2011 IL App (1st) 090666-U

FOURTH DIVISION
November 23, 2011

No. 1-09-0666

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. 06 CR 26598
	)	
TRISTAN SCAGGS,	)	The Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

HELD: Where trial court erred in admitting recorded telephone conversations against defendant at trial in violation of coconspirator exception to hearsay rule due to State's failure to provide required independent evidence of conspiracy to commit murder, conviction for that crime must be reversed and sentence vacated; however, conviction for attempted first degree murder must be affirmed where: (1) trial court did not err in allowing testimony that vehicle in which defendant was riding was stolen, (2) defense counsel was not ineffective for failing to request lesser included offense instruction, and (3) State proved him guilty of this crime beyond a reasonable doubt.

¶ 1 Following a jury trial, defendant Tristan Scaggs (defendant) was convicted of attempted

first degree murder of a police officer and conspiracy to commit murder. He was sentenced to concurrent terms of 38 years and 15 years, respectively. He appeals, contending that: 1) the trial court erred in admitting out-of-court statements against him; 2) the trial court erred in responding to a jury question; 3) the trial court erred in allowing evidence of uncharged crimes against him; 4) the State failed to prove him guilty of conspiracy beyond a reasonable doubt; 5) his trial counsel was ineffective where he failed to request a lesser included offense instruction; and 6) the State failed to prove him guilty of attempted murder beyond a reasonable. He asks that we reverse his convictions. For the following reasons, we reverse in part and vacate the accompanying sentence, thereby correcting defendant's mittimus accordingly, and we affirm in part.

¶ 2 BACKGROUND

¶ 3 Defendant was charged with multiple offenses, including first degree murder, attempted first degree murder, and conspiracy to commit murder regarding an incident that took place on October 30, 2006. The indictments alleged that defendant entered into an agreement with codefendants (and coconspirators) Melvin Martin and Lamel Burns to kill Dwandric McDowell and that, in the course of this, defendant pointed a .9 millimeter semiautomatic pistol at Sergeant Michael Bocardo which led to the deaths of defendant's coconspirators Marcus Thomas and William Tyler, who were shot and killed at the scene. Defendant was tried simultaneously, but separately, with codefendants Martin and Burns; they elected a bench trial while defendant elected a jury trial.

¶ 4 Prior to trial, the State filed a proffer seeking to allow the admission of oral

communications among the coconspirators, including defendant, which were intercepted by police via electronic surveillance of multiple cellular telephone conversations had among the men. In this proffer, the State argued that these communications showed a conspiracy, that the statements contained therein were made in furtherance of that conspiracy and that, when viewed in conjunction with other evidence, this was sufficient to establish a conspiracy. The State also argued that it was not required to provide independent evidence outside the conversations and that the trial court could look at the conversations' content in making its ruling on the admissibility of the statements. Defendant, however, made several arguments for the denial of the admission of these statements at trial. In part, he argued that the conversations referred to some six different topics that had nothing to do with the crimes, that he was not even heard on any of the tapes until long after several of these conversations were had and, particularly, that independent evidence of a conspiracy, which was missing from this cause, was required in order for the statements to be admissible at trial.

¶ 5 The trial court denied the State's request regarding the proffer. The court stated that it had looked "repeatedly" at the coconspirators' statements and could not "make head nor tails out of what is being said." It further stated that it could not "find there is any kind of evidence of a conspiracy or a conspiracy to do anything."

¶ 6 The State filed a motion to reconsider the trial court's ruling. Upon reconsideration, the trial court reversed its ruling and granted the motion, finding that the State had "established by a preponderance of the evidence[,] if [it] can prove what [it] say[s it] can prove, the existence of a conspiracy." Accordingly, the court declared that it would "allow the State to put in[to evidence]

those conversations."

¶ 7 The cause then proceeded to trial. A plethora of witnesses testified during the State's case in chief. Officers Michael Cronin and Xavier Elizondo, gang experts, testified that a violent gang war was occurring in the summer of 2006 between the New Breeds and Traveling Vice Lords street gangs. McDowell was identified as a ranking member of the Traveling Vice Lords who controlled the area around Iowa and Pulaski. Identified as members of the New Breeds were codefendants Burns and Martin (ranking members), as well as Marquell Harper, Marcus and Markel Thomas and William Tyler; defendant was also identified as associated with the New Breeds. Some 20 shootings were exchanged between these rival gangs that summer, resulting in several murders.

¶ 8 In July 2006, a New Breed member shot at McDowell; he was not hit, but his sister was struck by a bullet in the foot. Markel Thomas was arrested and charged with the crime. Later, in October 2006, Harper, a New Breed, was shot and killed.

¶ 9 During this time, police obtained permission from the courts to conduct a wiretap of Martin's and Burns' cell phones. Detective Gregory Jacobson testified that he was one of the officers who listened to the calls as they were received. He stated that he heard a conversation on October 20, 2006 between Martin and an unidentified person discussing Markel Thomas' arrest for the shooting of McDowell's sister. Other calls included discussions about Tyler, who had been interviewed by police, and about Harper's recent murder.

¶ 10 Officer Eric Walker testified that, on October 29, 2006, he was working surveillance monitoring a black Pontiac Grand Prix. He stated that he saw a maroon van approach the Grand

Prix three times, and that a Pontiac Bonneville and another car arrived at the location. About seven men from these vehicles, including Burns and Martin, exited the vehicles and met in a nearby park for a while, whereupon they left the area.

¶ 11 Detective Jacobson further testified that police had initiated surveillance of the black Grand Prix back on October 22, 2006, after it was reported stolen. On the morning of October 30, 2006, Detective Jacobson intercepted a series of phone calls between Martin, Burns, Marcus Thomas and defendant. He stated that the men were discussing trying to get together at 3 p.m. that day to drive around; they also discussed "bust downs" and defendant mentioned that he was "looking for some b*tches to f*ck with," which Detective Jacobson interpreted to mean that the men wanted to look for rival Traveling Vice Lords to harm. That afternoon, Martin and Burns discussed Martin's "baby momma;" when Martin asked Burns "where she at," Burns replied that she was "where you were looking for it yesterday." Defendant called Martin and told him he was "fittin' to slide through that way and see what's up." He called again at 2:04 p.m. and told Martin he was "fittin' to slide now;" Martin told defendant he would need someone to ride with him. Minutes later, Martin called Burns and told him that someone would be in "motion" in about 10 minutes to "gather them," and Burns replied that "she just sitting." Burns called Martin at 2:24 p.m. and told him to "hold the horses for a hot second" because "she just got some company *** baby's daddy pulled up." Martin then called defendant and defendant asked him, "[y]ou all fitting to grab the gloves?" Martin replied that someone was doing that now;

defendant then called Burns and told him that "it's all good on the gloves."[1]

¶ 12 On cross-examination, Detective Jacobson admitted that McDowell's name was never mentioned during any of the recorded telephone conversations. He also admitted that the phone calls from October 30, 2006 first referenced a woman and then later a man, and only to a car and not a white van. He further admitted that he never heard words to the effect of "to kill him" and that, to his knowledge, the Grand Prix never drove on Pulaski that day.

¶ 13 Detective John Graham testified that on October 30, 2006, he was on surveillance of the "stolen" black Grand Prix, which was parked outside a building on West Walton. He stated that, at approximately 3 p.m., a gray Chrysler arrived and four men, including Burns and defendant, exited the vehicle and went inside the building. Burns later emerged and drove off in the Chrysler, while the three other men, including defendant, got into the Grand Prix and began to drive around.

¶ 14 McDowell testified that, as a member of the Traveling Vice Lords, he controls the area around Iowa and Pulaski and is present there on a daily basis. He verified the shooting of his sister earlier that summer and identified New Breed Markel Thomas as the shooter. On October 30, 2006, McDowell left his grandmother's house around 2 or 2:30 p.m. to pick up his children, which he estimated would take about 15 to 30 minutes; his uncle drove them in a white van. Between 3 and 4 p.m., he arrived at Iowa and Pulaski, and walked to a gas station on nearby

[1]The parties stipulated to the phone records of Martin, Burns, Tyler, Thomas and defendant. Criminal researcher Rachel Sterk analyzed the phone records of September 19 through October 31, 2006 and determined that the highest number of contacts between the men was made on October 30, 2006, via Martin's phone.

