FIRST DIVISION
February 4, 2013

No. 1-10-3007

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>AUGUSTE BURTON,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Cook County<br><br><br>No. 07 CR 15188<br><br><br>Honorable Thomas Joseph Hennelly, Judge Presiding. |

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Rochford concur.

**ORDER**

¶ 1 *Held*: Defendant was proven guilty beyond a reasonable doubt. Defendant did not receive ineffective assistance of counsel. The trial court conducted a proper *Krankel* inquiry. The trial court did not consider an improper factor in sentencing defendant to 52 years' imprisonment, nor did the court abuse its discretion in imposing sentence. Defendant's convictions for attempt murder do not violate the one-act, one-crime doctrine. His conviction for aggravated discharge of a firearm does however, and must be vacated.

¶ 2 Following a jury trial, defendant Auguste Burton was convicted of attempt murder of a peace officer, attempt murder while armed with a firearm and aggravated discharge of a firearm.

Defendant was sentenced to concurrent sentences of 52 years' imprisonment for attempt murder of a peace officer, 35 years' imprisonment for attempt murder while armed with a firearm, and 20 years' imprisonment for aggravated discharge of a firearm. Defendant now appeals and argues: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) he received ineffective assistance of counsel; (3) the trial court erred by failing to conduct a *Krankel* inquiry; (4) the trial court considered an improper factor during sentencing; (5) the trial court abused its discretion in sentencing defendant to 52 years' imprisonment for attempt murder of a peace officer; and (6) all but one of defendant's convictions must be reversed under the one-act one-crime doctrine. For the following reasons, we affirm the judgment of the trial court but vacate defendant's conviction for aggravated discharge of a firearm because it violates the one-act, one-crime doctrine.

¶ 3 BACKGROUND

¶ 4 At trial, Deputy Chief Alfonza Wysinger[1], a 24-year veteran of the Chicago police department, testified that on June 23, 2007, he was attending his grandmother's 80th birthday party at her home at 440 N. LeClaire Avenue in Chicago. Deputy Chief Wysinger, who was Commander of the 15th police district on June 23, 2007, was raised in the same house by his grandmother and had known the residents on the block for 34 years. He was still a friend of his childhood neighbors Authurine Kelly, Michelle Cooper and Charlena Cooper. Deputy Chief

[1] At the time of the offense, Alfonza Wysinger was the Commander of the 15th police district for the Chicago police department. At the time of trial, he was the Deputy Chief of the Chicago police department. For purposes of this order, we will refer to Alfonza Wysinger as Deputy Chief Wysinger or Alfonza.

Wysinger testified that he visited his grandmother approximately six times per year.

¶ 5 He arrived at the party at about 6:00 p.m. At approximately 8:00 p.m., Deputy Chief Wysinger was sitting on the front porch of his grandmother's house with his younger brother Arnold. Deputy Chief Wysinger saw two black men walk past his grandmother's house going northbound on LeClaire Avenue and then went west on Ferdinand Street. Shortly after, Deputy Chief Wysinger saw one of the men walk back eastbound on Ferdinand Street toward Lawler Avenue and stop in the middle of LeClaire Street. Deputy Chief Wysinger identified defendant in open court as the man he saw on the sidewalk walking in the direction of Lawler Avenue.

¶ 6 As the man walked to the middle of the street, Deputy Chief Wysinger saw him raise a chrome revolver and fire several shots eastbound on Ferdinand Street in the direction of Lawler Avenue. Deputy Chief Wysinger could not see what he was firing at. Then, Deputy Chief Wysinger heard a "barrage of gunfire" coming from the direction of Lawler Avenue. He then saw defendant turn, crouch and run southbound on LeClaire Avenue, in the middle of the street. Deputy Chief Wysinger ran down the stairs toward the street announcing his office and yelling for defendant to stop and drop the weapon. Deputy Chief Wysinger testified that he yelled, "[p]olice, stop, drop the weapon, police[,] stop, drop the weapon," numerous times. Defendant did not stop or drop his weapon and Deputy Chief Wysinger began to chase defendant who was about eight to ten feet ahead of him. As he gave chase, Deputy Chief Wysinger continued to identify his office and instruct defendant to stop and drop the weapon. Defendant then paused, turned in the direction of Deputy Chief Wysinger, pointed his gun at him and fired one shot at him. Deputy Chief Wysinger fired two or three shots at defendant but did not hit him.

¶ 7 Defendant continued to run southbound on LeClaire Avenue but then crossed in between some cars, crossed the parkway and began to run southbound on the sidewalk on the west side of the street. Deputy Chief Wysinger continued to yell, "stop, police, drop the weapon." Defendant again turned and fired a shot at Deputy Chief Wysinger from about 15 to 20 feet away. They continued to run along the sidewalk and at some point defendant attempted to cut back across the parkway and tripped over some wiring on a fence. Deputy Chief Wysinger tripped over the same wire and fell. Defendant got up and continued running making his way back toward the middle of the street. Deputy Chief Wysinger got up and saw defendant stumble in the middle of the street. Deputy Chief Wysinger tackled defendant to the ground. Deputy Chief Wysinger, who still had his weapon in his hand, put his knee in defendant's chest to keep him from moving around because he had no handcuffs. He then looked to see if defendant had his weapon, which he did not. Deputy Chief Wysinger began to look around and yell to people who were standing around to find the weapon. He knew someone had called the police, and they arrived while he was subduing defendant. The officers who arrived recognized him as the commander of the 15th police district. Once the officers approached, Deputy Chief Wysinger got off of defendant and the officers transported defendant to the police station. Deputy Chief Wysinger later learned that the weapon was found by a tree in front of Authurine Kelly's house at 426 N. LeClaire. Deputy Chief Wysinger observed the weapon in the location where it was found. One of the officers recovered the gun but the gun was not fingerprinted.

