

Nos. 1-11-2633 and 1-13-1431 (consolidated)

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IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 C 17650 (02)
)	
ANTIONE BRANTLEY,)	The Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

HELD: The State properly proved defendant guilty beyond a reasonable doubt on the basis of accountability pursuant to the common design rule even though defendant did not shoot at the victim; the trial court did not coerce the jury's verdict in its responses to the notes the jury sent out during deliberations; defendant's counsel was not ineffective for failing to question a particular juror after that juror reaffirmed his verdict which was in unanimity with the rest of the jury; the trial court did not deny defendant a fair trial by permitting the introduction of prior inconsistent statements from a particular witness which were not cumulative; and his sentence was proper and not impermissibly excessive in light of the circumstances. However, defendant's sentence violated the one-act, one-

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crime rule and, upon the State's concession, his conviction and sentence for aggravated battery with a firearm must be vacated.

¶ 1 Following a jury trial, which was held simultaneously with codefendant Darius Williams' bench trial, defendant-appellant Antione Brantley (defendant) was convicted of attempted first degree murder and aggravated battery with a firearm and was sentenced to two concurrent terms of 35 years in prison. He appeals, contending that (1) the State failed to prove him guilty beyond a reasonable doubt on the basis of accountability; (2) the trial court coerced the jury's verdict; (3) his counsel was ineffective for failing to question a hesitant juror; (4) the trial court denied him a fair trial by permitting the State to introduce cumulative prior inconsistent statements from a particular witness; (5) his sentence violated the one-act, one-crime rule; and (6) his sentence was impermissibly excessive in light of various circumstances. He asks that we reverse his convictions outright or reverse them and remand for a new trial and, with respect to his sentence, that we vacate his conviction for aggravated battery with a firearm and reverse his sentence, either reducing it or remanding the matter for resentencing. For the following reasons, we affirm defendant's conviction for attempted first degree murder and vacate his conviction for aggravated battery with a firearm; in addition, we otherwise affirm his sentence, with the modification that his second 35-year term for his conviction for aggravated battery with a firearm is, accordingly, vacated.

¶ 2

BACKGROUND

¶ 3 Defendant was charged with three counts of attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm and aggravated battery in relation to

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events that occurred on the afternoon of August 31, 2009, at the home of the victim, Zachary Sanders. Codefendant Williams was also charged and, as noted, he elected to proceed to a bench trial, while defendant chose to have his cause heard by a jury.

¶ 4 At trial, Sanders testified that on the day in question, between 4 and 5 p.m., he was sitting on his front porch talking to defendant on the phone. Sanders and defendant had been good friends for several years and, though they had arguments in the past, these were always merely friendly squabbles. That day, the two were discussing defendant's new car; defendant told Sanders that he obtained it from their mutual friend without paying for it and Sanders told defendant he was lying, since their friend had told him previously that defendant had paid for the car. An argument ensued and Sanders asked defendant why he was "acting tough." In response, defendant told Sanders he would come to his house and show him the car. Upon further questioning by the State, Sanders recounted that defendant also told him, "If I wanted to get you touched, I can get you touched," which Sanders understood to mean "shot or get killed." However, Sanders did not think defendant was serious about harming him and was not afraid of him, so he told defendant to come over. After hanging up the phone, Sanders saw another friend, Shaneata Trotta, across the street and invited her to come over to his porch.

¶ 5 Sanders further testified that, about 20 minutes later, while he was on the porch with Trotta, defendant arrived, driving a white Cadillac Eldorado. Sanders saw codefendant, whom he did not know, in the front passenger seat and the shadow of another person in the back seat. Defendant got out of the car and went up to the porch; he asked Sanders if Trotta was who he was "trying to act tough for." Defendant and Sanders argued and, at one point, Sanders, who is

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bigger and taller than defendant, stood up, whereupon defendant walked off the porch. Sanders averred that, as defendant walked back to the car, he made a hand signal in the shape of a gun to codefendant and told codefendant to "go on ahead." Sanders stated that, after defendant got back into the driver's seat, codefendant opened the passenger side door of the car, stepped out halfway (with one leg still inside the car), and told Trotta to get off the porch. Once Trotta left, Sanders saw codefendant point a gun at the porch and start shooting in his direction. Sanders tried to dodge the bullets and get into his house, but could not; codefendant eventually stopped shooting, got back into the car and defendant drove away. Sanders was struck by bullets in his arm and chest and was grazed twice in his neck.

¶ 6 On cross-examination, Sanders reiterated that he was never afraid of defendant that day and that the two were friends. He also averred that defendant was unarmed, that he did not see defendant ever have a gun or any other weapon in his hands during the incident, and that defendant never said anything about codefendant having a gun or that codefendant was going to shoot him. In addition, Sanders admitted that in his written statement to police, which he reviewed and signed, he mentioned only that defendant made a hand signal to codefendant, but not that it was in the shape of a gun.

¶ 7 Trotta testified that she was visiting someone across the street when she saw her friend, Sanders, and he waved to her to come over to his porch, where they sat together. Trotta was playing with her phone and Sanders was talking on his, not appearing to be upset in any way. Shortly thereafter, Trotta saw defendant, whom she knew from school, pull up in a white Cadillac, get out of the car, walk up to the porch and start talking to Sanders. During the

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conversation, to which she was not paying close attention, Trotta heard defendant ask Sanders if he was trying to show off for her. Trotta averred that defendant was not mad or agitated and that Sanders seemed more upset than defendant; they did not raise their voices and the argument ended when Sanders stood up. At this point, defendant left the porch and went back to the car. Trotta observed that defendant did not look upset or angry, and she did not see him make any motions or say anything to anyone as he got back into the car.

¶ 8 Trotta further testified that once defendant was in the car, codefendant, whom she did not know, said something to Sanders and Sanders responded that he was not scared. Trotta stated that she only began to feel tension during this exchange and not before, since she knew that defendant and Sanders were good friends. Trotta averred that, following codefendant and Sanders' exchange, codefendant told her to get off the porch. As she was stepping down, she saw codefendant open the car door, wherein she saw his hand on a gun down by the passenger seat and another man in the back seat. Codefendant then stepped out of the car, lifted up the gun and fired it about three times. Trotta ran into her friend's house and, when she came back outside, she saw Sanders lying on the ground. Later, she spoke to police and identified the passengers in the car.

¶ 9 Delania Zimmerman, defendant's girlfriend at the time of the incident, testified that defendant and Sanders were very good friends who saw each other often. She stated that, earlier on the day of the shooting, defendant was at her house where she heard him on the phone with Sanders and heard him call Sanders "lame." She averred that she did not hear defendant threaten Sanders and that he never said anything about "touching" or shooting him. She further testified

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that defendant did not have a gun that day, nor had she ever seen him with one, and that he left her house shortly after his telephone conversation with Sanders.

