2014 IL App (1st) 130393-U

FIRST DIVISION
December 1, 2014

No. 1-13-0393

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEITH WILCOX, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 04 CR 9640 Honorable Brian Flaherty, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶1 ***Held:*** Defendant's convictions for first degree murder and aggravated unlawful restraint are affirmed. The evidence was sufficient to sustain the jury's verdict where a reasonable jury could have found the witnesses' testimony credible. Trial counsel did not render ineffective assistance by failing to utilize impeachment by omission where it was not available. Evidence that defendant was captured in Las Vegas and used an alias was properly admitted as showing the circumstances of defendant's capture. Finally, the trial court did not improperly consider a factor implicit in the offense of first degree murder as an aggravating factor during sentencing.

¶2 Following a jury trial, defendant Keith Wilcox was found guilty of first degree murder and aggravated unlawful restraint and sentenced to 50 and 5 years' imprisonment, respectively.

On appeal, defendant asserts that: (1) he was not proven guilty beyond a reasonable doubt; (2) he was denied the effective assistance of counsel; (3) the trial court improperly admitted evidence that defendant fled to Las Vegas, Nevada, and provided authorities there with an alias when he was apprehended; and (4) the trial court abused its discretion during sentencing by considering factors implicit in the offense of first degree murder as factors in aggravation and disregarding factors in mitigation. We affirm.

¶3 BACKGROUND

¶4 Defendant was initially tried and convicted of first degree murder and aggravated unlawful restraint in 2008. We reversed defendant's conviction, holding that the trial court improperly: (1) excluded testimony from Quincy Page implicating Muhammad Williams, one of the State's witnesses, in the murder; and (2) admitted evidence that defendant fled to Nevada following the murder and provided authorities with a fake identification card and alias. *People v. Wilcox*, 407 Ill. App. 3d 151, 166-71 (2010). After Defendant's retrial in November 2012, a jury found him guilty of first degree murder and aggravated unlawful restraint.

¶5 At defendant's second trial, Cameron Brefford testified that on November 23, 1997, he drove his girlfriend Wendy Rollins's car to Gerald Cross's house at 12:30 p.m. When Brefford arrived, Muhammad Williams, whom Brefford had never met, was at Cross's house. Cross stated that he wanted to sell a video game, so Brefford drove Cross and Williams to sell the game. They first drove to a house on Kinney Road in Robbins, Illinois. Cross went to the door and spoke with a woman, and came back to the car, and then the three men drove to nearby housing projects. There, the men picked up defendant, who intended to buy the game, and drove back to the house on Kinney Road. Once back at the Kinney Road house, Cross, Williams, and defendant went inside the house to test the game. The men then came out and asked Brefford to

drive to "the old projects" so defendant could get money to buy the game. When they arrived at the old projects, defendant exited the car and went into a house for a few minutes. When defendant came out of the house, he got back in the car and began smoking a "happy stick," which Brefford explained was marijuana laced with embalming fluid. Brefford did not like the smell, so he asked defendant to get out of the car. Defendant exited the car, at which point another car drove up. Defendant got into that car and it drove away. Then, Brefford drove Cross and Williams back to the house on Kinney Road, where they waited for defendant to return while they ate hamburgers. When defendant did not come back, Brefford, Cross and Williams left. Brefford dropped Cross off at his house and then dropped Williams off at a house on 158th Street and Paulina Street in Harvey, Illinois.

¶6 Around 4 p.m., Brefford picked up Rollins from work and drove to a trailer park in Robbins so Rollins could get her hair done by a friend. Brefford parked the car in front of Rollins's friend's trailer and then went to a different trailer to see a friend. When Brefford was walking back to the car, he saw defendant and Rollins speaking. According to Brefford, Rollins and defendant appeared to be arguing.

¶7 Defendant walked up to Brefford and asked him if he had found defendant's wallet. Defendant patted Brefford down to see if he was carrying the wallet. When he did not find the wallet on Brefford, defendant became irate and asked Brefford where else he had been that day. Brefford told defendant that Cross, Williams, and Rollins were the only other people who had been in the car. Defendant then pulled a gun on Brefford and told him not to run. Defendant told Brefford to take him to Cross's house. Brefford and defendant approached Rollins and Brefford asked her for the keys. When Brefford reached Rollins, he tried to signal her by "bugging" his eyes. Brefford explained that defendant did not wave the gun around and that he

did not mention the gun to Rollins because he believed defendant would have shot him. Rollins gave Brefford the keys and he and defendant got in the car and left.

¶8 While driving, Brefford intentionally ran several stoplights in an effort to attract the attention of the police. Defendant realized what Brefford was doing and warned him not to run anymore red lights or he would "blow [Brefford's] brains out" and that "if [defendant] going to catch a case, it might as well be a murder case and not a gun case." Brefford drove to an apartment complex in Harvey, Illinois, where defendant made a brief stop at a house. When defendant got back in the car, Brefford drove to another apartment complex. Brefford then drove defendant to Cross's house.

¶9 When they arrived at Cross's house, Brefford and defendant went to the door. When Cross came, Brefford told him that defendant was looking for his wallet and that Cross should give it back if he had it because "[defendant] talking about killing me." Brefford testified that defendant was standing behind him. Cross said that he believed Williams stole some items from his house, so Brefford, Cross, and defendant got in Rollins's car and Brefford drove to the house that he previously dropped Williams off at on 158th and Paulina.

