No. 129795

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. VICTOR HAYNES, Defendant-Appellee.	) Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-22-0296)) There on Appeal from the Circuit Court of Cook County, Illinois, No. 17 CR 00867)) The Honorable Michael J. Hood, Judge Presiding.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Defendant, Victor Haynes, shot the unarmed victim during a struggle on a "party bus." He was found guilty of attempted first degree murder following a Cook County bench trial and sentenced to the statutory minimum of 31 years in prison, which included a 25-year mandatory enhancement for personally discharging a firearm that caused great bodily harm. The appellate court affirmed defendant's conviction, but the court vacated his sentence and remanded for resentencing on the ground that trial counsel was ineffective for failing to seek a Class 1 sentence pursuant to 720 ILCS 5/8-4(c)(1)(E). The People now appeal from the appellate court's judgment. No issue is raised on the charging instrument.

ISSUE PRESENTED

Section 8-4(c)(1)(E) provides a Class 1 felony sentence (rather than a Class X sentence) for attempted first degree murder if the defendant demonstrates by a preponderance of the evidence that he or she (1) "was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another"; and (2) "had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death." 720 ILCS 5/8-4(c)(1)(E).

The issue presented is whether defense counsel was not ineffective for declining to seek a Class 1 felony sentence under this provision where (1) the

victim was not a willing participant in mutual combat and defendant's retaliation was out of all proportion to the provocation; and (2) had the victim died from his gunshot wound, his death would have been neither accidental nor the result of negligence.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 602. This Court allowed leave to appeal on November 29, 2023.

STATUTORY PROVISION INVOLVED

720 ILCS 5/8-4(c)(1)(E) provides:

(1) the sentence for attempt to commit first degree murder is the sentence for a Class X felony except that . . . .

> (E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony.

STATEMENT OF FACTS

Trial

Defendant was indicted on multiple counts of attempted murder and aggravated battery with a firearm, as well as multiple firearm possession charges, for shooting Jerome White and James Williams during a birthday celebration held on a party bus travelling around Chicago. C9-10.

The evidence at trial showed that on December 17, 2016, Virgetta White ("Precious") and her uncle, Jerome White ("Jerome"), rented a party bus to celebrate their birthdays. R155-56.[1] Joining them were 24 people, almost all of whom were close friends and family. R157, 158. Starting at 9:00 p.m., the bus made several stops to pick up guests, as well as alcohol (but no food). R157-60, 205.

Among those who joined Precious and Jerome on the bus were Precious's ex-boyfriend, JK, and James Staples, who was known as "Boo." R160, 162. They asked Precious if defendant could also join and, with Precious's consent, defendant got on the bus with Boo. R160, 162-63. Defendant was wearing black pants, a red shirt, and a jacket; Boo wore blue jeans and a puffy gold jacket. R161-62.

The bus stopped to pick up more liquor and more guests, then stopped at a gas station so Precious could get off the bus and throw up. R163-66. While Precious was off the bus, an altercation broke out between defendant and several other guests. R165. When Precious got back on the bus, she told defendant, "If it's going to be a problem, you can get off the bus." R167-68. JK then told Precious, "It's cool, I got this." *Id.*

Another hour of partying passed, then defendant and JK started arguing in the middle of the bus. R209, 221, 246, 251. Precious intervened

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[1] "C_," "R_," and "A_" refer to the common law record, report of proceedings, and appendix to this brief, respectively.

and said, "We not fit to do this," at which point defendant hit Precious in the jaw, grabbed Precious by the neck, and began choking her. R168, 170, 212, 250. Precious tried to hit defendant back, R171, and Jerome intervened and began struggling with defendant, R173, 251.

While Jerome was struggling with defendant, there was a gunshot, R173-74, 255, Jerome fell, and Precious realized that Jerome had been shot, R174, 197. Precious's cousin James Williams ("J-Lo"), R156-57, began "tussling" with defendant; no punches were thrown. R218. About two to three minutes after the first gunshot, there were two more gunshots, and J-Lo fell to the ground bleeding. R174-75, 197, 256.

Defendant and Boo climbed over and through the crowd and got off the bus. R177. Defendant held a black gun in his hand. R176. No one else was armed. R177-78. Police later saw defendant and Boo walking nearby. R445-47. The police followed defendant and Boo to a residential building where, after entering a first door from the street, the two could not get past a second door to gain access to the rest of the building. R452. Police handcuffed both men. R457.

Police and paramedics also arrived at the party bus where they removed Jerome and J-Lo. R178. They took Precious to the nearby residential building where they had found defendant and Boo and asked her what Boo was wearing. R179. She described Boo's distinctive clothing, and

they brought out Boo, who Precious identified. *Id.* Precious then described and identified defendant. *Id.*

A black handgun was recovered from under a bench in the foyer of the building where defendant was arrested. R451-52. Subsequent testing revealed that the two fired cartridges recovered from the party bus had been fired from the recovered gun. R610-21.

Jerome spent more than a week in the hospital and underwent multiple surgeries to treat his injuries; at the time of trial, a bullet remained lodged in his chest just beneath his heart. R260. J-Lo was still in the hospital, on life support and uncommunicative at the time of trial, more than four years later. R262.

Defendant did not testify or present evidence. R320. Defendant moved for a directed verdict, arguing that the gun fired accidentally; the court denied the motion. R670, 675, 722. In closing, defendant again argued that the gun fired accidentally and explained that because the firing was accidental, he had not raised self-defense, which requires intentional action. R341.

The trial court found defendant guilty of the aggravated battery and attempted first degree murder of Jerome and unlawful use of a weapon by a felon and not guilty of the offenses against J-Lo. R305, 309-12. The court also found that defendant knowingly discharged a firearm causing great bodily harm to Jerome. R311-12. Specifically, as to Jerome, the trial court

held that defendant had been the aggressor and that there was no evidence that anyone else was touching the gun when defendant shot Jerome. R309-10. In contrast, as to J-Lo, the court held that there had been a struggle for control of the gun before defendant shot J-Lo, so the court could not find beyond a reasonable doubt that defendant shot J-Lo as anything other than an accident. R308-09.

Defendant filed a motion for a new trial. C254. At the ensuing hearing, the trial court held that based on the location of Jerome's injuries, defendant shot to kill, rather than injure, Jerome. R532. It found that the nature of Jerome's wounds, as well as the circumstances surrounding the shooting, were evidence that defendant shot Jerome intentionally. R532. In sum, the court concluded that defendant intentionally shot Jerome in the chest following a fist fight, and that there had been no struggle for control of the gun. R550-51. The court explained:

> [D]efendant boarded the bus with a deadly weapon; a weapon he could not legally carry. He was involved in a fist fight with the victim [Jerome]. He was able to pull a deadly weapon, handgun somewhere — from somewhere secreted on his person and shoot him in the chest. He didn't shoot to maim or injure. He shot to kill. Based on the location of the gunshot wound, the location of the injuries is indicia of the intent. The nature and circumstances of the injury are indicia of intent. The evidence is that he voluntarily and willfully committed an act. His natural tendency was to destroy another's life with regard to [Jerome]. He then fled the scene, also indicia of guilt.

R531-32.

At sentencing, counsel argued for the minimum sentence of 31 years (the minimum 6 years for a Class X felony plus 25 years for personally discharging the firearm that caused Jerome's injuries). R565. In allocution, defendant alleged that his counsel had made errors and that he had been "unconscious" at the time of the shooting. R569. The trial court responded that defendant's claim that he was unconscious when the gun went off was "ridiculous," "not true," and "not based on any one scintilla of evidence." R573. The court sentenced defendant to 31 years in prison. R577-78; C233.

Appeal

On appeal, defendant argued that (1) the evidence was insufficient to prove he had the specific intent to kill Jerome, and (2) counsel was ineffective for not seeking a Class 1 sentence under section 8-4(c)(1)(E). A8-9. That provision provides a Class 1 felony sentence for attempted murder if the defendant demonstrates by a preponderance of the evidence that he or she (1) "was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another"; and (2) "had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death." 720 ILCS 5/8-4(c)(1)(E).

The appellate court affirmed defendant's attempted murder conviction, reasoning that "[t]he trial court found that this was a fist fight, until defendant pulled out a deadly weapon and fired at White," and that "the very

act of firing a gun at a person supports the conclusion that the person doing so acted with the intent to kill." A19.

The appellate court also held that counsel was ineffective for electing not to seek a Class 1 sentence under section 8-4(c)(1)(E). A29. On the first, provocation element, the court held that "mutual combat" constituted "serious provocation" for purposes of section 8-4(c)(1)(E). A23 (citing *People v. Lauderdale*, 2012 IL App (1st) 100939, and *People v. Harris*, 2013 IL App (1st) 110309). However, the court declined to follow *Lauderdale*'s holding that mutual combat did *not* constitute serious provocation where the defendant's response was out of all proportion to the provocation. A25. Specifically, the court held that because the Class 1 sentencing provision applies only to attempted murder, which requires a specific intent to kill the victim, "disproportionality has essentially already been decided" and therefore cannot be a bar to the sentencing reduction. A25.

The appellate court further held that the trial court's finding that the shooting was not an accident did not bar application of the Class 1 sentencing provision, even though section 8-4(c)(1)(E) applies only when, had the victim died, the death would have been accidental or negligent. A26-27. The court stated, "The only way that we can interpret the words of the provision to make sense, in light of an already proven intent to kill, is to find that, although the defendant intended to kill the victim, his acts were sufficiently

at the minimum, such that if the victim had actually died, the death could still be considered negligently or accidentally caused." A26.