¶ 8 The State introduced copies of Chicago police department rules and regulations addressing the duties of off-duty police officers. Off-duty officers are required to respond to

emergencies at any time.

¶ 9 Arnold Wysinger testified that he lived at the house at 440 N. LeClaire Avenue with his grandmother and two cousins. On the evening of his grandmother's birthday party, he was sitting with his brother Deputy Chief Wysinger on the porch when he heard something like firecrackers coming from Ferdinand Street. Then, Arnold saw defendant running toward LeClaire with a gun in his hand. His brother Alfonza jumped up and yelled, "Stop. Police officer. Drop the gun," numerous times. Defendant continued to run. Alfonza began chasing defendant yelling, "Stop. Police officer. Drop the gun," numerous times but defendant did not stop or drop his gun. Arnold heard a gunshot but did not see who fired it. He did not see his brother take out his gun. Defendant ran across to the west side of LeClaire, ran between some parked cars and then ran southbound along the sidewalk with Alfonza chasing him. Defendant pointed his gun at Alfonza and fired. Arnold did not know how many times defendant shot at Alfonza or how far they were apart. Defendant then ran across the sidewalk, crossed between some parked cars and tripped and fell in the street. Alfonza, who was still chasing defendant, also tripped. Defendant got up but was tackled by Alfonza.

¶ 10 Arnold heard Alfonza yell out his office several times during the chase. He also heard Alfonza yell at defendant to drop the gun numerous times. After Alfonza tackled defendant, Alfonza told Arnold to go look for defendant's gun. As he was walking northbound, someone told him that defendant's gun was found. Arnold saw a big, silver gun in front of a tree. Charlena Cooper was standing by the gun. Arnold called 911 and the police arrived shortly thereafter. Defendant was taken into custody.

¶ 11 Authurine Kelly testified that she has lived at 426 N. LeClaire since 1974 and has known Alfonza Wysinger since he was a child. Authurine was sitting in her car in front of her house waiting for her daughter to come out when she heard what she thought were firecrackers. She looked in her rear-view mirror and saw a man running towards her car with a big gun in his hand. Authurine saw Alfonza chasing him yelling, "Stop in the name of the law," but he did not stop. The man turned and pointed the gun over his shoulder and shot at Alfonza. Authurine heard three gunshots and saw someone fire one gunshot. When the man passed by her car, she saw him throw his gun down in front of a tree in front of her house. She got out of her car and she and Charlena Cooper stood over the gun.

¶ 12 Charlena Cooper testified that she lived at 421 N. LeClaire for almost 40 years and knew Alfonza when he was a child. She too heard what she thought were firecrackers. She then saw defendant, who she identified in open court, running down the sidewalk across the street with a big, silver gun. Alfonza was chasing him and yelling, "stop, police, drop it." Defendant shot at Alfonza and Alfonza returned fire. Charlena saw defendant throw his gun down in front of a tree by Authurine Kelly's house. She ran across the street to the gun.

¶ 13 Charlena Cooper's granddaughter, Coretta Jones, identified defendant in open court. She heard a gunshot and saw Alfonza chasing defendant down the street yelling "drop your weapon." She saw something silver in defendant's hand.

¶ 14 Officer Deady testified that on June 23, 2007, he and his partner responded to a call of shots fired on the 400 block of north LeClaire. Officer Deady saw Deputy Chief Wysinger, who was his Commander, detaining defendant who was on the ground, in the street. Officer Deady

approached, handcuffed defendant and placed him in his squad car and guarded defendant.

¶ 15 Forensic Investigator Jill Kolssak testified that she had been assigned to work the crime scene at Ferdinand and LeClaire streets. She recovered ten spent cartridge casings and a bullet fragment in the backyard at 500 N. Lawler Avenue, a metal fragment from under a parked PT Cruiser at 1549 W. Ferdinand, a metal fragment from the north gangway at 440 N. LeClaire, three fired cartridge cases from the parkway at 438 N. LeClaire and defendant's Smith and Wesson, six-shot revolver from 426 M. LeClaire. Defendant's gun was fully loaded with six spent cartridge cases but did not contain any live bullets. Kolssak discovered two bullet holes in the rear of the PT Cruiser, and bullet hole damage to a Daewoo and a Pontiac parked at 437 N. LeClaire. She also discovered bullet hole damage to the north side of the building at 440 N. LeClaire. Kolssak also inventoried Deputy Chief Wysinger's Smith and Wesson semi-automatic handgun and magazine at the scene. One live round was found in the chamber and nine live rounds were found in the magazine. All of the evidence was inventoried and sent to the Illinois State Police Crime Lab for testing. Following their search of the crime scene, Kolssak and her partner returned to Area 5 and inventoried defendant's clothes and performed a gun shot residue test on defendant's hands.

¶ 16 The Illinois State Police Crime Lab found that three fired casings recovered at 438 N. LeClaire and the bullet damage to the Daewoo and Pontiac were from Deputy Chief Wysinger's gun.