Harding. McDowell stated that he did not know defendant and he did not see a black Grand Prix driving down Iowa that day.

¶ 15 Police intercepted more phone calls between Burns and defendant on October 30, 2006. Burns called defendant at 3:16 p.m. and told him "Harding." A few minutes later, defendant called Burns asking "[y]ou said Harding right?" Burns told defendant he would call him right back because "she's pulling off." When Burns returned defendant's call, he told defendant, "[o]n the Ave" and "Pulaski!" Meanwhile, Martin called Marcus Thomas and told him "this n*gger *** on *** Pulaski and *** Iowa now, parked *** across the street from the gas station."

¶ 16 Lieutenant Joseph Gorman testified that he assumed surveillance of the now traveling black Grand Prix, which was proceeding on Augusta, then south to Iowa, westbound on Iowa to Harding and south to Chicago Avenue. When the Grand Prix stopped at a red light on Augusta and Kedzie, Lieutenant Gorman decided that a stop of the Grand Prix should be conducted and began notifying police officers in the area. In corroboration, Sergeant James Sanchez, who was also following the Grand Prix, testified that when the police order was given to conduct the stop, he approached the driver's side from the front with a shotgun and could see the driver, passenger and rear passenger. He stated that the driver was wearing red rubber gloves and the rear passenger had red rubber gloves in his pocket. He heard the driver, whom he identified as Tyler, lean back and yell "[g]et these b*tches," as he reached for his waistband. Sergeant Sanchez heard Lieutenant Gorman, who had approached the Grand Prix on the rear driver’s side, yell that there was a gun and saw the barrel of a rifle breaking the window of the back seat. Sergeant Sanchez fired at the rear passenger and then a second shot when he saw the rifle come up again.

Lieutenant Gorman corroborated Sergeant Sanchez's testimony, and described that the rear passenger, whom he identified as Thomas, pointed the assault rifle at him, so he too fired two or three times. He then fired at Tyler, who did not show his hands, and heard Sergeant Michael Bocardo warn that the third man, in the front passenger seat (defendant), was armed with a weapon. After the shooting stopped, Sergeant Sanchez went to the rear of the Grand Prix and took the rifle from Thomas' hand.

¶ 17 Lieutenant Gorman admitted on cross-examination that McDowell's name was never mentioned during any of the wiretapped conversations during the entire time they were monitored by police, and that on October 30, 2006, none of the conversations mentioned a person in a white van. Sergeant Sanchez admitted on cross-examination that he never saw a gun in defendant's hands. It was also later determined that Tyler (the driver) did not have a weapon.

¶ 18 Sergeant Michael Bocardo was also assigned to survey the black Grand Prix. He testified that when he arrived at the scene, he saw Lieutenant Gorman and Sergeant Sanchez and heard gunfire. From his stance, he saw the front passenger, whom he identified as defendant, get out of the car and come in his direction. Sergeant Bocardo testified that defendant was wearing red latex gloves and was holding a gun. Sergeant Bocardo stated that when he told defendant to drop the gun, defendant did not and instead raised it in Sergeant Bocardo's direction. Sergeant Bocardo averred that, "believ[ing]" defendant shot at him, he shot twice at defendant and defendant fell to the ground. Sergeant Bocardo further testified that defendant was still holding the gun and raised it up toward him a second time. Sergeant Bocardo fired again and then approached defendant; he noticed that there was a hole in the upper center on the right side of

defendant's back. On cross-examination, Sergeant Bocardo stated that another detective opened the passenger side door of the Grand Prix before defendant exited; whereupon the gunfire erupted. He further admitted that defendant's torso was not facing him when he shot defendant.

¶ 19 Detective James Egan testified that he arrived at the scene after the shooting had stopped. The Grand Prix was pointed eastbound on Augusta near Kedzie, and defendant was on the ground about to be placed into handcuffs. Detective Egan stated that he pulled a .9 millimeter handgun from underneath defendant's left side. He then rode with defendant to the hospital, where he recovered his clothing, a cell phone and a pair of red latex gloves. In conjunction with this, Detective Kevin Cole arrived at the scene after the shooting and found Tyler slumped over in the driver's seat of the Grand Prix; he was wearing red latex gloves, was unresponsive and was pronounced dead. Thomas was also dead at the scene.

¶ 20 Forensic evidence indicated that ten firearms were recovered from the scene, as well as 69 shell casings, multiple bullets and bullet fragments. All the casings came from firearms logged to police officers. Also recovered were a rifle and a .9 millimeter pistol with a magazine and six unfired cartridges. Testing confirmed that while Tyler and Thomas could not be excluded from the DNA profiles that were extracted from both the rifle and pistol, defendant was excluded, as his DNA was not on either weapon. Further, forensic expert Peter Brennan testified that, when he attempted to fire the .9 millimeter pistol for testing, it did not discharge because there was a heavy amount of grease preventing it from firing properly. After he cleaned the pistol, it then fired properly. He also testified that he observed a small indentation on the primer area of the base of one of the unfired cartridges from the pistol. He stated that this could be

indicative of many things, from a simple ejection of the cartridge out of the pistol, to the weapon's firing pin touching the bullet in a possible attempt to fire the pistol. Brennan testified that, through his testing, he could not identify or eliminate the firing pin as having made this indentation.

¶ 21 After the State rested its case in chief, defendant moved for a directed verdict. The trial court denied his motion. As for his case in chief, defendant presented stipulated testimony that he was treated for a bullet wound to the back; the bullet remains lodged in his right hip. The trial then concluded, and defendant's jury was sent into deliberations.

¶ 22 During these deliberations, defendant's jury sent the trial court a note asking, with respect to the charge of conspiracy, "was the State required to prove that the target was specifically [Dwandric] McDowell or any target?" When the court brought this to the attention of the parties, the State argued that the Illinois Pattern Jury Instructions on conspiracy do not require it to name a victim, and admitted that in this case, they did not name McDowell specifically. Defendant, for his part, argued that, because the State's theory at trial was that McDowell was the target, the court should instruct the jury that the State did, indeed, have to prove he was the target. The trial court ruled that it would answer the jury's question by stating, "no;" it concluded that, pursuant to the way the conspiracy was charged here, while the State had to prove an agreement to kill a particular person, it did not have to prove that this person was necessarily McDowell. Accordingly, the court sent the jury a response stating that the State was required to prove, beyond a reasonable doubt, that there was a conspiracy between defendant, Martin and Burns to commit murder and that an act in furtherance of the conspiracy was

performed by any of them.

¶ 23 Defendant's jury acquitted him of first degree murder, but convicted him of conspiracy to commit murder and attempted first degree murder of a police officer. He was sentenced to 15 years in prison for the former and 38 years in prison for the later, to be served concurrently.

¶ 24 ANALYSIS

¶ 25 As noted, defendant presents six issues for our review. We address each separately.

¶ 26 I. Hearsay Statements and the Coconspirator Hearsay Exception

¶ 27 Defendant's first contention on appeal is that the trial court erred in admitting numerous out-of-court statements, namely, the recorded telephone conversations, against defendant pursuant to the coconspirator exception to the hearsay rule. He further asserts that the trial court erred in considering the hearsay content to determine whether a conspiracy existed.

¶ 28 We begin with the appropriate standard of review. The parties agree that the underlying issue presented here is the propriety of the trial court's admission of the statements in question. The admission of evidence lies within the sound discretion of the trial court. See *People v. Taylor*, 409 Ill. App. 3d 881, 914 (2011). As such, the trial court's decision in this respect will, generally, not be reversed absent an abuse of that discretion. See *Taylor*, 409 Ill. App. 3d at 914; accord *People v. Baez*, 241 Ill. 2d 44, 110 (2011). However, a trial court may abuse its discretion in admitting evidence, especially in the context of hearsay statements, when its ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the court. See *People v. Rush*, 401 Ill. App. 3d 1, 10 (2010).

