2013 IL App (1st) 102549-U

SECOND DIVISION
January 22, 2013

No. 1-10-2549

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHARLES TAYLOR, Defendant-Appellant.	) Appeal from the) Circuit Court of) Cook County)) No. 99 CR 1111)) Honorable Bertina Lampkin,) Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Harris, P.J., and Connors, J., concurred in the judgment.

O R D E R

¶ 1 *HELD*: Defense counsel was not ineffective because defendant consented to counsel's introduction of codefendant's inculpatory statement. In addition, counsel was not ineffective because the introduction of codefendant's inculpatory statement constituted reasonable trial strategy and defendant has not established that he was prejudiced by the introduction of the statement. The trial court did not abuse its discretion in sentencing defendant where its alleged misstatement of fact did not influence its ultimate sentencing decision and it properly considered defendant's failure to take responsibility for the consequences of his actions as an aggravating factor in determining his sentence.

¶ 2 Following a bench trial, defendant Charles Taylor was found guilty of first degree

murder, armed robbery, and attempted armed robbery. Defendant was sentenced to 45 years imprisonment for murder, a concurrent 20-year term for armed robbery, and a consecutive 6-year term for attempted armed robbery. On appeal, defendant contends that defense counsel was constitutionally ineffective for introducing his codefendant's inculpatory statement as evidence at trial and that the trial court erred during sentencing by relying upon a misstatement of fact and defendant's failure to acknowledge guilt, which the trial court found to be aggravating factors in determining defendant's sentence. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant and codefendant Leratio Smith were charged with first degree murder, armed robbery, and attempted armed robbery in connection with a robbery and shooting that took place on December 4, 1998, that resulted in the death of Tony Colon. Defendant waived his right to a jury, and his bench trial was conducted contemporaneously with Smith's jury trial.

¶ 5 At trial, the State presented evidence of the incident, which took place around 11:45 p.m. on the night of December 4, 1998, at Pete's Sidelines Bar, located at 3534 North Elston Avenue, Chicago, Illinois. The State presented the testimony of Catherine Colon, the victim's wife, who was on the phone with her husband at the beginning of the robbery, and the testimony of Delores Schulte, Christopher Minkoff, and Carlos Lozano, who were present in the bar when the incident occurred. The State also presented a surveillance video recording of the bar from 11:45 until 11:48 p.m. that night, which was played for the court with the audio turned off while Schulte testified as to the events unfolding on the screen and identified the persons in the video. The evidence showed that around 11:45 p.m., Smith grabbed Colon and led him into the bar at

gunpoint, pointed his gun at the bartender, told the bartender to open the register, and told everyone to get on the floor. A struggle ensued between Smith and Colon and ended when Smith fatally shot Colon in the chest. Smith then grabbed the money that had been placed on the counter and exited the bar. In addition to the aforementioned evidence of Smith's robbery of the bar and murder of Colon, Lozano testified that he saw two black males exit a car and look into the bar just prior to the robbery and Schulte testified that Colon told Smith that the gun Smith was holding was a BB gun, rather than a real gun, during their struggle immediately before Smith shot Colon.

¶ 6 Chicago police officer Scott Hahn testified that about 11:45 p.m. on December 4, 1998, he was off-duty and had just met some friends outside of Pete's Sidelines Bar when he heard a loud pop and then saw Smith exit the front door of the bar while placing a dark-colored object into his waistband. As Smith walked by, he turned to Hahn and his friends and said "don't look at me." Smith proceeded to enter the driver's seat of a dark four-door Buick and drive away, and Hahn followed Smith in his car for about 20 minutes before finding a phone and calling 911. As he followed Smith, Hahn observed a black male in the front passenger seat of Smith's vehicle.

¶ 7 Michelle Boyd, Smith's girlfriend at the time of the incident, testified that on the evening of December 4, 1998, she was at her sister Vanessa's house with defendant, Smith, and other family and friends. Defendant and Smith left the house about 9 p.m. that evening and returned after midnight. Boyd spoke with Smith after he returned, and he told her that he had robbed a bar, that he had struggled with and shot a man as he did so, and that defendant was in the car during the robbery. When Smith and Boyd returned home, Smith placed a black handgun and the

money he had stolen underneath their mattress and put a gold ring and a black pager on their dresser. Boyd had not previously seen the ring or the pager.

