No. 127412

IN THE
SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>GERMEL DOSSIE,<br><br>Defendant-Appellant. | ) | Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-20-1050<br><br>There on Appeal from the Circuit Court of Cook County, Criminal Division, No. 15 CR 10914<br><br>The Honorable William H. Hooks, Judge Presiding. |

**BRIEF FOR PLAINTIFF-APPELLEE**
**PEOPLE OF THE STATE OF ILLINOIS**

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

JOHN E. NOWAK
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601-3218
(773) 590-7958
eserve.criminalappeals@ilag.gov

*Counsel for Plaintiff-Appellee*
*People of the State of Illinois*

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## TABLE OF CONTENTS



## POINTS AND AUTHORITIES

## NATURE OF THE CASE

Defendant Germel Dossie appeals from the judgment of the Illinois Appellate Court, First District, which reversed the circuit court's order granting his motion to quash his arrest and suppress evidence. No question is raised on the pleadings.

## ISSUES PRESENTED FOR REVIEW

1. Whether eyewitness identification from a man who drove defendant — who was armed with a firearm — to and from the scene of the shooting, as corroborated by surveillance video, established probable cause to arrest defendant.

2. Whether a public arrest supported by probable cause and pursuant to an investigative alert complies with the Illinois Constitution's warrant and separation of powers clauses and the Fourth Amendment of the United States Constitution.

## JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rule 315, as this Court allowed defendant's timely petition for leave to appeal.

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 6 of the Illinois Constitution:

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit

> particularly describing the place to be searched and the persons or things to be seized.

Article II, section 1 of the Illinois Constitution:

> The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF FACTS

Clifton Frye died from gunshot wounds he sustained on June 1, 2015. C25.[1] On July 13, 2015, defendant was charged by indictment with first degree murder. C25-30. Prior to trial, defendant filed a motion to quash arrest and suppress evidence, alleging that the police did not have probable cause for his warrantless arrest. C152-54.

At the motion hearing, Chicago Police Officer Nicolas Sanchez testified that on June 1, 2015, at approximately 1:00 p.m., he was on duty with his partner, surveilling narcotics activity around the CTA bus terminal near Howard Street and Ashland Avenue. R6. Sanchez observed a person later identified as Clifton Frye sitting in a red Pontiac that was parked in a no parking zone. R8. Sanchez and his partner attempted to detain Frye after

[1] "C," R," and "Sup R" refer to the common law record, the report of proceedings, and the supplement to the report of proceedings, respectively.

seeing him engage in what they suspected was a hand-to-hand narcotics transaction, but they lost sight of Frye's vehicle in traffic. R8, 12. Sanchez was also monitoring the radio; he and his partner responded to a call of shots fired, where they saw a small crowd gathered around Frye, who lay on the ground. R13.

Sanchez later obtained surveillance video from a building at the corner of Ashland Avenue and Jonquil Terrace. R14. On the video, Sanchez saw two black men running eastbound on Jonquil Terrace. R15. One of the men held a revolver in his left hand, and the other man had his hand in his left jacket pocket. R15. Sanchez described the men as being in their teens or early 20s, between 5′7″ and 6′ tall, and weighing approximately 150 pounds. R17. The two men were wearing dark clothes and hooded jackets. R18. Although Sanchez knew defendant from prior contacts, he was unable to identify him as one of the two men on the video. R16.

Detective Brian Tedeschi, one of the detectives assigned to investigate the shooting of Frye, Sup R43-44, testified that officers viewed the surveillance video from a building near the scene of the shooting. Sup R47. The video showed a red Hyundai Santa Fe SUV traveling westbound on Jonquil Terrace and through the intersection with Ashland Avenue. Sup R48, 58. The vehicle's license plate was visible. Sup R50. A short time later, the Hyundai reappeared traveling eastbound on Jonquil Terrace and back through the intersection with Ashland Avenue. Sup R48, 58. A little later,

the video showed two people running west on Jonquil Terrace (in the opposite direction of the Hyundai) toward Ashland Avenue. Sup R48-49, 58. One of the individuals then ran south onto Ashland, and for a brief period of time he was out of the camera's view. Sup R49. That individual then reappeared and both individuals sprinted eastbound toward where the camera was located (and in the direction the Hyundai had driven). Sup R49.

A few hours after the shooting, Detective Tedeschi learned that another officer had seen the same Hyundai parked on the 1300 block of West Touhy Avenue. Sup R50, 71. Tyrone Crosby and his grandmother — the vehicle's owner — were in the Hyundai at that time. Sup R50-51, 53. The police took Crosby to the station, where Detective Tedeschi spoke with him. Sup R53. Crosby, 27 years old, Sup R71, agreed to assist in the investigation, Sup R74, and told Tedeschi that he was the driver of the Hyundai that appeared on the video. Sup R53. Crosby said that he drove two men, "Lil Shawn" and "Spazz," to and from the shooting. Sup R53-54. Detective Tedeschi conducted a computer database search and identified "Spazz" as defendant and "Lil Shawn" as Shawn Randall. Sup R55.

Crosby said that he drove around the block near Jonquil Terrace, Sup R54, 58, and then defendant and Randall got out of the Hyundai, Sup. R54. A short time later, Crosby heard several gunshots, Sup R54, and shortly after that, defendant ran back to the car with a large-barreled gun in his hand.

Sup R54. Randall was holding his side, and defendant was still holding the gun as both men got into the Hyundai. Sup R54-55.

Based on the information he received from Crosby, at approximately 5:00 p.m. on June 1, 2015, Detective Tedeschi issued an investigative alert for defendant and Randall in connection with the shooting of Frye. Sup R55-56, 81.

On June 2, 2015, Crosby participated in a videotaped interview with Detective Tedeschi and an Assistant State's Attorney. Sup R56. During the interview, Crosby identified a photograph of defendant as the person he had picked up and driven to Jonquil Terrace and Ashland Avenue and as the person who got out of the Hyundai and returned a short time later with a large-barreled handgun, after Crosby heard gunshots. Sup R57, 58. Crosby also testified before the grand jury on June 2, 2015, where he repeated the information he had provided Detective Tedeschi and the Assistant State's Attorney, and again identified a photograph of defendant as the person involved. Sup R58.

Chicago Police Officer Chris Dingle, who was assigned to the fugitive apprehension unit, Sup R31, testified that on June 9, 2015, at 6:43 p.m., he and his partners were assigned an investigative alert regarding defendant and the June 1, 2015 shooting of Frye. Sup R32, 38. The investigative alert stated that defendant had been identified as being involved in an aggravated battery with a handgun. Sup R41. Dingle and his partners were conducting

surveillance outside an apartment building at 3543 Sunnyside Avenue in Chicago, Sup R33, when defendant walked out of the building and entered the rear passenger seat of a maroon Kia. Sup R34, 39.

Dingle and his partners briefly followed the Kia until officers in a marked car curbed it at 3918 West Montrose Avenue. Sup R34, 39. Dingle did not observe defendant commit any crimes. Sup R35. One of Dingle's partners arrested defendant and placed him in the back of a squad car. Sup R35. Dingle and his partners did not have a warrant for defendant's arrest. Sup R36. Dingle did not know defendant prior to June 9, 2015, and he had no part in the investigation of defendant that gave rise to the investigative alert. Sup R36-37.

At the conclusion of the motion hearing, the trial court ordered the parties to submit briefs addressing the impact of *People v. Bass*, 2019 IL App (1st) 160640, *aff'd in part, vacated in part*, 2021 IL 125434, and its holding that warrantless arrests pursuant to investigative alerts are unconstitutional. R57.

In August 2020, after the parties filed their respective briefs, C209, C217, the circuit court announced its ruling that the police lacked probable cause for defendant's arrest. The court found that the police officers had testified credibly. R66-67. But the court found that it was lacking certain information regarding Crosby, such as his background, whether he was under the influence of any substance when police talked to him, whether he had any

pending cases, and whether there was any additional corroboration of his statements (apart from the video). R73. The court noted that had the police sought an arrest warrant and presented Crosby as an informant, it would have wanted to know such information before deciding whether to issue a warrant. R73-75. The court expressly stated that it believed Crosby's testimony that he saw a firearm in defendant's hand when defendant came back to the Hyundai. R73. But the court questioned the reliability of the police database used to determine that "Spazz" was defendant and stated that it would have had questions about the database had the police sought an arrest warrant. R75-76. The court also wondered why Crosby was brought before the grand jury, but not before a judge in support of warrant application. R78.

The court went on to discuss the decisions in *Bass*, 2019 IL App (1st) 160640, and *People v. Braswell*, 2019 IL App (1st) 172810. R85. The court found that the Chicago Police Department's use of investigative alerts ignores "the constitutional obligations of any sitting court judge . . . [and] also aggregates the authority and supervisory authority . . . any prosecutorial agency has over its subordinate law enforcement agencies such as a police department, city or state." R86. The court described the use of investigative alerts as a "questionable[,] constitutionally offensive[,] Chicago-only policy." R90. The court then ruled that the police did not have probable cause to

arrest defendant, regardless of whether the arrest was pursuant to a warrant or an investigative alert. R90-92.

The People filed a timely notice of appeal and a certificate of substantial impairment. C243-44.

On appeal, the appellate court held that the police had probable cause to arrest defendant and that arrests based on investigative alerts are not per se unconstitutional. *People v. Dossie*, 2021 IL App (1st) 201050-U, ¶¶ 18-28. The court reasoned that the information collectively known to the police would have led a reasonably cautious person to believe that defendant had committed a felony. *Id.*, ¶¶ 24-26. As for the investigative alert issue, the court followed the reasoning in *Braswell* and its progeny upholding the constitutionality of arrests pursuant to investigative alerts. *Id.*, ¶¶ 20-22. The appellate court accordingly reversed the circuit court's order granting the motion to quash arrest and suppress evidence and remanded for further proceedings.

Defendant filed a petition for leave to appeal, which this Court allowed on September 29, 2021.

## ARGUMENT

The appellate court correctly held that the police had probable cause to arrest defendant for shooting Clifton Frye and that defendant's public arrest pursuant to an investigative alert was constitutional. Surveillance video showed two men getting out of a Hyundai SUV near the time of the shooting, running to the street corner near where the shooting occurred, and running back to the vehicle. One of the men was carrying a handgun. The driver of the Hyundai subsequently identified defendant as the man carrying a handgun. Based on that information, the police issued an investigative alert and later arrested defendant in public pursuant to that alert. Both the federal and state constitutions allow warrantless arrests in public based on the collective knowledge of the police. Even if this Court were now to change course on that point, though, the good faith exception to the exclusionary rule would apply.

### I. The Police had Probable Cause to Arrest Defendant for Shooting Frye Based on the Statement of the Person who Drove Defendant to and from the Shooting as Well as the Corroborating Surveillance Video.

It is well-established that the defendant bears the burden of proof at a hearing on a motion to suppress. *People v. Brooks*, 2017 IL 121413, ¶ 22. The defendant is required to make a prima facie showing that the evidence was obtained by an illegal search or seizure. *Id.* If the defendant makes a prima facie case, then the People then have the burden of producing evidence

to counter that prima facie case. *Id.* The ultimate burden of proof, however, remains with the defendant. *Id.*

In reviewing a circuit court's ruling on a motion to suppress, this Court employs a two-part standard of review. *People v. Hill*, 2020 IL 124595, ¶ 14 (citing *Ornelas v. United States*, 517 U.S. 690 (1996)). This Court must give appropriate weight to the circuit court's findings of fact, which will be reversed only if they are against the manifest weight of the evidence. *Id.* This Court reviews de novo the circuit court's ultimate conclusion whether suppression is warranted. *Id.* Here, the circuit court expressly found that the witnesses were credible, R66-67, and neither party challenges that determination. Therefore, all that remains is a de novo review of the circuit court's legal ruling. *People v. Burns*, 2016 IL 118973, ¶¶ 15-16; *People v. Buss*, 187 Ill. 2d 144, 205 (1999).

To establish probable cause, the totality of the facts and circumstances known to the officer must be sufficient to lead a reasonably cautious person to believe that the person arrested has committed a crime. *People v. Gocmen*, 2018 IL 122388, ¶ 33. The probable cause question must be viewed from the standpoint of the arresting officer, acting with reasonable caution — not the standpoint of an average citizen or reasonable person. *Id.* Probable cause "does not demand any showing that such a belief be correct or more likely true than false." *People v. Jones*, 215 Ill. 2d 261, 277 (2005) (citing *Texas v. Brown*, 460 U.S. 730, 742 (1983)).

Probable cause may be established by considering all of the information collectively known by multiple officers when officers are working in concert, "even if that information is not specifically known to the officer who makes the arrest." *Buss*, 187 Ill. 2d at 204. Moreover, probable cause may be based on hearsay. *Gocmen*, 2018 IL 122388, ¶ 43. After all, "if this were not the case, a police officer could not find probable cause based on the statement of a victim or a witness to a crime." *Id.* When the police rely on the hearsay statement of a third party, such as a victim or witness, the court should consider the totality of the circumstances, including any information known to police regarding the third party's veracity and the basis for his or her knowledge, to determine whether probable cause existed. *People v. Tisler*, 103 Ill. 2d 226, 237-38 (1984) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Thus, where police conduct an independent investigation that produces information corroborating details of a third party's hearsay statement, that supports a finding of probable cause, because "[w]hen a tip is proved accurate on some counts, . . . the informant is more likely correct about other details, including the alleged illegal activity." *Id.* (citing *Gates*, 462 U.S. at 244). Corroborating information obtained by police therefore reduces the risk that the third party's account stems from an inaccurate rumor or a fabricated story. *Id.*

A straightforward application of these principles to the facts of this case demonstrates that the police had probable cause to arrest defendant.

Officer Sanchez and his partner were surveilling the soon-to-be shooting victim, Clifton Frye, when, shortly after they lost sight of him, they heard a radio call of "shots fired." R6, 8, 13. The officers responded and found Frye on the ground, the victim of a shooting. R13. Police obtained surveillance video from a nearby building, which showed a red Hyundai Santa Fe SUV driving west on Jonquil Terrace and through the intersection with Ashland Avenue. Sup R48, 50, 58. That same vehicle then returned, traveling east on Jonquil, and again drove through the intersection with Ashland. Sup R48, 58. The video next showed two men running on Jonquil toward Ashland (opposite the Hyundai's direction of travel). R15; Sup R48-49, 58. One of the men ran south onto Ashland; he was out of the camera's view for a short time before reappearing; then both men sprinted east on Jonquil (in the Hyundai's direction of travel). R15; Sup R49. One of the men can be seen with a revolver in his left hand, while the other has his hand in his left jacket pocket. R15.

A few hours later, the police found that same Hyundai and spoke to its driver, Tyrone Crosby. Sup R50, 53, 71. Crosby said that he picked up "Lil Shawn" (Shawn Randall) and "Spazz" (defendant) and drove them to the area of Jonquil Terrace and Ashland. Sup R54, 57-59. The police conducted a computer database search for "Spazz" and "Lil Shawn," and, following that search, presented Crosby with a photograph from which he identified defendant as the person he knew as "Spazz." Sup R55-58. Crosby explained

that once they arrived at Jonquil and Ashland, Randall and defendant got out of the Hyundai, and a short time later, Crosby heard several gunshots. Sup R54, 57-59. Defendant and Randall then ran back to the Hyundai and got in. Sup R54, 57. Crosby saw defendant with a large-barreled gun in his hand and Randall holding his side. Sup R54-55, 57.

The surveillance video corroborated many of the details of Crosby's statement to police: it showed that two men got out of the Hyundai near Jonquil and Ashland, ran towards the area where Frye was later shot, and then ran back towards the Hyundai, one with a gun in his hand, shortly after Crosby heard gunshots. *Cf. People v. James*, 118 Ill. 2d 214, 225 (1987) (partial corroboration of accomplice's account lends credence to unverified portion when determining probable cause). The circuit court expressly found that Crosby's account was credible: "The Court believes this testimony, that Mr. Crosby saw a firearm with this same person who is now identified as [defendant] when he left the vehicle[.]" R73-74. Accordingly, the appellate court correctly concluded that the police had probable cause to arrest defendant because the information collectively known to the police would have led a reasonably cautious person to believe that defendant had committed the crime. *People v. Dossie*, 2021 IL App (1st) 201050-U, ¶ 26 (citing *Gocmen*, 2018 IL 122388, ¶ 19).

Defendant concedes that, "[a]t first glance, Crosby's account might appear to be incriminating to Dossie," but argues that Crosby's account

should be disregarded because he "may well have feared being deemed an accomplice. . . whose account should be considered with 'great caution.'" Def. Br. 23 (quoting *People v. Touhy*, 361 Ill. 332, 352-53 (1935)). But this Court rejected such reasoning in *James*, which recognized that while the testimony of an accomplice at trial may be suspect because of the motivation to blame others, 118 Ill. 2d at 225, "the danger of fabrication is less in [the probable cause] setting" outside of trial. *Id.*

Indeed, in *James*, this Court explicitly held that an accomplice's account may establish probable cause for an arrest, especially when that account is partially corroborated, because "the corroboration lends credence to the remaining unverified portion." *Id.* (citing 1 W. LaFave, Search & Seizure sec. 3.3(f) (2d ed. 1987)). Even if Crosby, as the driver, is an accomplice, his identification of defendant as the man holding a firearm before and after Frye's shooting in the area where Frye was shot was sufficient to establish probable cause, especially because it was corroborated by the surveillance video. *See id.*; *see also, e.g.*, *People v. Ornelas*, 295 Ill. App. 3d 1037, 1045 (1st Dist. 1998) ("A partially corroborated statement of someone who would not be presumed credible (e.g., an accomplice or paid informant) can establish probable cause for arrest.") (citing *James*, 118 Ill. 2d at 222-24); *People v. Jordan*, 282 Ill. App. 3d 301, 304 (1st Dist. 1996) ("Probable cause to arrest can be established by the statement of an

accomplice, especially where the statement is corroborated by what the police may already know.") (citing *James*, 118 Ill. 2d at 224-25).

Defendant also speculates about additional information Crosby might have provided if the circuit court judge had been able to question him. Def. Br. 24-26, 28-29. But even when the police apply to a court for an arrest warrant, they are not required to present any third party upon whose statement police have relied to the judge because an officer's statements based on hearsay are sufficient. *See Tisler*, 103 Ill. 2d at 238. This is especially true when other evidence known to the police corroborates part of the third party's account. *Id.* ("Corroboration operates in this way to reduce the risk that an informant's tip stems from an inaccurate rumor or a fabricated story."). After all, to establish probable cause, "the evidence relied upon by the arresting officers does not have to be sufficient to prove guilt beyond a reasonable doubt." *People v. Sims*, 192 Ill. 2d 592, 615 (2000). The facts known to the police do not even have to indicate that it is more probable than not that the suspect has committed the crime. *Id.* In short, the fact that the circuit judge might have preferred to question Crosby in person has no bearing on whether probable cause existed for his arrest.

Defendant's reliance on *People v. Shelby*, 221 Ill. App. 3d 1028, 1037 (1st Dist. 1991), for the proposition that "[c]ourts have the 'responsibility to assess the reliability of the informant upon whose information the arrest was carried out,'" Def. Br. 27-28, is misplaced. In *Shelby*, the defendant was

arrested after a co-defendant provided the police with the defendant's name and a description of the exterior of the house where the defendant might be found, but "there was no other information conveyed to the police officers connecting [the defendant] to the murder and burglary." 221 Ill. App. 3d at 1037. Here, unlike *Shelby*, Crosby gave a detailed statement regarding defendant's involvement in the shooting and twice identified a photograph of defendant (to Detective Tedeschi and the Assistant State's Attorney and later at the grand jury) as the person who got out of the Hyundai SUV and then, shortly after Crosby heard gunshots, returned to the Hyundai with a large-barreled handgun in hand. Sup R54, 57-58. Additionally, Crosby's statement to police was corroborated by the surveillance video. Thus, *Shelby* thus has no application here.

Defendant also questions the reliability of the Chicago Police Department's database, which a detective used to determine that defendant's nickname was "Spazz." Def. Br. 27 (citing R75). But defendant never challenged the reliability or use of that database before the circuit court, and it was his burden to do so. *See People v. Gipson*, 203 Ill. 2d 298, 307-08 (2003) (defendant failed to meet ultimate burden of proof on motion to suppress when he did not challenge testimony about written police policy about inventory searches). In any event, the database proved accurate. After police used the database to identify "Spazz," Crosby later identified a photograph of defendant as the person carrying the large-barreled handgun

whom he had driven to and from the shooting. Sup R56-58. And the circuit court expressly found Crosby's identification of defendant to be credible. R73-74 ("The Court believes this testimony, that Mr. Crosby saw a firearm with this same person who is now identified as Mr. Dossie when he left the vehicle[.]").

Lastly, defendant asserts that there was "no attempt to arrest Dossie . . . until June 9, 2015," and that this "suggests that the police, themselves, may have been unconvinced that the information in their possession was of such quality and quantity to suffice for probable cause." Def. Br. 28. But defendant is merely speculating. The investigative alert was issued on June 1, shortly after officers first spoke to Crosby. Sup R55-56, 81. Detective Dingle testified that he was part of the fugitive apprehension unit on June 9 and had been assigned the investigative alert regarding defendant and the shooting of Frye. Sup R31-32. He and his partner located defendant later that day and arrested him. Sup R33-36. Thus, while the record shows that police did not locate and arrest defendant until June 9, 2015, Sup R31-35, nothing in the record supports defendant's speculation that the police were not looking for defendant or attempting to arrest him during the intervening period. And, in any event, any brief delay in arresting defendant would have no bearing on whether the police had probable cause for his arrest.

In short, the police had probable cause to arrest defendant for the shooting of Frye based on Crosby's identification and the corroborating video

evidence. The appellate court's decision reversing the circuit court's order to quash arrest and suppress evidence should be affirmed.

## II. Arrests in Public Based on Probable Cause and Pursuant to Investigative Alerts Comply with the Illinois Constitution's Warrant and Separation of Powers Clauses and the Fourth Amendment of the Federal Constitution.

Defendant argues that his arrest was unconstitutional, even if the police had probable cause, because he was arrested pursuant to an investigative alert rather than an arrest warrant. Def. Br. 30. Defendant is incorrect. Warrantless, public arrests based on probable cause have long been held constitutional under the Fourth Amendment, even when police had sufficient time to obtain an arrest warrant. *See United States v. Watson*, 423 U.S. 411, 423 (1976) ("Law enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. But we decline to transform this judicial preference into a constitutional rule."). Moreover, this Court has firmly established — in cases such as *People v. Tisler*, 103 Ill. 2d 226 (1984), and *People v. Caballes*, 221 Ill. 2d 282 (2006) — that the search and seizure provision in article I, section 6 of the Illinois Constitution, which includes the warrant language on which defendant relies, is to be construed in lockstep with the Fourth Amendment. Even if the lockstep question were not well settled, there would be no basis to depart from lockstep here. This Court's long-standing precedent permits public, warrantless arrests supported by probable cause

under the Illinois Constitution, just as such arrests are permitted under the Fourth Amendment. And, in any event, given the precedent permitting warrantless arrests in public so long as those arrests are supported by probable cause, if this Court were to now depart from *Tisler* and *Caballes*, the exclusionary rule should not apply in this case because police here acted in good-faith reliance on that established law.

### A. The lockstep question is settled: the search and seizure clause of article I, section 6, of the Illinois Constitution is to be interpreted in lockstep with the Fourth Amendment.

Defendant's argument that article I, section 6 of the Illinois Constitution provides greater protections than the Fourth Amendment due to the language about warrants in Illinois's search and seizure clause, Def. Br. 43-52, is contradicted by this Court's clear precedent. To be sure, article I, section 6 requires that warrants be "supported by affidavit," whereas the Fourth Amendment requires they be supported by "oath or affirmation." But despite the slight differences in terminology, this Court has long recognized that there is no basis to construe the state constitution's search and seizure clause differently from the federal constitution's. Indeed, this Court has consistently held that the Illinois Constitution's "supported by affidavit" language and the Fourth Amendment's "Oath or affirmation" language are "virtually synonymous," and that the search and seizure provisions of the two constitutions "should be construed alike." *Caballes*, 221 Ill. 2d at 291. Thus, the Court concluded that

> the search and seizure clause of article I, section 6, of the state constitution, as construed under our limited lockstep approach, strikes the proper balance between protecting the people from unreasonable intrusion by the state and providing the people with effective law enforcement. We will not depart from the intent of the framers of the Illinois Constitution of 1970 or the understanding of the voters who adopted it — to the extent we are able to discern it from the language used, the committee comments, and the debate — to tip the balance in favor of expanding the scope of the right to be free from unreasonable searches and seizures that is already guaranteed by the fourth amendment.

*Id.* at 316-17.

And *Caballes* merely reinforced *Tisler*, 103 Ill. 2d 226, "the seminal case on the question of lockstep interpretation of the search and seizure provisions of the two constitutions," *Caballes*, 221 Ill. 2d at 295, where the Court rejected the notion that "article I, section 6, of the 1970 Illinois Constitution guarantees more individual rights than either the former State Constitution or the fourth amendment to the Federal Constitution," *Tisler*, 103 Ill. 2d at 241. There, the Court held that "the warrant clause with its probable-cause requirement, and the guarantee against unreasonable search and seizure . . . remains nearly the same as that of the fourth amendment." Accordingly, *Tisler* explained, the difference between the language of the Illinois Constitution and the Fourth Amendment of the United States Constitution "does no more than specifically provide for fourth amendment protection with regard to eavesdropping and invasion of privacy," *id.* at 242, and does not alter the warrant requirement at all. *See also People v. Manzo*, 2018 IL 122761, ¶ 28 (search and seizure provision in article I, section 6 of

Illinois Constitution is to be interpreted in lockstep with Fourth Amendment) (citing *Tisler*, 103 Ill. 2d at 245); *People v. Holmes*, 2017 IL 120407, ¶ 25 (when construing Illinois Constitution, Illinois courts "follow decisions of the United States Supreme Court regarding searches and seizures"); *People v. Fitzpatrick*, 2013 IL 113449, ¶ 15 (explaining that this Court has conducted limited lockstep analysis for purposes of article I, section 6 of Illinois Constitution and determined that "the framers intended for it to have the same scope as the fourth amendment").

In light of this settled precedent, defendant's view that the framers intended that article I, section 6 be construed more expansively than the Fourth Amendment is plainly wrong.

### B. Even if this Court were deciding the lockstep question in the first instance, no Illinois tradition requires that a warrant issue before an arrest may be made.

Even if it were to consider the lockstep question anew, this Court should hold that the warrant requirements of article I, section 6 and the Fourth Amendment are interpreted in lockstep because long-standing Illinois precedent permits public, warrantless arrests where supported by probable cause.

The Court's interpretation of the Illinois Constitution begins with the principle that it must "ascertain and give effect to the intent of the framers of [the constitution] and the citizens who have adopted it." *Caballes*, 221 Ill. 2d at 298 (internal quotations omitted). The "lockstep doctrine" was firmly in place before the adoption of the 1970 Constitution and known to its drafters,

to the constitutional delegates who voted to adopt the present language, and to the voters who approved the new constitution. *Id.* at 292. Therefore, prior to identifying "[a]ny variance between the Supreme Court's construction of the provisions of the fourth amendment in the Federal Constitution and similar provisions in the Illinois Constitution," this Court must:

> find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned.

*Tisler*, 103 Ill. 2d at 245.