¶ 10 Devontae Gaston, codefendant's foster brother, testified that he did not know Sanders and had never been to his house; Gaston, however, was friends with defendant. On the afternoon in question, defendant came to his and codefendant's house where the three talked on the porch and decided to go for a drive. Gaston averred that defendant did not appear upset or angry and there was no indication that they were going to Sanders' house. They first drove to defendant's grandmother's house; defendant went inside while Gaston and codefendant stayed in the car and smoked marijuana. Defendant got back into the car and they began to drive again, whereupon Gaston laid down in the back seat and fell asleep.

¶ 11 Gaston further testified that when he woke up, the car had stopped and he did not know where he was. He stated that he heard arguing, looked up and saw defendant outside the car arguing with another man (Sanders), whom he did not know, on his porch. Gaston averred that he did not see codefendant and Sanders exchange any words, nor did he remember defendant walking back to the car and/or him giving an order or saying anything like "F*ck that n*gger, shoot." Gaston could only remember an argument and gunshots, whereupon he ducked down in the back seat of the car. Gaston recounted that, at this point, he heard the car doors slam and defendant drove away, with codefendant in the front seat. They headed toward the expressway, but were pulled over by police soon thereafter. Gaston stated that he did not see either defendant or codefendant with a gun that day. Gaston was later taken to the police station where he provided a written statement the following day.

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¶ 12 Gaston further testified that, with respect to the written statement he gave police, he could not recall many of the details it contained regarding the incident, and he did not remember making any corrections to it. He averred that at the time he gave the statement to police, he was still under the effects of drugs he took that day, including the marijuana he smoked in defendant's car. Gaston also stated that police told him codefendant (his foster brother) would get 20 to 30 years if he (Gaston) did not cooperate and that he himself would go to jail if he mentioned the drugs or did not say what police wanted to hear. With respect to his grand jury testimony, Gaston stated that he felt threatened and nervous and was told that he would have to go back to the police station if he tried to change his account of the events; this is why he did not mention then that he had been on drugs at the time of the incident. Gaston averred that he "told everybody what they wanted to hear" while at the police station and during his grand jury testimony.

¶ 13 In relation to the written statement Gaston gave police, Detective Harvey Hobik testified that he met with Gaston when he was brought to the police station on the day of the shooting. Eventually, Gaston waived his *Miranda* rights and agreed to speak to him, whereupon he provided a written statement of the incident. Detective Hobik stated that Gaston did not appear to be under the influence drugs and did not say he was, and detective Hobik further stated that Gaston, who reviewed and signed the statement, was not threatened. Detective Hobik then read Gaston's statement into evidence for the jury. Similar to his trial testimony, Gaston recounted that defendant picked him and codefendant up in the white Cadillac and drove to defendant's grandmother's house. Gaston fell asleep in the back seat and later woke up to hearing defendant

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having an argument with another man (Sanders) on a porch. Gaston stated that defendant then returned to the car and said, "F*ck that n*gger, shoot," whereupon Gaston heard seven or eight gun shots while codefendant was outside of the car. Gaston hid in the back seat, codefendant got back into the car, and defendant drove to the expressway where they were pulled over by police. Gaston identified the gun as something defendant always had in his possession and stated that codefendant put it in the glove compartment after he got back into the car. Gaston concluded his written statement by stating that he was not under the influence of drugs and that police had not threatened him.

¶ 14 In relation to Gaston's statement to the grand jury, Assistant State's Attorney (ASA) Peter O'Mara testified that he met with Gaston in preparation for his testimony. He stated that he reviewed Gaston's written statement with him and that Gaston affirmed its contents. ASA O'Mara then published Gaston's grand jury statement at trial, which was similar to the written statement he gave police. Gaston described that defendant picked him and codefendant up in his Cadillac, that they went to defendant's grandmother's house, and that Gaston fell asleep and woke up to the sound of an argument. He saw defendant on the porch with another man and, when defendant walked back to the car, he said "f*ck you all n*ggers. Shoot that n*gger." Gaston then heard seven or eight gunshots from right outside the car and he hid in the back seat. He stated that codefendant got back into the car and defendant drove off to the expressway, where police pulled them over. Gaston averred that the gun in the car was one that defendant always had in his possession and that codefendant put it in the glove compartment after the incident. ASA O'Mara denied threatening Gaston in any way.

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¶ 15 Detective Hobik also testified that, after defendant was taken into custody, he agreed to speak to him and his partner. Defendant recounted to them that, earlier that day, he had been at his girlfriend's house on the phone with Sanders arguing about the Cadillac. He explained that “nobody [could] aggravate him more than” Sanders so, after he hung up, he decided to go over to Sanders' house just to “play scare.” He picked up codefendant and Gaston and, when they got to Sanders' house, he began to argue with him on his front porch. Defendant described that he then began to walk back to the car when he heard codefendant say, “we up,” and told defendant to get in the car. Codefendant got out of the car with a gun and defendant asked him what he was doing and told him to get back into the car. Defendant stated to detective Hobik that he told codefendant not to shoot his friend, but codefendant did so and then got back into the car. Defendant then recounted that he drove away and left the scene because he did not know what else to do and because codefendant had a gun; he drove away to “get out of the area.” Detective Hobik further testified that defendant told him while in the car, he argued with codefendant about why he shot his friend.

¶ 16 ASA Samuel Worley testified that he met with defendant and took his written statement, which he published for the jury. In that statement, defendant averred that he had gotten into an argument with Sanders over the phone earlier on the day of the incident regarding his car; defendant explained that Sanders knew “how to make [defendant] mad.” After the phone call, he left his girlfriend's house and went to pick up Gaston to “try to scare” Sanders; codefendant, however, was also there and decided to come along. Defendant recounted that he then drove to Sanders' house, got out of the car and began “talking trash” with Sanders on the porch where he

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was sitting with Trotta. Defendant heard codefendant call him back to the car and, as he was walking back, codefendant began to argue with Sanders. As defendant got into the driver's seat, codefendant got out of the car, pointed a gun at Sanders and began to fire, after which he got back in the car. Defendant told ASA Worley that he then drove off because he was scared and did not know what to do, so he decided to drive to his grandmother's house to avoid police. As he was driving, police pulled the car over and defendant saw codefendant put the gun in the glove compartment. ASA Worley further testified the defendant told him he did not know that codefendant had a gun or that he was going to shoot Sanders; defendant just wanted to "scare" Sanders. Defendant also asked ASA Worley to add the following to the end of his written statement: "I am sorry for what I did. I did not mean for anyone to get hurt."

¶ 17 Additional testimony provided at trial indicated that police stopped the Cadillac soon after the incident as it was heading on the expressway. Inside, police found defendant, codefendant and Gaston, as well as a semiautomatic handgun in the glove compartment. Forensic testing did not reveal any suitable fingerprints on the gun and gun shot residue tests performed on defendant, codefendant and Gaston were negative. However, the bullets and shell casings recovered from the scene were proven to have all been fired from the gun recovered in defendant's car.