¶ 17 Forensic Scientist Melissa Nally, a firearms identification expert, testified that on June 28, 2007, she received a Smith and Wesson .357 Magnum revolver and six fired cartridge cases.

Nally determined that the six fired cartridge cases were fired from the revolver. She also determined that two bullet fragments were fired from the revolver. Nally also received Deputy Chief Wysinger's Smith and Wesson .9 millimeter semi-automatic gun with 10 rounds of live ammunition and a magazine. Deputy Chief Wysinger's gun holds 13 live rounds when fully loaded. Nally determined that three .9 millimeter Luger fired cartridge casings were fired from Deputy Chief Wysinger's gun. Nine other cartridge casings found at the scene were fired from an unrecovered gun and one was fired from a different, unrecovered gun.

¶ 18 Detective Gilger testified that on June 23, 2007, he was an Area 5 violent crimes detective and was assigned, along with his partner, to a police-related shooting on north LeClaire Avenue. Detective Gilger spoke with responding officers and interviewed numerous witnesses at the scene. Detective Gilger documented the address where defendant's gun was found but did not request that it be tested for fingerprints because they already knew it was defendant who dropped it. Evidence is sent for fingerprinting when the offender is unknown or has fled the scene. A gun shot residue test was performed on defendant approximately 3.5 hours after the shooting.

¶ 19 After hearing all of the evidence, a jury found defendant guilty of attempt murder of a peace officer, attempt murder while armed with a firearm, and aggravated discharge of a firearm. Defendant was sentenced to 52 years' imprisonment for attempt murder of a peace officer, 35 years' imprisonment for attempt murder while armed with a firearm and 20 years' imprisonment for aggravated discharge of a firearm, all sentences to be served concurrently. This appeal followed.

¶ 20 ANALYSIS

¶ 21 Defendant first contends that the State failed to prove beyond a reasonable doubt that he knew or should have known that Deputy Chief Wysinger was a police officer, an essential element of attempt murder of a police officer and aggravated discharge of a firearm. Specifically, defendant claims that there was no direct evidence presented that defendant knew Deputy Chief Wysinger was a police officer when he shot at him. Furthermore, Deputy Chief Wysinger was dressed casually and did not carry a badge, shield or any other sign of his affiliation with the police.

¶ 21 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). It is not the function of the reviewing court to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony and resolves conflicts or inconsistencies in the evidence. *People v. Naylor*, 229 Ill. 2d 584, 614 (2008). The trier of fact is not required to disregard inferences that flow from the evidence or search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. McDonald*, 168 Ill. 2d 420, 447 (1995). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 22 To sustain a conviction for attempt murder of a police officer, the State must prove that a defendant, "with the intent to commit a specific offense [first degree murder], [did] any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2006). The sentence for attempt first degree murder is the sentence for a Class X felony except where "defendant knew or should have known that the murdered individual was a peace officer" and then the sentence is not less than 20 years and not more than 80 years. 720 ILCS 5/8-4(c)(1)(A) (West 2006); 720 ILCS 5/9-1(b)(1) (West 2006). To sustain a conviction for aggravated discharge of a firearm as charged in this case, the State must prove that defendant:

> "knowingly or intentionally * * * discharg[ed] as firearm in the direction of a person he or she knows to be a peace officer, * * * while the officer * * * is engaged in the execution of any of his or her official duties, or to prevent the officer * * * from performing his or her official duties, or in retaliation for the officer * * * performing his or her official duties." 720 ILCS 5/24-1.2(a)(3) (West 2006).

¶ 23 The evidence in this case is not so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. Deputy Chief Wysinger announced his office from his grandmother's porch and instructed defendant to stop and drop his weapon. Defendant did neither so Deputy Chief Wysinger, acting in accordance with police procedure, began to chase defendant while repeatedly yelling, "police, stop, drop your weapon." Numerous witnesses testified that they heard Deputy Chief Wysinger announcing his office and yelling at defendant to stop and drop his weapon. Defendant clearly knew that Deputy Chief Wysinger was a police officer when he fired at him.

¶ 24 Defendant's reliance on *People v. Infelise*, 32 Ill. App. 3d 224 (1975) is unpersuasive. In *Infelise* the defendant was convicted of aggravated assault of a police officer. Two off-duty police officers, dressed in T-shirts and shorts with handguns in their waistbands, observed several men in a car threaten a young woman. The officers followed the automobile, and confronted some of the men in front of the defendant's house, identifying themselves as police officers. The defendant, who was a 17-year-old immigrant who did not speak English very well, went into the house, retrieved a gun, pointed it at the officers, and swore at them in Italian. When the defendant's mother told him (in Italian) that the men were police officers, he put the gun away and cooperated with the officers. The appellate court held that the State did not prove that the defendant knowingly assaulted a police officer. *Id* at 226. There was no testimony in this case that defendant did not speak English and could not understand that Deputy Chief Wysinger was repeatedly announcing that he was a police officer. We also find *People v. Bush*, 4 Ill. App. 3d 669 (1972), similarly factually distinguishable.

¶25 When viewed in the light most favorable to the State, we must accept the jury's conclusion that the testimony established that defendant knew Deputy Chief Wysinger was a police officer. Consequently, the State proved defendant guilty of attempt murder of a police officer beyond a reasonable doubt.

