2012 IL App (1st) 110313-U

FIRST DIVISION
October 22, 2012

No. 1-11-0313

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CR 12464
	)	
ALI ABDULLA,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ *1* *HELD:* We affirm defendant's conviction and sentence for attempt first degree murder armed with a firearm and aggravated battery with a firearm. Defendant was proven guilty beyond a reasonable doubt and his sentence was not excessive. The court did not err in failing to order a fitness evaluation, grant defendant's request to change counsel or *sua sponte* raise an issue under *Batson v. Kentucky*, 476 U.S. 70, 106 S.Ct. 1712 (1986). Defendant was not denied a fair trial by the prosecutor's remarks and did not receive ineffective assistance of counsel.

¶ 2 A jury found defendant Ali Abdulla guilty of attempt first degree murder armed with a firearm and aggravated battery with a firearm. The trial court denied defendant's motion for a new trial and sentenced him to 30 years' imprisonment. On appeal, defendant argues: (1) the court erred by not ordering a fitness evaluation; (2) the court erred by denying defendant's request to change counsel; (3) the court erred in failing to *sua sponte* raise an issue regarding the prosecutor's violation of *Batson v. Kentucky*, 476 U.S. 70, 106 S.Ct. 1712 (1986), when the prosecutor used a peremptory challenge to strike a juror of Arab descent; (4) defendant was denied a fair trial by the prosecutor's repeated verbal attacks on defense counsel; (5) he received ineffective assistance of counsel; (6) he was not proven guilty beyond a reasonable doubt; and (7) his sentence was excessive. We affirm.

¶ 3 Background

¶ 4 Defendant was arrested and charged with attempt first degree murder while armed with a firearm and aggravated battery with a firearm for the June 25, 2009, shooting of Monika Sobocinska.

¶ 5 At trial, Sobocinska testified that she had known defendant since 2006. She was a waitress at a hookah café. Defendant, who she knew as "Ali," was a frequent customer at the café. Sobocinska had always served defendant because he asked for her specifically but, for the past year, she had avoided him. He gave her gifts, told her he loved her and frequently asked her out but she rebuffed his advances. On June 24, 2009, defendant had come to the café earlier than usual and left earlier than usual.

She had made fun of his pants.

¶ 6 Sobocinska testified that, at 3 a.m. on June 25, 2009, she left work at the end of her shift and started driving home. She noticed someone driving behind her, "fast and really getting close." Thinking the car was going to hit her, she pulled over and stopped her car. The car following her stopped next to her car.

¶ 7 Sobocinska looked over at the other car and "immediately" saw Ali was driving the car. She testified she had known him for years so it was "really easy" to identify him and she was "very sure *** a hundred percent sure" it was defendant in the car. Sobocinska was in her driver's seat with her side window open and looking at defendant in his driver's seat. The street was well lit and she had no trouble seeing his face. He was alone in the car and his passenger side window was down.

¶ 8 Sobocinska then heard "bang, bang twice and *** felt a huge pain on my shoulder." The sounds were fast, one right after another, "like explosions for *** fireworks or gun." She saw two quick flashes at the same time that she heard the bangs. Sobocinska thought defendant had thrown firecrackers at her. She did not see his hands. She did not see a gun or weapon. After the first bang, Sobocinska's eyes started itching and after the second bang she felt a "huge" pain in her shoulder. After the two bangs, defendant started "driving very fast and drove away."

¶ 9 Sobocinska turned her car around and went back to the hookah café. She went in, screaming that Ali had attacked her, had thrown something on her back and her back hurt "so much." Sobocinska testified she told responding police officers that Ali

threw fire crackers at her and hurt her. She did not know his last name but testified she described him clearly to the officers. Responding paramedics told Sobocinska she had a bullet in her back. They took her to the hospital where doctors removed a bullet from her rear right shoulder.

¶ 10 Sobocinska testified that, while in the hospital, a detective showed her a group of photographs in which she recognized a photo of a friend of Ali's, subsequently identified as Mamoun Sultan. She told the detective that she had seen the man in the hookah café with Ali but did not know his name. Hours later, the detective showed her another group of photographs, in which she recognized a photo of Ali. She identified him to the detective as the person who shot her. Sobocinska identified defendant in court as Ali.

¶ 11 Paramedic Riki Kaelin testified that Sobocinska had a bullet lodged in her right shoulder and a wound in her left shoulder.

¶ 12 Surgeon Jonathan Giannone testified that he removed a bullet from Sobocinska's right rear shoulder. She also had a wound in her left shoulder, consistent with a bullet path crossing from her left to her right shoulder. He opined that the pattern of injury and imaging tests performed on Sobocinska were consistent with Sobocinska's being seated in a car and being shot from another car aiming in her direction.

¶ 13 Hussein Aleisawi testified he was managing the hookah café on the evening of the shooting. Sobocinska had worked at the café that night but, sometime after she had left for the night, returned to the café crying. She told him that Ali had thrown something at her, "like firecrackers" and said there was burning. Aleisawi knew Ali

because he was a customer, one of the familiar faces in the café. Ali usually came alone but was occasionally accompanied by a man subsequently identified as Mamoun Sultan. Aleisawi remembered that Ali had come to the café that night but left early.

¶ 14 Aleisawi flagged a police car and subsequently learned Sobocinska had been shot. While he was talking to police, a car passed by the café. Amjad Raddad, a café employee, pointed to the car and told the police officers: "this is Ali." The officers took off in a rush and followed the car. The next day, Aleisawi saw a hole in the interior roof of Sobocinska's car and a bullet in the car, which he reported to a police detective. He identified a photo of Ali from a photo array the day after the shooting.

¶ 15 Amjad Raddad testified he was working at the café in the early morning of June 25, 2009, when Sobocinska came back to the café "screaming *** terrified" and said "look at what Ali did to me." Sobocinska showed Raddad her upper back and he saw a little blood and what looked like dark blue/green burn line under her skin all the way across her upper shoulders. An ambulance arrived and a paramedic reported Sobocinska had a bullet in her shoulder. Raddad had known waitress Sobocinska for two years and customer Ali for three years. Raddad identified defendant in court as Ali. Raddad testified that Ali and Sobocinska had a customer-waitress relationship but at some point Sobocinska stopped talking to and serving Ali.

¶ 16 While Sobocinska was inside the ambulance, Raddad saw Ali driving by the café in a dark car. Ali was alone in the car, driving very slowly, and looking inside the café. Raddad pointed to the car and told police officers that "this is the guy" who Sobocinska

said hurt her. The officers "ran after" the car. Raddad stated he knew Mamoun Sultan because he came to the café with Ali and he never told police that Mamoun Sultan was the person who shot Sobocinska.

¶ 17 Chicago police officer Gautum Patel testified that he and his partner, Officer Combs, responded to a hand wave at a hookah café on the morning of June 25, 2009. A woman pointed out a wound on her left shoulder and told the officers that "someone was following her" and "some guy named Ali threw a firecracker at her while she was driving" and she heard two firecracker pops. She did not give the officers a last name for Ali or the name Mamoun Sultan. A paramedic told Officer Patel that there was a bullet in Sobocinska's back.