¶ 18 At the close of evidence, the jury was instructed and began its deliberations, during which it sent the court three notes. The first two were sent at the same time, whereupon the court called the parties and explained:

"We have two questions from the jury. The first one is, please, give [a]

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clear definition of reasonable doubt.

Second question, what happens if [a] unanimous, misspelled, decision cannot be reached? I think the answer should be, you have all the evidence and instructions. Continue to deliberate. Does anyone have any problem with that?"

The parties agreed with the court's direction, and the response was sent to the jury. Sometime later, the jury sent a third note to the court. Again, the court called the parties and explained:

"We received the following note. How long do we have to stay here getting nowhere? The note is actually signed by Salvatore Caruso."

After the State asked whether the whole jury had signed the note, the trial court stated:

"It is just signed by him, so I don't know if that is a personal note or if that is something the whole jury agrees with, so the response is, you have all the instructions and evidence. Keep on deliberating."

Neither party objected to the trial court's decision, and the response was sent to the jury.

¶ 19 The jury found defendant guilty of attempted first degree murder and aggravated battery with a firearm, and it further found that the firearm enhancement had been proven. The trial court asked defense counsel if she wanted the jury polled, and she responded affirmatively. The clerk of the court then polled each juror individually. When the court called juror Edward Dickman, the following exchange took place:

"[THE COURT]: Edward Dickman.

[THE CLERK]: Was this then and is this now your verdicts?

Do you want me to repeat?

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[JUROR DICKMAN]: Yes."

After the polling was complete, the trial court thanked the jury for their service in the case which "took longer than it should have" "because of the weather conditions and because of other conditions out of our control." Then, as the court was expressing to the jury its hope that they had a "good experience" "in spite of all the problems that we've had with this case," it noted that "one of you [is] saying no right now." The court dismissed the jury.

¶ 20 Defendant filed a motion for a new trial, arguing that the evidence presented had been insufficient to support his convictions and that there had been "coercive conduct" during jury deliberations. With respect to the latter ground, defendant explained in his posttrial motion that during polling, one of the jurors--whom he did not name--was not responsive, so defense counsel questioned him following trial, whereupon this juror revealed he "felt physically intimidated by some of his fellow jurors" while deliberating because, for example, one "had pounded his fists repeatedly and shouted at him when it became apparent that he did not feel that a finding of guilty was warranted." The motion further stated that the juror was also purposefully not responsive when polled because "he felt that he was ignored when he sent a question from the jury room that asked what would happen if the jury was clearly unable to come to a unanimous verdict."

¶ 21 During the posttrial hearing, defendant presented the information from his written motion before the court. When discussing the allegation of a coercive jury environment, defendant again did not mention the name of the particular juror, but drew the court's memory to the "final [juror] sitting in the final seat of that jury box, when he was asked if this was his true and consistent

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verdict, he mumbled what appeared to be no," but then replied "yes" when asked again.

Defendant also reminded the trial court that it "was able to see his body language, that he was slumped in his seat." Defendant then explained to the court that it had spoken to the jurors after the trial and that this juror expressed that he had been "physically coerced" and "intimidated" because he did not believe defendant was guilty.

¶ 22 The trial court denied defendant's motion for a new trial. Initially, it made clear that the discussions defendant had with the juror occurred after the verdict had been submitted and after the jury was dismissed; these conversations occurred outside the courtroom and were not part of the record in this cause. The court then stated that the "right time" for defendant to bring this to its attention would have been at the time of the alleged conduct during polling, but that defendant did not. At this point, the court noted that it did not "recall [the juror's] particular conduct in response to the polling" and, thus, it denied the posttrial motion.

¶ 23 The cause then proceeded to a sentencing hearing before the trial court. After presenting several factors in aggravation, principally, that it was defendant who brought codefendant to the victim's home and ordered him to shoot, the State asked for the maximum sentence of 45 years in prison. Defendant, meanwhile, presented various factors in mitigation, including that he was only 21 years old, a valued member of his family who helped his mother by working a full time job, and a productive member of society who graduated high school and was currently a college student. Defendant further noted that he had absolutely no felony background and only one misdemeanor charge which had been resolved, and that codefendant in this matter had been given the minimum sentence of 21 years. Defendant then expressed his remorse, his apologies to

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Sanders' and his own families, and asked for the court's mercy.

¶ 24 In sentencing him, the trial court began by discussing defendant's rehabilitative potential, commenting that there were some "positive things," and considering his education and lack of criminal background. However, the court reviewed the cause and noted that defendant had directed codefendant to shoot when codefendant did not even know the victim, thereby making defendant "more responsible for what happened" than the actual shooter. Then, citing the "protection of the public," the court stated that

"for the deterrent to stop – to just stop all of these people from shooting, to stop people from encouraging others to shoot that a minimum sentence is not appropriate in this case."

Thus, "given the fact that [defendant was] really the influence in this case, that [he] caused it all to happen," the court sentenced him to 35 years in prison. Defendant's mittimus reflected one 35-year term for his attempted first degree murder conviction and a second 35-year term for his aggravated battery with a firearm conviction.

¶ 25 ANALYSIS

¶ 26 As noted, defendant presents six issues for our review. We address each separately.

¶ 27 I. Sufficiency of the Evidence and Accountability

¶ 28 Defendant's first contention on appeal is that his convictions should be reversed where there was no evidence of a plan and the State failed to prove he was accountable for codefendant's actions. He asserts that his statement, as well as Gaston's testimony, consistently prove defendant had no prior plan or agreement to aid or assist codefendant in shooting Sanders

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and that evidence indicating he gave codefendant a signal or command to do so was unreliable.

We disagree.

¶ 29 When a criminal defendant challenges the sufficiency of the evidence used to convict him, the standard of review is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *People v. Hunley*, 313 Ill. App. 3d 16, 20 (2000). Courts of appeal will not retry the defendant. See *People v. Digirolamo*, 179 Ill. 2d 24, 43 (1997). Instead, the jury, as the trier of fact in this cause, heard and saw the witnesses and, thus, had the responsibility to adjudge their credibility, resolve any inconsistencies, determine the weight to afford their testimony and draw reasonable inferences from all the evidence presented. See *People v. Steidl*, 142 Ill. 2d 204, 226 (1991); *Hunley*, 313 Ill. App. 3d at 21. Ultimately, a conviction will not be overturned unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of guilt. See *People v. Brown*, 185 Ill. 2d 229, 247 (1998).