¶10 When they arrived, all three men went to the door. A woman answered the door and called for Williams, who came to the door. Defendant told Williams that he was looking for his wallet. A loud argument ensued, and the woman asked the men to step off the porch because a police officer lived nearby. The men moved to the sidewalk and continued their discussion. Cross and Williams began accusing each other of taking defendant's wallet. Brefford stepped off the sidewalk onto the grassy area between the street and sidewalk. Cross grabbed Brefford, asked him why he brought defendant to his house, and then began punching Brefford in the face.

¶11 While Brefford and Cross were fighting, Brefford heard a gunshot come from his right side. When the shot rang out, defendant was standing to Brefford's right and Williams was behind Cross and to the right of defendant. Cross let go of Brefford and fell back, and Brefford turned and ran away. When Brefford was two houses down, he turned around and saw defendant shoot Cross several times while standing over Cross's body. Brefford heard seven gunshots.

¶12 Brefford located a girl two blocks away and asked her parents to call 9-1-1. When the police arrived, Brefford stated that defendant shot Cross. The police took Brefford back to the scene, but Brefford did not talk to the police there because he did not know where defendant was. Two days later, Brefford went to the police station and identified defendant as the shooter from a group of photos. Brefford testified that he did not want to go to any of the places he went to with defendant and only did so because defendant was holding him at gunpoint.

¶13 In addition to live testimony, the jury was also presented with various excerpts of stipulated testimony that Brefford had given in previous proceedings. The parties first stipulated that during defendant's first trial, Brefford testified that: (1) defendant returned to the car and left with Brefford, Williams, and Cross and that they drove to defendant's house on Kinney Road; (2) Brefford and Rollins went to a trailer park in Robbins around 5:20 p.m. on November 23, 1997; (3) Brefford and defendant stood side-by-side at Cross's door; and (4) at the time Brefford heard the first shot, defendant was standing behind Cross and Williams was off to the side. Finally, the parties stipulated that Brefford testified to a grand jury that defendant was standing behind Cross and Williams was off to the side.

¶14 Muhammad Williams testified that he was a good friend of Cross and that he was staying with Cross in November 1997. On November 23, 1997, Brefford came to Cross's house. Cross wanted to sell a video game, and Williams suggested that Cross sell the game to defendant, a

friend of Williams. Brefford drove Cross and Williams to defendant's house on Kinney Road. When they arrived, all three men went inside defendant's home. Defendant agreed to purchase the game but said he needed a ride to the projects. Brefford drove defendant, Cross, and Williams to the projects. When they arrived, defendant got out of the car, bought a happy stick, and went inside a residence. Defendant came back and got inside the car and lit the happy stick. Cross did not like the smell so he asked defendant to get out of the car.

¶15 Defendant got out of the car and then left in a different car. Williams told Cross and Brefford to wait for five minutes to see if defendant would come back. When defendant did not come back, they left and drove to defendant's house. Defendant was not there but his girlfriend was. She invited them inside and offered them hamburgers. Brefford, Cross, and Williams waited to see if defendant would come back to buy the game. When he did not come back, they left. Brefford dropped Cross off at his house, and then dropped Williams off at his girlfriend's house on Paulina Street in Harvey. An hour later, defendant and Quincy Page visited Williams at his girlfriend's house. Defendant asked Williams if he had seen defendant's wallet. Williams said that he had not seen it. Defendant then asked Williams if he knew where Cross lived. Williams said that he did not, even though he did, because he "just felt" that defendant "was up to something."

¶16 Approximately two hours later, defendant, Brefford, and Cross came to Williams's girlfriend's house. Williams's girlfriend answered the door and got Williams. After Williams came, his girlfriend asked the men to step off the porch. The men left the porch and walked toward the curb. Brefford and Cross were arguing about defendant's wallet and then Cross began hitting Brefford. At this point, Cross was facing Brefford's car, which was parked near the curb, and Brefford was facing the house. Cross and Brefford were to Williams's right, and

defendant was to Williams's left. After Cross hit Brefford, defendant reached across Williams, who was standing between defendant and Cross, and shot Cross. After the shot, Williams testified that Cross tensed up like he wanted to run, at which point defendant shot Cross again. After the second shot, Cross fell on his back to the ground. Defendant then walked around Cross while he was on the ground and shot him repeatedly. Williams ran away and eventually went to Page's grandmother's house. Williams told Page that defendant killed Cross. On December 1, 1997, Williams went to the police and identified defendant as Cross's killer.

¶17 On cross-examination, trial counsel impeached Williams with the fact that the statement Williams gave to police and Williams's grand jury testimony did not indicate that defendant and Page came to Williams's girlfriend's house. On redirect, Williams explained that the statement he gave to police on December 1, 1997, was a 25 line typewritten summary of his testimony produced by a police detective and that the statement did not contain all the details that the State's attorney asked Williams about at trial. Williams also stated that he did not mention Page's visit because he did not think it was relevant because "he was just like there for a couple of minutes" and "he wasn't there when the shooting happened ***." Williams also testified that he was a friend of Page in 1997, but they had a falling out in 2002 over the sale of a car.

