

NOTICE

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2014 IL App (5th) 120151-U

NO. 5-12-0151

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 09-CF-476
)	
MARVIN PARKER,)	Honorable
)	Michael N. Cook,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* A new trial and sentencing hearing were unwarranted where the defendant was unable to establish plain error or ineffective assistance of counsel.

¶ 2 BACKGROUND

¶ 3 In July 2009, the State filed a three-count criminal information charging the defendant, Marvin Parker, with armed violence (720 ILCS 5/33A-2(c) (West 2008)) (count I) (Class X felony), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) (count II) (Class X felony), and attempted armed robbery (720 ILCS 5/8-4(a), 18-2(a)(2) (West 2008)) (count III) (Class 1 felony). In April 2011, the cause proceeded to a jury trial where the State's evidence established the following.

¶ 4 On the night of April 12, 2009, at approximately 7:45 p.m., Jeremy Foster drove to the Mini-Mart on Camp Jackson Road in Cahokia and bought beer and cigarettes. While Jeremy was paying for the items, Demonta Taylor walked into the store and stood behind him

in line. As Jeremy was walking back to his truck after exiting the store, the defendant, armed with a revolver and wearing a purplish-blue bandana that partially covered his face, approached him and said, "Give me everything in your pocket." When Jeremy told the defendant "no," the defendant hit him in the head with the gun. The defendant then "pointed the gun at [Jeremy's] chest and tried to shoot, but the gun did not go off." At that point, Jeremy attempted to reenter the store, but Demonta, who had just exited, blocked his way. As Jeremy struggled with Demonta, the defendant shot Jeremy in the left leg. When Jeremy fell to the ground, the defendant and Demonta tried to get into his pants pockets. They then fled, and Jeremy reentered the store and told the clerk that he had been shot. The clerk called 9-1-1, and the police and paramedics arrived shortly thereafter. Jeremy was later transported to St. Louis University Hospital for treatment.

¶ 5 The incident in question was captured by the Mini-Mart's security cameras, and investigators assigned to the case recognized Demonta from the recorded video footage. When interviewed by investigators on April 27, 2009, Demonta gave a videotaped statement admitting, *inter alia*, that he and the defendant had attempted to rob Jeremy.

¶ 6 On April 29, 2009, when Lieutenant Dennis Plew of the Cahokia police department showed Jeremy a six-picture photo array that included the defendant's photograph, Jeremy positively identified the defendant as the man who had shot him. Plew later recalled that notwithstanding Jeremy's acknowledgment that he had only seen "a portion" of the defendant's face, Jeremy had identified the defendant "[a]lmost immediately" and without hesitation. At trial, Jeremy also positively identified the defendant as the man who had shot him. Jeremy further testified that the defendant and Demonta had undoubtedly been working together on the night in question. At some point after the incident, Demonta's father, Arthur Taylor, told Jeremy that "his son was involved with what had happened to [him]."

¶ 7 At trial, when called as a witness for the State, Demonta admitted that he had a

criminal history, had spent time in prison, and had previously entered a negotiated plea of guilty to a charge of attempted armed robbery for his participation in the incident at the Mini-Mart. When asked about the incident, Demonta testified that he had been at the Mini-Mart that night with a "dude named Duke," whose real name he did not know. He acknowledged, however, that in a prior videotaped statement, he had told investigators that the defendant had been with him. He further acknowledged that he had provided the investigators with specific details as to what had occurred and had indicated that the defendant had shot Jeremy because Jeremy had rebuffed the defendant's demand for money. Demonta testified that he had lied when previously implicating the defendant but that the rest of what he had told the investigators was true.

¶ 8 Demonta acknowledged that a few days before trial, he had met with the prosecutors and their investigator, and together, they had watched the security-camera footage of the attempted robbery and the video of his prior interview. He denied having said that he had been truthful when interviewed, however, or that it was the defendant in the surveillance footage. Demonta also testified that when entering his guilty plea, he had lied under oath when conceding, *inter alia*, that he had seen the defendant shoot Jeremy outside the Mini-Mart. Demonta indicated that he had not previously told anyone about Duke, because he thought that doing so would not have made any difference. Demonta acknowledged that he did not want to testify against the defendant.