¶ 18 Officer Combs then came out of the café, pointed to a black car that had just passed by and said "we got to follow this black car." Raddad had told Officer Combs "that's Ali right there." The officers followed the car, never losing sight of it. After a pursuit, the car stopped in an alley and the driver exited, briefly faced the officers and then jumped over a fence. Officer Patel also jumped over the fence but lost sight of the driver near the Chicago River. Officer Patel identified defendant in court as the driver he saw getting out of the car. He had no difficulty seeing the driver because the squad car's headlights and spotlight were directed to the black car. He saw the driver was wearing a black shirt and khaki pants.

¶ 19 The officers inspected the black car, which was registered to Mamoun Sultan. They found two IDs for Mamoun Sultan. In their report, they listed both "Ali" and

"Mamoun Sultan" as the "offender" in Sobocinska's shooting because the car and IDs named Mamoun and the officers did not know whether "Ali" was a nickname or a different person from Mamoun. Based on Sobocinska's description, they listed the offender's description as six feet tall, weighing 220 pounds, approximately 40 years old, with black hair and wearing a black shirt and khaki pants. Officer Patel testified that the description Sobocinska gave the officers matched the man he was chasing. The Mamoun Sultan IDs listed him as being 5'5" tall and weighing 145 pounds and did not match either Sobocinska's description or the man Officer Patel chased. Officer Patel testified that listing Mamoun Sultan in the offender box turned out to be a mistake, as he learned the next day when Ali Abdullah was identified as the offender.

¶ 20 Chicago Police Detective Arthur Young testified that he and his partner were on their way to the scene of a shooting at the café when they diverted to the scene of a foot pursuit of a suspect in the shooting. Officer Combs told him the suspect had been pointed out at the scene of the shooting, described him as a white male wearing tan shirt and khaki pants and said he had escaped into one of the backyards. The detectives searched for two hours but found no one.

¶ 21 By the end of the search, the suspect's vehicle had been identified as belonging to Mamoun Sultan. Detective Young obtained a photograph of Mamoun Sultan and presented it to the victim, Sobocinska, along with photographs of five other men. She identified Mamoun Sultan's photo as being "Ali's friend" and told the detectives that he was not the man who shot her and that "Ali" shot her.

¶ 22 Detective Young then went back to the police station where another detective told him of an "Ali" who worked in a liquor store. At the liquor store, he learned the name Ali Abdullah and an address. The detectives obtained a photograph of an Ali Abdullah. They took the photograph and five others to the hookah café where Aleisawi identified the photograph of Ali Abdullah as the Ali he knew.

¶ 23 Detective Young and other detectives went to the address received at the liquor store. Detective Young identified defendant in court as Ali Abdullah, the man who opened the door to the apartment but shut it in the detectives' faces when they announced they were police. The detectives forced entry and placed defendant in custody. There were a black shirt, tan pants and brown leather shoes in a pile outside the bathroom door. All were "wet as if they had been dumped in water" and Detective Young concluded defendant had jumped in the Chicago River.

¶ 24 Detective Young presented Sobocinska with the photo array and she identified the photo of Ali Abdullah as "Ali," the man who shot her. The detectives received the bullet removed from Sobocinska and inventoried it. After a phone call from Aleisawi, they also retrieved a fragmented bullet from the side front floor of Sobocinska's car, under a corresponding bullet hole. Detective Young testified that both the bullet from the car and the bullet from Sobocinska's back had striation marks, showing that the bullets had been fired from a gun. No handgun was recovered in the case.

¶ 25 After the close of evidence, the jury found defendant guilty of attempt first degree murder armed with a firearm and aggravated battery armed with a firearm. The court

denied defendant's motion for a new trial. The court heard argument on defendant's *pro se* motion alleging ineffective assistance of counsel and denied the motion. It sentenced defendant to 30 years' imprisonment. The court issued the mittimus on January 10, 2011. Defendant filed a timely notice of appeal on the same day.

¶ 26 Analysis

¶ 27 1. Fitness Examination

¶ 28 Plaintiff argues the court erred in failing to order a fitness examination of defendant *sua sponte*. A defendant is presumptively fit to stand trial and be sentenced. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶55; 725 ILCS 5/104-10 (West 2010). However, where a defendant's mental or physical condition renders him "unable to understand the nature and purpose of the proceedings against him or to assist in his defense," the defendant is unfit to stand trial. *Tolefree*, 2011 IL App (1st) 100689, ¶55 (quoting 725 ILCS 5/104-10 (West 2008)). If facts are brought to the court's attention that raise a *bona fide* doubt as to the defendant's fitness to stand trial, the court has a duty to order a fitness hearing *sua sponte. Tolefree*, 2011 IL App (1st) 100689, ¶56; 725 ILCS 5/104-11(a) (West 2010).

¶ 29 Whether a *bona fide* doubt regarding a defendant's fitness arose rests in the discretion of the trial court because the trial court, unlike this court, was able to observe the defendant and evaluate his conduct. *Tolefree*, 2011 IL App (1st) 100689, ¶53. There are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," but the court can consider a defendant's

irrational behavior and demeanor at trial, as well as any medical opinions regarding the defendant's competence to stand trial. *Tolefree*, 2011 IL App (1st) 100689, ¶56 (quoting *Drope v. Missouri*, 420 U.S. 162, 181, 95 S.Ct. 896 (1975)). Because fitness speaks only to a person's ability to function within the context of trial and does not refer to sanity or competence in other areas, a person may be fit for trial even though his mind is otherwise unsound. *Tolefree*, 2011 IL App (1st) 100689, ¶56. We will not reverse the trial court's failure to order a fitness hearing *sua sponte* absent an abuse of that discretion. *Tolefree*, 2011 IL App (1st) 100689, ¶53.

¶ 30 Defendant argues the court erred in failing to order a fitness hearing *sua sponte* because, during a pretrial hearing, defense counsel had told the court that, after several contacts with defendant, he thought a "BCX" fitness evaluation might be appropriate and that the State thought so as well. Defendant asserts the court abused its discretion when it failed to make some further inquiry into counsel's statement. As additional evidence that a fitness hearing was warranted, defendant points to defense counsel's statement that defendant became "quite irate" with counsel and told counsel his services were terminated. He also points to his statements to the court that he wanted a new counsel because his counsel provided the "worst, most horrendous representation;" was never available on the phone; was on "a campaign of lying" to him; had come to see him with a hangover; was "very belligerent, very abusive *** and would not let him talk"; and failed to call witnesses. He also points to the prosecutor's statement to the court that he had heard defendant make a derogatory remark to

defense counsel.

¶ 31 The court did not abuse its discretion in failing to order a fitness hearing of defendant *sua sponte.* The record shows that no facts were brought to the court's attention that raised a *bona fide* doubt as to defendant's fitness to stand trial. There was no medical evidence regarding defendant's mental or physical condition and at no time did the defense or the State request a fitness hearing. Defense counsel mentioned he thought a fitness hearing might be appropriate at some point but never pursued the suggestion. In fact, counsel told the court that, based on his last interview with defendant, he was not at the point of requesting an evaluation. At the court's suggestion, counsel told the court he would continue to consider whether defendant should be evaluated. He made no further mention of a fitness evaluation. There is nothing in this scenario that would have caused the court to suspect that defendant was unable to understand the nature and purpose of the proceedings against him or to assist in his defense.