¶26 Defendant next faults trial counsel for failing to seek a jury instruction on the subject of unreasonable or imperfect self-defense. Defendant maintains that the failure to request such an instruction was unreasonable given the facts of the case, where defendant faced a "dangerous situation when he allegedly fired at [Commander] Wysinger."

¶27 In a criminal case a defendant is constitutionally guaranteed effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const., 1970, art. 1 § 8; *Strickland v. Washington*, 466 U.S. 668 (1984); adopted by *People v. Albanese*, 104 Ill. 2d 504 (1984). A defendant must meet a two-prong test to prevail on an ineffective assistance claim: (1) counsel's performance fell below an objective standard of reasonableness and; (2) there is reasonable probability that, but for counsel's errors, the result of the trial would have been different.

¶28 Under the first prong of the *Strickland* test, defendant must overcome a "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, defendant must overcome the presumption that under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955).

¶29 A defendant satisfies the second prong of *Strickland* if he can show that a reasonable probability exists that, had counsel not erred, the trier of fact would not have found him guilty beyond a reasonable doubt. *People v. Caballero*, 126 Ill. 2d 248, 260 (1989). Where the defendant fails to prove prejudice, the reviewing court need not determine whether counsel's performance constituted less than reasonable assistance. *Strickland*, 466 U.S. at 697, 699; *People v. Flores*, 153 Ill.2d 264, 284 (1992).

¶30 The burden is on the defendant to overcome the strong presumption that defense counsel rendered adequate assistance using reasonable professional judgment pursuant to sound trial strategy. *Strickland*, 466 U.S. at 689-90. It is not enough that trial counsel failed to meet the competence standard; defendant must also show that he was prejudiced as a result.

*Strickland*, 466 U.S. at 692-93.

¶31 Defendant cannot establish that he was prejudiced by defense counsel's failure to request a jury instruction on defendant's unreasonable belief in the need for self-defense. First degree murder may be reduced to second degree murder when either of the following mitigating factors is present:

> "(1) [Provocation] At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill * * *, but negligently or accidentally causes the death of the individual killed; or
>
> (2) [Imperfect self-defense] At the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code [Justifiable Use of Force; Exoneration], but his belief is unreasonable." 720 ILCS 5/9-2(a) (1),(2) (West 2000).

¶32 Second degree murder is a "lesser mitigated offense" of first degree murder and is distinguished from self-defense only in terms of the nature of the defendant's belief at the time of the killing. *People v. Jeffries*, 164 Ill. 2d 104, 122 (1995) (citing *People v. Newbern*, 219 Ill. App. 3d 333, 353 (1991)); See also Daniel B. Shanes, *Murder Plus Mitigation: The "Lesser Mitigated Offense" Arrives in Illinois*, 27 J. Marshall L. Rev. 61, Fall, 1993. If the defendant's belief at the time of the killing was reasonable, self-defense may apply; if the defendant's belief was unreasonable, a conviction for second-degree murder may be appropriate. *People v. Hooker*, 249 Ill. App. 3d 394, 403 (1993). Once the State has proven all of the elements of first

degree murder, the burden shifts to the defendant who wishes to mitigate the offense to second-degree murder, to prove the existence of one of the statutory mitigating factors by a preponderance of the evidence. See 720 ILCS 5/9-2(c) (West 2004); *People v. Lopez*, 166 Ill. 2d 428, 447 (1995).

¶33 Defendant in this case was charged with attempt first degree murder. Attempt requires the intent to commit a specific offense, in this case first degree murder. 720 ILCS 5/8-4(a) (West 2006). While first and second degree murder share the same elements, second degree murder requires the presence of a mitigating circumstance. *Jeffries*, 164 Ill. 2d at 121-22. For attempt second degree murder to exist, a defendant must intend the presence of a mitigating factor, "which is an impossibility." *Lopez*, 166 Ill. 2d at 449. "One cannot intend to unlawfully kill while at the same time intending to justifiably use deadly force." *Id*. In short, "the offense of attempted second degree murder does not exist in this State." *Id* at 449.[2] In other words, because defendant did not actually murder Deputy Chief Wysinger, he could not mitigate his attempt to murder Deputy Chief Wysinger by arguing that he had an unreasonable belief in the need for self-defense because he did not know that the man chasing him, yelling, "Stop. Police. Drop your weapon," was a police officer. As the offense of attempt second degree murder does not exist in Illinois, we cannot see how defendant was prejudiced by defense counsel's failure to

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[2] The first degree murder statute was amended January 1, 2010, after the offense in this case, to allow for the first time, the use of the serious provocation mitigating factor by a defendant at sentencing. See 720 ILCS 5/8-4(c)(1)(E) (West 2010). Attempt second degree murder based on the mitigating factor of imperfect self-defense still does not exist in Illinois. *People v. Lauderdale*, 2012 IL App (1st) 100939.

request an instruction on unreasonable belief in the need for self-defense.

¶34 Ignoring for a moment that attempt second degree murder does not exist in Illinois, defendant's claim that trial counsel was ineffective for failing to request an imperfect self-defense instruction would still fail. The evidence does not support a finding that defendant acted in self-defense, nor did defense counsel argue self-defense to the jury. *People v. Serrano*, 286 Ill. App. 3d 485, 492 (1997). The record is bereft of any evidence showing that defendant feared for his life while he was shooting at Commander Wysinger.