Finally, the appellate court found that defendant was prejudiced by counsel's failure to seek a Class 1 sentence because "there was a reasonable probability that the trial court could have found, depending on the preponderance of the evidence presented by counsel, that defendant 'was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill.'" A28 (quoting 720 ILCS 5/8-4(c)(1)(E)). The court added that because "counsel had already argued both provocation and accident at trial, we find that counsel's performance at sentencing fell below an objective standard of reasonableness by not seeking the sentence reduction." A28. Accordingly, based on counsel's ineffectiveness in not seeking a Class 1 sentence, the court vacated defendant's sentence and remanded for resentencing, at which time counsel could ask for the Class 1 sentence. A29.

Justice Tailor dissented in part. He concurred in the portion of the court's opinion affirming defendant's conviction. A30. However, he would have held that counsel was not ineffective for electing not to pursue a Class 1 sentence because defendant was ineligible for a Class 1 sentence. A34. Justice Tailor emphasized that defendant "has failed to offer any argument on appeal as to negligence or accident as required by the second prong of section 8-4(c)(1)(E)." A31. And, he reasoned, counsel's performance was not

deficient because it "would be illogical for defense counsel to argue that [defendant] should be sentenced as a Class 1 offender because he was provoked, when this theory was clearly abandoned at trial." A33. Moreover, because the trial court had expressly found that defendant's actions towards Jerome were *not* accidental, "it would be equally illogical for defense counsel to argue that [defendant] should be sentenced as a Class 1 offender." A33.

STANDARDS OF REVIEW

Whether a defendant was denied the effective assistance of counsel is reviewed *de novo*. *People v. Johnson*, 2021 IL 126291, ¶ 52. The proper construction of section 8-4(c)(1)(E) presents a question of law, which this Court also reviews *de novo*. *In re Jarquan B.*, 2017 IL 121483, ¶ 21.

ARGUMENT

The appellate court erred in remanding for resentencing because defendant was not eligible for a Class 1 sentence under section 8-4(c)(1)(E), and thus defendant's attorney cannot have been ineffective in declining to argue for it. Section 8-4(c)(1)(E) is intended to parallel the mitigated offense of second degree murder in the attempted murder context. Accordingly, because defendant could not have mitigated his offense to second degree murder if Jerome had died, he similarly cannot receive a Class 1 sentence for attempted murder just because Jerome survived an intentional gunshot to the chest.

First, defendant could not establish provocation by way of mutual combat because his response was disproportionate to any provocation. The General Assembly intended that provocation in section 8-4(c)(1)(E) mean the same thing as it means in the second degree murder statute, including by requiring proportionality. Just as in second degree murder, provocation by way of mutual combat under section 8-4(c)(1)(E) does not exist where a defendant's response was out of all proportion to the provocation. Second, had Jerome died as a result of the gunshot wound to the chest, defendant would have caused the death intentionally, rather than accidentally or negligently. The trial court found that defendant fired the gun with the specific intent to kill Jerome, and the appellate court correctly affirmed that finding, which precludes a finding that Jerome's death could have been either accidental or the result of defendant's negligence. For these reasons, defendant can make neither showing required for a Class 1 sentence under section 8-4(c)(1)(E), and thus counsel cannot have been ineffective for not seeking a Class 1 sentence to which defendant was not entitled.

Counsel Was Not Ineffective for Not Seeking a Class 1 Sentence to Which Defendant Was Not Entitled.

Defendant's ineffective assistance claim is governed by *Strickland v. Washington*'s two-part test. 466 U.S. 668, 694 (1984). To show ineffective assistance of counsel, defendant must establish both that (1) counsel's performance fell below "an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *Id.*; *see also People v. Webb*, 2023 IL 128957, ¶ 21.

Here, counsel cannot have been ineffective for not seeking a Class 1 sentence because defendant cannot satisfy the requirements of section 8-4(c)(1)(E). *See Webb*, 2023 IL 128957, ¶ 22 ("An attorney will not be deemed deficient for failing to make an argument that has no basis in the law."). First, to establish deficient performance, a defendant must prove that counsel's performance, judged by an objective standard of competence under prevailing professional norms, was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Webb*, 2023 IL 128957, ¶ 22. Counsel's performance cannot have been deficient where he did not make a meritless argument. *See id.*

Similarly, there is no reasonable probability that defendant would have received a lesser sentence had counsel made the argument. With respect to *Strickland*'s prejudice prong, a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different is a 'probability sufficient to undermine confidence in the outcome.'" *Johnson*, 2021 IL 126291, ¶ 54 (quoting *Strickland*, 466 U.S. at 694). Counsel's choice not to seek a reduced sentence does not undermine confidence in the outcome of defendant's sentencing because defendant was not entitled to a reduced sentence.

In sum, because petitioner was not entitled to a Class 1 sentence, he cannot demonstrate deficient performance or prejudice. *See People v. Pingleton*, 2022 IL 127680, ¶ 60 ("A defendant's trial attorney cannot be considered ineffective for failing to raise or pursue what would have been a meritless motion or objection.").

A. Mutual Combat Does Not Satisfy the Provocation Prong Where Defendant's Response Was Out of All Proportion to the Provocation.

First, defendant was not entitled to a Class 1 sentence because he was not acting "under a sudden and intense passion resulting from serious provocation by the individual whom [he] endeavored to kill." *See* 720 ILCS 5/8-4(c)(1)(E). The first step in the Court's inquiry here is to interpret the meaning of the phrase "sudden and intense passion resulting from serious provocation" in the context of section 8-4(c)(1)(E). *See People v. Bradford*, 2016 IL 118674, ¶ 14 (where parties disagree about meaning of statute, Court must first construe statutory language before determining whether element has been proven). And, the most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning. *People v. Clark*, 2019 IL 122891, ¶ 20.

Although this Court has not considered the meaning of "sudden and intense passion resulting from serious provocation" in section 8-4(c)(1)(E), the Court has interpreted the nearly identical statutory language in section 720 ILCS 5/9-2(a)(1), which mitigates first degree murder to second degree murder in certain circumstances. *See* 720 ILCS 5/9-2(a)(1) (first degree

murder is mitigated to second degree murder if "at the time of the killing [defendant] is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill"). Given the nearly identical statutory language, it is appropriate to look to second degree murder cases that have addressed the meaning of serious provocation. *See Clark*, 2019 IL 122891, ¶ 20 (this Court construes "words and phrases in light of other relevant statutory provisions and not in isolation"); *see also People v. Smith*, 236 Ill. 2d 162, 169 (2010) (courts presume that, "when the legislature uses a term that has a settled legal meaning, the legislature intended it to have that settled meaning"); *People v. Bailey*, 232 Ill. 2d 285, 290 (2009) ("The law uses familiar legal expressions in their familiar legal sense."); *People v. McCarty*, 223 Ill. 2d 109, 133 (2006) ("Under the doctrine of *in pari materia*, two statutes dealing with the same subject will be considered with reference to one another to give them harmonious effect.").

This Court has recognized four types of serious provocation that can mitigate first degree murder to second degree murder: "substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse." *People v. Chevalier*, 131 Ill. 2d 66, 71 (1989) (cleaned up). The only type of serious provocation relevant here is mutual combat,[2]

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[2] The appellate court suggests in a single reference, without analysis, that "substantial physical injury or assault" could also be relevant here, A28, but

which this Court has defined as "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *People v. Austin*, 133 Ill. 2d 118, 125 (1989). Moreover, the Court has explained, "the alleged provocation on the part of the victim must cause the same passionate state of mind in an ordinary person under the same circumstances," and "the provocation must be proportionate to the manner in which the accused retaliated." *Id.* at 126-27. Thus, a defendant cannot argue provocation by way of mutual combat when he "attacks a victim with violence out of all proportion to the provocation." *Id.*

Indeed, the facts of *Austin* make it particularly instructive here. There, the defendant boarded a Chicago Transit Authority bus and argued with the bus driver over the fare. *Id.* at 122-23. Eventually, the fight turned physical and, after the defendant and driver exchanged blows for about 30 to 40 seconds, the defendant drew a gun and fired it into the floor of the bus. *Id.* The driver was able to force the defendant off the bus, where the defendant shot and killed the driver. *Id.* At trial, the defendant testified that she did not intend to shoot the bus driver. *Id.* This Court held that the evidence did

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this Court has held that a victim hitting a defendant does not constitute substantial physical injury or assault where, as here, the defendant suffered no injury from the victim. *See People v. Agee*, 2023 IL 128413, ¶ 82; R180-81 (Precious saw no injuries on defendant as he fled the bus). Accordingly, only mutual combat might provide a basis for a Class 1 sentence in this case.

not establish mutual combat because the bus driver did not enter the fight willingly and the fight was not on equal terms. *Id.* at 125. The Court explained:

> The record in this case indicates that defendant shot and killed an unarmed victim who provoked defendant by speaking gruffly to her and striking her on the hand with a transfer punch. At the most, the victim provoked defendant by engaging in a "fairly even" fistfight for 30 to 40 seconds and forcing her off the bus. Defendant testified that she was afraid and wanted to cease the altercation with the bus driver. There is nothing in the record, however, to objectively indicate that defendant had reason to fear for her life. Shooting the driver was an act completely out of proportion to the provocation. Therefore, mutual combat cannot apply.

Id. at 127.