¶18 Wendy Rollins testified that Brefford picked her up from work at 4 p.m. on November 23, 1997, and that they arrived at a trailer park in Robbins at approximately 5 p.m., at which point she and Brefford went to different trailers. While Rollins was standing beside her car outside of her friend's trailer, defendant approached her and asked her whom the car belonged to. Rollins said the car was hers and allowed defendant to look inside. After searching inside the car, defendant asked Rollins if she knew where Brefford was. Brefford emerged a few trailers down and began walking toward Rollins and defendant before turning to walk away. Defendant

approached Brefford and started talking to him, and then defendant and Brefford walked back to Rollins. Brefford asked Rollins for the car keys. According to Rollins, Brefford seemed nervous when he asked her for the keys. Brefford and defendant left in the car.

¶19 On cross-examination, Rollins testified that defendant and Brefford appeared to be having a normal conversation and that she did not see defendant: (1) place his hands on Brefford; (2) pull a gun on Brefford; or (3) "wag his finger like he was fussing at [Brefford]."

¶20 Quincy Page testified that he and Williams were close friends and members of the same street gang. On November 23, 1997, around 6 or 7 p.m., Page was at his grandmother's house when Williams arrived and said that he had just killed Cross. Williams explained that he and Cross had an argument about money from stolen car rims and that he shot Cross after Cross attacked him. Page testified that Williams said he shot Cross in the head and then "emptied the rest of the bullets into his body."

¶21 On cross-examination, Page admitted that he had three prior drug convictions. Page also admitted that he was friends with defendant and that he knew Cross. Page testified that he did not go to the police with the information Williams gave him until 2005 because "my gang don't get along with that gang [the police]." Page stated that he did not tell anyone that Williams confessed to Cross's murder until defendant's girlfriend contacted Page and Page had written to defendant in 2005.

¶22 Officer Roger Jage testified that he worked for the Harvey police department in 1997 and that he responded to a dispatch at 6:27 p.m. on November 23, 1997, reporting shots fired in the 15700 block of Paulina Street in Harvey. Officer Jage went to Marshfield Avenue, where the call came from, and met up with Brefford. Officer Jage asked Brefford who the shooter was and Brefford said that the shooter's name was Keith and that his last name began with a W. Next,

Officer Jage and Brefford went to the crime scene. Detective Martin arrived on the scene and Officer Jage drove Brefford to the police station for additional interviewing. Once Officer Jage dropped Brefford off at the station, he went to the hospital where Cross had been taken and collected some of Cross's clothes and two bullets doctors recovered from Cross's body. Officer Jage testified he had no further contact with Brefford after he dropped him off at the police station.

¶23 Agent Scott Bakken testified that he worked for the FBI in Las Vegas, Nevada, and that he was assigned to a fugitive task force on March 11, 2004. Agent Bakken explained that the fugitive task force's job was to "locate and apprehend fugitives who had fled Las Vegas and fugitives that had committed crimes in other jurisdictions and may have moved to and resided in Las Vegas." On March 11, 2004, Agent Bakken conducted a raid at a house in Las Vegas "to apprehend an individual named Keith Wilcox who was wanted from another jurisdiction" based on an arrest warrant for murder. Agent Bakken knocked on the front door of the house for approximately five minutes before identifying himself and his agents as police officers and FBI agents. A male inside identified himself as Dejuan and stated that he did not want to talk to anyone. Agent Bakken continued knocking on the door for fifteen minutes, at which point defendant, another man, and two children exited from the rear of the house. Defendant told Agent Bakken that his name was Dejuan Walker. Defendant was detained and taken to an FBI office for fingerprinting. At that point, defendant told Agent Bakken that his name was Keith Wilcox.

¶24 Dr. Stephen Cina, chief medical examiner for Cook County, testified that he reviewed the reports prepared by Dr. Brian Mitchell following Dr. Mitchell's November 24, 1997, autopsy of Cross. Those reports revealed that Cross sustained seven gunshot wounds. The report labeled

the wounds one through seven, although there was no way to tell which shot was first in time. The bullet from the first shot grazed the left side of Cross's head. The bullet from the second shot hit Cross in the right upper chest and traveled through his liver and right lung before lodging next to his vertebral column and had a wound course of front-to-back and right-to-left. The bullet from the third shot hit Cross in the left lateral chest area and traveled through his left lung and exited the right side of the mid-back and had a wound course of front-to-back and left-to-right. The bullet from the fourth shot hit Cross in the left mid-chest area and traveled through the spleen and exited the mid-back and had a wound course of front-to-back, left-to-right, and downwards. The bullet from the fifth shot hit Cross in the lower left chest and traveled through the left kidney and lodged in Cross's body and had a wound course of front-to-back, left-to-right, and slightly upward. The bullet from the sixth shot hit the palm of Cross's right hand and lodged in his right wrist and had a wound course of front-to-back, left-to-right, and upward. The bullet from the seventh shot hit Cross's left upper forearm before exiting the body and had a wound course of front-to-back, left-to-right, and downward. Dr. Cina testified that the sixth wound showed possible signs of close range firing but that none of the other wounds indicated close range firing. Dr. Cina stated that because several of Cross's wounds were left-to-right, it was hypothetically possible that the shooter was to Cross's left. Dr. Cina testified that Cross's cause of death was gunshot wound and the manner of death was homicide.

