2015 IL App (1st) 142298-U

FOURTH DIVISION
September 10, 2015

No. 1-14-2298

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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 15678
	)	
BRIAN RUIZ,	)	Honorable
	)	Sharon M. Sullivan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not apply improper standard for intent at bench trial for attempted first-degree murder. Evidence was sufficient to prove defendant guilty of attempted first-degree murder where contradictions in State's evidence did not create reasonable doubt of guilt, defendant's repeated kicks and stomps to victim's face proved intent to kill, and evidence did not raise self-defense. Trial court did not err in declining to sentence defendant in Class 1 range where evidence did not show that defendant acted in response to serious provocation.

¶ 2 An argument between defendant Brian Ruiz and Matthew Jones outside of a bar escalated to a physical altercation. Eventually, defendant knocked Jones to the ground and kicked him in the head several times until the police arrived and arrested defendant. Jones suffered several facial fractures that required surgery. After a bench trial, the trial court found defendant guilty of attempted first-degree murder and aggravated battery.

¶ 3 Defendant appeals and raises three issues: (1) that the trial court erred in applying an incorrect standard for his intent to commit attempted first-degree murder; (2) that the State's evidence was insufficient to prove him guilty of attempted first-degree murder; and (3) that the trial court erred in declining to sentence him as Class 1 offender pursuant to section 8-4(c)(1)(E) of the Criminal Code of 1961 (720 ILCS 5/8-4(c)(1)(E) (West 2010)) because he committed the attempted murder while acting under serious provocation.

¶ 4 We reject defendant's claims. We conclude that the trial court did not apply an incorrect intent standard where it explicitly stated that the State was required to prove defendant's intent to kill Jones in order to prove the attempted murder charge. We also reject defendant's claim that the State's evidence was insufficient to prove his intent to kill, as the evidence showed that defendant repeatedly kicked and stomped on Jones's face and head while he lay motionless on the ground, causing extensive fractures deep in Jones's skull and permanently disfiguring Jones's face. Finally, we reject the notion that defendant proved that he was seriously provoked at the time of the incident where the evidence showed that defendant was the instigator of the assault, and defendant's response to any provocation was greatly out of proportion to the provocation. We affirm defendant's conviction and sentence.

¶ 5 I. BACKGROUND

¶ 6 Jones testified that he went to several bars in Chicago in the early morning hours of August 19, 2009. After drinking with friends at a bar on Weed Street, he hailed a cab to go home. The next thing he remembered was waking up in the hospital on September 11, 2009. He had stitches under both of his eyes and packing in his nose, and his jaw had been wired shut.

¶ 7 Jones had four surgeries after September 11, 2009. The first was to remove the wire from his jaw. He also had procedures to remove a blood clot from the back of his right eye, to

reconstruct the bridge of his nose, to insert a screw in his nose, and to straighten one of his eyes. Jones said that, when he looked to the right, he still had double vision. Jones testified that his face was permanently disfigured in several ways: his right eye was lower than before, he had two scars under each of his eyes, he had a "new nose," and his jaw was displaced. Jones testified that he was 6'2" tall and, on August 19, 2009, he weighed 210 pounds.

¶ 8 Julianna Morgan, one of Jones's friends, testified that he called her shortly before 4 a.m. on August 19, 2009. They talked for about eight minutes, when, at the end of the call, she heard Jones yell, "What are you doing? Get away from me." Morgan tried to call Jones back several times, but he did not answer. Morgan said that, based on the sound of Jones's voice, she did not think that he was intoxicated.

¶ 9 Amber Ritter testified that, around 4 a.m. on August 19, 2009, she heard an argument outside her home at the corner of Dickens Avenue and Halsted Street. Ritter looked out the windows of her third-floor bedroom, which faced Halsted, and saw four men walking north in the middle of the street. The street was illuminated by streetlights. The men walked out of her line of sight, so Ritter went to the second floor of her home, looked out a window at the north side of her house, and saw the men continuing to argue. She could not hear the words they were saying, but, she said, their tone was "aggressive." Believing that the situation was "escalating," Ritter called the police.

¶ 10 Ritter estimated that, 30 to 45 seconds after she called the police, "one man started punching another man." The man punched the other man "five or six times," and the other man fell down. She did not see the man who fell try to retaliate in any way. Ritter testified that she then saw "the man who[had] been doing the punching start to kick and stomp on the [man] who was on the ground." She said that the man was kicking and stomping the other man's "chest,

neck, and face."