¶ 8 Chicago police detective Mark Pawelski testified that he arrested defendant at his home and took him to the police station on December 6, 1998. About 5:30 p.m. that day, defendant provided an inculpatory statement after speaking with Detective Pawelski and Detective John Woodall. Detective Pawelski was also present when defendant later provided substantially similar statements on December 7, 1998, to Assistant State's Attorney (ASA) Nancy Nazarian and on December 8, 1998, to ASA Robert Robertson.

¶ 9 John Doyle testified that shortly after 9:45 p.m. on December 4, 1998, he was talking to his neighbors, George Kovac and Bessie Bray, in the alley behind his home at 1910 West George Street when a black male wearing a dark jacket and a hat pulled down to his eyebrows approached them, pulled a gun from his belt area, and pointed it at Doyle and Kovac. The man told Doyle, Kovac, and Bray to look down at the ground and put their valuables on the ground. Kovac threw his money clip on the ground and Doyle threw his wallet on the ground. The man instructed Doyle, Kovac, and Bray to go into the garage of Kovac and Bray and followed behind them with his gun as they did. The man directed them to lie face down on the ground with their hands above their heads. Doyle and Kovac complied, but Bray said that she could not due to her legs. The man asked Bray what was in her purse and she said she only had coupons. The man also asked Bray what was on her hand, and she said it was her wedding ring. The man took Bray's ring, then noticed that Doyle had a pager on his belt and took the pager. The man returned Doyle's wallet after the cash had been removed, told the group to start counting out loud, and left.

Doyle stated on cross-examination that he did not see the robber's face and could not provide the police with a facial description of the offender when he spoke to them following the robbery.

¶ 10 ASA Nazarian testified that shortly after 4 a.m. on December 6, 1998, Smith provided her with a statement recorded by a court reporter regarding his involvement in the robbery and shooting at Pete's Sidelines Bar and reviewed and signed the statement along with her and the court reporter. The court then allowed ASA Nazarian to published the statement in its entirety, in which Smith related that about 11:30 or 11:45 p.m. on December 4, 1998, he drove his car north with his friend, Charles [defendant], while planning to rob someone with a gun. Smith saw a bar with an open door and parked his car at the end of the block. Smith walked toward the bar while carrying his gun and encountered a man [Colon] as he did so. Smith pushed Colon into the bar, pulled out his gun, pointed his gun at the people inside, and told everyone to look down and put their money on the table. Smith told the bartender to open the register and, as he walked toward the counter, he noticed that Colon was still on his phone, so he grabbed the phone and told Colon to look down. After Smith took the phone, Colon charged him and tried to tackle him. Colon said that Smith's gun was a BB gun as they struggled, and Smith eventually extricated himself from Colon and pointed his gun at the bartender. However, Colon charged at Smith again, so Smith pointed his gun at Colon and shot him in the chest or stomach. Smith then grabbed the money from the bar and put the gun in his pants as he walked outside. Smith returned to his car, where defendant was sitting, and drove to Vanessa Boyd's home.

¶ 11 ASA Robertson testified that about 9 p.m. on December 8, 1998, he met with defendant along with Detectives Pawelski, Woodall, Brown, and Moran and advised defendant of his

Miranda rights. Defendant subsequently agreed to provide a statement recorded by a court reporter and gave such a statement about 2:23 a.m. while ASA Robertson, Detective Pawelski, and the court reporter were present in the room. Defendant then reviewed the statement with ASA Robertson and Detective Pawelski, made corrections, and signed the document.

¶ 12 The court allowed ASA Robertson to publish the statement, in which defendant related that on the night of December 4, 1998, Smith asked him to take a ride to the north side of Chicago to commit easy robberies with a gun and that he then entered Smith's dark blue Buick along with Smith, who was carrying a black handgun. On the north side, defendant and Smith considered robbing two white males, but decided not to do so when the men walked to a well-lit area, and continued driving until they saw an elderly woman. Smith parked his car on a nearby street, defendant approached the woman while Smith, armed with his gun, walked behind him. Defendant grabbed the woman by the back of her head and told her he wanted her valuables. The woman said that she did not have any valuables and only had coupons. Defendant took the coupons and a ring off her hand and later gave the ring to Smith. An elderly man approached while defendant robbed the woman, and Smith pointed his gun at the man, told him to get on the ground, and took his wallet while he was on the ground. A younger man approached, and Smith pointed his gun at the man and told him to get on the ground as well. Smith then searched the younger man, took his wallet and his pager, put the pager in his pocket, and returned the wallet after having gone through it. Smith told the men and the woman to count out loud, and he and defendant returned to the car as they did so.