¶25 After deliberating, the jury found defendant guilty of first degree murder and aggravated unlawful restraint. During the sentencing hearing, trial counsel argued in mitigation that defendant had a work history, a family with children, and that defendant had no prior criminal convictions. Defendant spoke at the sentencing hearing, stating that he was trying to put his life back together and asking for the court's mercy. In aggravation, the trial court considered that

"defendant's conduct caused serious harm" and noted that "[a] sentence is necessary to deter others from committing the same crime." The court further stated that defendant's crime was "a senseless, senseless act that happened here, an execution," and added that "this was a senseless, senseless act that took the life of another person." The trial court sentenced defendant to 50 years' imprisonment on the first degree murder conviction and a concurrent five year prison term for the aggravated unlawful restraint conviction.

¶26 ANALYSIS

¶27 A. Sufficiency of the Evidence

¶28 Defendant first argues that the State did not present sufficient evidence to prove him guilty beyond a reasonable doubt. "The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)). A court entertaining a sufficiency of the evidence challenge "will not retry the defendant." *Id.* Instead, the jury's factual findings and credibility determinations are given "great weight" because the jury, and not the reviewing court, had the opportunity to hear the witnesses and observe their demeanor in court. *Id.* at 114-15. Accordingly, a reviewing court may reverse a conviction on the grounds that the evidence was not sufficient to prove the defendant guilty beyond a reasonable doubt only when "the evidence

is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *Id.* at 115.

¶29 The elements of first degree murder are set forth in section 9-1(a) of the Criminal Code of 1961 (720 ILCS 5/9-1(a) (West 1996)) (Code), which provides:

> "A person who kills an individual with lawful justification commits first degree murder if, in performing the acts which cause death
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) he is attempting or committing a forcible felony other than second degree murder."

Under the Code, "[a] person commits the offense of aggravated unlawful restraint when he knowingly without legal authority detains another while using a deadly weapon." 720 ILCS 5/10-3.1(a) (West 1996).

¶30 Defendant claims that his conviction cannot stand because Brefford and Williams were not credible witnesses. Defendant specifically argues that Brefford and Williams were not credible because their testimony at the second trial was contradictory and also inconsistent with their testimony at the first trial. Defendant first suggests that Brefford was not a reliable witness because his trial testimony that defendant was standing to the right of Brefford and that Williams was behind Cross and to the right of defendant when the first shot occurred contradicted his testimony at the first trial that defendant was behind Cross at the time of the shooting. Although Brefford did give differing accounts of how everyone was situated at the time the first shot occurred, he jury had the opportunity to hear his testimony and observe his demeanor in court to assess his credibility. Defendant also points out that Williams and Brefford offered inconsistent

testimony about whether defendant stood to the left or right of Williams. The jury also had an opportunity to weigh this testimony and observe the demeanor of both witnesses. The jury's credibility determination is thus entitled to deference from this court. *Wheeler*, 226 Ill. 2d at 114-15. We therefore cannot say that the jury acted unreasonably in crediting Brefford's testimony.

¶31 Defendant next asserts that Williams was not a reliable witness because his trial testimony that Cross and Brefford were to his right and defendant was to his left contradicted his testimony at the first trial that he was behind Cross and that Cross's back was towards Williams. However, trial counsel did not impeach Williams with that portion of his testimony from the first trial. Accordingly, this impeachment evidence was never before the jury.

¶32 Defendant next argues that Brefford and Williams were unreliable witnesses because their trial testimony was contradicted by Cross's autopsy results. Williams testified that the first shot hit Cross in his left side, and Brefford testified that the first shot "whizzed" past his ear. Defendant argues that this testimony cannot be reconciled with Cross's autopsy results because none of Cross's wounds were high enough to allow the first shot to have travelled past Brefford's ear and hit Cross in his left side.

¶33 Defendant, however, did not present any evidence that showed it was impossible for Brefford to feel a shot pass his ear that also hit Cross in the chest. Notably, Brefford perceived the shot while he was in a fist fight with Cross, and Williams testified that Cross grabbed his chest, and not his head, after the first shot. Furthermore, while Dr. Cina explained that he could not pinpoint the location of the shooter, he did testify that the fact that several of Cross's wounds had a wound-course of left-to-right was hypothetically consistent with Cross's shooter standing to Cross's left. Moreover, Dr. Cina testified that the fourth shot in the autopsy report hit Cross in

his left side and had a downward wound course, and Williams testified that Cross grabbed his chest after the first shot. Accordingly, a reasonable jury could have believed that the fourth shot in Cross's autopsy report was the first shot that Cameron perceived as coming past his ear and which Williams testified hit Cross in his left side.

¶34 Defendant next claims that Brefford and Williams were incredible witnesses based on two additional inconsistencies between their testimony. First, defendant points out that Brefford testified that Cross fell after the first shot, but Williams testified that Cross did not fall until the second shot. Second, defendant notes that Brefford testified that defendant stood over Cross's body firing the gun, but Williams testified that defendant walked around Cross's body firing the gun. Minor variations between the witnesses' testimony, such as those at issue here, are not sufficient to disturb the jury's verdict. To the contrary, such variations in testimony are "to be expected anytime several persons witness the same event under traumatic circumstances." *People v. Brooks*, 187 Ill. 2d 91, 133 (1999). In *Brooks*, the defendant was convicted of multiple counts of first degree murder and attempted first degree murder for the drive-by shooting of several gang members. *Id.* at 96-97. The court rejected the defendant's challenge to the sufficiency of the evidence despite the fact that there were discrepancies in the witnesses' testimony "as to how many cars were involved, whether defendant was in the front or the rear passenger seat, whether the cab's sign was lit, and whether anyone was leaning out of the cab." *Id.* at 133-34. Here, Williams and Brefford offered testimony which was generally consistent. See *Id.* As such, we cannot say that no reasonable jury could have believed Brefford and Williams based on these minor variations in their testimony.