¶ 11 All told, Ritter heard 8 to 10 kicks, which she described as a "thudding sound like a wet sandbag," as well as "a few other stomps." Ritter said that the kicks required "a windup between them"; that "[t]hey were very deep kicks that *** took a few seconds to kind of get accomplished." According to Ritter, the man kicked the man on the ground in "cluster[s]" of two to four kicks, then paused for 10 seconds, then kicked the man again.

¶ 12 She did not see the man on the ground move at all. The other two men stood and watched as the assailant kicked the man on the ground. While she heard some "taunting laughter," she was not sure who was laughing.

¶ 13 Ritter said that she did not have any difficulty seeing the incident, but that a metal fence "affected the bottom few feet of what [she] was seeing." But she could still see the "heads and the torsos" of the individuals that were standing. And she said that she could see the man on the ground through the openings in the fence. On cross-examination, Ritter said that she did not recall telling the police that she could not see the kicks through the fence that obstructed her view. She maintained that she could see where the kicks were landing on the body of the man on the ground. The parties stipulated that Ritter told the police that she could not see the kicks through the fence.

¶ 14 Ritter estimated that, 30 to 60 seconds after the physical assault began, a police car arrived. She said that, even after the police car arrived, the man continued kicking the man on the ground. She saw two officers get out of the car and "one of them grabbed the man who was doing the kicking and *** pulled him off."

¶ 15 Ritter could not identify any of the men who were in the street that night. She could not remember any of their characteristics, except that all four men were of "medium height and

build."

¶ 16 Ritter said that she did not see any of the men throw anything, she did not see anyone hold a flashlight, and she did not see anyone with a backpack. She could not see whether any of the men spit at each other.

¶ 17 Chicago police officer Thomas Baker testified that he and his partner, Officer Matt Wagner, responded to the incident. They were about half a block south of Dickens on Halsted when Baker heard the people yelling. Baker and Wagner pulled up to the intersection of Dickens and Halsted just a few seconds later, where Baker saw "a body laying lifeless on the sidewalk" and defendant, standing over the body, "stomping on the face of [the] motionless body." Baker asserted that the person on the ground, whom he identified as Jones, was "just laying there limp," he was not "trying to put his arms up or anything to block anything." Baker saw two other men—one about 2 or 3 feet from Jones and another about 30 to 40 feet away.

¶ 18 Baker said he jumped out of his squad car, drew his pistol, and yelled, "Chicago Police Department. Stop." Baker saw defendant walk toward a fence and pick up a bag, then walk back toward Jones and kick Jones in the jaw. When defendant kicked Jones, his head "crack[ed] back onto the sidewalk." Baker grabbed defendant, pushed him up against a fence, and called for an ambulance. Baker said that defendant's hands and shoes were covered in blood. The parties stipulated that DNA testing showed that the blood on defendant's shoes was Jones's.

¶ 19 While waiting for the ambulance to arrive, Baker tried to give aid to Jones, but "his face was torn open and there was blood pouring out of everything and *** his face was just completely smashed in." Baker could hear Jones "gargling blood." Baker turned Jones on his side so that he would not choke on his own blood.

¶ 20 The ambulance arrived and took Jones to the hospital. Baker testified that he rode along

with Jones and the paramedics. Baker said that, during the ride, Jones remained "motionless."

¶ 21 On cross-examination, Baker denied that Jones was "combative and agitated" when the paramedics tried to treat him, and he denied that the paramedics used "spider straps" to restrain Jones. He did not recall recovering Jones's cell phone, and he did not recall Wagner recovering a cell phone. The parties stipulated that Baker and Wagner told the detective on the case that they recovered the pieces of a broken cell phone from the scene.

¶ 22 Dr. Rebeca Rico, a trauma critical care surgeon, testified that she treated Jones at the hospital on August 19, 2009. Rico testified that Jones's face was bruised and swollen, his lips were swollen and lacerated, and he had blood coming from his nose and mouth. Jones had "some blood" in his airway but "it seemed like he was protecting his airway." Rico said that Jones's heart rate "was beating a little fast," but that she would expect that given the blunt trauma he had, as well as "all the chaos going on in the trauma bay." Jones did not have any other bruises or abrasions on his body other than those on his face.

¶ 23 After conducting some scans of Jones's body, Rico saw that he had some blood in his right lung and "multiple fractures of the midface." Specifically, Jones's hard palate, bones behind his nose, eye sockets, and right cheekbone were all fractured. She opined that it would have taken "a lot of force *** to fracture all those bones." She further opined that it would have taken "either a very large *** blow or multiple blows *** to fracture that many bones in the midface."