¶ 13 Defendant also related in his statement that Smith then drove across the street because he

saw another couple to rob. Smith exited the car, but defendant did not see if Smith robbed anyone. Smith stated when he returned that "he hit two more before he came out of the alley" and had told them to count as well. Smith then had trouble starting his car and attempted to start it three times before it finally worked. As they drove, Smith considered robbing a person on a skateboard, but decided not to do so because there was a car with its blinkers on in the middle of the street. Smith subsequently saw a black male he was interested in robbing and exited the car, but left the vehicle running so he would not have trouble starting it again. Smith approached the man with his gun, grabbed the man by his shoulder, led him into a gangway, and searched him. As Smith did so, defendant looked out for people and police cars and would have beeped the car horn if he saw someone. Smith did not find anything on the man and returned to the vehicle.

¶ 14 Defendant also related in his statement that he and Smith arrived at Pete's Sidelines Bar about 11:45 p.m. and looked into the bar to see how many people were inside. After returning to the car, Smith exited the vehicle and walked across the street toward the bar. Defendant believed that Smith was going to rob the bar. Smith kept the car running when he exited the vehicle so he would not have a hard time starting it later, and defendant looked out for people or police officers and would have beeped the horn if he saw anyone. As Smith approached the door, a man exited the bar while talking on his cell phone. Smith pulled out his gun, put it into the man's chest and pushed him back into the bar. About five minutes later, defendant heard a gunshot from inside the bar. Smith exited the bar about two minutes thereafter. As Smith walked toward his vehicle, he encountered some people walking across the street and said "what you looking at?" Smith had money in his hand when he returned to the car and put it down between himself and defendant,

then drove away. It seemed to defendant that a car was following them for a time while they were driving.

¶ 15 Defendant also related in his statement that while they were driving, Smith said that he had not wanted to shoot the man, but the man had attacked him from behind and said that his gun was not a real gun, but a BB gun. Smith said that he then turned and shot the man, and said that he had only shot him once because his gun had locked up on him. After the vehicle had stopped following Smith and defendant, they began looking for more robbery victims, but decided to return home after they were unable to rob a woman in a white car because she had gone inside her house and another girl with a red coat because there was too much light at the corner at which she was standing. When they arrived at defendant's home, Michelle Boyd and her sister Vanessa were there, and Smith said that "he didn't know why he shot the man" and that he had not meant to do so. Defendant further related that he had been treated well by the police while in the station, had been provided food and drink, and had been allowed to smoke and use the washroom.

¶ 16 The State then rested its case, and the defense called ASA Nazarian as a witness and attempted to introduce a portion of Smith's statement to the police. The State objected, and the trial court initially sustained the State's objection, but then overruled its objection and allowed admission of the statement in its entirety. In doing so, the court stated:

> "Counsel, I just heard Mr. [Leratio] Smith's statement entered into evidence yesterday so his whole statement is in the record. You make it a lot better than it is. If you want to elicit it and it's agreeable with Mr. Taylor for you

> to elicit the statement of [Leratio] Smith, I'll certainly take the whole statement of [Leratio] Smith if that's what your client wants but it has to be in context, counsel."

The court also noted that ASA Nazarian did not ask Smith about defendant's involvement in the incident at the bar when she elicited Smith's statement, stated that the court would consider the entire statement provided by Smith, and asked defendant "is that what you want me to do?" Defendant responded "yes," and defendant's entire statement was admitted into evidence as "Defendant Taylor Exhibit A."

¶ 17 The defense next called John Woodall, who testified that he was employed as a Chicago police detective in December 1998, but had since been indicted in federal court and charged with conspiracy to distribute a controlled substance. Woodall also testified that while he spoke with defendant on December 6, 1998, he was never left alone with defendant and he never laid his hands on defendant, threatened defendant, or told defendant what to say.