¶35 Defendant next argues Brefford and Rollins offered inconsistent testimony about the events in the trailer park, and that the testimony was so inconsistent that no reasonable jury could

have credited Brefford's testimony. Defendant specifically points out that: (1) Brefford testified that Rollins and defendant were arguing, while Rollins did not testify that she was arguing with defendant; (2) Brefford testified that he permitted defendant to pat him down, while Rollins testified that she did not see defendant touch Brefford; (3) Brefford testified that defendant was irate and yelling, while Rollins "described it as a normal conversation"; and (4) Brefford testified that he ran away and stopped when defendant told him to, while Rollins did not testify that Brefford ran and did not see a gun.

¶36 We reiterate that minor variations between witnesses' testimony do not justify overturning a jury's verdict. Moreover, several of these purported contradictions are not actually inconsistent. For instance, although Rollins did not see a gun, Brefford testified that defendant only briefly displayed the gun to Brefford and that defendant did not wave the gun around. In addition, although Rollins described her conversation with defendant as "normal," she also testified that defendant seemed "agitated" and "angry," which is consistent with Brefford's testimony that defendant was irate.

¶37 Defendant next claims that Williams and Brefford were unreliable because they both had motives to shoot Cross and implicate defendant. Defendant argues that Brefford had a motive to shoot Cross because Cross was beating him up and that Williams had a motive to shoot Cross because Cross had accused Williams of stealing from Cross. Testimony at trial, however, indicated that Brefford and Cross were friends. Accordingly, it was not unreasonable for the jury to believe that Brefford did not shoot Cross. Moreover, defendant did not introduce any evidence showing that Williams knew Cross had accused him of stealing at the time of the shooting. Accordingly, the jury's failure to find that Williams had a motive to shoot Cross was not unreasonable.

¶38 Finally, defendant asserts that Williams and Brefford were unreliable witnesses because their trial testimony about what happened after defendant lit the happy stick was inconsistent and also differed from their previous testimony during defendant's first trial. At the second trial, Brefford testified that he asked defendant to exit the car after defendant lit the happy stick. Williams, on the other hand, testified that Cross was the one who asked defendant to get out of the car. In addition, at the first trial, Brefford and Williams both testified that defendant got out of the car, and then got back in. At the second trial, they both testified that defendant left in another car and that they then went to defendant's house, where they ate hamburgers while waiting for him to return. When trial counsel attempted to impeach Brefford regarding the hamburgers, the State successfully objected.

¶39 Once again, we note that minor variations between witnesses' testimony do not justify overturning a jury's verdict. Moreover, with respect to the hamburger testimony, trial counsel never perfected the impeachment, and thus that evidence was not before the jury. Therefore, we cannot say that the jury acted unreasonably in crediting the testimony of Brefford and Williams.

¶40 Defendant also argues that the trial court improperly limited his cross-examination of Brefford by cutting off his impeachment about eating hamburgers. Defendant concedes that Brefford did not refer to hamburgers at the first trial, but urges that Brefford's silence about hamburgers amounted to an assertion of the non-existence of the fact, *i.e.*, a denial that he ate hamburgers while waiting for defendant.

¶41 "Limitation of cross-examination is a matter resting within the discretion of the trial court, and absent a clear abuse of that discretion, it will not be disturbed on review." *People v. Bryant*, 115 Ill. App. 3d 215, 222 (1983). "Prior inconsistent statements of a witness are generally admissible for impeachment purposes." *People v. Johnson*, 2012 IL App (1st) 091730,

¶ 68. "Inconsistency can arise where a witness fails to state a particular fact under circumstances in which it would be likely that he would state such fact if true." *Id.*

¶42 Here, whether Brefford ate hamburgers at defendant's house was collateral to his testimony regarding the shooting that he witnessed. As such, it is not the type of fact that Brefford would have been expected to convey in his testimony during the first trial. Accordingly, the trial court did not abuse its discretion by limiting defendant's cross-examination of Brefford.

¶43 In summary, we find that the jury could have reasonably credited the testimony of Brefford and Williams. Accordingly, defendant's sufficiency of the evidence challenge fails.

¶44 B. Ineffective Assistance of Counsel

¶45 Defendant next argues that he is entitled to a new trial because he received ineffective assistance of counsel. Defendant specifically claims that he was denied the effective assistance of counsel because trial counsel failed to impeach Brefford and Officer Jage by omission with their testimony from defendant's first trial regarding when Brefford first identified defendant as the shooter. The State argues in response that defendant's ineffective assistance claim fails because impeachment by omission was not available.

¶46 Criminal defendants have a constitutional right to the effective assistance of counsel. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, a criminal defendant must show that: (1) trial counsel's performance was objectively deficient; and (2) defendant was prejudiced, meaning "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687-88, 694; *People v. Stewart*, 141 Ill. 2d 107, 118 (1990).