¶ 29 The parties also agree that the statements at issue here, *i.e.*, the content of the wiretapped

phone conversations between Martin, Burns, Tyler, Thomas and defendant, comprised hearsay[2] (out-of-court statements used to prove the truth of the matters they asserted) which the trial court eventually admitted (following its grant of the State's motion to reconsider) pursuant to the coconspirator exception to the hearsay rule. This, however, is where their agreement ends. As we noted earlier, defendant essentially argues that, in order to employ this exception, the State is first required to prove by a preponderance of the evidence the existence of a conspiracy *independent* of the hearsay statement themselves; that is, it must provide sufficient nonhearsay evidence to show that the conspiracy truly existed. He continues by arguing that, because the State failed to present this required nonhearsay evidence, the coconspirator exception to the hearsay rule could not be applied and the statements should never have been admitted into evidence. The State, meanwhile, argues that, because the law allows a trial court to consider surrounding facts and circumstances, including the acts and declarations of the accused, it properly examined the statements to determine that a conspiracy existed and, therefore, properly employed the exception when it determined that there was, indeed, a conspiracy.

¶ 30 Based on our review of the pertinent case law, as well as the particular facts and circumstances of the instant cause, we agree with defendant here.

¶ 31 A conspiracy arises when two or more people, who intend to commit a crime, engage in a common agreement to accomplish their goal and at least one of them performs an act or acts in

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[2]They comprised out-of-court statements made by nontestifying or unavailable persons used to prove the truth of the matters asserted; again, Tyler and Thomas were both deceased at the time of trial, and Martin and Burns were defendant's simultaneous codefendants who were "unavailable" to testify at defendant's trial.

furtherance of the conspiratorial agreement. See *People v. Kliner*, 185 Ill. 2d 81, 138 (1998). Accordingly, conspiracy is, in and of itself, a crime. See *Kliner*, 185 Ill. 2d at 139.

¶ 32 The State is correct that the existence of a conspiratorial agreement may be inferred from all the surrounding facts and circumstances present, including the acts and declarations of the accused, and that proof of this may be circumstantial. See *People v. Leak*, 398 Ill. App. 3d 798, 826 (2010); see also *People v. Cook*, 352 Ill. App. 3d 108, 125 (2004) (evidence of existence of conspiracy need not be direct and, due to its "clandestine nature," courts may allow broad inferences to be drawn from the evidence); *People v. Melgoza*, 231 Ill. App. 3d 510, 521 (1992). It is also correct that any declaration made by one coconspirator is admissible against all the conspirators if that declaration was made during the course and in furtherance of the conspiracy; for example, if it advised, encouraged, aided or abetted its perpetration. See *Leak*, 398 Ill. App. 3d at 824-25 (citing *Kliner*, 185 Ill. 2d at 140-41).

¶ 33 However, our law is clear when it comes to these principles in the context of the coconspirator exception to the hearsay rule. That is, "[t]he coconspirator exception to the hearsay rule provides that, 'any act or declaration (1) by a coconspirator of a party, (2) committed in furtherance of the conspiracy, and (3) during its pendency is admissible against each and every coconspirator, *provided that (4) a foundation for its reception is laid by independent proof of the conspiracy*.' " *People v. Coleman*, 399 Ill. App. 3d 1198, 1202-03 (2010) (emphasis added) (quoting *People v. Childrous*, 196 Ill. App. 3d 38, 51 (1990)). In other words, " '[t]his court has held that the State must make an independent, *prima facie* evidentiary showing of the existence of a conspiracy between the declarant and the defendant.' " *Coleman*, 399 Ill. App. 3d at 1203

(quoting *People v. Ervin*, 226 Ill. App. 3d 833, 842 (1992)); accord *People v. Batrez*, 334 Ill. App. 3d 772, 783 (2002) (declarations of coconspirator made in furtherance of conspiracy are admissible against the defendant "upon an independent, *prima facie* showing of a conspiracy" between the declarant and the defendant); *Melgoza*, 231 Ill. App. 3d at 521 (independent, nonhearsay, evidence "aside from the coconspirator statement" evidencing a conspiracy and the defendant's participation in it is required for the hearsay evidence to be admitted). Therefore, while evidence of a conspiracy may be circumstantial, "it must be sufficient, substantial, and independent of the declarations made by the coconspirator in order for the hearsay statements to be admitted under this exception." *Coleman*, 399 Ill. App. 3d at 1203 (citing *Ervin*, 226 Ill. App. 3d at 842); see *Batrez*, 334 Ill. App. 3d at 783 (to establish *prima facie* showing of conspiracy in order for coconspirator's hearsay statements to be admissible, State must prove elements of conspiracy by preponderance of evidence *independent of* coconspirator's hearsay statements); accord *Melgoza*, 231 Ill. App. 3d at 524 ("[w]hile proof of a conspiratorial association may be circumstantial and existence of the conspiracy agreement may be inferred from all surrounding facts ***, before a coconspirator's out-of-court statement will qualify as an exception to the hearsay prohibition, there must be a showing of sufficient, substantial and independent non-hearsay evidence that a conspiracy existed"). Only if, and when, the conspiracy has been established by such nonhearsay evidence may statements made by a nontestifying coconspirator during the course of and in furtherance of the conspiracy be considered for admission into evidence at trial against a defendant. See *Melgoza*, 231 Ill. App. 32d at 524 (citing *People v. Goodman*, 81 Ill. 2d 278, 283 (1980)).

¶ 34 Pursuant to our review of the record regarding what occurred at defendant's trial in the instant cause, it is clear to us that the trial court committed reversible error by admitting the hearsay wiretapped phone conversations between Burns, Martin, Tyler, Thomas and defendant into evidence against him, as its decision violated the principles surrounding the coconspirator exception to the hearsay rule.

¶ 35 As we noted earlier, prior to trial, the State filed a proffer seeking to allow the admission of the hearsay conversations against defendant at trial, arguing that these communications showed a conspiracy among the men, that the statements contained therein were made in furtherance of that conspiracy and that, when viewed in conjunction with other evidence, this was sufficient to establish a conspiracy. The State also argued that it was not required to provide independent evidence outside the hearsay statements and that the trial court could look at the hearsay statements themselves in making its ruling on their admissibility. Upon defendant's objection to the proffer, particularly to the State's assertion that it did not need to present independent evidence of the conspiracy other than the hearsay statements which the trial court could look at in making its determination, the trial court denied the State's request. The basis of the trial court's decision was its examination of the conversations themselves, which it stated it looked at "repeatedly" but could not decipher what was being said, let alone that a conspiracy existed. Then, without any new argument or submission by the State, the trial court reversed itself upon the State's motion to reconsider and allowed the hearsay statements to be admitted against defendant, concluding that the "State ha[d] established [a conspiracy] by a preponderance of the evidence if [it] can prove what [it] say[s it] can prove."

¶ 36 Both of the trial court's decisions here were improper. First, regarding its initial decision to exclude the hearsay statements, the court looked at the content of the statements themselves. This was the precise reason for its decision–it specifically stated that, because it could not decipher what was being said in the conversations, it did not feel that they should be admitted. However, as we noted above, our law mandates that, before the content of a coconspirator's hearsay statement made in furtherance of a conspiracy can be reviewed for its admissibility against a defendant, the State is required to provide independent proof of that conspiracy, aside from the very statements sought to be admitted. See *Coleman*, 399 Ill. App. 3d at 1203; *Batrez*, 334 Ill. App. 3d at 783; *Melgoza*, 231 Ill. App. 3d at 521. While it is true that this independent proof need only be circumstantial, it is nonetheless required and must be sufficient, substantial and, again, independent of the statements. See *Coleman*, 399 Ill. App. 3d at 1203; *Batrez*, 334 Ill. App. 3d at 783; *Melgoza*, 231 Ill. App. 3d at 521. And, only if this is first provided may the admissibility of the hearsay statements against the defendant then be considered. See *Melgoza*, 231 Ill. App. 3d at 524. Accordingly, the trial court's reasoning for its initial decision (even though it resulted in an outcome congruent to our own here) was flawed because it was based on its evaluation of the content of the statements without any sort of determination that the State had met its required burden of first providing independent proof of the conspiracy itself.

