2013 IL App (2d) 111012-U
No. 2-11-1012
Order filed June 27, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-838
KARLONDO T. DUBOISE,	)	Honorable Rosemary Collins,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions of attempted murder and armed habitual criminal were affirmed where the State proved him guilty beyond a reasonable doubt; defendant forfeited his argument that the trial court erred in denying his motion *in limine* to bar the jury from hearing the name and nature of the two predicate convictions underlying the armed-habitual-criminal charge; trial counsel was not ineffective.

¶ 2 Defendant, Karlondo T. Duboise, appeals from his convictions of attempted murder (720 ILCS 5/8-4(a); 9-1(a)(1) (West 2008)) and armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)) following a jury trial. Defendant argues that the State failed to prove him guilty beyond a

reasonable doubt, that the trial court erred in denying his motion *in limine* to bar the jury from learning the name and nature of the two predicate convictions underlying the charge of armed habitual criminal, and that trial counsel was ineffective. We affirm.

¶ 3 BACKGROUND

¶ 4 The following facts are undisputed. Felix Harmon, the victim in this case, married Brianna[1] in 2002, and they had a son together. In 2006, Felix was sentenced to prison, during which time Brianna had a daughter with a man named Andrei Byrd (who was friends with defendant). When Felix was released from prison in 2008, he attempted to reconcile with Brianna. About one week after his release, Felix moved back into Brianna's house on Searles Avenue in Rockford, Illinois.

¶ 5 On March 17, 2009, Felix and Brianna were arguing at Brianna's house. Felix decided to move out and live with his sister, Meshonte Harmon. He called Meshonte to pick him up. Meshonte drove with her fiancé to Brianna's house, arriving at about 8:30 p.m. In the meantime, defendant had decided to accompany Byrd to Brianna's house, so that Byrd could pick up his daughter. Byrd drove his brother's white Dodge Magnum; defendant rode in the front passenger seat. Byrd pulled up in front of Brianna's house and honked the horn as Felix and Meshonte were loading Felix's belongings into Meshonte's car. Felix went to the driver's side of the Magnum, and began fighting with Andrei.

¶ 6 Within a few minutes, Felix had been shot in the neck, but whether Byrd or defendant shot him is in dispute. It is undisputed that, after Felix was shot, Byrd drove the Magnum, with defendant in the front passenger seat, and Felix in the back seat, bleeding and begging for help, to Karen Drive in Rockford. Again, exactly what happened there is disputed; however, Felix was stripped to his

[1]The record does not disclose Brianna's maiden name.

underwear and beaten. When a porch light came on at a nearby house and someone yelled at them, Byrd and defendant drove away in the Magnum, leaving Felix in the roadway.

¶ 7 A nearby resident called 911, and paramedics arrived and transported Felix to Rockford Memorial Hospital. Meshonte arrived at the hospital shortly thereafter. She identified both Byrd and defendant in a photographic line-up.

¶ 8 Defendant and Byrd were jointly charged in a nine-count indictment, alleging, in various forms, attempted murder, aggravated battery with a firearm, unlawful possession of a weapon by a felon (Byrd only) and armed habitual criminal (defendant only). Ultimately, on defendant's motion, and over the State's objection, the trial court severed defendant's and Byrd's trials.

¶ 9 On January 3, 2011, defendant's jury trial commenced. The court heard argument on defendant's motion *in limine* with respect to reading count IX (armed habitual criminal) of the indictment to the jury. Defendant sought to exclude any reference to "the class and name" of defendant's two prior felony convictions as listed in count IX (a Class 2 felony violation of the Illinois Controlled Substances Act in Winnebago County case No. 02-CF-1257 and a Class 3 felony violation of the Cannabis Control Act in Winnebago County case No. 08-CF-3731). The court denied defendant's motion; however, a few moments later, the court *sua sponte* reconsidered, stating that further research was necessary. The State argued that the prior felony convictions were elements of the offense of armed habitual criminal that it needed to prove and suggested that defendant could stipulate to the prior convictions as the least prejudicial way to prove those elements. Defense counsel agreed to stipulate that defendant was convicted of a felony in Winnebago County case number 02-CF-1257 and in Winnebago County case number 08-CF-3731. The court ruled that it would read count IX to the jury as stipulated, rather than as stated in the indictment.

¶ 10 The court read to the jury pool the charges at issue[2] from the bill of indictment as follows. Count I alleged that Byrd and defendant committed the offense of attempted murder, in that, without lawful justification, and with the intent to kill Felix Harmon, and while armed with a firearm, they performed a substantial step toward the commission of the offense, when they shot Felix in the neck with a handgun. Count VII alleged that Byrd and defendant committed the offense of aggravated battery with a firearm, in that, without legal justification, and by means of discharging a firearm, they knowingly caused injury to Felix Harmon when they shot him in the neck with a handgun. Count IX alleged that defendant committed the offense of armed habitual criminal, in that he knowingly possessed a firearm, a handgun, after having been previously convicted in Winnebago County in case Nos. 02-CF-1257 and 08-CF-3731.

¶ 11 After *voir dire* was completed, the trial court granted the State leave to file *instanter* a response to defendant's motion *in limine* regarding the reading of the indictment. The court heard argument and reversed its earlier ruling, deciding to read count IX as it was alleged in the indictment. The court then reread to the jury all three of the charges against defendant. The court read count IX as follows:

> "That on or about the [*sic*] March 17, 2009, in the county of Winnebago and state of Illinois, [defendant] committed the offense of armed habitual criminal in that the said defendant knowingly possessed a firearm, a handgun, after having been previously convicted of a Class 2 felony, violation of the Illinois Controlled Substances Act, in Winnebago County, case No.