¶47 A reviewing court must strive to avoid the bias of hindsight in evaluating trial counsel's performance. As the United States Supreme Court explained in *Strickland*, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 466 U.S. at 689. Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential" and we must afford trial counsel a "strong presumption" that her performance at trial was "within the wide range of reasonable professional assistance." *Id.* The defendant must overcome a presumption that the action or inaction complained of constituted "sound trial strategy." *Id.*

¶48 To satisfy the reasonable probability requirement, a defendant must do more than merely show that trial counsel's errors "had some conceivable effect on the outcome" at trial. *Stewart*, 141 Ill. 2d at 118-19. On the other hand, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome." *Id.* at 119. Instead, a reasonable probability means "a probability sufficient to undermine confidence in the outcome of the proceeding." *Id.*

¶49 "Generally, the decision whether to cross-examine or impeach a witness is a matter of trial strategy that will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *Id.* at 326-27. In order for a defendant to prevail on an ineffective assistance claim based on allegedly improper cross-examination, the defendant must show "that counsel's approach to cross-examination was objectively unreasonable." *Id.* at 327.

¶50 At defendant's second trial, the following colloquy took place between Brefford and the prosecutor:

"Q. [THE STATE]: Did the police eventually respond to where you were?

A. [BREFFORD]: Yes, they came where I was at.

Q. And when the police came, did you speak to the police officers?

A. Yes, I did.

Q. Did you tell them who had shot your friend?

A. Yes, I told them that Keith had shot my friend. I didn't know his last name, but I knew it started with a W.

Q. Did the police take you anywhere from that little girl's home?

A. Yes. They took me back to the scene.

Q. When you got back to the scene, was Gerald still there?

A. Yes, he was.

Q. Did you talk to the police at the scene?

A. No, I did not.

Q. Why not?

A. Because it was a lot of people standing outside.

Q. Why didn't you want to talk with a lot of people out there?

A. Because he had been shot and I didn't know where the killer was, so I didn't want to talk right there on the scene.

***

Q. Now, sir, did you eventually go back to the police station?

A. Yes, I did.

Q. Now, at some point while you were at the police station, did you speak with the police?

A. Yes.

***

Q. Did they show you some pictures?

A. Yes, they did.

Q. Did you pick anybody out of those pictures?

A. Yes, I did.

Q. Who did you pick out?

A. I picked out (indicating.) He's right there.

Q. Mr. Wilcox?

A. Keith, yes.

Q. Do you know how long it was after — was it that day or the next day that you saw the pictures?

A. I saw the pictures, I believe, two days after."

¶51 At defendant's first trial, the following colloquy took place between Brefford and the prosecutor:

"Q. [THE STATE]: Did the police eventually respond to where you were?

A. [BREFFORD]: Yes.

Q. And were you able to go back?

***

A. Yes, I was. They let me return to the scene of the crime after I track my shoe down, yes.

Q. Sir, when you returned to the scene of the crime, what did you observe?

A. When I returned to the scene of the crime, I still was shaken up and the police was asking me questions. And I was like, I told the police officer that I didn't really want to talk about it right there because if there was a killer on the loose and I saw all type of people standing outside. So I really didn't want to talk about it at the time.

***

Q. Now, you eventually went back to the police station. Is that right?

A. Yes.

Q. You spoke with the officers?

A. Yes, I did.

Q. Did you - - did they show you anything while you were there?

A. Yes. They had me look through some mug shots.

Q. And were you able to identify the defendant that day?

A. It wasn't the same day. We didn't look through the mug shots on day one.

***

Q. At some point did you return back to the police department?

A. Yes, I did.

Q. You indicated that you had to look at some mug shots?

A. Yes.

Q. Who were you able to pick out from the mug shots?

A. Keith Wilcox?

Q. Why did you pick him out?

A. Because that was the face that was in my head. That's who I saw.

Q. Saw do what?

A. That's who I saw kill Gerald Cross. And that's who took me at gunpoint."

¶52 Defendant argues that trial counsel was ineffective because she did not impeach Brefford with the apparent inconsistency between his testimony at the first and second trial regarding when he identified defendant as the shooter. However, the transcript from defendant's first trial does not reveal that Brefford was asked about what happened between the time when Officer Jage arrived at the residence on Marshfield and when he took Brefford back to the crime scene.

Accordingly, there was no direct prior inconsistent statement by Brefford regarding when he identified defendant that trial counsel could have used to impeach Brefford.

¶53 Defendant nonetheless argues that trial counsel could have impeached Brefford by omission. This argument lacks merit. "The rule for impeachment by omission is that it is permissible to use prior silence to discredit a witness' testimony if: (1) it is shown that the witness had an opportunity to make a statement, and (2) under the circumstances, a person would normally have made the statement." *People v. Conley*, 187 Ill. App. 3d 234, 244 (1989). As we have already explained, at defendant's first trial, the prosecutor did not ask Brefford questions about what he said to Officer Jage when he first met up with Brefford. Instead, the prosecutor merely asked Brefford, "[d]id the police eventually respond to where you were?," before asking Brefford questions about what happened after Brefford and Officer Jage returned to the crime scene. That question did not reasonably call for an identification of the suspect and therefore Brefford could not have been impeached on that basis.

¶54 Defendant also argues that trial counsel should have impeached Officer Jage regarding when Brefford told him that defendant killed Cross. At the second trial, Officer Jage testified that Brefford told him that defendant killed Cross when Officer Jage first met up with Brefford on Marshfield Avenue. At the first trial, trial counsel asked Officer Jage what description Brefford had given of the suspect, but the prosecutor successfully objected to the question and no answer was given. Trial counsel then asked Officer Jage "[d]id you receive any information on possible suspects?" but the State again successfully objected and no answer was given. Officer Jage was also prevented from discussing the description he included in his police report on the basis that the statement would be hearsay.