¶ 37 In addition, we find that the trial court's reversal of its decision to then allow the hearsay statements pursuant to the coconspirator exception to the hearsay rule was also improper, but for a different reason. This time, the trial court did indicate that it (now) believed the State had established a conspiracy by a preponderance of the evidence. Assuming that the court examined

the other evidence the State presented in the proffer, independent of the hearsay statements, then we would find that the trial court used the proper method of evaluation to admit the statements under the coconspirator exception to the hearsay rule; *i.e.*, it seems to have analyzed the independent evidence first and determined that the State, indeed, complied with its burden to provide sufficient independent proof a conspiracy, *and then* found the hearsay statements otherwise admissible, in line with the exception.

¶ 38 However, even giving the trial court the benefit of the doubt by assuming that it used the proper thought process and procedure in reversing its ruling, its ultimate decision to admit the statements was improper. This is because, based on our review of the record, we find that the State did not provide sufficient or substantial proof, independent of the hearsay statements themselves, to demonstrate, even circumstantially and with the broad inferences allowed under the law, by a preponderance of the evidence the elements of a conspiracy involving defendant.

¶ 39 Putting the content of the phone conversations aside, as we must, there is simply no solid independent proof that defendant joined with Burns, Martin, Tyler and Thomas in a common agreement to accomplish, with a criminal intent, the killing of McDowell on the afternoon of October 30, 2006, or that any one of them performed an act in furtherance of such an agreed goal. To the contrary, all that the evidence shows is a mere association between these men, which is insufficient under the coconspirator exception to the hearsay rule to admit the hearsay statements.

¶ 40 First, it is worth reviewing what was never demonstrated by the State in this respect. No witness was able to testify that defendant was a member of the New Breeds, or any gang for that

matter. Principally, officers Cronin and Elizondo, the State's gang experts, could not do so. In fact, Officer Elizondo made clear in his testimony that while Burns, Martin, Tyler and Thomas were New Breeds, defendant was merely an associate, someone who was at times seen in the company of gang member but was never stopped or listed as such by police. Next, the State could not show that defendant, during the entire six weeks the gangs were under surveillance by police, ever met with New Breed ranking officials before the day in question. Rather, the only observation of this the police made was Detective Graham's testimony that, on October 30, 2006, he saw defendant enter a building with three men, one of whom was Burns. Interesting, lacking from Officer Walker's testimony regarding the New Breeds' meeting in the park the day before the alleged conspiracy was to be put into effect is defendant's presence among the gang members at all. Instead, of the seven men Officer Walker saw meeting at the park, he did not identify any of them as defendant. Moreover, McDowell, the object of the alleged conspiracy, testified that he did not know defendant; nor did the State ever discuss a motive defendant may have had to shoot McDowell, no threats were made to or confrontations had with McDowell, and no shots were ever fired at McDowell. In addition, the Grand Prix in which defendant was riding on the day in question was, undisputably, heading in the opposite direct and away from, not toward, the intersection of Iowa and Pulaski where McDowell was, and was supposed to be, at the alleged time the conspiracy to shoot him was to take place.

¶ 41 So, what evidence, again independent of the content of the hearsay phone conversations, was the trial court presented with by the State to first establish a conspiracy involving defendant? There was a gang feud earlier that summer between the New Breeds and the Traveling Vice

Lords. It was established that defendant did not belong to either gang. Thomas, a New Breed, was arrested for shooting at McDowell, a Traveling Vice Lord, in July 2006 and hitting his sister in the foot, and Marquell Harper, a New Breed, was later shot and killed; neither incident involved defendant. During a six-week period in the fall of 2006, police monitored telephone calls from Burns' and Martin's cell phones; defendant, Burns and Martin spoke to each other several times during that lengthy period, including on the day in question. However, as these men were associated and had some kind of relationship with each other, this is not necessarily unusual. Finally, when the Grand Prix was pulled over on the day in question, the three men inside, including defendant, had weapons and latex gloves in their possession. However, again, the Grand Prix was traveling in the opposite direction of Iowa and Pulaski where the allegedly conspired crime was to take place, and our courts have made clear that the mere knowledge of or acquiescence in illegal activity neither constitutes a conspiracy nor infers that one existed. See *People v. Testa*, 261 Ill. App. 3d 1025, 1027-28 (1994) (this is particularly true when dealing in the context of the coconspirator exception to the hearsay rule). Thus, while defendant may have, granted unwisely, been riding in a car with gang members in possession of guns, even if he knew of a conspiracy, this does not amount to the existence of a conspiracy. See *Batrez*, 334 Ill. App. 3d at 784 (mere presence, knowledge, association or even approval of conspiracy is insufficient to establish that the defendant was involved in the conspiracy).

¶ 42 The State directs us to *Leak*, 398 Ill. App. 3d at 825-26, and *People v. Stroud*, 392 Ill. App. 3d 776, 800 (2009), two cases in which reviewing courts upheld the determinations by trial courts admitting hearsay statements pursuant to the coconspirator exception to the hearsay rule.

We find no fault in the holdings of *Leak* or *Stroud*. However, upon our review of these cases, they are notably distinguishable from the instant cause.

¶ 43 In *Leak*, the defendant was charged, in part, like defendant here, with conspiracy to commit murder. The State sought the admission into evidence against him of hearsay statements made during telephone conversations between defendant, his codefendant and a third man, pursuant to the coconspirator exception to the hearsay rule, and the trial court allowed them. The defendant appealed, claiming that the trial court's decision was improper because the State failed to set forth sufficient evidence independent of the hearsay statements to establish the conspiracy. The *Leak* court disagreed and instead affirmed the trial court's decision. See *Leak*, 398 Ill. App. 3d at 825. After outlining the law regarding the coconspirator exception to the hearsay rule, including the State's requirement to provide proof of the conspiracy independent of the hearsay statements themselves in order for them to be considered admissible, the *Leak* court examined the independent evidence and determined that it was, indeed, sufficient to prove the conspiracy. See *Leak*, 398 Ill. App. 3d at 824-25. This evidence included an initial but unsuccessful attempt by codefendant and the third man to kill the victim, the fact that they then killed the victim, their flight paths after the murder which suggested they had a common plan as to how they intended to escape after the planned shooting, the fact that the defendant alone had a personal motive to kill the victim, that the defendant held an insurance policy on the victim, the defendant's knowledge that the victim had filed several complaints against him, hundreds of phone calls logged between the defendant and codefendant, the defendant's presence in the area at the time the crime took place, and the defendant's admission that he received a phone call from codefendant that day

stating "it's gonna happen." See *Leak*, 398 Ill. App. 3d at 825. The *Leak* court concluded that, based on all this, which comprised evidence apart from the hearsay statements themselves, there was sufficient independent evidence of a conspiracy to warrant the admission of the statements under the exception. See *Leak*, 398 Ill. App. 3d at 825.

¶ 44 In *Stroud*, which we note at the outset does not specifically involve the coconspirator exception to the hearsay rule, the defendant challenged the sufficiency of the evidence against him regarding a charge under the criminal drug conspiracy statute. In determining whether the trial court properly concluded that the defendant possessed the requisite intent to participate in the conspiracy, the *Stroud* court reviewed the surrounding facts and circumstances for independent evidence of the conspiracy. See *Stroud*, 392 Ill. App. 3d at 800. This evidence included, in addition to audiotapes of phone conversations between the alleged coconspirators, videotapes and police officers' observations of the coconspirators' actions over an eight-month period, which displayed a consistent pattern of behavior over time. See *Stroud*, 392 Ill. App. 3d at 800. That is, coconspirator Elem would call the defendant; he would then call coconspirator Macklin and these two would meet at a prearranged location and exchange money; Elem would then drive to the defendant's home to retrieve drugs and then back to the prearranged location to give them to Macklin. See *Stroud*, 392 Ill. App. 3d at 800. The *Stroud* court also noted that the transactions between Elem and the defendant were always conducted in a "standardized manner," down to who participated, the consistency of the prices, the location of their meetings and the methods of payment and delivery. *Stroud*, 392 Ill. App. 3d at 801-02. Accordingly, and based on the independent evidence of the videotapes and officers' observations, rather than on

the audiotapes alone, the *Stroud* court found that the trial court's determination that a conspiracy existed was proper. See *Stroud*, 392 Ill. App. 3d at 802.