¶ 9 The State's final witness was Assistant State's Attorney Deborah Phillips, cocounsel for the State. Phillips testified, without objection, that she had been present at the pretrial meeting with Demonta when he had been shown his prior videotaped statement and the surveillance footage from the Mini-Mart. Phillips stated that she had also witnessed Demonta testify under oath when entering his guilty plea. Phillips testified that during the pretrial meeting, Demonta had stated that the information he had given in his videotaped

statement was accurate, that he had testified truthfully when entering his guilty plea, and that the defendant was the "shooter" seen in the surveillance footage.

¶ 10 Phillips recalled that Demonta had initially stated that if called to testify for the State, he would "lie" from the witness stand. When informed that he would be impeached and that there were "legal ramifications" for "lying under oath," however, Demonta had agreed to tell the truth. Phillips testified that Assistant State's Attorney Steven Sallerson and State's Attorney's Investigator Phil Delaney were also present during the pretrial meeting with Demonta. The jury was later instructed that it could consider a witness's prior inconsistent statement as substantive evidence if the statement described an event that the witness had personal knowledge of and the statement was videotaped or the witness acknowledged under oath that he made the statement. See 725 ILCS 5/115-10.1 (West 2008); Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000) (hereinafter IPI Criminal 4th).

¶ 11 For the defense, Arthur testified that he had spoken with Jeremy on August 31, 2009. Arthur indicated that when introducing himself, he had told Jeremy that he "was one of the guys' father." Arthur further indicated that when talking about what had happened to him at the Mini-Mart, Jeremy had referenced "a guy named Duke that he [knew] by name." Arthur acknowledged that when testifying about his conversation with Jeremy at a prior hearing, he had never mentioned the name "Duke."

¶ 12 After deliberating approximately 4½ hours, the jury found the defendant guilty on all counts. The trial court later merged count II into count I and imposed consecutive sentences totaling 29 years on counts I and III. The present appeal followed.

¶ 13 ANALYSIS

¶ 14 The defendant argues that it was reversible error to allow Assistant State's Attorney Phillips to testify as a witness while acting as cocounsel for the State and that he was otherwise denied a fair trial because the jury was given improper jury instructions. He thus

contends that we should reverse his convictions and remand for a new trial. He alternatively maintains that his cause should be remanded for a new sentencing hearing, because the trial court "used the wrong standard in imposing consecutive sentences." The defendant acknowledges that he did not present these issues in his posttrial motions, but to circumvent his procedural default of the claims (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), he asks that we review them under the plain error doctrine or as claims of ineffective assistance of trial counsel. Either way, we agree with the State's assessment that the arguments are without merit.

¶ 15 "It is well settled that both an objection at trial and a written post-trial motion raising the issue are necessary to preserve an alleged error for review." *People v. Kliner*, 185 Ill. 2d 81, 161-62 (1998). Nevertheless, the plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider an unpreserved claim of error when

"(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30 (citing *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005)).

"In both instances, the burden of persuasion remains with the defendant" (*Herron*, 215 Ill. 2d at 187), and "[t]he initial step in conducting plain-error analysis is to determine whether error occurred at all" (*People v. Walker*, 232 Ill. 2d 113, 124 (2009)). "Absent reversible error, there can be no plain error." *People v. Cosby*, 231 Ill. 2d 262, 273 (2008).

¶ 16 To succeed on a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Patterson*, 217 Ill. 2d 407, 441 (2005). "Under *Strickland*, a defendant must prove

not only that defense counsel's performance fell below an objective standard of reasonableness, but also that this substandard performance caused prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different." *People v. Johnson*, 218 Ill. 2d 125, 143 (2005). "For purposes of *Strickland*'s first prong, it is not enough that another lawyer, with the benefit of hindsight, would have acted differently than trial counsel." *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006). With respect to the second prong, "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008). "Because [a] defendant must satisfy both prongs of the test, the failure to satisfy either element precludes a finding of ineffective assistance of counsel under *Strickland*." *People v. Shaw*, 186 Ill. 2d 301, 332 (1998).

¶ 17 Assistant State's Attorney Phillips

¶ 18 Noting that Phillips extensively participated during trial by questioning witnesses and giving the State's opening and initial closing arguments, the defendant contends that it was reversible error to allow her to testify and that his trial attorney was ineffective for failing to object to her doing so. In response, the State asserts, *inter alia*, that the defendant "cannot meet his burden of proving the trial judge's ruling allowing Phillips' testimony constituted an abuse of discretion."