¶55 Thus, while it is correct that Officer Jage did not testify at the first trial that Brefford named defendant as the shooter, this purported gap in his testimony is attributable to the prosecutor's successful objections. Understood in this light, Officer Jage did not *omit* anything from his answers to this line of questions. Rather, he was precluded from answering altogether. As such, Officer Jage did not contradict himself when he testified at the second trial that Brefford identified defendant as the shooter when Officer Jage arrived at Marshfield Avenue. Because the purported contradiction in Officer Jage's testimony did not exist, trial counsel was not deficient for failing to pursue this line of impeachment. Accordingly, defendant's ineffective assistance of counsel claim fails.

¶56 C. Evidence of Defendant's Arrest

¶57 Defendant next argues that the trial court improperly permitted the State to introduce flight evidence in contravention of this court's mandate from his first appeal. At defendant's first trial, the State introduced testimony from Agent Bakken explaining that defendant was apprehended in Las Vegas and that defendant used an alias and had a fake identification card when he was apprehended.

¶58 On appeal, we held that the State should not have been permitted to introduce flight evidence because the State had not shown that defendant knew he was a suspect in Cross's murder. *Wilcox*, 407 Ill. App. 3d at 170. We stated that "the other evidence presented at trial does not support an inference that defendant fled Illinois and used an alias to avoid arrest for the murder of Cross and that such evidence is of little to no probative value." *Id.* We further explained that "the alleged flight evidence, and evidence of defendant's use of a fake identification card in particular, was prejudicial to

defendant because it could easily lead the jury to believe defendant was a bad person and untrustworthy." *Id.*

¶59 At defendant's second trial, the State introduced testimony from Agent Bakken in which he described apprehending defendant in Las Vegas while working as a member of a fugitive task force. Agent Bakken explained the details of defendant's capture, including the fact that defendant initially used an alias when he spoke with Agent Bakken. Agent Bakken did not testify that defendant possessed a fake identification card. Defendant asserts that "[b]ecause the shooting occurred in Illinois, and Wilcox was arrested in Las Vegas by an officer whose job it was to apprehend 'fugitives,' " the only conclusion the jury could reach based on Agent Bakken's testimony "was that Wilcox had fled." The State argues in response that the this evidence was admissible "to describe the circumstances leading up to and surrounding defendant's arrest, to explain the delay between the murder and the time of defendant's arrest, and to establish defendant's true identity."

¶60 We find that the trial court did not violate our mandate by permitting this testimony because the State did not utilize Agent Bakken's testimony as flight evidence. Unlike at defendant's first trial, where the State relied heavily on the fact that defendant allegedly fled Illinois, at defendant's second trial the State made only passing reference to defendant's capture in Nevada. Furthermore, the State did not argue that defendant fled or that the jury could or should consider the fact that defendant was captured in Nevada as evidence of his guilt. Accordingly, we find that the trial court did not violate our mandate by permitting Agent Bakken to testify about the details of defendant's capture.

¶61 That does not, however, end our inquiry. If Agent Bakken's testimony had no relevant purpose, then its introduction would still be unduly prejudicial to defendant. See Ill. R. Evid. 403 (eff. Jan. 1, 2011). Defendant argues that the State is using evidence that defendant was found using an alias as "thinly disguised evidence of flight." As previously mentioned, the State argues that this testimony was relevant inform the jury about the circumstances of defendant's capture, explain the delay between defendant's crimes and arrest, and prove defendant's identity.

¶62 We begin by considering defendant's argument that Agent Bakken's testimony was really used by the State as evidence of flight. Defendant cites *People v. Langford*, 234 Ill. App. 3d 855 (1992). *Langford*, however, merely stands for the general rule that a jury may use flight evidence to infer consciousness of guilt. *Id.* at 859. Defendant's argument is belied by the fact that the State made almost no reference to the fact that defendant was captured in Las Vegas in its opening and closing statements. Accordingly, we reject defendant's argument.

¶63 We next consider the State's argument that the evidence was properly admitted to show the circumstances of defendant's capture. Illinois courts have long held that "[t]he consequential steps in the investigation of a crime are relevant when necessary and important to a full explanation of the State's case to the trier of fact." *People v. Johnson*, 114 Ill. 2d 170, 194 (1986). In *People v. Hayes*, 139 Ill. 2d 89 (1990), *rev'd on other grounds, People v. Tisdel*, 201 Ill. 2d 210 (2002), a detective testified for the state that he tried several times to find the defendant at his house, obtained a warrant, set up a stakeout, and that the defendant was finally apprehended several days later. *Id.* at 130. The defendant argued that the testimony should not have been permitted because it

suggested that he tried to evade capture, even though there was no evidence that the defendant knew he was a suspect. *Id.* The Supreme Court agreed that the evidence was not admissible as flight evidence, but nonetheless held that the trial court did not abuse its discretion by permitting the testimony because it was "relevant evidence of the events leading up to the defendant's arrest." *Id.* at 131. Similarly, in *People v. Harris*, 225 Ill. 2d 1 (2007), the prosecution elicited testimony from an FBI agent explaining that he arrested the defendant in North Carolina nearly two and a half months after the crime occurred. *Id.* at 22-23. Noting that the State did not argue that the defendant's flight to North Carolina showed consciousness of guilt, the court held that "[e]vidence that defendant was apprehended in North Carolina was clearly admissible as a circumstance of his arrest." *Id.* at 25.