As in *Austin*, defendant cannot show mutual combat. First, defendant cannot establish mutual combat because any provocation was not proportionate to the retaliation. Indeed, defendant admitted as much to the appellate court. A24 (defendant conceded that his response was out of proportion to Jerome's actions). And the evidence presented at trial supports defendant's concession: after defendant punched and choked Precious, Jerome and defendant struggled, and then defendant pulled out a gun and shot Jerome in the chest. No one else was armed. Defendant's decision to respond to a fistfight by pulling out a gun and shooting Jerome in the chest at close range was "completely out of proportion," *Austin*, 133 Ill. 2d at 127, to any provocation. Second, Jerome was drawn into the struggle by defendant's actions: namely, punching and choking Precious. *See id.* 125 (no serious

provocation where victim did not enter fight willingly, but rather in response to defendant's actions). In sum, the way defendant responded to an otherwise unarmed struggle was out of all proportion to his fist fight with Jerome and belies any argument that defendant acted out of serious and intense passion caused by serious provocation. Put differently, there was no mutual combat between defendant and Jerome when defendant brought a gun to a fistfight and shot Jerome in the chest after Jerome stepped in to stop defendant from choking Precious.

For its part, the appellate court erred in ignoring the disproportionality of defendant's response based on its erroneous view that the General Assembly intended "serious provocation" to mean something different in section 8-4(c)(1)(E) than it means in the second degree murder statute. *See* A25. The appellate majority's reasoning is not only inconsistent with established principles of statutory construction requiring a presumption that when the legislature uses the same language in two statutes dealing with the same subject, it intended that the language have the same meaning, *see supra* p. 14 (quoting *Smith*, 236 Ill. 2d at 169; *Bailey*, 232 Ill. 2d at 290; and *McCarty*, 223 Ill. 2d at 133), but it is also belied by the legislative history of section 8-4(c)(1)(E).

Section 8-4(c)(1)(E) was passed at the recommendation of the CLEAR Initiative, which spent two years "clarifying, simplifying and streamlining the Illinois Criminal Code." Judge Michael P. Toomin, *Second Degree Murder*

and Attempted Murder: CLEAR's Efforts to Maneuver the Slippery Slope, 41 J. Marshall L. Rev. 659, 659 (2008). Judge Toomin, one of the commissioners of the CLEAR Initiative, explained that the commission's mandate "encompassed what authors and legal commentators have widely perceived as the disparate treatment of offenders resulting from judicial interpretation of our inchoate and substantive homicide offenses." *Id.* at 692. Relevant here, under the previous law, if a defendant was acting under serious provocation, he faced a greater penalty if his intended victim lived. *Id.* That is, attempted first degree murder was a Class X felony carrying a sentence of 6 to 30 years in prison, while second degree murder was a Class 1 felony carrying a potential sentence of 4 to 20 years, or even probation. *Id.* at 692-93. Thus, if the defendant was acting under serious provocation by the victim and the victim survived, the defendant convicted of attempted murder faced a greater sentence than the defendant convicted of second degree murder, even though the victim was killed.

This disparity stemmed from this Court's holding that the crime of attempted second degree murder does not exist in Illinois law. *See People v. Lopez*, 166 Ill. 2d 441, 451 (1995). Initially, the CLEAR initiative proposed amending section 8-4 to clarify the existence of attempted second degree murder. Toomin, 41 J. Marshall L. Rev. at 698. Next followed a proposal to expressly codify the crime of attempt second degree murder, punishable as a Class 1 felony. *Id.* at 698-99. Neither proposal garnered sufficient support,

so "the Commission focused on a somewhat different approach of . . . allowing for mitigation in sentencing upon a conviction for the subject offense." *Id.* at 699. That is, under the approach ultimately adopted, while the offense of attempted second degree murder would remain unrecognized, at sentencing, "defendants would have the opportunity to provide mitigating factors *consistent with the rationale of second degree murder*." *Id.* (emphasis added). Accordingly, by following the Commission's recommendation and enacting section 8-4(c)(1)(E), the General Assembly demonstrate its intent that "serious provocation" carry the same meaning it has in the second degree murder statute, where provocation based on mutual combat is not available where defendant's response was disproportionate to any provocation.

The appellate court's conclusion otherwise rested on faulty reasoning. The appellate majority stated that "once a party is found guilty of attempt — and, thus, of having the specific intent to kill — disproportionality has essentially already been decided." A25; *see also* A27 ("if defendants whose reactions were out of proportion were barred from this section, then no defendant would be eligible for the reduction because the State would have already proven beyond a reasonable doubt that they had a specific intent to kill"). This is incorrect. Specific intent to kill is distinct from disproportionality. As just one example, one can intend to kill someone with a knife in mutual combat, but still act proportionately if their opponent was similarly armed.

Thus, the appellate court erred in concluding that "serious provocation" in section 8-4(c)(1)(E) carries a different meaning that it does in the second degree murder statute. And when correctly interpreted, section 8-4(c)(1)(E) was not applicable to defendant's conduct because the evidence could not support a finding that his decision to pull out a gun and shoot Jerome in the chest at close range was proportionate to Jerome's actions when engaging in a fist fight with defendant. In other words, had Jerome died, defendant would not have been able to mitigate first degree murder to second degree murder. And, similarly, section 5/8-4(c)(1)(E) was not applicable to defendant's conduct where Jerome survived. Accordingly, because defendant's conduct rendered him ineligible for a Class 1 sentence, counsel was not deficient in not arguing for its application, and defendant was not prejudiced.

B. Had Jerome White Died, Defendant Would Have Caused the Death Intentionally, Rather than Accidentally or Negligently.

Alternately, defendant was ineligible for a Class 1 sentence under section 8-4(c)(1)(E) because had Jerome had died after defendant shot him in the chest at close range, defendant would have caused the death intentionally, and not through accident or negligence.

Just like 720 ILCS 5/9-2(a)(1), section 8-4(c)(1)(E) requires two showings. To be sentenced as a Class 1 offender, defendant would have to show by a preponderance of the evidence not only that he was acting under a sudden and intense passion, resulting from serious provocation, *but also* that had

Jerome died, his death would have been negligent or accidental. 720 ILCS 5/8-4(c)(1)(E); *see also* 720 ILCS 5/9-2(a)(1) (mitigating first degree murder to second degree murder where "at the time of the killing [the defendant] is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but [the defendant] negligently or accidentally causes the death of the individual killed"). It has been well established for more than a century that "[t]he conjunction 'and' signifies and expresses the relation of addition." *City of La Salle v. Kostka*, 190 Ill. 130, 137 (1901); *see also People v. A Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon Cnty., Illinois*, 217 Ill. 2d 481, 500-01 (2005) ("As a general rule, the use of the conjunctive, as in the word 'and,' indicates that the legislature intended for *all* of the listed requirements to be met.") (cleaned up).

Defendant has no argument on this record that Jerome's death would have been the result of accident or negligence. The word "accident" means an "unintended and unforeseen injurious occurrence." Black's Law Dictionary 18-19 (11th Edition 2019); *see also* Webster's Third New International Dictionary 11 (1993) (defining "accident" as "an event or condition occurring by chance," "a lack of intention or necessity," and "an unforeseen unplanned event"). The word "negligence" means "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar

situation." Black's Law Dictionary 1247 (11th Edition 2019). Negligence thus "denotes culpable carelessness." *Id.*

Had Jerome died from defendant's act of shooting him in the chest, it would not have been an "unintended" occurrence or the result of mere "carelessness." As the trial court noted when delivering the verdict, defendant did not shoot merely to scare or injure Jerome. R531-32. Defendant shot to kill; he intentionally shot Jerome in the chest at close range. *Id.* So, although the appellate court is correct that defendant fired a single shot at Jerome, A_, as the trial court noted, "the location of the injuries is indicia of [defendant's] intent," R531-32. In sum, as the appellate court held when rejecting defendant's sufficiency claim, A17-20, the evidence established that defendant willfully and intentionally performed an act designed to kill Jerome. Had Jerome died from that act, it would not have been the result of accident or negligence.

The appellate majority nevertheless found "a reasonable possibility" that defendant could satisfy this element based on its view that the trial court's finding that defendant acted with the specific intent to kill made section 8-4(c)(1)(E)'s accident or negligence standard incompatible with attempt murder. A27 (noting that "[w]e are not the first court to struggle with the accident or negligence requirement," and quoting language from a prior case stating "that a specific intent to kill is 'fundamentally incompatible with the statutory language providing that if the defendant's victim died, the

death would have been deemed negligent or accidental.'" A27 (quoting *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 23). But this overlooks cases where in the course of mutual combat, a defendant accidentally or negligently kills a third person. *See, e.g.*, *Taylor*, 2016 IL App (1st) 141251, ¶ 22 (language of section 8-4(c)(1)(E) encompasses "the 'transferred intent' scenario where the defendant specifically intends to kill his provoker, but instead takes a substantial step towards killing another, whose death, had it occurred, would have been deemed negligent or accidental"); *cf. People v. Epps*, 197 Ill. App. 3d 376, 384 (5th Dist. 1990) ("When one in a sudden intense passion endeavors to kill the provocateur, but kills another, the killing is second degree murder only if the killing was negligently or accidentally caused.").