Defendant can point to no such basis for a departure here. Nothing in the language of article I, section 6, or in the history of the constitutional debates, suggests an intent that the search and seizure provision of the Illinois Constitution be interpreted differently from the Fourth Amendment. Most significantly, the language of the two provisions is effectively identical. Indeed, as explained, this Court has already recognized that the "affidavit" and "Oath or affirmation" language in the two provisions are virtually synonymous. *Caballes*, 221 Ill. 2d at 291; *see supra* p. 19.

In any event, this language merely governs the *mechanism* by which a warrant may be obtained — whether a warrant application must be supported by an "affidavit," or instead by an "Oath or affirmation" — and not the scope of the warrant requirement itself. In other words, that a warrant application must be supported by affidavit in no way suggests that a warrant

is required for all arrests or otherwise has any bearing on the question presented here: whether a defendant may be arrested in public without a warrant when the police have probable cause. Accordingly, even if, as defendant asserts, the framers of the state constitution ascribed different meaning to the "supported by affidavit" language than to the Fourth Amendment's "Oath or affirmation" requirement, that difference would have no bearing on this case, nor do the related cases on which he relies — *Lippman v. People*, 175 Ill. 101 (1898), *People v. Elias*, 316 Ill. 376 (1925), and *People v. Clark*, 280 Ill. 160 (1917) — in which the People obtained warrants, and which addressed the validity of those warrants.

Moreover, the history of the Sixth Illinois Constitutional Convention, where the 1970 Constitution was drafted, supports interpreting the warrant requirements of the state and federal constitutions in lockstep. To be sure, unlike the Fourth Amendment, article I, section 6 provides citizens with express protection against eavesdropping devices and invasions of privacy, but proposals at the Convention to change other aspects of article I, section 6, such as the language about warrants, were rejected in committee. 6 Record of Proceedings, Sixth Illinois Constitutional Convention 29, 33. Indeed, the explanation to the voters prior to the adoption of the 1970 Constitution states: "This is an amended version of Article II, Section 6 of the 1870 Constitution expanded to include guarantees of freedom from unreasonable eavesdropping and invasions of privacy. *The restriction on warrants is*

*unchanged*." 7 Record of Proceedings, Sixth Illinois Constitutional Convention 2683 (emphasis added).

And under the 1870 Constitution, this Court had consistently held that police officers could make warrantless arrests in public where there is probable cause to believe that a crime was committed and that the individual arrested committed that crime. *See Cahill v. People*, 106 Ill. 621, 626 (1883) (applying "well-known rule that an officer has the right to make an arrest without warrant . . . where a criminal offence has been committed and he has reasonable ground for believing that the person arrested has committed the offence"); *see also People v. Wright*, 56 Ill. 2d 523, 528 (1974) (same); *People v. Hightower*, 20 Ill. 2d 361, 366 (1960) (same); *Lynn v. People*, 170 Ill. 527, 535 (1897) (same). Thus, under both the 1870 and the 1970 Constitution, the relevant question in Illinois, as under the federal constitution, is whether the police had probable cause to arrest; the "fact that the police may have had time to obtain an arrest warrant is immaterial." *People v. Denwiddie*, 50 Ill. App. 3d 184, 190 (3d Dist. 1977) (citing *Watson*, 423 U.S. at 423-24).

Defendant's argument "there does not appear to have developed, under the Illinois Bill of Rights, a strong tradition of specifically and affirmatively approving warrantless arrests in non-exigent circumstances, by delegation to non-judicial actors and after a considerable delay following the development of probable cause," Def. Br. 51, overlooks extensive precedent establishing that in Illinois, as under the federal constitution, so long as police had

probable cause to arrest, the "fact that the police may have had time to obtain an arrest warrant is immaterial" to the legality of the arrest. *Denwiddie*, 50 Ill. App. 3d at 190 (citing *Watson*, 423 U.S. at 423-24). As the Supreme Court explained nearly a century ago, "the usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony." *Carroll v. United States*, 267 U.S. 132, 156 (1925). This reflected the common-law rule that a peace officer was permitted to make a felony arrest without a warrant whether or not it was committed in his presence if there was reasonable ground for making the arrest. *Watson*, 423 U.S. at 418.

Defendant's reliance on *People v. Bass*, 2019 IL App (1st) 160640, for a contrary rule is misplaced. Despite the fact that *Bass* was vacated by this Court, *see* 2021 IL 125434, defendant nonetheless insists that "it may be considered persuasive authority, and should be recognized for its scholarly approach on a matter of first impression in our State." Def. Br. 44 n.7; *see also* Def. Br. 33, 39-40, 46-47, 52. Not so. Putting to one side the fact that, following this Court's judgment vacating the relevant portion of that decision, it effectively no longer exists, every subsequent appellate court decision to consider the question has rejected *Bass*'s reasoning and instead held that arrests made in public with probable cause and pursuant to investigative alerts are constitutional.

The appellate court's holding in *Bass* that "arrests based solely on investigative alerts, even those supported by probable cause, are unconstitutional under the Illinois Constitution" was truly an outlier. 2019 IL App (1st) 160640, ¶ 43, *vacated in part, affirmed in part*, 2021 IL 125434. According to the *Bass* majority, "the text of the Illinois Constitution leaves beyond dispute that a finding of probable cause must be based, not only on a minimum threshold of sufficient facts, but sufficient facts presented in proper form (a sworn affidavit) to the appropriate person (a neutral magistrate)." *Id.*, ¶ 62.

But *People v. Braswell*, 2019 IL App (1st) 172810, explained the obvious flaw in *Bass*'s reasoning: "arrests must be based on probable cause, not warrants as the majority in *Bass* suggests." *Id.*, ¶ 39. Moreover, as *Braswell* also explained, the *Bass* holding "creates the somewhat paradoxical situation where police may arrest an individual without a warrant and without an investigative alert if they have probable cause to do so, but that same arrest becomes unconstitutional if police issue an investigative alert based on the same facts that gave rise to the probable cause." *Id.* To avoid such an absurd result, *Braswell* held that as long as the investigative alert is based on probable cause, the use of an investigative alert complies with the Illinois Constitution. *Id.*

Subsequent panels of the appellate court, when faced with the conflict between *Bass* and *Braswell*, universally followed *Braswell* and held that

arrests based on probable cause and pursuant to investigative alerts are constitutional. *See People v. Simmons*, 2020 IL App (1st) 170650, ¶ 64 ("we agree with *Braswell* and decline to follow *Bass*"); *People v. Bahena*, 2020 IL App (1st) 180197, ¶¶ 59-64 (same); *People v. Thornton*, 2020 IL App (1st) 170753, ¶¶ 45-50 (agreeing with *Braswell* that *Bass* was incorrect, and adding that "barring investigative alerts seems contrary to the central requirement of the fourth amendment and Illinois's search and seizure provision, which is reasonableness"); *see also People v. Hardaway*, 2022 IL App (1st) 200660-U, ¶ 26 ("following those cases which have concluded that investigative alerts do not violate the Illinois Constitution"); *People v. Hodrick*, 2021 IL App (1st) 182367-U, ¶ 105 ("we will follow other panels of this court that have concluded that investigative alerts do not violate the Illinois constitution"); *People v. Clark*, 2021 IL App (1st) 180523-U, ¶ 84 (same).[2] And contrary to the circuit court's apparent belief that investigative alerts are "unique" to Chicago, R69, and a "Chicago-only policy," R90, and *Bass*'s stated belief that "in Illinois, only the Chicago Police Department appears to use investigative alerts," 2019 IL App (1st) 160640, ¶ 5, the Third District recently upheld a Peoria defendant's arrest pursuant to an investigative alert within the Peoria police department because it was based

[2] Pursuant to Illinois Supreme Court Rule 23(e)(1), the People cite these nonprecedential orders for persuasive purposes and will furnish copies to counsel and the court under a separate filing.

on probable cause, *People v. Harris*, 2022 IL App (3d) 200234, ¶ 12 (citing *Simmons*, 2020 IL App (1st) 170650, ¶ 61).

Defendant's reliance on *Campos v. State*, 117 N.M. 155 (1994), and the New Mexico Supreme Court's interpretation of its own state constitution, is misplaced. Def. Br. 50. *Campos* acknowledged the United States Supreme Court's holding that a warrantless public arrest based on probable cause is constitutional regardless of whether the police could have secured an arrest warrant. 117 N.M. at 158 (citing *Watson*, 423 U.S. at 423). Looking to its own state constitution, *Campos* held that New Mexico law requires both probable cause *and* exigent circumstances prior to a public arrest without a warrant. *Id.* at 159. Unlike article I, section 6 of the Illinois Constitution, however, New Mexico's state constitution is not interpreted in lockstep with the Fourth Amendment. *See State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997) ("we no longer follow the lock-step approach"). Indeed, this Court expressly considered and rejected New Mexico's approach. *See Caballes*, 221 Ill. 2d at 312-13 (rejecting invitation to adopt *Gomez*'s "interstitial" approach in Illinois); *see also Fitzpatrick*, 2013 IL 113449, ¶ 23 ("our state constitutional jurisprudence cannot be predicated on the actions of our sister states").

Rather, as discussed above, Illinois has a long tradition of following United States Supreme Court precedent upholding the constitutionality of public, warrantless arrests based on probable cause, regardless of whether exigent circumstances exist. *See, e.g., Braswell*, 2019 IL App (1st) 172810,

¶¶ 8-11, 39 (affirming arrest based on probable cause pursuant to investigative alert issued nearly one year earlier); *Denwiddie*, 50 Ill. App. 3d at 190 (relevant question is whether the police had probable cause to arrest, and the "fact that the police may have had time to obtain an arrest warrant is immaterial" to answering that question) (citing *Watson*, 423 U.S. at 423-24). *Campos* and its interpretation of the New Mexico Constitution is simply irrelevant here. *See Fitzpatrick*, 2013 IL 113449, ¶ 23 ("[w]hat another state determines about its own constitution is not relevant to this question").

In sum, the framers of the 1970 Constitution expressly stated that they intended no change to the warrant requirement of the 1870 Constitution, which allowed officers to make warrantless arrests in public when supported by probable cause, nor did they intend to that Illinois's search and seizure provision depart from lockstep with the Fourth Amendment, which similarly allows such warrantless arrests. Against a plethora of precedent to this effect, defendant asserts, without support, that some Illinois tradition — as yet unidentified by this Court — requires that a warrant issue before an arrest may be made. This is plainly insufficient to justify a departure from lockstep. *See, e.g., Fitzpatrick*, 2013 IL 113449, ¶¶ 15-16 (reaffirming that "the lockstep question is generally settled for search and seizure purposes," with a limited allowance "for consideration of 'state tradition and values as reflected by long-standing state case precedent'") (citing *Caballes*, 221 Ill. 2d at 313-14).

### C. Public arrests based on probable cause and pursuant to investigative alerts are compatible with the Illinois Constitution's separation of powers clause.

Defendant also argues that arrests pursuant to investigative alerts violate the Illinois Constitution's separation of powers clause, which provides: "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970 Art. II, § 1; *see* Def. Br. 53. In defendant's view, "[t]he Police Department's investigative alert procedure, which establishes a proxy or *de facto* warrant system for cases in which a warrant would otherwise be used, constitutes an unlawful exercise of judicial-branch powers by another branch of government." Def. Br. 54. But defendant has forfeited this argument because he failed to raise it in his petition for leave to appeal and never raised it below. *See People v. Hartfield*, 2022 IL 126729, ¶ 66 n.1 (issue not raised in petition for leave to appeal is forfeited) (citing *People v. McCarty*, 223 Ill. 2d 109, 122 (2006)); *People v. Coleman*, 129 Ill. 2d 321, 340 (1989) (failure to raise issue in motion to suppress results in forfeiture). Regardless, the argument is without merit.

This Court has recognized that "our constitution does not attempt to define legislative, executive and judicial power, as it is neither practicable nor possible to enumerate the myriad powers of government and to declare that a given power belongs exclusively to one branch for all time." *In re Derrico G.*, 2014 IL 114463, ¶ 75 (citing *People v. Hammond*, 2011 IL 110044,

¶ 51). Instead, "[i]n both theory and practice, the purpose of the [separation of powers] provision is to ensure that the whole power of two or more branches of government shall not reside in the same hands." *Id.* In other words, "[t]he separation of powers provision was not designed to achieve a complete divorce among the three branches of our system of government; nor does it prescribe a division of governmental powers into rigid, mutually exclusive compartments." *Id.* (citing *Hammond*, 2011 IL 110044, ¶ 52). There will always be "areas in which the separate spheres of government overlap, and in which certain functions are shared." *Id.* (citing *County of Kane v. Carlson*, 116 Ill. 2d 186, 208 (1987)). In the end, "'if the judiciary is given an adequate opportunity to review what has been done, the principle of separation of powers . . . is generally satisfied.'" *Waukegan v. Pollution Ctrl. Bd.*, 57 Ill. 2d 170, 181-82 (1974) (quoting Braden & Cohn, *Illinois Constitution: An Annotated and Comparative Analysis* (1969), at 104-05).

Defendant's argument that investigative alerts are a "*de facto* warrant system," Def. Br. 53-54, rests on the false premise that courts have no oversight when a person is arrested pursuant to an investigative alert based on probable cause. As the appellate court recently explained when rejecting a similar separation of powers argument, "the mere use of alerts to disseminate information among officers does not eliminate judicial evaluations of probable cause." *Harris*, 2022 IL App (3d) 200234, ¶ 13. To the contrary, courts continue to play their constitutionally assigned role with respect to

determining whether probable cause supports the warrantless arrest. As in any other case where the police make an arrest without a warrant, while police may make the initial determination that they have probable cause for arrest, a "judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest" is required. *Gerstein v. Pugh*, 420 U.S. 103, 112-14 (1975). This means that a probable cause hearing before a judge generally must be held within 48 hours. *People v. Nicholas*, 218 Ill. 2d 104, 116 (2006) (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 54 (1991)). Defendant's separation of powers argument fails because it ignores the existence of *Gerstein* and the requirement of prompt judicial review of warrantless arrests.

### D. The good-faith exception to the exclusionary rule applies even if a warrant is required for an arrest under the Illinois Constitution.

Finally, even if this Court were to conclude that warrantless public arrests supported by probable cause violate the Illinois Constitution — and, for the reasons discussed above, it should not — the good-faith exception to the exclusionary rule would apply in this case. Contrary to defendant's argument, Def. Br. 55, the People preserved this argument by raising it before the circuit court, C171-72, and the appellate court, although neither court decided whether the good-faith exception would apply. *See Dossie*, 2021 IL App (1st) 201050-U, ¶ 26 ("Having concluded that the circuit court erred in granting defendant's motion to quash his arrest and suppress evidence, we do not reach the State's argument that the exclusionary rule should be relaxed

because the police acted in good faith."). If this Court were to reach the issue, it should hold that the good-faith exception applies in this case.

"There is no constitutional right to have the evidence resulting from an illegal search or seizure suppressed at trial." *People v. LeFlore*, 2015 IL 116799, ¶ 22. Instead, the exclusionary rule is limited to the "unusual" case where it can achieve its "sole objective" of deterring future violations of the right to be free from unreasonable searches and seizures. *Id.*; *Manzo*, 2018 IL 122761, ¶ 62. A court must ask "whether a reasonably well trained officer would have known that the search [or seizure] was illegal in light of all of the circumstances" when determining whether the good-faith exception applies. *LeFlore*, 2015 IL 116799, ¶ 25. Moreover, this Court has expressly held that the *Leon* good-faith exception (*United States v. Leon*, 468 U.S. 897 (1984)), applies to claims under article I, section 6 of the Illinois Constitution as it does under the Fourth Amendment. *LeFlore*, 2015 IL 116799, ¶¶ 25-67 (discussing *People v. Krueger*, 175 Ill. 2d 60 (1996), and stating that "*Krueger* expressly reaffirmed that this court would continue to accept both the good-faith exception as expressed in *Leon* and the rationale used to support it").

Applying the exclusionary rule here is unwarranted because, "[w]here the particular circumstances of a case show that police acted with an objectively reasonable good-faith belief that their conduct [was] lawful. . . there is no illicit conduct to deter." *LeFlore*, 2015 IL 116799, ¶ 24 (internal quotation marks and citations omitted). As explained above, at the time of

time of defendant's arrest, and for more than a century before that, binding appellate precedent held that warrantless arrests in a public place and supported by probable cause were lawful. *See id.*, ¶ 31 (declining to apply exclusionary rule where (1) officer could rely on "binding appellate precedent" permitting conduct, and (2) "police conduct in relying on the legal landscape that existed at the time was objectively reasonable and a reasonable officer had no reason to suspect that his conduct was wrongful under the circumstances").

Here, in June 2015, the arresting officer would have had no reason to suspect that his conduct might be held to be unlawful. The United States Supreme Court explicitly held in *Watson* that a warrant is not required for a public arrest when probable cause is present even if there was sufficient time to obtain an arrest warrant, 423 U.S. at 417-24, Illinois courts had followed *Watson*, and the officer in this case could reasonably rely on this established precedent. This is particularly true because this Court in *Caballes* reaffirmed its commitment to applying the limited lockstep approach when interpreting the Illinois Constitution's search and seizure provision. *See Caballes*, 221 Ill. 2d at 313-14; *see also Holmes*, 2017 IL 120407, ¶ 25 (when construing the search and seizure clause of the 1970 Illinois Constitution, Illinois courts are to "follow decisions of the United States Supreme Court regarding searches and seizures").

Nor would the arresting officer have had reason to doubt that he could rely on the investigative alert prepared by a different detective. *Tisler*, 103 Ill. 2d at 237 (officer need not have personally observed facts asserted as probable cause for arrest); s*ee also Whitely v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568 (1971) (police may act upon a communication through official channels directing that an arrest or search be made, though arrest or search may be invalidated if officer or agency making the request lacked probable cause); *People v. McGee*, 2015 IL App (1st) 130367, ¶ 49 (when an arrest is "predicated on information received in an official police communication by a commanding officer," "the State must demonstrate that the circumstances known to other, non-arresting officers, whose report or directions were relied upon by the officer in making the arrest, were sufficient to establish probable cause to arrest the defendant."); *People v. Lawson*, 298 Ill. App. 3d 997, 1002 (1st Dist. 1998) (same, collecting cases); 2 W. LaFave, Search & Seizure § 3.1(a) (5th ed.) (under the Fourth Amendment, it is "clearly established" that "the police are free to make an arrest without first obtaining an arrest warrant even when there was ample time to obtain one"); *id.* § 3.5(b) (discussing *Whitely*'s rule and its application). Because a reasonable officer would have had no reason to suspect that his conduct might later be ruled unlawful, the good-faith exception would apply here. *See LeFlore*, 2015 IL 11670, ¶ 22.

For all of these reasons, this Court should affirm the appellate court's judgment reversing the circuit court's order quashing defendant's arrest and suppressing evidence.

## CONCLUSION

The People of the State of Illinois respectfully request that this Court affirm the judgment of the appellate court, which reversed the circuit court's order granting defendant's motion to quash his arrest and suppress evidence, and remand this matter to the circuit court for further proceedings.

May 16, 2022

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

JOHN E. NOWAK
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7958
eserve.criminalappeals@ilag.gov

*Counsel for Plaintiff-Appellee*
*People of the State of Illinois*

## 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 or words contained in 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 36 pages.

/s/ John E. Nowak
JOHN E. NOWAK, Bar #6243584
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7958
eserve.criminalappeals@ilag.gov

## PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 16, 2022, the **Brief for Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system, which provided service to the following:

Sharone Mitchell, Jr.
Cook County Public Defender
Suzanne A. Isaacson
Assistant Public Defender
69 West Washington
15th Floor
Chicago, Illinois 60602
LRD.PD@cookcountyil.gov

*Counsel for Defendant-Appellant*

Kimberly M. Foxx
State's Attorney of Cook County
Richard J. Daley Center, 3d Floor
Chicago, Illinois 60602
eserve.CriminalAppeals@cookcountyil.gov

/s/ John E. Nowak
JOHN E. NOWAK, Bar #6243584
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7958
eserve.criminalappeals@ilag.gov

No. 127412

IN THE
SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>GERMEL DOSSIE,<br><br>Defendant-Appellant. | ) | Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-20-1050<br><br>There on Appeal from the Circuit Court of Cook County, Criminal Division, No. 15 CR 10914<br><br>The Honorable William H. Hooks, Judge Presiding. |

# APPENDIX OF NON-PRECEDENTIAL ORDERS CITED IN THE APPELLEE BRIEF OF THE PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

JOHN E. NOWAK
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601-3218
(773) 590-7958
eserve.criminalappeals@ilag.gov

*Counsel for Plaintiff-Appellee*
*People of the State of Illinois*

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## TABLE OF CONTENTS

2021 IL App (1st) 180523-U

SIXTH DIVISION
September 3, 2021

No. 1-18-0523



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 16035 |
| | ) | |
| ANGELO CLARK, | ) | Honorable |
| | ) | Nicholas Ford, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Justice Harris concurred in the judgment.
Presiding Justice Mikva concurred in part and dissented in part.

**ORDER**

¶ 1 *Held*: Defendant's convictions for aggravated battery based on discharge of a firearm are affirmed over his contentions that 1) his statement should be suppressed because he was arrested pursuant to an investigative alert; 2) the trial court erred because it violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012); and 3) the trial court denied him due process and a fair trial because it conveyed to the jury that it was biased against him by suggesting he had an improper motive during cross-examination and because it allowed lay witnesses to testify as to their opinion that he was a "lookout." The trial court's sentence was not an abuse of discretion.

¶ 2 Following a jury trial, defendant Angelo Clark was found guilty of two counts of aggravated battery based on discharge of a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) under an accountability theory. The court sentenced defendant to 16 years in prison on each count, to be served consecutively. Defendant contends on appeal that: 1) his statement should be suppressed because he was arrested pursuant to an investigative alert, not an arrest warrant; 2) the trial court committed plain error because it failed to ask the jurors whether they accepted the principles set forth in Illinois Supreme Court Rule 431(b) (eff. Jul. 1, 2012); 3) the trial court denied him due process and a fair trial because it conveyed to the jury that it was biased against him by suggesting he had an improper motive during cross-examination; 4) the trial court denied him due process and a fair trial when it allowed lay witnesses to testify as to their opinion that he was a "lookout"; and 5) the trial court failed to consider the requisite sentencing factors when it sentenced defendant, who was 17 years old, to a total of 32 years in prison. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant's convictions arose from a shooting that took place near the area of 311 West 105th Street, in Chicago, during the evening of July 19, 2013, in which two victims, a 6-year-old girl and 52-year-old woman, were shot and injured. At trial, the State proceeded on three counts of aggravated battery and five counts of attempted first degree murder (720 ILCS 5/9-1(a)(1) (West 2012) (720 ILCS 5/8-4(a) (West 2012)) against defendant based on an accountability theory. Co-defendants, Terrence Lynom and Ladon Barker, were tried separately and are not parties to this appeal.

¶ 5 A. Motion to Quash Arrest and Suppress Evidence

¶ 6 Before trial, defendant filed a motion to quash arrest and suppress evidence, contending that he was arrested without probable cause and a valid arrest warrant.

¶ 7 At the hearing on the motion, Lashan Clark, defendant's mother, testified for defendant as follows.[1] On July 22, 2013, Lashan was at her mother's house when two police officers arrived looking for defendant, who was living at Lashan's sister's house. Lashan voluntarily accompanied the officers to her sister's house. When they arrived, Lashan walked to the back of the house and told the officers to wait outside. Lashan walked through the back door and saw defendant sitting at the kitchen table. Lashan told defendant that the police were there "about a little girl" and it was serious. When Lashan and defendant were talking, the officers entered the house without permission. The officers then choked defendant, threw him against the wall, and threatened to taser him.

¶ 8 Chicago police officer Patrick Kinney[2] testified that on July 22, 2013, he and his partner, Chicago police officer Kevin O'Neill, learned that there was an investigative alert for defendant and that "there was probable cause attached to that investigative alert." Kinney testified that there were two types of investigative alerts, one being with probable cause and one without probable cause. He testified that "according to my data warehouse search of the alert it said specifically probable cause to arrest." He testified that the basis for probable cause for the investigative alert was that defendant had been "positively identified as being the shooter where two victims were shot."

[1] Lashan Clark shares the same last name as defendant. We will therefore refer to Lashan Clark by her first name.

[2] The report of proceedings spells Officer Kinney's name as "Kenny" but the parties and the arrest report contained in the common law record spell his name "Kinney."

¶ 9 After Kinney learned that there was an investigative alert with probable cause to arrest defendant, he performed a search on defendant's name and went to the residence of the first address that appeared. At that residence, defendant's mother, Lashan Clark, was "extremely" cooperative and informed them that defendant lived with her sister. Lashan accompanied the officers to her sister's house. When they arrived, Kinney went to the back of the residence, O'Neill went to the front, and Lashan waited in the police car. Kinney knocked on the back door. A man, who was about 20 or 25 years old, answered the door and Kinney told him that he was looking for defendant and had probable cause for his arrest. The man opened the door, moved to the side, and pointed to a back bedroom where Kinney saw defendant. Kinney, who was outside the residence, told defendant that he had a probable cause investigative alert for his arrest and asked him to come to the police station. Defendant said, "Okay, let me get some clothes," after which Kinney entered the residence and defendant put on his clothes. Kinney did not have consent to go inside the house and he entered the residence because he did not "know what [defendant] was going to grab" and "wanted to have eyes on prior to me arresting him." The State then asked, "And was he cooperative and then came out with you?" Kinney testified, "Yes, very." The State then asked Kinney, "Then you placed him under arrest?" and he responded, "That's correct." Kinney then brought him to the police station. Kinney did not have an arrest warrant for defendant.

¶ 10 The trial court denied defendant's motion to quash arrest and suppress evidence. In doing so, the court found that Kinney was "believable" and a "compelling" witness and that Lashan's testimony was "utterly without any credibility." The court stated that it agreed with defense counsel that "the existence of an investigative alert with probable cause to arrest does not offer an officer the ability to enter a home to effect an arrest on that point." The court further stated that

Kinney's eventual entry occurred after defendant had "already agreed to accompany" the officers and it was not "to effect arrest but to effect and facilitate his accompaniment, which he already agreed to do."

¶ 11 B. Motion to Suppress Statements

¶ 12 Defendant also filed a motion to suppress the statements he made after he was arrested. He argued that the court should suppress his statements because of his young age, he was never given *Miranda* warnings, and his statements were obtained as a result of psychological and mental coercion.

¶ 13 Chicago police detective Matthew Weber testified that on July 19, 2013, he was assigned to investigate the shooting, which had occurred at 311 West 105th Street, in Chicago, with Chicago police detectives Henry Barsch and Tom Lieber. On July 22, 2013, at about 5 p.m., Weber and Lieber met with defendant at the police station. When Weber initially entered the interview room, he introduced himself and explained why defendant was there. Defendant told Weber he did not "know anything" and was not in any gangs. Weber did not give defendant *Miranda* rights at this time and did not ask him any questions. Weber left the room "briefly" and then returned to the room, at which time he read defendant his *Miranda* rights. Defendant indicated he understood each of his rights and agreed to speak with Weber and Lieber, after which they spoke for about 30 or 40 minutes.

¶ 14 Weber left the interview room with defendant and then at about 1 a.m., he called Assistant State's Attorney (ASA) Patricia Melin. Thereafter, Weber and Melin spoke with defendant. Melin advised defendant of his rights and defendant indicated he understood his rights and agreed to speak. At some point during the conversation, when Melin and defendant were in the room without

Weber, defendant agreed to give a handwritten statement. Thereafter, Weber, defendant, and Melin went to a larger interview room where defendant gave his statement and Melin typed it. When defendant finished his statement, Weber, Melin, and defendant reviewed it, signed each page, and initialed any corrections. Defendant read a portion of his statement, which demonstrated to Weber that defendant was able to read and write English.