¶ 24 Rico said that the facial fractures alone would not have caused Jones's death if they had been left untreated. But, she said, the bleeding caused by the facial fractures could have led him to choke on his own blood if he was unconscious and could not protect his airway.

¶ 25 According to Rico, Jones was "uncooperative and combative" and it was obvious to her that he had alcohol in his system. But she believed that his behavior was normal because the

blood from Jones's face was dripping back into his throat, so his instinct would be to resist being held down so that his airway would not be clogged. Rico testified that Jones's blood-alcohol level was 0.267%.

¶ 26 Rico testified that, according to the hospital's documentation, Jones was able to get out of bed on his second day in the hospital. He was taking pain medication orally and was on a general diet, although he was not eating solid foods.

¶ 27 Iris Klicic and Daniel Vanoni, the two individuals with defendant during the incident, testified on defendant's behalf. They testified that they were walking with defendant near Dickens and Halsted after leaving a nearby bar. Vanoni testified that defendant had a flashlight out and was "twirling it around." As defendant was twirling the flashlight, Vanoni saw Jones sitting next to a storefront with a bloody nose. Vanoni asked Jones if he was all right, and Jones stood up and appeared "really angry." Klicic, who was walking ahead of the group, heard Jones "scream[ ]" at defendant. Both Klicic and Vanoni saw Jones take off his shirt and drop his cell phone on the ground. Klicic and Vanoni described Jones as being between 6'2" and 6'4", tall, and muscular.

¶ 28 According to Klicic and Vanoni, Jones then briefly chased defendant north on Halsted. After giving up on the chase, Jones turned around and walked back south toward Klicic and Vanoni. Vanoni tried to hand Jones his shirt and phone, but Jones threw the shirt and phone to the ground. Defendant then returned to the group and tried to shake hands with Jones, but Jones spat in defendant's face. Defendant tried to shake Jones's hand two more times, with Jones spitting in his face each time.

¶ 29 Klicic and Vanoni testified that, after spitting in defendant's face a third time, Jones tried to hit defendant, defendant ducked, and defendant punched Jones in the face. Jones fell to the

ground. As Jones tried to stand up, defendant punched him three or four more times. Vanoni testified that defendant tried to kick Jones, but that he grabbed defendant before his foot could make contact with Jones. At that point, the police arrived on the scene and detained defendant and Vanoni.

¶ 30 The parties stipulated that Klicic told the police that he did not hear any talking before Jones chased defendant, and that defendant only punched Jones once. Klicic also did not tell the police that Jones spat in defendant's face. The parties also stipulated that Vanoni told the police that Jones spat on him, not defendant.

¶ 31 Defendant also called Maria Cerna, one of the paramedics who treated Jones, in support of his case. Cerna described Jones as a "pretty large guy" and muscular. According to her reports, she estimated that he weighed 240 pounds. She said that it took five paramedics and firefighters to lift Jones on a backboard.

¶ 32 Cerna testified that Jones was able to respond to the things she said to him, but that "his words were incomprehensible." She added that, while Jones's eyes were swollen shut and "[h]e couldn't speak," he "attempted to speak" in response to her voice. She testified that he was "gurgling" because he had "quite a bit" of blood in his airway.

¶ 33 Cerna described Jones as "agitated" and "combative." But she attributed his agitation to his "being disoriented[and] fearful." Because Jones was flailing his arms, Cerna and other paramedics used "spider straps" to secure him to the backboard. Cerna said that they restrained Jones because, in light of his head injury, his flailing could create the possibility that Jones would injure his spine. Cerna described Jones's behavior as "very normal" in light of the obstruction of his airway and his traumatic head injuries.

¶ 34 Cerna testified that no police officer accompanied her in the ambulance when she took

Jones to the hospital.

¶ 35 The trial court found defendant guilty of attempted first-degree murder and aggravated battery. The court found Ritter's and Baker's testimony to be credible. It also found incredible Klicic and Vanoni's testimony that defendant did not kick Jones. The court said, "the numerous facial fractures sustained by the victim *** raised serious questions about the testimony of Vanoni and Klicic."

¶ 36 In discussing the standards applicable to the attempted first-degree murder charge, the court said:

> "To prove attempted murder, the evidence must prove beyond a reasonable doubt that defendant intended to kill. The specific intent to kill may be inferred from the circumstances such as the character of the assault on the victim and the use of a deadly weapon.
>
> This Court recognizes that intent to commit great bodily harm is insufficient to support a conviction for attempted murder, and every assault involving serious bodily injury does not necessarily support a conviction for attempted murder."