¶ 45 Again, we find no problem with the holdings of *Leak* and *Stroud*. In fact, we find them to be illustrative of the proper legal rationale required to be employed pursuant to the coconspirator exception to the hearsay rule; consistent with what we have reiterated herein, both the *Leak* and *Stroud* courts performed reviews of the State's evidence, independent of the hearsay phone conversations, to determine if it was sufficient to properly support the admission of the content of these statements at trial. The difference arises in the fact that, here in the instant cause, there simply was not enough independent evidence to sufficiently and substantially prove, by a preponderance of the evidence, that a conspiracy existed. The independent evidence in *Leak*, aside from the hundreds of phone calls between the coconspirators, demonstrated an attempt on the victim, the victim's actual murder, and common flight paths of the conspirators, as well as the defendant's motive to kill the victim, his presence at the scene, and his admission that his codefendant called him right before the murder to tell him it was happening. Similarly, the independent evidence in *Stroud*, aside from the phone calls between the coconspirators, exhibited an eight-month pattern of detailed common behavior and standardized actions resulting in drug deals involving marked police funds, all caught on videotape. Contrary to these cases, and as we have discussed, the independent evidence against defendant here, aside from the phone calls, demonstrates nothing more than a mere association between gang members and a man during a six-week period of gang feuding (during which defendant was not involved), and the police pulling him over in a car traveling in a direction opposite from the conspiracy site in

possession of guns. The instant cause clearly does not merit the same outcome as *Leak* and *Stroud*.

¶ 46 Finally, the State points to *Bourjaily v. U.S.*, 483 U.S. 171 (1987), which held that, pursuant to the Federal Rules of Evidence, a court is permitted to consider a coconspirator's hearsay telephone conversations when making its determination as to whether a conspiracy existed and whether the accused and the declarant were members of that conspiracy. See *Bourjaily*, 483 U.S. at 181 (independent showing of reliability as condition for admitting coconspirator's hearsay statements not required where the statements satisfy the requirements of the Federal Rules of Evidence). Without citation, the State summarily claims that, while *Bourjaily* addressed federal rules regarding the admission of coconspirator hearsay statements, "its reasoning has subsequently be adopted by courts in this jurisdiction."

¶ 47 The State's representation of *Bourjaily* is, at best, incomplete and, at worst, wholly incorrect. Briefly, in that case, the majority of the United States Supreme Court allowed the hearsay coconspirator's statement into evidence, but did so under specific rules of the governing Federal Rules of Evidence, which permit federal courts to analyze the statements themselves as part of the proof required for the establishment, by a preponderance of the evidence, of the existence of a conspiracy. See *Bourjaily*, 483 U.S. at 181. However, this is not where the analysis of this case can end, particularly in light of Illinois' rules regarding the coconspirator exception to the hearsay rule. For example, in a specially concurring opinion, one justice in *Bourjaily* emphasized that the federal rules do not, and should not, allow the admission of hearsay coconspirator statements without some corroborating evidence to support the existence

of the conspiracy. *Bourjaily*, 483 U.S. at 184. And, more critically, three dissenting justices made their view clear that, contrary to the majority's declaration, the federal rules did not change the requirement that evidence independent of the coconspirator's hearsay statements themselves was first required before their admissibility could be considered. See *Bourjaily*, 483 U.S. at 200.

¶ 48 Significantly, while the State insists, again without any citation, that our courts have adopted the majority view in *Bourjaily*, it ignores that one of the very cases it relies on in its brief, *Melgoza*, specifically rebuts this notion. *Melgoza*–an Illinois state case directly dealing with our own rules of evidence regarding the coconspirator exception to the hearsay rule–clearly states, "[w]hile one might hope the Illinois Supreme Court would adopt rules of evidence similar to Federal rules [as used in *Bourjaily*] ***, our case authority requires a degree of proof consistent with the *Bourjaily* dissent in order to admit a coconspirator's out-of-court statements into evidence." *Melgoza*, 231 Ill. App. 3d at 523.

¶ 49 Ultimately, without more than what was presented by the State regarding the required independent establishment of a conspiracy, aside from the hearsay statements in the phone calls, we hold that the trial court improperly admitted these statements in violation of the coconspirator exception to the hearsay rule. Therefore, we reverse defendant's conspiracy conviction and vacate the accompanying sentence, correcting his mittimus accordingly. See, *e.g.*, *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 50 II. Trial Court's Response to Jury Question

¶ 51 Defendant's second contention on appeal involves the note the jury sent to the trial court

during deliberations asking whether the State was required to prove that the target of the conspiracy was, specifically, McDowell. After hearing argument, the trial court responded, "no," because of certain circumstances. Defendant now argues that the court's response was contrary to the law because it allowed the jury to convict him of conspiring to murder someone else–a crime with which he was not charged.

¶ 52 However, because we have determined that defendant's conspiracy conviction must be reversed for the reasons stated above, we need not address this issue upon review.

¶ 53 III. Admission of Uncharged Crimes

¶ 54 Defendant's next contention on appeal is that the trial court improperly admitted evidence of uncharged, or "other," crimes without a proper foundation. Claiming that there was no proof offered that the alleged other crime happened or that he participated in it, he argues that the trial court erred in repeatedly allowing such evidence at trial because it was highly prejudicial.

¶ 55 At the outset, we note that the "uncharged crimes" evidence to which defendant points comprises the testimony of certain police officers that the black Grand Prix, in which defendant was riding on the day in question, was "stolen." At trial, Detective Jacobson testified that police had begun surveillance on the Grand Prix as early as October 22, 2006, when it was first reported "stolen." In addition, Detective Graham testified that, on the day in question, he was conducting surveillance of, and following, the "stolen" Grand Prix.

¶ 56 As a threshold matter, the State contends, and defendant concedes, that he has forfeited this issue for our review. While defendant raised the issue in his posttrial motion, he did not object at the time the evidence was introduced, *i.e.*, during the detectives' testimony. The law is

clear that both an objection at trial and a written posttrial motion raising the issue are required to preserve it for review on appeal (see *People v. Steidl*, 142 Ill. 2d 204, 235 (1991)), and if not properly preserved in this manner, the issue is waived (see *People v. Fields*, 135 Ill. 2d 18, 59 (1990)). See *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). As defendant admits he did not follow this procedure, his argument is waived.

¶ 57 Defendant urges us to employ the plain error doctrine to review his claim. Plain error may be used to review a waived issue only in two limited circumstances: when the evidence is so closely balanced that the error on its own threatens to tip the scales of justice against the defendant, or when the error is so serious that one of the defendant's substantial right is affected to the point that the fairness and integrity of his trial may be questioned. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *People v. Wembley*, 342 Ill. App. 3d 129, 138 (2003) (plain error rule permits consideration of errors even though technically waived for review). However, before this doctrine may be invoked, it is necessary to first determine whether an error occurred. See *Piatkowski*, 225 Ill. 2d at 565. The burden to demonstrate the existence of an error lies with the defendant. See *Piatkowski*, 225 Ill. 2d at 566.

¶ 58 Defendant here is correct that evidence of other crimes is not admissible merely to show one's propensity to commit crimes. See *Kliner*, 185 Ill. 2d at 146. However, it is admissible when relevant to prove any other material question (see *Kliner*, 185 Ill. 2d at 146), and where it simply forms a natural part of a witness' account of the circumstances surrounding the charged offense (see *People v. Manuel*, 294 Ill. App. 3d 113, 124 (1997)). While the State must first show that the other crime took place and that the defendant committed or participated in it, proof

of this need not be beyond a reasonable doubt. See People v. Thingvold 145 Ill. 2d 441, 445-46 (1991). The trial court is to then weigh the probative value of this evidence in light of any prejudice, and its decision to admit it will not be reversed absent an abuse of discretion. See *Kliner*, 185 Ill. 2d at 146.