¶ 19 "The advocate-witness rule precludes an attorney from acting as advocate and witness in the same case." *People v. Gully*, 243 Ill. App. 3d 853, 859 (1993). "The rule reflects the inconsistency between the role of an advocate and that of a witness; the function of an advocate is to advance or argue the cause of another, while that of the witness is to state the facts objectively." *Id.* "The rule is particularly pertinent to prosecutors in criminal cases because of the sensitive role they assume as the government's representative in the courtroom." *People v. Blue*, 189 Ill. 2d 99, 136 (2000). "The rule, however, is not absolute,"

and "[a] prosecuting attorney may testify in a criminal case in which he is engaged if, in the discretion of the trial court, such testimony is necessary." *Gully*, 243 Ill. App. 3d at 859; see also *People v. Wilson*, 271 Ill. App. 3d 943, 946 (1995); *People v. Langdon*, 91 Ill. App. 3d 1050, 1056 (1980). A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable or "where no reasonable person would agree with the position adopted by the trial court." *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 20 "It is improper for the prosecutor to ask a witness questions for purposes of impeachment unless the prosecutor is prepared to offer proof of the impeaching information." *People v. Olinger*, 112 Ill. 2d 324, 341 (1986). When seeking to impeach a witness's testimony, the State must therefore have the intent and the ability to complete or "perfect" the impeachment. *People v. Williams*, 204 Ill. 2d 191, 212 (2003).

¶ 21 Here, the defendant suggests that the trial court abused its discretion in allowing Phillips to testify, because Investigator Delaney could have perfected the State's impeachment of Demonta's account of what occurred at the pretrial meeting with the prosecutors. The defendant argues that Delaney was a readily available witness and that Phillips' testimony was therefore unnecessary. As the State observes, however, "[t]he parties did not make a record on Delaney's location, or his availability, or the length of a recess that would be required in order to call him to the stand." In light of such ambiguity, we cannot conclude that the trial court abused its discretion or that a timely objection would have been sustained. See *People v. Nesbit*, 398 Ill. App. 3d 200, 215 (2010); *In re Marriage of Golden*, 358 Ill. App. 3d 464, 473 (2005). The defendant is therefore unable to establish plain error or prevail on his ineffective-assistance-of-counsel claim. *People v. Kuntu*, 196 Ill. 2d 105, 129-30 (2001). We nonetheless note that we do not believe that the evidence of the defendant's guilt was closely balanced, as the defendant asserts on appeal. We also reject his blanket contention that "[t]he closeness of a case is shown by the length of the jury

deliberations." See *People v. Nugen*, 399 Ill. App. 3d 575, 584 (2010) ("We reject the general premise [that] a lengthy deliberation necessarily means the evidence is closely balanced.").

¶ 22 "The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict." *People v. Smith*, 185 Ill. 2d 532, 541 (1999). A prior inconsistent statement admitted as substantive evidence is also sufficient to convict. *People v. Armstrong*, 2013 IL App (3d) 110388, ¶ 23; *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 23; *People v. Logan*, 352 Ill. App. 3d 73, 79-81 (2004); *People v. Morrow*, 303 Ill. App. 3d 671, 677 (1999). Here, the jury had both, and under the circumstances, we agree with the State that "the evidence that [the] defendant was the shooter was not closely balanced with the evidence that 'Duke' was the shooter."

¶ 23 Jury Instructions

¶ 24 The defendant next argues that he was denied a fair trial because the jury was given erroneous jury instructions that failed to accurately convey the law with respect to the offense of armed violence predicated on aggravated battery. The defendant contends that his trial attorney was ineffective for not objecting to the instructions and that the issue is also reviewable as plain error. We disagree.

¶ 25 "The purpose of jury instructions is to provide the jury with correct legal principles applicable to the evidence so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Wales*, 357 Ill. App. 3d 153, 157 (2005). Pursuant to Supreme Court Rule 451(a) (eff. July 1, 2006), the trial court is required to use all applicable IPI jury instructions in a criminal case. *People v. Hudson*, 222 Ill. 2d 392, 399-400 (2006). "However, if there is no IPI instruction governing a particular criminal charge, the court has the discretion to give a non-IPI instruction to the jury ***." *People v. Jenkins*, 383 Ill. App. 3d 978, 990 (2008). "The decision to instruct a jury using nonpattern instructions is reviewed

for an abuse of discretion." *People v. Pollock*, 202 Ill. 2d 189, 211 (2002).