¶ 15 Weber testified that defendant was given a cheeseburger and a Snickers bar, and he did not want anything to drink. Defendant was allowed to use the bathroom and make a telephone call. Defendant never asked for an attorney or to make any phone calls. Weber did not offer defendant anything in exchange for his statement and did not make any threats or promises to him. Weber did not tell defendant that if defendant did not help him, he was going to be charged with murder.

¶ 16 Defendant, who was 17 years old on July 22, 2013, testified that the "arresting officer" came into the back of his aunt's house without consent or a search warrant. The officer then grabbed him and asked for his name. Defendant gave the officer his name, after which the officer told defendant that he was taking him to the station for questioning. Defendant told the officer that he did not want to go to the station. The officer then pulled out a taser, placed handcuffs on defendant, and took him to the police station where he was placed in a small room. About an hour later, defendant was taken into an interrogation room. Defendant testified that the detective who had previously testified at the hearing came into the room and asked defendant what happened. Defendant told the detective that "I don't know nothing about anything." The detective left the room and about 30 to 35 minutes later, he returned with two other officers. Defendant told the officers that he did not "know nothing about nothing" and the officers continued to interrogate him. Defendant eventually gave a statement. The detective never read defendant his *Miranda*

warnings and defendant was never told that he had a right to a lawyer or the right not to talk. Defendant gave a statement because the detective told him that if he did not say he participated in the crime, he would be charged with first degree murder.

¶ 17 After defendant gave his statement to the detective, he met with an ASA in a different room. The ASA never told him that he had a right to an attorney or that he had a right not to talk to them. Defendant knew certain details that he provided in his statement because it was "the word around the neighborhood." Asked why he told the police "what the word around the neighborhood was," he testified that "they told me if I didn't say I participated in this crime, I'd be charged with first-degree murder" and "I only did what I was told." Defendant testified that he signed the statement and read it because that "that's what you have to do" and the detective told him that "if I didn't say I participate in this crime, I would be charged with first degree murder." He never told the ASA that he did not want a lawyer or that he did not have a problem talking to them. He was not allowed to make a phone call to his mother or aunt.

¶ 18 On cross-examination, defendant acknowledged that his mother brought the police to the location where he was arrested. Defendant stated that he never asked for an attorney or to make a phone call. He acknowledged he signed a handwritten statement regarding the shooting, his signature was on pages one and three of the statement, and he initialed it three times. He acknowledged that he said in the statement that the police and ASA treated him okay, he was given a cheeseburger and Snickers bar, and he was allowed to use the bathroom. He acknowledged that after the ASA finished typing his statement, he demonstrated he could read by reading a portion of it out loud.

¶ 19 Following argument, the court denied defendant's motion to suppress statements. In doing so, the court found that defendant "freely admitted reading" the statement, which contained *Miranda* warnings. The court stated that it was "readily apparent to me that these are his words and that these words were given to the police not as a result of duress or coercion of any kind, but a decision he made freely and voluntarily" after having been given his *Miranda* warnings.

¶ 20 C. Jury Trial

¶ 21 Juannakee Kennedy, the mother of the six-year-old victim Q.T., testified that on July 19, 2013, Q.T. attended a barbeque with her older daughter. At about 10 p.m. that night, she learned that Q.T. had been shot in the back, the bullet went through her lung, and she was unconscious in the intensive care unit at the hospital. Q.T.'s right lobe of her lung had to be removed and she was in the hospital for about three weeks.

¶ 22 Lisa Travis testified that on July 19, 2013, at about 7:30 p.m., she was attending a memorial for her nephew, who had died five years earlier. The memorial was held at a residence located at 311 West 105th Place in Chicago, with mostly women and some children. At some point, she fell to the ground and could not feel her foot. Her niece said, "They shooting," and everybody started running into the house. She did not hear shots and did not see anybody shooting. She tried to scoot herself into the gangway area to hide and it was "chaotic" for a few moments. After the bullets stopped, her son carried her into the house. Travis was shot in the leg, which required therapy and caused her to miss six months of work.

¶ 23 Ayanna Moore testified that on July 19, 2013, she was at 311 West 105th Street to attend the memorial with about 20 or 30 people.[3] At about 7 p.m., she left the memorial with her sister to get more cups. When Ayanna stopped her car at a nearby intersection on 105th Street, she saw an individual named Kevin Collins, whom she referred to as "Cool," and he stopped to talk to her from the passenger's side of her vehicle. Ayanna noticed a group of about 10 guys whom she had not seen before. At some point when she was talking to Cool, a guy with dreadlocks and a red t-shirt, who was about five to seven feet from her, walked up and lifted his shirt so she could see the butt of a gun tucked into his waistband. Cool told the individual to "like go back" and he dropped his shirt and walked away. Ayanna continued driving to the store and called her cousin, Jarvis Thomas, to find out if "they were having some conflict" because she was suspicious about Cool and the other individuals.

¶ 24 Ayanna testified that about 15 or 20 minutes later, she returned to the memorial. When she was on the porch, she looked down the street towards a dead end on the block and saw "three guys" come from an alley onto 105th Street. The three individuals were in red, black, and white t-shirts and she recognized all three of them from her encounter with Cool earlier that evening. The person in the red shirt was the same person whom she had previously seen with the gun, and she identified defendant in court as the individual who was in the white shirt. The individuals in the red and black shirts ran across the street and "started shooting" and "holding the guns out." They were shooting towards the people in front of the residence at 311 West 105th place. In front of the house were about 15 to 20 people, most of whom were women and children.

[3] Ayanna Moore shares the same last name as another other witness Shusana Moore. Therefore, we will refer to these witnesses by their first names.

¶ 25 Ayanna testified that defendant did not have a gun and he "came out behind them," "laid back," and stood "off to the side." She also testified that defendant was standing "a little off from them" in the alley and was "just standing there the whole time." She stated that defendant "walked like right behind them and then he looked and walked back" to the alley right before the shooting started. After the shooting stopped, the individuals ran down the alley towards 106th Street. At some point during the shooting, Ayanna saw Q.T. get hit while she was riding her bike, after which Q.T. ran towards the porch and collapsed in Ayanna's lap. Ayanna tried to stop the bleeding and stayed with Q.T. until the ambulance arrived.

¶ 26 Ayanna identified one of the shooters from a photo array that the detectives had showed her at the police station after the shooting. She testified that on July 21, 2012, when she was at the hospital with Q.T., she identified from a photo array the shooters in red and black shirts, as well as the person who was "just a lookout." The State then asked Ayanna, "So when you say the lookout, are you referring to the person—well, who is the person that you identified as a lookout?" Defense counsel objected to the word "lookout," and the court sustained the objection. Ayanna then testified that the person whom she had just identified was defendant and he was the person who had been standing by the alley.

¶ 27 Ayanna testified that on July 22, 2013, at a line-up at a police station she identified the shooter, who was wearing a red shirt, and defendant, who she described as "being a lookout.". The court overruled defendant's objection. Ayanna then testified that after she viewed the lineup, she went back to the detective and told him that the person she had previously identified in the "first array" "wasn't the one that was the lookout." Defense counsel objected to the word "lookout," after which the court admonished the jury as follows:

> "THE COURT: Okay. Folks, I'm going to take a minute and pause on the word lookout. Whether or not the defendant was a lookout in this case, that's going to be your decision and your decision alone to make. This witness is testifying on her own impressions of what was going on out there. That's something you can consider but the decision of guilt or innocence of the defendant rests solely within you and it's based on your observations of the witnesses. Does everybody understand that?"

The jury responded affirmatively, and the court stated it was "going to sustain the objection, as to the use of the word lookout."

¶ 28 Ayanna testified that on July 23, 2013, she viewed another lineup at the police station, where she identified the shooter who had the "blond patch" in his hair and the person who was wearing the red shirt. Ayanna identified a photograph of the porch where she was standing on the night of the shooting, and she placed a mark where defendant and the two shooters were standing.

¶ 29 On cross-examination, Ayanna acknowledged that after the shooting, she told the detectives that the person who showed her the firearm was wearing a black shirt, but at trial, she testified that he was wearing a red shirt. She testified that when she spoke with the detectives after the shooting, she "might have said a lot" because "it happened so fast" and it was "kind of chaotic." There were about 7 to 10 return shots fired at the shooters.

¶ 30 Shushana Moore testified that on June 19, 2013, she was at the memorial and at about 7 p.m. she went to her aunt's house, which was located on the same street. When she was standing in front of her aunt's house, she saw Ayanna in her car at the intersection at 105th and Wentworth, which was about 50 feet away from her. Ayanna was talking to "Cool" and there were other young guys with him. During the conversation, a young man who was wearing a red shirt and had

dreadlocks turned towards Cool, lifted up his shirt, and pointed to a gun in his waistband, which was poking out. Cool shook his head "no." About 30 or 45 minutes later, Shushana went to the store with her aunt. On her way there, she turned into an alley on 105th Street and saw about 7 to 10 guys in a nearby field, one of whom she had previously seen wearing the red shirt with the gun. She also saw a person in a black shirt who had a "patch of hair that was dyed blond" and a person in a white shirt, whom she identified in court as defendant. Shushana's aunt called her mother to warn her that the group of guys "looked suspicious." Shushana then heard about 10 gunshots. She drove back to the memorial and saw a child, whom she later learned was Q.T., crawling up the stairs to the house.

¶ 31 Shushana further testified that on July 22, 2013, she viewed a line up at the police station and identified defendant as the person with the white shirt in the field who "was standing out there with them." She also identified the person with the red shirt and the gun in his pants. On July 23, 2013, she viewed another line up at the police station and identified the individual with the "gold hair patch" whom she saw in the field.

¶ 32 Jarvis Thomas testified that he was currently living in Nevada, where he had a pending armed robbery case, and further stated as follows. On July 19, 2013, at 7:30 p.m., he was at the memorial and noticed "two guys walking out the alley" from the south side of the street. One of the men was wearing a red shirt and the other was wearing a black shirt. A third man, whom he identified in court as defendant, was in a white shirt and kneeling down by the gate on the south side of the street. He testified that when the men in the red and black shirts crossed the street, defendant "[j]ust stand there and look and observe." After the two men crossed the street, "gunshots started ringing out" and the men in the red and black shirts were shooting towards the

crowd of people on the north side of the street. There were about 12 or 13 gunshots, and someone shot back at the men who were shooting. Defendant never crossed the street and was "[s]till standing there" and "kneeling down" the entire time and only stood up when the shooters left. After the shooting stopped, the men crossed the street and went back to the alley. Defendant waited for them and then he "stood up, and they all took off in the same direction."

¶ 33 At one point during Thomas's testimony, he was asked what defendant was doing when the men in the red and black shirts were shooting. Thomas testified that defendant was "[k]neeling by the gate," after which the following colloquy occurred:

> "MR. NOLAN [(ASSIATANT STATE'S ATTORNEY)]: Okay. And what did he appear to be doing while the people were shooting? Just kneeling?
>
> MS. PATZKE [(DEFENSE ATTORNEY]: Objection—
>
> THE WITNESS: Observing—
>
> MS. PATZKE:—asked and answered.
>
> THE WITNESS: Observing the surroundings—
>
> THE COURT: Overruled.
>
> MS. PATZKE: Objection.
>
> THE WITNESS:— and the shooters' lookout.
>
> THE COURT: Overruled."

¶ 34 The court then told the jury: "As I've already explained, folks, the role of the parties is for you to determine based on your observations of the witnesses." The State asked Thomas what led him to the opinion that defendant was "observing." Thomas testified that he "was looking around" towards the people on the block and not towards the shooters and his eyes were focused primarily

on the block. On re-cross, Jarvis testified that defendant was just looking towards the party and not looking back the other way towards the alley. He also testified that defendant was not looking at the shooters and agreed that he "wasn't looking around, he was looking in one place." The State showed Thomas a photograph of the street where the shooting took place and he described where he was standing when the gunshots started. On July 21, 2013, he identified defendant in a photo array as well as the two shooters. On July 22, 2013, he identified defendant and one of the shooters in a line up and the next day he identified the other shooter in a lineup.

¶ 35 Cragg Hardaway testified he did not remember where he was at 7 p.m. on the night of the shooting. However, he did remember that at some point that evening, he was with his cousin, Isaiah Hicks, at his grandmother's house at 105th and Edbrooke. He eventually left his grandmother's house with Hicks and drove towards Michigan Avenue. At around 105th and Lafayette, DeAndre Butler got into the car and Hardaway drove around the neighborhood for a little bit. The police stopped him near 105th and State Street. He did not remember if someone had jumped out of the car before the police stopped him. The officers took the occupants' names and let them go, whereupon Hardaway drove back to his grandmother's house with Hicks and Butler.

¶ 36 When he was asked whether it was "true that you heard multiple gunshots when you walked out of grandma's house," Hardaway stated he could not remember, after which defense counsel objected based on a leading question. The court then stated it was granting the State leave to treat him as a hostile witness based on his "repeated and very pointed indications of not recollecting." Hardaway then testified that right after he picked up Butler in his car, he picked up Barker, Lynom, and defendant.

¶ 37 Hardaway further stated that on July 21, 2013, he met with two detectives at the police station and his conversation was recorded. He had a pending armed robbery case at the time. A few weeks before Hardaway testified at trial, he watched the video recording of his interview. Hardaway testified that the detectives tried "to put me in something" and told him he was going to prison for 25 years for something he did not do.

¶ 38 Hardaway did not remember certain statements he made during the interview. Hardaway did not remember telling the detectives that at about 7:40 p.m. on the night of the shooting, he walked to the gate of his grandmother's house and heard multiple gunshots "up towards the hill," that Lynom, whom he knew as "Little Lord," was wearing a red shirt and that defendant was wearing a gray shirt when they got in his car that night. He remembered telling the police that defendant had exited his vehicle at 105th and Lafayette, Barker had exited the vehicle around 106th and Wabash, and Lynom jumped out of his car right before the police pulled him over. He did not remember telling the detectives that defendant had said to Lynom, "I saw you shoot someone" and "I know someone's dead." He did not recall whether he told the police that when he returned to his grandmother's house, he got out of the car with Butler and Hicks and walked back up the hill, where he ran into defendant, who had changed clothes. He did not recall whether he told the police that he heard defendant tell Butler that he had thrown the guns by a field near the train tracks. Hardaway testified that at the end of the recorded interview, he stated that he was treated well by the police and he gave the interview freely and voluntarily.

¶ 39 After Hardaway stated that he did not remember the questions or answers from his grand jury testimony, Hardaway stated that when he gave his statement to the police and testified at the grand jury proceeding, he "told them what they wanted to hear."

¶ 40 John Dillon, who was an ASA in July 2013, testified that he met with Hardaway before he testified at the grand jury proceeding and he asked Hardaway questions at the proceeding. The State read portions of the State's questions and Hardaway's answers from the grand jury proceeding and Dillon answered affirmatively that the portions the State read were the State's questions and Hardaway's answers from that proceeding. We summarize that testimony as follows. When Hardaway stepped outside his grandmother's house, he heard about 12 gunshots coming from "up the hill." Hicks, who was sitting in the car, did not hear the gunshots because his music was loud. Defendant said to Lynom, "I saw you shoot someone." While Hardaway was driving, Lynom told him to stop the car and then Lynom got out of the car and jogged though a gangway, after which a police car pulled over Hardaway. The officers asked for their names and questioned why the guy with the red shirt, which was Lynom, had exited. Thereafter, a second police car pulled over Hardaway and let the men go after taking their names and searching the car. When Hardaway returned to his grandmother's house, he walked up the hill on 105th Street towards Michigan Avenue with Hicks and Butler. They ran into defendant, who had changed his clothes, and defendant told Butler that he threw the guns "back by the train tracks" near a field on 106th Street. The police and ASA treated Hardaway well and did not threaten him. Hardaway gave the videotaped statement freely and voluntarily.

¶ 41 Chicago police detective Henry Barsch testified that at the police station on July 20, 2013, Hardaway agreed to have his statement recorded. In his statement, Hardaway identified a photograph of Hicks as the person sitting in the car when the gunshots went off, Lynom as the person he picked up in the area of the shooting, and Barker as one of the people who fled the area of the shooting. Hardaway identified a photograph of defendant as the person "who was also part

of the shooters." Barsch never told Hardaway that he would receive 25 years in prison if Hardaway did not tell him what he wanted to hear. After Barsch's conversation with Hardaway, the detectives issued investigate alerts for defendant, Lynom, and Barker, after which defendant was arrested on July 22, 2013. The court allowed the State to publish certain portions of Hardaway's statement.

¶ 42 Assistant state's attorney Patricia Melin testified that on July 23, 2013, she and Weber met with defendant at the police station. She explained her role and advised defendant of his *Miranda* warnings. Defendant indicated he understood each of his rights and agreed to speak to her. The initial conversation lasted between 30 and 45 minutes and defendant told Melin he had been treated fine by the police. Defendant agreed to give a typed written statement, so Melin, Weber, and defendant went to another room with a computer. When Melin finished typing defendant's statement, she reviewed it line by line with defendant and Weber. Defendant read a portion of the statement out loud to demonstrate that he understood and could read and write English. Defendant, Melin, and Weber signed each page of the statement and defendant was allowed to make corrections. The court admitted defendant's statement into evidence and the State published it.

¶ 43 Melin read defendant's statement to the jury, which we summarize as follows. He was advised of his *Miranda* rights, understood each of his rights, and agreed to make a statement. He was 17 years old and was a member of "Goon Town," which was a mix of people from different gangs. Goon Town was fighting with the "10-4 L." On July 19, 2013, defendant was with "some other Goontowns," including Lynom, Barker, Butler, Kevin Collins, whom he called "Cool," and a person named Maris Oliver. They saw a group of 10-4 Ls down the block "so they decided to go around to the other end of the block and shoot back at the people" who were having a gathering with about 30 people in front of a house. Defendant stated that Barker and Lynom "volunteered to

shoot" and that he and Oliver said they would "go with to make sure [Barker] and [Lynom] were ok." Defendant, Oliver, Lynom, and Butler, who brought guns to the scene, walked by the train tracks through an alley to the other end of the block at 105th and Wentworth. Oliver stayed close to the alley and defendant, Barker, and Lynom walked to the corner of the alley. Defendant stayed at the corner of the alley and Barker and Lynom crossed the street and started shooting at the group in front of the house. While they were shooting, defendant "stayed at the edge of the alley to make sure they were ok." Defendant stated that Barker "was holding his gun in both hands when he fired, it looked like he knew what he was doing, but [Lynom] was firing with one hand up, and his hand was moving around like the gun was too big to be fired like that." After Barker and Lynom "shot down the block," defendant saw that "someone from down the block fired two times back towards them, but he saw the bullets ricochet on the ground in front of them." Barker and Lynom ran back to defendant and then "they all ran back the same way to 106th, and there Maris took both guns." Defendant, Lynom, and Barker kept running until they got into a car with Hardaway, Hicks, and Butler. At 105th and Lafayette, defendant got out and went to his grandmother's house. Defendant changed his clothes because "he knew that a person on the porch at 105th and Wentworth had seen him." Defendant walked somewhere with his cousin, and saw Butler, Hardaway, Hicks, and Lynom there. Some people were telling Lynom that "he had shot a kid" and someone punched Lynom because he "shot a little girl." Defendant stated that he "decided that he was going to get the 9-millimeter gun back" and bring it back to where it was usually kept. Defendant "did go get the gun, but not on that day." Defendant stated that he had been treated well by the police and had been given a cheeseburger and Snickers bar and was allowed to use the bathroom. Defendant stated that he gave his statement freely and voluntarily and he demonstrated his ability to read and write in English by reading part of his statement out loud.

¶ 44 Chicago police sergeant Kevin Norris, an evidence technician, testified that he found several fired cartridge cases of two different calibers on the street, sidewalk, and parkway near the shooting. He concluded that there were at least two guns that were fired. Two semi-automatic firearms were recovered from the roof of a nearby garage. Caryn Tucker, who was an expert in firearms identification, testified that the firearms inventoried included two 9-milimeter guns, one Ruger, and one Browning. Three of the cartridge casings that she examined were recovered from the street and were fired from the Browning firearm. Nine other cartridge casings she examined were fired from the same unknown firearm and seven cartridge cases were identified as being fired from the same unknown .40-caliber Smith and Wesson firearm. She did not identify any cartridge casings that were fired by the recovered Ruger firearm.

¶ 45 Lashan Clark, defendant's mother, testified for the defense. Lashan's testimony was similar to her testimony at the hearing on defendant's motion to quash and arrest and suppress evidence. She testified that on July 22, 2013, she was at her mother's house when two police officers came looking for defendant. The officers allowed Lashan to ride with them to her sister's house to find him. Lashan entered the back of her sister's house and the police officer initially stayed on the porch. Lashan spoke with defendant, who saw the officer and became upset. Lashan tried to calm defendant down. The officer entered the house and told defendant they were not going to wait for him to get dressed. Defendant told the officer he was not going, after which the officer grabbed defendant, told him he was going to taser him, and dragged him out of the house.

¶ 46 Defendant, who was 17 years old on the night of the shooting, testified that on July 22, 2013, he was in the back bedroom of his aunt's house when his mother walked in and closed the door behind her. A police officer was on the back porch and there were police officers in the front

and back of the house. After he talked to his mother, one of the officers walked into the house and asked defendant to come to the police station. After defendant refused, the officer grabbed defendant by the wrist, forcefully pulled him up, slammed him into the door, and put a taser in the back of his neck and threatened to tase him. Defendant testified he complied with the arrest and the officers took him to a police station.

¶ 47 At the police station, defendant, who was in handcuffs, was taken to a small room. About 45 minutes later, Detective Weber came in and told him that Hardaway placed him at the scene of the crime. Weber never told defendant that he did not have to talk or that he had the right to a lawyer. Defendant told Weber that he did not want to talk to him, he did not know what he was talking about, and he did not "know anything about nothing." Weber started yelling and screaming at him and left the room. Thirty minutes later, Weber told defendant that if he did not say he had anything to do with the crime then he would "be going down for first degree murder." Defendant decided to talk to Weber because he "was scared out of his f*** mind."

¶ 48 Defense counsel asked defendant about the statement that the ASA had read and how defendant knew about the specific things included in the statement. Defendant responded that his grandmother lived around the area of the shooting, and everyone knew what had happened because "word get around fast where I'm from." Asked why he told the detectives that he was involved in the shooting, defendant testified that the detective told him "if I didn't say that I was there, I was going to be charged with first degree murder" and the detective told him he could go home after he gave the statement.

¶ 49 On cross-examination, defendant testified that Goon Town was "a bunch of guys that *** grew up with each other." Lynom, who defendant had known for about a year before the shooting,

was involved in Goon Town with defendant. Defendant knew Barker from "around the neighborhood" and had also known him for about a year before the shooting. He testified that Goon Town was not a street gang. Asked whether he had told the ASA and the detectives that Goon Town and the 10-4 Ls had been fighting, he testified that his statement was dictated by the ASA and Weber, after which the following colloquy occurred:

> "Q. Well, didn't you tell the Assistant State's Attorney and the detectives that they had never gotten along, that they had been fighting since before you were even involved?
>
> A. You know as well as I know that that statement was dictated by Detective Weber and the State's Attorney.
>
> Q. I don't know that. And we'll go through that.
>
> A. Yes, you do.
>
> THE COURT: Listen. I'm going to warn you once. All right?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You hear me?
>
> THE DEFENDANT: I understand you, Judge Ford. Yes.
>
> THE COURT: I'm treating you with all the respect I can muster. You're going to listen to the questions—sir, can you pause for a minute. You're going to listen to the questions and answer the ones posed. You can't interject anything into them. Okay. Just listen and answer the questions—
>
> THE DEFENDANT: I understand that."

¶ 50 The State then asked defendant about the night of July 19, 2013. Defendant testified that at about 6 p.m., he was playing Xbox at his grandmother's house. At around 8:15 or 8:30 p.m., he

went outside and saw a group of people hanging out. He did not hear gunshots. At some point that evening, defendant saw Hardaway and Hicks when they pulled up their car at 104th and Wabash. The State showed defendant his statement and he acknowledged that his signature was on page one. He testified that he gave his statement "not voluntarily." Defendant testified about the statement and court sustained several of the State's objections based on defendant being nonresponsive.

¶ 51 Defendant acknowledged that his statement indicated that in July 2013, he moved back to Chicago after he was expelled from a high school in Wisconsin. He acknowledged he told the ASA that Lynom and Barker volunteered to shoot at the memorial and that he "went over there to make sure that they were okay." He acknowledged stating that he stayed close to the alley at 105th Street while Barker and Lynom went across the street and started shooting and that he said he was "there to make sure that your guys were okay." During a series of questions with defendant about whether Weber had told defendant to state that Barker had a gun in both hands, the following colloquy occurred:

> "Q. Did Detective Weber tell you to say that [Barker] had the gun in both hands?
>
> A. Detective Weber told me that.
>
> Q. Did Detective Weber—
>
> A. You're trying to confuse me. You're not going to get—you know as I know that this statement is involuntary.
>
> MS. KREMIN [(ASSISTANT STATE'S ATTORNEY)]: Objection. Nonresponsive.
>
> THE COURT: Folks, we're going to go over something right now. All of that that he just said, That's not evidence. There was no question pending. It's an effort by the defendant

to do, I don't know what. But it's not responsive to the question and he can't do it and you can't consider it. Does everybody understand that?

THE JURORS: Yes.

THE COURT: Do you understand that when a question is asked of you, it's your duty just to answer it, my friend?

THE DEFENDANT: Yes.

THE COURT: The just blurting things out, that's not allowed in a court of law. Do you understand that? Yes or no?

THE DEFENDANT: Yes, I do, Judge Ford."

¶ 52 Defense counsel then requested a side bar and, outside the presence of the jury, defense counsel moved for a mistrial "based upon what you said about what the defendant—you don't know what he's trying to do, but he's trying to do it, for the record." The court stated that defendant had been "consistently failing to answer questions as posed" and it had been "fairly patient with him, asking him to just respond to the questions as posed." The court stated it would make a clarification for the jury, after which the court admonished the jury as follows:

"The defense has pointed out, and I agree, that as I've been talking to [defendant] about what's been going on out here, I indicated that there was a certain—he said, I think, a couple sentences that were really not in response to any question. I want you to understand, he can—that you just can't consider that in any way. I have no knowledge of what—completely what he said because it was nonresponsive, but you can't consider it unless it's a response to a question. Does everybody understand that?"

The jurors responded, "Yes," and then the court stated:

> "That's the long and the short of it. He gets to say whatever he wants. He can be reexamined by his own attorneys if they choose, and they're not required to choose to do so. And the State is also allowed to ask questions that they may ask. That's within their job title also. And that's the purpose of this. But what any witness, and this applies to any of the witnesses that have testified during the course of the trial, has a duty to do is answer the question when posed. That's one of the rules that we've got here. Does everybody understand that?"

The jury responded "Yes," after which the court asked the jury: "And do you all promise not to consider any remarks that I made as it relates to [defendant's] remarks in any way in reaching whatever verdict you reach?" The jury responded, "Yes."

¶ 53 The State then continued its cross-examination. Defendant testified that Weber told him to say that Lynom and Barker volunteered to shoot. At one point during the questioning regarding what Weber had told him to say, the court sustained defense counsel's objection based on a question being asked and answered, after which defendant attempted to answer the question. The court stated that the objection was sustained and there was no question pending and then told defendant, "Have a seat, my friend. *** For the record, [defendant] stood up, faced the deputy sheriff and became obstreperous. Don't consider any of that either. Everybody understand that?" The jurors responded, "Yes." The court told defendant that the State would continue asking him questions and defendant responded, "Judge Ford, I don't have nothing to say. I don't." The court told defendant that they would continue, and defendant responded again that "I don't—I have nothing to say. I have nothing to say."