¶35 Defendant argues that the trial court erred by failing to conduct a *Krankel* inquiry after defendant claimed in allocution that he received ineffective assistance of counsel.

¶36 In *Krankel*, defendant filed a *pro se* motion for a new trial wherein he alleged that his counsel was ineffective for failing to investigate his alibi and for failing to present a defense. Our supreme court noted that both the State and defendant agreed that the "defendant should have had counsel, other than his originally appointed counsel, appointed to represent him at the posttrial hearing in regard to his allegation that he had received ineffective assistance of counsel." *Krankel*, 102 Ill. 2d at 189. The court agreed with the assertions of the State and defendant and remanded the case for a hearing on defendant's motion for a new trial with appointed counsel other than his originally appointed counsel. Id.

¶37 Subsequent cases interpreting *Krankel* compel a fairly narrow reading of the case. In *People v. Nitz*, 143 Ill. 2d 82 (1991), our supreme court clarified that there is no *per se* rule that new counsel must be appointed every time a defendant presents a *pro se* motion for a new trial alleging ineffective assistance of counsel. *Nitz*, 143 Ill. 2d at 134. Rather, the trial court should

first examine the factual matters underlying the defendant's claim to determine whether new counsel should be appointed. *Nitz*, 143 Ill. 2d at 134. Subsequently, in *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003), our supreme court found that when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, a trial court should examine the factual basis of the defendant's ineffective assistance claim and, if it determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. If however, the allegations demonstrate possible neglect, then new counsel should be appointed. *Moore,* 207 Ill. 2d at 77-78.

¶38 In this case, defendant did not present a written or oral posttrial motion to the court alleging ineffective assistance of trial counsel. Rather, at sentencing, in allocution, defendant stated:

> "DEFENDANT: Your honor, I waited a long time to speak with you in open court, but I was prohibited from doing so by my Defense Counsel.
>
> THE COURT: Mr. Burton, I know you may be a little bit nervous, but just speak a little bit slowly so that we can hear everything that you say, okay?
>
> THE DEFENDANT: Yes, sir. Your Honor, I waited a long time to speak with you in open court, but I was prohibited from doing so by my Defense Counsel. I feel that she violated my 6th and 14th Amendment. I requested her to raise several issues through pre-trial motions and she refused to do so.
>
> I then filed a complaint with the ARDC against my Defense Counsel. This was brought to the Court's attention 12-7-09 and no action took place regarding this issue.

The jury found me guilty of Count 5, which is insufficient as charged. There was no evidence presented to the Grand Jury to support Count 5. According to all documents there was no criminal conduct committed to Alfonso Weisinger [sic] as civilian.

It was alleged that a criminal conduct was committed after Alfonso Weisinger [sic] announced his office. Your Honor, I understand you have the authority to review the Grand Jury transcript and determine if there was any evidence presented to the Grand Jury to support certain counts of the indictment. Count 5 should have been nolle prosed along with the civilian Count 6 and 9 prior to trial.

Also the jury had found me guilty of Count 5 and 8. These counts come from the same physical act that was formed for the basis of the Count 1 conviction. I think that goes to violate the one act one crime [sic] statute.

Your Honor, I feel that I wasn't granted a fair trial. That proves my innocence of these allegations. The State withheld GSR from the jury was proved negative [sic]. Your Honor, these charges were fabricated against me to cover for the unlawful justification of Alfonsa Weisinger [sic] discharging his weapon at me and damaging civilian property.

I stand before this Court today, Your Honor, proclaiming my innocence.

THE COURT: All right. Anything else you wish to say?

DEFENDANT: No, sir.

THE COURT: Thank you very much."

¶39 Defendant asserts that the trial court did not make an adequate inquiry into his allegation of ineffective assistance of counsel. Defendant requests that we remand his case to the trial court for the court to conduct a proper *Krankel* inquiry into his claim of ineffective assistance of trial counsel.

¶40 During an inquiry into a posttrial *pro se* claim of ineffective assistance, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Moore*, 207 Ill. 2d at 78. A trial court may also base its evaluation on its knowledge of defense counsel's performance at trial and the sufficiency, or lack thereof, of the defendant's allegations on their face. *Id* at 79. Whether the trial court made an adequate inquiry is a question of law, and our review is *de novo*. *People v. Savage*, 361 Ill. App. 3d 750 (2005).

¶41 Defendant argues that *People v. Vargas*, 409 Ill. App. 3d 790 (2011), is instructive here. In *Vargas*, the defendant was found guilty of first degree murder, attempt first degree murder and aggravated discharge of a firearm. *Id*. In allocution, the defendant stated that defense counsel failed to investigate his case by, among other things, failing to "obtain records and information I advised him was [sic] very helpful for my defense strategy." *Id* at 800. The trial court asked defendant if he had anything else to say, to which the defendant responded, "No, your Honor." The court thanked defendant and proceeded immediately to sentencing, without responding to the defendant's grievances.

¶42 On appeal, we remanded to the trial court for the trial court to conduct an inquiry

consistent with *Krankel*. *Id* at 803. Although the trial court had heard all of the testimony at trial, defendant's ineffective assistance of counsel claim was based on counsel's failure to review unspecified records and information. These records and information "related to matters *de hors* the record and [were] not readily ascertainable by a trial judge." *Id* at 803.