¶ 26 The defendant complains that rather than giving the IPI definition and issues instructions for armed violence (IPI Criminal 4th Nos. 11.51Y and 11.52Y), the trial court instead gave non-IPI armed-violence instructions that were tendered by the State. However, the IPI armed-violence instructions were patterned after the version of the statute defining the offense that was in effect prior to January 1, 2000 (see IPI Criminal 4th Nos. 11.51Y and 11.52Y, Committee Notes, at 522, 527; 720 ILCS 5/33A-2 (West 1994); Pub. Act 91-404, eff. Jan. 1, 2000 (amending 720 ILCS 5/33A-2 (West 1994))), and are now only applicable in armed-violence prosecutions predicated on the theory that a defendant committed a predicate felony while armed with a dangerous weapon, *i.e.*, a violation of section (a) of the statute as amended (720 ILCS 5/33A-2(a) (West 2008)).

¶ 27 Here, the State's armed-violence charge alleged that the defendant committed a felony "while armed with a dangerous weapon," but the charge more specifically alleged that the defendant personally discharged a firearm causing great bodily harm to another person in violation of section (c) of the statute defining the offense of armed violence (720 ILCS 5/33A-2(c) (West 2008)). At trial, the State prosecuted the charge as if it had alleged that the defendant had personally discharged a firearm while committing an aggravated battery, *i.e.*, a violation of section (b) of the statute (720 ILCS 5/33A-2(b) (West 2008)), and whether "great bodily harm resulted from the discharging of the firearm" was added to the issues instruction, ostensibly as a special interrogatory or as a clarification of the State's theory of guilt with respect to the predicate offense. See *People v. Hines*, 257 Ill. App. 3d 238, 244-45 (1993). In any event, the IPI armed-violence instructions that the defendant claims should have been used were inapplicable; the non-IPI instructions that the jury received were accurate; and, in light of the evidence adduced at trial, any variance between the State's charging instrument and the tendered instructions was undoubtedly harmless. See *People v.*

Satterfield, 195 Ill. App. 3d 1087, 1099-1100 (1990); *People v. Laramore*, 163 Ill. App. 3d 783, 792 (1987).

¶ 28 "Both the State and the defendant are entitled to have the jury instructed on their theories of the case" (*People v. Floyd*, 262 Ill. App. 3d 49, 55 (1994)), and the trial court bears the burden of ensuring that the jury is properly instructed on the essential elements of the crime in question (*People v. Pearson*, 252 Ill. App. 3d 1, 11 (1993)). Here, the trial court fulfilled that duty and did not abuse its discretion in giving the jury non-IPI armed-violence instructions that correctly conveyed the relevant law.

¶ 29 The defendant also complains because the jury was given the IPI instruction defining the predicate offense of aggravated battery (IPI Criminal 4th No. 11.13) but was not given the accompanying IPI issues instruction for the offense (IPI Criminal 4th No. 11.14). As the State counters, however, because the defendant was not charged with aggravated battery, an instruction defining the predicate offense of the armed-violence charge was all that was required. See IPI Criminal 4th No. 11.51Y, Committee Note, at 522 ("Give the instruction defining the offense that is the subject of the armed violence."). As the State further notes, the defendant's argument on this issue has been previously addressed and rejected. See *People v. Walls*, 224 Ill. App. 3d 885, 892-93 (1992).

¶ 30 Equally without merit is the defendant's claim that he was prejudiced because the non-IPI armed-violence instructions failed to inform the jury that it had to find that he had acted "knowingly" when committing the offense of aggravated battery. Although the non-IPI instructions did not include a requisite mental state for the predicate offense, "[i]nstructions in criminal cases must be read as a whole" (*People v. Terry*, 99 Ill. 2d 508, 516 (1984)), and the IPI definition instruction for aggravated battery that the jury received stated, "A person commits the offense of aggravated battery when he knowingly and by any means causes great bodily harm to another person" (IPI Criminal 4th No. 11.13). When read together, the

instructions thus advised the jury that to find the defendant guilty of armed violence, it had to find that he had knowingly caused great bodily harm, which was the only way the jury could have found the defendant guilty of aggravated battery under the circumstances. *Cf. People v. Hines*, 257 Ill. App. 3d 238, 244-46 (1993) (reversing the defendant's armed-violence conviction where due to improper instructions, the jury could have found the defendant guilty of the predicate felony of aggravated battery under two different theories, only one of which was proper).