¶ 18 Defendant then testified on his own behalf that he entered Smith's car between 9 and 10 p.m. on the night of December 4, 1998. Smith drove them to the north side of the city and stopped the car in front of a bar, shut off the motor, and told defendant that he was going into the bar. Defendant sat in the car while Smith was in the bar and heard a pop about three minutes after Smith had gone inside. About two minutes later, Smith exited the bar, entered the car, dropped some money between him and defendant, and drove away. While they were driving, defendant observed a pager that he had not seen earlier in the evening.

¶ 19 Defendant also testified that on December 7, 1998, he spoke with Detective Woodall and

denied knowing anything about the shooting and robbery. Detective Woodall maintained that defendant did know something about the homicide and threw defendant into a wall when he denied knowing anything about it. Detective Pawelski then entered the room, at which time Detective Woodall left the room. Detective Pawelski asked defendant if he was ready to "talk" and "cooperate," and defendant responded that he was ready to cooperate. Defendant testified that the statement he had provided the police was not accurate and that he told the police that he had acted as a lookout, that the engine was running while Smith was in the bar, and that he had robbed Bray, Doyle, and Kovac because he had told the police that he was going to cooperate and he did not want to be beaten up anymore.

¶ 20 On cross-examination, defendant stated that Detective Woodall asked him whether he was going to talk after having thrown him against the wall and that when he refused, Detective Woodall slapped him on both sides of his face and told him that he was going to be charged regardless of whether he cooperated. Defendant also stated that Detective Woodall told him to implicate himself, but did not tell him exactly what to say, that Detective Pawelski told him to say that he was acting as a lookout while the car engine was running, and that he invented the rest of the incriminating facts related in his statement on his own.

¶ 21 Based on this evidence, the trial court found defendant guilty of murder, armed robbery, and attempted armed robbery under an accountability theory. In doing so, the court found that defendant was not a credible witness, that defendant's testimony that his inculpatory statement was given as a result of physical coercion was unbelievable, and that the evidence showed that defendant knew Smith was going to rob the bar at gunpoint.

¶ 22 At the sentencing hearing, a witness testified in aggravation as to a robbery committed by defendant and another man on November 21, 1998, and several witnesses testified as to armed robberies committed by defendant and Smith on November 19 and 29, 1998. In addition, George Kovac testified about the armed robbery of himself, Doyle, and Bray, and the State presented victim impact statements from Colon's wife and mother. In mitigation, James Holley, Diana Boyd, and Joseph Palmer testified as to defendant's participation in church activities. In allocution, defendant expressed sympathy toward Colon's family for their loss and spoke about the positive effect religion had on him since his incarceration. In addition, defendant stated that "I understand what comes with the punishment and the accountability for someone else's actions. I understand that. But yet, I will say this, I ain't do nothing, you know. I ain't do nothing."

¶ 23 The court then sentenced defendant, stating that it had considered factors in aggravation and mitigation and noting that "what Mr. Taylor did not say [in allocution] is that he caused the pain which is amazing to me. He said he's sorry for the victim's family's pain, but he does not acknowledge that he is responsible for the pain." The court also referenced the evidence showing that defendant had committed multiple robberies with Smith prior to the robbery and shooting at issue and while recounting the evidence presented at trial, stated that:

> "[O]nce Leratio Smith got back to the car and this is like one of the most aggravating things that I can conceive of, Leratio Smith comes back to the car and tells Charles Taylor that he shot the victim and that's still not enough. They had shot the person. He asked why did you just shoot him once. Well, the gun jammed. Why did you just shoot him once? Because the gun jammed. They are

not appalled at what they have done."

The court then entered a sentence of 45 years imprisonment for first degree murder, a concurrent 20-year term for armed robbery, and a consecutive 6-year term for attempted armed robbery.

¶ 24 ANALYSIS

¶ 25 I. Ineffective Assistance

¶ 26 Defendant first contends that he was denied the effective assistance of counsel when defense counsel introduced Smith's inculpatory statement as evidence. The State initially asserts that defendant cannot challenge counsel's decision to introduce Smith's statement because he consented to that decision at trial. A defendant generally cannot claim that counsel was ineffective for taking actions in furtherance of a defense strategy where the defendant has expressed his knowing and intelligent consent to the challenged course of action. *People v. Page*, 155 Ill. 2d 232, 263 (1993); *People v. Anderson*, 272 Ill. App. 3d 566, 571 (1995).