It also overlooks cases where a defendant acting under a sudden and intense passion takes a substantial step with the specific intent to kill the victim, but the step was sufficiently preliminary that if that step *had* killed the victim, it would have been by accident or negligence. In such cases, the defendant is still guilty of attempted murder, but subject to lesser sentencing exposure (specifically, a Class 1 sentence). *See* 720 ILCS 5/8-4(a) ("A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense"). It is surprising that the appellate court overlooked such cases because in its own effort to resolve this perceived incompatibility, the majority rewrote the statute, transforming the

requirement that "had the individual the defendant endeavored to kill died, the defendant *would* have negligently or accidentally caused that death," 720 ILCS 5/8-4(c)(1)(E) (emphasis added), to a requirement that "although the defendant intended to kill the victim, his acts were sufficiently at the minimum, such that if the victim had actually died, the death *could* still be considered negligently or accidently caused." A26 (emphasis added). While the majority lowered the statutory burden from "would" to "could" because it feared that "there would be no circumstance where a sentence reduction based on accident could ever take effect," A26, its own articulation acknowledges that cases exist where a defendant's substantial, but preliminary, acts are sufficient to constitute attempt murder, but could make him eligible for a Class 1 sentence if he was acting in response to serious provocation.

The appellate majority's error lay in concluding that defendant's decision to intentionally shoot Jerome in the chest at close range was just such a substantial but preliminary step. A26. Had Jerome died from defendant's act, defendant would have caused that death intentionally, not accidentally or negligently. But there exist (counterfactual) scenarios in which defendant could have taken a preliminary step toward killing Jerome and where, had Jerome died, the death would have been accidental or negligent. For example, if defendant's only act taken with the specific intent of killing Jerome had been to draw his gun, after which he dropped the gun

and it fired, hitting and killing Jerome, defendant would have caused Jerome's death accidentally or negligently. Although drawing his gun with the specific intent of killing Jerome — and being thwarted by a bad grip rather than bad aim — would still make defendant guilty of attempt murder, defendant could seek a Class 1 sentence on the ground that the death was accidental or negligent (assuming, *arguendo*, that he could show that he was responding to serious provocation). *See People v. Smith*, 148 Ill. 2d 454, 460 (1992) (substantial step towards commission of crime is taken when defendant has all materials required to complete crime and is present at or near location of intended criminal act); *People v. Terrell*, 99 Ill. 2d 427, 434 (1984) (same).

In sum, defendant was not eligible for Class 1 sentencing under section 8-4(c)(1)(E) both because his response to the fist fight — shooting Jerome in the chest at close range — was out of all proportion to any provocation, and because had Jerome died, defendant would have caused his death intentionally, as opposed to accidentally or negligently. Accordingly, counsel cannot have been ineffective for not seeking such a sentencing reduction.

CONCLUSION

This Court should reverse the appellate court's judgment and affirm defendant's sentence.

March 13, 2024

Respectfully submitted,

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Attorney General of Illinois

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty-six pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

APPENDIX

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FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff/Petitioner

Reviewing Court No: 1-22-0296
Circuit Court/Agency No: 2017CR0086701
Trial Judge/Hearing Officer: MICHAEL J HOOD

v.

VICTOR HAYNES
Defendant/Respondent

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff/Petitioner

v.

VICTOR HAYNES
Defendant/Respondent

Reviewing Court No: 1-22-0296
Circuit Court/Agency No: 2017CR0086701
Trial Judge/Hearing Officer: MICHAEL J HOOD

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS

v.

VICTOR HAYNES
Defendant

Case Number 17CR0086701
Date of Birth 03/10/1985
Date of Arrest 12/18/2016
IR Number 1249560 SID Number 045522710

ORDER OF COMMITMENT AND SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Years	Months	Class	Consecutive	Concurrent
002	720 - 5/8-4(A)(720-5	ATTEMPT MURDER/INTENT TO KILL	31		X		
004	720 - 5/8-4(A)(720-5	ATTEMPT MURDER/INTENT TO KILL	31		X		
006	720 - 5/8-4(A)(720-5	ATTEMPT MURDER/INTENT TO KILL	31		X		
012	720-5/12-3.05( )(1)	AGG BATTERY/DISCHARGE FIREARM	6		X		
013	720-5/24-1.1(a)	FELON POSS/USE FIREARM PRIOR	6		2		

On Count _____ defendant having been convicted of a class _____ offense is sentenced as a class _ offender pursuant to 730 ILCS 5/5-4.5-95(b).

On Count 2,4,6, 12,13 defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of 1975 days, as of the date of this order. Defendant is ordered to serve 3 years Mandatory Supervised Release.

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case numbers(s) _____

AND: consecutive to the sentence imposed under case number(s) _____

IT IS FURTHER ORDERED THAT ALL COUNTS MERGED; SENTENCE IS 6 YR IDOC PLUS 25 YEARS MANDATORY SENTENCE ENHANCEMENT FOR A TOTAL OF 31 YEARS ON COUNTS 02,4,&6-- TO BE SERVED @ 85%; 3 YR MSR;

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

Dated March 1, 2022
Certified by: _____
Deputy Clerk I. Garcia

Judge Hood, Michael J 2111
Judge's No.

IRIS Y MARTINEZ, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

TO THE APPELLATE COURT OF ILLINOIS
IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

Case #17CR0086701

PEOPLE OF THE STATE OF ILLINOIS)
) No. 17CR807
-vs-) Trial Judge: Michael Hood
) Attorney: ~~17CR867~~ - Michael A. Johns

Victor Hayne

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:
APPELLANT'S NAME:
IR# 1249560 D.O.B. 3/10/85
APPELLANT'S ADDRESS: ILLINOIS DEPARTMENT OF CORRECTIONS
APPELLANT'S ATTORNEY: State Appellate Defender
ADDRESS: 203 N. LaSalle, 24th Floor, Chicago, IL 60601
OFFENSE: Att Murder
JUDGEMENT: GUILTY
DATE: 3/1/22
SENTENCE: 31 YEARS ILLINOIS DEPARTMENT OF CORRECTIONS

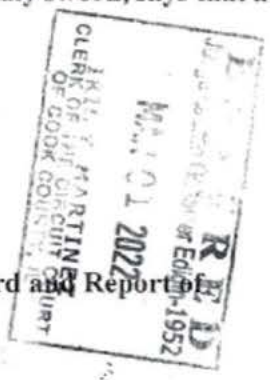
credit for 1,975. days

APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS
COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the appellant; order the Clerk to prepare the Record on Appeal and the Appoint Counsel on Appeal. Appellant, being duly sworn, says that at the time of his conviction he was and is unable to pay for the Record or appeal lawyer.

APPELLANT'S ATTORNEY



ORDER

IT IS ORDERED the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished appellant without cost within 45 days of receipt of this Order.

Dates to be transcribed;

PRE-TRIAL MOTION DATES(S)
~~JURY TRIAL DATE~~(S)
BENCH TRIAL DATE(S) - 7/27/21, 9/2/21, 11/26/21 OTHER: _____
SENTENCING DATE(S) - 3/1/22 12/7/21, 1/[illegible]
DATE: 3/1/22

ENTER: _____
JUDGE

2023 IL App (1st) 220296
No. 1-22-0296
Opinion filed June 2, 2023

SIXTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. VICTOR HAYNES, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 17 CR 00867 The Honorable Michael J. Hood, Judge, presiding.

JUSTICE ODEN JOHNSON delivered the judgment of the court, with opinion.
Justice C.A. Walker concurred in the judgment and opinion.
Justice Tailor concurred in part and dissented in part, with opinion.

OPINION

¶ 1 Defendant Victor Haynes was convicted after a bench trial of the attempted first degree murder of Jerome White (hereinafter, White). The trial court sentenced defendant to the minimum sentence, which was 31 years with the Illinois Department of Corrections. The 31-year sentence included a 25-year mandatory sentencing enhancement for personally discharging a firearm. See 720 ILCS 5/8-4(c)(1)(D) (West 2016) (sentencing enhancement).

¶ 2 On this direct appeal, defendant first challenges his conviction, by claiming that the State failed to prove beyond a reasonable doubt that he had an intent to kill. Second,

defendant challenges his sentence, by claiming that his counsel was ineffective for failing to seek a sentence reduction pursuant to section 8-4(c)(1)(E) of the Criminal Code of 2012 (Code) (720 ILCS 5/8-4(c)(1)(E) (West 2016)). This subsection permits a sentence reduction if the defendant proves by a preponderance of the evidence at sentencing that he "was acting under a sudden and intense passion resulting from serious provocation" *and*, that, if "the individual the defendant endeavored to kill [had] died, the defendant would have negligently or accidentally caused that death." 720 ILCS 5/8-4(c)(1)(E) (West 2016). Third, defendant seeks a remand for a *Krankel* hearing (*People v. Krankel*, 102 Ill.2d 181 (1984)), on the ground that the trial court failed to inquire regarding his allegation at sentencing that his counsel had failed to pursue a possible line of investigation. For the following reasons, we affirm his conviction but vacate his sentence and remand for resentencing.

¶ 3 I. BACKGROUND

¶ 4 The relevant events occurred on a party bus rented to celebrate the birthday of Virgetta White (hereinafter, Virgetta). The bus was rented by Virgetta's uncle, Jerome White, and by Virgetta's cousin, Nathal Williams (hereinafter, Williams). At trial, defendant was charged with the attempted murder of both men. While the trial court found defendant guilty of the attempted murder of White, the court acquitted defendant of the attempted murder of Williams. The witnesses at trial included event witnesses White, Virgetta, and Crystal Massey, who were all on the bus.