¶ 31 Reviewing the jury instructions as a whole, we find that they correctly conveyed the applicable law. The defendant is therefore unable to establish plain error or prevail on his ineffective-assistance-of-counsel claim.

¶ 32 Consecutive Sentences

¶ 33 At the defendant's trial, Jeremy testified that he had undergone several weeks of physical therapy following his release from the hospital and now suffers from nerve damage that requires him to wear therapeutic shoes. At the defendant's sentencing hearing, the State presented evidence that as a result of his leg injury, Jeremy "suffers from extraordinary pain" that "radiates from his heel of his foot to his toes and up his leg." The State also presented evidence that Jeremy works as a laborer and that the pain "has affected his ability to earn a living," because he cannot work "consistent hours." In his statement in allocution, the defendant noted that Jeremy was still alive, "just with a limp."

¶ 34 At the defendant's sentencing hearing, the State argued for the imposition of consecutive sentences totaling 34 years on the defendant's convictions for armed violence and attempted armed robbery. The State maintained that consecutive sentences were mandatory, because "the jury found that the defendant [had] inflicted great bodily harm, also known as severe bodily injury on the victim." Without stating its reasons, the court ultimately imposed consecutive sentences totaling 29 years (25 on the armed-violence count

and 4 for the attempted armed robbery).

¶ 35 By statute, consecutive sentences are mandatory where "[o]ne of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(d)(1) (West 2008). Arguing that "great bodily harm" is not synonymous with "severe bodily injury," the defendant argues that his cause should be remanded for resentencing, because the trial court "used the wrong standard."

¶ 36 It has been held that for sentencing purposes, "[t]he difference between 'great bodily harm' and 'severe bodily injury' is merely semantic; no meaningful distinction can be made between 'great' and 'severe' or between 'harm' and 'injury.'" *People v. Witherspoon*, 379 Ill. App. 3d 298, 308 (2008). On the other hand, it has been held that these terms are not synonymous, because "[w]here the legislature uses certain words in one instance and different words in another, different results were intended." *People v. Williams*, 335 Ill. App. 3d 596, 599-600 (2002). We need not decide whether there is a meaningful distinction between "great bodily harm" and "severe bodily injury," however, because the defendant is again unable to establish plain error or ineffective assistance of counsel.

¶ 37 "The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference." *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Additionally, "a trial court is presumed to know the law and apply it properly." *People v. Phillips*, 392 Ill. App. 3d 243, 265 (2009). "The burden is on the defendant to affirmatively establish that the sentence was based on improper considerations." *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). "It is well settled that an appellant bears the burden of preserving a sufficient record for review and any doubts arising from an incomplete record will be resolved against the appellant." *People v. Ranstrom*, 304 Ill. App. 3d 664, 672 (1999).

¶ 38 Here, the trial court was asked to impose mandatory consecutive sentences on the defendant's convictions, because "the jury found that the defendant inflicted great bodily harm, also known as severe bodily injury on the victim." The court did not, however, state whether it agreed with the State's representation that those terms are synonymous. Moreover, the trial court did not rule that consecutive sentences were mandatory based on a finding of great bodily harm, and there was evidence before the court that supported a finding that the defendant did cause severe bodily injury. *Cf. People v. Williams*, 335 Ill. App. 3d 596, 599-601 (2002) (remanding for a new sentencing hearing where the trial court ostensibly imposed consecutive sentences on a finding of severe bodily injury in the absence of evidence regarding the severity of the victims' injuries). Under the circumstances, we thus agree with the State's observation that we must presume that the court based its imposition of consecutive sentences on a finding of severe bodily injury. See *Ranstrom*, 304 Ill. App. 3d at 672 ("When the record presented on appeal is incomplete, this court will indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted properly."); *People v. Besser*, 273 Ill. App. 3d 164, 169 (1995) ("A reviewing court will extend all reasonable presumptions in favor of the judgment or order from which an appeal is taken, and will not presume that error occurred below.").

¶ 39 As a final matter, we grant the State's motion to strike footnote 3 from the defendant's brief on appeal.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, the defendant's convictions and sentences are hereby affirmed.

¶ 42 Affirmed.