¶ 32 Further, there was nothing in defendant's behavior or his statements regarding his counsel or in the prosecutor's mention of the derogatory remark defendant made to his counsel that would lead the court to think that defendant was unable to understand the nature and purpose of the proceedings against him or to assist in his defense. The record shows defendant actively participated in his own defense by testifying competently during a pre-trial hearing; argued strongly and articulately for a change in defense counsel; and, as will be discussed below in section 2, deliberately attempted to

delay the trial until Sobocinska, the principal witness, left the country. His conduct and demeanor throughout trial show he was an active participant in directing his case, clearly understood the proceedings and attempted to manipulate them to his own ends. The court's observations of defendant would not have raised any *bona fide* doubt as to defendant's fitness to stand trial. Accordingly, the court did not abuse its discretion in failing *sua sponte* to order a fitness hearing.

¶ 33 2. Request to Change Counsel

¶ 34 Plaintiff argues the court erred in denying his request to change counsel, made during an October 2010 hearing on defendant's motion to suppress statements. During the hearing, defense counsel had informed the trial court that during his meeting with defendant the previous day, defendant had become "quite irate" with him and told him defendant wished to "fire [him] and hire a new lawyer." Defendant had reiterated before the start of the hearing that counsel's services were terminated and defendant intended to hire a new lawyer. Counsel told the court he was willing to "stand on and act" as defendant's counsel, as the court saw fit, and was ready to proceed on the motion to suppress.

¶ 35 Defendant told the court that his counsel provided him the "worst, most horrendous representation"; rushed him through the process and never gave him a chance to make any decision. He told the court he did not want counsel to represent him because he gave him "very ineffective assistance of counsel." Defendant told the court his counsel had "been on a campaign of lying" to him; constantly changed the

sentencing range facing defendant; was never available when defendant or his family telephoned him; and had come to see him "with a hangover, very belligerent, very abusive in words." He said counsel was "not to be reasoned with" *** would not let [him] talk *** was very violent and everything." Defendant said counsel had asked, "What are you going to do, fire me?" and defendant had responded "Yeah, as a matter of fact, you're fired."

¶ 36 The court asked defendant whether he had a different lawyer present in the courtroom that day. Defendant replied that he did not have another lawyer at that time but his family was looking for one.

¶ 37 Asked by the court to respond to defendant's allegations, defense counsel stated that he had told defendant from the onset that the offense was a non-probational class X offense with a determinate period of incarceration but that defendant continually told him he should receive probation because he had no criminal background. Counsel denied visiting defendant while drunk; lying to defendant; or being violent. Counsel said that when defendant told him he wanted to fight the charges, counsel told him he would fight and do the best he could, at which point he filed assorted motions to suppress.

¶ 38 Defendant then enumerated additional complaints against his counsel, calling him "pathetic" and "not fit to represent" him. He told the court that his family had a well-known litigation attorney in Buffalo, New York, Jim Ostrowski, who would arrive "this week, if not next week, to overlook [his] case." Defendant then said that he had assorted witnesses that should have been called during a previous motion to suppress

and counsel refused to call them. Defense counsel responded that the witnesses were actually the State's witnesses who would support the State's theory of the case and counsel had deemed it wise not to call them.

¶ 39 The prosecutor told the court that the State was ready to proceed and time was of the essence because Sobocinska, a Polish citizen and the complaining witness, was in the country on a visa which was only extended for six more months. It was defense counsel's understanding that defendant was aware that Sobocinska was awaiting the outcome of the case before her deportation.

¶ 40 The trial court found it "clear" that defense counsel had met with defendant and "done his job." The court stated that it believed defendant was "doing this for dilatory purposes to continue the case." It noted that defendant did not have another attorney ready to take over the case and stated the case was "a case that started in the summer of '09, and we have to move forward on the case. I think that is why you are talking about this conflict." The court told defendant he had not pointed "to anything specific that your attorney needs to do that he hasn't done. He is ready to represent you."

¶ 41 Asked by the court whether he was willing to continue representing defendant or had a conflict given defendant's challenge, defense counsel replied that it would be his pleasure to represent defendant. The court denied the "motion for a continuance, the motion to fire the attorney." Defendant continued arguing that he had the right to fire his counsel; he did not trust his counsel; counsel had misled him; counsel had only visited him three times; and counsel had rushed him. Defense counsel responded that

he had visited defendant nine to ten times. The court reiterated that the motion for continuance was denied and then proceeded with the motion to suppress.

¶ 42 The Sixth Amendment grants a defendant the right to retained counsel of his choice. *People v. Tucker*, 382 Ill. App. 3d 916, 919 (2008). The right does not depend on whether the defendant received a fair trial or was prejudiced by the representation he received. *Tucker*, 382 Ill. App. 3d at 919. A defendant may forfeit his right to counsel of choice if the defendant abuses the sixth amendment in an attempt to delay trial and thwart the effective administration of justice. *Tucker*, 382 Ill. App. 3d at 920. "In balancing the judicial interest of trying the case with due diligence and the defendant's constitutional right to counsel of choice, the court must inquire into the actual request to determine whether it is being used merely as a delaying tactic." *Tucker*, 382 Ill. App. 3d at 920 (quoting *People v. Burrell*, 228 Ill. App. 3d 133, 142 (1992).

¶ 43 The determination of whether the defendant's right to selection of counsel unduly interferes with the orderly process of judicial administration lies within the trial court's discretion and turns on the particular facts of each case. *Tucker*, 382 Ill. App. 3d at 920. The court must consider factors such as "whether defendant articulates an acceptable reason for desiring new counsel; whether the defendant has continuously been in custody; whether he has informed the trial court of his efforts to obtain counsel; whether he has cooperated with current counsel; and the length of time defendant has been represented by current counsel." *Tucker*, 382 Ill. App. 3d at 920. "[I]f new

counsel is not specifically identified or does not 'stand ready, willing, and able' to make an appearance on defendant's behalf," the court does not abuse its discretion in denying a motion to change counsel. *Tucker*, 382 Ill. App. 3d at 920 (quoting *Burrell*, 228 Ill. App. 3d at 142).

¶ 44 The court did not abuse its discretion in denying defendant's motion for change of counsel. The record supports the court's finding that defendant's arguments for change of counsel were insufficient to warrant the delay that would occur if the court granted the motion. Defendant pointed to nothing specific that his counsel did wrong in representing him. Defendant did not like how counsel was handling his case but there is nothing in his assertions that shows counsel was not diligent in his representations or had done anything contrary to defendant's interests. Further, defendant had no new counsel present or "ready and willing" to take over the case. Indeed, it appeared he had made no effort whatsoever to secure a new counsel, referring only to a family lawyer who might come and look things over to determine what needed to be done.

¶ 45 If the court allowed the change in counsel, the length of the delay was indeterminate. This was unacceptable to the court because, not only had the case been pending for two years, but the complaining witness's visa was in danger of expiring. Given the judicial interest in trying the two-year old case, the expiration of Sobocinska's visa, defendant's lack of diligence in acquiring new counsel and his unconvincing reasons for wanting new counsel, the court could clearly find that defendant was using his request to change counsel as a delaying tactic. The court did

not abuse its discretion in denying the request.

¶ 46 3. *Batson* Violation

¶ 47 Plaintiff argues the court erred in failing to raise a *Batson* issue *sua sponte* when the State used a peremptory challenge to strike a juror of Arab descent, the same descent as defendant. During jury selection, the following colloquy had occurred between the court and potential Juror Wafaa Darwish:

"THE COURT: Can you be fair to both sides in the case?

