discharged a firearm that proximately caused" Anding's death, the mandatory firearm enhancements statute required the trial court to add "25 years or up to a term of natural life" to defendant's prison term. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). Accordingly, the sentencing range for defendant's offense was 45 years to a term of natural life in prison. *Id*. Here, the trial court sentenced defendant to natural life, a term permitted by the sentencing statute.

¶ 55 Further, nothing in the record supports defendant's contention that the trial court failed to consider the applicable mitigating factors that defendant identifies or failed to consider his rehabilitative potential. The record indicates that the trial court was well aware of the mitigating factors identified by defendant on appeal. The pre-sentence report, which the trial court had in its

possession and stated it had thoroughly reviewed and considered, included information regarding defendant's family and his criminal, work, and educational history. In addition, defendant's contention that the trial court failed to consider his non-violent criminal record is belied by the record. The record reveals that the trial court was well aware of defendant's "involvement with the criminal justice system," which included three felony convictions: possession with intent to deliver cannabis, aggravated unlawful use of a weapon, and unlawful use of a weapon by a felon.

¶ 56 Defendant fails to recognize that rehabilitative potential of a defendant is only one of the factors that a trial court needs to weigh in deciding a sentence, and it does not need to expressly outline its reasoning for sentencing or explicitly find that the defendant lacks rehabilitative potential. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007). Furthermore, the existence of mitigating factors does not automatically require the sentencing court to reduce the sentence from the maximum. *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 133. The most important sentencing factor is the seriousness of the offense. *Evans*, 373 Ill. App. 3d at 968.

¶ 57 Regarding the seriousness of the offense the trial court noted that defendant's "premeditated" murder of Anding "showed a complete disregard for human life" by shooting Anding 13 or more times and threatening the lives of the two other people in the car as he "riddled" the car with shots. The trial court also noted that defendant then "boasted" about the murder, which was motivated by the victim's failure to pay defendant after he "fronted [the victim] eight pounds of weed," and that defendant was involved in the culture of guns, drugs, and violence, and also planned to kill the female driver of the car, Desiree Beach.

¶ 58 We conclude that there is nothing in the record to indicate that the trial court failed to consider the applicable mitigating factors or defendant's rehabilitative potential. Given the trial court's consideration of the facts of this case as well as the factors in aggravation and mitigation, we cannot say that defendant's sentence is "greatly at variance with the spirit and purpose of the

law or manifestly disproportionate to the nature of the offense." *Alexander*, 239 Ill. 2d at 212. Accordingly, we determine no abuse of discretion in the length of defendant's sentence for his conviction of first-degree murder.

¶ 59 2. Firearm Enhancement

¶ 60 Defendant argues that the 25-years-to-life firearm sentencing enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2014)) is unconstitutionally vague and asks this court to vacate his sentence and remand for resentencing with instructions to disregard the firearm enhancement.

¶ 61 A vagueness challenge is a due process challenge that asks the court to determine whether the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *People v. Einoder*, 209 Ill. 2d 443, 450 (2004). Due process requires that a criminal statute "provide explicit standards to regulate the discretion of governmental authorities who apply the law." *People v. Maness*, 191 Ill. 2d 478, 484 (2000). A statute is unconstitutionally vague if its terms are so ill-defined that their meaning will ultimately be determined by the opinions and whims of the trier of fact rather than any objective criteria. *Einoder*, 209 Ill. 2d at 451. The constitutionality of a statute is "a pure question of law" and, therefore, our standard of review is *de novo*. *People v. Aguilar*, 2016 IL 112116, ¶ 15.

¶ 62 Defendant argues that the statute offers no criteria to guide judges in imposing sentences within its broad range. Defendant contends that such guidance is particularly necessary to prevent arbitrary sentencing when the more severe penalties are at issue.

¶ 63 The appellate court recently decided this question in *People v. Butler*, 2013 IL App (1st) 120923, *appeal denied*, No. 116420 (Ill. Sept. 25, 2013). In *Butler* the appellate court held that the firearm enhancement statute is not unconstitutionally vague. *Id.* ¶ 41. The court acknowledged that the enhancement allows for a wide range of sentences; however, the trial

court has no discretion regarding whether to apply the enhancement and there is a clear and definite scope of the sentencing range, 25-to-life. *Id.* The court also determined that the standards for imposing the enhancement are clearly defined: the enhancement must be applied when a defendant commits first degree murder and discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death. *Id.* See also *People v. Sharp*, 2015 IL App (1st) 130438, *appeal denied,* No. 119084, (Ill. May 27, 2015) (following *Butler* and holding that the 25-to-life firearm enhancement is not unconstitutionally vague); *People v. Thompson,* 2013 IL App (1st) 113105, *appeal denied,* No. 116832, (Ill. Jan. 29, 2014) (stating, "[w]e find the reasoning of our recent *Butler* decision to be persuasive, and follow it to conclude that the 25-to-life firearm enhancement is not unconstitutionally vague"). Thus, we determine that the reasoning of these recent decisions regarding this issue is persuasive and conclude that the 25-to-life firearm enhancement is not unconstitutionally vague.