¶64 We find, pursuant to *Hayes* and *Harris*, that Agent Bakken's testimony that he apprehended defendant in Las Vegas was properly admitted as evidence showing the circumstances of defendant's capture. For the same reason, we also find that the trial court did not abuse its discretion in permitting the State to introduce Agent Bakken's testimony regarding defendant's use of an alias. Defendant gave Agent Bakken the alias while Agent Bakken was executing the raid in an effort to apprehend defendant. This evidence was therefore relevant to give the jury a full exposition of the events of defendant's apprehension. Based on the foregoing, we find that the trial court did not err in permitting Agent Bakken's testimony.

¶65 D. Trial Court's Consideration of Aggravating Factors

¶66 Lastly, defendant challenges his sentence, contending that the trial court improperly considered aggravating and mitigating factors. Defendant specifically contends that the trial

court improperly considered the fact that his conduct caused serious harm as an aggravating factor because serious harm is an element of the offense of first degree murder. Defendant concedes that he did not raise this issue in his motion to reconsider sentence. To avoid waiver, defendant argues that we should review the trial court's decision under a plain error analysis. See Ill. Sup. Ct. R. 615(a). "Before invoking the plain error exception, however, 'it is appropriate to consider whether error occurred at all.' " *Harris*, 225 Ill. 2d at 24 (quoting *People v. Wade*, 131 Ill. 2d 370, 376 (1989)). Thus, we will first consider whether the trial court committed error when it sentenced defendant.

¶67 "[I]t is well settled that a factor which is implicit in the offense of which defendant was convicted should not be considered at sentencing as an aggravating factor." *People v. Latona*, 268 Ill. App. 3d 718, 729 (1994) (citing *People v. Conover*, 84 Ill. 2d 400, 404 (1981)). Nonetheless, "the commission of any offense has varying degrees of harm or threatened harm, and this variance constitutes an aggravating factor even where serious bodily harm is implicit in the offense." *Id.* at 729-730. "[S]ound public policy demands that a defendant's sentence vary in accordance with the particular circumstances of the offense committed." *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986). Thus, "the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*" (Emphasis in original.) *Id.* However, "even though a court may properly consider the degree of harm inflicted by a defendant in fashioning a sentence for an offense wherein serious bodily harm is implied, it may not focus on the end result of the harm, the death of the victim, if such death is implicit in the offense." *People v. Allan*, 231 Ill. App. 3d 447, 458-59 (1992). The infliction of serious bodily harm to the

victim is implicit in the offense of first degree murder. See 720 ILCS 5/9-1(a)(1), (2) (West 1996).

¶68 In sentencing defendant, the trial court stated that "defendant's conduct caused serious harm" and noted that "[a] sentence is necessary to deter others from committing the same crime." The court further stated that defendant's crime was "a senseless, senseless act that happened here, an execution," and added that "this was a senseless, senseless act that took the life of another person." We find no error here. First, the trial court had to make some reference to the facts of the crime in order to explain the basis for its sentencing decision. A trial court does not commit reversible error in sentencing a defendant convicted of murder by mentioning that someone died as a result of defendant's crime. See *People v. Kibayasi,* 2013 IL App (1st) 112291, ¶ 56. The trial court's statement that "defendant's conduct caused serious harm" and "took the life of another person" was simply "acknowledgment that a serious offense had occurred." *Id.* ¶ 57. Second, we find that the trial court properly considered the *manner* and *degree* of defendant's conduct. The trial court described Cross's murder as an "execution." This statement undoubtedly was in reference to the fact that defendant shot Cross seven times, including no less than five times while Cross lay wounded and defenseless on the ground. Accordingly, the trial court did not err in its consideration of aggravating factors. Therefore, we need not consider defendant's argument that trial counsel provided ineffective assistance by failing to object to the trial court's consideration of the aggravating factors.

¶69 Next, defendant argues that the trial court did not give appropriate weight to several mitigating factors, namely that defendant "had not received any disciplinary tickets while in jail, he had a work history and children, and a stable family." The Illinois Constitution provides "[a]ll penalties shall be determined both according to the seriousness of the offense and with the

objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I., § 11. "This constitutional mandate calls for the balancing of the retributive and rehabilitative purposes of punishment." *People v. Center*, 198 Ill. App. 3d 1025, 1033 (1990). To conduct this balancing, the sentencing court must consider all aggravating and mitigating factors. *Id.* "Where mitigating evidence is before the court, it is presumed the court considered that evidence absent some contrary indication other than the sentence imposed." *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993). Moreover, it is the trial court's role to determine what weight to afford mitigating evidence, and therefore "the existence of mitigating factors does not automatically oblige the trial court to reduce a sentence from the maximum allowed." *Id.*

¶70 During the sentencing hearing, the trial judge stated that he "had an opportunity to *** review the factors in aggravation and mitigation." When discussing defendant's mitigating factors, he explicitly mentioned that defendant had no "history of prior delinquency or criminality." On this record, we cannot conclude that the trial court did not consider all of the mitigating factors which defendant presented. Moreover, given the severity of defendant's conduct, we cannot say that the trial court abused its discretion in sentencing defendant.

¶71 CONCLUSION

¶72 Based on the foregoing, we affirm defendant's conviction and sentence.

¶73 Affirmed.