¶ 59 First, we find that there was no error in what occurred here. Upon our review of the record, and particularly of detectives Jacobson's and Graham's testimony, it is clear that the brief mentions of the Grand Prix as being a stolen car were not admitted as other crimes evidence or to show defendant's propensity to commit crime but, rather, were part of the natural testimony of these witnesses. Detective Jacobson, who had been in charge of monitoring the wiretaps for weeks before the day in question, discussed that the Grand Prix was stolen as part of his testimony explaining why police had initiated surveillance on the vehicle in the first place, in addition to the wiretaps themselves. Likewise, Detective Graham was describing his part as a member of the investigating team; he recounted that, on the day in question, he was following a stolen black Grand Prix, pursuant to police orders. Their comments were nothing more than part of their narratives giving an account of the circumstances and events leading up to the shooting incident which took place on October 30, 2006.

¶ 60 Moreover, even if the admission of these comments by the trial court into evidence could somehow be considered error, it was harmless and does not meet the standards required to invoke the plain error doctrine. There is simply no connection between any reference to the Grand Prix being a stolen car and the crimes with which defendant was charged. These had nothing to do with each other; the conspiracy and attempted murder charges did not depend,

even in the slightest, upon any consideration of the ownership status of the Grand Prix. Further, there is no connection between such a consideration and the specific elements of these crimes; nor is there any relevant fear that the jury in this cause used this consideration to find defendant guilty of the crimes charged. We fail to see how a few brief mentions of the Grand Prix as "stolen" tipped the scales of justice against defendant or how the fairness and integrity of his trial were undermined because of them. Therefore, we find no warrant for a reversal on this basis.

¶ 61 IV. Sufficiency of Evidence Regarding Conspiracy Conviction

¶ 62 Defendant's fourth contention on appeal is that the State failed to prove him guilty of conspiracy beyond a reasonable doubt. In addition to citing Martin's and Burns' acquittals on this charge in their simultaneous bench trials, he asserts that the evidence presented by the State was insufficient to sustain his conviction of the crime.

¶ 63 However, again, because we have already determined that defendant's conspiracy conviction must be reversed for the reasons stated above related to the coconspirator exception to the hearsay rule, we need not address this issue upon review.

¶ 64 V. Ineffective Assistance of Counsel

¶ 65 Defendant's next contention on appeal is that he was denied effective assistance of counsel where defense counsel failed to request a jury instruction of aggravated assault as a lesser included offense to the charge of attempted murder of a police officer. He claims that, due to a lack of evidence regarding a specific intent to kill Sergeant Bocardo and an act toward doing so, defense counsel was deficient in failing to ask for the lesser instruction, a deficiency that

prejudiced him and affected the outcome of his trial. We ultimately disagree.

¶ 66 Claims of ineffective assistance are examined under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); the defendant must demonstrate both that his trial counsel's performance was deficient and that this deficient performance substantially prejudiced him. See *People v. Enis*, 194 Ill. 2d 361, 376 (2000). To demonstrate performance deficiency, the defendant must establish that trial counsel's performance fell below an objective standard of reasonableness. See *People v. Enoch*, 122 Ill. 2d 176, 202 (1988). Meanwhile, to demonstrate sufficient prejudice, the defendant must show that there is a reasonable probability that, but for his trial counsel's unprofessional errors, the result of the proceedings would have been different. See *Enoch*, 122 Ill. 2d at 202. A reasonable probability is one sufficient to undermine the confidence in the outcome. See *Enis*, 194 Ill. 2d at 376 (trial counsel's deficient performance must have rendered the result of the trial unreliable or fundamentally unfair). Again, the defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to succeed on his claim of ineffective assistance of trial counsel. See *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996).

¶ 67 Under certain circumstances, a defendant is entitled to have the jury instructed as to a lesser included offense than that with which he is charged. See *People v. Walker*, 259 Ill. App. 3d 98, 102 (1993) (citing *People v. Bryant*, 113 Ill. 2d 497, 502 (1986)); accord *People v. Jefferson*, 260 Ill. App. 3d 895, 908 (1994) (this is true even if there is only slight evidence in record to support giving lesser instruction or if defense theory is inconsistent with possible guilt of lesser crime; this gives the jury third option if it believes the defendant is guilty of something,

but not the greater offense). While traditionally we have determined the applicability of this concept by comparing the statutory elements of the charged offense and proposed lesser included offense, more recent cases have expanded this analysis to include an examination of the language used in the charging instrument and the evidence presented at trial. See *Jefferson*, 260 Ill. App. 3d at 908 (citing *Bryant* to conclude that if the charging instrument lays a "broad foundation" or "main outline" for the lesser offense and trial evidence supports it, then jury could be instructed on it); accord *Walker*, 259 Ill. App. 3d at 102. Therefore, "the relevant inquiry" is whether the elements of the lesser offense are, in some broad sense, included in the charged offense and the evidence is sufficient to permit the jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater offense. *Walker*, 259 Ill. App. 3d at 102.

¶ 68 Pursuant to a review of the charging instrument and the evidence presented at trial, we find that defendant is correct in his assertion that, under these particular circumstances, aggravated assault was, indeed, a lesser included offense of attempted murder in this case. A person commits aggravated assault when, while armed with deadly weapon, he places another in reasonable apprehension of receiving a battery or knows that the person being assaulted is a police officer and he commits the assault other than by discharging a firearm at the officer. See 720 ILCS 5/12-2(a)(6) (West 2006). A person commits attempted murder when he, with the intent to commit murder, does any act that constitutes a substantial step toward its commission. See 720 ILCS 5/8-4(a) (West 2006). At first glance, and under the traditional strict statutory approach, it would appear that aggravated assault is not a lesser included offense of attempted murder. This is because aggravated assault requires the offender to put the victim in reasonable

apprehension of receiving a battery, while attempted murder has no concern with the victim's state of mind. See *Jefferson*, 260 Ill. App. 3d at 909.

¶ 69 However, as we have discussed, the modern approach is no longer simply a statutory comparison of the crimes but, rather, now requires an examination of the particular charging instrument in a case, along with the evidence presented at trial. See *Jefferson*, 260 Ill App. 3d at 908, and *Walker*, 259 Ill. App. 3d at 102 (both citing *Bryant*). In the instant cause, the indictment charging defendant with attempted murder states only, and quite broadly, that he committed this crime when he "pointed a 9 millimeter semi-automatic pistol at Michael Bocardo, a person he know or reasonably should have known to be a peace officer." It does not state that defendant fired a gun at him or even attempted to do so–just that he pointed the pistol at Sergeant Bocardo. See *Jefferson*, 260 Ill. App. 3d at 909 (citing *People v. Kimball*, 243 Ill. App. 3d 1096, 1097-99 (1993), to note that indictment charging shooting at victim cannot lead to inference that the defendant meant only to frighten him thereby dispelling merit of lesser included aggravated assault instruction, whereas merely aiming gun and not shooting could so indicate and would thereby warrant this lesser instruction). Since it does not state that defendant shot at Sergeant Bocardo, this indictment reasonably provides a main outline for the lesser offense of aggravated assault, as well as attempted murder. In addition, Sergeant Bocardo's testimony at trial was that he saw defendant "bail out" of the Grand Prix with a pistol and run toward him; when Sergeant Bocardo yelled at him repeatedly to drop it, defendant did not comply and instead raised the pistol "in [Sergeant Bocardo's] direction." Sergeant Bocardo further testified only that he "believed" defendant fired at him, which is why he fired at

defendant–not that defendant actually fired at him; defendant then fell to the ground and, after again "point[ing]" the pistol toward him, Sergeant Bocardo fired again. Moreover, the forensic evidence in this cause could not indicate with any certainty that defendant did, indeed, fire any weapon at Sergeant Bocardo. Rather, of 69 casings recovered from the scene, all were from police weapons; defendant's DNA was wholly excluded from both the rifle found in the Grand Prix and the pistol defendant was alleged to be carrying; and forensic expert Brennan testified that, while he was eventually able to fire the pistol after cleaning it, none of its cartridges had been fired and he could not conclude that its firing pin made the only indentation on the only cartridge that someone may, or may not, have attempted to fire.