¶43 We find *Vargas* distinguishable notwithstanding that in this case, as in *Vargas*, there was no interchange between the trial court and defendant regarding defendant's ineffective assistance claim. Unlike *Vargas*, there was no lengthy interchange required in this case where defendant's allegations were not based on matters outside of the record. Defendant's allegations were based on trial counsel's failure to raise certain issues in pretrial motions. The trial court was free to base its evaluation of defendant's claims on its knowledge of defense counsel's performance at trial and the sufficiency of defendant's allegations on their face. *Moore*, 207 Ill. 2d at 78-79.

¶44 The record shows that defense counsel filed several pre-trial motions, including a motion to suppress statements, a motion *in limine* to prohibit the State from mentioning gangs, a motion to sever the charge of armed habitual criminal, an oral motion *in limine* to bar the State from mentioning defendant's aliases, a motion *in limine* to bar mention of a woman receiving a gunshot wound the night of the shooting and a *Montgomery* motion to bar the use of prior convictions for impeachment. After the jury retired to deliberate, the trial court stated, "Congratulations to both sides for your professionalism, I thought you both did a fine job representing your clients."

¶45 Our "operative concern" as a court of review is to ensure that the trial court has made an adequate inquiry. *Moore*, 207 Ill. 2d at 78. Based on the record before us, we find that the trial

court was adequately apprised of defendant's allegations and could make a reasonable judgment as to the insufficiency of defendant's claims based on its knowledge of defense counsel's performance at trial. Therefore, defendant's *Krankel* claim fails.

¶46 Defendant also argues that the trial court improperly considered Deputy Chief Wysinger's successful career at the Chicago police department as a reason to impose a harsher sentence. As the State notes, sentencing issues are forfeited unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant acknowledges that he forfeited this issue by failing to include it in his motion to reconsider the sentence but urges us to consider it under the plain error doctrine.

¶47 Forfeited issues relating to sentencing may be reviewed for plain error. *Id* at 545. To establish plain error, a defendant must show either that: "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id*. Defendant bears the burden of persuasion under either prong of the plain error rule. *Id.* However, before we can determine whether defendant has met his burden under either prong of plain error, we must first decide whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶48 Defendant argues that the State dwelled on Deputy Chief Wysinger's career in the Chicago police department and made numerous improper comparisons between the lives of defendant and Deputy Chief Wysinger. During sentencing the prosecutor stated:

"[Defendant] has graduated from his drug cases and his gun cases to the

attempt murder of a Chicago Police Officer for his 7th felony conviction. And compare that, Your Honor, to Commander Weisinger [sic] that you heard testifying. Someone who grew up in similar neighborhoods to the Defendant, someone who is gainfully employed by the Chicago Police Department for 24 and a half years at the time he testified, someone who obtained the rank of Deputy Chief of the Detective Division, in charge of all the detectives on the south side of the City of Chicago at the time he testified.

* * *

This is a Chicago Police Officer that was off duty. He was at a front porch of a house at a birthday party for his grandmother's 80th birthday, outside the home that he grew up. And without hesitation he jumps off the porch and chases a man with a gun. He didn't sit and watch and didn't talk about what he does or what his profession was. He showed it on that date. And his actions show you the character of the man Alfonono Weisinger [sic]."

¶49 Defendant claims that the trial court relied on the State's improper argument in imposing sentence and considered Deputy Chief Wysinger's career as a police officer and the numerous comparisons between the men's character. A reasoned judgment as to the proper sentence to be imposed must be based upon the particular circumstances of each individual case and depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *Perruquet*, 68 Ill. 2d at154. "In determining an appropriate sentence, the defendant's history, character, rehabilitative potential,

the seriousness of the offense, the need to protect society and the need for deterrence and punishment must be equally weighed." *Jones*, 295 Ill. App. 3d at 455. The imposition of a sentence is a matter within the trial court's discretion, and a reviewing court has the power to disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74.

¶50 At sentencing, the court outlined the factors it had considered in selecting an appropriate sentence. The court indicated that it had:

> "considered the evidence that was presented at trial in this case, considered the Pre-Sentence Investigation, the corrections that were made, I considered the evidence that was offered in aggravation and in mitigation and the statutory factors that I must consider in aggravation and mitigation.
>
> I have considered the financial impact of incarceration. I considered the arguments of both the attorneys as to what they believe is the appropriate sentence and I have considered the Defendant's statements that were made in his own behalf.
>
> What I find particularly egregious about this case, in addition to the facts that were pointed out by the State, which the jury found Mr. Burton guilty of, was that this - - it was the time and location that this occurred. This occurred in a residential neighborhood in an early summer evening while people were going about their business when the Defendant I believe fired the shots. And that was testified to by the witnesses in this case."

¶51 Defendant relies on *People v. Joe*, 207 Ill. App. 3d 1079 (1991) and *People v. Bernette*, 30 Ill. 2d 359 (1964), in support of his argument that the court improperly relied on the State's

argument in aggravation comparing the character of the two men. In *Joe*, the defendant was convicted of murder. The sentencing court considered the fact that the victim was a doctor and his status in the community as factors in aggravation, despite the fact that they were irrelevant to the offense committed. *Joe*, 207 Ill. App. 3d at 1087. In *Bernette*, the prosecutor elicited at trial from the victim's widow that the victim had left small children behind. *Bernette*, 30 Ill. 2d at 373. Our supreme court found this testimony to be irrelevant and highly inflammatory therefore reversible error. *Id*.