¶ 5 The evidence at trial established that the bus departed on December 17, 2016, from West 13th Street and South Karlov Avenue at 8 p.m. with Virgetta[1] and approximately two

[1]Since Virgetta and her uncle Jerome share the same last name, we will refer to Jerome by his last name and Virgetta by her first name.

dozen of her friends and family members. They brought alcohol on the bus, but no food. After driving to a nearby train station to pick up a cousin, they drove back to 13th Street and Karlov Avenue, where defendant and James Staples (hereinafter Staples) boarded the bus. Virgetta did not know defendant but JK, whom Virgetta had previously dated, and Staples, JK's cousin, asked if defendant could come. Virgetta said yes.

¶ 6 At some point in the evening, JK and defendant began arguing on the bus. Virgetta got in between them, and Virgetta and defendant began physically fighting. After hearing that Virgetta had been punched, White ran from the front of the bus to the back, moved Virgetta out of the way, and punched defendant in the face. White and defendant began fighting, with White on top of defendant. White smelled gunpowder, stood up, realized he had been shot, and then fell down with blood on his shirt. White testified that he did not bring a gun on the bus. After White fell, Williams began fighting with defendant. White testified that, as Williams and defendant fought, White observed that Williams and defendant were fighting over something black in defendant's hand. Two more shots were fired, and Williams fell down. As defendant climbed over people on the bus to escape, Virgetta saw a black gun in his hand. Crystal Massey, a friend of Virgetta and a cousin of Williams, also observed a black gun in defendant's hand. Both defendant and Stapes ran off the bus.

¶ 7 After receiving a report of shots fired and a description of the offenders, two officers on patrol observed two men matching the offenders' description and followed them. At approximately 2 a.m. on December 18, 2016, Officer Gilberto Nieto and his partner followed defendant and Staples to the foyer of a residential building on Lake Shore Drive, where the officers recovered a small black gun from under a bench in the foyer. Defendant had a gunshot wound to his left hand.

¶ 8 A firearms expert, Mark Pomerance, testified that two fired cartridge cases recovered from the bus were fired by the gun recovered from the foyer, but he was unable to determine if a live round found on the bus had also been ejected from the same gun. Pomerance testified that if one person was gripping the gun in a firing position, another person could hit the gun's slide during a struggle and discharge the gun. The gun was a semiautomatic pistol, with a slide on top. At the time that the gun was recovered, it contained two more bullets.

¶ 9 As a result of the shooting, White had several surgeries. On the date of trial, he still had a bullet lodged under his heart. Williams, the other victim, remained in a hospital bed on life support, in a vegetative state, and unable to communicate.

¶ 10 During closing, the State argued to the court that "defendant was the initial aggressor here." Defense counsel responded: "It's not self-defense, Judge." Counsel argued that the shooting was not in self-defense but rather an accident that occurred during a struggle:

> "Now, I think—I don't know if I'm going to shorten [the State's rebuttal] closing or not—but I received some case law yesterday, which I reviewed, all having to do with self-defense. And I listened to [the State's] argument here, and they talked about self-defense. It's not self-defense, Judge.
>
> And they talk about initial aggressor. And I'm going to put this aside. *** [I]n relation to [Virgetta] okay, where he may or may not be the initial aggressor, okay, and had he shot [Virgetta]—[but] he's not charged with anything against [Virgetta]. *** So now when [White] comes charging across the bus *** [defendant] is no longer the aggressor. Okay? But let's put that aside because I'm not even going to argue self-defense.

> And the reason being, Judge, self-defense, the theory of self-defense is you do it, you take this action not accidentally, not negligently, not recklessly, you take these actions purposefully. There's a purpose in your mind. The purpose is to defend yourself against imminent death or great bodily harm. You're defending yourself against imminent death or great bodily harm. And though [defendant] may have thought at that moment by [White] charging at him, [defendant] doesn't at that point, at any point—no witness ever testifies that [defendant] aims, points, raises in any way, shape, or form that gun in the direction of anybody."

Defense counsel argued that defendant and White, and subsequently Williams, were "tussling" over the gun when the gun fired. Counsel argued that this "tussling" was inconsistent with defendant's cocking and shooting a gun but was consistent with somebody touching the slide and thereby causing a bullet to discharge.

¶ 11 At the end of the bench trial, the trial court found defendant not guilty of the charges related to Williams. The court found, based on White's testimony, that Williams and defendant were struggling over the gun when it went off and struck Williams. As a result, the court stated that it could not find defendant guilty beyond a reasonable doubt of the charges related to Williams. However, it found defendant guilty of the attempted murder of White, the aggravated battery of White, and unlawful use of a weapon by a felon. The other charges later merged into the attempted murder conviction.

¶ 12 Prior to sentencing, the trial court stated that it wanted to make "an additional record on the case" in order to "clarify" its findings. The trial court stated:

> "With regard to Jerome White, I made a finding that the defendant knowingly discharged a firearm causing injury to Jerome White. I also found beyond a reasonable

doubt his intent was to kill Jerome White. To that, the Court looks to the nature and circumstances of the event. I don't know if I was clear on the record, so I'll state it now ***.

The defendant boarded the bus with a deadly weapon; a weapon he could not legally carry. He was involved in a fist fight with the victim White. He was able to pull a deadly weapon, handgun somewhere—from somewhere secreted on his person and shoot him in the chest. He didn't shoot to maim or injure. He shot to kill. Based on the location of the gunshot wound, the location of the injuries is indicia of the intent. The nature and circumstances of the injury are indicia of intent. The evidence is that he voluntarily and willfully committed an act. His natural tendency was to destroy another's life with regard to Mr. Jerome White. He then fled the scene, also indicia of guilt."

¶ 13 Defense counsel asked the court to reconsider its findings. In making this argument, counsel discussed intent:

"I indicated [in defendant's answer] that I may or may not assert the defense of self-defense but did not argue it. And the reason I didn't argue it is because in order for it to be *** self-defense *** it has to be an act that he's taking for a purpose ***. When it's an accident, it's not self-defense."

Counsel argued that "the court has to find the specific intent and the nature of the injuries in and of themselves aren't sufficient to show the intent" in the case at bar.

¶ 14 In response, the trial court further found:

"With regard to Jerome White, this was not an accident. Now, I based my finding on a totality of the circumstances; certainly location of the wound, gravity of the wound, all of those factors I considered. ***

> There was no tussle over—there's no testimony that there was a struggle over a gun with regard to Jerome White. A struggle over the gun involved Nathall Williams and [defendant], that's what the testimony of Jerome White, one of the most compelling witnesses I have ever seen, that was the testimony. And that's exactly why—and you're right on this, [counsel], and you did a good job pointing it out. That's exactly why he was not guilty as to the Nathal Williams [charges] ***
>
> But there was—in the case of Jerome White, the man goes back to the back of the bus. There's no struggle over a gun, there's no evidence that there's a struggle over a gun, there's no accident. It's a fist fight and your client shoots him in the chest."

The trial court denied defendant's posttrial motion for a new trial and proceeded to sentencing.

¶ 15 The parties agreed that the minimum was 31 years and that defendant was required to serve 85 percent of his sentence.[2] The trial court then gave defendant the opportunity to make a statement, which defendant did. One of the issues on appeal is whether the trial court should have made further inquiry into assertions that defendant made at sentencing about his counsel, so we provide his statement in detail below.

> "DEFENDANT: Your Honor, I feel through this trial I got an unfair trial. *** Due to certain issues I would like to bring to your attention. One was, every witness that got on the stand they said something different than what they said in the police station. They told me they did not say what they said in [*sic*] the police, and I feel that they truly changed their story to make their story sound way more believable.

[2]Eighty-five percent of 31 is 26.35. Defendant was 32 years old on the date of the offense and turned 37 the week following sentencing.

Second, it was the State before evidence—it got pictures of the party bus where I was knocked unconscious and the pictures are proved I was unconscious because there's a big puddle of my blood. And I know when they take DNA of each blood, they know who blood is whose. So this blood on the rear of the party bus on the back seat where I was proved that it was me. For me to be there that long, that lets you know I was there unconscious for a long period of time because when you see when I was in a hotel lobby it was just streaks of blood but that right there is a big puddle of my blood. And for there to be that much of my blood that would prove to you that I was knocked unconscious.

Another issue was, I wind up being locked up with Crissy Massey's fiancé, and he came and post to me the true story of what happened on the party bus. And I asked him, hey, how do you know that? He said Crissy, my fiancé. His name is Ronald Williams. So I'm like, she said all of that on the phone, and he said, yes. I brought it to my lawyer's attention. This was the first day of trial when I came back and he was on the phone when he told everything. He told her how they was on the party bus jumping on me. She also stated that on the recording one of the phones, that the State told her if she don't—if she don't testify, she could lose her job and her Section 8 [housing]. She also said she stated that she told the State she didn't—if they put her on the stand, she was going to regret it[. T]hat's why she didn't get on the stand the first day. And she's also going around she say she dislike when her family comes around because every time they comes around they start stuff. She also stated to him that the boy [defendant] was not doing nothing; my cousin was jumping on him for no reason. So, I told my attorney that I would like to bring issue to you even try to get the phone records; like I know

exact time it was and exact date and the phone record it would have proved he could have cross-examined her on it but he did nothing. So, I feel like that phone record—would have proved to you that I was innocent. Like, that phone record was everything, and it's like a lot of issues. It just like got back in, like all them issues that could help me be home with my family today, and I am truly innocent. I truly so sorry for what happened on the party bas. *I was wrong for having a gun on the party bus,* but my intention was not to hurt nobody, not to kill nobody but the gun went off when I was unconscious. (Emphasis added.)