Then, in finding defendant guilty of attempted first-degree murder, the court said:

> "Here defendant *** repeatedly and forcefully kicked Jones in the face and head area causing a broken nose, fractured orbital bones, and multiple deep facial fractures. Defendant used his fists and his feet as a deadly weapon. The repeated kicks were to the victim's most vulnerable areas, his face and head, and continued as Jones lay unresponsive on the sidewalk.
>
> I find this shows a callous indifference and an intent to kill, and there will be a finding of guilty on the attempt[ed] first degree murder."

¶ 37 Defendant filed a posttrial motion, as well as two supplemental posttrial motions, which the trial court denied. When discussing the issue of defendant's intent, the trial court quoted *People v. Coolidge*, 26 Ill. 2d 533, 536-37 (1963):

> "It is not requisite or necessary that the party charged should have brooded over the intent, or entertained it for any considerable time, but it is enough if at the instant of the assault he intended to kill the party assaulted, or it will be enough if he is actuated in making the assault by wanton and reckless disregard of human life that denotes malice, and the assault is made under such circumstances that, if death had ensued, the killing would have been murder."

The trial court then said, "Defendant's actions here show that he acted with malice and with a wanton and reckless disregard for human life from which his intent to take life can be inferred—from which his intent to take life is inferred."

¶ 38 At sentencing, defendant requested to be sentenced as a Class 1 offender pursuant to section 8-4(c)(1)(E), which provides for the reduced sentencing range when the defendant can prove by a preponderance of the evidence that the attempted first-degree murder was committed in response to "serious provocation by the individual whom the defendant endeavored to kill," and, "had the individual *** died, the defendant would have negligently or accidentally caused that death." 720 ILCS 5/8-4(c)(1)(E) (West 2010).

¶ 39 The court declined to apply section 8-4(c)(1)(E). The court noted that there are four categories of "serious provocation": "substantial physical injury or assault, mutual quarrel or combat, illegal arrest and adultery with the offender's spouse." The court found that the only one potentially applicable would be mutual quarrel or combat, and found that defendant failed to prove mutual quarrel or combat because, based on the testimony the court found credible at trial,

Jones did not engage in any physical combat. The court sentenced defendant to the minimum Class X sentence of six years' incarceration for attempted murder. The court merged defendant's aggravated battery convictions into the attempted murder conviction. Defendant appeals.

¶ 40 II. ANALYSIS

¶ 41 A. Whether the Trial Court Applied the Correct Standard for Attempted Murder

¶ 42 Defendant first claims that the trial court applied an improper intent standard in finding him guilty of attempted first-degree murder. Defendant cites the trial court's reference to his "wanton and reckless disregard of human life" as evidence that the court did not properly hold the State to its burden of proving defendant's intent to kill Jones. Defendant also notes that the trial court cited *People v. Coolidge*, 26 Ill. 2d 533 (1963) for a proposition of law which, according to defendant, has since been abandoned by the Illinois Supreme Court.

¶ 43 The State contends that the trial court applied the proper standard for defendant's intent in this case. And, the State says, the portion of *Coolidge* quoted by the trial court remains good law.

¶ 44 The question of whether the trial court applied the correct standard in evaluating defendant's intent is a question of law. See *People v. Campos*, 349 Ill. App. 3d 172, 176 (2004). We apply *de novo* review. *Id.*

¶ 45 When we review a bench trial, we presume that the trial court knows the law and applies it properly. *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 41. But when the record affirmatively shows that the trial court incorrectly applied the law, that presumption is rebutted. *Id.* When prosecuting a charge of attempted first-degree murder, the State bears the burden of proving that the defendant possessed the specific intent to kill the victim. *People v. Trinkle*, 68 Ill. 2d 198, 202 (1977); *People v. Jaimes*, 2014 IL App (2d) 121368, ¶ 27. The question in this

case is whether the trial court's findings showed that it applied an incorrect mental state to the offense of attempted first-degree murder.

¶ 46 We disagree with defendant that the trial court failed to apply the proper legal standard in evaluating his intent. At the beginning of its findings, the trial court said, "To prove attempted murder, the evidence must prove beyond a reasonable doubt that defendant intended to kill." The court also noted that an intent to inflict great bodily harm was insufficient. In finding defendant guilty of attempted first-degree murder, the court said, "I find [the evidence] shows a callous indifference and *an intent to kill*." (Emphasis added.) While the trial court did note that defendant acted with "wanton and reckless disregard of human life" at the hearing on his posttrial motions, the trial court continued by saying that it inferred defendant's intent to kill from the evidence. Thus, the court clearly understood the intent element for attempted first-degree murder and correctly applied it.

