In the
Indiana Supreme Court

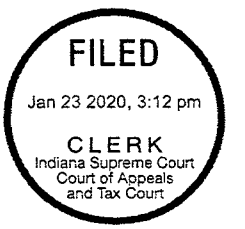
Shawn Twitty,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
19A-CR-00500

Trial Court Case No.
49G06-9503-CF-33600



Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

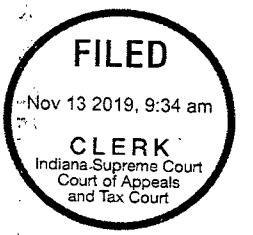
Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 1/23/2020.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

MEMORANDUM DECISION



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IN THE COURT OF APPEALS OF INDIANA

Shawn Twitty,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 13, 2019

Court of Appeals Case No. 19A-CR-500

Appeal from the Marion Superior Court

The Honorable Mark D. Stoner, Judge

Trial Court Cause No. 49G06-9503-CF-33600

Sharpnack, Senior Judge.

Statement of the Case

[1] Shawn Twitty appeals from the denial of his motion to correct erroneous sentence, contending that the doctrine of amelioration applies. Finding that Twitty has already challenged his consecutive sentences, raising the same issue several times, we affirm the decision of the trial court, rejecting his most recent challenge.

Issue

[2] Twitty presents the following issue which we restate as the following question: Did the trial court err by denying Twitty's motion to correct erroneous sentence?

Facts and Procedural History

[3] In a memorandum decision, a panel of this court affirmed Twitty's convictions of three counts of attempted murder, each as a Class A felony, and one count of carrying a handgun without a license, a Class A misdemeanor, and affirmed the trial court's sentencing decision. *Twitty v. State*, No. 49A05-9601-CR-16, slip op. at 2-3 (Ind. Ct. App. Aug. 18, 1997), *trans. denied* ("Twitty I"). The facts recited in the direct appeal follow:

> On the night of March 4, 1995, Garcia Scott, Chabwera Underwood, and Craig Mushatte went with a group of friends to the Barritz Nightclub in Indianapolis. While they were there, a fight broke out between the group and Shawn Twitty and his friends. After the two groups were ejected from the club, the fight continued in the parking lot, where Scott and Underwood

were both shot in the head. Scott was permanently blinded as a result of the shooting and Underwood suffered irreversible memory loss and motor skills impairment.

At Twitty's jury trial, Mushatte testified that he saw Twitty remove a gun from the trunk of a car and shoot it at Mushatte, Scott, and Underwood. Mushatte testified that he believed the weapon was a nine millimeter gun. Twitty and others left in the car from which Twitty had removed the gun. The car was later found at Twitty's residence. Police at the crime scene found a spent bullet jacket which a ballistics expert testified was fired from a nine millimeter gun. Two days later, Mushatte identified Twitty in a photo array as the person who fired the gun.

Twitty received forty-five year sentences on each of the three attempted murder counts and a one year sentence on the fourth count, carrying a handgun without a license. The sentences for counts I and II were to be served consecutively, and the sentences on counts II and IV were to be served concurrently with the sentences for counts I and II.

[4] Twitty filed a petition for post-conviction relief on November 9, 1998. After amendments by counsel, among the issues presented to the post-conviction court was that appellate counsel did not argue on direct appeal that the trial court erred in imposing consecutive sentences. The post-conviction court denied Twitty's petition, and the denial was affirmed on appeal. *Twitty v. State*, 49A02-0503-PC-199 (Ind. Ct. App. Sept. 13, 2005) ("Twitty II").

[5] On January 28, 2019, Twitty moved to correct erroneous sentence, raising the doctrine of amelioration in support of that motion. His motion was denied and this appeal ensued.

Discussion and Decision

[6] Twitty challenges the denial of his motion to correct erroneous sentence, in which he cited Indiana Code section 35-38-1-15 (1983), which provides as follows:

> If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

[7] Our Supreme Court has stated that the purpose of the statute "is to provide prompt, direct access to an uncomplicated legal process for correcting the occasional erroneous or illegal sentence." *Robinson v. State*, 805 N.E.2d 783, 785 (Ind. 2004) (citation omitted). A motion to correct erroneous sentence is appropriate only when the sentencing error is "clear from the face of the judgment imposing the sentence in light of the statutory authority." *Id.* at 787. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct erroneous sentence. *Davis v. State*, 937 N.E.2d 8, 11 (Ind. Ct. App. 2010), *trans. denied.* Such claims should instead be addressed on direct appeal or through post-conviction relief. *Robinson*, 805 N.E.2d at 787. A motion to correct erroneous sentence is a narrow remedy, and a reviewing court will strictly apply the requirement of a facially erroneous sentence. *Id.*

[8] On appeal, we review a trial court's denial of a motion to correct erroneous sentence for an abuse of discretion. *Davis v. State*, 978 N.E.2d 470, 472 (Ind. Ct. App. 2012). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id.*

[9] In the direct appeal of his convictions and sentencing, a panel of this court addressed Twitty's challenge to his sentence, which included an argument that the trial court erred by imposing consecutive forty-five year sentences for two of the attempted murder counts. Twitty's argument on direct appeal, as pertained to his sentence, specifically referred to Indiana Code section 35-50-1-2(c), limiting the total of the consecutive terms of imprisonment for felony convictions arising out of a single episode of criminal conduct. The exceptions listed in the subsection of the statute included murder and felony convictions for which an enhanced sentence is imposed because the defendant knowingly and intentionally caused serious bodily injury to the victim. Twitty argued, without citation to authority, that because attempted murder is a crime separate from murder, and, thus not among the statutory exceptions, he could not be sentenced to a term of more than fifty years, which was the presumptive sentence for murder at the time. *See* Ind. Code § 35-50-2-3 (1994).

[10] Instead of deeming the issue waived for failure to cite to authority, we considered the argument and reviewed case law, ultimately concluding that the statutory reference to murder convictions necessarily included attempted murder convictions as exempt from consecutive sentencing limitations. Twitty I, slip op. at 5-7.

[11] In 1998, Twitty filed a petition for post-conviction relief. After amendments by counsel, among the issues presented to the post-conviction court was whether Twitty had received ineffective assistance of trial and appellate counsel. On January 12, 2005, the post-conviction court denied the petition.