THE COURT: Did you just say the gun went off when you were unconscious?

DEFENDANT: Yes.

THE COURT: Okay.

DEFENDANT: I was unconscious. And like I say, that picture will prove that I was unconscious for it to be that much of my blood, and [Staples]' statement, the guy I was with, he's the one who woke me up. Like I wanted to get on the stand, but I listened to my attorney; he told me don't do it. I'm like I want to tell my side of the story; I want to defend myself. And I figured all that would of helped me come home.

And on top of that when I was Grand Jury indicted, I was Grand Jury indicted on aggravated battery unlawful use of a weapon, great bodily harm; I was never charged with attempt murder.

THE COURT: You're wrong about that.

DEFENDANT: If you look it up, Google me right now and look it up, it's going to pop up aggravated battery unlawful use of a weapon.

THE COURT: Okay. I have the indictment in front of me. I actually asked for the front page but go ahead.

DEFENDANT: That's all the issue I want to bring to Your Honor. I truly am sorry for what happened to [White and Williams], like, I pray for them every day. I don't want nothing to happen to them. Like, I truly am sorry for their pain and like I'm sorry for bringing a gun on the party bus. I would've had a better outcome is my trial. That's all I have to say."

¶ 16 The trial judge responded that defendant's counsel was "one of the best lawyers" he had "ever known with regard to defending criminal cases." The court found defendant's statement that defendant was "unconscious and the gun went off" to be "ridiculous." The State then requested a conference with both defense counsel and the court, and they went off the record. Back on the record, the court stated that "[w]e broke because based on what the defendant said, there was a question whether we should move forward. Move forward we will." The court found: "You weren't unconscious. I've never heard anything so ridiculous to sit there and throw your lawyer under the bus." After stating that it would not hold these remarks against defendant, the trial court sentenced defendant to the minimum of 31 years.

¶ 17 On March 1, 2022, which was the same day as the sentencing, defendant filed a notice of appeal, and this timely appeal followed.

¶ 18 II. ANALYSIS

¶ 19 A. Conviction

¶ 20 Defendant's first claim regarding sufficiency of the evidence challenges his conviction by arguing that the State failed to prove that he had a specific intent to kill. Defendant argues that the record contains no evidence that defendant threatened to kill White and the record

shows that there were several bullets still remaining in the gun. In other words, if he had wanted to kill White, he could have fired more shots.

¶ 21 When a defendant challenges the sufficiency of the evidence at trial, the 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. *People v. Aljohani*, 2022 IL 127037, ¶ 66. It is the factfinder's responsibility to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences. *Aljohani*, 2022 IL 127037, ¶ 66. This standard applies whether the evidence is direct or circumstantial, and circumstantial evidence is sufficient to sustain a conviction. *Aljohani*, 2022 IL 127037, ¶ 66.

¶ 22 When reviewing a sufficiency challenge, we will not retry the defendant or substitute our judgment for the trier of fact. *Aljohani*, 2022 IL 127037, ¶ 67. A conviction will be reversed only where the evidence is so unreasonable or improbable that it creates a reasonable doubt of the defendant's guilt. *Aljohani*, 2022 IL 127037, ¶ 67. "This standard of review applies regardless of whether the defendant received a bench or jury trial." *Aljohani*, 2022 IL 127037, ¶ 67.

¶ 23 To prove a defendant guilty of attempted murder, the State must prove (1) that defendant performed an act that constituted a substantial step toward committing a murder and (2) that he had the criminal intent to kill the victim. *People v. Teague*, 2013 IL App (1st) 110349, ¶ 22. On this appeal, defendant contests only the second element, claiming that he had no intent to kill White.

¶ 24 In the case at bar, the trial court stated that it found White to be a particularly credible witness, and White testified that he had no gun. "It is the responsibility of the fact finder, not

the reviewing court, to determine the credibility of witnesses." *Teague*, 2013 IL App (1st) 110349, ¶ 26 (citing *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009)).

¶ 25 The trial court found that this was a fist fight, until defendant pulled out a deadly weapon and fired at White. As this court has repeatedly held, the very fact of firing a gun at a person supports the conclusion that the person doing so acted with the intent to kill. *Teague*, 2013 IL App (1st) 110349, ¶ 26 (see list of cases cited therein); *People v. Thompson*, 2020 IL App (1st) 171265, ¶ 76; *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 77.

¶ 26 Also, this court has repeatedly held that "frustrated marksmanship is not a defense to attempted murder." *Thompson*, 2020 IL App (1st) 171265, ¶ 75; *Teague*, 2013 IL App (1st) 110349, ¶ 27 (see cases cited therein). Rather, "it is a question of fact" for the factfinder "to determine whether defendant lacked the intent to kill or whether defendant was simply unskilled with his weapon." *Teague*, 2013 IL App (1st) 110349, ¶ 27. Similarly, misjudging how many shots to the chest are necessary to ensure death is not a defense to attempted murder.

¶ 27 Since intent to kill is a state of mind, it is usually difficult to establish by direct evidence and, thus, it is usually inferred from the surrounding circumstances. *Teague*, 2013 IL App (1st) 110349, ¶ 24. Defendant's intent, as gleaned from the circumstances, was a question for the court as factfinder, since this case involved a bench trial. Circumstances that may establish intent include the character of the assault, the use of a deadly weapon, and the nature and extent of the victim's injuries. *Teague*, 2013 IL App (1st) 110349, ¶ 24. In the case at bar, defendant and White were involved in a fist fight, until defendant pulled out a deadly weapon and fired at White's chest, at almost point-blank range, causing a bullet to lodge just below White's heart. A person could have easily believed that one shot would kill White, given that White was slumped on the floor of the bus with a blood-soaked shirt and a gunshot wound to his chest

from a gun fired at close range. Reviewing these circumstances, we cannot conclude that the trial court's finding of an intent to kill was irrational. See *Aljohani*, 2022 IL 127037, ¶ 66 (the issue is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt). Thus defendant's sufficiency claim must fail.

¶ 28 B. Sentencing

¶ 29 Defendant argues that his trial counsel was ineffective for failing to argue for a sentence reduction pursuant to section 8-4(c)(1)(E) of the Code. 720 ILCS 5/8-4(c)(1)(E) (West 2016). Section 8-4, entitled "Attempt," sets forth the law regarding attempt offenses, including attempted murder. 720 ILCS 5/8-4 (West 2016). The particular subsection at issue on this appeal provides in full:

> "(E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, [1] he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, *and*, [2] had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony." (Emphasis added.) 720 ILCS 5/8-4(c)(1)(E) (West 2016).

In short, a defendant must show both (1) serious provocation and (2) negligence or accident.

¶ 30 In his closing argument, counsel discussed both (1) provocation and (2) accident. However, counsel said he was dropping provocation because it would be relevant only to self-defense and he was arguing accident instead of self-defense. Nonetheless, counsel stressed that

there was serious provocation. Although counsel discussed both factors during closing, he did not later move for a sentence reduction based on them.

¶ 31 To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland*). Under *Strickland*, a defendant must prove both (1) that his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness and (2) that, absent these errors, there was a reasonable probability that the outcome of the proceeding would have been different. *Carlisle*, 2015 IL App (1st) 131144, ¶ 71.

¶ 32 Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness, as measured against prevailing professional norms. *Carlisle*, 2015 IL App (1st) 131144, ¶ 72. Under the second prong, the defendant must show that, " 'but for' " counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Carlisle*, 2015 IL App (1st) 131144, ¶ 72. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 33 To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Carlisle*, 2015 IL App (1st) 131144, ¶ 73. Thus, if one of the two prongs is missing, we need not consider the other one. Our analysis does not have to proceed in a particular order. *Carlisle*, 2015 IL App (1st) 131144, ¶ 73.

¶ 34 First, we examine whether counsel erred by failing to seek the sentence reduction. To the extent that defendant's claim requires us to interpret the statute, we observe that the oft-quoted rules of statutory interpretation require us to look, first and foremost, to the plain language of the statute itself. *VC&M, Ltd. v. Andrews*, 2013 IL 114445, ¶ 30. With statutory interpretation, our primary goal is to ascertain and give effect to the intent of the statute's drafters. The most reliable indicator of their intent is the language they chose to use. *VC&M, Ltd.*, 2013 IL 114445, ¶ 30.

¶ 35 Both defendant and the State observe that prior first district appellate panels have interpreted the term "serious provocation" in the attempt statute (720 ILCS 5/8-4(c)(1)(E) (West 2016)) as having the same meaning as "serious provocation" in the second degree murder statute (720 ILCS 5/9-2 (West 2016)). Both cite *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶ 23, in support of this observation. See *People v. Harris*, 2013 IL App (1st) 110309, ¶ 13. While we may find the logic and reasoning of an appellate court opinion persuasive, "the opinion of one district, division, or panel of the appellate court is not binding on other districts, divisions, or panels." *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008). An appellate court is "not bound" by an earlier appellate-court opinion and may "part company with that decision without offending the doctrine of *stare decisis*." *O'Casek*, 229 Ill. 2d at 440. Neither party cites a supreme court case on point, nor can we find one.