¶ 54 The court explained to the jury that defendant testified on direct examination, which exposed him to cross-examination. Thereafter, asked whether Weber had told him to state that he stayed at the edge of the alley to make sure Lynom and Barker were okay, he responded: "I don't have anything to say." The court sustained the State's objection based on being nonresponsive. Defendant then stated: "You're going to say the same thing. I'm going to give you the same reply every time. I don't have anything to say. It's over with. They made their minds up already." The court told the jurors: "Folks, I'm certain that none of you have made your minds up already; is that correct?" The jurors responded, "Yes." The court then explained to the jurors that the court "will rule on the objections" and "[i]t's your duty as a juror that we swore an oath originally that you may not consider the guilt or innocence of the defendant until after you've heard the arguments of the attorneys."

¶ 55 The State asked defendant about whether Weber had told him to say certain statements during his interview with the ASA and defendant responded, "I don't have anything to say." Asked whether he told Weber that someone from down the block had fired back towards them two times, defendant responded, "I don't have anything to say." The State objected again based on being nonresponsive, after which the court stated:

> "Folks, I just want to make one clarification. That objection is sustained. When the defendant chose to testify, which he did, he testified through an entire direct and answered the questions posed by his attorney, he waives his Fifth Amendment right against self-prosecution—against self-incrimination. Do you understand that? And it is appropriate and allowable for the State to cross-examine him once he's waived his right against self-incrimination. Does everybody understand that?"

The jurors responded, "Yes."

¶ 56 Shortly thereafter, outside the presence of the jury, the court told defendant that he could hold him in contempt for failing to answer the questions and if he continued to refuse to answer questions during cross-exanimation, the court could strike his testimony and instruct the jury not to consider anything he said. Defense counsel moved for a second mistrial based on one juror having raised his hand during the court's admonishments. The court questioned the juror, who indicated he could be fair and had not made up his mind, and the court denied defendant's motion for a mistrial.

¶ 57 Thereafter, the State continued its cross-examination regarding defendant's statement. Defendant testified that his "whole statement is made up." On re-direct, defendant testified that he made up the statement because he wanted to go home.

¶ 58 Defense counsel entered stipulations between the parties that in the grand jury proceedings, Shushana had testified that the gunshots "were coming from the memorial" and that Ayanna had testified that the individual who pulled up his shirt and showed the gun when she was talking to "Cool" was about 20 feet away from her.

¶ 59 In the State's rebuttal, the State called Detective Kinney.[4] Kinney testified that on July 22, 2013, he and his partner, Officer O'Neill, learned that there was an investigative alert for defendant. He went to the last known address listed in the Chicago Police Department database. Defendant's mother answered the door and told him that defendant was most likely at her sister's

[4] At the February 2016 hearing on the motion to quash arrest, Detective Kinney was an officer but at trial he was a detective.

house and that she would take them there. Kinney and O'Neill drove their police vehicle to defendant's aunt's house with defendant's mother, who was very friendly and helpful.

¶ 60 When Kinney arrived at defendant's aunt's house, he parked the car in the front and then walked to the back of the residence. O'Neill stayed in the front and defendant's mother stayed in the car. There were no other police officers there. Kinney knocked on the back door and a man answered the door. After Kinney explained why he was there, the man moved his body and pointed at defendant, who was standing in a room about five to seven feet away. Kinney told defendant that they had an investigative alert for him and that the detectives wanted to talk to him at the police station. Kinney allowed defendant to put on a shirt, at which point Kinney walked in the house and stood there. Kinney testified that he was not asked to come inside the house, but he walked inside "for safety" and to "just see where his hands were reaching to make sure he didn't pull a weapon out on me." After defendant put on his shirt and shoes, he came out willingly and did not struggle. Kinney placed defendant in handcuffs outside the back door and did not grab his wrist, throw him against the wall, or place a taser on him.

¶ 61 The State also called Detective Weber in rebuttal, who testified as follows. On July 22, 2013, at about 5:30 p.m., he and Detective Lieber met with defendant at the police station. The ASA and Weber both advised defendant of his *Miranda* rights before each of them met with defendant. Defendant indicated that he understood his rights and agreed to talk. Weber never threatened defendant that he would charge him with first degree murder if he did not answer any questions or if he did not put himself at the scene. Weber never told defendant what to say and did not tell defendant that he could go home if he gave a statement. According to Weber, defendant stated that he had participated in the shooting. Asked to give a summary of what defendant told

him, Weber testified that "basically, he was a lookout" and "was standing in the alley so he could watch anybody coming and keep an eye on his two guys." Weber testified that defendant told him he was involved in disposing of the guns after the shooting and that "I think he volunteered to take the guns and put them back where they belonged." Defendant never told Weber that he was at his grandmother's house with his cousin during the shooting.

¶ 62 On cross-examination, Weber admitted that although defendant told him where he had placed the guns, Weber could not find them after searching the location for hours. Defense counsel asked Weber, "You talked several times about [defendant] telling you that he was a lookout; correct?" Weber responded, "Correct." Weber testified that the word "lookout" does not appear in defendant's handwritten statement. On redirect, Weber testified that in his statement, defendant recalled that while they were shooting, defendant "stayed at the edge of the alley to make sure they were okay." Later, the State asked Weber what he understood defendant's role to be based on what defendant told him and Weber testified that "he was a lookout."

¶ 63 D. Closing Argument and Deliberations

¶ 64 In closing argument, the State argued that defendant was accountable for Barker and Lynom's actions because he was "the lookout" and "agreed to go with them to make sure that he's [*sic*] okay." Defense counsel argued that the State did not prove that defendant had the requisite intent and asserted that the only time the jury heard the word "lookout" was from the State's witnesses, which was their opinion and not based on anything reasonable.

¶ 65 Following argument, the jury began deliberating at 5:30 p.m. on Wednesday July 12, 2017. At 9:25 p.m. that day, the jurors were sequestered until the next morning and then began deliberating again. At about 12:40 p.m. that day, the court received a note from the jury that

requested the grand jury transcripts from the witnesses who testified at trial and a copy of the transcript from the first day of the trial. At about 4:35 p.m. that same day, the jury requested a transcript from the trial proceedings that took place on another day of the trial, and the court informed the jury they would get the requested transcripts as soon as they were available. The jury had also reached a verdict on two counts, but was deadlocked on the other counts. Following agreement with the parties, the court gave the jury a *Prim* instruction, after which the jury deliberated for four more hours. The next day, the jury deliberated for nine hours. Thereafter, the jury found defendant guilty of two counts of aggravated battery with a firearm and the court declared a mistrial on the remaining counts.

¶ 66 The court subsequently denied defendant's motion for new trial. Defense counsel also orally informed the court that she filed a motion for remand to the juvenile court and argued that defendant should be sentenced as a juvenile, noting that he had turned 17 years old nine days before the shooting. The court denied defendant's motion.

¶ 67 E. Sentencing

¶ 68 At sentencing, the State read the victim impact statement of Lisa Travis, who stated that the shooting "forever changed my life" and caused physical pain and mental stress. She depended on others to help care for herself and could not work for six months, which caused financial hardship. The State also read a victim statement from Q.T., the six-year old girl who was shot. Q.T. stated that she could not enjoy athletic activities like she did before the shooting. She had just finished kindergarten before the shooting, and she hoped defendant would "stay in jail where you belong for a very long time so you won't ever help your friends hurt someone else again." Juannakee Kennedy, Q.T.'s mother, testified that her family was affected in many ways after the

shooting, and she requested the court to sentence defendant "to a sufficient amount of time" so that "he truly pays for his participation in the near death experience that my daughter endured."

¶ 69 The State argued in aggravation that in June 2013, defendant had a finding of delinquency for aggravated assault and unlawful use of a weapon and that, just over a month later, he was involved in the shooting here. The State argued that defendant was still denying responsibility for his actions. The State asserted that the shooting affected Q.T. and caused her physical and mental suffering. The State requested the court to sentence defendant to a "long period of time."

¶ 70 In mitigation, defense counsel argued that defendant was "just a child," never had the opportunity to go to high school because he was working when he was 15 years old, and "was only a little over 10 years older than the victim." Counsel stated that defendant had a "tough life" and grew up without his dad in his life. Counsel noted that defendant was depressed in 2011 and tried "to kill himself" when he was 15 years old. Counsel stated that he was not trying to make excuses for defendant, but requested the court to be lenient because defendant was a child and had just turned 17 years old before the shooting. Counsel stated that defendant "did not have direction" and "no one to show him the way" and requested that "be factored in greatly" for sentencing.

¶ 71 In allocution, defendant wrote a letter that defense counsel read to the court and stated as follows. He was a "changed person" and was "no longer that reckless 17 year old kid." He was now "a humble young man evolving into a grown man over time of my incarceration" and had a lot of time to evaluate himself. He stated that he thought about the offense "that caused two innocent people pain and suffering every night plus my family," he was "better than this," and he had "to live with this for the rest of my life." Defendant stated that "[b]elieve it or not, I am truly sorry for that happening. Now I understand. I have to be mindful of who I surround myself with

and what type of actions I take part in." His mentors were "willing to get me a job, to get me back in school" and he "made a promise to myself that I'm done with the act." Defendant stated that he was "past my adolescent state of mind," had "developed into a mature adult," and had learned his lesson. Defendant requested the court to give him "a second chance at life" and he told the court he was "also making a promise to you that if you give me a second chance, you won't regret it." Defendant requested the minimum sentence and stated that "I want to make something of myself while I still have a chance. Every word that I read is true. You have my word as a man."

¶ 72 The court sentenced defendant to 23 years in prison for each count of aggravated battery with a firearm, to be served consecutively. In doing so, the court stated that it considered the evidence presented at trial, the presentence investigation report (PSI), which it "reviewed in its entirety," the evidence offered in mitigation and aggravation, the statutory factors in aggravation and mitigation, the attorneys' arguments, the victim impact statements, and defendant's allocution. The court stated that it was "fully familiar" with the evidence presented at trial and it was very mindful of the financial impact of incarceration. The court stated that it listened to defendant's statement, which provided "some degree of optimism," but also made "me even sadder that this decision that he made he became involved in this group and participate in this offense changed the course of his life substantially." The court stated that "I can't eschew the extreme gravity of their conduct" and the sentence had to "reflect the seriousness of the conduct."

¶ 73 Following the court's pronouncement of the sentence, defense counsel orally requested a motion to reconsider, arguing that the sentence was excessive, "greatly" above the minimum, and that defendant was "very young" at the time of the offense. The court denied defendant's motion to reconsider the sentence. In doing so, the court stated it was "mindful" of defendant's "youth,"

but "the magnitude of these offenses because there's two victims involved here and the concerted effort they engaged in to cause the injuries."

¶ 74 F. Amended Motion to Reconsider Sentence

¶ 75 On January 8, 2016, defendant filed an amended motion to reconsider the sentence. Defendant argued his sentence was excessive in light of his background, young age, and the nature of his participation in the offense, including that he never fired a gun. Defendant asserted that the 46-year sentence eliminated any opportunity for rehabilitation.

¶ 76 At a subsequent hearing on the motion, defense counsel argued that a 46-year sentence for a 17-year-old was "akin to a life sentence" and that defendant did not have background, was not the shooter, and was only found guilty of aggravated battery with a firearm, not attempted murder. Defense counsel argued that defendant had just turned 17 years old at the time of the shooting and that the long sentence "for such a young man with no background leaves absolutely no chance at all for rehabilitation." Counsel stated that there was no evidence to show that defendant shot a gun and requested the court give defendant "a chance to actually have some impact on society for the good, to show that he's learned what he has done wrong." Defense counsel requested the minimum sentence.

¶ 77 Ultimately, the court resentenced defendant to consecutive prison terms of 16 years in prison for each count of aggravated battery with a firearm, for a total of 32 years. In doing so, the court stated: "I am mindful of the fact that he is a young person. I've taken that into further account. I don't often grant motions to reconsider sentences, but this one is one that I continued to mull, even after the sentence had been issued in the case." This appeal followed.

¶ 78 II. ANALYSIS

¶ 79 A. Investigative Alert

¶ 80 Defendant first contends that his statement should be suppressed because he was arrested pursuant to an investigative alert, not a warrant based on probable cause. Defendant asserts that under *People v. Bass*, 2019 IL App (1st) 160640, ¶¶ 62, 71, when a defendant is arrested pursuant solely to an investigative alert, the arrest violates the Illinois Constitution. He also asserts that under *Bass*, the failure to obtain an arrest warrant violates the Illinois Constitution. Defendant argues that because he was arrested pursuant to an investigative alert and not an arrest warrant, his arrest was unconstitutional. Defendant further asserts that the constitutional violation was not harmless because the case was close and without defendant's statement, the evidence at trial only showed that he was present in the area of the shooting. He also claims that his statement was the only evidence suggesting he knew the others were armed and planned on shooting as well as the only evidence that he agreed to go with the others to the scene to see that they were "okay." He argues the court erred when it denied his motion to quash arrest and suppress evidence and requests that we reverse and remand the matter for a new trial.

¶ 81 When we review a trial court's ruling on a motion to suppress, we review the court's factual findings for clear error and will only reject those findings if they are against the manifest weight of the evidence. *People v. Bass*, 2021 IL 125434, ¶ 21. However, we review *de novo* the trial court's ultimate ruling on a motion to suppress. *Id*. The defendant bears the burden of proof. *People v. Simmons*, 2020 IL App (1st) 170650, ¶ 49. Once the defendant sets forth a *prima facie* case that the seizure was unreasonable, the burden shifts to the State to provide evidence to rebut it. *Bass*, 2021 IL 125434, ¶ 21. When a defendant is arrested without probable cause or a warrant based on

probable cause, both the United States and Illinois constitutions are violated. *Simmons*, 2020 IL App (1st) 170650, ¶ 49.

¶ 82 Here, Officer Kinney testified at the motion to suppress hearing that on July 22, 2013, there was an investigative alert for defendant with probable cause attached to it and that according to a "data warehouse search of the alert it said specifically probable cause to arrest." Defendant does not argue on appeal that the officers did not have probable cause to arrest him. Rather, defendant argues that his arrest was unconstitutional because he was arrested pursuant to an investigative alert and not an arrest warrant.

¶ 83 Defendant relies on the appellate court opinion in *People v. Bass*, 2019 IL App (1st) 160640, ¶¶ 62, 71, *aff'd in part and vacated in part*, 2021 IL 125434, ¶ 34. In *Bass*, the defendant was arrested pursuant to an investigative alert based on probable cause, as here, and a divided panel of the appellate court concluded that the defendant's motion to suppress should have been granted because arrests based solely on investigative alerts, even if the alert is based on probable cause, violate the Illinois Constitution. *Id.* ¶¶ 7, 42, 71. After the briefing was completed in this case, in April 2021, our supreme court issued an opinion in *Bass*, in which it agreed with the appellate court that the defendant's motion to suppress should have been granted, but it reached that conclusion on narrower grounds, finding that the traffic stop at issue was unconstitutionally extended. *Bass*, 2021 IL 125434, ¶ 26. Because the court decided the case on narrow grounds regarding the legality of the traffic stop, it did not address the constitutional issue regarding whether investigative alerts violate the Illinois Constitution, and it vacated the portions of the appellate opinion relating to investigatory alerts. *Id.* ¶¶ 29, 33; see *People v. Little*, 2021 IL App (1st) 181984, ¶ 63.

¶ 84 Thus, because the supreme court has vacated the portions of *Bass* regarding the constitutionality of investigative alerts, we will not follow those portions of the appellate court opinion. Rather, we will follow other panels of this court that have concluded that investigative alerts do not violate the Illinois constitution. See *People v. Braswell*, 2019 IL App (1st) 172810, ¶ 39; *Simmons*, 2020 IL App (1st) 170650, ¶ 64; *People v. Thornton*, 2020 IL App (1st) 170753, ¶¶ 45-50; *People v. Bahena*, 2020 IL App (1st) 180197, ¶ 63. Accordingly, we are unpersuaded by defendant's argument that his arrest was unconstitutional because he was arrested pursuant to an investigative alert and not an arrest warrant. The trial court did not err when it denied defendant's motion to suppress.

¶ 85 B. Illinois Supreme Court Rule 431(b)

¶ 86 Defendant next contends that the trial court committed plain error when it failed to ask the jurors whether they both understood and accepted the four principles set forth in Illinois Supreme Court Rule 431(b) (eff. Jul. 1, 2012) that are necessary for a fair and impartial trial. Defendant asserts that the trial court asked the potential jurors whether they took "issue" or "struggle[d]" with those principles and that, therefore, it did not comply with Rule 431(b) because it failed to ascertain whether the jurors accepted the principles set forth in the rule.

¶ 87 Initially, we note that defendant acknowledges he did not preserve the issue for review because he did not object at trial or include it in his posttrial motion. See *People v. Anaya*, 2017 IL App (1st) 150074, ¶ 50 (to preserve an alleged error for review, a defendant must object at trial and raise the issue in a posttrial motion). Defendant nevertheless asserts that we should review his challenge under the plain error doctrine, which provides that we may review unpreserved error if (1) "the evidence is so closely balanced that error alone threatened to tip the scales of justice

against the defendant" or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The defendant has the burden of persuasion under both prongs. *People v. Wilmington*, 2013 IL 112938, ¶ 43. Before we apply the plain error doctrine, we must first determine whether any error occurred at all. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005).

¶ 88 Rule 431(b) states as follows:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: 1) that the defendant is presumed innocent of the charge(s) against him or her; 2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; 3) that the defendant is not required to offer any evidence on his or her own behalf; and 4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. Jul. 1, 2012).

The rule "requires that the trial court ask potential jurors whether they *understand* and *accept* the enumerated principles." (Emphasis in original.) *Wilmington*, 2013 IL 112938, ¶ 32. The trial court may conduct the questioning either individually or in a group, "but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010).

¶ 89 Here, defendant argues, the State concedes, and we agree that the trial court violated Rule 431(b). The trial court asked the potential jurors whether they understood the four principles, but it did not ask whether they accepted each principle. Instead, with respect to the first principle, it

asked whether they "struggle[d]" with it and, with respect to the other three principles, it asked whether they had or took "issue" with them. Accordingly, we find that the trial court did not comply with Rule 431(b) because it did not ask the potential jurors whether they both understood and accepted the four enumerated principles. See *People v. Sebby*, 2017 IL 119445, ¶ 49 (concluding that the trial court erred when it asked the potential jurors whether they "had any problems with" or "believed in" the principles, noting that the "rule requires the trial court to ask potential jurors whether they understand and accept" the four principles).

¶ 90 Defendant urges review of the error under the first prong of the plain error doctrine because the evidence was closely balanced. To determine whether the evidence was closely balanced, we must review the totality of the evidence and conduct a qualitative, commonsense assessment of the evidence within the context of the case. *Sebby*, 2017 IL 119445, ¶ 53. "Our analysis involves an assessment of the evidence on the elements of the charged offense, along with any evidence regarding the credibility of the witnesses." *Id.* A defendant must show that the evidence at trial was so closely balanced that the "error alone tipped the scales toward a guilty verdict." *People v. Jackson*, 2016 IL App (1st) 133741, ¶ 49. It is a defendant's burden to show that the case was closely balanced. *Piatkowski*, 225 Ill. 2d at 567. We conclude that defendant's challenge fails under the first prong of the plain error doctrine because the evidence was not closely balanced. The trial court's violation of Rule 431 did not alone tip the scales toward the jury finding defendant guilty on two counts of aggravated battery based on discharge of a firearm.

¶ 91 Defendant was convicted of two counts of aggravated battery based on discharge of a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) under an accountability theory (720 ILCS 5/5-2(c) (West 2012)). A person is guilty of aggravated battery of discharge of a firearm if he or she

"[d]ischarges a firearm, other than a machine gun or a firearm equipped with a silencer, and causes any injury to another person." 720 ILCS 5/12-3.05(e)(1) (West 2012). A person is legally accountable for the conduct of another when before or during the commission of an offense and with the intent to promote or facilitate that commission, he solicits, aids, abets, agrees, or attempts to aid the other person in planning or committing the offense. 720 ILCS 5/5-2(c) (West 2012). The fact finder "may infer accountability from 'the circumstances surrounding the perpetration of the unlawful conduct,' including 'the defendant's presence during the commission of the offense, the defendant's continued close affiliation with other offenders after the commission of the crime, the defendant's failure to report the incident, and the defendant's flight from the scene.' " *People v. Rebollar-Vergara*, 2019 IL App (2d) 140871, ¶ 102 (quoting *People v. Batchelor*, 171 Ill. 2d 367, 376 (1996)). Accordingly, to prove defendant guilty of the offense as charged here, the State had to prove that either before or during the commission of the offense, and with the intent to promote or facilitate that commission, he solicited, aided, abetted, agreed, or attempted to aid the codefendants in the planning or commission of the offense of aggravated battery based on discharge of firearm. From our review, we find that the evidence overwhelmingly showed that defendant was accountable for the offense of aggravated battery based on discharge of a firearm.

¶ 92 At trial, the State presented evidence of defendant's statement in which he provided details about the night of the shooting and admitted he was involved with the planning and the commission of the shooting where codefendants shot towards a crowd of people and injured a 6-year-old girl and a 52-year-old woman. Specifically, in defendant's statement, he stated that on the night of the shooting, he was with Lynom and Barker and that they saw a group of 10-4Ls down the block "[s]o they decided to go around to the other end of the block and shoot back at the people" who

were having a gathering with about 30 people in front of a house. Defendant stated that Barker and Lynom "volunteered to shoot" and he said he would "go with to make sure [Barker] and [Lynom] were okay." Defendant stated that he stayed at the corner of the alley, after which Barker and Lynom crossed the street and started shooting at the group in front of the house and that, while they were shooting, he "stayed at the edge of the alley to make sure they were okay." He stated that after Barker and Lynom shot their guns, someone fired back at them two times, and they ran back to defendant. Then "they all ran back the same way" until they saw Hardaway, after which they got into the back of his car. At some point, defendant got out the car and went to his grandmother's house, where he changed his clothes because someone had seen him. Defendant also stated that he "did go get the gun, but not on that day."

¶ 93 Defendant's statement regarding his involvement during the commission of the shooting is corroborated by eyewitness testimony. Ayanna Moore testified that on the night of the shooting, she saw three guys, who were wearing red, black, and white shirts, come from an alley, after which the individuals in the red and black shirts ran across the street and started shooting towards the people at the gathering. She identified defendant in court as the person wearing the white shirt and she testified that defendant "came out behind them," "laid back," and stood "off to the side." Ayanna's testimony is corroborated by Thomas's testimony, who testified that when he was at the gathering, he saw two men, who were wearing red and black shirts, walking out of the alley and a third person, whom he identified in court as defendant, wearing a white shirt. He testified that when the individuals in the red and black shirts crossed the street, they started shooting towards the crowd of people and that defendant "[j]ust stand there and look and observe." He also testified that defendant was "kneeling down" and that after the shooting stopped, the men crossed the street

and defendant waited for them and then "stood up, and they all took off in the same direction." Thomas testified that during the shooting, defendant was "[k]neeling by the gate" and "observing the surroundings."

¶ 94 In addition, the State presented evidence of Hardaway's statement after the shooting and his grand jury testimony that corroborated defendant's statement and the eyewitness's testimony regarding defendant's involvement. Hardaway identified a photograph of defendant as the person "who was also part of the shooters" and he stated that after the shooting, he picked up defendant, Lynom, and Barker in his car and let them out. Hardaway testified to the grand jury that when he returned to his grandmother's house after the shooting, he ran into defendant, who had changed his clothes and stated that he threw the guns "back by the train tracks" near a field.

¶ 95 Based on the totality of the evidence showing defendant's presence and involvement with the codefendants before and during the commission of the offense of aggravated battery based on discharge of a firearm, the evidence demonstrating that defendant was accountable was overwhelming and not closely balanced.

¶ 96 Defendant asserts that his statement to the police did not change the fact that the evidence was closely balanced because defendant testified that the statement was coerced by the police, which created a credibility contest as to the veracity of his statement. The jury heard the contents of defendant's statement, defendant's testimony in which he denied the contents of statement and stated his statement was involuntary, and the eyewitnesses' testimony. It was the jury's responsibility to assess the credibility of the witnesses and determine the appropriate weight of the testimony. See *People v. Evans*, 209 Ill. 2d 194, 211 (2004). Further, Ayanna's and Thomas's eyewitness testimony was uncontradicted and corroborated by the contents of defendant's

statement. See *People v. Jackson*, 2019 IL App (1st) 161745, ¶ 48 ("No 'credibility contest' exists when one party's version of events is unrefuted, implausible, or corroborated by other evidence" and "a fact-finder's need to assess the credibility of a witness where no rival witnesses or other competing evidence was presented does not render the evidence closely balanced").

¶ 97 We are unpersuaded by defendant's reliance on *Sebby*, 2017 IL 119445, ¶ 63, to assert that the evidence was closely balanced because there was a credibility contest. In *Sebby*, our supreme court concluded that the evidence was closely balanced where the State's witnesses' testimony was consistent and so was the defendant's testimony and his witnesses. *Id*. ¶ 61. The court also found that both versions were credible and that neither version was supported by corroborating evidence. *Id*. ¶¶ 61-63. Here, unlike *Sebby*, the State presented evidence of defendant's statement in which he admitted his involvement in the shooting. Further, in *Sebby*, there were two credible and consistent version of events from the State's witnesses and from the defendant and his witnesses. Here, however, defendant asserts that the credibility contest at issue here was between defendant's statement introduced as evidence at trial and his own testimony at trial where he testified his statement was made up and that it was involuntary and dictated by Detective Weber. We find the facts in *Sebby* distinguishable.

¶ 98 Defendant also asserts that the State could not prove that the court's error in violating Rule 431(b) was harmless and that the evidence was not closely balanced because the court had to declare a mistrial on certain counts and the jury sent notes indicating it wanted to review transcripts from the grand jury proceedings and the trial. We are unpersuaded by defendant's arguments.

¶ 99 The jury reached guilty verdicts on two counts of aggravated battery based on discharge a firearm. With respect to the remaining counts, which included attempted murder, the jury was

deadlocked and the court declared a mistrial. We cannot find that the fact that court declared a mistrial on the other counts means that the evidence with respect to aggravated battery based on discharge of a firearm was closely balanced. Further, the fact that the jury sent notes requesting transcripts from the trial and grand jury proceedings does not persuade us that the evidence was closely balanced. See *People v. Cotton*, 393 Ill. App. 3d 237, 260 (2009) (stating "the mere fact that the jury indicated in one note that it could not reach a decision does not render the evidence closely balanced"); *People v. Minniweather*, 301 Ill. App. 3d 574, 580 (1998) (where the defendant contended the jury had a reasonable doubt as to the defendant's guilt because the jury requested to review evidence and asked questions during deliberations, the court found the argument meritless, stating "[t]hat the jury asked for guidance during deliberations merely indicates that the jury took its job seriously and conscientiously worked to come to a just decision"). Moreover, lengthy jury deliberations do not necessarily mean the evidence was closely balanced. See *People v. Nugen*, 399 Ill. App. 3d 575, 584 (2010) ("We reject the general premise a lengthy deliberation necessarily means the evidence is closely balanced.").

¶ 100 Accordingly, defendant has failed to meet his burden of demonstrating that the evidence was closely balanced under the plain error doctrine. Defendant therefore cannot establish plain error.