[12] Next, Twitty appealed the denial of his petition for post-conviction relief. As respects his sentencing challenges, Twitty presented those arguments in his claim of ineffective assistance of appellate counsel. Shortly after our decision in Twitty's direct appeal, our Supreme Court handed down a case discussing how to treat consecutive sentencing in attempted murder cases. *See Greer v. State*, 684 N.E.2d 1140 (Ind. 1997).

[13] *Greer* defined the steps to be taken in analyzing whether consecutive sentences are warranted under the sentencing statute in effect at that time. The first step is to identify the presumptive sentence for the felony that is one class higher than the most serious felony with which the defendant was charged. 684 N.E.2d at 1142. Murder is the next highest offense, therefore, the presumptive sentence is fifty years. Regarding Greer's convictions for three counts of attempted murder and one count of criminal deviate conduct, for which consecutive sentences were imposed, the next step is to determine if the defendant received an enhanced penalty because the felony resulted in serious bodily injury, and, if so, did the defendant knowingly or intentionally cause the serious bodily injury. *Id.*

[14] In Twitty's case, the trial court enhanced all three attempted murder convictions to forty-five years based in pertinent part on the seriousness of the crime. Twitty I, slip op. at 8. We found that the evidence was sufficient to support Twitty's conviction, which meant that his conduct was done knowingly and intentionally. *Id.* at 5. The specific circumstances of the crime, beyond that which is needed to support an attempted murder conviction, establish that the enhanced penalty was imposed because the felony resulted in serious bodily injury. Scott was permanently blinded because of the shooting and Underwood suffered irreversible memory loss and motor skills impairment.

[15] Twitty argued in his petition that appellate counsel should have cited to *Greer* in the petition to transfer filed in his case. When reviewing this argument, we noted that the Supreme Court reached the same conclusion as did our court in Twitty's direct appeal, but reached that conclusion applying a different rationale. After reciting Twitty's burden of establishing the claim and the deference afforded to appellate counsel's choice of which issues to raise on appeal, we concluded that appellate counsel was not ineffective. Twitty II, slip op. at 17-19. Citation to *Greer* would not have provided Twitty the sentencing relief he was seeking.

[16] Twitty argues that his consecutive sentences for two of the attempted murder counts is erroneous on the face of the sentencing order. The State contends that: (1) the sentencing order is not erroneous on its face; (2) the doctrine of amelioration is inapplicable; and (3) Twitty's claim is barred by res judicata. We have considered each of the arguments presented by the parties and

conclude that the dispositive argument is that Twitty's claim is barred by res judicata. Thus, the trial court did not err in denying the motion.

[17] Twitty's support for his motion to correct erroneous sentence is his claim that the consecutive sentences for two of his three attempted murder convictions constituted an erroneous sentence under the doctrine of amelioration and his citation to the timing of amendments to Indiana Code section 35-50-1-2 and case law addressing how to treat attempted murder convictions for purposes of consecutive sentencing.

[18] Twitty unsuccessfully challenged his consecutive sentences on direct appeal and transfer was denied by the Supreme Court. Twitty unsuccessfully challenged his consecutive sentences in a petition for post-conviction relief. This Court affirmed the denial of Twitty's petition. Further, Twitty challenged his consecutive sentences in a motion to correct erroneous sentence.

[19] "*Res judicata*, whether in the form of claim preclusion or issue preclusion (also called collateral estoppel), aims to prevent repetitious litigation of disputes that are essentially the same, by holding a prior final judgment binding against both the original parties and their privies." *Becker v. State*, 992 N.E.2d 697, 700 (Ind. 2013). Here, Twitty has raised the same or similar challenges to his consecutive sentences, each time resulting in a denial of relief. We conclude that Twitty's argument is barred by res judicata. Thus, the trial court did not err by denying Twitty relief.

Conclusion

[20] Because Twitty's motion to correct erroneous is barred by res judicata, we conclude that the trial court did not err by denying Twitty the relief requested.

[21] Affirmed.

Kirsch, J., and Robb, J., concur.

IN THE

COURT OF APPEALS OF INDIANA

Shawn Twitty,

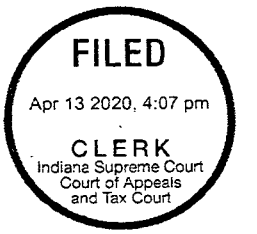
Appellant,

v.

State of Indiana,

Appellee.

Court of Appeals Case No. 19A-CR-500



Order

[1] Appellant, pro se, has filed a Motion to Produce Copies of Appellate Decisions for Federal Certiorari Proceedings Appendix Exhibits.

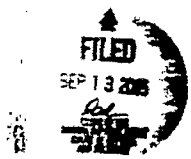
[2] Having reviewed the matter, the Court finds and orders as follows:

1. Appellant's Motion to Produce Copies of Appellate Decisions for Federal Certiorari Proceedings Appendix Exhibits is granted.
2. Within seven (7) days of the date of this order, the Clerk of the Court is directed to provide Appellant with a copy of (1) the Court's August 18, 1997 Memorandum Decision issued in Cause Number 49A05-9601-CR-16; and (2) the Court's September 13, 2005 Memorandum Decision issued in Cause Number 49A02-0503-PC-199.
3. The Clerk of the Court is directed to file a copy of this order in Cause Numbers 19A-CR-500, 49A05-9601-CR-16, and 49A02-0503-PC-199.

[3] Ordered 4/13/2020

Chief Judge

APPENDIX B



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IN THE COURT OF APPEALS OF INDIANA

SHAWN M. TWITTY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0503-PC-199
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G02-9503-PC-33600

September 13, 2005

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Shawn Twitty appeals the denial of his petition for post-conviction relief that challenged his convictions and sentences for three counts of attempted murder. We affirm.