¶ 47 The court's mere reference to defendant's "wanton and reckless disregard of human life" does not show that it applied an incorrect standard. In *People v. Valentin*, 347 Ill. App. 3d 946, 952 (2004), we rejected a claim that the trial court applied an improper intent standard in an attempted murder case where the trial court said both that the defendant " 'specifically intended to do great bodily harm' " to the victims and that he " 'specifically intended to kill to kill them both.' " We held that, despite the trial court's improper reference to the intent to do great bodily harm, "the record show[ed] that the trial court did, in fact, find defendant possessed the intent to kill." *Id.* Thus, even assuming that the trial court made an improper reference to "wanton and reckless disregard of human life," that does not diminish the fact that the trial court expressly applied the correct intent standard at defendant's trial.

¶ 48 Having reached this conclusion, we need not decide whether, as defendant suggests, *Coolidge* is no longer good law. Because the trial court properly required the State to prove that defendant intended to kill Jones, no further inquiry is necessary.

¶ 49 B. Sufficiency of Evidence of Intent to Kill

¶ 50 Defendant next claims that the State presented insufficient evidence to prove that he possessed the intent to kill Jones. Defendant's argument is three-fold. First, he claims that the trial court erred in crediting the testimony of Ritter and Officer Baker over Vanoni and Klicic where Ritter's and Baker's accounts of the incident were inconsistent and incredulous. Second, he claims that, assuming the truth of the State's evidence, it was still insufficient to prove that he possessed the intent to kill. Third, he claims that the State's evidence failed to prove beyond a reasonable doubt that he did not act in self-defense. We address each argument in turn.

¶ 51 When reviewing the sufficiency of the evidence, we must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the State proved the necessary elements of the offense beyond a reasonable doubt. *People v. Fernandez*, 2014 IL 115527, ¶ 13. We may not substitute our judgment for the trier of fact's regarding the weight of the evidence or the credibility of the witnesses. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). We will not reverse a conviction simply because the evidence is contradictory, or because the defendant claims that the witnesses were not credible. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 52 1. Credibility of the State's Witnesses

¶ 53 Defendant's first argument is that the State's two central witnesses—Ritter and Baker—were not credible. Defendant's argument is simply that his case—specifically, the testimony of his friends Vanoni and Klicic—was more believable than the State's.

¶ 54 Defendant highlights several contradictions in the State's evidence. He notes that, while Ritter testified that the police did not arrive until 30 to 60 seconds after she called 911, Baker testified that he arrived on the scene mere seconds after he first heard the argument. He points out that, while Baker testified that he drew his gun when he arrived at the scene, Ritter said that the officers did not draw their guns. He also notes that, while Baker said that Jones was unconscious and not strapped down when he was taken to the hospital, Cerna testified that Jones was conscious and that she and other paramedics strapped him to a backboard. Defendant also cites Cerna's testimony that no police officers rode with her in the ambulance, contradicting Baker's testimony that he accompanied Jones to the hospital in the ambulance. Finally, defendant challenges Ritter's assertion that she could see where defendant was kicking Jones when she previously told the police that she could not see defendant's lower body or Jones through a fence obstructing her view.

¶ 55 We recognize that there were contradictions in the State's evidence, but it was the trial court's prerogative to assess the credibility of the witnesses and to resolve any conflicts in their testimony. See *Siguenza-Brito*, 235 Ill. 2d at 228 ("[I]n a bench trial, it is for the trial judge *** to resolve any conflicts in the evidence."). We may not second-guess the trial court's judgment as to these matters. *Jackson*, 232 Ill. 2d at 280-81. The trial court had ample opportunity to assess the conflicts in the evidence and determine whether those conflicts rendered the State's evidence unworthy of belief. It did not make such a determination, however, and it is not our place to undertake the same inquiry on appeal.

¶ 56 In any event, none of the contradictions were so great that we can affirmatively state that no rational trier of fact would accept the testimony of the State's witnesses. Ritter and Baker corroborated one another on the fact that defendant kicked and stomped on Jones's face while

Jones lay helpless in the street. Dr. Rico's testimony about the extent of Jones's facial fractures also corroborated the severe beating described by Ritter and Baker and contradicted Klicic and Vanoni's description of a brief altercation. Whether the police did or did not have their guns drawn upon arrival, whether Jones was or was not conscious when placed into the ambulance, and whether Baker did or did not accompany Jones in the ambulance are not nearly among the most important observations either Baker or Ritter made in their testimony. The trial court could have reasonably concluded that they would remember such details far less than the horrific details of the beating that preceded these events.