¶ 101 C. Trial Court's Comments and "Nonresponsive" Objection

¶ 102 Defendant contends the trial court denied him due process and a fair trial because it conveyed to the jury it had a bias against him by suggesting he had an improper motive during cross-examination. Specifically, defendant asserts that the trial court told the jury that it "did not know what defendant was trying to do with his testimony," which implied that he had an improper

motivation during cross-exanimation. He also states that the trial court, *sua sponte*, told the jury that defendant's mother's answer was "nonresponsive" without an objection from the State, which further showed bias against him. Defendant argues that the court's comments were a material factor in his convictions and likely contributed to the jury's verdict.

¶ 103 In all criminal prosecutions, a defendant is entitled to a fair and impartial trial by jury. *People v. Eckert*, 194 Ill. App. 3d 667, 673 (1990). A trial court "has a duty to see that all persons are provided a fair trial." *People v. Sims*, 192 Ill. 2d 592, 636 (2000). The trial court has wide discretion in presiding over a trial. *People v. Tatum*, 389 Ill. App. 3d 656, 662 (2009). However, a defendant is entitled to a trial that is free from improper and prejudicial comments by the trial judge. *Tatum*, 389 Ill. App. 3d at 662. The trial judge "must refrain from interjecting opinions, comments or insinuations reflecting bias toward or against any party." *Sims*, 192 Ill. 2d at 636. The trial judge "must exercise a high degree of care to avoid influencing the jurors in any way, to remain impartial and to not display prejudice or favor toward any party, due to the judge's great influence over the jury." *Tatum*, 389 Ill. App. 3d at 662.

¶ 104 Improper comments are considered to be "those which reflect disbelief in the testimony of defense witnesses, confidence in the credibility of the prosecution witnesses or an assumption of defendant's guilt." *People v. Williams*, 209 Ill. App. 3d 709, 718 (1991). Further, "a hostile attitude toward a criminal defendant, his witnesses, or his attorney may improperly influence the jury in reaching its verdict, resulting in an unfair trial." *People v. Minter*, 2015 IL App (1st) 120958, ¶ 115. However, even when a trial court makes improper comments, the comments will only constitute reversible error if the remarks were prejudicial, and the defendant was harmed by them. *Tatum*, 389 Ill. App. 3d at 662. It is the defendant's burden to demonstrate prejudice. *People v.*

*Johnson*, 2012 IL App (1st) 091730, ¶ 76. "Even where the court's method of ruling on an objection does indicate an opinion as to the validity of a party's position, the context of the judge's remark may be such that there is no prejudice." *People v. Heidorn*, 114 Ill. App. 3d 933, 938 (1983). Further, if "the comments do not constitute a material factor in the conviction" or if "prejudice to the defendant is not the probable result, the verdict will not be disturbed." *People v. Williams*, 209 Ill. App. 3d 709, 718-19 (1991).

¶ 105 Here, defendant takes issue with two comments made by the trial court: when it stated, "I'm treating you with all the respect I can muster" and that it "did not know what [defendant] was trying to do." The court made the comments during defendant's cross-examination when the State was asking defendant about his statement. Initially, we note that defendant did not object to the first comment at trial or raise the issue in his posttrial motion. However, "given the fundamental importance of a fair trial and the practical difficulties involved in objecting to the conduct of the trial judge, the waiver rule is applied less rigidly when the judge's conduct is the basis for the objection." *Heidorn*, 114 Ill. App. 3d at 936. We will therefore review the merits.

¶ 106 With respect to the first comment, the following colloquy occurred before the remark:

> "Q. Well, didn't you tell the Assistant State's Attorney and the detectives that they had never gotten along, that they had been fighting since before you were even involved?
>
> A.You know as well as I know that that statement was dictated by Detective Weber and the State's Attorney.
>
> Q. I don't know that. And we'll go through that.
>
> A.Yes, you do.
>
> THE COURT: Listen. I'm going to warn you once. All right?

THE DEFENDANT: Yes.

THE COURT: You hear me?

THE WITNESS: I understand you, Judge Ford. Yes.

THE COURT: I'm treating you with all the respect I can muster. You're going to listen to the questions— sir, can you pause for a minute. You're going to listen to the questions and answer the ones posed. You can't interject anything into them. Okay. Just listen and answer the questions—"

¶ 107 The second comment occurred later during the cross-examination after the court had sustained numerous objections based on being nonresponsive. Specifically, before the court made the second comment, defendant testified that the detective told him to state that Barker had a gun in his hands, after which the State started asking him a question, "Did Detective Weber" and defendant stated "You're trying to confuse me. You're not going to get—you know as I know that this statement is involuntary." The State objected on the basis of being nonresponsive, after which the court stated:

> "Folks, we're going to go over something right now. All of that that he just said, that's not evidence. There was no question pending. It's an effort by the defendant to do, I don't know what. But it's not responsive to the question and he can't do it and you can't consider it. Does everybody understand that?"

The jury responded, "Yes." Thereafter, outside the presence of the jury, defense counsel moved for a mistrial "based upon what you said about what the defendant—you don't know what he's trying to do, but he's trying to do it, for the record."

¶ 108 When the parties returned to the presence of the jury, the court admonished the jury as follows:

> "The defense has pointed out, and I agree, that as I've been talking to [defendant] about what's been going on out here, I indicated that there was a certain—he said, I think, a couple sentences that were really not in response to any question. I want you to understand, he can—that you just can't consider that in any way. I have no knowledge of what—completely what he said because it was nonresponsive, but you can't consider it unless it's a response to a question. Does everybody understand that?"

The jurors responded, "Yes" and then the court stated:

> "That's the long and the short of it. He gets to say whatever he wants. He can be reexamined by his own attorneys if they choose, and they're not required to choose to do so. And the State is also allowed to ask questions that they may ask. That's within their job title also. And that's the purpose of this. But what any witness, and this applies to any of the witnesses that have testified during the course of the trial, has a duty to do is answer the question when posed. That's one of the rules that we've got here. Does everybody understand that?"

The jurors responded, "Yes," and the court continued: "And do you all promise not to consider any remarks that I made as it relates to [defendant's] remarks in any way in reaching whatever verdict you reach?" The jurors responded, "Yes."

¶ 109 Accordingly, the court instructed the jury that it could not consider any remarks the court made as they related to defendant in reaching a verdict, and the jury expressly responded that it promised not to consider any remarks. The jury is presumed to follow the court's instructions and

expressly indicated it would do so. See *People v. Williams*, 2015 IL App (1st) 130097, ¶ 52 ("The jury is presumed to follow the instruction that the court gives it."). Thus, we presume that the jury followed the court's instruction and did not consider any remarks it made that related to defendant. Further, we note that the court sustained several objections based on defendant's answers being nonresponsive and then instructed the jury that it could only consider testimony that was in response to a question.

¶ 110 Further, as previously discussed, the evidence against defendant was overwhelming. Thus, the trial court's remarks could not have played a material role in the jury's verdict. See *People v. Thompson*, 234 Ill. App. 3d 770, 773-74 (1991) (where the reviewing court concluded that the trial court's comment to the jury that "at this particular juncture it is the opinion of the court that the defense will have to move forward in presenting its case" did not constitute reversible error because the evidence supporting the defendants' convictions was overwhelming and the trial court's remark could not have played a material role in the jury's verdict). Viewed in the total circumstances of this case, we find that the court's remarks did not affect the jury's verdict and were not a material factor in the jury's findings. See *Heidorn*, 114 Ill. App. 3d at 938 (the court viewed the court's comments in the total circumstances of the case and found that while the remarks were improper and should not have been made, they had no effect on the jury's verdict and constituted harmless error).

¶ 111 Defendant also asserts that the trial judge showed bias against him when it characterized his mother's testimony as being "nonresponsive" without an objection from the State.[5] Specifically

[5] We note that in defendant's opening brief, he asserts that the trial court told the jury that defendant was being "nonresponsive" on cross-examination without an objection from the State. In defendant's reply brief, he clarifies that appellate counsel erred when it indicated that the court had

defendant cites to the record where the State asked defendant's mother whether she had an "independent memory of what these officers look like?" and she responded, "No. I've been through a lot. My momma passed and my baby had a liver transplant. I've been through a lot these last four years that [defendant] has been in here." The court then stated, "I'm going to sustain that as nonresponsive, folks." We note that a trial judge "is permitted to make rulings without objections from counsel." *People v. Thigpen*, 306 Ill. App. 3d 29, 40 (1999). Further, defendant does not argue or direct us to the record where the court made repeated *sua sponte* objections during defendant's testimony such that it showed bias against him. In addition, given the overwhelming evidence, we cannot find that the court's *sua sponte* nonresponsive objection during defendant's mother's testimony was a material factor in the jury's verdict. See *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 172 (where the reviewing court concluded that the trial court "should not have 'jumped the gun' and should have waited for the state's objection," the court stated "this was an isolated instance and certainly not a material factor in defendant's conviction where the evidence was overwhelming").

¶ 112 D. State's Witnesses' Testimony that Defendant was a "Lookout"

¶ 113 Defendant contends that his right to due process and a fair trial was violated because the trial court allowed Ayanna and Thomas to testify that he was a "lookout" for the shooters. He argues that this was improper opinion testimony and highly prejudicial given the totality of the evidence and because it went to the ultimate issue of whether he was accountable.

¶ 114 Illinois Rule of Evidence 701 addresses testimony of lay witnesses and states as follows:

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characterized defendant as unresponsive without an objection from the State, because the court did so during the defendant's mother's testimony.

> "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Ill R. Evid. R 701 (eff. Jan 1. 2011).

Rule of Evidence 701 is modeled after Federal Rule of Evidence 701 and, therefore, our supreme court has stated that we may look to federal law as well as state decisions interpreting similar rules for guidance. *People v. Thompson*, 2016 IL 118667, ¶ 40.

¶ 115 Lay witness testimony " 'must be confined to statements of fact of which the witness has personal knowledge.' " *People v. McCarter*, 385 Ill. App. 3d 919, 934 (2008) (quoting *People v. Brown*, 200 Ill. App. 3d 566, 578 (1990)). It must be based on "personal observations and recollections of concrete facts, not on specialized knowledge." *People v. Risper*, 2020 IL App (1st) 160707, ¶ 35. Further, "lay opinion testimony must be relevant to be admissible, like all other evidence." *Id*.

¶ 116 Although a lay witness may not testify as to a legal conclusion at issue, a lay witness may express an opinion on an issue if that opinion will assist the trier of fact. *People v. Richardson*, 2013 IL App (2d) 120119, ¶ 10. Further, a lay witness "may provide an opinion on the ultimate issue in a case." *People v. Terrell*, 185 Ill. 2d 467, 496-97 (1998). "This is so because the trier of fact is not required to accept the witness's conclusion and, therefore, such testimony cannot be said to usurp the province of the jury." *Id*. Further, "[l]ay witnesses also may give opinion testimony about a defendant's mental state, which are not expert opinions, but are 'based on the

witness's perception and that are helpful in understanding the testimony or in determining a fact in issue.' " *United States v. Diaz*, 637 F.3d 592, 600 (5th Cir. 2011) (quoting *United States v. McMillan*, 600 F.3d 434, 456 (5th Cir. 2010)). "Accordingly, as long as this opinion is based on the witness's personal observation, is one that a person is generally capable of making, and is helpful to a clear understanding of an issue at hand, it may be permitted at trial." *Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412, ¶ 44.

¶ 117 We review the admission of evidence under an abuse of discretion standard. *People v. Frazier*, 2019 IL App (1st) 172250, ¶ 26. A court is considered to have abused its discretion where the decision is arbitrary, fanciful, unreasonable, or where no reasonable person would agree with the position it adopted. *Id*. From our review of the record, we cannot find that the court abused its discretion.

¶ 118 Defendant takes issue with Ayanna's and Thomas's testimony that defendant was a "lookout." We note that the court sustained several of defense counsel's objections that were based on Ayanna and Thomas using the "word lookout" and instructed the jury that it was the jury's role to determine whether he was a lookout. With respect to Ayanna's testimony, she first used the word "lookout" when she testified that a few days after the shooting she identified defendant in a photo array as the "lookout." However, defense counsel objected "to the word lookout" and the court sustained the objection. Later, Ayanna used the word lookout when she testified that a few days after the shooting she had identified defendant in a lineup as "being a lookout." Although the court overruled defense counsel's objection, when Ayanna used the word lookout again, defense counsel specifically objected "to the word lookout," after which the court instructed the jury as follows:

> "Folks, I'm going to take a minute and pause on the word lookout. Whether or not the defendant was a lookout in this case, that's going to be your decision and your decision alone to make. This witness is testifying on her own impressions of what was going on out there. That's something you can consider but the decision of guilt or innocence of the defendant rests solely within you and it's based on your observations of the witnesses. Does everybody understand that?"

The jury responded, "Yes," and then the court sustained the objection "as to the use of the word lookout."

¶ 119 Accordingly, the court sustained two of defense counsel's objections when Ayanna used the word lookout and then instructed the jurors that based on their observations of the witnesses, it was their decision to determine whether he was a "lookout." We must presume the jurors follow the law set forth in the court's instructions and there is nothing to indicate they did not do so. See *People v. Wilmington*, 2013 IL 112938, ¶ 49 ("[a]bsent some indication to the contrary, we must presume that jurors follow the law as set forth in the instructions given them").

¶ 120 Turning to Thomas's testimony, when Thomas testified that defendant was "the shooters lookout," and "[a] lookout basically," the court overruled two of defense counsel's objections. However, after overruling the objections, the court also instructed the jury as follows: "As I've already explained, folks, the role of the parties is for you to determine based on your observations of the witnesses." Although the court overruled defense counsel's objections to Thomas using the word "lookout," the court still reminded the jurors of its instruction that they must determine the parties' roles based on their observations of the witnesses. We must presume the jury followed the

law. We cannot find that the court abused its discretion with respect to its rulings regarding the word "lookout" during Ayanna's and Thomas's testimony.

¶ 121 Further, Ayanna's and Thomas's testimony that defendant was a "lookout" was rationally based on their personal observations and recollections of concrete facts of the shooting. With respect to Ayanna's testimony, before she testified that defendant was a lookout, she testified that when the shooters ran across the street, defendant "came out behind them," "laid back," and stood "off to the side." She also testified that defendant "walked like right behind them and then he looked and walked back" to the alley right before the shooting started. Thomas testified that when the shooters crossed the street, defendant "[j]ust st[ood] there and look[ed] and observe[d]." He testified that there were about 12 to 13 gunshots and defendant was "[s]till standing there" and "kneeling down" and only stood up when they left. He testified that during the shooting, defendant was "observing" and "[o]bserving the surroundings." He believed defendant was "observing" because he "was looking around" towards the people on the block and not towards the shooters.

¶ 122 Applying the principles regarding lay witness testimony discussed above, including Illinois Rule of Evidence 701, we find Ayanna's and Thomas's testimony that defendant was a "lookout" was admissible. Their testimony was relevant, rationally based on their personal observations of defendant and the shooters, and was helpful in determining a fact in issue, *i.e.*, whether defendant either before or during the commission of the shooting, and with the intent to promote or facilitate that commission, solicited, aided, agreed, or attempted to aid codefendants in the planning or commission of the shooting. See *United States v. Diaz*, 637 F.3d 592, 599-600 (5th Cir. 2011) (where the witness testified that the defendant was a "lookout," the court concluded that the "testimony did not rest upon scientific, technical, or specialized knowledge" but rather was an

observation that " 'result[ed] from a process of reasoning familiar in everyday life,' " noting that the witness testified that he saw the defendant "standing in between the trailer and the van, seeing side to side, making sure no vehicles were coming" (quoting *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008)). Further, the testimony was not based on scientific, technical, or other specialized knowledge. The court did not abuse its discretion when it allowed the witnesses to testify that defendant was a "lookout."

¶ 123 E. Sentencing

¶ 124 Defendant next contends that the trial court abused its discretion when it sentenced him to 16 years in prison for each count of aggravated battery based on discharge of a firearm, for a total of 32 years in prison. He argues his sentence is excessive and that the court failed to consider the requisite statutory factors set forth in section 5-4.5-105(a) of the Unified Code of Corrections (730 ILCS 5/5-4.5-105(a) (West 2016)) that a sentencing court must evaluate when sentencing a 17 year old. These factors include the juvenile's background, his ability to consider risks and consequences, peer pressure, the presence of childhood trauma, and the defendant's role in the offense. Defendant requests that we reduce his sentence to the minimum sentence.

¶ 125 Defendant initially asserts that to the extent that he did not properly preserve his challenge because he did not raise the issue in the trial court, we should review his challenge under the plain error doctrine. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("To preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required."); *People v. Gunn*, 2020 IL App (1st) 170542, ¶ 150 (where the defendant argued on appeal that the trial court committed plain error because it did not apply section 5-4.5-105 of the Unified Code of Corrections at the sentencing hearing, the reviewing court noted that

the defendant forfeited the issue for appellate review). Defendant is correct that we may review his challenge to his sentences for plain error. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 11. As previously discussed, before we apply the plain error doctrine, defendant must first demonstrate that a clear or obvious error occurred when the trial court resentenced him. *Id.*

¶ 126 A trial court has broad discretionary powers when it imposes a sentence. *People v. Alexander,* 239 Ill. 2d 205, 212 (2010). On review, we give great deference to a trial court's sentencing decision because the trial court observed defendant and the proceedings and is in a better position to consider the relevant sentencing factors. *Id.* at 212-13. The relevant sentencing factors include the defendant's credibility, demeanor, social environment, age, mentality, habits, and moral character. *People v. Vega*, 2018 IL App (1st) 160619, ¶ 60. Other factors include the nature of the crime, the protection of the public, deterrence and punishment, and the defendant's rehabilitative prospects. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 14. The seriousness of the offense is the most important factor. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 11. Still, the trial court must "impose a sentence that achieves a balance between the seriousness of the offense and the defendant's rehabilitative potential." *People v. Brown*, 2018 IL App (1st) 160924, ¶ 8. The trial court is in the best position to find this appropriate balance between protecting society and rehabilitating a defendant. *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005).

¶ 127 We will only modify a sentence if the trial court abused its discretion. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 50. A trial court abuses its discretion when no reasonable person could agree with its position. *People v. Sven*, 365 Ill. App. 3d 226, 241 (2006). When a sentence falls within the prescribed statutory limit, we will not find that a court abused its discretion unless

the sentence is "greatly at variance with the purpose and spirit of the law or is manifestly disproportionate to the offense." *People v. Means*, 2017 IL App (1st) 142613, ¶ 14.

¶ 128 Aggravated battery based on discharge of a firearm is a Class X felony (720 ILCS 5/12-3.05) (West 2016)) with a sentencing range of 6 to 30 years in prison (730 ILCS 5/5-4.5-25(a) (West 2016)). The trial court sentenced defendant to 16 years in prison for each count of aggravated battery based on discharge of a firearm, to be served consecutively, which are terms well within the permissible statutory range. Because defendant's sentences fall within the applicable sentencing range, we presume the sentences are proper. See *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12 (a sentence that falls within the statutory guidelines is presumed proper).

¶ 129 Nevertheless, defendant asserts that his consecutive sentence of 16 years in prison for each count of aggravated battery based on discharge of a firearm is excessive and that the court failed to consider the relevant statutory factors set forth in section 5-4.5-105(a) of the Unified Code of Corrections. Section 5-4.5-105(a) provides:

> "(a) On or after the effective date of this amendatory Act of the 99th General Assembly, when a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court, at the sentencing hearing conducted under Section 5-4-1, shall consider the following additional factors in mitigation in determining the appropriate sentence:
>
> (1) the person's age, impetuosity, and level of maturity at the time of the offense, including the ability to consider risks and consequences of behavior, and the presence of cognitive or developmental disability, or both, if any;

(2) whether the person was subjected to outside pressure, including peer pressure, familial pressure, or negative influences;

(3) the person's family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma;

(4) the person's potential for rehabilitation or evidence of rehabilitation, or both;

(5) the circumstances of the offense;

(6) the person's degree of participation and specific role in the offense, including the level of planning by the defendant before the offense;

(7) whether the person was able to meaningfully participate in his or her defense;

(8) the person's prior juvenile or criminal history; and

(9) any other information the court finds relevant and reliable, including an expression of remorse, if appropriate. However, if the person, on advice of counsel chooses not to make a statement, the court shall not consider a lack of an expression of remorse as an aggravating factor." 730 ILCS 5/5-4.5-105(a) (West 2016).

¶ 130 Our supreme court has concluded that a trial court's obligation in subsection 5-4.5-105(a) to consider the additional mitigation factors "is temporally limited by 'language in that same subsection.' " *Gunn*, 2020 IL App (1st) 170542, ¶ 152 (quoting *People v. Hunter*, 2017 IL 121306, ¶ 48). This court has found that according to the plain language of subsection(a), the section "applies only to offenses committed on or after the effective date, which was January 1, 2016." *Gunn*, 2020 IL App (1st) 170542, ¶ 153. Here, the offense occurred on July 19, 2013. Because this offense was committed before the effective date, this section did not apply at defendant's sentencing hearing. See *id.* (where the offense occurred on September 20, 2013, the court

concluded that because the offense "was not committed on or after the effective date, [section 5-4.5-105] did not apply at defendant's sentencing"). We note the dissent asserts that in *People v. Buffer*, 2019 IL 122327, where the defendant committed the offense before the statute was enacted, our supreme court held that the factors in section 5-4.5-105 should be applied on remand because the court had previously imposed a *de facto* life sentence. However, here, the trial court resentenced defendant to 32 years in prison, which is not considered a *de facto* life sentence. See *People v. Villalobos*, 2020 IL App (1st) 171512, ¶ 63 ("our supreme court has now established that a prison term of "40 years or less" does not constitute a *de facto* life sentence * * * Since the defendant's sentence is 40 years' imprisonment, it does not constitute a *de facto* life sentence") (citing *People v. Buffer*, 2019 IL 122327, ¶ 41).

¶ 131 To the extent that defendant asserts that his sentence is excessive because the court did not consider the applicable mitigation factors, including those set forth in section 5-4.5-105, we conclude that the trial court did not abuse its discretion when it sentenced him. When mitigation evidence is presented to the trial court, absent some indication to the contrary, we presume that the court considered it. *Sauseda*, 2016 IL App (1st) 140134, ¶ 19. When, as here, a defendant argues that the court failed to consider relevant factors, a defendant must make an affirmative showing that the court did not consider those factors. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. As previously discussed, the relevant factors a trial court considers include the particular circumstances of the case, the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999).

¶ 132 Defendant has not met his burden of affirmatively showing that the trial court failed to properly consider the relevant mitigating factors. When the court pronounced its sentence, it

expressly stated that it considered the statutory factors in mitigation, the financial impact of incarceration, and the presentence investigation report (PSI), which it reviewed "in its entirety." The PSI contained information about the relevant mitigating factors, including defendant's lack of adult criminal convictions, as well as his social, education, financial, family, health, and psychological histories. Because the court expressly stated that it considered the PSI, we presume the court considered the relevant mitigating factors contained therein, including defendant's age, background, and potential for rehabilitation. See *Burton*, 2015 IL App (1st) 131600, ¶ 38 ("We presume the sentencing court considers mitigation evidence"); *People v. Babiarz*, 271 Ill. App. 3d 153, 164 (1995) ("Where the sentencing court examines a presentence report, it is presumed that the court considered the defendant's potential for rehabilitation.")

¶ 133 In addition, the court expressly stated that it considered the evidence offered in mitigation, the attorney's arguments, and defendant's allocution. At sentencing, defense counsel argued that defendant was "just a child," had turned 17 years old just days before the shooting, and never had the opportunity to go to high school because he had been working since he was 15 years old. Defense counsel told the court that defendant had a "tough life," a history of depression in 2011, and tried "to kill himself" when he was 15 years old. Counsel argued that defendant "did not have direction" and "no one to show him the way" and requested that "be factored in greatly" for sentencing. Further, defense counsel read defendant's allocution letter to the court, in which defendant stated, *inter alia*, he was "no longer that reckless 17 year old kid," was "a humble young man evolving into a grown man over time of my incarceration," he was "truly sorry" for what happened, and had learned his lesson. Defendant also told the court that he was "also making a promise to you that if you give me a second chance, you won't regret it" and that "I want to make

something of myself while I still have a chance." We presume the court considered the mitigation evidence that defense counsel presented to the court at the sentencing hearing and nothing in the record indicates otherwise. See *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 53 ("We presume the sentencing court considered mitigation evidence when it is presented.").

¶ 134 Further, at the hearing on defendant's motion to reconsider his sentence, defense counsel argued that defendant had no background, was not the shooter, was only found guilty of aggravated battery with a firearm, and had just turned 17 within days of the offense. Again, we presume the court considered the mitigation evidence that counsel presented. Further, when the court resentenced defendant, it expressly stated that it considered defendant's age, as it stated that it was "mindful of the fact that he is a young person. I've taken that into further account." The court also stated that it did not "often grant motions to reconsider sentences, but this one is one that I continued to mull, even after the sentence had been issued in the case."

¶ 135 Defendant asserts that even though the court was "mindful" of his young age at the time of the offense, "there was no apparent consideration of how the specific factors relative to youth affected a sentence with the object of rehabilitation" and the court did not base its sentence on the particular factors set forth in section 5-4.5-105 of the Unified Code of Corrections. However, the court was not required to recite and assign value to each sentencing factor. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 16. Nor was it required to articulate the process it used to determine the appropriateness of defendant's sentence. See *People v. Wright*, 272 Ill. App. 3d 1033, 1046 (1995). We may not reweigh the sentencing factors or substitute our judgment for the trial court because we would have weighed the factors differently. *Alexander*, 239 Ill. 2d at 214.

¶ 136 Defendant asserts that the court's original sentence was "based almost exclusively on the injuries caused in the shooting, precluding even a balancing of the proper factors in mitigation" and that the original sentence was based on the nature of the offense, not the particular factors set forth in section 5-4.5-105 of the Unified Code of Corrections. As previously discussed, the seriousness of the offense is the most important factor. *Wilson*, 2016 IL App (1st) 141063, ¶ 11. Further, "[t]here is a strong presumption that the trial court based its sentencing determination on proper legal reasoning." *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 14. It is a defendant's burden to affirmatively establish that the court's sentence was based on improper considerations. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). Defendant does not point us to anything in the record to show that the court improperly considered an aggravating factor when it issued either its original sentence or its amended sentence.

¶ 137 In sum, defendant's consecutive sentences of 16 years in prison for each count of aggravated battery based on discharge of a firearm do not vary greatly with the purpose and spirit of the law. The court therefore did not abuse its discretion when it sentenced defendant.

¶ 138 Lastly, defendant argues in the alternative that to the extent he did not properly preserve his sentencing challenge, his counsel was ineffective for failing to explicitly cite the factors in mitigation set forth in section 5-4.5-105(a) of the Unified Code of Corrections. To prove counsel was ineffective, a defendant must show he was prejudiced by the deficient performance. *People v. Temple*, 2014 IL App (1st) 111653, ¶ 53. An attorney is not considered ineffective for failing to file a motion that has no merit. *People v. Stewart*, 365 Ill. App. 3d 744, 750 (2006). Because we concluded that defendant's sentencing challenges do not have merit, he cannot establish that he was prejudiced when counsel failed to raise section 5-4.5-105 in the trial court.

¶ 139 III. CONCLUSION

¶ 140 For the reasons explained above, we affirm.

¶ 141 Affirmed.

¶ 142 PRESIDING JUSTICE MIKVA, dissenting in part:

¶ 143 I agree fully with the majority on all issues relating to the findings of Angelo's guilt. However, I would vacate Angelo's sentence and remand this case to the trial court to consider an appropriate sentence in light of the youth-based factors set out in *Miller v. Alabama*, 567 U.S. 460 (2012).