MS. DARWISH [Potential Juror]: I guess.

THE COURT: Why do you say that?

MS. DARWISH: He's Arabian. I'm Arabian, too. So maybe I'm not sure.

THE COURT: That's not going to be a reason for you to say one way or the other is it? You're not going to automatically –

MS. DARWISH: I'm not sure.

THE COURT: So you think that may affect you?

MS. DARWISH: I can't –

THE COURT: Obviously that wouldn't be fair, right, if you said he's guilty or not guilty just because you're both Arabian?

MS. DARWISH: I didn't say that, but just I'm going to feel not comfortable with this. Dealing with this. That's it. I'm not going to be not fair, but I'm not feeling comfortable with this.

* * *

THE COURT: So if you're on the jury, it's okay that you're aware of this issue and you're not completely comfortable. But will you do your best to be fair to both sides?

MS. DARWISH: Yes.

THE COURT: Do you think you can do that?

MS. DARWISH: Yes.

THE COURT: Will you follow the law as I give it to you?

MS. DARWISH: Uh-huh."

Ms. Darwish also told the court her English was only "80% good" and that she would have childcare issues if selected as a juror.

¶ 48 Although not reflected in the report of proceedings of the voire dire, at some point during the voire dire, to quote a subsequent statement by the court, defendant "reached out and spoke Arabic to a juror [Ms. Darwish] during jury selection."

¶ 49 After voir dire was complete, the court had the following discussion with both counsel:

"THE COURT: Any motion for cause?

PROSECUTOR: Judge, my partner is indicating Ms. Darwish. I had already crossed her off apparently. We are asking for cause on this aside from what she disclosed at the time where the defendant was thanking her in his own language, which she apparently understood and as well herself indicated that to be on the jury may effect her. She's not comfortable with this. And I believe she said he's

Arabian and I'm Arabian. I think it's quite clear on the record that she cannot be fair and there is some bias here.

THE COURT: [Defense counsel]?

DEFENSE COUNSEL: Judge, I would object. I suppose if your honor is going to make a finding that the contact would be one to support a strike for cause, then what we're left with is a woman who is of Arabic decent and I don't think that though she did indicate that she did think she could be fair, I think she indicated it would be more of a personal discomfort * * * due to the fact she has four children. Certainly, I don't think that would be basis for cause. The State certainly has ample opportunity to use and I would object.

PROSECUTOR: I would think just the fact that this [*sic*] with who escaped getting held in contempt, just the fact that he speaks with a juror, they are from the same descent speaks volumes. There is a bias here. An inherent bias. I believe she was --

DEFENSE COUNSEL: -- I don't know what country my client is --

THE COURT: As to Ms. Darwish motion denied. That being said she'll be off the jury. Anybody else?"

* * *

THE COURT: That's 12. Each side has a peremptory as to each alternate. Ms. Darwish?

DEFENSE COUNSEL: We accept her.

THE COURT: State?

PROSECUTOR: Gone."

¶ 50 Pursuant to *Batson v. Kentucky*, 476 U.S. 70, 106 S.Ct. 1712 (1986), racially motivated peremptory challenges during jury selection are forbidden because they are discriminatory and violate the equal protection clause of the constitution. *Batson,* 476 U.S. at 89, 106 S.Ct. at 1719. Under the three-step process set out in *Batson*, a party objecting to use of a peremptory challenge must first "establish a *prima facie* case of purposeful discrimination 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' " *People v. Rivera*, 221 Ill. 2d 481, 500 (2006) (quoting *Batson*, 476 U.S. at 93-94, 106 S.Ct. at 1721)). If a *prima facie* case is demonstrated, then the burden shifts to the other party to articulate a nondiscriminatory and neutral explanation for the challenge. *Rivera*, 221 Ill. 2d at 500. Lastly, the trial court makes the determination of whether the objector did establish purposeful discrimination. *Rivera*, 221 Ill. 2d at 500.

¶ 51 A trial court may raise a *Batson* issue *sua sponte*, but " 'only when a *prima facie* case of discrimination is abundantly clear.' " *People v. Rivera*, 227 Ill. 2d 1, 5 (2007) (quoting *Rivera*, 221 Ill. 2d at 505). There must be "a clear indication of a *prima facie* case of purposeful discrimination *before* trial courts are authorized to act." (Emphasis in original.) *Rivera*, 221 Ill. 2d at 505. In deciding whether the requisite *prima facie* showing of purposeful discrimination against a particular race exists, " 'all relevant circumstances' " must be considered. *Rivera*, 221 Ill. 2d at 501 (quoting *Batson*, 476

U.S. at 96-97, 106 S.Ct. at 1723)). To paraphrase our supreme court, the following factors are relevant for evaluating the existence of a *prima facie* case of alleged racial discrimination against an Arabic juror:

> "(1) racial identity between the party exercising the peremptory challenge and the excluded venirepersons; (2) a pattern of strikes against [Arabic] venirepersons; (3) a disproportionate use of peremptory challenges against [Arabic] venirepersons; (4) the level of [Arabic] representation in the venire as compared to the jury; (5) the challenging party's questions and statements during voir dire examination and while exercising peremptory challenges; (6) whether the excluded venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses." *Rivera*, 227 Ill. 2d at 12 (citing *Rivera*, 221 Ill. 2d at 501).

When a court raises a *Batson* issue *sua sponte*, we review its findings of fact under the manifest weight of the evidence standard of review. *Rivera*, 227 Ill. 2d at 11-12. But we review the ultimate legal determination based on those findings *de novo*. *Rivera*, 227 Ill. 2d at 12

¶ 52 Beyond the fact that defendant and Ms. Darwish are both apparently of Arabic descent, there is nothing in the record to show that the State's use of a peremptory challenge against venireperson Darwish was a case of *prima facie* discrimination.[1]

[1] We say "apparently," because, although we know defendant is from Yemen, there is nothing to show Ms. Darwish's country of origin. As did the trial court, we take Ms. Darwish at her word that she is "Arabian."

There is nothing in the record regarding the racial identity or national origin of any of the other venirepersons or jurors. As a result, we cannot assess whether there is a pattern of strikes or a disproportionate use of peremptory challenges against Arabic venirepersons. Given that defendant challenges only the State's peremptory challenge against Ms. Darwish, we presume there is no such pattern or disproportionate use of improper strikes.

¶ 53 Similarly, without knowing the race of the other jurors, we cannot assess the level of Arabic representation in the venire as compared to the jury nor whether the excluded venirepersons were a heterogeneous group sharing race as their only common characteristic. We do know the race of the defendant, victim, and one of the witness: defendant is Arabic; the victim is Polish; and prosecution witness Aleisawi is also Arabic, albeit from a different country than defendant. But, again, this tells us nothing regarding whether a *prima facie* case of discrimination exists.

¶ 54 Lastly, looking to the prosecutor's questions and statements during voir dire examination, we see that the prosecutor did not raise the issue of the race/nationality of the defendant or any of the venirepersons during the voire dire. Venireperson Darwish brought it up after defendant spoke to her in Arabic. She told the court she was uncomfortable being on the jury because she and defendant were both "Arabian." Only after that, in seeking to strike Ms. Darwish for cause, did the prosecutor raise Ms. Darwish's "Arabian" commonality with defendant, and then only in the race-neutral context of her self-claimed bias.