¶ 30 In the instant cause, defendant was charged under the accountability theory. A defendant may be convicted under this theory, and thus be held liable for the conduct of another, when, "either before or during the commission of the offense, and with the intent to promote or facilitate such commission, he or she solicits, aids, abets, agrees, or attempts to aid" the other person in planning or committing the offense. 720 ILCS 5/5-2(c) (West 2008). To prove the defendant had the "intent to promote or facilitate the crime," the State must show, beyond a reasonable doubt, that either the defendant shared the criminal intent of the principal or there was

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a common criminal design. See *People v. Willis*, 2013 IL App (1st) 110233, ¶ 79, citing *In re W.C.*, 167 Ill. 2d 307, 337 (1995). The latter of these, also known as the common design rule, provides that " 'where two or more persons engage in a common criminal design or agreement, any acts in furtherance thereof committed by one party are considered to be the acts of all parties to the common design and all are equally responsible for the consequences of such further acts.' " See *People v. Terry*, 99 Ill. 2d 508, 513-14 (1984), quoting *People v. Kessler*, 57 Ill. 2d 493, 496-97 (1974); accord *Willis*, 2013 IL App (1st) 110233, ¶ 79, citing *W.C.*, 167 Ill. 2d at 337. Thus, if the State can show that the defendant, either before or during the commission of the offense, intentionally aided or abetted the offender in conduct constituting an element of the offense, the defendant is accountable for the offense. See *People v. Redmond*, 341 Ill. App. 3d 498, 515 (2003).

¶ 31 Moreover, the State need not present evidence of words of agreement to prove a common design between cooffenders, nor must it prove that the defendant actively participated in the overt act committed in order to hold him accountable. See *Willis*, 2013 IL App (1st) 110233, ¶ 79, citing *People v. Batchelor*, 171 Ill. 2d 367, 376 (1996); *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995). Rather, common design can be inferred from the circumstances of the crime, such as the defendant's presence during its commission, his continued close association with other offenders after its commission, his failure to report the crime, and his flight from the scene. See *Willis*, 2013 IL App (1st) 110233, ¶ 79, citing *Batchelor*, 171 Ill. 2d at 376; *Taylor*, 164 Ill. 2d at 141; see also *People v. Perez*, 189 Ill. 2d 254, 266 (2000) ("[i]ntent may be inferred from the character of [the] defendant's acts as well as the circumstances surrounding the commission

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of the offense"). With respect to presence and flight, particularly, while these do not constitute *prima facie* evidence of accountability (see *Perez*, 189 Ill. 2d at 266), they do constitute circumstantial evidence which may tend to prove and establish the defendant's guilt (see *Willis*, 2013 IL App (1st) 110233, ¶ 79, citing *People v. Foster*, 198 Ill. App. 3d 986, 993 (1990)).

Thus, evidence that the defendant "voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another." *W.C.*, 167 Ill. 2d at 338. Again, as a reviewing court, we will not overturn a jury's verdict under the accountability theory unless the evidence, when viewed in the light most favorable to the State, is so improbable or unsatisfactory that a reasonable doubt of the defendant's accountability and, thus, of his guilt, exists. See *Willis*, 2013 IL App (1st) 110233, ¶ 79.

¶ 32 In the instant cause, the evidence presented, which included proof that defendant picked up codefendant and brought him to the scene where he otherwise would not have been, was present throughout the shooting, waited until it was over to then drive himself and codefendant away from the scene, and failed to report what occurred until in police custody, was sufficient to convict him of the crimes charged under the common design rule of the accountability theory. Sanders testified that, while speaking to defendant over the phone twenty minutes before the incident, they got into an argument and defendant, who was now "acting tough," threatened him by telling him that he could have him "touched," or shot. Shortly thereafter, defendant arrived at Sanders' home with two other men including codefendant, whom Sanders had never met and did not know. The argument between defendant and Sanders continued on the porch and ended only

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after Sanders, who was bigger and taller than defendant, stood up, whereupon defendant retreated from the porch. Sanders testified that, at this point, as defendant was walking back to the car, he made a hand signal in the shape of a gun to codefendant and told him to "go on ahead." Sanders further testified that once defendant got into the driver's seat, codefendant opened fire. After codefendant finished shooting, he got back into the car and defendant drove the group away.

¶ 33 Trotta and Gaston corroborated Sanders' testimony in detail. First, Trotta, who was present on the porch, saw defendant arrive at Sanders' house and the exchange between them. She also witnessed the shooting, which included defendant waiting for codefendant to finish shooting and then driving himself, codefendant and Gaston away from the scene. In addition, Gaston reaffirmed that, from the back seat of the car, he saw defendant and Sanders argue on the porch and then heard gunshots. Following this, he heard the car doors slam, saw codefendant get in the front passenger seat, and witnessed defendant drive them all away toward the expressway, until they were pulled over by police. Further, while he refused to discuss any threats or orders he heard at the scene in his trial testimony, Gaston had provided prior statements clearly identifying defendant as having given codefendant an order to shoot Sanders—statements that were admitted at trial as substantive evidence. That is, he clearly corroborated Sanders' testimony that defendant ordered, and indicated to, codefendant to shoot Sanders. Detective Hobik testified that, in the written statement Gaston gave to police the day after the incident, Gaston stated that, when defendant left Sanders' porch and was returning to the car, he said to codefendant, "F*ck that n*gger, shoot," whereupon codefendant opened fire on Sanders. Gaston also recounted that once the shooting was over, defendant and codefendant got back into the car

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and defendant drove the group away from the scene, heading toward the expressway. Gaston made clear to detective Hobik that the gun codefendant used was one that defendant always had in his possession, and that codefendant put it back in the glove compartment of defendant's car. Concomitant with his written statement to police, Gaston provided essentially the same statement later to the grand jury. As ASA O'Mara testified, he met with Gaston to prepare for the hearing, whereupon Gaston stated to him that defendant picked him and codefendant up in his car and drove them to Sanders' house, where defendant and Sanders got into an argument on Sanders' porch. Gaston further recounted that, as defendant walked back to the car, Gaston heard him say to codefendant, "f*ck you all n*ggers. Shoot that n*gger," followed by several gunshots; defendant and codefendant then got back into the car and defendant drove the group away toward the expressway, where police stopped them. Again, Gaston identified to ASA O'Mara that the gun codefendant used was defendant's and that defendant always kept this gun in his possession.

¶ 34 What is especially significant with respect to Gaston as a witness is that his written statement to police and his grand jury testimony were admitted here at trial as substantive evidence, and not merely as impeachment evidence. If prior statements made by a witness are inconsistent with his testimony at trial, and the witness is subject to cross-examination concerning those prior statements, and the prior statements were either made under oath at another proceeding or narrate, describe or explain an event or condition of which the witness had personal knowledge and which are proved to have been written or signed by him, then these prior statements may be introduced at trial as substantive evidence. See 725 ILCS 5/115-10.1 (West 2008); see also Illinois Rules of Evidence 801(d)(1) (Ill. R. Evid. 801(d)(1) (eff. Jan. 1, 2011)).