¶ 144 The trial court originally sentenced Angelo to two consecutive sentences of 23 years, for a total of 46 years. Given that Angelo was a juvenile offender, our supreme court would now consider that sentence to be a *de facto* life sentence. It is a violation of the eighth amendment of the United States constitution for a juvenile offender to receive such a sentence, unless the record is clear that the trial court properly and fully considered that individual's youth and its attendant characteristics. *People v. Buffer*, 2019 IL 122327, ¶ 42.

¶ 145 The aggregate 32-year sentence that the court imposed on reconsideration in this case was still 20 years above the minimum sentence. In my view, such a lengthy sentence is at odds with the fact that Angelo was barely 17 at the time of the offense, was the least active participant in the offense, had a troubled background, and had struggled with depression so severe that it had caused him to attempt suicide little more than a year prior to the crime charged.

¶ 146 The majority lays out (*supra* ¶ 129) the specific mitigation factors that now apply to all sentences imposed on individuals who were under the age of 18 at the time of the commission of an offense. 730 ILCS 5/5-4.5-105(a) (West 2016). These include the person's "age, impetuosity,

and level of maturity," their "family, home environment, educational and social background," including "childhood trauma" and the "degree of participation and specific role in the offense." However, the majority takes the view that the trial court was not obligated to consider these factors because the crime for which Angelo was convicted occurred before the effective date of that statute. *Supra* ¶ 130. But, because the trial court in this case was reconsidering the originally imposed *de facto* life sentence, I disagree.

¶ 147 In *Buffer,* our supreme court held that the factors set out in section 5-4.5-105 should be applied on remand, although the crime in that case occurred long before the statute was enacted, because the court had previously imposed a *de facto* life sentence. The *Buffer* court noted, when it remanded the case to the trial court for resentencing, in 2019, on a crime committed sometime before 2010: "Further, the parties correctly agree that defendant is entitled on remand to be sentenced under the scheme prescribed by section 5-4.5-105 of the Unified Code of Corrections (730 ILCS 5/5-4.5-105 (West 2016))." 2019 IL 122327, ¶ 47.

¶ 148 In support of this conclusion, the *Buffer* court cited its earlier reasoning in *Holman*, where it had noted that "consideration of the *Miller* factors is consistent with section 5-4.5-105 of the Unified Code of Corrections, which now requires the trial court to consider factors taken from the Supreme Court's list." *People v. Holman*, 2017 IL 120655, ¶ 45. The *Holman* court went on to conclude, "[b]ecause *Miller* is retroactive," that "*all juveniles*, whether they were sentenced after the statutory amendment became effective on January 1, 2016, or before that, should receive the same treatment at sentencing." (Emphasis added.) *Id.*

¶ 149 While the majority in this case correctly points out (*supra* ¶ 130) that the jail term before us now is not a *de facto* life sentence, Angelo was in the same position as the defendant in *Buffer*.

In *Buffer* our supreme court instructed the trial court, when it resentenced the defendant, to consider, "under the scheme prescribed by section 5-4.5-105" (*Buffer*, 2019 IL 122327, ¶ 47), the appropriate sentence for a juvenile offender who had been given a 50-year *de facto* life sentence. Here, the trial court's task, when it had before it the defendant's motion to reconsider the sentence, was, quite similarly, to consider the appropriate sentence for a juvenile offender who had been given a 46-year *de facto* life sentence. At that point, the "scheme prescribed by section 5-4.5-105" became applicable. I note that even the State, in its response brief in this case, does not suggest that the factors set out in section 5-4.5-105 were inapplicable in this case. Rather, it argues that Angelo failed to rebut the presumption that these factors were considered.

¶ 150 It is also clear to me that the trial court did not, in fact, consider these factors when it resentenced Angelo. As the majority's opinion makes clear, not all courts view these factors as applicable, where the crime was committed before the effective date of section 5-4.5-105. The trial court made no mention of the factors themselves. Nor did it ever reference Angelo's limited role in this shooting, the fact that he was unarmed, his limited criminal background, that he was one week past his seventeenth birthday or that he suffered from depression. All the court said that in any way referenced the factors laid out in *Miller* or in section 5-4.5-105 was: "I'm mindful of the fact that he was a young person." That is woefully insufficient to suggest that the relevant factors were considered here. I would remand to give the trial court the opportunity to apply those factors and sentence Angelo as the juvenile that he was when this tragic crime occurred.

¶ 151 I respectfully dissent, in part, for the reasons stated.

2022 IL App (1st) 200660-U

No. 1-20-0660

Order filed February 8, 2022.

Second Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 96 CR 30301 |
| | ) | |
| MAURICE HARDAWAY, | ) | The Honorable |
| | ) | Arthur F. Hill, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE LAVIN delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court properly denied defendant's motion for leave to file a successive postconviction petition where he failed to meet the requirements of the cause and prejudice test.

¶ 2 Defendant Maurice Hardaway appeals from the circuit court's order denying him leave to file a successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS

5/122-1 *et seq*. (West 2018)). On appeal, he contends the court erred because the *pro se* petition raised a "viable claim" that his warrantless arrest was unconstitutional. We affirm.

¶ 3 Following a 1999 jury trial, defendant was found guilty of first degree murder, attempted murder, and home invasion, and sentenced to life in prison. We relate only the facts relevant to the instant appeal.

¶ 4 Defendant, Jermaine Daniels, and Derwin Wright were arrested following a shooting early on October 21, 1996, that left James Scott and Ronald Goodwin dead, and Arlene Owens with a gunshot wound to the head.

¶ 5 Defendant filed a motion to quash arrest and suppress statement. At the hearing on the motion, trial counsel argued that defendant was "illegal[ly]" arrested without probable cause and a warrant.

¶ 6 Chicago police sergeant Louis Caesar testified that he joined the investigation on October 23, 1996, and spoke to witness Doris Clark the next day.[1] Clark stated that four men forced her to help them enter an apartment, and identified one man as "Dirt" and another as possibly nicknamed "Main." Clark described the men, and said she had seen three of them around 71st Street and St. Lawrence Avenue. Clark later identified Wright in a photographic array and a lineup, and identified Daniels while touring the area of 71st Street with officers.

¶ 7 Caesar later learned that Daniels made a statement on October 31, 1996, stating that he, defendant, Wright, and another man were members of the same gang, and that the four men went to a location to collect money from, or "violate***," a person named "Ron." Daniels further stated that defendant and Wright were armed with firearms and shot Ron and other individuals. On

[1]Doris Clark is also referred to Doris McCarty in the record.

November 2, 1996, Clark and Owens viewed photographic arrays containing defendant's photograph, each woman identified defendant, and he was arrested.

¶ 8 Chicago police detective Steven Bradley testified that he spoke to Daniels several times on October 30 and 31, 1996, and Daniels identified "Reece," whose "proper name" was Maurice Hardaway, as involved in the offenses. After Daniels identified defendant, Bradley obtained photographs of defendant and showed them to Owens and Clark, and both women identified defendant. Bradley did not obtain an arrest warrant for defendant after speaking to Daniels, and did not know whether other officers obtained a warrant.

¶ 9 Following argument, the trial court found probable cause to arrest defendant and denied the motion. The matter proceeded to a jury trial, where the State presented defendant's inculpatory statement and testimony from several witnesses.[2] Defendant testified that he was at home the night of the offenses and only made a statement to implicate Wright, who beat defendant's girlfriend and stole his vehicle. The jury found defendant guilty of two counts of first degree murder, one count of attempted murder, and two counts of home invasion.[3]

¶ 10 In his motion for a new trial, defendant alleged, relevant here, that the court erred in denying his motion to quash arrest and suppress statement as he was arrested without a warrant or probable cause. The trial court denied the motion, and sentenced defendant to natural life in prison for the two murders and 30 years for each count of home invasion and attempted murder, all to run concurrently. Because defendant was found guilty of murdering more than one victim, section 5-

[2]Defendant's jury trial was held simultaneously, but separately, with Daniels' and Wright's trials. Daniels and Wright were also sentenced to life in prison. See *People v. Daniels*, 2019 IL App (1st) 170232-U; *People v. Wright*, 2015 IL App (1st) 112456-U. They are not parties to this appeal.

[3]Eight pages are missing from the trial transcript; however, their absence does not affect the disposition of this appeal.

8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1996)) required that he be sentenced to natural life in prison without parole (730 ILCS 5/3-3-3(d) (West 1996)).

¶ 11 On direct appeal, we vacated one home invasion conviction pursuant to the one-act, one-crime doctrine, and otherwise affirmed. See *People v. Hardaway*, No. 1-00-0297 (2001) (unpublished summary order under Supreme Court Rule 23(c)). Defendant then filed two unsuccessful postconviction petitions. See *People v. Hardaway*, 2012 IL App (1st) 1093580-U; 2021 IL App (1st) 182617-U.

¶ 12 On October 29, 2019, defendant filed a *pro se* motion for leave to file a second successive postconviction petition. The petition alleged that the trial court erred when it denied the motion to quash arrest and suppress statement because defendant was illegally arrested without a warrant. The petition further alleged that defendant's claim met the requirements of the cause and prejudice test because *People v. Bass*, 2019 IL App (1st) 160640, *aff'd in part and vacated in part*, 2021 IL 125434, which held that arrests pursuant to investigative alerts were unconstitutional, was new law unavailable to defendant at the time of his trial and direct appeal.

¶ 13 On February 27, 2020, the circuit court denied defendant leave to file the second successive postconviction petition noting, relevant here, that the transcript from the hearing on the motion to quash arrest and suppress statement showed that an officer spoke to Daniels and had no knowledge of an arrest warrant for defendant, and that a "stop order" was issued after defendant was identified by a witness in a photographic array. The court further noted that defendant did not allege that the arresting officers were involved in unlawful conduct or had not acted "according to established policies." The court finally noted that *People v. Braswell*, 2019 IL App (1st) 172810, "upheld" the

use of investigative alerts, relied on *Braswell* to find that the trial court properly denied the motion to quash arrest and suppress statement, and denied defendant leave to file the second successive postconviction petition.

¶ 14 On appeal, defendant contends that the circuit court erred in denying him leave to file the second successive postconviction petition because it raised a "viable" claim that his warrantless arrest was unconstitutional. He argues that the appellate opinion in *Bass* is "better-reasoned" than cases that declined to follow it, and should be followed here.

¶ 15 The Act permits a defendant to assert a substantial denial of his constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Because the Act contemplates the filing of a single petition, leave to file a successive petition will only be granted if the defendant raises a colorable claim of actual innocence or alleges sufficient facts to satisfy the cause and prejudice test. See *People v. Holman*, 2017 IL 120655, ¶¶ 25-26. To establish " 'cause,' " a defendant must show "an objective factor external to the defense" that prevented him from raising the claim in his initial postconviction proceeding. *Id.* ¶ 26. To establish " 'prejudice,' " he must show that the alleged constitutional error "so infected his trial that the resulting conviction violated due process." *Id.* We review the circuit court's denial of leave to file a successive postconviction petition *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13. Here, we find that defendant has not established prejudice.

¶ 16 Defendant relies on *Bass*, 2019 IL App (1st) 160640, *aff'd in part and vacated in part*, 2021 IL 125434, to argue his arrest pursuant to a "stop order" alert rather than an arrest warrant was unconstitutional, and the trial court therefore erred by denying his motion to quash arrest and suppress statement.

¶ 17 In reviewing a ruling on a motion to quash arrest and suppress evidence, we apply a two-part standard of review. *People v. Holmes*, 2017 IL 120407, ¶ 9. Under this standard, we give deference to the court's findings of fact, reversing them only where they are contrary to the manifest weight of the evidence. *Id*. However, we review *de novo* "the court's ultimate legal ruling as to whether the evidence should be suppressed." *Id*.

¶ 18 Both the United States and Illinois Constitutions protect individuals against unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. "An arrest executed without a warrant is valid only if supported by probable cause." *People v. Grant*, 2013 IL 112734, ¶ 11. "Probable cause for an arrest exists when the totality of the facts and circumstances known to the officer is such that a reasonably prudent person would believe that the suspect is committing or has committed a crime." (Internal quotation marks omitted.) *Braswell*, 2019 IL App (1st) 172810, ¶ 27. As this court has noted, when a defendant is arrested without "requisite probable cause," the "fruits of that arrest will be inadmissible in a criminal prosecution." *People v. Spain*, 2019 IL App (1st) 163184, ¶ 42. A defendant bears the initial burden of proof, and once he shows a *prima facie* case of an unconstitutional arrest, the burden shifts to the State to show his warrantless arrest was based on probable cause. See *People v. Simmons*, 2020 IL App (1st) 170650, ¶ 49. However, the ultimate burden of proof remains with a defendant. *Id.*

¶ 19 The parties do not dispute that defendant's arrest was warrantless. Therefore, the State was required to demonstrate that the arrest was based on probable cause, and therefore legally justified.

¶ 20 An arrest without a warrant is valid only when supported by probable cause. *Grant*, 2013 IL 112734, ¶ 11. Police have probable cause to arrest an individual when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that

the individual committed a crime. *Id*. Whether probable cause exists depends on the totality of the circumstances at the time of the arrest. *Id*. An officer's factual knowledge, based on his or her police experience, is relevant to determining probable cause. *Id*. Probable cause is governed by commonsense considerations, and the calculation concerns the probability of criminal activity rather than proof beyond a reasonable doubt. *Id.*

¶ 21 While an arrest may be based on information beyond the arresting officer's personal knowledge, the State must show that the information reflected facts sufficient to show probable cause. See *People v. Hyland*, 2012 IL App (1st) 110966, ¶ 22. "An arresting officer may rely on information received in an official police communication, provided that the officer who issued the communication had probable cause to arrest." *Simmons,* 2020 IL App (1st) 170650, ¶ 56.

¶ 22 After reviewing the record, we conclude that the State presented sufficient evidence at the hearing on the motion to quash arrest and suppress statement to establish that the police had probable cause to arrest defendant. Bradley testified that after Daniels made a statement, Bradley obtained photographs of defendant that he showed to a victim, Owens, and a witness, Clark, and both women identified defendant. Bradley did not obtain an arrest warrant and defendant was thereafter arrested.

¶ 23 Thus, at the time of defendant's arrest on November 2, 1996, he had been implicated by a co-offender and identified in photographic arrays by the surviving victim and a witness. Although Bradley did not obtain an arrest warrant, the facts known to him, and which supported the investigative alert or "stop order," established probable cause to arrest defendant. *Grant,* 2013 IL 112734, ¶ 11.

¶ 24 Defendant, however, relies on the appellate opinion in *Bass* to argue that his warrantless arrest was unconstitutional. He acknowledges that the appellate court's holding was vacated by our supreme court in *People v. Bass*, 2021 IL 125434, but argues that the supreme court did not express an opinion as to the constitutionality of investigative alerts or disagree with the appellate court's "sound" analysis.

¶ 25 In *Bass*, the defendant was arrested pursuant to an investigative alert based on probable cause, and a divided panel of the appellate court concluded that his motion to suppress should have been granted because arrests based solely on investigative alerts, even when an alert reflects probable cause, violate the Illinois Constitution. *Bass*, 2019 IL App (1st) 160640, ¶¶ 7, 43, 71. Our supreme court, however, found that the traffic stop which led to the discovery of the defendant's investigative alert was unreasonably extended and the motion to suppress should therefore have been granted. *Bass*, 2021 IL 125434, ¶ 26. Having affirmed this court's decision to reverse the defendant's conviction and remand for a new trial, the supreme court declined to "express any opinion on limited lockstep analysis, its application to warrants or investigatory alerts, or the constitutionality of investigative alerts," and vacated the "portions of the appellate opinion dealing with these issues" *Id*. ¶¶ 27, 29-31. Because our supreme court decided the case based upon the legality of the traffic stop, it did not address whether investigative alerts violate the Illinois Constitution. *Id.* ¶¶ 29, 33; see also *People v. Little*, 2021 IL App (1st) 181984, ¶ 63.

¶ 26 Accordingly, because our supreme court has vacated the portions of the appellate court opinion in *Bass* regarding the constitutionality of investigative alerts, we will not follow those portions of the opinion. Rather, following those cases which have concluded that investigative alerts do not violate the Illinois Constitution, we conclude that the trial court did not err when it

denied defendant's motion to quash arrest and suppress statement. See *Simmons*, 2020 IL App (1st) 170650, ¶ 64; *People v. Thornton*, 2020 IL App (1st) 170753, ¶¶ 45-50; *People v. Bahena*, 2020 IL App (1st) 180197, ¶¶ 59-64; *Braswell*, 2019 IL App (1st) 172810, ¶¶ 36-39. As defendant has failed to establish that the trial court erred in denying his motion to quash arrest and suppress statement, he cannot establish prejudice. *Holman*, 2017 IL 120655, ¶ 26. Accordingly, because defendant failed to meet the requirements of the cause and prejudice test, the circuit court properly denied him leave to file the second successive postconviction petition. See *Bailey*, 2017 IL 121450, ¶ 13.

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.

2021 IL App (1st) 182367-U

FOURTH DIVISION
November 24, 2021

No. 1-18-2367



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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| | ) | Appeal from the |
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Circuit Court of |
| | ) | Cook County |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | |
| | ) | No. 14 CR 12196 |
| DOMINIQUE HODRICK, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | James B. Linn, |
| | ) | Judge Presiding. |

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PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Rochford and Martin concurred in the judgment.

**ORDER**

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where (1) the evidence was sufficient to find defendant guilty of first-degree murder beyond a reasonable doubt, (2) the trial court did not err in denying defendant's motion to suppress where the investigative alert was supported by probable cause and not unconstitutional, (3) defense counsel was not ineffective for failing to request a second-degree murder jury instruction, and (4) the State abided by the trial court's pretrial rulings on evidentiary issues. We, however, vacate defendant's conviction for knowing murder under the one-act, one-crime doctrine.

¶ 2 After a jury trial, defendant Dominique Hodrick was found guilty of first-degree murder

for the shooting death of Betty Howard. Defendant was sentenced to 60 years' imprisonment with an additional 20 years for firearm enhancement for a total sentence of 80 years. On appeal, defendant argues (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt of first-degree murder either as the principal or under an accountability theory, (2) the trial court erred in denying his motion to quash and suppress evidence as investigative alerts are unconstitutional, (3) defense counsel was ineffective for failing to request a second-degree murder jury instruction, (4) he received an unfair trial due to prosecutorial misconduct, and (5) his two convictions for the first-degree murder of Howard violate the one-act, one-crime rule. For the reasons which follow, we affirm and vacate one conviction for first-degree murder pursuant to the one-act, one-crime doctrine.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment of first-degree murder in the shooting death of Howard on May 29, 2014. Howard, who was working at the Kale Realty office located at East 79th Street and South Evans Avenue, was shot and killed after a bullet came through the building façade, striking her. The State proceeded to trial on counts 8 and 9 of the indictment which charged defendant with first-degree murder under two different theories, intentional murder (720 ILCS 5/9-1(a)(1) (West 2014)) and strong probability of death (720 ILCS 5/9-2(a)(2) (West 2014)) and that defendant personally discharged a firearm in the commission of the offense.

¶ 5 Pretrial

¶ 6 *Motion to Quash Arrest and Suppress Evidence*

¶ 7 Defendant filed a motion to quash arrest and suppress evidence in which he asserted that his arrest was illegal where it was made without probable cause or a warrant.

¶ 8 At the suppression hearing, Officer Jamie Luna of the Chicago Police Department

testified that on June 10, 2014, at 2:49 p.m. he observed defendant—who he identified in court—sitting in the rear seat of a Dodge Charger. Officer Luna approached the vehicle, identified defendant, and placed him into custody. Officer Luna testified that defendant's arrest was based on "an active investigative alert probable cause to arrest"; however, no warrant had been issued for defendant's arrest at that time. Officer Luna then drove with defendant back to the police station. The State stipulated that while defendant was in custody, Officer Luna made "some statements regarding the police investigation of the shooting of Betty Howard."

¶ 9 On cross-examination, Officer Luna testified that he works for the gang unit of the Chicago Police Department and had been looking for defendant since May 30, 2014. On that date he met with Detective Patrick Ford. Detective Ford informed him about Howard's murder and that video surveillance captured an individual walking outside the apartment building at 720 East 79th Street (the 720 building) with a handgun in his hand. This individual then raised the weapon, pointed in the direction of 735 East 79th Street where Kale Realty was located, and fired the weapon. The individual then went back inside the apartment building. Detective Ford informed Officer Luna that several Chicago police officers identified defendant as being the individual seen in the videotape and that an investigative alert had been issued for defendant. Officer Luna testified that his "top priority" became trying to locate defendant.

¶ 10 Officer Luna further testified that on June 10, 2014, he learned defendant was at a Motel 6 in Lansing, Illinois. When he arrived at the location, he set up surveillance and eventually observed defendant outside the Motel 6 seated in a vehicle. Thereafter, he placed defendant under arrest based on the information provided to him by Detective Ford.

¶ 11 On redirect, Officer Luna testified he had not seen the videotape of the shooting but had viewed still images of the individual derived from the videotape.

¶ 12 The defense rested and the State called Detective Ford to testify. Detective Ford testified that he is a homicide detective for the Chicago Police Department. On May 29, 2014, at 6 p.m. he received an assignment regarding the homicide of Howard which occurred on East 79th Street and South Evans Avenue. Detective Ford traveled to the scene with his partner, Detective William Meister. The responding officers informed him that there were two 9-mm shell casings discovered in front of the 720 building. He went to that location and observed the shell casings in front of the doorway on the sidewalk. After speaking with other officers on the scene, he learned that there was a videotape of the shooting. Detective Ford testified that he viewed the surveillance videotape in the basement of the apartment building. He observed that the timestamp on the video was approximately three hours behind.

¶ 13 The surveillance videotapes were then published. Detective Ford described what occurred on the videotapes for the court. First he noted that an individual wearing a grey shirt exited the 720 building and pointed a handgun in a southeast direction, which "would have been where Mrs. Howard was." The individual then ran back inside the 720 building with the weapon in his hand and placed it in his waistband as he ran through the lobby. The same individual was then captured on video surveillance of the third floor of the building. The third floor images clearly depicted the individual's face. Detective Ford used these videos to create still images of the suspect.

¶ 14 Detective Ford further testified that he made efforts to identify the shooter, including contacting several gang officers that were assigned to the sixth district. They met with him on May 30, 2014, and he presented them with the still images. Ten officers viewed the images individually and three officers identified the individual as defendant. According to Detective Ford, Officer Todd Muller was assigned to the area where the offense occurred and he "knew all

the players" and had had contact with defendant, whom Officer Muller identified by name. Officers Matthew Kennedy and Bobby Weatherly indicated they had several contacts with defendant in the past.

¶ 15 In addition, Detective Ford presented another Chicago police officer, Officer Don Hoard, with the still images and he indicated that there had been a disturbance earlier in the day on May 29, 2014, in which defendant had been involved. Officer Hoard also stated that defendant had been wearing the same clothing earlier that day that he had on in the still images.

¶ 16 Upon identifying defendant, Detective Ford asked a gang investigation team if they would look for defendant and arrest him. Detective Ford also issued an investigative alert on May 30, 2014, at 6 p.m. as defendant was suspected of being the individual who killed Howard on May 29, 2014. In the narrative portion of the investigative alert, Detective Ford wrote that defendant had been positively identified as one of the individuals who had discharged a weapon causing the death of Howard. Thereafter, Officer Luna arrested defendant on June 10, 2014.

¶ 17 On cross-examination, Detective Ford testified that at the time he issued the investigative alert he had not located any witnesses that identified defendant on the scene as firing a weapon. Detective Ford also clarified that the officers identified defendant from the third floor still images and defendant was not observed with a weapon in those images.

¶ 18 The defense rested and presented closing argument in which defense counsel argued that the investigative alert was not accurate because no one witnessed defendant firing the weapon. Defense counsel further argued that detectives did not have enough information to obtain a warrant at the time the investigative alert was issued.

¶ 19 The trial court denied the motion to suppress. In doing so, the trial court stated it found the testifying officers to be credible and compelling witnesses. The trial court further found that

the individual who appears in the 720 building lobby firing a weapon "looks basically identical to the person that was captured on the third floor." Regarding probable cause, the trial court found that the case was "actually brimming with probable cause." The trial court observed that defendant was identified from the still images by officers who knew him and that it was "more probable than not" that the person in the lobby was the same person depicted on the third floor. Thereafter, defendant filed a motion to reconsider the motion to quash arrest and suppress evidence, which the trial court denied.

¶ 20 Defendant then filed a motion to suppress his statements to the detectives. In the motion, defendant asserted that his statements were involuntary and that he waived his rights because he was threatened and battered by the police officer who rode in the back seat with him from Lansing to Chicago.

¶ 21 At the second suppression hearing, Officer Patrick Fahey testified that he was assigned to the gang investigations division and was working on June 10, 2014, looking for an individual who had an investigative alert. He, along with other officers, set up a point of surveillance for a motel in Lansing, Illinois. Officer Fahey observed defendant in the rear passenger seat of an automobile. Officer Fahey had defendant exit the vehicle and Officer Luna placed defendant into custody. Officer Luna issued defendant his *Miranda* warnings. Officer Fahey could not state with certainty where he sat in the police vehicle as he and Officer Craig Brownfield transported defendant to Chicago. He did recall that he was a passenger in the vehicle. Officer Fahey denied telling defendant that he was "going to go away for the rest of his life." He also denied slapping defendant.

¶ 22 According to Officer Fahey, he did not inform defendant why he was under arrest. Officer Fahey testified it was standard procedure to advise an individual that they are "being

arrested for an investigative alert" and when defendant asked what that is, Officer Fahey replied, "it's like a warrant." Officer Fahey did not ask defendant any questions during the drive. Officer Fahey further testified he assisted in placing defendant in an interview room. Four video clips of defendant in the interview room were published. None of those video clips depicted any of the officers or detectives striking or threatening defendant.

¶ 23 On cross-examination, Officer Fahey testified that he rode in the rear of the vehicle with defendant due to the violent nature of the offense and the length of the drive back to the police station. He further testified that defendant was cooperative when he was placed into custody.

¶ 24 Detective Ford testified that on June 10, 2014, he became aware that defendant had been taken into custody and was transported to the police station. Detective Ford met with defendant at 8:41 p.m. and informed him of his *Miranda* rights. Defendant indicated he wanted to speak to him. Defendant was interviewed for 10 minutes and made an exculpatory statement. Detective Ford then left the interview room and obtained a coat for defendant to wear and a bottle of water for him to drink. Two hours later, Detective Ford spoke with defendant again. Defendant made an exculpatory statement; however, when confronted with information learned during the investigation defendant made an inculpatory statement. Defendant never mentioned being slapped or threatened by the arresting officers. A clip of Detective Ford's first interview with defendant was published to the court and did not depict the detectives slapping or threatening defendant.

¶ 25 The parties rested and the trial court heard closing argument. The defense maintained that the State had not met its burden of proof that defendant's statement was given only after he was physically assaulted and threatened.

¶ 26 The trial court found the testimony of the officers to be credible and compelling, noted

that defendant presented no evidence in support of his claims, and thus denied the motion.

¶ 27 *Motion for Nontraditional Other-Crimes Evidence*

¶ 28 The State filed a motion to admit "non-traditional other crimes evidence" seeking leave to introduce evidence of two unrelated homicides connected to defendant. The first homicide occurred on March 11, 2013, when Jonathan Watkins and his infant daughter Jonylah were shot inside their vehicle. Three days later, defendant voluntarily spoke with detectives at the police station because "word on the street" was that he was the shooter. Defendant was never charged regarding this offense. The State sought to admit this evidence to establish defendant had, in the past, voluntarily spoken with detectives and did not fear police officers.