¶ 55 Nothing in the record shows the prosecutor was on a campaign to strike all Arabic venirepersons or intended to strike Ms. Darwish solely because she was Arabic. We note that the trial court saw and heard the venire persons and jurors for an extended period of time and would have observed the racial identity of these persons. It would have been readily apparent to the trial court if there was a pattern or disproportionate use of improper strikes against Arabic venirepersons, if the level of Arabic representation in the venire as compared to the jury was disproportionate or if the excluded venirepersons were a heterogeneous group sharing race as their only common characteristic. The court raised no such issues and, on this record, we find no error. There is no clear indication in the record that a *prima facie* case of racial discrimination occurred when the State used a peremptory challenge to strike Ms. Darwish. Therefore, the trial court did not have the authority to *sua sponte* raise a *Batson* issue. *Rivera*, 227 Ill. 2d at 5.

¶ 56 4. Prosecutorial Misconduct

¶ 57 Defendant argues the prosecutor's verbal attacks and sarcastic comments directed at defense counsel were egregious and deprived him of a fair trial. He argues he was denied a fair trial by the prosecutor's verbal attacks against defense counsel (a) during the examination of witnesses, (b) during rebuttal argument and (c) cumulatively.

¶ 58 (a) Examination of Witnesses

¶ 59 Defendant first argues the prosecutor prejudiced his case during examination of the witnesses, citing the following four exchanges:

(1) During the re-direct examination of Sobocinska:

"PROSECUTOR: Okay. *And counsel is asking you these ridiculous questions* about --

DEFENSE COUNSEL: Objection, judge. Move to strike ridiculousness, the only thing that's ridiculous is the State's Attorney's questions.

THE COURT: Sustained as to ridiculous. Go ahead and ask another question.

PROSECUTOR: Okay, I will *withdraw the ridiculous*.

* * *

PROSECUTOR: *Counsel asked you ad nauseam* as to why you didn't tell the police about you being on the telephone initially; do you remember that?

WITNESS: Yes.

PROSECUTOR: *And you started to answer the question before you were cutoff*. Why--

DEFENSE COUNSEL: Objection, judge, to the State's statement that I didn't ask why, just that she didn't, judge.

THE COURT: Sustained as to being cutoff. She answered the question. Next question is?

* * *

PROSECUTOR: *And he was trying to get you to say* * * *

DEFENSE COUNSEL: Objection, judge, to the State's characterization trying to get.

THE COURT: Sustained." (Emphasis added by defendant.)

(2) During the re-direct examination of Aleisawi:

"PROSECUTOR: * * * *But do you remember then [defense counsel] here asked you, or he led you, he wanted you to agree with his statement?*

DEFENSE COUNSEL: Judge, I'm going to object to the State characterizing.

THE COURT: Just ask a question." (Emphasis added by defendant.)

(3) During cross-examination of Officer Patel:

"DEFENSE COUNSEL: * * * did you tell the State's attorneys sitting at this table that you could identify Ali Abdullah?

WITNESS: No, sir. Before --

DEFENSE COUNSEL: There is no question pending.

(pause)

PROSECUTOR: *Are you okay, counsel?*

DEFENSE COUNSEL: Fine. Thank you." (Emphasis added by defendant.)

(4) During re-direct examination of Officer Patel:

"PROSECUTOR: *I'm going to let you finish your answers.*

DEFENSE COUNSEL: Objection, Judge.

THE COURT: Sustained.

* * *

PROSECUTOR: * * * And I believe you said this *before you were being continuously interrupted by [defense counsel],* * * *

* * *

"PROSECUTOR: You didn't know this guy Ali from anywhere?

WITNESS: No, sir.

PROSECUTOR: *In fact, you didn't even know [last name of defense counsel] from anywhere, right?*

WITNESS: No, sir.

* * *

DEFENSE COUNSEL: I'm going to object to the state's attorney lecturing and actually testifying.

THE COURT: Sustained as to leading.

PROSECUTOR: *I'm just following along with what [defense counsel] is doing.*

DEFENSE COUNSEL: Judge, if he could just ask a question.

THE COURT: *Both cut it out.* Ask questions." (Emphasis added by defendant.)

¶ 60 Every defendant is entitled to a trial free from improper comments or arguments that engender prejudice. *People v. Franklin*, 42 Ill. App. 3d 408, 415 (1976). However, unless such remarks (1) constituted a material factor in the defendant's conviction or (2) resulted in substantial prejudice to the defendant, we will not reverse a conviction. *Franklin*, 42 Ill. App. 3d at 415. To determine whether the prosecutor's comments or arguments constitute prejudicial error, we look to see whether the jury would have reached a contrary verdict had the improper remarks not been made. *Franklin*, 42 Ill. App. 3d at 415.

¶ 61 Defendant argues he was denied a fair trial when the prosecutor accused defense counsel of asking ridiculous questions, asking questions *ad nauseam*, cutting off witnesses, leading witnesses and not allowing witnesses to finish answers; sarcastically asking defense counsel whether he was alright; and referring to defense counsel by his last name only. We do not find that the prosecutor's course of conduct during the examination of witnesses infringed on defendant's right to a fair and impartial trial.

¶ 62 First, there was no prejudice from the prosecutor's accusing defense counsel of asking ridiculous questions, asking questions *ad nauseam*, cutting off witnesses, leading witnesses and not allowing witnesses to finish answers. These argumentative remarks were directed at opposing counsel's trial theory and strategy and should not have been made during cross-examination. But the latitude allowed in cross-examining a witness rests within the discretion of the trial court (*Franklin*, 42 Ill. App. 3d at 420) and, here, the court sustained defendant's objections to the challenged remarks and ordered both attorneys to "cut it out."

¶ 63 Second, we cannot determine tone from the record and, therefore, cannot determine whether the prosecutor was indeed "sarcastic" when he asked defense counsel whether he was alright. On the record, it merely appears to be legitimate concern, which would not prejudice defendant. Lastly, the prosecutor's reference to defense counsel by his last name only, although disrespectful, occurred only once and was such a minor remark that it cannot possibly have prejudiced defendant.

¶ 64 Further, the evidence was not closely balanced. In short, it shows that two bullets were fired at Sobocinska; one bullet lodged in her back; the bullets were fired from the car that pulled up next to her car; the street was well-lit; Sobocinska had a good opportunity to see the occupant of the car; she had known defendant for years; and she was 100% certain that defendant was the sole occupant of that car. As discussed more fully below in Section 6, the evidence leads to the inescapable conclusion that defendant fired the bullets at Sobocinska, intending to kill her. There is no probability that the jury would have reached a contrary verdict had the improper remarks not been made. Accordingly, the challenged remarks made by the prosecutor during his examination of witnesses were neither a material factor in defendant's conviction nor so prejudicial that reversal is required.