Issues

The restated issues before us are:

I. whether Twitty received effective assistance of trial counsel; and

II. whether he received effective assistance of appellate counsel.

Facts

On direct appeal, we described the facts of Twitty's case as follows:

> On the night of March 4, 1995, Garcia Scott, Chabwera Underwood, and Craig Mushatte went with a group of friends to the Barritz Nightclub in Indianapolis. While they were there, a fight broke out between the group and Shawn Twitty and his friends. After the two groups were ejected from the club, the fight continued in the parking lot, where Scott and Underwood were both shot in the head. Scott was permanently blinded as a result of the shooting and Underwood suffered irreversible memory loss and motor skills impairment.
>
> At Twitty's jury trial, Mushatte testified that he saw Twitty remove a gun from the trunk of a car and shoot it at Mushatte, Scott, and Underwood. Mushatte testified that he believed the weapon was a nine millimeter gun. Twitty and others left in the car from which Twitty had removed the gun. The car was later found at Twitty's residence. Police at the crime scene found a spent bullet jacket which a ballistics expert testified was fired from a nine millimeter gun. Two days later, Mushatte identified Twitty in a photo array as the person who fired the gun.

> Twitty received forty-five year sentences on each of the three attempted murder counts and a one year sentence on the fourth count, carrying a handgun without a license. The sentences for counts I and II were to be served consecutively, and the sentences on counts III and IV were to be served concurrently with the sentences for counts I and II.

Twitty v. State, No. 49A05-9601-CR-16, slip op. pp. 2-3 (Ind. Ct. App. Aug. 18, 1997). Twitty's appellate counsel raised as issues the sufficiency of the evidence and the propriety of the trial court's sentencing decision. We rejected both arguments. Our supreme court denied Twitty's petition for transfer.

Twitty filed a petition for post-conviction relief in 1998. After amendments by counsel, the issues presented to the post-conviction court included whether Twitty had received ineffective assistance of trial and appellate counsel. On January 12, 2005, the post-conviction court denied Twitty's petition. He now appeals.

Analysis

A post-conviction relief petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner is in the position of appealing from a negative judgment. Fisher, 810 N.E.2d at 679. "On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court." Id. "In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law." Id. "In post-conviction proceedings, complaints that something went awry at trial are generally

cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

I. Ineffective Assistance of Trial Counsel

Twitty claims that he received ineffective assistance of trial counsel.

> We review claims of ineffective assistance of counsel under the two components set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced him. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> In addition, counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. Consequent' isolated poor strategy or bad tactics do not necessarily amount to ineffective assistance of counsel unless, taken as a whole, the defense was inadequate. Furthermore, we will not speculate as to choosing a trial strategy which, at the time and under the circumstances, seems best.

Smith v. State, 822 N.E.2d 193, 202 (Ind. Ct. App. 2005) (citations omitted), trans. denied.

Twitty claims his trial counsel was ineffective for two reasons. First, he contends trial counsel should have objected to the attempted murder instructions given to the jury. Specific intent is a necessary element of attempted murder. Ramsey v. State, 723 N.E.2d

869, 871 (Ind. 2000) (citing Zickefoose v. State, 270 Ind. 618, 622, 388 N.E.2d 507, 510 (1979)). Attempted murder jury instructions must include the required mens rea of specific intent to kill. Id. (citing Spradlin v. State, 569 N.E.2d 948, 950 (Ind. 1991)). Jury instructions that reference a "knowing" mens rea or that instruct the jury that it can convict of attempted murder based on a "knowing" mens rea are erroneous. Id. at 872. Instances of Spradlin error are not per se reversible, however. Metcalfe v. State, 715 N.E.2d 1236, 1237 (Ind. 1999). In some cases, typically post-conviction relief appeals, error of this sort has been held not fundamental especially when the intent of the perpetrator was not a central issue at trial or if the wording of the instruction sufficiently suggested the requirement of intent to kill. Id.

As part of its preliminary instructions, the trial court read to the jury the charging informations against Twitty, which stated for all three counts, "Shawn M. Twitty, on or about March 5, 1995, did attempt to commit the crime of Murder, which is to knowingly kill another human being . . . by engaging in conduct, that is, shooting at and against [the victim], with intent to kill [the victim], which constituted a substantial step towards the commission of said crime of Murder." App. p. 239. The trial court further instructed as follows:

> Attempt is defined by statute as follows. A person attempts to commit a crime when acting with the culpability required for the commission of the crime he engages in conduct that constitutes a substantial step toward the commission of the crime. . . . The crime of murder is defined by statute as follows. A person who knowingly or intentionally kills another human being, commits Murder, a felony. To convict the defendant, the State must prove beyond a reasonable doubt each of the following elements. The defendant, number

> one, knowingly; number two, with the specific intent to kill; number three, shot at and against [the victim] by means of a deadly weapon, that is, a handgun; four, which constituted a substantial step towards the commission of said crime of Murder.

Id. at 241. The trial court in its preliminary instructions also defined "knowingly" but did not define "intentionally."

Originally, the trial court's written instructions referred to the State's having to prove as the first element that Twitty "knowingly or intentionally" attempted to kill the three victims. The trial court omitted the word "intentionally" when it read the instructions to the jury after the prosecutor insisted, "We're charged here as knowing. We don't have an intentional thing here." Id. at 203. Defense counsel did not object to the trial court's instructions. We observe that four years after Spradlin was decided, the prosecutor, defense attorney, and trial court all apparently failed to grasp the importance of proving intentional rather than knowing conduct in an attempted murder case.

Nevertheless, the narrow question before us is whether trial counsel's failure to object to the attempted murder instructions was both objectively unreasonable and caused such prejudice to Twitty that he was deprived of effective assistance of trial counsel. We do not conclude that he was. The jury in Twitty's case was instructed in much the same manner as was the jury in Ramsey. The instruction there provided:

> A person attempts to commit murder when, acting with the culpability required for commission of Murder, he engages in conduct that constitutes a substantial step toward commission of Murder; which is to knowingly or intentionally kill another human being. The crime of attempted murder is a Class A felony.

To convict the defendant of Attempted Murder under Count I, the State must prove each of the following elements:

1. The defendant
2. knowingly
3. with specific intent to kill
4. engaged in conduct
5. which was a substantial step toward the commission of the crime of Murder; which is to knowingly or intentionally kill another human being.

Ramsey, 723 N.E.2d at 871. The jury was also read the charging information, which stated, "Fairlis G. Ramsey, on or about December 8, 1996, did attempt to commit the crime of Murder which is, with intent to kill, Fairlis G. Ramsey did shoot a handgun at and against Marcia Ramsey . . . which constituted a substantial step toward the commission of said crime of Murder." Id. at 872 n.5.