¶ 27 The record shows that the State objected to defense counsel's attempt to enter a portion of Smith's statement into evidence and that the trial court ultimately overruled that objection after argument by the parties, stating that it would consider the statement in its entirety. In doing so, the court stated that it would consider the statement "if that's what Mr. Taylor wants" and told defense counsel that "you can have the whole thing published if that's what Mr. Taylor wants done." The court subsequently asked defendant "is that what you want me to do," and defendant responded "yes." Defendant asserts, however, that his response to the court's single question is insufficient to establish that he knowingly consented to counsel's strategy and that this case is distinguishable from *Anderson* and *Page* for that reason.

¶ 28 In *Anderson*, 272 Ill. App. 3d at 569, the defendant challenged defense counsel's decision to inform the jury of a prior conviction and the record showed that the trial court had asked the defendant whether he understood and agreed with counsel's decision and that the defendant responded in the affirmative. This court held that the defendant could not claim that counsel's decision constituted ineffective assistance because he had consented to that decision and there was "nothing to suggest that defendant's consent was not knowing and intelligent, particularly given the fact that defendant was acquainted with the trial process, having been both a police officer and prison guard." *Id.* at 571.

¶ 29 In *Page*, 155 Ill. 2d at 260-62, the defendant challenged defense counsel's decision to argue that he was guilty of the lesser offense of voluntary manslaughter as a defense to murder. The record showed that during trial, the court asked counsel if he had spoken with defendant regarding the admission of guilt to voluntary manslaughter, and counsel replied that they had lengthy discussions on that topic. *Id.* at 262. The court then asked the defendant if counsel's reply was correct, and he responded "yes." *Id.* This court held that the defendant could not challenge counsel's conduct as ineffective assistance because he had expressly consented to counsel's strategic decision. *Id.* at 263.

¶ 30 Defendant maintains that unlike in *Anderson*, where the defendant was acquainted with the trial process from having been a police officer and a prison guard, and *Page*, where defense counsel informed the court that he and defendant had discussed the challenged trial strategy, here there is no evidence showing that defendant was comparably familiar with the trial process or that he discussed the challenged decision with defense counsel at all. While the facts in this case

are not identical to those in *Anderson* and *Page*, those distinctions do not dictate a different result where the determinative fact in both cases is the defendants' express consent to counsels' trial strategies. In *Anderson*, 272 Ill. App. 3d at 571, this court referred to the defendant's familiarity with the trial process only after having determined that he had consented to counsel's decision and that there was nothing to suggest that his consent was not knowing and intelligent. Also, in *Page*, 155 Ill. 2d at 263, the court made no mention of defense counsel's statement that he had discussed the challenged trial strategy with the defendant in concluding that "the defendant's express consent to the strategy adopted by counsel forestalls any objection *** that counsel was ineffective for having initially chosen a theory of defense based on voluntary manslaughter." In this case, defendant expressly consented to the admission of Smith's statement at trial and nothing indicates that his consent was not knowing and intelligent. As such, we determine that defendant cannot now establish that defense counsel was ineffective for seeking the admission of Smith's statement where defendant expressly consented to that decision at trial.

¶ 31 Moreover, we determine that defense counsel was not constitutionally ineffective. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A failure to make the requisite showing of either deficient performance or sufficient prejudice defeats a claim of ineffective assistance of counsel. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). To establish deficient performance, the defendant must overcome the strong presumption that the challenged action might have been the product of sound trial strategy (*People v. Simms*, 192 Ill. 2d 349, 361

(2000)) and show that counsel's performance fell below an objective standard of reasonableness (*People v. Manning*, 241 Ill. 2d 319, 326 (2011)). To establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Simms*, 192 Ill. 2d at 362.

¶ 32 Initially, we do not see how defendant could have been prejudiced by counsel's decision to introduce Smith's statement where the statement had already been admitted into evidence in its entirety during the State's case-in-chief. Further, for the reasons that follow, we determine that counsel's decision to introduce the statement was reasonable trial strategy and that the statement was not prejudicial to defendant.