¶ 29 The second homicide occurred on January 29, 2014, on the third floor of the 720 building. Defendant was present at the time of the shooting and admitted to detectives that he was depicted in video surveillance footage of the third floor of the 720 building. Ultimately, no one was charged in the murder. The State argued that this evidence was relevant because it went to defendant's familiarity with the 720 building and his knowledge that the premises was equipped with video surveillance.

¶ 30 Defendant argued that this evidence should not be allowed because the jury's knowledge of defendant's involvement in prior homicides was more prejudicial than probative. He further maintained that any details regarding the homicides, such as the fact an infant had been killed, was also highly prejudicial.

¶ 31 The trial court ruled that no details regarding either homicide were to be revealed to the jury, including the fact that these incidents involved homicides. The trial court further ruled that should defendant testify that he was fearful of the police, then the State could address the 2013 incident, but how the State would fashion its questioning would be considered only at that time.

Regarding the January 29, 2014, homicide, the trial court allowed the State to elicit testimony that defendant was familiar with the 720 building and knew it was equipped with video surveillance. Although the State informed the trial court that it was not offering the other-crimes evidence as proof of defendant's gang-related motive, defendant did not present a motion *in limine* barring the State from eliciting gang evidence.

¶ 32 Trial

¶ 33 The matter then proceeded to trial with the State first presenting Bruce Stafford who testified that on May 29, 2014, he was working at Kale Realty as the assistant manager. The Kale Realty office was located at 735 East 79th Street at the intersection of East 79th Street and South Evans Avenue. Howard was an employee for Kale Realty, but had been working out of a different location. On May 29, 2014, Howard telephoned Stafford and asked if she could do some paperwork at that office location. Stafford invited her to use the office. It was the first time Howard had been at that Kale Realty location. When Howard arrived Stafford was present along with three other agents, Adrienne Craig, Louis Hardy, and Rachel Burson. They were all situated along the west wall adjacent to South Evans Avenue. Stafford testified that at 5:27 p.m. he heard a gunshot followed by more gunshots. Stafford observed fragments from the wall come off and the "chairs were getting shot" as the gunfire entered the building. Hardy was grazed by a bullet in the abdomen. Howard, who had been standing with her back facing the west wall, was struck by a bullet. Howard appeared to be gravely injured. Stafford testified he ran outside, flagged a police officer down, and had him enter the Kale Realty office. First responders arrived within minutes.

¶ 34 Stafford further testified that he did not hear anything outside prior to hearing the gunshots. Stafford also testified that certain photographs accurately reflected how the Kale

Realty office appeared in May 2014. These photographs were admitted into evidence and published to the jury.

¶ 35 On cross-examination, Stafford testified that he heard one gunshot followed by three additional shots in rapid succession. He did not observe who fired the shots.

¶ 36 The parties then entered a stipulation regarding still images recorded from a surveillance camera located at 735 East 79th Street facing southbound on South Evans Avenue and facing eastbound on East 79th Street. The parties further stipulated to digital images recorded from this surveillance camera on May 29, 2014, from 4 p.m. until 6 p.m. The parties also stipulated to the admission into evidence of surveillance footage from a camera located at 739 East 79th Street taken on May 29, 2014, from 5 to 5:46 p.m.

¶ 37 Brittany Williams testified that on May 29, 2014, shortly before 5:30 p.m. she was walking her dog near the intersection of East 79th Street and South Evans Avenue. As she was walking northbound on South Evans Avenue she heard a gunshot followed by two more gunshots. Each of the gunshots sounded the same, but she could not determine from which direction the gunshots were fired. Williams further testified that she heard tires screeching on South Evans Avenue. She attempted to run home down East 79th Street but she collapsed and was assisted by emergency medical technicians. She realized she had been grazed by a bullet on the side of her left hand. Williams testified to the truth and accuracy of still images taken from a surveillance camera in the area as it depicted her walking her dog and reacting to the gunfire on May 29, 2014. Williams also testified that video footage depicting her coming around the corner on East 79th Street and collapsing was true and accurate. These still images and video surveillance footage were admitted via the previous stipulation and were published to the jury.

¶ 38 On cross-examination, Williams testified she did not observe where the shots came from

or who fired the shots. Williams denied seeing a four door red Cadillac followed by a gray vehicle speed away southbound on South Evans Avenue and explained she only heard tires screeching. She denied telling a police officer that she saw a red Cadillac and a gray vehicle speeding down the street. She also denied telling a police officer that she assumed the shots came from the gray vehicle.

¶ 39 On redirect, Williams testified that prior to hearing the gunshots she did not hear any arguing or yelling nearby.

¶ 40 Rachel Burson testified that on May 29, 2014, she was working at Kale Realty on 735 East 79th Street. At 5 p.m. she was at the office with Stafford, Hardy, Craig, and Howard, whom she had just met. Howard appeared to be in a rush and went directly to the fax machine. After she used the fax machine, Howard approached Burson and they spoke near her desk on the west wall. She and Howard were standing shoulder to shoulder when the gunshots were fired in rapid succession. Both of them got on the ground. When Howard got up, she was holding her neck. Brunson knew Howard had been injured and instructed her to lie down and not to move.

¶ 41 Adrienne Craig testified that on May 29, 2014, she was a leasing agent at Kale Realty working out of the office on 735 East 79th Street. Howard entered the office right before 5 p.m. At 5:27 p.m. Craig heard gunshots. Prior to that she did not hear any loud commotion outside. After hearing the second shot everyone in the office attempted to hit the floor, but a bullet came through the wall and struck Howard in the neck. Another bullet grazed Hardy's stomach. Stafford went outside of the office to flag down a police officer and an ambulance arrived shortly thereafter.

¶ 42 On cross-examination, Craig testified she did not see where the shots came from aside from coming through the wall. She also testified she heard one shot followed by two more shots.

¶ 43 Lamar Giles testified that he is the building maintenance man and resides on the premises of the 720 building. According to Giles, the 720 building is large with its only entrance on East 79th Street. It has a second and third floor with 26 apartments in the building and was equipped with video surveillance cameras.

¶ 44 Giles testified that on January 29, 2014, an incident occurred in the building on the third floor in apartment 301 and he assisted in providing the police access to the surveillance equipment. On May 29, 2014, he again assisted the police in gaining access to the surveillance equipment. Within days of the shooting death of Howard, the video surveillance equipment was stolen.

¶ 45 Giles further testified that apartment 301 was vacant from January through May 2014 and that apartment 302 had been occupied by a woman but she had moved out. Giles was also aware that the owner of the building, Mark Loncar, had provided the police with keys to the building. Giles testified to the truth and accuracy of photographs depicting the 720 building, which were admitted into evidence and published to the jury.

¶ 46 On cross-examination, Giles testified he was not present at the 720 building on May 29, 2014, when the shooting occurred.

¶ 47 Johnny Hendricks, a paramedic for the City of Chicago, testified that on May 29, 2014, just before 5:30 p.m., he and his partner were returning from a call and were traveling eastbound on East 79th Street near South Evans Avenue. The windows in the ambulance were open. As he passed the intersection of 79th and Evans and was stopped at a red light one block away, he heard between four and eight gunshots in rapid succession. Hendricks, who is a gun owner, testified that the shots sounded like they came from a single weapon. Hendricks observed a Chicago police officer running toward the sound of the gunshots. Hendricks radioed his

dispatcher to let them know shots had been fired. The dispatcher informed him that a person was shot and to respond.

¶ 48 Hendricks testified that when he arrived at 79th and Evans he was directed inside a building where Howard was positioned on the floor. Hendricks assessed Howard, provided her with medical treatment, and transported her to the ambulance. As they drove to the hospital, Howard was in full cardiac arrest.

¶ 49 On cross-examination, Hendricks testified he could not determine what kind of weapon the gunshots were fired from based on the sound. He also testified that he did not observe the shots being fired.

¶ 50 Officer Antonio Brand of the Chicago Police Department testified that on May 29, 2014, he was assigned to foot patrol in the vicinity of East 79th Street and South Evans Avenue. At 5:27 p.m. he was at the currency exchange one block from 79th and Evans when he heard five rapid gunshots, but did not observe anyone shooting. According to Officer Brand, the gunfire sounded as though it came from a single weapon. When he heard the shots fired, he jogged to South Evans Avenue and observed someone flag him down. He crossed the street to 735 East 79th Street and entered the Kale Realty office. He observed Howard on the ground with an apparent gunshot wound. Officer Brand radioed for an ambulance. He then went outside and observed numerous people around the intersection. He was assigned to stay on the crime scene near the wall where the bullets had entered to protect the scene.

¶ 51 On cross-examination, Officer Brand testified that someone relayed to him that a silver vehicle had just fled the area traveling southbound on South Evans Avenue.

¶ 52 Steven Swain, an evidence technician for the Chicago Police Department, testified that he investigated the scene at East 79th Street and South Evans Avenue on May 29, 2014. He first

observed the Kale Realty office and noted that there were a couple of fired bullets on the floor and a few defects in the interior of the office walls. On the exterior of the building he viewed four defects. He further testified he discovered two fired 9-mm cartridge cases near the front doorway on the sidewalk at 720 East 79th Street. In addition, he took photographs of the scene which were admitted into evidence and published to the jury.

¶ 53 On cross-examination, Swain testified he did not know whether the exterior wall defects to the Kale Realty office were made due to gunfire. He also could not opine on the type of weapon the bullets he recovered came from.

¶ 54 Caryn Tucker, an expert in firearm and toolmark examination and employed by the Illinois State Police, Division of Forensic Services, testified that she was assigned to analyze the firearms evidence recovered in this case. She determined that the two fired cartridge casings were 9-mm Luger caliber and opined that they were fired from the same firearm. She further testified she received three fired bullets and opined that they were 9-mm and were fired from the same firearm.

¶ 55 On cross-examination, Tucker testified that a .22-caliber revolver would not expel cartridge casings. Tucker could not opine regarding whether the bullets were fired from a semiautomatic weapon or a revolver. Tucker further testified that the bullets recovered from inside the Kale Realty office were not from a .22-caliber revolver.

¶ 56 Officer Eric Szwed, a forensic investigator employed by the Chicago Police Department, testified that on June 11, 2014, he was assigned to utilize trajectory rods in apparent bullet holes in the side of the Kale Realty office for demonstration purposes. The rods themselves are 18 to 24 inches long and are used to show the path of bullet holes. There were four bullet holes on the west side of the building and another hole appeared near the entrance on the side of the building.

Photographs of the trajectory rods in the bullet holes were admitted into evidence and published to the jury. Each of the trajectory rods placed in bullet holes located on the west side of the building pointed in a northwest direction, which would be kitty corner from Kale Realty. Szwed further testified that there were two holes where each bullet entered, one in the exterior wall and one on the interior drywall. According to Szwed, having two holes in which to insert the trajectory rod makes the trajectory angle more accurate. Regarding the defect in the exterior wall that was further south on South Evans Avenue, Szwed testified that this trajectory was "in a more northerly [*sic*] direction."

¶ 57 Szwed further testified that he was directed to examine a bullet defect in the exterior east wall of the Kale Realty office. He began by cutting a hole into the drywall where the initial hole was observed. He failed to find a bullet lodged in the drywall at that point, so he proceeded to cut a hole at the base of the wall to see if the bullet had dropped on the interior side of the wall. He was then able to locate the bullet just inside of the white baseboard on a two-by-four. He then recovered the bullet and inventoried it.

¶ 58 On cross-examination, Szwed testified that he was not sure whether the hole in the exterior wall, which was located away from the grouping of four bullet holes, was from a fired bullet. He clarified that this hole was larger than the four other holes and it was "a possibility" that this hole could have been caused by a different caliber bullet. He also did not discover a bullet in the vicinity of this hole. He testified that he is not certain whether this hole was caused by a bullet but it could have been.

¶ 59 The parties stipulated that, if called as a witness, Jennifer Barrett would testify that she is employed as a forensic scientist with the Illinois State Police Crime Lab and is assigned to the fingerprint section. She would further be qualified as an expert in the forensic science of latent

fingerprint analysis and comparison. Barrett would testify that she examined the two fired cartridge casings and they were no longer suitable for the purpose of analysis.

¶ 60 Angela Kaeshamer, a forensic scientist employed by the Illinois State Police Forensic Science Center at Chicago in the Biology and DNA section, testified as an expert that because the bullets and their casings are exposed to an excessive amount of heat, the DNA breaks down and limits the ability to obtain a DNA profile. Accordingly, in this case, she was unable to obtain any DNA suitable for analysis from the fired casings and bullets.

¶ 61 Officer Matthew Kennedy of the Chicago Police Department testified that he belongs to the Gang Investigations Division, Bureau of Organized Crime. He explained his current role as part of the Gang Intelligence Unit as one where he does "a lot of workup in long-term investigations on violent gangs across the city[.]" In May 2014, however, he was not assigned to the Gang Investigations Division but was a plain-clothes officer in the 6th District, which includes the intersection of East 79th Street and South Evans Avenue. His role was to suppress any type of violent crimes in the district, gather gang intelligence, and assist citizens. Officer Kennedy testified that, prior to the May 29, 2014, shooting, he knew defendant as he had spoken with him several times during his course of dealings as an officer in the 6th District.

¶ 62 Officer Kennedy further testified that on May 30, 2014, he went to the police department and met with Detective Ford who showed him several photographs and asked for Officer Kennedy's assistance in identifying the individual depicted in those photographs. Officer Kennedy testified he identified the individual in the photographs as defendant. The photographs shown to Officer Kennedy were admitted into evidence and published to the jury. Officer Kennedy then identified defendant from video surveillance footage taken around the time of the May 29, 2014, shooting. Immediately thereafter, the trial court instructed the jury that "the

testimony you heard about the officer's prior dealings with [defendant] and the fact that he's had conversations with him in the past, that's solely given to you as a basis for the identification that he's claiming to make in open court today, not to be considered by you for any other reason whatsoever." Officer Kennedy also testified that he has observed defendant in the vicinity of the 720 building "several times."

¶ 63 Officer Don Hoard of the Chicago Police Department testified that on May 29, 2014, he had been assigned to the 6th District (which encompassed the intersection of East 79th Street and South Evans Avenue) as a foot patrol officer for almost two years. At 3:15 p.m. that day, he and his partner Officer Darryl Holmes, were alerted by some citizens to a disturbance at Billy's Tavern. The officers went to that location and Officer Hoard observed two groups of men in a verbal altercation. One of the men involved in the altercation was identified by Officer Hoard in court as defendant. Officer Hoard testified he observed defendant daily while on his foot patrols in the 6th District. Officer Hoard dispersed the group and radioed his sergeant to request more units be sent to the area. That afternoon, he was relieved by other officers and as he drove back to the police station heard a call of shots fired over the radio. The shots were reported in the vicinity of East 79th Street and South Evans Avenue. Officer Hoard drove back to the 720 building to view the video surveillance footage. As he entered the building he observed fired shell casings and alerted officers to their presence. Officer Hoard accessed the surveillance footage and "was able to pull up the frames in which I saw the defendant walk, peek out the door, and then he came back out again and began firing what looked like a weapon." Officer Hoard identified the individual depicted in the surveillance footage as defendant.

¶ 64 Officer Hoard further testified that the following day he met with Detective Ford who presented him with a series of photographs. Officer Hoard identified defendant as the individual

depicted in those photographs and informed Detective Ford that defendant was wearing the same clothing he had on at 3:15 p.m. at Billy's Tavern.

¶ 65 In addition, Officer Hoard testified he was also familiar with the 720 building which, according to Officer Hoard, he had been called to on January 29, 2014. The owner of the apartment building provided Officer Hoard with access to the building and the video surveillance system. Officer Hoard testified he viewed the video surveillance from January 29, 2014, and observed defendant on the videotape.

¶ 66 On cross-examination, Officer Hoard clarified that he did not observe defendant every single day but would see him "quite often."

¶ 67 After Officer Hoard was excused, the trial court offered a limiting instruction to the jury. In the instruction the trial court advised the jury that "[e]vidence has been received that the defendant has been involved in conduct other than that charged in the indictment" and that this evidence was to be used for identification and presence only. The trial court further informed the jury, "[i]t is for you to determine whether the defendant was involved in that conduct and, if so, what weight should be given to this evidence on the issues of identification and presence."

¶ 68 Dr. Ponni Arunkumar, the medical examiner of Cook County, testified that Howard's cause of death was a gunshot wound to the back and the manner of death was homicide.

¶ 69 Detective Lorenzo Sandoval of the Chicago Police Department testified that on January 29, 2014, he was investigating an unrelated incident that occurred at the 720 building outside of apartment 301. During the course of his investigation he was able to view the video surveillance footage of the lobby and the third floor. Detective Sandoval identified defendant in court as one of the individuals in that video surveillance footage. Detective Sandoval interviewed defendant at the police station on March 27, 2014. During this interview, defendant acknowledged that he

was on the third floor of the 720 building on January 29, 2014.

¶ 70 Officer Jamie Luna of the Chicago Police Department testified that on May 29, 2014, he was assigned to the Gang Investigations Unit. On May 30, 2014, he met with Detective Ford and was advised of the investigative alert issued for defendant and, according to Officer Luna, that there was probable cause for his arrest. Officer Luna was then assigned to locate defendant. He visited multiple residences but was unable to locate defendant. On June 10, 2014, he received information that defendant was inside a Dodge Charger outside of a Motel 6 in Lansing, Illinois. Officer Luna, along with Officers Brownfield and Fahey, arrived at the location and set up surveillance. They identified defendant inside a Dodge Charger, approached him, and transported him back to the Chicago police station without incident.

¶ 71 Detective Ford testified consistently with his testimony at the suppression hearing. In addition, Detective Ford testified that he initially viewed the scene at Kale Realty then went to the 720 building where he observed two fired shell casings directly outside the front door. Once inside the 720 building he went into the basement and viewed the surveillance footage of the incident. Detective Ford described what he viewed in the surveillance footage—an African-American man walking out of the apartment building, discharging a firearm, and then running back into the building. The same individual was then viewed on the third-floor surveillance footage shortly after he had entered the building. The video surveillance footage was obtained and short clips and still images were produced from that footage. These items were admitted into evidence and published to the jury. The videotape shows the lobby of the 720 building and an African-American man walk through the lobby, peek out the front door, open the front door, walk outside a few steps left of the front door while raising his weapon in the direction of Kale Realty, and then run back into the 720 building with the firearm in his right hand.

¶ 72 Detective Ford further testified that on May 30, 2014, he presented five still images from the surveillance footage to certain 6th District police officers in an attempt to identify the individual depicted. Detective Ford asked each officer separately if they knew the individual in the photographs. According to Detective Ford, Officer Kennedy immediately identified the individual as defendant by name. Officer Hoard also identified the individual as defendant and informed Detective Ford that defendant was wearing the same clothing he had been wearing earlier that day at Billy's Tavern. Detective Ford then issued an investigative alert for defendant so he could be located. Detective Ford also spoke to 10 officers regarding the crime and asked them for assistance in locating and arresting defendant. Detective Ford further testified that he was present when the trajectory rods were placed and that the trajectory rods pointed northwest to the front door of the 720 building.

¶ 73 Detective Ford testified that on June 10, 2014, defendant was arrested and brought to the police station. Defendant waived his *Miranda* rights and was interviewed at 8:41 p.m. Defendant was interviewed again at 10:32 p.m. until 11:25 p.m. Defendant's interviews were recorded, admitted into evidence, and published to the jury. In his initial interview, defendant denied being present at Billy's Tavern at 3:15 p.m. on May 29, 2014. According to defendant, he was at the barber shop nearby and did not witness the fight. Upon leaving the barber shop, defendant went to the 720 building to smoke on the roof. He then heard yelling, but could not determine where it was coming from, so he went to the front door of the building to see what was going on. When he stepped out onto the sidewalk the shooting started. Shots were being fired from a vehicle. He observed "Nookie" (whose name is James Jones) driving the vehicle. Defendant relayed that he was scared, as this was not the first time that they "came for him." He walked back inside the building and went to apartment 302. When asked by detectives why the

shooting occurred, defendant stated that it was a conflict between two different groups, the "79th street squad" and the "BDs from Vernon." Defendant informed the detectives that earlier that day Jones had stated to him, "We're going to let a mother f*** live today." Defendant denied firing a weapon at 5:27 p.m. on May 29, 2014. He further denied that anyone on the sidewalk was in possession of a weapon at that time. Defendant learned of Howard's death that evening from a cigarette vendor.

¶ 74 After being informed by the detectives that the video surveillance footage did not support his story and that the video depicted defendant holding a firearm, defendant admitted he fired two shots from a .22-caliber revolver at Jones' vehicle striking the driver's side and trunk. He also indicated he had originally believed that shots were being fired from the vehicle, and suggested that someone else must have been shooting from the sidewalk. Defendant added that he exchanged words with Jones earlier in the day. Jones accused defendant of "playing police games" and said, "I should kill your b*** a***." Based on those statements, defendant shot at Jones' vehicle that evening.

¶ 75 On cross-examination, Detective Ford testified that on May 29, 2014, he spoke to Williams who had been walking her dog at the time the shooting occurred. Williams informed Detective Ford that she heard shots fired and observed a four-door red Cadillac followed by a silver vehicle speed away southbound on South Evans Avenue. Detective Ford further admitted that the image of the firearm on the videotape surveillance footage is grainy and that one cannot determine the type of weapon defendant is holding from the footage.

¶ 76 The State rested and defendant moved for a directed verdict, which was denied.

¶ 77 Defendant testified that on May 29, 2014, at approximately 5 p.m. he had an altercation with Jones and then ran into the 720 building. He told his friend, who resided in apartment 302,

that Jones came up to him and told him he was going to kill defendant. Defendant then "sat around smoking" on the roof for a couple of minutes and told his friend, "I can't let him [(Jones)] catch me like that again." Defendant then left the apartment and as he approached the front door of the building he heard people arguing outside. Defendant looked out the front door and observed Jones driving a silver Cutlass with three passengers inside. According to defendant, Jones had previously shot him twice in August 2013, so he was concerned about what Jones was going to do in this situation. Defendant testified that, at the time, he was in possession of a .22-caliber revolver. He stepped outside of the 720 building and fired two shots, which struck the silver Cutlass. One shot hit the driver's passenger side door and the other struck the trunk. Another individual was also outside shooting at the silver Cutlass. This individual was standing four to five feet away diagonally from defendant. Defendant further testified that at the same time he heard additional shots that he believed were fired by Jones. After defendant fired the shots he ran back into the 720 building. He denied firing a 9-mm weapon and firing the shot that killed Howard.

¶ 78 Defendant also testified that, because he was scared, he did not initially disclose to Detective Ford that he shot his .22-caliber revolver. He also did not tell Detective Ford about the other individual who was discharging a weapon because "where I live and where I come from and if you tell on somebody, you will become a snitch." According to defendant, if he had told Detective Ford, "I probably wouldn't be sitting here today fighting for this case."

¶ 79 On cross-examination, defendant testified he obtained the preloaded .22-caliber revolver from a friend named "Mike" and that he used the revolver for protection. He and Mike sold the weapon after the shooting. Defendant admitted he fired the weapon on a public street, in broad daylight, with nothing obscuring his face. He also admitted that he is depicted on the videotape

surveillance footage. In addition, defendant admitted Jones did not shoot at him.

¶ 80 Defendant further testified that while he did not have a Firearm Owner's Identification Card and had no training on firing a weapon, he knew about the different types of firearms available. He expressly stated he knew the difference between a .22-caliber revolver and a 9-mm semiautomatic firearm. When asked whether pulling the trigger to fire bullets from a .22-caliber revolver feels different from firing a 9-mm semiautomatic firearm, defendant replied, "a gun is a gun and if you pull a trigger of a gun the trigger is the same as any other gun that you pull. It don't matter how fast you pull it or how slow you pull it, a trigger is a trigger of a gun."

¶ 81 According to defendant, it was his friend, Lionel Simmons, who was discharging a 9-mm weapon toward Jones' vehicle with the intent to strike Jones. He did not inform Detective Ford of Simmons as he was afraid of being known as a "snitch" and getting killed. Defendant denied being in a gang but agreed he and Simmons were both firing at Jones with the intent to strike him.

¶ 82 Defendant testified that he knew the police were looking to talk to him about a murder the day before he was arrested.

¶ 83 The defense rested and the State presented the testimony of Detective Ford in rebuttal. Detective Ford testified that all of the conversations he had with defendant were recorded. In none of those conversations did defendant inform him that he had an altercation with Jones prior to the May 29, 2014, shooting. Defendant did not inform Detective Ford that Jones threatened to kill him. Defendant did, however, state that on May 28, 2014, Jones pulled up in a vehicle and told defendant "I will let a mother*** live today." He did not tell Detective Ford that Jones had shot him in the past. Detective Ford further testified that defendant told him he knew a woman had been killed immediately after the shooting occurred.

¶ 84 The State rested and the trial court held a jury instructions conference outside the presence of the jury. Over defendant's objection, the trial court allowed the jury to be instructed on accountability. Defense counsel did not request a second-degree murder instruction be given.

¶ 85 After hearing closing arguments and jury instructions, the jury deliberated and ultimately found defendant guilty of first-degree murder and that he personally discharged a firearm in the commission of that offense.

¶ 86 Defendant filed a posttrial motion for a new trial, which the trial court denied. The matter proceeded to a sentencing hearing where, after considering evidence in mitigation and aggravation, the trial court sentenced defendant to 60 years' imprisonment for first-degree murder on each count and a 20-year sentence for personal discharge of a firearm to be served consecutively for a total sentence of 80 years.

¶ 87 ANALYSIS

¶ 88 On appeal, defendant argues (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt of first-degree murder either as the principal or under an accountability theory, (2) the trial court erred in denying his motion to quash and suppress evidence as investigative alerts are unconstitutional, (3) defense counsel was ineffective for failing to request a second-degree murder jury instruction, (4) he received an unfair trial due to prosecutorial misconduct, and (5) his two convictions for the first-degree murder of Howard violate the one-act, one-crime rule. We address each issue in turn.

¶ 89 Sufficiency of the Evidence

¶ 90 Defendant maintains that the State failed to prove beyond a reasonable doubt that he was guilty as the principal for the shooting death of Howard. Defendant asserts the State presented no evidence which attempted to distinguish between the multiple shooters' bullets sufficient to

establish defendant's guilt; rather, the State's evidence demonstrated that there were multiple shooters, and a total of a minimum of five shots, only two of which defendant was personally responsible for. Defendant concludes as the State did not prove that either of defendant's two shots struck Howard, the State failed to prove beyond a reasonable doubt that he committed the offense. Defendant requests his first-degree murder conviction be reversed. In the alternative, defendant asserts that the State also did not prove him guilty of first-degree murder under an accountability theory.

¶ 91 In response, the State maintains the evidence was sufficient where it established beyond a reasonable doubt that defendant alone discharged a firearm in the direction of the Kale Realty office while intending to shoot Jones and ended up killing an innocent bystander. Although defendant claims he only fired two shots from a .22-caliber revolver, the State presented evidence that a 9-mm handgun was fired a minimum of four times. Thus, it was a question of fact and credibility for the jury—whether or not defendant fired a .22-caliber revolver or a 9-mm handgun—and also how many shots he fired. The State argues that the jury did not believe defendant's version of events and found him guilty of first-degree murder.