Our supreme court observed that the trial court should not have included the word "knowingly" in the jury instruction. Id. at 872. However, it noted that the instruction had not been objected to and held that it did not constitute fundamental error. Id. The court concluded, "Because the correct mens rea was enumerated both as an element in the charging instrument and as an element that the State was required to prove beyond a reasonable doubt, we believe that the jury instructions, taken as a whole, sufficiently informed the jury of the State's burden of proving that the Defendant specifically intended to kill the victim." Id. at 872-73.

Here, likewise, the trial court correctly enumerated that the State had to prove beyond a reasonable doubt that Twitty acted with the specific intent to kill the three victims. The charging information also referenced the necessary intent to kill, although

admittedly, it also erroneously mentioned a "knowing" mens rea. We also observe that the trial court gave the following final instructions:

> The intent to [kill][1] may be inferred from the use of a deadly weapon in a manner likely to cause serious bodily injury or death and may be inferred from discharging a weapon in the direction of a victim. The intent to kill can be found from the acts, declarations and conduct of the defendant at or just immediately before the commission of the act from the character of the weapon used and from the part of the body in which the wound was inflicted.

App. p. 250. These instructions emphasized to the jury that it had to find Twitty acted with the specific intent to kill. Finally, unlike in Ramsey, Twitty's intent was not the primary issue in this case. Cf. id. at 872 n.4 (noting the defendant's intent was "squarely at issue"). The identity of the shooter was the main factual dispute that the jury here was asked to resolve. This mitigates any error in describing the necessary mens rea for attempted murder. See Metcalfe, 715 N.E.2d at 1237. We conclude the trial court's instructions taken as a whole sufficiently apprised the jury of the State's burden of proving that Twitty acted with the specific intent to kill, which intent was not the primary issue in the case.

Unlike here, Ramsey addressed the attempted murder instructions in the context of fundamental error, while we are considering a claim of ineffective assistance of trial counsel. We do not believe the result in Ramsey would have been different if the defendant had framed his argument in terms of ineffective assistance instead of

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[1] The transcript indicates that this word is inaudible, but the printed copy of the instructions lists the word as "kill."

fundamental error. Under either standard, the prejudice caused by the type of attempted murder jury instructions given in Ramsey and here does not amount to fundamental error or the type of prejudice necessary to sustain a finding of ineffective assistance of counsel. See Rouster v. State, 705 N.E.2d 999, 1008 n.8 (Ind. 1999) (concluding that descriptions of prejudice necessary for finding of ineffective assistance and for finding of fundamental error are "virtually interchangeable"). Because he has not established prejudice, Twitty has failed to meet his burden of proving he received ineffective assistance based on trial counsel's failure to object to the attempted murder instructions.

Twitty's second claim of trial counsel ineffectiveness is that trial counsel should have attempted to introduce into evidence the deposition of Sheriff's Deputy Cornelius Sullivan, who had talked to Mushatte at the hospital on the night of the shooting. Mushatte was the only witness at trial who positively identified Twitty as the shooter. Deputy Sullivan testified at trial that he did not remember talking to Mushatte the night of the shooting. However, in a pretrial deposition Sullivan had said that he had talked to Mushatte in the hospital and asked him for the phone number of a friend of one of the other victims. The deposition continued:

> Q: Did Mr. Mushatt [sic] identify to you who the shooters were?
>
> A: No, sir.
>
> Q: Did he indicate that he had seen the shooters?
>
> A: No, sir.
>
> Q: Did he indicate to you where he was at the time of the shooting –

A: No, sir.

Q: – or how many shots were fired?

A: No, sir.

App. p. 320. The deposition then proceeded to a different subject. At trial, counsel used the deposition to refresh Sullivan's memory that he had talked to Mushatte but did not attempt to introduce any part of the deposition into evidence.

Twitty contends that trial counsel should have introduced Sullivan's deposition into evidence to impeach his assertion at trial that he could not remember talking to Mushatte.[2] He cites to Wright v. State, 581 N.E.2d 978 (Ind. Ct. App. 1991), abrogated on other grounds as recognized by Shaffer v. State, 674 N.E.2d 1, 7 (Ind. Ct. App. 1996), trans. denied. There, we held that a defendant in a child molestation case received ineffective assistance of trial counsel when he failed to lay a proper foundation for introducing evidence that impeached the alleged victim, whose testimony was the only direct evidence against the defendant. Id. at 980. The impeaching evidence would have included testimony that the alleged victim had previously told a social worker that she had fabricated her molestation claim against the defendant. Id. at 979.

The alleged impeachment quality of Sullivan's deposition is much less evident than was the impeaching evidence in Wright. In his deposition, Sullivan merely stated that Mushatte had not told Sullivan who the shooter was when he visited Mushatte in the

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[2] Twitty frames his argument this way, but it would appear the real purpose of introducing Sullivan's deposition would be to impeach Mushatte's trial testimony that Twitty was the shooter.

hospital. The deposition does not indicate that Sullivan actually asked Mushatte if he had seen the shooter or that Mushatte had explicitly denied seeing the shooter. The only question Sullivan said he had asked Mushatte was for the phone number of the friend of another one of the victims. Sullivan also testified at trial, "My mission at the hospital was to identify the victims. Anybody I talked to and anything other than trying to find out who the victims were it was not my primary mission at that time." App. p. 218. This bolsters the conclusion that Sullivan had not asked Mushatte for any details regarding the shooting. Sullivan's deposition would not have directly contradicted in any way Mushatte's in-court implication of Twitty, unlike in Wright. Thus, because of a lack of demonstrable prejudice we cannot conclude Twitty received ineffective assistance of trial counsel on this issue.

II. Ineffective Assistance of Appellate Counsel

Twitty also contends that he received ineffective assistance of appellate counsel.

> We review claims of ineffective assistance of appellate counsel using the same standard applicable to claims of trial counsel ineffectiveness. The defendant must show that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. Ineffective assistance claims at the appellate level of proceedings generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well.

Fisher, 810 N.E.2d at 676-77 (citations omitted).