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[2]In addition to the three counts noted, the court read count IV (attempted murder, knowing that their acts created a strong probability of death or great bodily harm); however, the court dismissed that count on the State's motion the following day.

02 CF 1257, and a Class 3 felony, violation of the Cannabis Control Act, in Winnebago County, case No. 08 CF 3731, in violation of Illinois law."

¶ 12 The State then presented its case-in-chief. The evidence relevant to the issues on appeal was as follows. Felix testified that he had been convicted twice of possession of a controlled substance with intent to deliver. He then explained that he met Byrd in 2008, the day after he (Felix) was released from prison, when Felix went to Brianna's house to visit his son. Felix shook Byrd's hand to "show[] him respect." Thereafter, as Felix attempted to reconcile with Brianna, Felix and Byrd "grew not to like each other."

¶ 13 Felix testified that, on March 17, 2009, he was at his sister-in-law's house with Brianna, their son, and his two stepchildren. At about 3:30 p.m., Felix was outside in front of the house, when Byrd drove by in a white Dodge Magnum. Felix yelled an obscenity at Byrd, who looked at Felix, smiled, and continued driving. Felix and his brother-in-law, Fernando, got in a vehicle and pursued Byrd. They found Byrd and "drove in front of the Magnum to block it off." Fernando jumped out of the car and dared Byrd to exit his vehicle. Fernando acted as if he had a gun. Felix grabbed Fernando and told him that he (Felix) "didn't need no gun because [he] was willing to fight, you know, without a gun." At that point, they all left the scene. Felix testified that there was a passenger in the Magnum with Byrd, but Felix did not know who the person was. Felix said that he had not seen anyone with a weapon during the incident. Felix went back to his sister-in-law's house until later, when he went home with Brianna and the children.

¶ 14 Felix explained that, when he and Brianna got home, they started arguing. Felix called his sister, Meshonte, to pick him up. When Meshonte arrived at Brianna's house at about 8:30 p.m., Meshonte and Felix started putting Felix's belongings in Meshonte's car. Byrd drove up in the

Magnum and parked in front of the house (with the passenger side by the curb). There was a person, whom Felix did not know, sitting in the front passenger seat. Although it was dark and Felix could not make out the passenger's face, as he approached the Magnum, he observed that the passenger had a black, small caliber weapon.

¶ 15 Felix testified that he continued to the driver's side as Byrd began to exit the vehicle. Felix said that his adrenaline was pumping both from the confrontation with Byrd and from the argument with Brianna, and that he felt disrespected. By the open driver's door, Felix and Byrd began "tussling." Felix thought that he threw the first punch. As they fought, Felix and Byrd fell into the Magnum. Felix did not know what the passenger was doing during this time. During the fight, Felix ended up in the back seat with his leg straddling the front seat. As he continued to fight with Byrd, Felix saw the passenger turn around and remembered something cold hitting his chin. Felix knew it was a gun. He heard a "loud pow" and went limp. Felix remembered Meshonte unsuccessfully trying to pull him out of the Magnum. Byrd drove away; the passenger was in the front passenger seat.

¶ 16 Felix further testified that he "remember[ed] specifically words being said, 'Let's drive him. Let's drive him to the cornfield and kill him.' " Felix recalled "begging for [his] life" before his "throat clogged up with blood." The Magnum stopped. Both Byrd and the passenger pulled Felix out of the vehicle, leaned him against the back tire, jumped on him, kicked him, and hit him. Felix heard the passenger yelling, " 'You are going to die tonight.' " Felix remembered being cold but could not recall what had happened to his clothes.[3] Felix said that a porch light came on, and Byrd

[3]The testimonies of Officer Heidi Kuhls and paramedic Christopher Tumeo showed that Felix's clothing was strewn about the Karen Drive location. When Tumeo arrived on the scene,

and defendant left in the Magnum.

¶ 17 On cross-examination, Felix said that he "vaguely" remembered speaking with Detective Richard DeVlieger at the hospital that evening, but really could not remember what happened in the emergency room. Felix did not recall telling DeVlieger that Byrd had shot him and pulled him into the car. Felix admitted to drinking on the day of the incident, but said that it was "[n]ot a lot" and he was not really "buzzing." Felix remembered talking to police in September 2009. He said that, at that time, he was not aware that he had charges pending against him. He agreed that he was arrested in January 2010. Felix acknowledged the dismissal of those charges, but said that the dismissal had no effect on his trial testimony.

¶ 18 On redirect examination, Felix testified that he "was messed up" in the emergency room. He was unable to move anything except his mouth and his eyes. He was unable to speak once his throat closed; he had a tracheotomy in the emergency room. Felix reiterated that, when he told police in September 2009 that it was the passenger who had shot him, he was not aware of any charges pending against him. The dismissal of those charges had nothing to do with an agreement with the State's Attorney's office. Felix did not give his September 2009 statement in response to any promises made by the State.

¶ 19 Meshonte testified that, when the Magnum pulled up in front of Brianna's house, Byrd "called [Felix] out." Felix went to the street and began fighting with Byrd by the Magnum's open driver's door. Meshonte tried to break up the fight—she got in the middle of them and was pushed down. Byrd and Felix fell into the Magnum and continued fighting. The passenger got out of the vehicle and "started jumping into the fight." When both Byrd and the passenger started "jumping

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Felix was clothed in only a t-shirt and underwear.

[her] brother," Meshonte picked up a bottle from the street and hit Byrd in the head with it so he would get off of Felix and give him "some breathing room." Byrd began to fight with Meshonte in the street. Felix tried to exit the Magnum by moving from the backseat to the front, but the passenger "came around and shot [Felix]." The passenger was on the Magnum's passenger side when he shot Felix.