¶ 33 Defendant asserts that counsel's decision to introduce Smith's statement was objectively unreasonable because the statement had no exculpatory value where ASA Nazarian did not ask Smith about his participation in the robbery and shooting and the statement implied that defendant was a knowing participant in those crimes where it was consistent with much of his own inculpatory statement. The State responds that counsel's decision was a matter of trial strategy, which is immune from claims of ineffective assistance, and that the strategy was reasonable where the evidence presented at trial showed that defendant was with Smith at the time of the incident.

¶ 34 Decisions concerning what evidence to present on a defendant's behalf have long been viewed as matters of trial strategy that ultimately rest with defense counsel and are generally immune from claims of ineffective assistance. *People v. West*, 187 Ill. 2d 418, 432 (1999). The fact that a trial strategy was ultimately unsuccessful is not a sufficient reason to deem counsel's

representation ineffective. *People v. Skillom*, 361 Ill. App. 3d 901, 913-14 (2005).

¶ 35 Here, defendant's own statement to police that he had acted as Smith's lookout during the robbery and shooting provided the trier of fact with evidence severely damaging to his defense. The State also presented evidence showing that defendant was with Smith at the time of the incident where Michelle Boyd testified that defendant and Smith left her sister's house together around 9 p.m. and returned after midnight that night, and Scott Hahn testified that there was a black male in the front passenger seat of Smith's car when he followed that vehicle after the shooting. Thus, while the testimony of Boyd and Hahn showed that defendant was likely with Smith at the time of the incident, defendant's involvement in the crimes was established by his admission that he had acted as a lookout. As such, defense counsel was faced with the dilemma of overcoming that confession.

¶ 36 In response, defense counsel introduced Smith's statement into evidence under the belief that it was exculpatory as to defendant where Smith related that defendant was in his car during the incident, but did not relate that defendant participated in the crimes. Defense counsel also attempted to discredit defendant's confession by arguing that it was procured by coercion when defendant was physically abused by Detective Woodall and was directed as to what to say by Woodall and Detective Pawelski.

¶ 37 Defendant maintains that Smith's statement was not exculpatory because the statement reflects that Smith was never asked about defendant's involvement in the crimes while he was giving his statement and that defense counsel should have known that the trial court would not find the statement to be exculpatory where the court expressly said so. We initially note that few,

if any, viable strategies were available to defense counsel in light of defendant's confession. Although counsel attempted to show that the confession was coerced, defendant's testimony of abuse was not corroborated by other evidence and, as the court noted in its finding of guilt, his testimony was internally inconsistent where he initially testified that Woodall only threw him against a wall, but then embellished on cross-examination that Woodall threw him against a wall and slapped him twice as well. In addition, it was not unreasonable for counsel to believe that Smith's statement had some exculpatory value where Smith addressed his plan to commit a robbery and that defendant was in his car, but did not relate that defendant was acting as a lookout. Also, while the court informed counsel that it found the statement to have relatively little exculpatory value when it told counsel that "you make [the statement] a lot better than it is," it did not state that the statement was of no value at all. Thus, while Smith's statement was of minimal value to defendant because Smith was not asked about defendant's involvement in the crimes when he gave his statement, it was not unreasonable for counsel to present such evidence where it may have had at least some exculpatory value and defendant had no other viable defense. See *People v. Nieves*, 192 Ill. 2d 487, 498-99 (2000) (counsel was not deficient for arguing legally dubious position where "the defendant had confessed to the crime and his attorney was trying to come up with something where his client had no defense."). As such, we determine that defendant has not satisfied the first prong of the *Strickland* test because he has not established that counsel's performance was deficient and his failure to do so defeats his claim of ineffective assistance of counsel.

¶ 38 Moreover, defendant cannot satisfy the second prong of *Strickland* because he has not

established that he was prejudiced by counsel's allegedly deficient performance. Defendant maintains that Smith's statement was prejudicial because it undermined defendant's claim that his confession was coerced and "made up" where the statement was consistent with his confession in many respects. Defendant notes that his confession and Smith's statement are consistent in that both statements relate that defendant and Smith drove to the north side in Smith's car to commit robberies, that Smith was carrying a gun, that Smith looked into the bar before committing the robbery, that Smith pushed a man with a cell phone into the bar, and that Smith and defendant returned together later that night. Defendant asserts that these consistencies undercut his claim that he "made up" the facts in his confession due to police coercion. Defendant also maintains that he otherwise could have shown that his confession was coerced because the court could have believed his testimony regarding coercion in light of the discrepancies between his confession and Doyle's testimony regarding the robbery that had allegedly occurred prior to the shooting.