¶52 We find *Joe* and *Bernette* unpersuasive. Appellate courts assume that a trial judge considered only competent evidence in sentencing a defendant and this assumption will be overcome only if the record affirmatively demonstrates the contrary. *People v. Kolzow*, 301 Ill. App. 3d 1 (1998). Unlike *Joe* and *Bernette*, there is no indication that the trial court considered any improper factor in imposing sentence, nor is there an inkling of evidence to suggest that the trial court considered Deputy Chief Wysinger's character, his lengthy service to the Chicago police department or any comparisons made by the State between defendant and Deputy Chief Wysinger in crafting an appropriate sentence. The trial court specifically stated that it considered the evidence adduced at trial, the evidence offered in aggravation and mitigation, the statutory factors in aggravation and mitigation, and the arguments made by the parties as to what the appropriate sentence should be. Accordingly, we find that no error occurred and plain error analysis is unnecessary.

¶53 Defendant next contends that the trial court abused its discretion when it sentenced him to 52 years' imprisonment for attempt first degree murder of a peace officer, where the court

failed to consider his troubled family background, lack of prior violent offenses and rehabilitative potential.

¶54 A trial court has broad discretionary powers in choosing the appropriate sentence a defendant should receive. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). A reasoned judgment as to the proper sentence to be imposed must be based upon the particular circumstances of each individual case and depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). "In determining an appropriate sentence, the defendant's history, character, rehabilitative potential, the seriousness of the offense, the need to protect society and the need for deterrence and punishment must be equally weighed." *People v. Jones*, 295 Ill. App. 3d 444, 455 (1998). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and the court is presumed to have considered any evidence in mitigation that is before it. *People v. Partin*, 156 Ill. App. 3d 365, 373 (1987). The imposition of a sentence is a matter within the trial court's discretion, and a reviewing court has the power to disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74.

¶55 We find no abuse of discretion in this case where the trial court sentenced defendant to 52 years' imprisonment for attempt first degree murder of a peace officer. As previously discussed, the court indicated that it had considered the evidence that was presented at trial, the pre-sentence investigation report, the evidence offered in aggravation and mitigation and the statutory factors in aggravation and mitigation. See 730 ILCS 5/5-5-3.1, 3.2 (West 2006).

Furthermore, attempt murder of a peace officer carries a possible punishment of 20-to-80 years' imprisonment. 720 ILCS 5/8-4(c)(1)(A) (West 2006). A sentence which falls within the statutory range is presumptively proper and does not constitute an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007). Therefore, it is presumed that since the 52-year sentence fell within the statutory range, it is proper.

¶56 Last, defendant argues that his two convictions for attempt first degree murder and conviction for aggravated discharge of a firearm must be vacated under the one-act, one-crime doctrine set forth in *People v. King*, 66 Ill. 2d 551, 566 (1977). Defendant did not raise this claim below and therefore he forfeited it.

¶57 Before we address defendant's plain error argument, we find it necessary to note that we agree with defendant and the State that under the one-act, one-crime doctrine, his conviction for aggravated discharge of a firearm should be vacated. *King*, 66 Ill. 2d at 566. We therefore vacate defendant's conviction for aggravated discharge of a firearm. *People v. Garcia*, 179 Ill. 2d 55, 71 (1997) (under the one-act, one-crime rule, a sentence should be imposed on the more serious offense and the conviction on the less serious offense should be vacated); See also *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶58 The plain error rule is a limited exception to forfeiture and may be invoked only if the evidence is closely balanced, or if the alleged error is so fundamental it may have deprived defendant of a fair trial. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Our supreme court has held that "forfeited one-act, one-crime arguments are properly reviewed under the second prong

of the plain-error rule because they implicate the integrity of the judicial process." *People v. Nunez*, 236 Ill. 2d 448, 493 (2010). However, we must first determine if error occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶59 The one-act, one-crime doctrine involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161 (2010). First, the court must determine whether the defendant's conduct constituted a single act or multiple acts. *Id*. Multiple convictions are improper if they are based on precisely the same physical act. *Nunez*, 236 Ill.2d at 494. A physical act is "any overt or outward manifestation which will support a different offense." *People v. Rodriguez*, 169 Ill.2d 183, 188 (1996). If the court determines that the defendant's conduct involved multiple acts, the court must then determine whether any of the offenses are lesser-included offenses. *Miller*, 238 Ill. 2d at 165. Multiple convictions are improper if any of the offenses are lesser-included offenses. *Id*.

¶60 The first step in determining whether the one-act, one-crime doctrine has been violated is to determine whether the defendant's conduct consisted of a single physical act or separate acts. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). Defendant argues that his convictions for attempt murder must be vacated because the State's indictment charged only one single physical act and did not apportion different charges to separate acts, nor did the State apportion different charges to separate acts in the presentation of its case. Defendant analogizes the facts of the instant case with those in *People v. Crespo*, 203 Ill. 2d 335 (1977).