¶ 57 The timing of the beating vis-à-vis the police officers' arrival could be viewed as inconsistent, but as the State notes, neither Baker nor Ritter gave anything but estimates of times, and the trial court could reasonably view any apparent inconsistency as minor. We would say the same of Ritter's testimony that she could see where defendant's kicks and stomps were landing, when the investigating detective testified via stipulation that she said she could not see them because of the fence posts. The trial court heard such evidence and fully credited Ritter's testimony, which we would note was fully corroborated by police and medical testimony that Jones suffered multiple blows to the face and head. We thus reject defendant's contention that the State's evidence was insufficient simply because it was contradictory in certain respects.

¶ 58 2. Intent to Kill

¶ 59 Next, defendant claims that, even accepting the State's evidence as true, the State failed to prove that he possessed the intent to kill Jones, where the evidence only showed that he kicked Jones, Jones's injuries were not life-threatening, and Jones was larger and stronger than defendant. The State contends that the extent of defendant's blows, the fact that he kicked and

stomped on Jones's head, and the severity of Jones's injuries offer sufficient evidence from which defendant's intent to kill may be inferred.

¶ 60 To prove the offense of attempted first-degree murder the State must prove that the defendant took a substantial step toward the completion of first-degree murder and that the defendant intended to kill the victim. *People v. Garrett*, 216 Ill. App. 3d 348, 353 (1991). Defendant contests only the intent element.

¶ 61 The intent to kill may be inferred from the circumstances, such as "the character of the assault on the victim and the use of a deadly weapon." *People v. Jones*, 184 Ill. App. 3d 412, 429 (1989). An intent to inflict great bodily harm on the victim is insufficient, and "every assault involving serious bodily injury does not necessarily support a conviction for attempted murder." *Id.* at 429-30. While the use of a gun or knife ordinarily gives rise to an inference that the defendant possessed an intent to kill, the use of bare fists ordinarily does not. *People v. Scott*, 271 Ill. App. 3d 307, 311-12 (1994).

¶ 62 Three cases inform our analysis. First, in *Jones*, 184 Ill. App. 3d at 416, we held that the State failed to prove the three defendants' intent to kill the victim where the evidence showed that the defendants hit the victim with a gun, threatened to kill him, kicked him, and "stomped" on his head several times. The victim had lacerations on his head and a broken nose. *Id.* at 417. While acknowledging that the victim's injuries and the attack were severe, we stressed that serious bodily injury alone "does not necessarily support a conviction for attempted murder." *Id.* at 430-31. In finding the evidence of the defendants' intent to kill insufficient, we stressed that, while the one of the defendants was armed with a gun, they "did not fire the gun but used it to beat" the victim. *Id.* at 431. And, we noted, while the victim's injuries were serious, "there was no evidence presented that they were life-threatening." *Id.*

¶ 63 Second, in *Garrett*, 216 Ill. App. 3d at 350-51, we held that the State's evidence was insufficient to prove the defendant's intent to kill where the defendant held a knife to the victim's throat, threatened to kill the victim, and kicked the victim's face. After one of the kicks to the victim's face, the victim lost consciousness. *Id.* at 351. He suffered lacerations on his face and lost two teeth. *Id.* The doctor who treated the victim said his injuries "could [have been] considered as life-threatening," but the victim was released from the hospital within four hours. *Id.* In finding the State's evidence insufficient, we found that "the character of the attack on [the victim] was not of the type that justifies an inference of an intent to kill." *Id.* at 354. Citing *Jones*, we noted that, while the defendant had carried a knife during the assault, he did not use it, and that the victim's injuries required only four hours of medical treatment. *Id.*

¶ 64 Finally, in *Scott*, 271 Ill. App. 3d at 309, we held that the State presented sufficient evidence to prove the defendant's intent to kill the victim where the evidence showed that the defendant severely beat the victim and, when asked about what happened to the victim, he said, " 'I took care of her.' " After the beating, the victim bled from her eyes and ears, was in the hospital for 22 days, needed surgery on her eyes, and was unable to walk without assistance for four months. *Id.* at 310. The doctor who treated the victim said that her injuries were not life-threatening, however. *Id.* We distinguished *Garrett* and *Jones* on the basis that, in both of those cases, the defendant "possessed a gun or a knife at the time of the crime but did not use it." *Id.* at 311. And we dismissed the fact that the victim's injuries were not life-threatening, noting that the defendant "would have had no way of knowing this at the time of the incident." *Id.* While we acknowledged that the defendant's use of his fists did not give rise to an inference of an intent to kill, we held that the State proved his intent based on "the extreme and extended beating inflicted upon [the victim], coupled with [the defendant's] size and strength." *Id.* at 312.