¶ 65 (b) Rebuttal

¶ 66 Defendant next argues that, even after being admonished by the court, the prosecutor continued to make personal attacks on defense counsel in rebuttal, accusing him of having lots of problems, being on a different planet, being in a hypnotic state, making ridiculous statements and being offensive when he attacked someone whose first language was not English. Defendant points out that, after Officer Patel's testimony, outside the presence of the jury and before closing argument, the court had admonished both attorneys as follows:

> "THE COURT: *Jury is gone. We are still here. Mr. Abdullah is still here. let me start by asking both gentlemen, specifically [prosecutor], [defense counsel], to*

cut it out. It's been escalating. Let's cut out all the cuteness. Let's remain professional. Let's maintain decorum on both sides. No more comments from either side. Let's just ask questions, let's make arguments, let's save argumentative questions for argument and cut out the comments. Mr. [prosecutor], what's next?" (Emphasis added by defendant.)

Then, during the State's rebuttal, the prosecutor argued as follows:

"*[Defense counsel] told you repeatedly that he has problems, lots of problems; he does have problems, but they have nothing to do with this case. He tells you that we're on a different universe. He's the one on a different planet.*

* * *

*He made a ridiculous statement *** it's a ridiculous comment for him to make*.

* * *

Counsel sits there and berates the officer, and I would submit to you almost like in a hypnotic fashion, he keeps attacking Officer Patel. You made a mistake with this report, you made a mistake, you made a mistake.

* * *

You've heard some bantering going on between counsel and I, and it's just insulting when you're trying to attack people where English is their second language and you're trying to trip them up, to me that's offensive. You're attacking the police, you didn't do this, you didn't do that." (Emphasis added by defendant.)

¶ 67 Prosecutors have wide latitude in making a closing argument and may comment on the evidence and any fair, reasonable inferences it yields. *People v. Glasper*, 234 Ill.2d 173, 204 (2009). A prosecutor may challenge a defendant's credibility, the credibility of his defense theory and the persuasiveness of the defense. *People v. Robinson*, 391 Ill. App. 3d 822, 840 (2009). A prosecutor may not, however, argue assumptions or facts not contained in the record or make personal attacks on defense counsel. *Glasper*, 234 Ill.2d at 204; 204. A closing argument must be viewed in its entirety and the challenged remarks must be viewed in their context. *Glasper*, 234 Ill.2d at 204. A statement is not improper if it was provoked or invited by the defense counsel's argument. *Glasper*, 234 Ill.2d at 204. If the jury could have reached the opposite verdict absent the improper remarks or if we cannot determine that the improper remarks did not contribute to defendant's conviction, a new trial is warranted. *Robinson*, 391 Ill. App. 3d at 839.

¶ 68 Needless to say, telling the jury that defense counsel has "lots of problems" unrelated to the case and is "on a different planet" are personal attacks on defense counsel beyond the boundaries of permissible closing argument. These comments go beyond any invited by or made in response to defense counsel's argument. Granted, defense counsel told the jury that he had lots of problems with the case [and then proceeded to address each of those problems]. He also told the jury that the State was "a universe away from proving this case beyond a reasonable doubt." But the prosecutor's subsequent rebuttal remarks twisted defense counsel's statements

regarding the evidence into a personal attack on defense counsel. The prosecutor's remarks were particularly egregious given that the court had admonished both attorneys to remain professional and "cut out the cuteness."

¶ 69 However, this was the only instance in which the prosecutor mounted a personal attack on defense counsel. Further, as mentioned previously, given the evidence presented, there is no possibility that the jury would have found that defendant did not fire the bullets at Sobocinska or that he did not intend to kill her had these improper remarks not been made. Therefore, the improper remarks were not a material factor in defendant's conviction and did not result in substantial prejudice to the defendant. A new trial is not warranted on this basis.

¶ 70 There was no error in the prosecutor's rebuttal remarks that defense counsel made a "ridiculous" statement and "ridiculous" comment. The prosecutor's remarks were clearly directed to defendant's theory of the case and not to defense counsel personally. A prosecutor may challenge the credibility of a defense theory and the persuasiveness of the defense during argument, including referring to the defense theory or argument as “ridiculous” or "wacky" or "a fairy tale” or "a joke." *Robinson*, 391 Ill. App. 3d at 840-41. In fact, defense counsel repeatedly characterized the State's assertions as "nonsense" and "insanity." There was no error here.

¶ 71 The prosecutor's remark that defense counsel berated and attacked Officer Patel in a hypnotic fashion was a permissible comment based on the evidence. The remark was made in response to defendant's attempts to convince the jury that portions

of Officer Patel's testimony were incredible. During questioning, defense counsel asked Officer Patel essentially the same question over and over. We cannot discern tone from the record, but we can clearly see that counsel browbeat Officer Patel, attempting to cast doubt on the reliability of the police report and Officer Patel's identification of defendant as the man who fled from police and left the car at the river. "Hypnotic" and "berate" are perhaps overstatements but, given counsel's aggressive and repetitive questioning of Officer Patel, are supported by the record. There was no error in these remarks.

¶ 72 The last challenged remark is the prosecutor's statement that, in relation to defense counsel's questioning of Officer Patel, "it's just insulting when you're trying to attack people where English is their second language and you're trying to trip them up, to me that's offensive." The assertion that defense counsel [verbally] attacked and tried to trip up someone who spoke English as a second language was supported by the record. The record shows defense counsel did try to "trip" Officer Patel up, attempting to cast doubt on his testimony and police report in numerous ways during his repetitive questioning of this witness, and then reinforced that doubt during his closing argument.

¶ 73 A statement is not improper if it was provoked or invited by the defense counsel's argument. *Glasper*, 234 Ill.2d at 204. Here, the prosecutor's remarks were supported by the evidence and invited by defense counsel's characterization of the State's evidence, specifically the inadequacies of Officer Patel's testimony. The "attack" and "trip up" remarks were not made to disparage defense counsel and, therefore, were not

error. The prosecutor's comment that he found the questioning offensive was error. This remark improperly injected the prosecutor's own opinion into the argument. However, given the evidence against defendant, the error was not prejudicial.

¶ 74 (c) Cumulative Error

¶ 75 Looking at the challenged comments cumulatively, we find defendant suffered no prejudice from the prosecutor's remarks. The court sustained defendant's objections to the improper comments made during the examination of witnesses; the majority of the challenged rebuttal remarks were supported by the evidence and invited by defendant's closing argument; and the two instances in which the prosecutor did improperly attack defense counsel during rebuttal were isolated. The central theme in the State's closing argument was not an attack on defense counsel but rather an attack on defendant's theory of the case. It, therefore, did not impermissibly shift the jury's focus away from the facts of the case or otherwise deny defendant a fair trial. *People v. Gonzalez*, 388 Ill. App. 3d 566, 591 (2008). In addition, the evidence shows that defendant did fire the bullets at Sobocinska, intending to kill her. There is no possibility that the jury would have reached a contrary verdict had the improper remarks not been made and defendant, therefore, suffered no prejudice from the remarks, individually or cumulatively, Accordingly, there is no basis for awarding defendant a new trial based on the prosecutor's conduct during the trial.

¶ 76 5. Ineffective Assistance of Counsel

¶ 77 Defendant argues a new trial is warranted because he received ineffective

assistance of counsel. In order to establish ineffective assistance of counsel, defendant must prove that (1) his counsel's performance was deficient and (2) he was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see also *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984) (adopting the *Strickland* standard for use in Illinois). To succeed on any ineffective assistance claim, a defendant must overcome the strong presumption that the challenged conduct falls within the realm of sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. When considering an ineffective assistance claim, a reviewing court must look to counsel's total performance and not focus solely on isolated acts. *People v. Whittaker*, 199 Ill. App. 3d 621, 627 (1990).