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On cross-examination at trial, Gaston disavowed both his prior written statement to police, which narrated his personal knowledge of what occurred and which he had signed on the day of the incident, and his grand jury testimony, which he made under oath in that proceeding. In both of these prior statements, Gaston averred that he heard defendant order codefendant to shoot Sanders. These prior statements were inconsistent with his trial testimony, wherein he stated he did not remember defendant giving such an order. Accordingly, they were admissible against defendant as substantive evidence of his accountability in the victim's shooting.¹

¶ 35 Finally, in conjunction with the witness testimony, detective Hobik and ASA Worley, who spoke to defendant while in custody, provided corroborating testimony supporting defendant's conviction under the common criminal design theory of accountability. That is, detective Hobik testified that defendant told him he drove over to Gaston's house following a phone conversation wherein Sanders made him angry, picked up Gaston and codefendant, and decided to bring the group over to Sanders' house to "play scare." He then argued with Sanders on the porch and, as he went back to the car, codefendant got out with a gun and opened fire on the porch while Sanders attempted to dodge the bullets. Defendant waited for this to be over and then drove the group away from the scene. Likewise, ASA Worley testified that, in taking his written statement, defendant admitted he had gotten into an argument with Sanders earlier and that Sanders had made him mad, and that he went to pick up Gaston so they could drive to Sanders' house to "try to scare" him. Codefendant joined them, they arrived at Sanders' house

¹We discuss this aspect of the cause in further detail below in relation to defendant's appellate argument concerning the propriety of the admissibility of Gaston's prior statements.

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where defendant argued with him on the porch and, as defendant returned to the car, codefendant began shooting. Defendant waited for codefendant to finish and to get back into the car, whereupon defendant drove the group away. Defendant explained that he then attempted to drive to his grandmother's house in order to avoid police.

¶ 36 From all this, when taken in the light most favorable to the State, and considering in particular Sanders' testimony as the victim, defendant's flight from the scene and Gaston's prior statements which comprised substantive evidence against defendant, we find that any rational trier of fact could have found him guilty beyond a reasonable doubt pursuant to an accountability theory.

¶ 37 Defendant cites several accountability cases where the convictions of the defendants involved were reversed because the evidence presented was found to be insufficient to prove they knew what their companions intended to do and, thus, that they participated in a common criminal design. These include *People v. Washington*, 375 Ill. App. 3d 1012 (2007) (accountability conviction reversed where evidence did not establish that the defendant shared common purpose to shoot the victim), *Perez*, 189 Ill. 2d 254 (2000) (accountability conviction reversed where evidence was insufficient to show that the defendant knew his companion was armed or saw signs of impending violence), *People v. Estrada*, 243 Ill. App. 3d 177 (1993) (accountability conviction reversed where evidence was not sufficient to prove the defendant knew his companion was going to shoot the victim nor to tie him to common design to shoot the victim), and *People v. Johnmel Phillips*, 2012 IL App (1st) 101923. It is on this last case we wish to focus because it is both the most recent case cited by defendant and it was overturned by

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our state supreme court in *People v. Fernandez*, 2014 IL 115527, via a detailed, thoughtful, and particularly pertinent reaffirmation of the common criminal design rule of the accountability theory.

¶ 38 Briefly, in *Fernandez*, the defendant agreed to drive his friend, Gonzalez, to a parking lot so that Gonzalez could burglarize parked cars. While the defendant waited in his car, an off-duty police officer spotted Gonzalez breaking into a vehicle and attempted to stop him. When Gonzalez saw the officer, he began to walk back to the defendant's car and the defendant drove forward to pick him up. Gonzalez opened the passenger side door and fired three shots at the officer. The defendant was convicted of aggravated discharge of a firearm in the direction of a peace officer under the accountability theory's common design rule, and the appellate court affirmed his conviction. Following the grant of his petition for leave to appeal, he argued to our state supreme court that his conviction must be reversed because the State failed to produce any evidence showing he knew Gonzalez had a gun and he knew Gonzalez would discharge that gun at a police officer. See *Fernandez*, 2014 IL 115527, ¶ 12. And, just as defendant in the instant cause, he relied heavily on *Johnmel Phillips* for his assertions. See *Fernandez*, 2014 IL 115527, ¶ 19.

¶ 39 Turning to *Johnmel Phillips*, our state supreme court noted that there, the defendant was driving with his passenger, Sanders, when he nearly collided with another car that was making a U-turn. The two cars then stopped and blocked each other's path. At this point, Sanders got out of the defendant's car and began shooting at the other car; after he was done, Sanders got back into the defendant's car and the defendant drove away. The *Johnmel Phillips* court reversed the

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defendant's convictions for aggravated battery with a firearm and aggravated discharge of a firearm, both of which had been obtained under the common design rule of the accountability theory, finding that the State's evidence was insufficient to show that the defendant knew Sanders intended to commit a crime when he got out of the defendant's car. See *Johnmel Phillips*, 2012 IL App (1st) 101923, ¶¶ 20-21. The *Johnmel Phillips* court concluded that, even assuming the defendant intended to help Sanders commit some crime, he could not have logically intended to help him commit a crime he did not know was possible, *i.e.*, if the defendant did not know Sanders had a gun, then he could not have intended to help Sanders commit a crime that necessarily required a firearm and, thus, he could not be held accountable for such a crime. See *Johnmel Phillips*, 2012 IL App (1st) 101923, ¶ 22.

¶ 40 Again, relying on the appellate court's decision in *Johnmel Phillips*, the defendant in *Fernandez* argued that, if he did not know his companion Gonzalez was armed, it must follow that he could not have specifically intended to promote, solicit, aid, or attempt to aid Gonzalez's offense of aggravated discharge of a firearm which, by necessity, required the use of a gun. The Illinois Supreme Court, however, wholly rejected such a conclusion, specifically overturned *Johnmel Phillips* and, in its decision, precisely clarified the law with respect to the common design rule.

¶ 41 In doing so, the Court began by examining the statutory law of accountability and the evolution of the common design rule. Then, it turned to *People v. Kessler*, 57 Ill. 2d 493 (1974), which it explained was a "textbook application" of the common design rule. In *Kessler*, the defendant and two companions planned to burglarize a tavern. The defendant waited outside in a

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car while his two companions, who were unarmed, went inside. While inside, the companions were surprised by the tavern owner and one of them, finding a gun on the premises, shot him. The companions then left the tavern and returned to the car where the defendant was waiting, and the three drove away. Police gave chase and pulled over the car; while his companions fled on foot, the defendant remained inside the car. During the foot chase, one of the companions shot at a police officer. The defendant was convicted of burglary and attempted murder of both the tavern owner and the police officer under the common design rule of the accountability theory. See *Kessler*, 57 Ill. 2d at 494-95.

¶ 42 The defendant appealed, and the appellate court reversed his attempted murder convictions. See *People v. Kessler*, 11 Ill. App. 3d 321 (1973). The appellate court framed the issue as whether the defendant could be found guilty on accountability without proof of his specific intent to commit the attempted murders perpetrated by his companions. See *Kessler*, 11 Ill. App. 3d at 325. In holding that he could not, the appellate court looked at the law on accountability and concluded that one cannot be held accountable unless found to have the specific intent to commit or aid in the commission of the substantive crime for which he is being held accountable. See *Kessler*, 11 Ill. App. 3d at 325. The appellate court further concluded that liability under accountability principles cannot lie "for all consequences and further crimes which could flow from participation in the initial criminal venture absent a specific intent by the accomplice being held accountable to commit, or aid and abet the commission of, such further crimes." See *Kessler*, 11 Ill. App. 3d at 325-26, 327 (a defendant is not accountable "for crimes committed by an accomplice which the defendant was not shown to have intended").