¶ 70 From all this, aggravated assault qualified as a lesser included offense of attempted murder under the particular circumstances of this case. Without an indictment specifically charging defendant with firing a weapon at Sergeant Bocardo, and without any evidence indicating the same, it could be said that defendant pointed the weapon at him in order to merely scare him, thereby creating a reasonable apprehension in Sergeant Bocardo of receiving a battery by a means other than firing the pistol–an aggravated assault. Compare *People v. Krueger*, 176 Ill. App. 3d 625, 629 (1988) (trial court should have instructed jury on aggravated assault along with charged attempted murder where evidence showed the defendant fired at victim's house from street rather than at him through window and remaining evidence suggested only that he merely intended to scare him), and *People v. Ross*, 226 Ill. App. 3d 392, 395 (1992) (where indictment charged the defendant with merely aiming gun at officer, and evidence indicated only that the defendant turned and pointed it at police officer and no evidence showed he fired any

shots at him, trial court erred in not giving lesser included aggravated assault instruction along with charged attempted murder instruction), with *Kimball*, 243 Ill. App. 3d at 1099 (where indictment specifically charged the defendant with shooting victim with gun and evidence showed the defendant fired at the victim's face rather than merely in his general direction, lesser included offense instruction of aggravated assault was inapplicable), *Walker*, 259 Ill. App. 3d at 103-04 (no error in refusing to give aggravated assault instruction as lesser included offense where indictment charged the defendant with shooting the gun at the victim, and evidence showed he did shoot at victim and did not merely aim gun at him; the defendant could only have been found guilty or not guilty of attempted murder), and *Jefferson*, 260 Ill. App. 3d at 909-10 (where indictment charged that the defendant shot at victim and evidence adduced that he did so, there was no way jury could have rationally concluded he may have been guilty of aggravated assault as a lesser included offense of attempted murder and, thus, trial court did not err in refusing to give aggravated assault instruction).

¶ 71 That said, however, we must conclude that defendant cannot prevail in his contention here. This is because defendant couches his argument under an ineffective assistance of counsel claim. And, based on our review of the standards regarding ineffective assistance of counsel, as well as our review of the record in relation to such a claim, we simply cannot find that, despite its applicability to this case, defense counsel was ineffective in failing to ask for an aggravated assault instruction.

¶ 72 We have already outlined that, in order to succeed on an ineffective assistance of counsel claim, a defendant must demonstrate both that his trial counsel's performance was deficient and

that this deficient performance substantially prejudiced him. See *Enis*, 194 Ill. 2d at 376. This requires him to establish that defense counsel's performance fell below an objective standard of reasonableness, and that but for defense counsel's errors, the outcome of his cause would have been different. See *Enoch*, 122 Ill. 2d at 202.

¶ 73 In addition, " 'there is a strong presumption that the challenged action of counsel was the product of sound trial strategy and not of incompetence' " (*Steidl*, 142 Ill. 2d at 240 (quoting *People v. Barrow*, 133 Ill. 2d 226, 247 (1989))), and falls "within the 'wide range of reasonable professional assistance' " (*Steidl*, 142 Ill. 2d at 248 (quoting *People v. Franklin*, 135 Ill. 2d 78, 116-17 (1990))). Significantly, we note that simple errors of judgment or mistakes in trial strategy do not make defense counsel's representation ineffective. See *People v. West*, 187 Ill. 2d 418, 432 (1999). In fact, trial tactics encompass matters of professional judgment and we will not order a new trial for ineffective assistance based on these claims. See *People v. Reid*, 179 Ill. 2d 297, 310 (1997). Specifically, decisions regarding "whether to request an instruction on a lesser included offense is ' "one of trial strategy, which has no bearing on the competency of counsel." ' " *People v. Rhodes*, 386 Ill. App. 3d 649, 654 (2008) (quoting *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006) (quoting *People v. Balle*, 256 Ill. App. 3d 963, 971 (1993))). In evaluating counsel's effectiveness, we look at the totality of counsel's representation. See *People v. Eddmonds*, 101 Ill. 2d 44, 69 (1984).

¶ 74 There is nothing in the record to remotely indicate that defense counsel performed deficiently in his representation of defendant here. Rather, counsel clearly advocated unrelentingly on defendant's behalf. Counsel filed multiple motions and argued extensively

against those brought by the State; this was clearly exhibited, for example, in response to the State's proffer regarding the telephone conversations before trial had even begun. At trial, he presented argument, cross-examined the State's witnesses at length, and focused the jury's attention on the forensic evidence, which appeared favorable to defendant. He also moved for a directed verdict, and presented evidence on defendant's behalf that he was shot in the back during the incident.

¶ 75 Furthermore, regarding counsel's specific decision not to request the jury instruction on aggravated assault, the record proves that it was clearly one of trial strategy. Following defendant's trial, and at argument on posttrial motions, the record shows that defense counsel argued, in addition to several contentions, that the court should "throw out" the attempted murder verdict against defendant because what occurred, based on the evidence and testimony provided, was "an aggravated assault at best." Before he concluded his motion, he again argued that "at best it is an aggravated assault," and that the court should "rightly toss out" the guilty verdicts, "especially the attempt[ed] murder of a police officer" because there "just [was] not enough evidence" for that conviction.

¶ 76 From this, it is clear to us that counsel knew the availability of a lesser included aggravated assault instruction but, as part of his trial strategy, he chose not to ask the trial court to give it. It is quite reasonable, particularly in light of defense counsel's comments posttrial, to assume that he sincerely believed the evidence was not sufficient for the jury to find defendant guilty of attempted murder. As he said, "at best" what occurred was an aggravated assault. Asking the trial court to give the aggravated assault instruction, however, would have provided

the jury with a third avenue in an effort to find defendant guilty of something. That is, it would have offered the jury three options: guilty of attempted murder, guilty of the lesser offense of aggravated, or not guilty. No longer would the jury's options have been only guilty or not guilty of attempted murder; with the aggravated assault instruction, the jury would have now had the opportunity to reach a compromised verdict and find defendant alternatively guilty of a lesser crime that was not even charged, if it did not believe the evidence proved him guilty of the greater crime. Rationally, and strategically, giving the jury a chance to find defendant guilty of something, rather than the precise (and greater) crime charged, was not in defendant's best interest. See, *e.g.*, *People v. Barnard*, 104 Ill. 2d 218, 231 (1984) (defense counsel was not incompetent in failing to ask for lesser included offense instruction, as this amounted to strategy of presenting jury with option of either finding the defendant guilty or not guilty of greater crime and not presenting them with a third alternative of finding him guilty on a lesser crime, thereby creating a potential compromised verdict).

¶ 77 In addition, we note that even were we to find that defense counsel's representation of defendant somehow fell below an objective standard of reasonableness because he failed to ask for the lesser included offense instruction, we would still find that defendant cannot show he was sufficiently prejudiced to the point this undermined the confidence in the outcome of his trial. To show such prejudice, defendant would have to demonstrate that the trial court would have given the aggravated assault instruction had counsel asked for it and that the jury would have acquitted him of attempted murder and convicted him of this lesser included crime instead. Our law states that, even if a lesser included offense is determined to be established from the

charging instrument and the evidence presented at trial, it "does not automatically give rise to the correlative right to have the lesser included instructions submitted to the jury." *People v. Wys*, 103 Ill. App. 3d 273, 277 (1982); accord *People v. Hamilton*, 179 Ill. 2d 319, 324 (1997). Rather, it is only properly given when an examination of the evidence reveals that it would allow the jury to rationally find the defendant guilty of the lesser included offense but acquit him of the greater offense. See *Hamilton*, 179 Ill. 2d at 324; accord *Wys*, 103 Ill. App. 3d at 277. In the instant cause, and as charged in the indictment, the evidence presented regarding the attempted murder was the same as it would have been had defendant been charged with aggravated assault; both of these would have arisen from the same conduct of defendant pointing the pistol at Sergeant Bocardo. As such, if the jury refused to believe Sergeant Bocardo's testimony that defendant pointed the pistol at him (thereby acquitting him of attempted murder), then the jury could not legally turn around and find defendant guilty of the lesser included offense of aggravated assault (since pointing the pistol would be the main element of that crime as well).