Twitty's first claim of appellate ineffectiveness is based on complete failure to present an issue on direct appeal, or waiver of an issue. We must be deferential to appellate counsel on this type of claim. Id. at 677. We "should be particularly sensitive

to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." Timberlake v. State, 753 N.E.2d 591, 605 (Ind. 2001), cert. denied, 537 U.S 839, 123 S. Ct. 162 (2002). "We employ a two-part test to evaluate 'waiver of issue' claims: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are 'clearly stronger' than the raised issues." Fisher, 810 N.E.2d at 677.

A part of Twitty's defense during trial was that the shooter was Floyd Teague. Teague had been Twitty's co-defendant in an earlier trial, which had resulted in an acquittal for Teague and a hung jury for Twitty. On rebuttal in Twitty's second trial, the State presented the testimony of police detective Herman Humbles, who testified over a relevancy objection that Teague had been acquitted in the first trial. Twitty contends appellate counsel was ineffective for not raising as an issue that Humbles's testimony was improperly admitted.[3]

It is a settled rule of law that "Evidence of a conviction or guilty plea of others charged with the same offense as the defendant is not substantive evidence of the defendant's guilt or innocence." Hughes v. State, 546 N.E.2d 1203, 1210 (Ind. 1989); see also Lincoln v. State, 191 Ind. 426, 429, 133 N.E. 351, 352 (1921). It has also been

[3] Twitty frames this issue as an instance of prosecutorial misconduct. It is not clear to us that this is potential prosecutorial misconduct as opposed to simply the admission of evidence over defense counsel's objection.

said that the fact that a defendant's alleged accomplice had been acquitted of a charge involving the same crime with which the defendant is charged is irrelevant to the question of the defendant's guilt, if the defendant and accomplice did not have a relationship of principal and accessory. Resnover v. State, 434 N.E.2d 78, 80 (Ind. 1982). Resnover was a case in which the defendant had attempted to introduce evidence of his alleged accomplice's acquittal as evidence of his own innocence; the State had objected to any such evidence and our supreme court affirmed the trial court's sustaining of the objection. Id.

Twitty extrapolates from these cases that it was clearly improper here for the State to elicit testimony that Teague had been acquitted in the first trial. However, he has not cited any cases that are on all fours with his case, nor has our own research disclosed any such cases. Here, it was only after Twitty had argued and presented evidence to the jury suggesting that Teague was the shooter did the State on rebuttal offer evidence that Teague had been acquitted in the first trial. We need not decide whether it would be proper to conclude Twitty had opened the door to such evidence. The fact is that no Indiana case has addressed this type of factual scenario. There is no clear precedent that Humbles's rebuttal testimony was improper as a matter of law. We cannot say appellate counsel was ineffective for not raising this issue because it was not "significant and obvious" from the face of the record and in light of available precedent.[4]

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[4] Twitty also alleges appellate ineffectiveness for completely failing to raise the issue of the attempted murder instructions. Having concluded that Ramsey is directly on point with this case, we reject this

Twitty's other claim of ineffective assistance of appellate counsel alleges a failure to present an issue well with respect to the propriety of his sentence; on direct appeal we addressed Twitty's sentence and did not waive his arguments in that regard.[5] Claims of inadequate presentation of certain issues, when such were not deemed waived on direct appeal, are the most difficult for defendants to advance and reviewing tribunals to support. Bieghler v. State, 690 N.E.2d 188, 195 (Ind. 1997), cert. denied, 525 U.S. 1021, 119 S. Ct. 550 (1998). When the issues presented by an attorney are analyzed, researched, discussed, and decided by an appellate court, deference is afforded both to the attorney's professional ability and the ability of the appellate judges who first decided the case to recognize a meritorious argument. Id. at 196. An ineffectiveness challenge resting on counsel's presentation of a claim must overcome the strongest presumption of adequate assistance. Id. Judicial scrutiny of counsel's performance, already highly deferential, is at its highest for this type of claim. Id. "Relief is only appropriate when the appellate court is confident it would have ruled differently." Id.

Twitty contends appellate counsel gave improperly short shrift to the adequacy of the trial court's sentencing statement. He now argues that appellate counsel should have more directly challenged the trial court's statement, "the Court considers as aggravating the fact that imposition of a reduced sentence or suspension of the sentence, or anything

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claim for essentially the same reasons as we rejected Twitty's claim of trial counsel ineffectiveness on this issue.

[5] We did waive on direct appeal an argument regarding the adequacy of the presentence report; Twitty now makes no argument regarding this issue.

less than the maximum, would depreciate the seriousness of the crime." App. p. 261. He notes the general rule that "depreciate the seriousness of the crime" generally is not considered an aggravating circumstance justifying an enhanced sentence. Ector v. State, 639 N.E.2d 1014, 1016 (Ind. 1994).

However, a trial court may properly cite as an aggravator the non-statutory factor that imposition of less than an enhanced term would depreciate the seriousness of the crime, if the court indicates that it was doing so. Simmons v. State, 746 N.E.2d 81, 90 (Ind. Ct. App. 2001), trans. denied. The trial court, as quoted above, did indicate that any sentence less than the enhanced sentence would depreciate the seriousness of Twitty's crimes. On direct appeal, we characterized the trial court's statement in this regard to be a proper comment on the seriousness of the crimes, including the severe extent of Underwood's and Scott's injuries. Twitty has not persuaded us that we would have addressed the trial court's reliance on the "depreciate the seriousness" aggravator substantially differently if appellate counsel had made a more thorough argu. . .

Twitty also now argues that the trial court placed too much importance on his criminal history in imposing sentence. He notes that the trial court, in its sentencing statement, did not detail the particulars of that history. As we observed on direct appeal, however, it was clear that the trial court "had read and thoroughly considered Twitty's pre-sentence report . . . ." Twitty, slip op. at 8. That report recites his criminal history. Failure to recite the particulars of a defendant's criminal history is not fatal to a sentence enhancement where it is clear the trial court reviewed and relied upon a pre-sentence

report that recited such history. See Pennington v. State, 821 N.E.2d 899, 903-04 (Ind. Ct. App. 2005).