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¶ 43 Following this, our state supreme court reviewed the case and rejected the appellate court's reasoning in its entirety. Upon its examination of the law, our supreme court held that accountability, via the common design rule, "means that where one aids another in the planning or commission of an offense, he is legally accountable for the conduct of the person he aids; and that the word 'conduct' encompasses *any criminal act done in furtherance of the planned and intended act.*" (Emphasis added.) *Kessler*, 57 Ill. 2d at 497. Thus, applying it to the facts of *Kessler*, the supreme court found that the defendant's attempted murder convictions were proper: the burglary was the offense which the defendant and his companions planned, and each was legally accountable for the conduct of the others in connection with it, including his companions' attempted murder of the tavern owner while inside and of the police officer while fleeing. See *Kessler*, 57 Ill. 2d at 499 (once the defendant agreed to participate in the burglary, he was liable under the common design rule of the accountability theory for every criminal act committed in connection therewith, including the unplanned shootings committed by his companions).

¶ 44 Reaffirming its ruling in *Kessler*, our state supreme court in *Fernandez* returned to its original roots on this issue and clarified the common design rule of the accountability theory which cases like *Johnmel Phillips* had since improperly skewed. It noted that, just as in *Kessler*, the defendant in *Fernandez* entered into a plan to commit a burglary with his companion Gonzalez, whom he claimed he did not know was armed. See *Fernandez*, 2014 IL 115527, ¶ 17. Also as in *Kessler*, the defendant waited in the car while Gonzalez committed the actual burglary; upon interruption, Gonzalez shot at the police officer and then the defendant and Gonzalez drove away from the scene together. See *Fernandez*, 2014 IL 115527, ¶ 17. Thus,

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because the defendant conceded that he aided Gonzalez in the planning and commission of the burglary, the Court concluded that he was legally accountable for any criminal act that Gonzalez committed in furtherance of the burglary, which included the aggravated discharge of a firearm in the direction of a peace officer, regardless of whether the defendant knew this criminal act could or would happen. See *Fernandez*, 2014 IL 115527, ¶ 18. This comprised the very essence of the common design rule of the accountability theory.

¶ 45 The Court in *Fernandez* also took a moment to specifically reexamine *Johnmel Phillips*, noting that the appellate court's statement that a defendant may never be held accountable for a crime that he did not specifically intend to promote or facilitate (*i.e.*, he cannot be held accountable for a crime involving a firearm if he did not know his companion was armed) "reflects the very reasoning that this [C]ourt rejected 40 years ago in *Kessler*, and is flatly at odds with this [C]ourt's well-settled accountability jurisprudence." *Fernandez*, 2014 IL 115527, ¶ 19. Instead, the law, as it stands, is that, where there is a common design to do an unlawful act, then whatever act any one of those involved performs in furtherance of the common design is the act of all, and all are equally guilty of whatever crime is subsequently committed, regardless of whether the defendant knew it would or could occur or intended it to occur. See *Fernandez*, 2014 IL 115527, ¶ 19. "In other words, there is no question that one can be held accountable for a crime other than the one that was planned or intended, provided it was committed in furtherance of the crime that *was* planned or intended. To the extent that [*Johnmel*] *Phillips* holds or suggests otherwise, it is hereby overruled." (Emphasis in original.) *Fernandez*, 2014 IL 115527, ¶ 19.

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¶ 46 Finally, the Court in *Fernandez* wished to make one last clarification, this one between the distinct branches of the accountability theory, as it felt that a confusion between them was the origin for incorrect decisions like that found in *Johnmel Phillips*. See *Fernandez*, 2014 IL 115527, ¶ 20. As the Court noted, and as we noted initially herein, in order to hold a defendant accountable for the crimes of his companion, the State may prove the defendant's intent to promote or facilitate an offense by showing *either* that he shared his companion's criminal intent *or* that there was a common criminal design. See *Fernandez*, 2014 IL 115527, ¶ 21, citing *W.C.*, 167 Ill. 2d at 337. It is only under the first of these—shared intent—that the focus is on what a defendant knew about his companion's criminal intentions, since a defendant cannot share an intent to promote or facilitate the commission of a crime when he does not even know that a crime is going to be committed. See *Fernandez*, 2014 IL 115527, ¶ 21. However, as the Court pointed out,

"this emphatically is *not* the rule in common-design rule cases, where by definition the defendant intentionally sets out to promote or facilitate the commission of a crime. [Emphasis in original.] In common-design rule cases, the rule is and remains that of *Kessler*, namely, that 'where one aids another in the planning or commission of an offense, he is legally accountable for the conduct of the person he aids; and that the word "conduct" encompasses any criminal act done in furtherance of the planned and intended act.' [Citation omitted.] Conflating these two distinct accountability schemes—shared intent and common design—is where [*Johnmel*] *Phillips* went astray, and we hereby correct that

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mistake so that similar missteps are avoided going forward." *Fernandez*, 2014 IL 115527, ¶ 21.

¶ 47 Following our state supreme court's most recent resurrection of *Kessler* in *Fernandez*, our fellow appellate courts have made the effort to employ its clarifications in accountability cases. Just weeks ago, the court in *People v. Demetrice Phillips*, 2014 IL App (4th) 120695, applied the same analysis enunciated in *Fernandez* to hold that the defendant's conviction for first degree murder was proper under common design rule. There, the defendant and his companion, Grimes, set out to confront Frazier following a fight Frazier's girlfriend had with the girlfriends of the defendant and Grimes. The defendant, Grimes and their girlfriends drove to the area of the fight. The defendant and Grimes got out of the car and, finding Frazier amid a large group, hid behind some houses for fear of the crowd's retaliation. As the defendant was about to leave the area, Grimes told him to wait a minute and then walked to the front of the houses, where he fired a single shot. The defendant and Grimes ran back to their car and the group drove away from the scene. Grimes' shot killed Maclin. See *Demetrice Phillips*, 2014 IL App (4th) 120695, ¶¶ 6-7, 10-11.