¶ 36 Subsection (E) became effective on January 1, 2010, and the *Lauderdale* case was decided two years later, in early 2012. The *Lauderdale* court stated that, since no opinions had yet interpreted this subsection, the court would turn for guidance to cases interpreting the term " 'serious provocation' " in the second degree murder statute. *Lauderdale*, 2012 IL App (1st)

100939, ¶ 23. As further support for looking to the second degree murder statute, the court noted that the language in subsection (E) was substantially similar to the language used in one of the grounds for second degree murder. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 23.

¶ 37 The *Lauderdale* court observed that, although the criminal code did not contain any categories or examples of serious provocation, the supreme court had recognized four distinct categories in connection with the second degree murder statute: (1) substantial physical injury to or assault of the defendant, (2) mutual quarrel or combat, (3) illegal arrest, and (4) adultery with the defendant's spouse. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 24 (applying these four categories to the sentence reduction provision); *Harris*, 2013 IL App (1st) 110309, ¶ 13 (applying these four categories to the sentence reduction provision). But see *People v. Taylor*, 2016 IL App (1st) 141251, ¶¶ 5, 26 (with no mention of the four categories, the appellate court found that the defendant had acted out of a sudden and intense passion, after he witnessed the victim deliberately sideswipe the driver's side of a parked vehicle in which his daughter was a passenger); *People v. Guyton*, 2014 IL App (1st) 110450, ¶ 88 (with no mention of the four categories, the appellate court found no provocation). Of the four categories, only mutual combat was discussed in *Lauderdale* because it was the only one at issue on the facts of that case. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 26. The court defined mutual combat as a fight where two people, upon a sudden quarrel and in hot blood, fight upon equal terms and death results. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 26. However, the court stated that there is no mutual combat if the manner in which the defendant retaliated was out of all proportion to the provocation. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 26.[3]

[3]Unlike *Lauderdale*, *Harris* did not discuss whether an out-of-proportion response disqualified an action as mutual combat under the sentence reduction provision, since there was no mutual combat or injury to the defendant in that case. *Harris*, 2013 IL App (1st) 110309, ¶ 14.

¶ 38 In *Lauderdale*, even though the defendant argued that the victim was much larger, the court found that his reaction was out of all proportion, where he pulled out a gun and pulled the trigger five times. *Lauderdale*, 2012 IL App (1st) 100939, ¶¶ 27-28. The gun failed to fire the first two times. The third and fourth times, the defendant fired at the victim's left leg and then at his right leg. The fifth time, he aimed at the victim's chest, but the victim turned and was shot in the shoulder, and the defendant fled. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 28. The court found that defendant's response was out of proportion and "[t]here was no mutual combat as the fight was not on equal terms," where the victim punched the defendant once and the defendant's response was to pull out a gun and fire multiple times. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 29.

¶ 39 On this appeal, we do not have to decide whether, as compared to the facts of *Lauderdale*, defendant's response was, or was not, out of proportion because defendant conceded that he would not have been found guilty of attempt had his response not been out of proportion. Defendant argues that "the whole point of the attempt murder conviction is that [defendant's] response was out of proportion. Had it not been out of proportion—if he had a legal justification—he likely would have been found not guilty of attempt[ed] murder." See, *e.g.*, *People v. Reagan*, 99 Ill. 2d 238, 240 (1983) ("The requirement of the attempt statute is not that there be an intent to kill, but that there be an intent to kill without lawful justification."). Defendant observes that, since every defendant eligible for this sentence reduction has already been found guilty of attempted murder, the issue at this stage is not the sufficiency of the evidence supporting the conviction, but rather whether there is evidence of serious provocation that would reduce the possible sentencing range.

¶ 40 Defendant thus presents us, as an initial matter, with a straightforward, purely legal question—namely, whether, as *Lauderdale* found, the statute bars eligibility to a defendant who engaged in mutual combat but responded out of proportion. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 34.

¶ 41 Without offense to *stare decisis* or our fellow jurists of the first district appellate court, we decline to follow *Lauderdale*. Certainly, the words of the attempt statute, quoted above, say nothing about mutual combat, much less a need for proportionality. Although there is similar language in both the second degree murder and the attempt statutes, they serve different functions. Before the application of the second degree murder statute, the defendant must first be found guilty of first degree murder. 720 ILCS 5/9-2(a) (West 2016). However, first degree murder does not necessarily require an intent to kill. 720 ILCS 5/9-1(a) (West 2016). A person may be found guilty if he or she has an intent to do great bodily harm or if he or she knows that his or her actions create a probability of great bodily harm. 720 ILCS 5/9-1(a)(1), (2) (West 2016). By contrast, the attempt statute specifically requires an intent to kill. Thus, before the sentence reduction provision at issue here can be applied, the defendant must have already been found, beyond a reasonable doubt, to have had an intent to kill. *Teague*, 2013 IL App (1st) 110349, ¶ 22; 720 ILCS 5/8-4(a) (West 2016). Hence, once a party is found guilty of attempt—and, thus, of having the specific intent to kill—disproportionality has essentially already been decided. Based thereon, we decline to find that disproportionality is an absolute bar to the sentence reduction set forth in the attempt statute.

¶ 42 An argument made by the State on appeal illustrates just how differently the sections function. The State argues, among other things, that it was the defense counsel's strategy to argue accident rather than provocation. In so arguing, the State raises an interesting question:

how is it possible for a defendant to prove accident, by a preponderance, after the State has already proven, beyond a reasonable doubt, that he had a specific intent to kill?

¶ 43 In order to be proven guilty of attempted murder, the State must prove that the defendant had a specific intent to kill. See 720 ILCS 5/8-4(a) (West 2016). In fact, in the case at bar, the defense counsel argued accident as a complete defense to the State's argument of specific intent, and the trial court acquitted him of the State's charges with respect to one of the victims. If accident is a complete defense to the specific intent required for the offense, and a finding of "no accident" results in a guilty finding, then there would be no circumstance where a sentence reduction based on accident could ever take effect.

¶ 44 The State also argues a lack of prejudice, in that the argument for a sentence reduction would have failed, since accident and provocation are inapposite and his counsel chose to argue the former. We find that argument unpersuasive because, as we noted above, rather than treating them as inapposite, the statute requires both.

¶ 45 As noted above, the provision at issue requires defendant to prove by a preponderance that, "had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death." 720 ILCS 5/8-4(c)(1)(E) (West 2016). The only way that we can interpret the words of this provision to make sense, in light of an already proven intent to kill, is to find that, although the defendant intended to kill the victim, his acts were sufficiently at the minimum, such that if the victim had actually died, the death could still be considered negligently or accidentally caused. In the case at bar, where defendant fired one shot at the victim during the midst of a physical fight, we find that the trial court, acting as factfinder at sentencing, may have found this part of the provision satisfied. We cannot say definitively because defendant in the case at bar never even tried to satisfy his preponderance

burden, since his counsel never raised the issue. However, as much as it is possible to say, with no attempt yet having been made to satisfy the burden, we find that defendant has shown a reasonable possibility of success with respect to the accident or negligence requirement.

¶ 46 We are not the first court to struggle with the accident or negligence requirement. In *Taylor*, 2016 IL App (1st) 141251, ¶ 23, the appellate court found that a specific intent to kill is "fundamentally incompatible with the statutory language providing that if the defendant's victim died, the death would have been deemed negligent or accidental." The *Taylor* court solved the problem by reading the word "and" in the provision as an "or" (720 ILCS 5/8-4(c)(1)(E) (West 2016)). *Taylor*, 2016 IL App (1st) 141251, ¶ 22 ("the statutory language clearly addresses two separate scenarios"). The *Taylor* court postulated that the provision contained two different and separate scenarios and that the accident or negligence requirement must be assumed to be addressing "the 'transferred intent' scenario," where one accidentally kills someone other than the intended victim. *Taylor*, 2016 IL App (1st) 141251, ¶ 22. We do not find this interpretation persuasive, because we presume that legislators know the difference between "or" and "and."

¶ 47 As for the serious provocation requirement, we note that White, the victim in this case, ran from the front of the bus to the back of it, for the express purpose of assaulting defendant and engaging in mutual combat with him. We find compelling defendant's argument that, if defendants whose reactions were out of proportion were barred from this section, then no defendant would be eligible for the reduction because the State would have already proven beyond a reasonable doubt that they had a specific intent to kill, without any legal justification. Thus, since this language requiring proportionality cannot be found in the plain language of the statute, we decline to apply it. Based on White's decision to run to the back of the bus in

order to assault defendant and engage in mutual combat, we find that there was a reasonable probability that the trial court could have found, depending on the preponderance of evidence presented by counsel, that defendant "was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill." 720 ILCS 5/8-4(c)(1)(E) (West 2016). Accordingly, counsel's failure to ask the court to consider a sentence reduction under the attempt statute resulted in prejudice to defendant.

¶ 48 Having found the prejudice prong of *Strickland*, we turn to the performance prong. Given that counsel had already argued both provocation and accident at trial, we find that counsel's performance at sentencing fell below an objective standard of reasonableness by not seeking the sentence reduction. *Carlisle*, 2015 IL App (1st) 131144, ¶ 72. Defendant had nothing to lose at this point by arguing for the reduction and could only gain. He had already been found guilty beyond a reasonable doubt of the offense, and the offense mandated a Class X sentence. There was simply no downside to seeking a sentence reduction. For these reasons, we vacate defendant's sentence and remand for resentencing.