¶ 20 Meshonte next testified that she tried to pull Felix from the Magnum by pulling his leg while holding onto the steering wheel to brace herself. Byrd yanked Meshonte's hand off of the steering wheel and pushed her into the street. Byrd and the passenger re-entered the Magnum and drove away. Meshonte tried to chase them in her car but was unable to catch up to them. She went back to Brianna's house, heard the dispatch on the radio that officers had located Felix, and proceeded to Rockford Memorial Hospital.

¶ 21 Meshonte testified that, at the hospital, she gave police a statement and identified both Byrd and the passenger, as defendant, in a photographic line-up. She testified that she did not know either Byrd or defendant, but had heard of Byrd and knew who he was. Meshonte also testified that she got a good look at defendant. She said that she would be able to recognize defendant if she saw him today. When asked if she saw defendant in the courtroom, Meshonte said, "No." When asked if she was sure, she replied, "I'm not sure. It has been two years."

¶ 22 Meshonte testified that she saw both Byrd and defendant with weapons at the scene. She explained that she saw the "butt of a gun *** like a handle type thing" in Byrd's pocket. She saw defendant with a gun too. Meshonte acknowledged that she had been convicted of misdemeanor retail theft in 1998, child abduction in 2003, and was currently on probation for a 2008 conviction of possession of cocaine with intent to deliver.

¶ 23 On cross-examination, defense counsel asked Meshonte about her testimony that she had seen both Byrd and defendant with guns. Meshonte replied, "No. I said I saw the driver with something in his pocket. I didn't say both had guns." Meshonte testified that she saw defendant pull out a gun and saw Byrd with "an object" in his pocket. She did not see Byrd with a gun. Meshonte saw defendant with a gun "but not while they were fighting." Meshonte testified that she had told Detective DeVlieger at the hospital that defendant had a gun. She denied telling DeVlieger that Byrd also had a gun. Defense counsel asked Meshonte if, early on March 18, 2009, she had told police that Byrd "reached into his pocket and pulled [out] a handgun." Meshonte responded, "I was so confused at the moment from leaving the hospital and things like that, you know, but that's not true." She clarified, "I told him that, but it's not true." Upon further questioning, Meshonte repeated, "I stated that, but I am telling you that is not true." Meshonte denied telling police that Byrd fired at Felix. She did not recall telling police that Felix had run toward the Magnum.

¶ 24 On redirect examination, Meshonte explained that she had been concerned about Felix at the hospital. The only thing she could really remember from the hospital was police asking her to come to the station. At the time she gave her written statement at the police station, Meshonte was worried about Felix because his throat was closing up. Meshonte said that she had no reason to protect Byrd and, prior to the shooting, had held no grudge against defendant. Nothing had happened since the shooting to cause her not to tell the truth.

¶ 25 Amber Clapp (nka Amber Cudia) testified that she was at home at 2812 Karen Drive in Rockford on March 17, 2009. She was with her (now) husband, Christoper Cudia, in the living room at about 9 p.m. when she heard "like, a bouncing sound." She looked outside but did not see anything. When she heard the sound again, she looked out of the front door and saw "two men over

[the] top of another gentleman on the ground kicking him" near a vehicle that looked like a Magnum. Amber went to the edge of her driveway, about five feet away from the men. The man on the ground was not fighting back. The dome light was on in the Magnum, and both passenger doors were open. Both of the men were hitting and kicking the victim. They were yelling, " 'Kick him again. Strip his f—ing clothes off.' " Amber could not see the men's faces or identify them. She said that both of them were fairly tall, about six feet or six feet one inch, and slender.

¶ 26 Amber testified that she yelled, "What the hell do you think you're doing? Leave him the f— alone." The men kicked the victim three or four more times, got in the Magnum, and left the victim on the ground. Amber called 911. An ambulance arrived a few minutes later.

¶ 27 Detective Michael McDonald testified that he executed an arrest warrant for defendant on April 14, 2009, after defendant had called police to surrender himself. McDonald interviewed defendant and took his oral statement. McDonald testified that defendant was about five feet, six inches tall. The following reflects McDonald's testimony of what defendant told him.

¶ 28 Defendant was at home with his wife and children when he received a phone call from Byrd inviting him to a friend's (Henry's) house. Defendant drove with his family to Henry's house and met Byrd there. Defendant's family left shortly after arriving because defendant's wife had not brought diapers for the children. Henry said that he wanted to go to the store. Byrd asked if defendant wanted to ride with him to pick up his (Byrd's) daughter. Defendant agreed because he did not want to be left alone at Henry's house.

¶ 29 McDonald further testified that defendant said that Byrd honked the horn when they arrived at Brianna's house. Felix came out of the house and began moving toward the Magnum. Other people at the house tried to hold Felix back, but he went to the driver's door of the Magnum and

began fighting with Byrd. Felix ended up inside the vehicle, on top of Byrd. Defendant told McDonald that he (defendant) opened his door to get out, but he "kind of fell out of the car and landed in a seated position on his rear end." Outside the car, defendant heard a gunshot. Defendant told McDonald that Byrd had shot Felix. Defendant stood up and "leaned toward the open passenger side of the car." Byrd pulled defendant inside the car and drove away. Defendant had not seen Byrd with a gun.

¶ 30 McDonald continued testifying about what defendant had told him. When they drove away, Felix was in the back seat asking for help, "bleeding all over the place," and not moving. Byrd drove to a location with which defendant was not familiar and pulled over. Byrd told defendant to get out of the car; he did. Byrd exited the vehicle and pulled Felix out. Byrd removed Felix's clothes and started kicking and stomping Felix. Defendant stood by and watched, crying. A light came on and someone began yelling at them, so they got in the car and drove away, leaving Felix at the curb. Someone from Brianna's house started chasing them. During the chase, Byrd pulled over and told defendant to get out and run. Defendant did so.