¶ 78 Although both prongs of the *Strickland* test must be satisfied, an ineffective assistance claim may be disposed of on the prejudice grounds alone, without an examination of whether counsel was deficient. *People v. Munson*, 171 Ill. 2d 158, 184-85 (1996). To demonstrate prejudice, defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Munson*, 171 Ill. 2d at 184-85. A "reasonable probability" exists if that probability sufficiently undermines confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

¶ 79 Defendant asserts his counsel's performance was ineffective because counsel failed to (a) request a fitness examination of defendant; (b) withdraw despite an antagonistic relationship with defendant; (c) request a *Batson* hearing regarding the

strike of the Arab venireperson; (d) object to the State's improper rebuttal arguments; (e) accept the court's offer of a continuance to interview a possible alibi witness; (f) include the proper standard of review in his motion for a new trial; and (g) file a motion to reduce sentence. He also argues (h) counsel's performance was cumulatively ineffective.

¶ 80 (a) - (d) Failure to Request Fitness Examination, Withdraw, Raise *Batson* Issue and Object to Rebuttal Remarks

¶ 81 As the preceding discussion shows, we have determined that neither a fitness examination of defendant nor change of defense counsel was warranted. We have also determined that there was no clear indication of a *prima facie* case of a *Batson* violation and that the remarks by the prosecutor in rebuttal did not warrant awarding defendant a new trial. Further, although defendant attempted to convince the court that his counsel's performance was so deficient counsel should be fired, there is nothing to show that counsel was antagonistic toward defendant. Indeed, counsel told the court he had no conflict with defendant and was happy to continue representing him

¶ 82 Given these findings, defendant cannot have suffered any prejudice from his counsel's failure to request a fitness hearing, to withdraw from representing defendant, to request a *Batson* hearing when the State used a peremptory challenge to strike Ms. Darwish or to object to the prosecutor's improper rebuttal remarks because any such measures by counsel would have been unavailing. He cannot show that, but for his counsel's failure to perform any of the four enumerated actions, the outcome of the trial

would have been any different. Therefore, the first four ineffective assistance of counsel claims fail because defendant cannot show he was prejudiced by counsel's inaction.

¶ 83 (e) Failure to Accept Continuance

¶ 84 Defendant next argues his counsel was ineffective because he failed to accept the court's offer of a continuance to interview a possible alibi witness. This argument is without merit because counsel did receive a continuance and did interview the witness. On November 15, 2010, defense counsel had answered ready for trial but notified the court that defendant had informed him that day that there was an alibi witness, referred to as "Habeeb." Counsel had met Habeeb for the first time on the courthouse steps that day, when Habeeb dropped off clothes for defendant. Habeeb had agreed to come to the courtroom but had not appeared. Both the State and defense counsel told the court they were not asking for a continuance based on the possible new alibi witness. Defense counsel explained that, given the timing of the disclosure of the witness, he was concerned about Habeeb's "veracity."

¶ 85 Defense counsel then told the court he had Habeeb's phone number and asked for leave to phone him. The court granted leave and passed the case. When the case resumed, counsel told the court he had spoken to Habeeb by phone using defendant's brother as a translator because Habeeb spoke Arabic, not English. Counsel had asked Habeeb whether he was with defendant on June 24 in the evening or in the early morning hours of June 25 and Habeeb told him he was not with defendant at that time.

Counsel told the court that, based on that conversation, he was not calling Habeeb as a witness because he was not an alibi witness for the time of the shooting.

¶ 86 Here, after obtaining a short continuance in order to speak to Habeeb by phone, counsel determined that Habeeb was not, as defendant asserted, an alibi witness. Counsel's decision not to call Habeeb or pursue further inquiries regarding Habeeb was purely a matter of trial strategy and, on this record, sound and immune from an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

¶ 87 Further, looking to counsel's decision in the context of his total performance, the report of proceedings shows that counsel mounted a vigorous and strategic defense. Counsel succeeded in having assorted statements suppressed; was extremely thorough in his lengthy and detailed examinations of the witnesses; attempted to discredit Sobocinska's identification of defendant as the offender through assorted avenues; and, through his examination of both Sobocinska and Officer Patel, attempted to cast suspicion on Mamoun Sultan as the offender. Counsel's decision not to call or further investigate Habeeb as an alibi witness was not ineffective assistance of counsel.

¶ 88 (f) Motion for New Trial

¶ 89 Defendant next argues his counsel was ineffective because he failed to include the proper standard of review in his motion for a new trial. In paragraph 9 of the 11-paragraph motion for a new trial, counsel had argued: "The verdict is based upon evidentiary facts which do not exclude every reasonable hypothesis consistent with the innocence of the Defendant." As defendant correctly points out, the "reasonable

hypothesis of innocence" standard has not been a viable standard of review in Illinois for over 20 years. See *People v. Pintos*, 133 Ill. 2d 286, 291 (1989). He argues defense counsel's inclusion of an outdated standard of review in the motion for a new trial fell below an objective standard of reasonableness and prejudiced defendant.

¶ 90 Defendant suffered no prejudice from this error. Paragraph 9 was not the only argument directed at the inadequacy of the evidence. Paragraph 2 asserted the State failed to prove defendant guilty beyond a reasonable doubt and paragraph 11 asserted the State failed to prove every material allegation of the information beyond a reasonable doubt. Had paragraph 9 been stricken, paragraphs 2 and 11 amply set forth a challenge to the sufficiency of the evidence. There is no reasonable probability that, but for counsel errors, the result of the proceeding would have been any different.

¶ 91 (g) Motion to Reduce Sentence

¶ 92 Defendant lastly argues his counsel was ineffective because he did not file a motion to reduce sentence. The court sentenced defendant to 15 years' imprisonment for the class X felony [attempt first degree murder] plus a mandatory 15 year enhancement [armed with a firearm], for a total of 30 years' imprisonment. The court agreed to stay the mittimus until January 10, 2011, because defense counsel said he would file a motion to reconsider sentence by that date. Defense counsel did not file a motion to reconsider sentence by January 10, 2011, and the court entered the mittimus for 30 years, noting no one had appeared.

¶ 93 Defendant suffered no prejudice from his counsel's failure to file a motion to

reconsider sentence because his sentence was not excessive. A sentence is not excessive if it is within the statutory range and is neither greatly at variance with the spirit and purpose of the law nor manifestly disproportionate to the nature of the offense. *People v. Hensley*, 354 Ill. App. 3d 224, 234–35 (2004). Here, defendant's sentence was at the low end of the 21- to 45-year range for the offense (720 ILCS 5/8-4(c)(1)(B) (West 2010)). The record shows the court considered testimony regarding defendant's lack of a criminal record and the fact that Sobocinska was not dangerously injured. But the fact remains that defendant's crime was a violent one: he fired two bullets at Sobocinska at short range, intending to kill her. The only reason Sobocinska is still alive is because defendant's aim was poor, not for his lack of trying. Overall, given the nature of the offense, the court did not abuse its discretion in sentencing defendant. Accordingly, defendant showed no prejudice from defense counsel's failure to file a motion to reconsider sentence and, therefore, was not denied effective assistance of counsel.