¶61 In *Crespo*, the defendant was convicted of the first degree murder of one victim and one count of each armed violence and aggravated battery in the stabbing of a second victim. *Id.* at 337. On appeal to the Illinois Supreme Court, the defendant argued that his conviction for

aggravated battery should be vacated because it stemmed from the same physical act as the armed violence charge. *Id*. The defendant had stabbed the second victim three times, each stabbing being a separate and distinct act, but the State did not charge defendant for the three stabbings in the indictment. Instead, the three stabbings were charged as different counts under different theories of criminal culpability. *Id*. at 342. In addition, the State's theory at trial, as outlined in closing argument, established that the State intended to portray the defendant's conduct as a single attack. *Id*.

¶62 Our supreme court held that where a defendant commits multiple criminal acts but the indictment only charges defendant with a single course of conduct, the trial court cannot convict the defendant of separate criminal acts. The court emphasized that the State could have charged the crime as multiple acts and could have argued the case to the jury that way but chose not to do so. *Id* at 344.

¶63 We disagree with defendant that *Crespo* is dispositive. The State proceeded to trial in this case on two separate acts of attempt first degree murder: one attempt murder of a peace officer and one attempt murder while armed with a firearm. Because both charges alleged that defendant shot at Deputy Chief Wysinger, both charges contained essentially the same language. In addition, the State argued that the two shootings were separate acts with intervening circumstances to the jury in closing argument and in rebuttal argument. Specifically, the State argued that as Deputy Chief Wysinger was chasing defendant in the street, defendant turned and fired his gun at Deputy Chief Wysinger. Deputy Chief Wysinger returned fire. As defendant ran from the street to the sidewalk, defendant turned and again fired shots at Deputy Chief

Wysinger. Defendant continued to run and Deputy Chief Wysinger gave chase. Defendant clearly fired his gun at Deputy Chief Wysinger two separate and distinct times. Those two distinct firings were separated by the intervening acts of Deputy Chief Wysinger returning fire and defendant running onto the sidewalk. See *Crespo*, 203 Ill. 2d at 343-44. Accordingly, we find that defendant's conduct constituted multiple acts.

¶64 Neither defendant, nor the State, make an argument involving the second step of the one-act, one-crime analysis. Nevertheless, because we have found that defendant's conduct involved multiple acts, we are required to determine whether any of the offenses are lesser-included offenses. *Miller*, 238 Ill. 2d at 165. A lesser-included offense is defined as an offense established by proof of lesser facts or mental state, or both, than the charge offense. 720 ILCS 5/2-9 (West 2008). In making this determination we use the abstract elements approach. *Miller*, 238 Ill. 2d at 175.

¶65 Under the abstract elements approach, we must compare the statutory elements of the two offenses. *Id* at 166. "If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second." *Id*. It must be impossible to commit the greater offense without committing the lesser offense. *Id*.

¶66 To sustain a conviction for attempt murder of a police officer, the State must prove that a defendant, "with the intent to commit a specific offense [first degree murder], [did] any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2006). The sentence for attempt first degree murder of a peace officer is the sentence for a

Class X felony except where "defendant knew or should have known that the murdered individual was a peace officer" and then the sentence is not less than 20 years and not more than 80 years. 720 ILCS 5/8-4(c)(1)(A) (West 2006); 720 ILCS 5/9-1(b)(1) (West 2006). To sustain a conviction for attempt murder while armed with a firearm, the State must prove that a defendant, "with the intent to commit a specific offense [first degree murder], [did] any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2006). The sentence for attempt first degree murder while armed with a firearm is the sentence for a Class X felony "for which 15 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/8-4(c)(1)(B) (West 2006); 720 ILCS 5/9-1(b)(1) (West 2006).

¶67 While it appears that under the abstract elements test the offenses of attempt murder of a peace officer and attempt murder while armed with a firearm could be construed as lesser-included offenses of each other because "all of the elements of one offense [attempt murder] are included within a second offense [attempt murder] and the first offense [attempt murder] contains no element not included in the second offense [attempt murder], the first offense is deemed a lesser-included offense of the second," such a result would be illogical. *Miller*, 238 Ill. 2d at 166. A lesser-included offense is an offense established by proof of lesser facts or mental state, or both, than the charge offense. 720 ILCS 5/2-9 (West 2008). Here, both charges of attempt murder require proof of the same facts and mental state. The only difference between the two offenses as charged is the proof required to extend or enhance the corresponding sentence. *People v. Smith*, 2012 IL App (1st) 102354 ¶ 110. Attempt murder of a peace officer requires proof of an aggravating factor, that the victim was a peace officer and the defendant

knew or should have known that he was a peace officer, to increase the sentencing range to 20 to 80 years imprisonment. 720 ILCS 5/8-4(c)(1)(A) (West 2006); 720 ILCS 5/9-1(b)(1) (West 2006). Attempt murder while armed with a firearm requires proof that defendant was armed with a firearm to enhance his sentence to a Class X plus 15 years. 720 ILCS 5/8-4(c)(1)(B) (West 2006); 720 ILCS 5/9-1(b)(1) (West 2006). We therefore cannot find that one charge of attempt murder is a lesser included offense of the other charge of attempt murder, and therefore both of defendant's convictions for attempt murder can stand under *King*.

¶68 As we have found that defendant's convictions for attempt murder do not violate the one-act, one-crime rule, we cannot find that error occurred for purposes of plain error analysis. Therefore, plain error analysis is unnecessary.

¶69 CONCLUSION

¶70 For these reasons, we vacate defendant's conviction for aggravated discharge of a firearm but affirm as to all other issues raised by defendant in this case.

¶71 Affirmed in part and vacated in part.