Twitty also contends that his criminal history was not severe enough to warrant substantial aggravating weight. It is true that the significance of criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense. Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999). Wooley, however, appears to have been the first case to clearly and directly state this proposition–at least, Wooley cited no previous authority for this proposition–and it was decided two years after Twitty's direct appeal. The trend in recent years has been for appellate courts to more closely scrutinize reliance on criminal history as an aggravating circumstance, but it is not clear that was the case in 1996 or 1997 when Twitty's direct appeal was under consideration. Appellate counsel was not ineffective for failing to anticipate or effectuate a future trend in the law. See Concepcion v. State, 796 N.E.2d 1256, 1260 (Ind. Ct. App. 2003), trans. denied (quoting Trueblood v. State, 715 N.E.2d 1242, 1258 (Ind. 1999), cert. denied, 531 U.S. 858, 121 S. Ct. 143 (2000)).

It is not clear that we would have considered Twitty's criminal history to be insignificant had the issue been raised. Although such history consisted entirely of misdemeanors, Twitty had amassed six convictions by the age of twenty-one, when he committed the shootings. One of those was a Class D felony possession of cocaine conviction for which he was alternatively sentenced for a Class A misdemeanor. One was for possession of a handgun without a license, which is directly relevant to the shootings, also committed with an unlicensed weapon. He also has convictions for

operating a vehicle while intoxicated, resisting law enforcement, possession of marijuana, and operating a vehicle without having ever received a license. In sum, Twitty's extensive criminal history amassed during just three years of adulthood evidences substantial disregard for the law and properly warranted aggravating weight in his sentencing for the shootings.

Twitty's final claim of appellate ineffectiveness relates to the trial court's decision to order two of the forty-five year attempted murder sentences to run consecutively. At the time of the shootings, Indiana Code Section 35-50-1-2(c) provided in part:

> [E]xcept for murder and felony convictions for which a person receives an enhanced penalty because the felony resulted in serious bodily injury if the defendant knowingly or intentionally caused the serious bodily injury, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of felonies for which the person has been convicted.

Appellate counsel argued, pursuant to this statute, that the total aggregate sentence Twitty could have received for this episode of criminal conduct was fifty years, or the presumptive sentence for murder, the next highest level of felony above attempted murder, at the time of the shooting.

Although appellate counsel did not cite authority for this proposition, we undertook to perform our own research on the issue. In so doing, we rejected appellate counsel's argument, relying in part on Haggenjos v. State, 441 N.E.2d 430 (Ind. 1982). There, our supreme court determined that a sentence for attempted murder was partially

nonsuspendable under Indiana Code Section 35-50-2-2 as it then existed, despite the fact that attempted murder was not expressly listed as a nonsuspendable offense. Id. at 434. The Haggenjos court had reasoned that when Section 35-50-2-2 spoke of murder as a nonsuspendable offense, it also necessarily referred to attempted murder. Id. (citing Kee v. State, 438 N.E.2d 993, 994 (Ind. 1982)). Thus, on Twitty's direct appeal we held that when Section 35-50-1-2(c) referred to murder, it also necessarily included convictions for attempted murder as exempt from consecutive sentencing limitations.

We issued our opinion on August 18, 1997. On September 4, 1997, our supreme court handed down Greer v. State, 684 N.E.2d 1140 (Ind. 1997). Greer analyzed Section 35-50-1-2(c) in a case involving sentences for attempted murder in a different fashion than we had analyzed the issue in Twitty's case. It also rejected the State's argument that Haggenjos should control the case by stating, "Because the crime of attempted murder will at times involve serious bodily injury . . . and at times not (as where a defendant fires a weapon at the victim but misses), we think it more consistent with the legislature's intent to treat attempted murder as a felony distinct from murder." Greer, 684 N.E.2d at 1142 n.7. Twitty contends that appellate counsel should have made an argument based on Greer in his petition for transfer to our supreme court.[6]

We are confident that a Greer analysis of Twitty's case leads to the same result as we reached in our direct appeal opinion in reliance upon Haggenjos. In Greer, the court held that the limitation on consecutive sentencing found in the previous version of

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[6] The petition for transfer only sought review of Twitty's sufficiency of the evidence claim and not his sentencing claims.

Section 35-50-1-2(c) did not apply to the defendant's attempted murder convictions because: (1) the sentences for attempted murder had been enhanced; (2) there was evidence the victims in fact suffered serious bodily injury; (3) the convictions required the jury to find that the defendant had acted with a knowing or intentional mens rea; and (4) the trial court's statement that it was enhancing the sentences because of the "seriousness of the totality of these crimes" was sufficient to indicate that the enhancement was because of the infliction of serious bodily injury. Id. at 1142-43.

Here, likewise, Twitty's sentences for attempted murder had been enhanced. There was evidence that two of the victims, Underwood and Scott, undeniably suffered serious bodily injuries after being shot in the head. As we discussed earlier, the jury was sufficiently apprised that it had to find that Twitty had acted intentionally. Finally, the trial court noted the seriousness of the offenses when sentencing Twitty, which as the Greer court also concluded indicates at least in part that the trial court was relying on the serious bodily injuries when imposing sentence. We conclude that under Greer it was appropriate for the trial court to order two of the attempted murder sentences to run consecutively without limitation by the previous version of Section 35-50-1-2(c).[7] As such, appellate counsel was not ineffective for failing to raise Greer in the petition to

[7] The limitation would apply to the attempted murder conviction related to Mushatt, who apparently did not suffer serious bodily injury.

transfer because we are confident our supreme court would have rejected such an argument.[4]

Conclusion

Twitty has failed to establish that he received ineffective assistance of either trial or appellate counsel. We affirm the denial of his post-conviction relief petition.

Affirmed.

CRONE, J., and NAJAM, J., concur.

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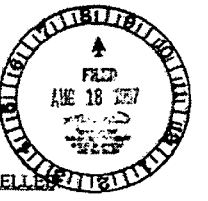
[4] We make one final observation. As part of Twitty's evidence regarding his claim of ineffective assistance of appellate counsel, he appropriately obtained a copy of the direct appeal brief filed by defense counsel from the clerk of this court. Unfortunately, this copy of the brief contains substantial handwritten markings and comments in it, many of which are critical of appellate counsel and the brief in general. Twitty's post-conviction counsel stated at the beginning of the hearing that the certified copy of the brief obtained from the clerk already contained the markings. The post-conviction court properly stated that it would ignore these comments in ruling on Twitty's petition, and so have we. It is unclear who made these markings. In any event, we would request in the future that the clerk of this court, when asked to provide a copy of a brief to an interested party or other member of the public, ensure that the copy provided not contain such markings.