¶ 65 The facts of this case more closely resemble those of *Scott* than those of *Jones* or *Garrett*. Like the defendant in *Scott*, defendant in this case inflicted an extended beating on a victim who, during much of the attack, was defenseless. Viewing the evidence in the light most favorable to the State, defendant knocked Jones to the ground and kicked and stomped on his head numerous times. He used significant force, taking breaks between kicks to muster the energy to inflict serious damage to Jones's face. Defendant continued to assault Jones as he lay motionless on the ground, unable to protect himself from defendant's blows. Indeed, just as the defendant in *Scott* continued to attack the victim until he had "[taken] care of her"—that is, until he believed he had killed her—in this case, the evidence shows no indication that defendant had any immediate plans to stop kicking and stomping Jones. Both Ritter and Baker testified that defendant continued to kick Jones even after the police arrived and did not stop kicking him until an officer physically restrained him.

¶ 66 Defendant attempts to distinguish *Scott* on the basis that, in this case, Jones was larger than defendant, whereas in *Scott*, the defendant was much larger than the victim. Although size differences between the victim and the defendant can be relevant in determining whether an intent to kill can be inferred, we do not find the discrepancy in size to be particularly relevant in the factual context of this case. Jones's superior size did not matter in the least while he lay on the ground, prone and defenseless, as defendant continued to attack him. Moreover, Jones was excessively intoxicated—more than triple the legal limit for driving a car—which, as the trial court noted, "may explain why he fell and did not fight the defendant." Under the facts of this case, the victim's size is of limited relevance.

¶ 67 We recognize that, like the defendants in *Jones* and *Garrett*, defendant in this case kicked Jones in the head and stomped on his face. But there are significant factual distinctions between

this case and those decisions. First, the defendants in *Jones* and *Garrett* were armed with deadly weapons they easily could have used had they intended to kill their victims. In this case, defendant was not so armed. Second, the victims in *Jones* and *Garrett* suffered non-life-threatening wounds that were treated on an outpatient basis, whereas Jones suffered significant fractures to the bones deep in his skull, required multiple surgeries to repair his face, suffered permanent disfigurement, and spent significant time in the hospital. Third, in those other cases, the defendants stopped their attacks before they reached the point of become life-threatening, whereas here, defendant continued his brutal attack even after the police arrived; it required nothing short of physical restraint by the police to stop him.

¶ 68 We cannot say that the trial court acted irrationally in finding that defendant intended to kill Jones.

¶ 69 3. Self-Defense

¶ 70 Defendant's last contention with respect to the sufficiency of the State's evidence is that the State failed to prove that he was not acting in self-defense when he kicked and stomped on Jones. Defendant argues that the evidence shows that Jones chased him and tried to punch defendant first, starting the altercation that led to Jones's being injured.

¶ 71 Self-defense is an affirmative defense and, once a defendant raises it, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. *People v. Lee*, 213 Ill. 2d 218, 224 (2004). In order to raise self-defense, the defendant must present some evidence of each of the six elements of self-defense: (1) that unlawful force was threatened against the defendant; (2) that the defendant was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the defendant actually and subjectively believed that a danger existed that required the use of force that he applied; and (6)

that the defendant's beliefs were objectively reasonable. *Id.* at 225; *People v. Morgan*, 187 Ill. 2d 500, 533 (1999). If the State negates any one of the elements of self-defense, the defendant's claim fails. *Lee*, 213 Ill. 2d at 225.

¶ 72 Defendant's argument stands entirely on Klicic and Vanoni's account of the incident, which described Jones as the initial aggressor. But the trial court rejected this account. Instead, the trial court found Ritter to be credible, and she described defendant as the initial aggressor. As we discussed above, we will not undermine the trial court's resolution of this credibility conflict. *Jackson*, 232 Ill. 2d at 280-81. Because the evidence that the trial court found to be credible described defendant as the initial aggressor, the State disproved his claim of self-defense.