¶ 31 McDonald further testified that defendant at first was hesitant to talk to McDonald. Defendant initially denied leaving Brianna's house and going to the Karen Drive location. He then admitted being present on Karen Drive but continued to deny participating in the beating. When McDonald asked defendant if he had a gun, defendant said no, that he had been holding a beer, but not a gun. McDonald testified that defendant was crying at the end of the interview and told McDonald that he had been having nightmares about Felix in the backseat. McDonald testified that defendant told him he saw the actual shooting occur. When McDonald asked defendant directly who shot Felix, defendant said that Byrd did. McDonald did not take a written statement from defendant nor did he videotape the interview.

¶ 32 The court admitted two certificates of conviction offered by the State as a stipulation by defendant. One certified that defendant was convicted of violating the Cannabis Control Act[4] (a Class 3 felony) in Winnebago County case No. 08-CF-3731. The other certified that defendant was convicted of possession with intent to deliver a controlled substance (a Class 2 felony) in Winnebago County case No. 02-CF-1257.

¶ 33 The defense called Detective Richard DeVlieger, who had spoken with both Felix and Meshonte in the emergency room on the night of the incident. DeVlieger testified that Felix told him that "Byrd shot him and pulled him into the vehicle." Meshonte told DeVlieger that Felix ran toward the car, that Byrd was still in the driver's seat, and that Byrd had a handgun. Meshonte's demeanor was fine; she was cooperative. DeVlieger testified that Meshonte did not tell him that the passenger had a gun. On cross-examination, DeVlieger acknowledged that Meshonte was concerned about Felix and wanted to stay with Felix when she was talking to DeVlieger in the emergency room.

¶ 34 At the close of all of the evidence, the court heard argument and instructed the jury. Relevant to this appeal, the court instructed the jury on accountability and the justified use of force in the defense of a person.

¶ 35 The jury found defendant guilty of attempted murder, aggravated battery with a firearm, and armed habitual criminal. The jury also found that the State proved that defendant was armed with a firearm when he committed attempted murder.

¶ 36 On July 13, 2011, the court denied defendant's motion for a new trial and conducted the sentencing hearing. The court merged the aggravated battery conviction with the attempted murder

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[4] The certificate cites 720 ILCS 550/5.2, which describes the offense of delivery of cannabis on school grounds.

conviction. The court sentenced defendant to 35 years' imprisonment on the attempted murder conviction (20 years plus a 15-year enhancement for being armed with a firearm). The court sentenced defendant to a 10-year prison term on the armed-habitual-criminal conviction, to run consecutively to the attempted murder sentence.

¶ 37 Following the trial court's denial of his motion to reconsider the sentence, defendant timely appeals.

¶ 38 ANALYSIS

¶ 39 Defendant raises three arguments: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred in denying his motion *in limine* to bar the jury from hearing the name and nature of the predicate offenses underlying the armed-habitual-criminal charge; and (3) he received ineffective assistance of counsel. We address each in turn.

¶ 40 "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *Collins*, 106 Ill. 2d at 261. Rather, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under this standard, a court of review must draw in the State's favor all reasonable inferences from the record. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). The trier of fact, who saw and heard the witnesses, is responsible for determining the witnesses' credibility, weighing their testimony, and deciding on the reasonable inferences to be drawn from the evidence. *People v. Sweigart*, 2013 IL App (2d) 110885, ¶ 18. Nonetheless, our supreme court has recognized that "[r]easonable people

may on occasion act unreasonably." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Therefore, although "the fact finder's decision to accept testimony is entitled to great deference[,] [it] is not conclusive and does not bind the reviewing court." *Cunningham*, 212 Ill. 2d at 280; see also *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 25. "[I]f only one conclusion may reasonably be drawn from the record, a reviewing court must draw it even if it favors the defendant." *Cunningham*, 212 Ill. 2d at 280.

¶ 41 To prove a defendant guilty of attempted murder, the State must show that the defendant took a substantial step toward the commission of murder while possessing the intent to kill the victim. *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 44. Here, the act of shooting Felix in the neck constituted a substantial step toward murder and proved the shooter's intent to kill Felix. See *Stanford*, 2011 IL App (2d) 090420, ¶ 41 ("Intent to kill is a state of mind that can be proved by the surrounding circumstances, including the character of the assault and the use of a deadly weapon."); *People v. Aliwoli*, 238 Ill. App. 3d 602, 616 (1992) ("Intent may be inferred when the State shows defendant committed a substantial step toward the commission of murder: when he shoots and wounds his victim."). The question is: did the evidence prove beyond a reasonable doubt that defendant shot Felix? Defendant does not dispute that he was the passenger in the Magnum and was present during the shooting at Brianna's house. However, defendant maintains that the State failed to produce any credible evidence that he shot Felix.

¶ 42 Felix and Meshonte were the only eyewitnesses to the shooting who testified at trial. Their testimonies were consistent on all key points. Both testified that, on the evening of March 17, 2009, Felix called Meshonte to pick him up from Brianna's house, because he had been fighting with Brianna and wanted to move in with Meshonte. Both testified that Meshonte arrived at Brianna's house at about 8:30 p.m. with her fiancé. Both testified that, as they were loading Felix's belongings

into Meshonte's car, Byrd and defendant pulled up in front of the house in a white Dodge Magnum with the passenger side at the curb. Both testified that Felix approached the driver's side of the Magnum as Byrd was exiting the vehicle. Both testified that Felix and Byrd began fighting by the open driver's door and then fell into the Magnum as they fought.