¶ 64 D. Sentence For Aggravated Discharge of a Firearm

¶ 65 Defendant argues his sentence for his aggravated discharge of a firearm conviction must be vacated on one-act, one-crime grounds because his conviction was based on the same physical act as his murder conviction. "Multiple convictions are improper if they are based on precisely the same physical act." *People v. Artis*, 232 Ill. 2d 156, 265 (2009) (citing *People v. King,* 66 Ill. 2d 551, 566 (1977)).

¶ 66 Defendant raises this argument for the first time on appeal and, therefore, the issue is forfeited. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). See also *People v. Leach*, 2011 IL App (1st) 090339 ¶ 29. However, defendant correctly contends that the issue may be raised as plain error. See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 67 The plain error rule allows a reviewing court to consider a trial error not properly preserved when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error

alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010) (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). The plain error rule allows the review of a waived error if either of the two prongs is satisfied. *Harvey*, 211 Ill. 2d at 389. "[A]n alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule." *Id*.

¶ 68 The threshold step in the analysis is to determine whether an error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). If we find that a one-act, one-crime error occurred, then it is reversible error under the second prong of the plain-error doctrine. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). However, the one-act, one-crime rule only applies to multiple convictions for acts against a single victim. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 30. Multiple convictions are proper when there are multiple victims. *Id.* See also *People v. Butler*, 64 Ill. 2d 485 (1976).

¶ 69 Defendant notes that he was acquitted of the charges of aggravated discharge of a firearm in the direction of Beach and Cash. Defendant, therefore, argues that the only remaining shots were fired at the victim, Anding. Defendant further argues that the State did not apportion the individual shots; rather, all the shots were part of the same continuous series of shots, and, therefore, the aggravated discharge conviction was based on the same physical act as the murder conviction, the most serious offense.

¶ 70 Defendant ignores the number of victims in this case. Anding, who, as the jury found, was murdered by defendant, was not the only victim; Beach and Cash were also threatened by

defendant. Both Beach and Cash occupied the vehicle defendant shot at approximately 23 times. Beach and Cash were subjected to the threat of being struck by the bullets that took Anding's life.

¶ 71 Defendant argues that Beach and Cash were not "victims" for purposes of supporting multiple conviction because he was charged under the portion of section 24-1.2(a)(2) of the Criminal Code of 1961 that defines the criminal act as being directed at the vehicle.

¶ 72 Defendant was convicted of aggravated discharge of a firearm by firing in the direction of an occupied vehicle under section 24-1.2(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.2(a)(2) (West 2010)). This section of the Code provides that a person commits the offense of aggravated discharge of a firearm "when he or she knowingly or intentionally *** [d]ischarges a firearm in the direction of another person or in the direction of a vehicle he or she knows or reasonably should know to be occupied by a person." *Id*. The plain language of the aggravated discharge of a firearm statute is phrased as being committed against an individual. See *People v. Pryor*, 372 Ill. App. 3d 422, 436 (2007) (interpreting similar language in the vehicular hijacking statute as allowing a separate count for each victim).

¶ 73 Here, Beach was "a person" that defendant "knew or reasonably should have known," "occupied" the vehicle because she sat behind the steering wheel as defendant shot through the windshield and at the hood of the car. See *Leach*, 2011 IL App (1st) 090339, ¶ 34. The evidence does not reveal whether defendant knew or should have known that Cash occupied the vehicle because the evidence indicates that, during the shooting, Cash was on the floor in the back of the vehicle. Thus, defendant's conviction for aggravated discharge of a firearm by firing in the direction of an occupied vehicle applies to at least two occupants of the vehicle, although only one conviction would result. In this case murdering Anding is not the same act as shooting at an occupied vehicle with multiple passengers. Because defendant did not commit multiple acts against a single victim, the one-act, one-crime rule does not apply to defendant's convictions for

first-degree murder and aggravated discharge of a firearm. Having found no error, there can be no plain error. See, *e.g.*, *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005).

¶ 74 Defendant cites *People v. Beltran*, 327 Ill. App. 3d 685 (2002), to support his argument. In *Beltran* the defendant was convicted of three counts of aggravated discharge of a firearm and three counts of attempt first-degree murder after the evidence revealed that he fired between five and seven shots at three men in a driveway, paralyzing one man, and "grazing" another man. *Id.* at 687-88. This court vacated defendant's convictions for aggravated discharge of a firearm reasoning that his convictions for attempt first-degree murder were based on the same acts. *Id.* at 693. We noted that "the indictments did not specify which shots supported which charge" and, therefore, "against each victim, [the] defendant committed a single act that supported only a single conviction." *Id.* Here, the indictment did not need to specify which shots supported which charge because unlike *Beltran,* defendant in this case was not charged with and convicted of murder and aggravated discharge of a firearm as to each victim. Rather, here, defendant's two convictions were supported by his acts against at least two separate victims. Thus, *Beltran* is distinguishable from this case.

¶ 75 III. CONCLUSION

¶ 76 For the reasons stated, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed statutory State's Attorney fees as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 77 Affirmed.