¶ 94 (h) Cumulative Ineffective Assistance

¶ 95 Looking at the alleged errors by counsel cumulatively, defendant did not receive ineffective assistance of counsel. As noted previously, counsel mounted a vigorous and strategic defense. Further, the evidence here was not closely balanced and leads to the inescapable conclusion that defendant fired the bullets at Sobocinska, intending to kill her. There is little probability, let alone a reasonable one, that the jury would have found that defendant did not fire the bullets at Sobocinska or did not intend to kill her

but for defense counsel's alleged errors. Accordingly, defendant suffered no prejudice from any alleged errors on the part of defense counsel and his claim of ineffective assistance of counsel fails.

¶ 96 6. Guilt Beyond a Reasonable Doubt

¶ 97 Defendant argues that he was not proven guilty of attempt first degree murder armed with a firearm beyond a reasonable doubt. When considering a challenge to the sufficiency of the evidence, we must determine, viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v. Hall*, 194 Ill.2d 305, 329-30 (2000). A conviction for attempted murder must be supported by evidence proving "beyond a reasonable doubt that the defendant, with the specific intent to commit murder, did any act that constituted a substantial step toward the commission of murder." *In re T.G.*, 285 Ill. App. 3d 838, 843 (1996) citing *People v. Allen*, 153 Ill. 2d 145, 154 (1992). Intent to kill can be established by proof of surrounding circumstances, including the character of the assault, the use of a deadly weapon, the nature and seriousness of the injury and other matters of which an intent to kill can be inferred, such as "evidence that the defendant voluntarily and willfully committed an act whose natural tendency was to destroy another's life." *T.G.*, 285 Ill. App. 3d at 843; *People v. Mitchell*, 209 Ill. App. 3d 562, 569 (1991).

¶ 98 Defendant argues he was not proven guilty beyond a reasonable doubt because the evidence did not show that (a) he fired the gunshot that hit Sobocinska and/or (b)

he intended to kill Sobocinska. We disagree. Granted, Sobocinska did not see the gun that shot her and did not see defendant holding a gun. But the elements of a crime may be established by circumstantial evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242-43 (2006); *People v. Pollock*, 202 Ill. 2d 189, 217 (2002). Here, the circumstantial evidence shows that two bullets were fired at Sobocinska from the car that pulled up next to her and that defendant was the sole occupant of that car, leading to the inescapable conclusion that defendant fired those bullets and intended to kill Sobocinska.

¶ 99 Sobocinska testfied she saw defendant was the driver of the car that had pursued her and then pulled up next to her. She recognized him clearly. She was "one hundred percent sure" it was defendant. She testified she had known defendant for over two years, the street was well-lit and she had no trouble seeing his face when he pulled next to her. She testfied defendant was alone in the car and he had the passenger side window down. Officer Patel's testimony corroborates Sobocinska's testimony. He testified that the man who fled from police and then got out of the car at the river matched the description given by Sobocinska of Ali, the man she said threw firecrackers (shot) at her, and that the man was alone in the car.

¶ 100 Sobocinska testified she heard two bangs and saw two flashes emanate from the car. She immediately felt something sting her eyes and then something else burn her back. That second something, as shown by the testimony of paramedic Kaelin and Dr. Giannone, was a bullet in Sobocinska's right rear shoulder. Their testimony and

that of Raddad shows Sobocinska had an entry wound in her left rear shoulder and a burn mark under her skin spanning the space between the entry point and the bullet. Dr. Giannone testified that the pattern of Sobocinska's injuries was consistent with being shot, while seated in a car, from another car aiming in her direction. Aleisawi and Detective Young testified that there was a bullet on the floor of Sobocinska's car. Detective Young testified that both the bullet taken from Sobocinska's shoulder and the bullet found in her car had striation marks, meaning that they had been shot from a gun.

¶ 101 This evidence shows that two bullets were fired at Sobocinska from a gun from inside the car that pulled up next to Sobocinska. It also shows defendant was the sole occupant of the car from which the bullets were fired at Sobocinska. Given that defendant was alone in the car, the logical inference is that defendant fired the bullets. Defendant's attempt to escape the police bolsters the inference that he was the shooter. There is no reasonable doubt that defendant fired the bullets at Sobocinska.

¶ 102 There is also no reasonable doubt that defendant intended to kill Sobocinska. The evidence shows defendant shot at Sobocinska twice, from across the short distance between his driver's seat and Sobocinska's driver's seat. Clearly, when you fire two bullets at someone from a short distance away, you can be presumed to intend to kill your victim given the natural tendency of a bullet to destroy another's life. *People v. Garcia*, 407 Ill. App. 3d 195, 201-02 (2011). The fact that Sobocinska was not seriously injured by the bullets is no indication that defendant did not intend to kill her. It is not unreasonable to conclude that defendant knew that his actions in firing a gun at

someone from short range were practically certain to result in the death or substantial injury of another. *Garcia*, 407 Ill. App. 3d 195, 202. Defendant's specific intent to kill Sobocinska can clearly be inferred from his actions and the circumstances of the shooting.

¶ 103 At trial, defense counsel attempted to create reasonable doubt regarding defendant's guilt by casting Mamoun Sultan as the shooter. The trier of fact, here the jury, was charged with determining which evidence to believe. P*eople v. Cooper*, 283 Ill. App. 3d 86, 93 (1996). It chose to believe Sobocinska's explanation of how she was shot and her identification of defendant as the shooter. We cannot substitute our judgment for that of the trier of fact in determining the credibility of witnesses, the weight to be given to their testimony, and any reasonable inferences to be drawn from the evidence. *People v. Lee,* 256 Ill. App. 3d 856, 860 (1993). We will not reverse a conviction unless " 'the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt' " *Lee,* 256 Ill. App. 3d at 860 (quoting *People v. Collins,*106 Ill. 2d 237, 261 (1985)).

¶ 104 No such doubt exists here. A conviction can be sustained upon a single witness' identification of the accused if the witness viewed the accused under conditions permitting a positive identification to be made, and the witness "had an adequate opportunity to view the accused and that the in-court identification is positive and credible." *People v. Slim*, 127 Ill. 2d 302, 307 (1989). There is no question that Sobocinska recognized who shot her and credibly identified him. She had recognized

defendant "immediately" when he pulled up in the car next to her because she had known him for years and saw him clearly on a well-lit street. She consistently testfied that it was Ali and not Mamoun that shot her and that she never told the police that Mamoun shot her. Officer Patel testified that, notwithstanding the fact that he mistakenly listed both Ali and Mamoun as the offender in his police report, Sobocinska had never told the officers that Mamoun was the shooter. Sobocinska consistently identified the shooter as Ali and subsequently identified defendant as Ali. Viewing the evidence in the light most favorable to the prosecution, we find it sufficient to support the guilty verdict.

¶ 105 7. Sentencing

¶ 106 In a single sentence with no citation to authority, defendant argues that his 30-year sentence was excessive because he had no prior criminal record and Sobocinska's wound was superficial and treated with local anesthetic. As discussed above in Section 5(g), defendant's sentence was not excessive. The court did not abuse its discretion in sentencing defendant to 30 years' imprisonment.

¶ 107 8. Conclusion

¶ 108 For the reasons stated above, we affirm the decision of the trial court.

¶ 109 Affirmed.