¶ 43 At this point in the chronology, Felix's and Meshonte's accounts of the incident differed. Felix testified that he did not know what defendant was doing, while Meshonte described both her own and defendant's actions as Felix and Byrd fought. Nonetheless, both testified that Felix ended up in the backseat with his leg straddling the front seat. Both testified that defendant, from the passenger side of the vehicle, shot Felix. Although Felix testified (from his perspective in the backseat) that he saw defendant turn around and then felt a gun under his chin, Meshonte testified (from her perspective outside the vehicle) that defendant went back around to the passenger side and shot Felix. Both testified that they actually saw defendant with a gun. Both testified that Meshonte tried to pull Felix from the vehicle after he was shot. Both testified that the Magnum's doors were closed and that Byrd drove away with defendant in the front passenger seat and Felix in the back seat.

¶ 44 In addition to Felix's and Meshonte's testimonies about the actual shooting, the jury heard defendant's statement via Detective McDonald's testimony. After providing a context for how defendant happened to be with Byrd on the night of the incident, defendant's story was similar to Felix's and Meshonte's regarding his and Byrd's arrival at Brianna's house, Byrd's honking the horn, Felix's coming to the Magnum and fighting with Byrd outside the open driver's door, and Felix's and Byrd's falling into the vehicle. At this point in the chronology, defendant's version of events diverged significantly from Felix's and Meshonte's. Defendant said that he opened his door to get out, but he "kind of fell out of the car and landed in a seated position on his rear end." Outside the

car, defendant heard a gunshot. Defendant said that Byrd shot Felix.

¶ 45 On this record, the jury could have believed Felix's and Meshonte's testimonies that defendant shot Felix, or, it could have believed defendant's story that Byrd shot Felix. We reiterate that it was the jury's province to assess the witnesses' credibility and weigh the evidence. *Sweigart*, 2013 IL App (2d) 110885, ¶ 18. A rational trier of fact could have believed Felix's and Meshonte's testimonies over defendant's version of events. As noted, Felix's and Meshonte's testimonies were consistent on all key points. They were both unequivocal that defendant, from the passenger side of the vehicle, shot Felix, who was in the backseat. Defendant's story, though placing Felix in the backseat when he and Byrd drove away with him, fails to account for how Felix got there. The jury also heard McDonald's testimony that defendant was initially less than forthcoming in his statement as he at first denied being present at the Karen Drive location but later admitted it. Additionally, the jury heard evidence from Amber Clapp that directly contradicted defendant's story that he did not participate in the beating but rather merely stood by watching and crying. A rational trier of fact could have chosen to believe Felix's and Meshonte's testimonies instead of defendant's story, especially in light of McDonald's and Amber's testimonies. See *People v. Romero*, 387 Ill. App. 3d 954, 969 (2008) ("[I]t was within the province of the jury to find the testimony of the above witnesses more credible than the testimony of defendant.").

¶ 46 On the record before us, we simply cannot say that only one conclusion reasonably could have been drawn. See *Cunningham*, 212 Ill. 2d at 280 ("[I]f only one conclusion may reasonably be drawn from the record, a reviewing court must draw it even if it favors the defendant."). Accordingly, we hold that the evidence was sufficient to prove defendant guilty of attempted murder beyond a reasonable doubt.

¶ 47 Nevertheless, defendant contends that the State's evidence was insufficient because both

Felix and Meshonte lacked credibility. Defendant points out that, although Felix and Meshonte both testified at trial that defendant shot Felix, on the night of the shooting, neither Felix nor Meshonte told police that defendant was the shooter. Thus, according to defendant, Felix and Meshonte changed their stories.

¶ 48 In its case-in-chief, the defense impeached Felix's and Meshonte's testimonies with the testimony of Detective DeVlieger. DeVlieger testified that, in the emergency room, Felix told him that Byrd had shot him and Meshonte told him that Byrd had a gun and was silent as to defendant's having a gun and as to who shot Felix. Again, it was the province of the jury to determine the witnesses' credibility, weigh their testimony, and decide on the reasonable inferences to be drawn therefrom. *Sweigart*, 2013 IL App (2d) 110885, ¶ 18. Felix and Meshonte both testified on direct examination at trial that defendant shot Felix. On cross-examination, Felix could not recall telling DeVlieger that Byrd had shot him. During her cross-examination, Meshonte testified that she told DeVlieger that defendant had a gun and that she did not tell DeVlieger that Byrd had a gun. On redirect examination, Meshonte said she had been worried about Felix in the emergency room and could only remember the police wanting her to come to the station to make a statement. We cannot say that no rational person could have believed Felix's and Meshonte's trial testimonies, despite DeVlieger's testimony.

¶ 49 Assuming that the jury believed DeVlieger's testimony, a rational person could have inferred that Felix was, as he himself testified, "messed up" in the emergency room. It would have been reasonable to infer that Felix confused the driver (Byrd) and the passenger (defendant) when DeVlieger questioned him. Indeed, Felix's confusion, and even lack of intelligibility, would have been a reasonable inference drawn from the evidence that Felix had been shot in the neck, his throat was closing, and he was given a tracheotomy. Similarly, despite DeVlieger's testimony that

Meshonte was cooperative and her demeanor was fine, a rational person could have believed Meshonte's testimony that she nonetheless was not clearheaded in the emergency room in light of the traumatic events of the evening and her concern about her brother, Felix.

¶ 50 Defendant further posits that the "original" story—that Byrd shot Felix—was supported by the circumstances surrounding Byrd's and Felix's rivalry. According to defendant, while defendant did not even know Felix, Byrd had a "strong motive" to shoot Felix. Putting aside that motive is not an element of attempted murder (720 ILCS 5/8-4(a); 9-1(a)(1) (West 2008); Illinois Pattern Jury Instructions, Criminal, No. 6.07X (4th ed. 2000)), defendant's argument is not persuasive. While Byrd may have had a motive to shoot Felix, it also follows that the fact that Byrd and Felix had a hostile relationship would have given Felix and Meshonte an incentive to testify that Byrd shot Felix. That they testified that defendant shot Felix, if anything, lends credibility to their testimonies.