¶ 78 Ultimately, and in addition to our review of the totality of defense counsel's representation of defendant (see *Eddmonds*, 101 Ill. 2d at 69), which we find to have been both thorough and zealous, we hold that defendant received effective representation and any claim to the contrary, particularly regarding counsel's decision not to ask for a lesser included offense instruction on aggravated assault, is without merit under the circumstances of this cause.

¶ 79 VI. Sufficiency of Evidence Regarding Attempted Murder Conviction

¶ 80 Defendant's sixth, and final, contention on appeal is that the State failed to prove him guilty of attempted murder beyond a reasonable doubt. He asserts that the physical evidence

presented at his trial did not establish the elements of that crime, namely, that he performed an act constituting a substantial step toward the commission of murder or that he had the specific intent required. Based on our review of the record before us, we disagree.

¶ 81 When a criminal defendant challenges the sufficiency of the evidence used to convict him, the standard of review is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *People v. Hunley*, 313 Ill. App. 3d 16, 20 (2000). Courts of appeal will not retry the defendant. See *People v. Digirolamo*, 179 Ill. 2d 24, 43 (1997). Instead, the trier of fact hears and sees the witnesses and, thus, has the responsibility to adjudge their credibility, resolve any inconsistencies, determine the weight to afford their testimony and draw reasonable inferences from all the evidence presented. See *Steidl*, 142 Ill. 2d at 226; *Hunley*, 313 Ill. App. 3d at 21. Ultimately, a conviction will not be overturned unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of guilt. See *Brown*, 185 Ill. 2d at 247.

¶ 82 A person commits attempted murder when, with the specific intent to kill, he commits any act which constitutes a substantial step toward the commission of murder. See 720 ILCS 5/8-4 (West 2006). The intent to kill is a question of fact to be determined by the trier of fact, and may be inferred from the surrounding circumstances which include the nature of the attack and the use of a deadly weapon, and from the act itself which has the natural tendency to destroy another's life. See *People v. Johnson*, 368 Ill. App. 3d 1146, 1162 (2006); accord *People v. Valentin*, 347 Ill. App. 3d 946, 951 (2004); see also 720 ILCS 5/8-4 (West 2006).

¶ 83 Defendant first argues that the State failed to present sufficient evidence of an act, *i.e.*, that he fired a weapon at Sergeant Bocardo. He relies principally on the forensic evidence in this cause, which showed that all of the recovered shell casings came from police weapons, his DNA was not on the pistol, the pistol itself was inoperable, and there was no indication that the pistol was fired at the scene. From this, he claims that the State proved that he "only pointed a malfunctioning weapon at" Sergeant Bocardo, which does not support a conviction for attempted murder. Second, defendant argues that the State also failed to present sufficient evidence of his specific intent, *i.e.*, to kill Sergeant Bocardo. He claims that because the evidence shows he was fleeing from the scene and was shot in the back, Sergeant Bocardo's testimony that he pointed the pistol at him was not credible and, thus, his conviction cannot stand. We find defendant to be incorrect under both claims.

¶ 84 First, regarding an act necessary for a conviction of attempted murder, we do not discount the citation defendant has made to the forensic evidence. However, he neglects to mention the entirety of the evidence presented at his trial. The testimony indicated that defendant was present in the Grand Prix with two known gang members. Once the vehicle was curbed and police began to approach it, shots were fired. Defendant was seen "bail[ing] out" of the Grand Prix wearing red latex gloves and holding a pistol in his hand. Instead of submitting to police, he ran towards Sergeant Bocardo. Moreover, instead of heeding Sergeant Bocardo's repeated yells to throw down his weapon, defendant did not and actually raised it and pointed it at Sergeant Bocardo. In addition, once Sergeant Bocardo shot at defendant, defendant dove to the ground, still holding the pistol. Even at this point, instead of relinquishing the weapon and

submitting to police, he, for a second time, raised it and pointed it at Sergeant Bocardo. All the while defendant pointed the pistol at Sergeant Bocardo, it was fully loaded, had a live round in the chamber, and its safety was off.

¶ 85 Defendant insists that, because the forensic evidence shows that the pistol was inoperable, his actions cannot support his conviction because pointing a malfunctioning weapon at someone does not constitute the "natural tendency to destroy another's life." However, defendant mischaracterizes the evidence. That is, the evidence presented at his trial was not that the pistol was inoperable, nor that it was inoperable at the time he pointed it at Sergeant Bocardo. Rather, forensic expert Brennan testified that the pistol did not discharge at the time he tested it because it had grease in it. Yet, after he cleaned it, the pistol immediately fired properly. There is nothing here to indicate that the pistol was incapable of firing or, more specifically, that it was incapable of firing at the time defendant pointed it Sergeant Bocardo; only that, by the time the pistol got to the lab for testing, it initially did not work. Moreover, even if the evidence had shown that the pistol was inoperable at the time defendant pointed it at Sergeant Bocardo, this is not a defense to the crime of attempted murder. See 720 ILCS 5/8-4(b) (West 2006) (assertion of misapprehension of the circumstances rendering it impossible for the accused to commit the offense attempted is not a viable defense to the charge of attempt); *People v. English*, 334 Ill. App. 3d 156, 166 (2002) (impossibility is not a defense to attempted murder).

¶ 86 In addition, that his DNA was not found on the pistol and that Brennan's analysis of the indentation in the unfired cartridge was inconclusive of whether the pistol was fired do not support defendant's argument here. Again, testimony indicated that defendant, while holding the

pistol, was wearing latex gloves. And, while Brennan stated that the indentation on the cartridge could indicate that the cartridge was simply ejected, he testified that it likewise could prove that the firing pin touched the bullet in an attempt to fire the pistol. All this amounted to credibility determinations for the jury to resolve, not, as defendant insists, for this court to evaluate.

¶ 87 As for defendant's arguments regarding an alleged lack of a specific intent to kill, we find that they fail as well. Again, defendant claims that because the evidence presented showed he was fleeing from the scene and was shot in the back, Sergeant Bocardo's testimony that he pointed the pistol at him could not be credible and, thus, there is no reliable evidence of his intent. However, again, defendant neglects to discuss several aspects of his conduct and the circumstances surrounding this incident. The evidence presented demonstrated that defendant was armed with a deadly weapon which, at the time he pointed it at Sergeant Bocardo, was fully loaded, had a live round in its chamber and had the safety off. Sergeant Bocardo testified that while defendant "bail[ed] out" of the car in an effort to flee the vehicle, he then chose to run directly at him (Sergeant Bocardo) while in possession of the pistol. Moreover, defendant refused to relinquish the pistol and, instead, repeatedly pointed it at Sergeant Bocardo, despite continuous police orders to drop it as well as shots fired at him which forced him to dive to the ground. Even at this point, defendant chose to raise the pistol up a second time and point it directly at Sergeant Bocardo. Critically, Sergeant Bocardo's testimony was corroborated by other officers who were at the scene; Detective Graham testified that he heard an officer shout "drop the gun" as one of the Grand Prix's occupants exited the passenger side (this is where defendant was sitting in the vehicle and he was the only of them to exit it), and Lieutenant

Gorman testified that he heard Sergeant Bocardo warn that defendant was still armed before the pistol was removed from under him after the shooting had stopped.

¶ 88 The credibility of all this evidence and testimony was for the jury, which clearly found, from an examination of the surrounding circumstances, including the nature of the attack, defendant's use of a deadly weapon, and his very actions, that defendant possessed the requisite specific intent to kill to be convicted beyond a reasonable doubt of attempted murder. Based on our review of the record, we find nothing erroneous with the jury's inferences. Ultimately, we hold that the evidence here was sufficient to prove beyond a reasonable doubt that defendant, with the specific intent to kill, committed a substantial step toward committing murder by pointing the pistol at Sergeant Bocardo and, therefore, we will not reverse his conviction.

¶ 89 CONCLUSION

¶ 90 Accordingly, for all the foregoing reasons, while we reverse defendant's conviction for conspiracy to commit murder pursuant to the specific facts of this cause and, thus, vacate that portion of his sentence and correct his mittimus accordingly, we affirm his conviction for attempted first degree murder.

¶ 91 Reversed in part, sentence partially vacated and mittimus corrected accordingly; affirmed in part.