¶ 92 When a defendant challenges the sufficiency of the evidence, the reviewing court must determine if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense proven beyond a reasonable doubt. *People v. Pizarro*, 2020 IL App (1st) 170651, ¶ 29. All reasonable inferences from the evidence must be made in the State's favor. *People v. Hardman*, 2017 IL 121453, ¶ 37. Under this standard of review, it is not the reviewing court's role to retry the defendant. *People v. Gray*, 2017 IL 120958, ¶ 35. We may not substitute our judgment for that of the trier of fact with respect to the weight of the evidence or the credibility of witnesses. *People v. Jackson*, 232 Ill. 2d 246, 280-81

(2009). It is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67. We will not reverse a conviction unless the evidence is so improbable, unreasonable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Carr-McKnight*, 2020 IL App (1st) 163245, ¶ 52.

¶ 93 An individual commits first-degree murder if, in performing the acts which cause the death, he or she intends to kill or do great bodily harm to a person, or knows that such acts will cause such death or great bodily harm. 720 ILCS 5/9-1(a)(1) (West 2014).

¶ 94 The doctrine of transferred intent applies to situations where "innocent bystanders" are injured. *People v. Hill*, 315 Ill. App. 3d 1005, 1012 (2000). The doctrine holds that one who intends to kill another and kills an unintended victim is not absolved from answering to the crime of murder. *Id.* The determination of whether the defendant acted with the requisite intent to commit first-degree murder is a question of fact and may be inferred from the circumstances surrounding the incident, the defendant's conduct, and the nature and severity of the victim's injuries. *People v. Renteria*, 232 Ill. App. 3d 409, 416-17 (1992).

¶ 95 Defendant does not dispute that he fired a weapon, nor does he dispute that his actions resulted in the death of Howard—indeed, defendant testified that he intentionally fired his .22-caliber revolver at Jones. Rather, defendant contends that the evidence failed to prove that he was the shooter as he fired a .22-caliber revolver twice and the evidence demonstrated that more than four shots were fired, with the victim being struck with a 9-mm bullet.

¶ 96 Here, considering the evidence in the light most favorable to the prosecution, the record demonstrates sufficient evidence from which a rational trier of fact could have found the essential elements of first-degree murder beyond a reasonable doubt. In the present case, the

jury heard two different versions of what occurred on May 29, 2014. In the State's version, defendant discharged a firearm in the direction of Jones' vehicle with the intent to kill him. Instead of striking Jones, defendant's shots struck the west wall of the Kale Realty office, with one striking and killing Howard, an innocent bystander. In defendant's version, he heard a commotion outside the 720 building and went to see what was going on. Upon realizing Jones was outside in a vehicle, defendant exited the building with his firearm drawn and started shooting at Jones immediately as he was frightened that Jones would kill him. As defendant was firing his .22-caliber revolver, his friend Simmons was also firing a handgun at Jones' vehicle. Defendant then ran back inside the 720 building. This case presented a credibility contest between the State's witnesses and the defense's witness. Ultimately, the jury had a choice as to whose version to believe and what culpability, if any, defendant had. The jury believed the State's version that the defendant acted intentionally and alone in shooting Howard. Reviewing courts generally should not second-guess these determinations. See *Gray*, 2017 IL 120958, ¶ 35; *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 97 We further observe that defendant's argument mainly revolves around the number of bullets fired. Defendant maintains the evidence established he only fired two shots, yet the physical evidence established that a minimum of four shots were fired. The State, however, presented trajectory evidence that the bullet holes in the Kale Realty office originated from in front of the 720 building. And while defendant testified that he stepped out of the 720 building and in front of a restaurant when he discharged his weapon, the videotape surveillance from the lobby (which was viewed by the jury) demonstrated he remained in front of the 720 building. The jury was also presented with evidence of defendant's interview with the detectives wherein he initially denied firing a weapon at all and then, upon learning that shell casings were

discovered in front of the 720 building, admitted he fired a revolver—a weapon that is incapable of discharging casings. Then, during his courtroom testimony defendant admitted for the first time that another individual was present and fired a weapon during the incident. Furthermore, additional testimony placed defendant's credibility at odds with the State's witnesses. For example, defendant testified that people were yelling in front of the 720 building before the shooting; yet Stafford, Williams, and Craig testified that they did not hear any arguing or yelling prior to the shooting. See *People v. Aljohani*, 2021 IL App (1st) 190692, ¶ 94 (observing that while there were no "eye" witnesses to the offense there were "ear" witnesses). Multiple witnesses also testified that the shots sounded like they came from the same firearm. *Id.* In this case, the jury was presented with the State's and the defense's evidence and two theories surrounding that evidence and determined defendant intentionally discharged a weapon causing Howard's death. *Gray*, 2017 IL 120958, ¶ 35. Determinations of witness credibility, the weight to be given testimony, and the reasonable inferences to be drawn from the evidence are the responsibilities of the trier of fact, not the reviewing court. *People v. Spiller*, 2016 IL App (1st) 133389, ¶ 28. After considering all of the evidence presented at defendant's trial and viewing that evidence in the light most favorable to the State, we find that the evidence was sufficient to prove beyond a reasonable doubt that defendant was guilty of the first degree murder of Howard. *Id.*; *Carr-McKnight*, 2020 IL App (1st) 163245, ¶ 52.

¶ 98 In sum, we find that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of first-degree murder as the principal. As we have found the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of first-degree murder as the principal, we need not consider his argument that the evidence was insufficient to prove him guilty of first-degree murder under an accountability theory. See *People v. Fauber*, 266 Ill. App.

3d 381, 386 (1994).

¶ 99 Motion to Quash and Suppress

¶ 100 Defendant next maintains that the trial court erred in denying his motion to quash and suppress and that the matter should be remanded for a new trial. Relying on *People v. Bass*, 2019 IL App (1st) 160640, ¶¶ 62, 71, defendant contends his arrest, which was pursuant to an investigative alert, was unconstitutional. In the alternative, defendant asserts that he was denied effective assistance of counsel where defense counsel failed to move to quash his arrest and suppress his statement on the specific basis that his arrest was based solely on an investigative alert.

¶ 101 The State asserts defendant forfeited review of this claim where he failed to raise it before the trial court in a motion to suppress and a posttrial motion. Regardless of any forfeiture, the State argues that defendant cannot demonstrate plain error where the investigative alert was supported by probable cause.

¶ 102 When we review a trial court's ruling on a motion to suppress, we review the court's factual findings for clear error and will only reject those findings if they are against the manifest weight of the evidence. *People v. Bass*, 2021 IL 125434, ¶ 21. However, we review *de novo* the trial court's ultimate ruling on a motion to suppress. *Id.* The defendant bears the burden of proof. *People v. Simmons*, 2020 IL App (1st) 170650, ¶ 49. Once the defendant sets forth a *prima facie* case that the seizure was unreasonable, the burden shifts to the State to provide evidence to rebut it. *Bass*, 2021 IL 125434, ¶ 21. When a defendant is arrested without probable cause or a warrant based on probable cause, both the United States and Illinois constitutions are violated. *Simmons*, 2020 IL App (1st) 170650, ¶ 49.

¶ 103 Here, Detective Ford testified at the suppression hearing that he issued an investigative

alert for defendant on May 30, 2014, based on other officers identifying defendant as the individual who fired a weapon, striking Howard. Specifically, Detective Ford testified that these other officers knew defendant. In the narrative portion of the investigative alert, Detective Ford wrote that defendant had been positively identified as one of the individuals who had discharged a weapon causing the death of Howard. Officer Luna testified that on June 10, 2014, there was an investigative alert for defendant with "probable cause to arrest" and that he arrested defendant pursuant to that investigative alert. Defendant does not argue on appeal that the officers did not have probable cause to arrest him. Rather, defendant argues that his arrest was unconstitutional as he was arrested pursuant to an investigative alert and not pursuant to an arrest warrant.

¶ 104 Defendant relies on the appellate court opinion in *People v. Bass*, 2019 IL App (1st) 160640, ¶¶ 62, 71, *aff'd in part and vacated in part*, 2021 IL 125434, ¶ 34. In *Bass*, the defendant was arrested pursuant to an investigative alert based on probable cause, as here, and a divided panel of the appellate court concluded that the defendant's motion to suppress should have been granted because arrests based solely on investigative alerts, even if the alert is based on probable cause, violate the Illinois Constitution. *Id.* ¶¶ 7, 42, 71. In April 2021, while this case was being briefed, our supreme court issued an opinion in *Bass*, in which it agreed with the appellate court that the defendant's motion to suppress should have been granted, but it reached that conclusion on narrower grounds, finding that the traffic stop at issue was unconstitutionally extended. *Bass*, 2021 IL 125434, ¶ 26. As the court decided the case on narrow grounds regarding the legality of the traffic stop, it did not address the constitutional issue regarding whether investigative alerts violate the Illinois Constitution, and it vacated the portions of the appellate opinion relating to investigatory alerts. *Id.* ¶¶ 29, 33; see *People v. Little*, 2021 IL App (1st) 181984, ¶ 63.

¶ 105 Thus, as our supreme court has vacated the portions of *Bass* regarding the constitutionality of investigative alerts, we will not follow those portions of the appellate court opinion. Instead, we will follow other panels of this court that have concluded that investigative alerts do not violate the Illinois constitution. See *People v. Braswell*, 2019 IL App (1st) 172810, ¶ 39; *Simmons*, 2020 IL App (1st) 170650, ¶ 64; *People v. Thornton*, 2020 IL App (1st) 170753, ¶¶ 45-50; *People v. Bahena*, 2020 IL App (1st) 180197, ¶ 63. Accordingly, we are unpersuaded by defendant's argument that his arrest was unconstitutional because he was arrested pursuant to an investigative alert and not an arrest warrant. The trial court did not err when it denied his motion to suppress. Moreover, as the trial court observed in this case, regardless of the constitutionality of an arrest based on an investigative alert, defendant's arrest was supported by probable cause in that the officers who knew defendant had already identified him as the shooter by name from the video surveillance footage. Thus, defendant's arrest did not run afoul of the Illinois Constitution. See *Little*, 2021 IL App (1st) 181984, ¶ 64.

¶ 106 In the alternative, defendant contends that defense counsel was ineffective for failing to raise this argument in the motion. However, based on our analysis above, the unargued issue that defendant's arrest pursuant to an investigative alert was unconstitutional was not meritorious. See *People v. Gayden*, 2020 IL 123505, ¶ 28 ("In order to establish ineffective assistance based on counsel's failure to file a suppression motion, the defendant must demonstrate both that the unargued suppression motion was meritorious and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed."). Counsel cannot be deemed ineffective if the motion would have been futile. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Accordingly, defendant's ineffective assistance of counsel argument as to defense counsel's failure to raise the constitutional issue in the motion to

suppress fails.

¶ 107 Ineffective Assistance of Counsel – Jury Instruction

¶ 108 Defendant next asserts that he received ineffective assistance of counsel when his defense counsel failed to pursue a second-degree murder jury instruction. Defendant maintains that the evidence was sufficient to instruct the jury on an imperfect self-defense theory of second-degree murder. Defendant further maintains that because there is a reasonable probability that the jury would have accepted the theory of imperfect self-defense, defense counsel's failure to seek this instruction constituted ineffective assistance and this court should reverse his conviction and remand the matter for a new trial.

¶ 109 In response, the State asserts that defense counsel was not ineffective where his strategic decision not to seek the instruction was reasonable and where, even if such an instruction had been given, the outcome would not have changed.

¶ 110 A criminal defendant is guaranteed the right to the effective assistance of counsel by both the United States and Illinois Constitutions. U.S. Const., amend. VI, XIV; Ill. Const. 1970, art. I, § 8. Claims that counsel provided ineffective assistance are evaluated under the familiar two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which our supreme court adopted in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on an ineffective-assistance-of-counsel claim, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88; *People v. Johnson*, 2021 IL 126291, ¶ 52.

¶ 111 A defendant must satisfy both prongs of the *Strickland* test to prevail on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992). Reviewing courts measure counsel's performance by an objective standard of competence under prevailing

professional norms. *Spiller*, 2016 IL App (1st) 133389, ¶ 36. To establish deficient performance, defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Id.*

¶ 112 Conduct that would otherwise constitute first-degree murder instead constitutes second-degree murder when either of the two statutory mitigating circumstances are present. See 720 ILCS 5/9-2(a) (West 2014). The mitigating circumstance at issue in this case is what is generally referred to as "imperfect self-defense." *People v. Jeffries*, 164 Ill. 2d 104, 113 (1995); see *People v. Castellano*, 2015 IL App (1st) 133874, ¶ 18. A conviction for second-degree murder based on the mitigating factor of imperfect self-defense is appropriate when "there is sufficient evidence that the defendant believed he was acting in self-defense, but that belief is objectively unreasonable." *Jeffries*, 164 Ill. 2d at 113; see also 720 ILCS 5/9-2(a)(2) (West 2014) (providing that a defendant is guilty of second-degree murder if, at the time of the killing, he believed circumstances were present that would have justified the killing based on self-defense had those circumstances actually been present).

¶ 113 A defendant is entitled to an instruction on second degree murder if there is some evidence in the record to support his claim that a mitigating circumstance is present. *People v. McDonald*, 2016 IL 118882, ¶ 25.

¶ 114 Defendant argues that his counsel was ineffective since the evidence at trial was sufficient for a finding of second-degree murder. Defendant points to his own testimony and videotaped interview wherein he repeatedly stated he was scared of Jones. Not only had Jones shot him twice in 2013, but Jones had threatened to kill him earlier in the day on May 29, 2014. Defendant testified that when he heard yelling outside of the 720 building after 5 p.m. on May 29, 2014, he knew it was Jones and acted out of fear when he exited the building and attempted

to shoot Jones.

¶ 115 Although defendant now argues that he unreasonably believed he was justified in firing his weapon at Jones in imperfect self-defense, the evidence at trial demonstrates otherwise. To establish this affirmative defense, the defendant must present evidence supporting the elements of self-defense: (1) unlawful force was threatened against a person; (2) the person threatened was not the aggressor; (3) there was an imminent danger of harm; (4) the use of force was necessary; (5) the person actually and subjectively believed a danger existed requiring the use of the force applied; and (6) the person's belief was objectively reasonable. *Gray*, 2017 IL 120958, ¶ 50. If the defendant meets that burden, the burden of proof shifts to the State to prove beyond a reasonable doubt not only that the defendant committed first-degree murder, but also that he did not act in self-defense, by negating any of the elements of self-defense. *Jeffries*, 164 Ill. 2d at 127-28. If the State negates any one of these elements, the defendant's claim of self-defense must fail. *People v. Olaska*, 2017 IL App (2d) 150567, ¶ 145.

¶ 116 Defendant here has failed to present some evidence to warrant a second-degree murder jury instruction. While defendant testified that approximately 45 minutes before the shooting occurred Jones threatened to kill him, he did not testify that there was an immediate threat at the time the shooting occurred. In fact, defendant testified that he walked out of the 720 building and immediately fired his loaded .22-caliber revolver at Jones' vehicle. There was no time, at that moment, for Jones to have threatened defendant prior to defendant firing his weapon. This evidence also demonstrates that defendant was the aggressor in this scenario. Regarding an imminent danger of harm, defendant testified that he was on the roof at the time Jones drove in front of the 720 building and admitted that he was safe on the roof. This testimony negates any imminent danger of harm. Lastly, we observe that defendant failed to present any evidence that

the use of force was necessary—indeed, defendant admitted he fired his weapon first and there was no evidence that Jones was armed with a firearm. We further observe that the State demonstrated evidence of flight, and flight is circumstantial evidence from which a defendant's knowledge that he did not act in self-defense can be inferred and a self-defense theory can be refuted. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 59.

¶ 117 In sum, the evidence at trial established that defendant was not in imminent danger and that he was the aggressor and therefore there was not some evidence of each of the elements of self-defense to warrant a second-degree murder jury instruction. Accordingly, defense counsel did not render ineffective assistance when he failed to request a second-degree murder instruction. See *People v. Hampton*, 2021 IL App (5th) 170341, ¶ 101 (finding a second-degree murder jury instruction was not appropriate where the evidence established that the defendant "easily could have driven away" if he believed the victim posed a danger, but instead he exited the vehicle and fired multiple shots at the victim).

¶ 118 Prosecutorial Misconduct

¶ 119 Defendant next maintains that the State violated the trial court's pretrial ruling when it elicited improper other-crimes evidence, elicited irrelevant and improper gang evidence, and introduced evidence relating to defendant's prior contacts with police officers. Defendant asserts that the trial court indicated that it would allow the State to elicit evidence of the March 11, 2013, incident and the January 29, 2014, incident if defendant first opened the door in his testimony and that, as defendant did not open the door, such testimony was improper and prejudicial to him.

¶ 120 In response, the State argues that defendant forfeited these claims when he failed to raise them during trial and in a posttrial motion. Forfeiture aside, the State asserts that there was no

error when it was in full compliance with the trial court's pretrial rulings. The State notes that it never introduced any evidence of the March 11, 2013, incident and when evidence was introduced regarding the January 29, 2014, incident the testimony did not apprise the jury that this incident involved a murder or was gang related. The State further asserts that it did not seek to exclude gang evidence and, therefore, there was no bar on gang testimony. The State notes that defendant himself acknowledged he was in a gang in his interview with detectives, yet this interview was not objected to by defendant.

¶ 121 To preserve an issue for review, a party ordinarily must raise it at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010). This requires that a defendant specifically object at trial and raise the specific issue again in the posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 471 (2005). Failure to preserve an alleged error for review is a procedural default. *People v. Rivera*, 277 Ill. App. 3d 811, 818 (1996). As defendant did not properly preserve this issue for consideration on appeal, it is forfeited.

¶ 122 Defendant acknowledges that this issue was not properly preserved for appellate review, and requests that this court consider the issue under the plain-error doctrine. He argues both that the evidence was closely balanced and that he was denied a fair trial.

¶ 123 To establish plain error, a defendant must first establish that a clear or obvious error occurred (*Thompson*, 238 Ill. 2d at 613), and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error (*People v. Naylor*, 229 Ill. 2d 584, 593 (2008)) or that the error was sufficiently grave that it deprived defendant of a fair trial (*People v. Herron*, 215 Ill. 2d 167, 187 (2005)). The first step in a plain-error review generally is to determine whether the trial court committed error, and

the burden is on defendant to establish that an error occurred. *Thompson*, 238 Ill. 2d at 613.

¶ 124 We begin our analysis with the basic standards of review applicable to evidentiary issues. The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion. *People v. Hall*, 195 Ill. 2d 1, 20-21 (2000). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would agree with the position adopted by the trial court. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). Illinois courts have long recognized, as a matter of common law, that a trial court may exercise its discretion to exclude evidence, even when it is relevant, if its prejudicial effect substantially outweighs its probative value. *People v. Walker*, 211 Ill. 2d 317, 337 (2004).

¶ 125 Our review of the record reveals that no error occurred in the questioning of the State's witnesses during the State's case-in-chief. Prior to the trial, the State filed a motion to introduce other-crimes evidence. Specifically, those other crimes involved two incidents which occurred on March 11, 2013, and January 29, 2014. The trial court prohibited the State from eliciting the specific offenses that occurred on these dates from its witnesses. Regarding the March 11, 2013, date, the trial court ruled that general testimony regarding the fact defendant voluntarily went to the police station for questioning could come into evidence if defendant were to testify he was fearful of the police. Defendant, however, did not so testify and therefore no testimony was elicited regarding March 11, 2013.

¶ 126 As for the January 29, 2014, incident, the trial court allowed the State to elicit testimony establishing defendant was familiar with the 720 building, but expressly disallowed any reference to a murder taking place there on that date. The State elicited testimony from Giles, Officer Hoard, and Detective Sandoval regarding January 29, 2014. Giles, the building

maintenance man, testified that an incident occurred in apartment 301 on January 29, 2014, and he assisted the police in obtaining the video surveillance footage. Officer Hoard testified that he had been called to the 720 building on January 29, 2014, and observed defendant on the video surveillance footage that day. After Officer Hoard testified, the trial court issued a limiting instruction to the jury which advised the jury to consider any of defendant's conduct not involved in the indictment to be received on the issues of defendant's presence in the building and for identification only. Detective Sandoval testified he was assigned to investigate what occurred at the 720 building on January 29, 2014. During the course of his investigation he was able to view the video surveillance footage and identified defendant as appearing in that footage. In March of that year, Detective Sandoval interviewed defendant. Defendant acknowledged that he had been on the third floor of the 720 building on January 29, 2014. A review of this testimony reveals that the State did not exceed the bounds set by the trial court in questioning its witnesses regarding defendant's presence in the 720 building on January 29, 2014. No testimony was elicited regarding the type of investigation that was being conducted nor did anyone testify defendant was a suspect or had been arrested. When considered in conjunction with the trial court's limiting instruction, it is evident that the jury was aware that the State presented this testimony to establish defendant's familiarity with the third floor of the 720 building. Accordingly, we conclude no prejudicial error occurred. "Having found no error, there can be no plain error." *People v. Bannister*, 232 Ill. 2d 52, 79 (2008).

¶ 127 Defendant contends, however, that the State's witnesses improperly referenced "gangs" when testifying despite such a reference being highly prejudicial. Defendant asserts that the 17 references to "gangs" served to inflame the jury and infected their verdict.

¶ 128 In response, the State observes that there was no motion *in limine* prohibiting it from

referencing gangs, that defendant himself admitted he was a gang member in his interview with the detectives, and, regardless, the witnesses' testimony regarding their assignments to gang units was not so prejudicial as to require reversal.

¶ 129 Evidence of gang membership and gang-related activity is admissible where it is relevant to an issue in dispute, there is sufficient proof that membership is related to the charged offense, and its probative value is not substantially outweighed by its prejudicial effect. *People v. Johnson*, 208 Ill. 2d 53, 102 (2003). In this case, however, we find that the State did not present any evidence that the shooting was gang related or that defendant was a gang member.

¶ 130 We find the issue raised here similar to that addressed by this court in *People v. Gales*, 248 Ill. App. 3d 204 (1993). In *Gales*, the trial court ruled that the State could not introduce evidence of the gang affiliation of any witness, and the State indicated it did not intend to offer any such evidence during its case in chief. *Id.* at 227-29. During trial, "[s]everal police officers introduced themselves as 'gang specialist' assigned to 'gang crimes south' with their assignment being 'gang suppression.' " *Id.* at 227. The defendant noted on appeal that the word "gangs" was used more than 96 times during trial and argued that this use of the word indirectly implied that he was a gang member. *Id.* This court pointed out that there was no testimony that any of the defendants were gang members, no testimony about gang activity in the area, and no evidence presented that the investigation was gang related. *Id.* at 228. We noted that the trial court's pretrial ruling clearly barred testimony regarding gang affiliation, and found that the officers' testimony identifying themselves as "gang crimes specialists" did not violate that ruling or infer that the defendant was a gang member. *Id.* at 228-29.

¶ 131 The record reflects that Officer Kennedy testified that he was currently assigned to the Gang Investigations Division and does "a lot of workup in long-term investigations on violent

gangs across the city." However, when the offense at issue occurred in May 2014, he was not assigned to the Gang Investigations Division but was a plain-clothes officer in the 6th District. Officer Hoard testified that he was currently assigned to the "troubled buildings" unit of the Chicago Police Department and that his duties included working "drug and gang house enforcement." However, he was not working in the troubled buildings unit in May 2014. Officer Luna testified that on May 29, 2014, he was assigned to the Gang Investigations Unit. When asked by the State what other types of detectives exist, Detective Ford testified that there are detectives assigned to "fugitive apprehension, gangs." Detective Ford also testified regarding his investigation of this case that he requested "all his tactical and gang officers meet us in the gang office" to identify the individual in the video surveillance footage. Then, Detective Ford testified that Officer Kennedy identified defendant due to Officer Kennedy's previous contacts with defendant while performing his duties as a gang officer. Ford also explained that during the course of his investigation he spoke with at least 10 officers in various "gang and tactical units."

¶ 132 We agree with the State that the references made by the State's witnesses to gangs was not in violation of any motion *in limine* nor did the references prejudice defendant. First, we observe that defendant did not bring a motion *in limine* prohibiting the State from referencing gangs or addressing whether or not defendant was a member of a gang. Second, any reference to gang evidence the State made during the hearing on its motion involving other-crimes evidence was solely related to the other crimes and not to the May 29, 2014, shooting. For example, when asked by the trial court whether the murder in this case was related to the January 29, 2014, murder, the prosecutor responded, "They're probably both gang related, but I'm not looking to go there." The prosecutor further expressed that she was not seeking to offer the proof of other crimes to prove defendant's gang-related motive. Third, the trial court did not issue a ruling

related to gang evidence in this case. Fourth, when gang references were made during the trial it was primarily in regard to the officers' assignments and duties and not directly connected to defendant. See *Gales*, 248 Ill. App. 3d at 227. Fifth, the State's witnesses did not testify that defendant was in a gang or that the May 29, 2014, shooting was gang related. Accordingly, we find no prejudicial error occurred in this case. As no error occurred, there can be no plain error and defendant's claims on appeal fail. See *Bannister*, 232 Ill. 2d at 79.

¶ 133 One-Act, One-Crime

¶ 134 Lastly, defendant contends his mittimus, which reflects two convictions for first-degree murder, should be corrected to reflect one conviction and sentence for first-degree murder. The State agrees that defendant's mittimus should be corrected to reflect one conviction of intentional murder (720 ILCS 5/9-1(a)(1) (West 2014)).

¶ 135 Under the one-act, one-crime rule, multiple convictions may not be carved from the same physical act. *People v. Coats*, 2018 IL 121926, ¶ 11. When multiple convictions are erroneously imposed, surplus convictions must be vacated. See *In re Tyreke H.*, 2017 IL App (1st) 170406, ¶ 123. A one-act, one-crime claim is reviewable under the second prong of the plain-error rule. *Coats*, 2018 IL 121926, ¶ 10. We review this purely legal claim *de novo*. *Id.* ¶ 12.

¶ 136 Here, we agree with the parties that defendant's conviction for knowing murder (720 ILCS 5/9-1(a)(2) (West 2014)) must be vacated. See *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009) (a sentence should be imposed on the offense that bears the more culpable mental state). Pursuant to the one-act, one-crime doctrine, multiple convictions are improper if they are "based on precisely the same act." *In re Angel P.*, 2014 IL App (1st) 121749, ¶ 66. In this instance, the two convictions for first-degree murder reflect defendant's actions towards a single victim. Accordingly, both convictions cannot stand and we vacate defendant's conviction for knowing

murder (720 ILCS 5/9-1(a)(2) (West 2014)).

¶ 137 CONCLUSION

¶ 138 For the reasons stated above, we vacate defendant's conviction for knowing murder (720 ILCS 5/9-1(a)(2) (West 2014)) pursuant to the one-act, one-crime rule but otherwise affirm the judgment of the circuit court of Cook County. The mittimus shall be corrected accordingly.

¶ 139 Affirmed in part, vacated in part.

## PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 16, 2022, the **Appendix of Non-Precedential Orders Cited in the Appellee Brief of the People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system, which provided service to the following:

Sharone Mitchell, Jr.
Cook County Public Defender
Suzanne A. Isaacson
Assistant Public Defender
69 West Washington
15th Floor
Chicago, Illinois 60602
LRD.PD@cookcountyil.gov

*Counsel for Defendant-Appellant*

Kimberly M. Foxx
State's Attorney of Cook County
Richard J. Daley Center, 3d Floor
Chicago, Illinois 60602
eserve.CriminalAppeals@cookcountyil.gov

/s/ John E. Nowak
JOHN E. NOWAK, Bar #6243584
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7958
eserve.criminalappeals@ilag.gov