¶ 51 Furthermore, defendant's reliance on *People v. Wise*, 205 Ill. App. 3d 1097 (1990), in support of his position that Felix and Meshonte were incredible because they "recanted,"[5] is misplaced. In *Wise*, the defendant was convicted of robbery under a theory of accountability, and the appellate court reversed for insufficient evidence. *Wise*, 205 Ill. App. 3d at 1098, 1101. The sole accusing witness testified that the defendant had come up from behind him and grabbed him in a " 'bear hug' " as the co-defendant pulled jewelry from the witness's neck and hit him in the eye. *Wise*, 205

[5]We note that the term "recantation" usually refers to a person's renunciation of his testimony or other sworn statement (see e.g. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004) (discussing the defendant's actual-innocence claim based on a witness's affidavit recanting his trial testimony)) and that *Wise* addressed impeachment with prior inconsistent statements, not actual recantations. In any event, defendant's argument fails on the merits.

Ill. App. 3d at 1098-99. The defense impeached the witness's testimony with two written statements that the witness gave to a defense investigator in which he had stated that the defendant had nothing to do with the robbery and never touched him. *Wise*, 205 Ill. App. 3d at 1099-1100. Here, unlike in *Wise*, there were two accusing witnesses who testified that defendant himself shot Felix. Moreover, in *Wise*, there were two impeaching statements, and those statements were made over one year after the incident. *Wise*, 205 Ill. App. 3d at 1098-1100. In contrast, Felix and Meshonte were each impeached with only one statement, and those statements were made immediately after the incident, in the emergency room as Felix struggled with a gunshot wound to the neck, paralysis, and a tracheotomy.

¶ 52 Defendant additionally asserts that Felix's and Meshonte's testimonies were inconsistent with each other. Defendant points out that Felix testified that he fought with Byrd only, while Meshonte testified that defendant "started jumping into the fight." He notes that Felix did not mention that Meshonte joined the fight or that she distracted Byrd by hitting him on the head with a bottle. Defendant also observes that Felix testified that there was not enough light for him to see defendant's face, but Meshonte testified that she got a good look at defendant's face.

¶ 53 A rational trier of fact could view Felix's and Meshonte's testimonies as essentially consistent. The major difference was that Meshonte testified about what she and defendant were doing while Felix and Byrd were fighting, while Felix did not. The jury reasonably could have found that this difference reflected, not an inconsistency, but rather the fact that Meshonte's observations were the product of her location and role in the fight. Felix was enraged, focused on fighting Byrd, and physically confined to the Magnum after the fight began. That he was unaware of what defendant and Meshonte were doing until defendant shot him was not surprising. In contrast, Meshonte's role was that of an assistant in the fight. She was also outside the vehicle the entire time

and could see what defendant did from that vantage point.

¶ 54 Nor do the minor discrepancies undermine the credibility of either Felix or Meshonte. With respect to the lighting conditions, again, as Felix approached the Magnum, he was focused on Byrd, not defendant. It is not surprising that Felix did not get a good look at defendant's face. Nor is it surprising that, although it was dark out, Meshonte could have seen defendant's face since she was not focused solely on Byrd. In any event, it is for the jury to decide how any flaws in a witness's testimony affected the credibility of the testimony as a whole. See *Cunningham*, 212 Ill. 2d at 283 (affirming the defendant's conviction despite the fact that three of the key witness's statements were subject to question).

¶ 55 Defendant also contends that Meshonte's testimony was internally inconsistent. Defendant calls our attention to the fact that Meshonte testified that she clearly saw defendant and would be able to recognize him; yet, when asked if defendant was in the courtroom, she said no. Defendant further points to Meshonte's allegedly "dubious, confusing, and internally contradictory facts" regarding whether Byrd had a gun. Defendant finally notes Meshonte's criminal convictions and her alleged drug use (which, we note, was not an inference required from her prior conviction of cocaine possession with intent to deliver). While we agree that Meshonte's testimony may have been less than absolutely clear, we cannot say that this is unusual in criminal trials, especially those involving traumatic events and serious injuries. See *People v. Tenney*, 347 Ill. App. 3d 359, 366 (2004) ("A conviction shall not be reversed simply because the defendant claims a witness is not credible."). Given that Meshonte's testimony was unequivocal that defendant shot Felix, we cannot say that the minor inconsistencies rendered her testimony inherently unbelievable. See *Cunningham*, 212 Ill. 2d at 284 ("Where the record is not such that the only inference reasonably drawn from flaws in the testimony is disbelief of the whole, a reviewing court should bear in mind that the fact finder had the

benefit of watching the witness' demeanor."); *People v. Boyd*, 363 Ill. App. 3d 1027, 1042 (2006) ("When evidence is merely conflicting, a reviewing court will not substitute its judgment for the judgment of the trier of fact." (Internal quotation marks omitted)). And, even assuming *arguendo* that Meshonte's entire testimony had to be discredited, Felix's unequivocal testimony would have been sufficient to convict. See *People v. Rendak*, 2011 IL App (1st) 082093, ¶ 31 ("[T]he testimony of even a single witness, if positive and credible, is sufficient to convict even if it is contradicted by the defendant.").