¶ 48 The defendant was convicted of first degree murder based on the common design rule of the accountability theory. On appeal, he argued, just as the defendant in *Johnmel Phillips*, that the State failed to prove him guilty beyond a reasonable doubt because he did not share Grimes' intent to shoot anyone; he had intended only to confront Frazier. See *Demetrice Phillips*, 2014 IL App (4th) 120695, ¶ 17. Outlining, as we have, our supreme court's decisions in *Fernandez* and *Kessler*, the reviewing court upheld the defendant's conviction. See *Demetrice Phillips*,

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2014 IL App (4th) 120695, ¶¶ 22-29. As the court noted, the State demonstrated that the defendant and Grimes together went to the area of the prior fight intending to commit a crime, namely, the defendant "would attack Frazier, and Grimes would be his backup." *Demetrice Phillips*, 2014 IL App (4th) 120695, ¶ 30. Thus, because he attached himself to a group bent on illegal acts, the defendant became accountable for all the crimes of his companions in furtherance of those acts, including Grimes' shooting which resulted in the killing of Maclin. See *Demetrice Phillips*, 2014 IL App (4th) 120695, ¶ 34. Pursuant to *Fernandez* and *Kessler*, and in direct contrast to *Johnmel Phillips*, that the defendant did not have the same criminal intentions as Grimes was irrelevant under the common design rule. As the court explained, and just as our supreme court in *Fernandez* stressed, under the common design rule, the State did not need to prove that the defendant and Grimes shared the same intent with respect to the murder but, rather, only that the defendant had the specific intent to promote or facilitate a crime; once it did so (*i.e.*, that defendant and Grimes set out to confront and hurt Frazier), it had established the defendant's responsibility for any criminal act in furtherance of the intended crime (*i.e.*, Grimes' shooting which caused the death of Maclin). See *Demetrice Phillips*, 2014 IL App (4th) 120695, ¶¶ 43-44. Thus, while what a defendant knows about his companion's criminal intentions is relevant under the shared intent rule of the accountability theory, it has no relevance under the common design rule. See *Demetrice Phillips*, 2014 IL App (4th) 120695, ¶¶ 47-48 (shared intent is not an element of the common design rule; it is a wholly separate branch of the accountability theory). Hoping that *Fernandez* had finally set straight the law surrounding the common design rule of the accountability theory, the *Demetrice Phillips* court again rejected the erroneous

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interpretation of it as perpetuated by *Johnmel Phillips* and its progeny and reaffirmed the rule's dual purpose of providing "harsh medicine for those who willingly join with others to engage in criminal acts" and deterring them from intentionally aiding or encouraging the commission of offenses. See *Demetrice Phillips*, 2014 IL App (4th) 120695, ¶¶ 45, 49, 54 (concluding that [*Johnmel*] *Phillips*, and those cases that relied on it, including *People v. Johnson*, 2013 IL App (1st) 122459 (*appeal denied; judgment vacated by People v. Johnson*, 2014 WL 2459679), and *People v. Williams*, 2013 IL App (1st) 112693 (*appeal denied; judgment vacated by People v. Williams*, 2014 WL 2459685), are "premised upon an erroneous interpretation of the accountability statute").

¶ 49 In the instant cause, defendant first asks us to discount any testimony indicating he ordered codefendant to shoot Sanders as "inconsistent and unreliable," and he then presents the same argument found in *Johnmel Phillips*, namely, that because he did not intend for the shooting to occur and did not even know it would occur (*i.e.*, he did not know codefendant was armed and was going to shoot Sanders), he cannot be held accountable. As we have more than thoroughly discussed, however, his assertions cannot stand. First and foremost, we cannot say that the testimony presented showing he ordered codefendant to shoot Sanders was "inconsistent and unreliable." As we noted earlier, the jury, as the trier of fact here, heard and saw the witnesses testify and, thus, had the responsibility to adjudge their credibility, resolve any inconsistencies, determine the weight to afford their testimony and draw reasonable inferences therefrom. See *Steidl*, 142 Ill. 2d at 226; *Hunley*, 313 Ill. App. 3d at 21. Sanders testified that, as defendant walked off the porch toward his car, he heard him tell codefendant to "go on ahead"

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and saw him make a hand signal to him in the shape of a gun; this followed a previous threat defendant made earlier over the phone to Sanders about having him shot, as well as their argument over the car which defendant told detective Hobik and ASA Worley had made him “mad” and angry. Additionally, Gaston corroborated Sanders in both his written statement to police and his grand jury testimony, in which he stated he heard defendant, following his second argument with Sanders, tell codefendant to shoot him. That Trotta did not hear him say this and that he did not admit this in his statement to police does not render Sanders and Gaston’s testimony unreliable as to whether he gave such an order but, rather, only constitutes inconsistencies. Admittedly, Trotta testified she did not pay close attention to the confrontation that day, and we would be hard-pressed to believe defendant would admit to giving such an order. Regardless, the jury, as was their prerogative, chose to believe Sanders’ testimony as to the events and Gaston’s corroboration of it in light of any determinable inconsistencies.

¶ 50 More critically, however, just as our state supreme court in *Fernandez* and our sister court in *Demetrice Phillips*, we find that defendant’s argument that he cannot be accountable because he did not share the same intent as codefendant and because he did not know codefendant was armed and was going to shoot Sanders must fail. Again, defendant is trying to resurrect the flawed reasoning of *Johnmel Phillips*. Initially, we would note that the jury clearly could have believed Gaston’s statements to both detective Hobik and ASA O’Mara that defendant did, indeed, know codefendant was armed, as Gaston related that the gun codefendant used was actually one that belonged to defendant and that defendant always kept with him in his possession. The gun, after all, was found by police in the glove compartment of defendant’s car

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and ballistics evidence showed it matched the bullets expended at the scene.

¶ 51 Moreover, as we have explained and as the common design rule of the accountability theory makes clear, it is wholly irrelevant that defendant did not share the same intent as codefendant to shoot Sanders. Instead, defendant admitted in his statements that Sanders had made him mad following their conversation over the phone and that he was angry. He picked up codefendant and Gaston with the intent to go over to Sanders' house to "play scare," that is, to confront Sanders while codefendant and Gaston provided backup. Thus, not only did defendant willingly join with others to engage in criminal acts, he actually spearheaded the group. These facts, particularly, recall the situation in *Demetrice Phillips*. Under the common design rule, the State did not need to prove that defendant and codefendant shared the same intent with respect to Sanders' shooting but, rather, only that the defendant had the specific intent to promote or facilitate a crime, which it did here. Once the State did so by proving that defendant, codefendant and Gaston set out to confront Sanders, it had established defendant's responsibility for any criminal act in furtherance of the intended crime, including codefendant's shooting of Sanders. Thus, defendant became accountable for all the crimes of codefendant. This, coupled with the inferences arising from defendant's presence during the shooting, his waiting until codefendant was finished shooting and got back into the car, his flight from the scene, his admission that he was driving away to his grandmother's house in order to avoid police and his failure to report the crime until in custody, fully support his convictions here.

¶ 52 Accordingly, pursuant to *Kessler*, *Fernandez* and *Demetrice Phillips*, and after viewing the evidence presented in the light most favorable to the State, as we must, we conclude that a

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rational trier of fact could have found defendant guilty beyond a reasonable doubt under the common design rule of the accountability theory.