¶ 39 Initially, the record does not support defendant's assertion that he could have shown that his confession was coerced absent the evidence of Smith's statement where counsel's attempt to do so at trial was unsuccessful because the court found that defendant was not a credible witness and that his coercion testimony was unbelievable. Also, Smith's statement did not undercut defendant's trial strategy of trying to show that he was coerced into fabricating his confession. Rather, it was defendant's testimony at trial that he was with Smith during the time at which the murder and a number of armed robberies took place and the consistencies between the statements related to events that confirmed that defendant had been with Smith that night as defendant testified at trial. Thus, Smith's statement did not prejudice defendant where the court did not find

defendant to be a credible witness or believe his coercion testimony and the consistencies between defendant's and Smith's statements related to events defendant witnessed with Smith on the night of the shooting as defendant testified at trial.

¶ 40 We therefore determine that counsel was not ineffective for introducing Smith's statement where its slight exculpatory value was not offset by any risk of prejudice. As such, we conclude that defendant cannot establish ineffective assistance where he consented to counsel's decision to introduce Smith's statement and he cannot satisfy either prong of the *Strickland* test.

¶ 41 II. Sentencing

¶ 42 Defendant does not dispute that his sentences fall within the permissible statutory ranges for the applicable crimes, but contends that this court should vacate his sentences and remand for resentencing or reduce his sentences where the trial court relied on improper aggravating factors in sentencing him by basing its decision on a misstatement of fact and considering his failure to admit guilt. Defendant has failed to object to the court's challenged actions or raise these claims in his motion to reconsider sentence, but asserts that this court may nonetheless review his claims under the plain-error doctrine.

¶ 43 To preserve a claim of sentencing error for appeal, both a contemporaneous objection and a written postsentencing motion raising the issue are required. *People v. Hiller*, 237 Ill. 2d 539, 544 (2010). A reviewing court may consider unpreserved error under the plain-error doctrine when 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 the 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. Piatkowski*, 225 Ill. 2d 551, 565 (2007). However, the first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 44 Generally, a reviewing court may only disturb a sentence that falls within the statutory range for the offense of which the defendant has been convicted if the trial court has abused its discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). Defendant maintains, however, that this court should apply a *de novo* standard of review because the question of whether the trial court relied on improper factors is a question of law. The State, citing *People v. Bailey*, 409 Ill. App. 3d 574, 591 (2011), asserts that this court has rejected that argument and held that an abuse of discretion standard applies in cases such as this because the trial court is in the best position to determine the circumstances of the case and weigh the credibility of the witnesses.

¶ 45 For an appellate court to remand for resentencing, the defendant must show that the trial court considered an improper factor during sentencing and that the court relied on that improper factor when imposing its sentence. *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007). Thus, in considering defendant's challenges to his sentences, we must consider the effect of the allegedly improper factors on the court's ultimate sentencing decision in addition to determining whether the court considered improper factors in the first place. As such, defendant's claims do not raise a pure question of law, and we will, therefore, only disturb defendant's sentences if the trial court has abused its discretion in imposing the sentences.

¶ 46 A. Misstatement of facts

¶ 47 Defendant asserts that the trial court misstated the evidence presented at trial during the

sentencing hearing when it stated that:

> "[O]nce Leratio Smith got back to the car and this is like one of the most aggravating things that I can conceive of, Leratio Smith comes back to the car and tells Charles Taylor that he shot the victim and that's still not enough. They had shot the person. He asked why did you just shoot him once. Well, the gun jammed. Why did you just shoot him once? Because the gun jammed. They are not appalled at what they have done."

Defendant maintains that this statement misrepresents the evidence presented at trial where the record shows that he did not relate in his statement that he asked Smith why he had only shot the victim one time but, rather, related only that Smith had told him that he had only shot the victim one time because his gun had locked up on him.

¶ 48 The relevant portion of defendant's statement, as published by ASA Robertson at trial, is as follows:

> "Q. Did [Smith] tell you how many times he shot the man?
>
> A. Shot him once.
>
> Q. And did he say why he only shot the man once?
>
> A. Yes.
>
> Q. Why was that?
>
> A. The gun had locked up – had locked on him."