¶ 56 In support of his position, defendant relies on *People v. Smith*, 185 Ill. 2d 532 (1999), and *People v. Schott*, 145 Ill. 2d 188 (1991). In *Smith*, our supreme court held that the State's evidence was insufficient to convict the defendant of murder. *Smith*, 185 Ill. 2d at 534. The court pointed out that the State's case hinged upon the testimony of one chief witness, as only she directly linked the defendant to the crime. *Smith*, 185 Ill. 2d at 542. The court determined that the chief witness's testimony was contradicted by the testimony of two other witnesses. *Smith*, 185 Ill. 2d at 542. The court further decided that the chief witness's testimony was seriously undermined by another witness, who the court reasoned was more credible based on his motive to carefully watch the defendant (the witness was a bartender who feared that the defendant was going to rob the bar). *Smith*, 185 Ill. 2d at 543. The court further observed that the chief witness's credibility was repeatedly impeached with her signed statement to the defense investigator (regarding her habitual drug use at the time of the incident). The court additionally reasoned that the chief witness's actions following the murder undermined her credibility where she did not go for help or even report the crime to the police until two days later. Finally, the court determined that the chief witness had a motive to falsely implicate the defendant because a possible alternate suspect was her sister's boyfriend, and the police suspected her sister of providing the gun to the shooter. *Smith*, 185 Ill. 2d

at 544. Based on these "serious inconsistencies" and the "repeated impeachment" of the chief witness's testimony, the court reversed the defendant's conviction. *Smith*, 185 Ill. 2d at 545.

¶ 57 In *Schott*, our supreme court held that the State's evidence was insufficient to convict the defendant of aggravated indecent liberties with a child (his stepdaughter). *Schott*, 145 Ill. 2d at 190, 209. The State's "critical evidence" was the victim's testimony. *Schott*, 145 Ill. 2d at 204. The court noted that the victim's testimony was "so lacking in credibility" that it left a reasonable doubt as to the defendant's guilt. *Schott*, 145 Ill. 2d at 207. The victim, among other things, admitted that she lied to a judge when she previously falsely accused her uncle of molesting her, admitted that she had previously lied because she was angry with her uncle, and had a motive to lie about the defendant because she wanted him to leave the house. *Schott*, 145 Ill. 2d at 207.

¶ 58 All of the alleged problems with Felix's and Meshonte's testimonies pale in comparison to the problems identified by the courts in *Smith* and *Schott*. Unlike in *Smith* and *Schott*, defendant does not argue that either Felix or Meshonte had a motive to lie. Moreover, in *Smith* and *Schott*, there was only one key witness, whereas, here, both Felix and Meshonte testified that defendant shot Felix.

¶ 59 Defendant's arguments regarding the sufficiency of the evidence are all based on his assertion that there was no *credible* evidence of his guilt. We reiterate that it was the jury's province to assess the witnesses' credibility and weigh the evidence. Defendant's arguments fail to show that only one conclusion reasonably could have been drawn. In light of our holding that the evidence was sufficient to prove defendant guilty of attempted murder as the principal, we need not address defendant's arguments regarding the sufficiency of the evidence under an accountability theory.

¶ 60 Furthermore, given our holding that the evidence was sufficient to prove defendant guilty of attempted murder, the evidence also was sufficient to prove defendant guilty beyond a reasonable

doubt of armed habitual criminal. A person commits the offense of armed habitual criminal if he possesses any firearm after having been convicted two or more times of any violation of the Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher. 720 ILCS 5/24-1.7(a)(3) (West 2008). The evidence was sufficient to prove beyond a reasonable doubt that defendant possessed a firearm because it was sufficient to prove that he used a firearm. And, the two certificates of conviction admitted into evidence proved the requisite qualifying prior convictions. See *People v. Moton*, 277 Ill. App. 3d 1010, 1012 (1996) (recognizing, in an unlawful-possession-of-a-weapon-by-a-felon case, that a certificate of conviction created a presumption of the defendant's prior conviction, which, if not rebutted, constituted proof beyond a reasonable doubt of that element of the offense).

¶ 61 Defendant next argues that the trial court erred in denying his motion *in limine* to bar the jury from hearing the name and nature of his two qualifying prior convictions with respect to the armed-habitual-criminal charge. He acknowledges that he forfeited this issue by failing to raise it in his posttrial motion. Defendant asks us to review his argument under the plain-error doctrine; however, other than telling us the two prongs of the plain-error doctrine, defendant makes no argument as to why the doctrine applies here. Accordingly, he has forfeited his plain-error argument regarding the motion *in limine*. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (stating that, when a defendant fails to establish plain error, the reviewing court must honor the procedural default); *Lozman v. Putnam*, 379 Ill. App. 3d 807, 826 (2008) (noting that failure to argue a point results in forfeiture).

¶ 62 In the alternative, defendant asserts that trial counsel was ineffective for failing to properly move to bar evidence of his prior convictions and for failing to move to sever the armed-habitual-criminal charge from the other charges against him. Under the familiar, two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984), to succeed on a claim of ineffective assistance of counsel, "a

defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). In demonstrating that counsel's performance was deficient, a defendant must overcome the strong presumption that counsel's conduct might be considered sound trial strategy. *Strickland*, 466 U.S. at 689; *Houston*, 226 Ill. 2d at 144. A reasonable probability that the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Houston*, 226 Ill. 2d at 144. Failure to satisfy either prong of the *Strickland* test defeats an ineffective-assistance claim. *Strickland*, 466 U.S. at 697; *Houston*, 226 Ill. 2d at 144-45.

¶ 63 With respect to counsel's alleged failure to properly move to bar the evidence of defendant's prior convictions, defendant's argument fails under the first *Strickland* prong. Defendant does not explain how counsel's actions were objectively deficient. Rather, he generally asserts, without any relevant authority, that counsel knew that the prior-convictions evidence would be prejudicial and that the jury must have been prejudiced by the evidence. As noted above, counsel filed a motion *in limine* to exclude the class and name of the prior felonies. The motion included a suggested stipulation that did not include the name and nature of the underlying offenses—namely, that defendant had previously been convicted in two Winnebago County cases with the case numbers. The court initially granted the motion but then reconsidered and read the charge to the jury as stated in the indictment—including the class of each felony and the relevant statute violated. As the State argued, the prior convictions were elements of the offense of armed habitual criminal that the State was required to prove. 720 ILCS 5/24-1.7(a) (West 2008); *People v. Davis*, 405 Ill. App. 3d 585, 597 (2010). Thus, *any* motion to bar the evidence would have failed. See *Davis*, 405 Ill. App. 3d

at 597 (holding that trial counsel was not ineffective for stipulating to the defendant's prior convictions, including the names of those convictions, and allowing them to be entered into evidence, because the armed-habitual-criminal statute specifies particular qualifying offenses that must be proved by the State). Accordingly, counsel's performance, even had she not filed a motion to bar, could not be said to have been deficient.