¶ 73 Moreover, even assuming that Jones threw the first punch, the amount of force used by defendant was objectively unreasonable in light of the threat he faced. Even after defendant had knocked Jones to the ground and incapacitated him, he continued to kick and stomp on Jones's face. This evidence refutes any claim that defendant reasonably believed that the amount of force that he used was necessary to defend himself. See *In re Jessica M.*, 399 Ill. App. 3d 730, 733, 737 (2010) (respondent could not establish self-defense where she knocked victim to ground and continued beating her); *People v. Tirrell*, 87 Ill. App. 3d 511, 517 (1980) (defendant could not establish self-defense where "[t]he beating and kicking continued after [the victim] was on the ground and could not have seriously harmed" defendant). We affirm the trial court's judgment as to defendant's attempted murder conviction.

¶ 74 C. Class 1 Sentencing

¶ 75 Finally, defendant contends that the trial court erred in declining to sentence him as a Class 1 offender pursuant to section 8-4(c)(1)(E) because, according to defendant, his crime was a response to "serious provocation" by Jones. 720 ILCS 5/8-4(c)(1)(E) (West 2010).

¶ 76 Attempted first-degree murder is a Class X offense carrying a sentencing range of 6 to 30 years' incarceration. 720 ILCS 5/8-4(c)(1) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). But section 8-4(c)(1)(E) provides that a defendant may be sentenced in the range for a Class 1 offense—4 to 15 years' incarceration (730 ILCS 5/5-4.5-30(a) (West 2010))—where the defendant can prove by a preponderance of the evidence that the attempted first-degree murder was committed in response to "serious provocation by the individual whom the defendant endeavored to kill," and, "had the individual *** died, the defendant would have negligently or accidentally caused that death." 720 ILCS 5/8-4(c)(1)(E) (West 2010).

¶ 77 The language of section 8-4(c)(1)(E) mirrors the "serious provocation" language of the second-degree murder statute, which states that an individual commits second-degree murder where, "at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed." 720 ILCS 5/9-2(a)(1) (West 2010). Because of the similarities between section 8-4(c)(1)(E) and the second-degree murder statute, we have interpreted the phrase "serious provocation" in section 8-4(c)(1)(E) to have the same meaning that it does in the second-degree murder statute. *People v. Harris*, 2013 IL App (1st) 110309, ¶ 13; *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶ 23.

¶ 78 Under the second-degree murder statute, there are four types of "serious provocation": (1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the offender's spouse. *People v. Viramontes*, 2014 IL App (1st) 130075, ¶ 39. Here, defendant argues that he presented sufficient evidence to show that he and Jones were engaged in mutual combat.

¶ 79 Mutual combat means "a fight or struggle which both parties enter willingly or where two

persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *People v. Austin*, 133 Ill. 2d 118, 125 (1989). "One who instigates combat cannot rely on the victim's response as evidence of mutual combat ***." *Id.* at 126. Significantly, if the defendant's retaliation is "out of all proportion" to the provocation, there is no mutual combat. *Id.* at 127.

¶ 80 Defendant's claim that he acted in response to serious provocation in this case fails for two reasons. First, the trial court concluded that defendant instigated the violence. According to the Ritter's testimony, which the trial court found to be credible, defendant threw the first punch at Jones. Ritter also testified that she never saw Jones retaliate to defendant's assault in any way. The trial court further found that there were no injuries to defendant "other than to his hands, which is consistent with no punches being thrown by the victim." While Ritter testified that Jones and defendant had been arguing before defendant threw the punch, words alone may not constitute serious provocation. *People v. Chevalier*, 131 Ill. 2d 66, 71-72 (1989). Thus, defendant did not show that he was seriously provoked when he instigated the incident.

¶ 81 Second, even assuming that Jones threw the first punch, defendant's retaliation was out of all proportion to the threat Jones posed. After knocking Jones down, defendant continued to kick and stomp on Jones's face. Jones did not fight back or defend himself from defendant's persistent attacks. The evidence did not show that defendant and Jones were engaged in mutual combat on equal terms; it showed that defendant severely beat Jones while he lay on the ground, unable to defend himself. See, *e.g.*, *Viramontes*, 2014 IL App (1st) 130075, ¶ 51 (defendant's retaliation was disproportionate to alleged provocation where the victim "was severely beaten during a prolonged struggle"). Thus, defendant failed to prove that his attacks were a response to "serious provocation" by Jones, and the trial court did not err in refusing to apply section 8-4(c)(1)(E).

¶ 82 III. CONCLUSION

¶ 83 For the reasons stated above, we affirm defendant's conviction and sentence. The evidence was sufficient to prove that defendant committed attempted first-degree murder, and the trial court did not err in sentencing defendant as a Class X offender.

¶ 84 Affirmed.