Thus, while defendant related in his statement that Smith told him he had only shot the victim one time because his gun locked up on him, the statement does not indicate that defendant asked

Smith why he had only shot Colon one time. As such, the trial court's statement that defendant asked Smith why he had shot Colon only once was contradicted by the evidence and we must now consider whether that misstatement of fact influenced the court's sentencing decision such that it led to a greater sentence for defendant.

¶ 49 A trial court's consideration of a misstated fact will not require remand or resentencing if so little weight was placed on that fact that it did not influence the court's sentencing decision and did not lead to a greater sentence. *People v. Cotton*, 393 Ill. App. 3d 237, 266 (2009). A reviewing court must consider the record as a whole in determining the correctness of a sentence, and an isolated remark made in passing, even if improper, will not require resentencing unless the defendant can show that the court relied on the improper fact in imposing the sentence. *Reed*, 376 Ill. App. 3d at 128.

¶ 50 Defendant maintains that the court's misstatement of fact influenced his sentences where the court stated that the fact that he asked Smith why he shot the victim only one time was "one of the most aggravating things that I can conceive of" and he was sentenced well in excess of the minimum. The State responds that the court's misstatement of fact did not influence defendant's sentences where it was just one of many facts that established defendant's callousness and the court considered all the relevant aggravating and mitigating factors in reaching an appropriate sentence under the circumstances.

¶ 51 The record shows that the trial court considered multiple aggravating and mitigating factors in determining defendant's sentence. In particular, the court noted that defendant had not acknowledged responsibility for his role in the incident, had participated in other armed robberies

with Smith prior to the shooting, had planned to commit armed robberies with Smith on the night of the shooting, and had wanted to commit additional armed robberies with Smith before and after the shooting. Thus, defendant's disregard for the safety of others and callousness in the face of the murder of Colon was fully established independent of the misstated fact, and we therefore determine that the misstated fact did not influence the court's sentencing decision or lead to a greater sentence and that resentencing is not required in this case.

¶ 52 B. Failure to accept responsibility

¶ 53 Defendant, citing *People v. Ward*, 113 Ill. 2d 516 (1986), also asserts that the trial court erred by considering his failure to acknowledge his guilt as an aggravating factor in determining his sentence. A defendant's continued protestation of innocence following a determination of guilt will not be automatically and arbitrarily applied as an aggravating factor, but must instead be evaluated in light of all the other information before the court. *Id.* at 529. In addition, a court may consider the defendant's failure to accept responsibility for a serious offense in determining his sentence. *People v. Dowding*, 388 Ill. App. 3d 936, 944 (2009).

¶ 54 Although defendant maintains that the court considered his refusal to admit guilt as an aggravating factor, the record shows that it was defendant's failure to accept responsibility for the consequences of actions that was considered to be an aggravating factor by the court. Defendant stated in allocution that "I understand what comes with the punishment and the accountability for someone else's actions. I understand that. But yet, I will say this, I ain't do nothing, you know. I ain't do nothing." In handing down defendant's sentence, the court stated that "what Mr. Taylor did not say [in allocution] is that he caused the pain which is amazing to me. He said he's sorry

for the victim's family's pain, but he does not acknowledge that he is responsible for the pain." Thus, based on the court's statements, it appears that it did not interpret defendant's statements during allocution to be a protestation of innocence but, rather, a refusal to accept responsibility for the consequences of his actions. This interpretation is reasonable where defendant expressed an understanding of criminal accountability for the actions of another prior to emphasizing that he did not do anything. As such, it was not unreasonable for the court to interpret defendant's comments as being an acceptance of criminal accountability for the actions of Smith but a refusal to accept that he was actually responsible for Colon's death where he was not directly involved in the shooting.

¶ 55 We therefore determine that the trial court did not err in considering defendant's refusal to accept responsibility for his actions to be an aggravating factor and conclude that it did not abuse its discretion by sentencing him to 45 years imprisonment for murder, a concurrent 20-year term for armed robbery, and a consecutive 6-year term for attempted armed robbery. As such, there is no error by the court to rise to the level of plain error to excuse defendant’s procedural default of his sentencing challenges in this case.

¶ 56 CONCLUSION

¶ 57 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 58 Affirmed.