NOT FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

SHAWN TWITTY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs	)	No. 49A05-9601-CR-16
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 2
The Honorable Stephanie W. Roth, Master Commissioner
The Honorable Webster L. Brewer, Judge
Cause No. 49G02-9503-CF-33600

August 18, 1997

MEMORANDUM DECISION[1] - NOT FOR PUBLICATION

BARTEAU, Judge

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[1] This memorandum decision shall not be regarded as precedent nor cited before any court except as allowed in Indiana Appellate Rule 15(A)(3).

Shawn M. Twitty appeals his conviction of three counts of attempted murder, a Class A felony, and one count of carrying a handgun without a license, a Class A misdemeanor. He raises two issues:

> 1. Whether eyewitness testimony that Twitty shot the victims was insufficient, "inherently improbable" or of "incredible dubiosity?"
>
> 2. Whether the trial judge erred in enhancing Twitty's sentences and ordering two of the forty-five year sentences for attempted murder to be served consecutively?

We affirm.

FACTS

On the night of March 4, 1995, Garcia Scott, Chabwera Underwood, and Craig Mushatte went with a group of friends to the Barritz Nightclub in Indianapolis. While they were there, a fight broke out between the group and Shawn Twitty and his friends. After the two groups were ejected from the club, the fight continued in the parking lot, where Scott and Underwood were both shot in the head. Scott was permanently blinded as a result of the shooting and Underwood suffered irreversible memory loss and motor skills impairment.

At Twitty's jury trial, Mushatte testified that he saw Twitty remove a gun from the trunk of a car and shoot it at Mushatte, Scott, and Underwood. Mushatte testified that he believed the weapon was a nine millimeter gun. Twitty and others left in the car from which Twitty had removed the gun. The car was later found at Twitty's residence. Police at the crime scene found a spent bullet jacket which a ballistics expert testified was fired from a nine millimeter gun. Two days later, Mushatte identified Twitty in a photo array as the person who fired the gun.

Twitty received forty-five year sentences on each of the three attempted murder counts and a one year sentence on the fourth count, carrying a handgun without a license. The sentences for counts I and II were to be served consecutively, and the sentences on counts III and IV were to be served concurrently with the sentences for counts I and II.

SUFFICIENCY OF THE EVIDENCE

In reviewing sufficiency of the evidence, we will affirm a conviction if, considering only the probative evidence and reasonable inferences supporting the verdict, and without weighing evidence or assessing witness credibility, a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt. Kimp v. State, 546 N.E.2d 1193, 1196 (Ind. 1989), trans. denied. (1990). The uncorroborated testimony of a single witness is sufficient to sustain a conviction. Wray v. State, 547 N.E.2d 1062, 1068 (Ind. 1989). It is the jury's responsibility to determine whether testimony is contrived and to generally judge the credibility of witnesses, and we will not in any way impinge on the jury's responsibility unless we are confronted with "inherently improbable" testimony, or coerced, equivocal, and wholly uncorroborated testimony of "incredible dubiosity." Bedwell v. State, 481 N.E.2d 1090, 1092 (Ind. 1985). Twitty challenges Mushatte's testimony as "inherently improbable" and tainted by bias, and argues that even if Twitty was the gunman, the State failed to prove Twitty had specific intent to kill any of the people at whom shots were fired.

Twitty characterizes Mushatte's testimony as "inherently improbable" because it suggests Mushatte was able to determine that a shooting was about to occur, identify the gunman and the weapon used, push his companions, and duck for cover himself, all in the space of about thirty seconds. Our supreme court has found evidence of a similar nature not

to be "inherently improbable." See Chandler v. State, 451 N.E.2d 319, 320 (Ind. 1983). There, a witness was shot at a night depository in a lighted parking lot. He testified that the defendant ran from behind a fence, came to a stop several feet away from the witness, ordered the witness to drop a bag containing money, then shot the witness. The witness described his assailant before being taken from the crime scene, then later identified him in a photo array. At Chandler's trial, the testimony of other witnesses conflicted with the victim's description of the robber and his apparel.

Like the testimony in Chandler, Mushatte's testimony is not so inherently unbelievable as to permit us to disregard it. While Mushatte's testimony conflicts with that of other witnesses, those discrepancies go to the weight of the evidence and the credibility of the witnesses, and thus are questions for the jury and beyond our review. Id. at 321. Similarly, Twitty's assertion that Mushatte's testimony was tainted by "bias" because the two had been engaged in a fight earlier that night goes to Mushatte's credibility and we cannot reconsider it on appeal.

The jury could have reasonably inferred Twitty's criminal intent from the evidence before it. In a prosecution for attempted murder, there must be a showing of a specific intent to kill. Johnson v. State, 622 N.E.2d 172, 173-74 (Ind. 1993). The jury may infer such intent from the use of a deadly weapon in a manner likely to cause death or serious bodily injury. Id. at 173. Specifically, a jury may properly infer that a defendant has exhibited an intent to kill when he fires a gun in someone's direction. See Jones v. State, 536 N.E.2d 267, 270 (Ind. 1989) (intent to kill a police officer was properly inferred from evidence that the defendant shot at a police officer while fleeing from the officer). Here, the jury heard

testimony that Twitty repeatedly shot directly at Mushatte, Scott, and Underwood, shooting Scott and Underwood in the head. That testimony was sufficient to support the jury's inference that Twitty acted with intent to kill Mushatte and the two shooting victims. There was ample evidence to sustain Twitty's convictions.

SENTENCING

The trial court did not abuse its discretion in enhancing Twitty's sentences based on aggravating circumstances and imposing consecutive forty-five year sentences for two of the attempted murder counts. The presumptive sentence for attempted murder is 30 years, and the sentence may be enhanced by up to 20 years when there are aggravating circumstances. Ind. Code § 35-50-2-4. Sentencing is within the sound discretion of the trial court and will be reversed only if there has been a manifest abuse of discretion. Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993). A trial court may enhance a presumptive sentence for a crime, order sentences to run consecutively, or both, because of aggravating circumstances. Edwards v. State, 518 N.E.2d 1137, 1140 (Ind. Ct. App. 1988), trans. denied. If a sentence is authorized by statute, we will not revise it unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender. Poulton v. State, 666 N.E.2d 390, 393 (Ind. 1996).