¶ 64 In a related argument, defendant contends that counsel was ineffective for failing to move to sever the armed-habitual-criminal charge from the other charges under section 114-8 of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-8 (West 2008)). Defendant notes that whether to file a motion to sever is generally a matter of trial strategy (see *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10), and then speculates that the trial court would have granted a motion to sever because other-crimes evidence is inherently prejudicial. Defendant's argument fails under the second prong of *Strickland* because he fails to demonstrate that, had the charges been severed, there was a reasonable probability that he would have been acquitted of armed habitual criminal. If he had been tried separately on the armed-habitual-criminal charge, the State would have introduced the same evidence it did of defendant's possession of a gun and the certificates of conviction. There is no reason to believe that defendant would have been acquitted.

¶ 65 Of course, the heart of defendant's argument is that he was prejudiced regarding the attempted murder charge, because, according to defendant, it is "inconceivable" that the jury was not impacted by hearing that he was a "convicted drug dealer." Defendant ignores that the evidence of his prior qualifying convictions was probative and fails to argue how any prejudicial effect outweighed the probative value of that evidence. "A defendant is not prejudiced by the improper joinder of charges if, had separate trials been given, defendant still would have been convicted." *People v. Gonzalez*, 339 Ill. App. 3d 914, 922 (2003). As discussed at length above, the evidence

was sufficient to prove defendant guilty beyond a reasonable doubt of attempted murder. Defendant fails to show that the prior-convictions evidence, which consisted of certificates of conviction rather than testimony detailing the prior offenses, tipped the scales in favor of the State. We reject outright defendant's suggestion that trying a defendant on any charge in addition to armed habitual criminal would be prejudicial because it has "the effect of telling the jury *** that [the defendant] was an 'habitual' criminal." Accordingly, defendant's argument fails under the second *Strickland* prong, because he has failed to demonstrate prejudice from counsel's failure to move to sever the charges. *Gonzalez*, 339 Ill. App. 3d at 925.

¶ 66 Defendant's reliance on *People v. Walker*, 211 Ill. 2d 317 (2004), and *People v. Edwards*, 63 Ill. 2d 134 (1976), is misplaced. Both cases involved offenses of unlawful possession of a weapon by a felon. *Walker*, 211 Ill. 2d at 320; *Edwards*, 63 Ill. 2d at 136. In *Walker*, the court held that the probative value of the name and nature of the defendant's prior felony conviction was outweighed by its prejudicial effect in the possession-of-a-weapon-by-felon case because the State needed to prove only the defendant's status as a felon. *Walker*, 211 Ill. 2d at 338. In *Edwards*, the court held that the trial court abused its discretion in denying the motion to sever an armed robbery charge from an unlawful-use-of-a-weapon by a felon charge, because the defendant was prejudiced by the State's use of evidence of the defendant's prior burglary conviction to prove the felony-weapons charge. *Edwards*, 63 Ill. 2d at 140. Unlike the unlawful-possession-of-a-weapon-by-a-felon statute, which requires proof of a defendant's status as a felon, the armed-habitual-criminal statute specifies particular qualifying offenses that must be proved by the State. *Davis*, 405 Ill. App. 3d at 594. Thus, in the present case, unlike in *Walker* and *Edwards*, the name and nature of the prior qualifying convictions was not "unnecessary surplusage without any evidentiary significance" (*Walker*, 211 Ill. 2d at 338).

¶ 67 Finally, defendant claims that his counsel was ineffective for failing to present the correct jury instructions on the justified use of force in defense of a person. Over the State's objection, the court instructed the jury as defendant requested as follows:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend *himself or another* against the imminent use of unlawful force.
>
> However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm *to himself*." (Emphases added.)

The instruction given was based on Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000). Defendant takes issue with the fact that the instruction given, while allowing for defense of self or another in the first paragraph, does not allow for defense of another in the second paragraph. Defendant argues that the omission rendered the instruction internally inconsistent as well as confusing to the jury. Defendant further contends that the instruction failed to allow the jury to find that defendant was justified in the use of force to defend Byrd.

¶ 68 Defendant has failed to show that the omission prejudiced him. The use of force by either defendant or Byrd would have been justified only if the jury reasonably could have believed both that Felix was the initial aggressor and also that the use of a gun was necessary to prevent imminent death or great bodily harm to either defendant or Byrd. See 720 ILCS 5/7-1(a) (West 2008). The evidence was undisputed that Felix was the initial aggressor against Byrd. However, Felix's aggression consisted of fist fighting and tussling; there was no evidence that Felix had a weapon of any kind. While we recognize that the use of a weapon may be a justifiable response to a physical attack, there was no evidence presented that Felix could have inflicted serious bodily harm on defendant or on

Byrd. See *People v. Willis*, 217 Ill. App. 3d 909, 918 (1991). Defendant fails to make any argument as to how a reasonable person could have found that the use of deadly force against Felix's aggression was justified. Thus, even if the instruction had been given without the omission, defendant fails to show a reasonable probability that the outcome of his trial would have been different. Accordingly, defendant did not receive ineffective assistance of counsel.

¶ 69 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 70 Affirmed.