¶ 49 To recap, there have been four opinions citing subsection (E): two cited the four categories, two did not. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 24 (citing the four categories); *Harris*, 2013 IL App (1st) 110309, ¶ 13 (citing the four categories). But see *Taylor*, 2016 IL App (1st) 141251, ¶ 26 (no mention of the four categories); *Guyton*, 2014 IL App (1st) 110450, ¶ 88 (no mention of the four categories). We take no position on whether provocation for subsection (E) is limited to these four categories. We do not have to decide this question in order to resolve the case before us because two of the categories are present here—namely, mutual combat and substantial physical assault. As discussed, we find that an "out of proportion" response is not an absolute bar to application of this section because it is

inconsistent where a specific intent to kill and a lack of legal justification have already been proven beyond a reasonable doubt. Only one of the four opinions found that an out-of-proportion response disqualified a defendant from the sentence reduction provision, and that was *Lauderdale*. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 34. For the reasons already discussed, we did not find this part of *Lauderdale* persuasive. Of the four opinions, only one mentioned the issue of whether the firearm enhancement applies to subsection (E). The *Lauderdale* court noted the issue without deciding it, and we do the same. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 35. In the case below, that question failed to become an issue when counsel failed to invoke the section at all. We take no position on that question unless and until it becomes ripe for our decision.

¶ 50 Since we are remanding for resentencing, there is also no need for us to address defendant's *Krankel* claims at this time. If defendant chooses to reassert his allegations at resentencing, we presume that the court will take whatever actions are required on the record. In the sentencing transcript before us, it appears as though any relevant discussions about defendant's remarks regarding ineffective counsel occurred off the record and, hence, were hidden from us.

¶ 51 III. CONCLUSION

¶ 52 Due to counsel's ineffectiveness in not seeking a sentence reduction, we vacate the sentence and remand for resentencing. Defendant has demonstrated that counsel's failure to advocate for the reduction was not reasonable, where there was no downside to asking, the court was adhering to the minimum, and defendant has demonstrated a reasonable probability that the outcome of the sentencing may have been different, given that White ran to the back of the bus in order to assault defendant and engage in mutual combat.

¶ 53 Sentence vacated; cause remanded.

¶ 54 JUSTICE TAILOR, concurring in part and dissenting in part:

¶ 55 I concur in the majority's decision to affirm Haynes' conviction for attempted murder, but dissent from its decision to vacate his sentence and remand for a new sentencing hearing. Haynes raises a simple issue relating to his sentence: Was counsel ineffective for failing to argue that Haynes should have received a Class 1 sentence under section 8-4(c)(1)(E), based upon the fact that he acted under a sudden and intense passion resulting from serious provocation? The majority, however, analyzes whether section 8-4(c)(1)(E) "bars eligibility to a defendant who engaged in mutual combat but responded out of proportion." The resolution of Hayne's ineffective assistance of counsel claim is much less complicated.

¶ 56 Section 8-4(c)(1)(E) states in pertinent part:

> "(E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, [1] he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, *and*, [2] had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony." (Emphasis added.) 720 ILCS 5/8-4(c)(1)(E) (West 2016).

¶ 57 In finding that Haynes established the necessary prejudice under *Strickland*, the majority concludes:

> "Based on White's decision to run to the back of the bus in order to assault [Haynes] and engage in mutual combat, we find that there was a reasonable probability that the trial court could have found, depending on the preponderance of evidence presented by

counsel, that [Haynes] 'was acting under a sudden and intense passion resulting from serious provocation by the individual whom [Haynes] endeavored to kill.' 720 ILCS 5/8-4(c)(1)(E) (West 2016). Accordingly, counsel's failure to ask the court to consider a sentence reduction under the attempt statute resulted in prejudice to [Haynes]." *Supra* ¶ 47.

¶ 58 As difficult as it is to make sense of section 8-4(c)(1)(E), it is clear that for Haynes to be sentenced as a Class 1 offender under section 8-4(c)(1)(E), he would have to show by preponderance of the evidence that he was acting under a sudden and intense passion, resulting from serious provocation, *and* that had White died, his death would have been negligent or accidental. 720 ILCS 5/8-4(c)(1)(E) (West 2016). Our supreme court long ago observed that, "[t]he conjunction 'and' " signifies and expresses the relation of addition." *City of La Salle v. Kostka*, 190 Ill. 130, 137 (1901). " ' "As a general rule, the use of the conjunctive, as in the word '*and*,' indicates that the legislature intended for *all* of the listed requirements to be met. [Citations.]" ' " (Emphasis in original and added.) *People v. A Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon County, Illinois*, 217 Ill. 2d 481, 500-01 (2005) (quoting *Byung Moo Soh v. Target Marketing Systems, Inc.*, 353 Ill. App. 3d 126, 131 (2004), quoting *Gilchrist v. Human Rights Comm'n*, 312 Ill. App. 3d 597, 602 (2000)).

¶ 59 Although Haynes now argues that he was acting as a result of serious provocation when he shot White under the first prong, Haynes has failed to offer any argument on appeal as to negligence or accident as required by the second prong of section 8-4(c)(1)(E)—that is, had White died, his death would have been negligent or accidental. The majority has ignored Haynes's failure in this respect, finding "that [Haynes] has shown a reasonable possibility of success with respect to the accident or negligence requirement" because the "trial court, acting

as factfinder at sentencing, may have found this part of the provision satisfied" where "[Haynes] fired one shot at the victim during the midst of a physical fight." *Supra* ¶ 45. My search found that Haynes did not mention the word accident, negligence, or any variation of either word even once as part of his ineffective assistance argument on appeal. Accordingly, I would find that Haynes has failed to establish the prejudice necessary for an ineffective assistance of counsel finding. *People v. Graham*, 206 Ill. 2d 465, 476 (2003) ("[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient.").

¶ 60 In addition to my finding with regard to prejudice, I also take issue with the majority's finding that defense counsel's performance was unreasonable under the first prong of *Strickland*. Despite previously acknowledging that defense counsel made a strategic decision not to pursue provocation "because it would be relevant only to self-defense and he was arguing accident instead of self-defense," the majority nonetheless finds that counsel should have argued for Class 1 sentencing "[g]iven that counsel had already argued both provocation and accident at trial." *Supra* ¶¶ 30, 48. Contrary to the majority's finding, defense counsel did not argue provocation. With respect to provocation and self-defense, defense counsel stated he was not arguing self-defense because

> "the theory of self-defense is you do it, you take this action not accidently, not negligently, not recklessly, you take these actions purposefully. There's a purpose in your mind. The purpose is to defend yourself against imminent death or great bodily harm. You're defending yourself against imminent death or great bodily harm. And though [Haynes] may have thought that at that moment by [White] charging at him,

> [Haynes] doesn't at that point, at any point -- no witness ever testifies that [Haynes] aims, points, raises in any way, shape, or form that gun in the direction of anybody."

Later, defense counsel stated with respect to self-defense:

> "[I]t wouldn't have worked here, Judge. If I asserted that Victor Haynes did this for a purp -- Self-defense you do for a purpose. You do it because you want to shoot that person because at the time you have an imminent fear of death or great bodily harm at that moment, and therefore, you're doing it for a reason. Self-defense is never an accident.
>
> Okay. And in this case, Judge, the reason that we didn't go forward with self-defense is because this was an accident. Victor Haynes had no -- had no intention, had no reason, had no purpose at that point to shoot any of these people. This was during a struggle, this was during a tussle."

¶ 61 Defense counsel clearly made a strategic decision not to pursue self-defense based on provocation. It would be illogical for defense counsel to argue that Haynes should be sentenced as a Class 1 offender because he was provoked, when this theory was clearly abandoned at trial. Furthermore, at the hearing on Haynes's motion for a new trial, the court specifically stated, "With regard to Jerome White, this was not an accident. Now, I based my finding on the totality of the circumstances; certainly location of the wound, gravity of the wound, all of those factors I considered. With regard to Jerome White, this wasn't an accident." As the trial court had already determined that Haynes's actions with respect to White were not accidental, it would be equally illogical for defense counsel to argue that Haynes should be sentenced as a Class 1 offender because had Haynes killed White, his death would be negligent or

accidental. I therefore disagree with the majority's finding that defense counsel's failure to pursue Class 1 sentencing was unreasonable.

¶ 62 As an aside, I find it important to note that, at sentencing, Haynes acknowledged that he should not have brought a gun on the party bus but claimed that he was unconscious when the gun when off. Seeking clarification, the court asked. "Did you just say the gun went off when you were unconscious?" Haynes replied, "Yes." Haynes then explained, "I was unconscious. And like I say, that picture will prove that I was unconscious for it to be that much of my blood, and James' statement, the guy I was with, he's the one who woke me up."

¶ 63 If Haynes was truly unconscious at the time the gun went off, as he claimed, he was not "acting" at all, let alone acting as a result of serious provocation. According to him, he was lying on the floor of the bus in a pool of blood. It would therefore be impossible for him to prove by preponderance of the evidence that he committed the attempted murder while acting under the sudden and intense passion, resulting from serious provocation, necessary for him to be sentenced as a Class 1 offender. Accordingly, Haynes could not establish prejudice under *Strickland* for counsel's failure to request a Class 1 sentence for attempt murder.

¶ 64 I concur in the majority's decision to affirm Haynes' conviction for attempted murder, but respectfully dissent in its decision to vacate his sentence and remand for a new sentencing hearing.

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 13, 2024, the foregoing **Appellant's Brief and Appendix** was electronically filed with the Clerk, Illinois Supreme Court, through the Odyssey eFileIL system, which will serve the following, counsel for defendant:

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