Twitty contends his consecutive sentences totaling 90 years were not authorized by statute because Ind. Code § 35-30-1-2 limits the length of certain consecutive sentences:

> *. . . except for murder and felony convictions for which a person receives an enhanced penalty because the felony resulted in serious bodily injury if the*

> *defendant knowingly and intentionally caused the serious bodily injury*[2], the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of felonies for which the person has been convicted.

Ind. Code § 35-30-1-2(c) (emphasis supplied).

Twitty notes that attempted murder is a separate crime from murder, and asserts, without argument or citation to authority, that "[a]ttempted murder by statute does not enhance the quality of the offense because of serious bodily injury." Appellant's Brief at 26. Thus, Twitty reasons, he cannot be sentenced to more than 50 years.[3] We disagree.

While murder and attempted murder are separate crimes, attempt is always an included offense of the crime attempted, Ind. Code § 35-41-1-16. The "attempt" statute under which Twitty was charged, Indiana Code section 35-41-5-1, does not, by itself, define the crime of attempted murder. Rather, it defines the crime only when read in conjunction with Indiana Code section 35-42-1-1 (murder). See Haggenjos v. State, 441 N.E.2d 430, 434 (Ind. 1982). Thus, in Haggenjos, our supreme court determined that a sentence for attempted murder was not suspendable even though Indiana Code section 35-50-2-2 included murder, but not attempted murder, in its list of nonsuspendable offenses. Id.

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[2]The legislature substituted the phrase "crimes of violence" for the phrase "murder and felony convictions for which a person receives an enhanced penalty because the felony resulted in serious bodily injury if the defendant knowingly and intentionally caused the serious bodily injury" effective with crimes committed after June 30, 1995.

[3]Fifty years was the presumptive sentence for murder, the next highest level of felony, at the time of the shooting. Ind. Code § 35-50-2-3.

Similarly, in Kee v. State, 438 N.E.2d 993, 994 (Ind. 1982), our supreme court rejected an argument that the defense of duress should be available to a defendant charged with attempted murder. Indiana Code section 35-41-3-8 specifically makes that defense unavailable to persons charged with an "offense against the person as defined in IC 35-42." Kee argued that since he was charged with attempted murder, which is defined not in article 42 but in article 41, the statutory exclusion of the defense could not be applied to him. The court noted that the attempt statute defines the crime of attempted murder only when read in conjunction with the murder statute in article 42; thus, attempted murder, as well as murder, is "an offense against the person as defined in IC 35-42." Id. See also United States v. Mitchell, 23 F.3d 1, 3 (1st Cir. 1994) (conspiracy to commit a "crime of violence" is itself a crime of violence for purposes of the federal Bail Reform Act, since the conspiracy increases the chance the crime will be committed beyond a mere possibility.)

We believe the rationales of Haggenjos, Kee, and Mitchell apply to Indiana Code section 35-50-1-2 (c), and hold that the statutory exclusion from the limitation on the length of consecutive sentences applies to attempted murder, as well as to murder. The trial court could properly sentence Twitty to consecutive 45 year terms.

Twitty also contends the trial judge's sentencing statement was inadequate to support the imposition of enhanced sentences because it merely recited the statutory factors for sentence enhancement based on aggravating circumstances, and did not include sufficient facts specific to Twitty and the crime of which he was accused. Twitty correctly notes that a trial court's sentencing statement must identify all the significant mitigating and aggravating circumstances; it must state the specific reason why each circumstance is considered to be

mitigating or aggravating; and it must evaluate and balance the mitigating circumstances against the aggravating circumstances. Henderson v. State, 489 N.E.2d 68, 71-72 (Ind. 1986). A statement of facts peculiar to the particular defendant must be included, and a mere recital of the statutory factors is not sufficient. Barker v. State, 508 N.E.2d 795, 798 (Ind. 1987).

The record does not support Twitty's premise that the court's sentencing statement was a "mere recital of the statutory factors." The record of the sentencing hearing indicates the judge had read and thoroughly considered Twitty's pre-sentence report;[4] she heard a lengthy statement by Twitty at his sentencing hearing, and she heard argument by Twitty's counsel. She also heard testimony by Garcia Scott, who was blinded by the gunshot, and heard argument about the extent of Underwood's injuries and the effect of the shootings on both victims and their families. She then concluded that aggravating factors were Twitty's history of criminal activity and the seriousness of the crime.[5] She found no mitigating factors.

Where, as here, the record indicates the trial judge engaged in the required evaluative

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[4] Twitty argues the trial judge improperly relied on the presentence report because it was not a "neutral document." Twitty speculates that the trial judge relied too heavily on unfavorable information in the report. However, he does not point to any specific information in the report that is inaccurate or which unfairly characterizes Twitty's background, nor does he provide us with any cogent argument supported with legal authority why the report itself was otherwise inadequate or why the judge failed to properly consider it. Thus, he has waived that issue. Ind. Appellate Rule 8.3(A)(7). Huff v. Langman, 646 N.E.2d 730, 732-33 (Ind. Ct. App. 1995).

[5] The trial judge could properly enhance Twitty's sentence based on "the seriousness of the crime" even though attempted murder is an inherently "serious" crime. While a material element of a crime may not also constitute an "aggravating circumstance," the particularized individual circumstances of the criminal act may be considered as an aggravator. Ector v. State, 639 N.E.2d 1014, 1015 (Ind. 1994). See Smith v. State, 655 N.E.2d 532, 540 (Ind. Ct. App. 1995), reh'g denied, trans. denied (fact that death resulted was proper aggravating circumstance for enhancement of sentence for conspiracy to commit murder, since there is no requirement that the object crime actually be committed to support a conspiracy conviction.)

processes, the purpose of the specificity requirement is satisfied, even if the judge does not sufficiently articulate the reasons for enhancing the sentence. Henderson, 489 N.E.2d at 72. The trial judge's sentencing statement was adequate to support the enhancement of Twitty's sentence.

Because there was sufficient evidence to support Twitty's convictions, and because the trial judge did not abuse her discretion in imposing enhanced and consecutive sentences, we affirm.

SHARPNACK, C.J., concurs.

SULLIVAN, J., concurs in result.