¶ 53 II. Trial Court's Instructions to Jury

¶ 54 Defendant's second contention on appeal is that the trial court coerced his guilty verdict by repeatedly instructing the jury to continue deliberating in spite of multiple notes they sent to the court indicating they were incapable of reaching a unanimous verdict. Citing *People v. Wilcox*, 407 Ill. App. 3d 151 (2010), and claiming that the three notes showed the jury was deadlocked, defendant asserts that the trial court's responses were tantamount to an *Allen* charge, that they violated *Prim* rules requiring that responses to jury notes allow for the option of returning no verdict if a consensus cannot be reached and, thus, that his convictions must be reversed and his cause remanded for a new trial. We disagree.

¶ 55 As a threshold matter, the State points out, and defendant admits, that he has waived this issue for review since he failed to both object at the time the trial court responded to the jury's notes and raise this issue in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (timely objection and written posttrial motion are required to preserve issue for appellate review). Yet, defendant insists we apply plain error to review the matter not only because the evidence in his cause was close, but also because the error on the part of the trial court was so serious that it denied him his substantial right to a fair trial.

¶ 56 Specifically regarding jury notes and a trial court's response thereto, it is well established that where a defendant acquiesces in a trial court's answer to a jury question, he cannot later complain that the trial court abused its discretion; the issue is, undeniably, waived. See *People v.*

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Reid, 136 Ill. 2d 27, 38-40 (1990) (where jury sent note and trial court consulted parties and responded, without any objection from the defendant at that time, that they should reach verdict based on instructions given, this issue was waived for review as no prejudice resulted). In addition, we note in these situations that our courts have gone so far as to further conclude that plain error review is not available. See *People v. Townsell*, 209 Ill. 2d 543, 547-48 (2004); *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011). This is because plain error analysis applies to cases involving procedural defaults, not to those involving affirmative acquiescence to an event at trial. See *Townsell*, 209 Ill. 2d at 547-48; *Bowens*, 407 Ill. App. 3d at 1101. As such, "where defense counsel affirmatively acquiesces to actions taken by the trial court, a defendant's only challenge may be presented as a claim for ineffective assistance of counsel on collateral attack." *Bowens*, 407 Ill. App. 3d at 1101 (holding that inaction by defense counsel to object to trial court's response to deliberating jury's note bars a defendant from complaining about that response on appeal, even under a plain error analysis).

¶ 57 In the instant cause, it is clear that defense counsel acquiesced in the trial court's responses it provided to the notes sent to it by the jury. The record shows that, of the three notes, the first two were sent at the same time. The trial court called the parties into court and read the notes to them. Following a discussion on record, the court suggested that the reply to these notes should inform the jury that they have all the evidence and instructions and that they should continue to deliberate. The court then specifically asked the parties, including defendant, if they had "any problem with that." The State responded "no," and defense counsel did not object. This same pattern repeated itself with the third jury note: the trial court called the parties into

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court, read the note to them, discussed what occurred and suggested a response, whereupon neither party, including defendant, objected. Defendant's inaction equates to affirmative acquiescence to the trial court's actions. As such, not only is his claim waived here, but it cannot be reviewed under plain error; instead, he must raise it as a claim for ineffective assistance of counsel on collateral attack, which he does not. See *Bowens*, 407 Ill. App. 3d at 1101; see also *Townsell*, 209 Ill. 2d at 547-48.

¶ 58 Even were we to review defendant's claim under plain error, we find that it could not succeed.

¶ 59 Generally, and as defendant notes, the plain error doctrine allows us to consider a forfeited error when either the evidence is close or when the error is of sufficient seriousness. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Under the first prong, a defendant must prove a prejudicial error occurred, namely, that there was plain error and that the evidence was so closely balanced that this error alone severely threatened to tip the scales of justice against him. See *Herron*, 215 Ill. 2d at 187; accord *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The second prong of the plain error doctrine examines the seriousness of the error, regardless of the closeness of the evidence. See *Herron*, 215 Ill. 2d at 187; accord *Piatkowski*, 225 Ill. 2d at 565. The defendant must prove that there was plain error and that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. See *Herron*, 215 Ill. 2d at 187. Ultimately, before a plain error analysis may be undertaken, the defendant must show that an error occurred, for, absent error, there can be no plain error. See *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010), citing *Herron*, 215 Ill. 2d at 187; see also *Piatkowski*,

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225 Ill. 2d at 565 ("the first step is to determine whether error occurred").

¶ 60 Based on the circumstances presented in the instant cause, we find that there was no error with respect to the trial court's responses to the jury's notes and, even if there was, defendant cannot meet his burden under either prong of plain error.

¶ 61 In answering a jury's note, a trial court may not "hasten" a verdict by giving the jury an instruction that has the effect of coercing them to surrender their views. *People v. Boyd*, 366 Ill. App. 3d 84, 99 (2006). Rather, the court's instruction to continue deliberating should be simple, neutral and not coercive, and it should not imply that the majority view is the correct one. See *People v. Love*, 377 Ill. App. 3d 306, 316 (2007). "The test for determining whether the trial court's comments to the jury were improper in this context is whether, under the totality of the circumstances, the language used by the court actually interfered with the jury's deliberations and coerced a guilty verdict." *People v. McCoy*, 405 Ill. App. 3d 269, 275 (2010). As this is based in subjectivity, the reviewing court is called upon to ascertain whether the comments pressured the minority jurors and caused them to defer to the majority's conclusion for the purpose of reaching an expedited verdict. See *People v. Fields*, 285 Ill. App. 3d 1020, 1029 (1996). Ultimately, the trial court has discretion in determining how best to respond to a jury's note, and we will not reverse its decision absent an abuse of discretion, which occurs only where the trial court's decision is arbitrary, fanciful, unreasonable or where no reasonable person would take the view adopted by the trial court. See *People v. Averett*, 381 Ill. App. 3d 1001, 1012 (2008); accord *Reid*, 136 Ill. 2d at 38-39; see also *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 62 In the instant cause, we find that the trial court did not abuse its discretion in instructing

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the jury to continue deliberating in response to the three notes. Again, the first two notes asked for a clarification of reasonable doubt and inquired what would happen if a unanimous decision could not be reached; the third note, sent sometime later and signed "Salvatore Caruso," asked how long they would "have to stay here getting nowhere," but it was not clear if it came from the whole jury or just one juror. In any event, and again, after consulting with the parties, the trial court told the jury to "[c]ontinue to deliberate," and to "[k]eep on deliberating." We fail to see how these responses were in any way coercive. To the contrary, they were simple and in no way implied that the view of the majority of the jury was somehow the correct one. Indeed, at that point, there was no indication of what the majority view even was. Additionally, the language the court used in no way interfered with the jury's deliberations in order to coerce a verdict. It did not impose any pressure for an expedited verdict, and there was no mention of a possible sequestering or forced deliberation until a verdict was reached. Simply put, the trial court's responses were consistent and wholly neutral. Under the totality of these circumstances, we do not find these responses at all coercive. Thus, we find no error.

¶ 63 Even if error did somehow occur, the evidence presented was not closely balanced and any alleged error was not so serious as to have affected the fairness of the trial or the integrity of the judicial process. We have already discussed at length herein that the evidence was more than sufficient to support defendant's conviction under the common design rule of the accountability theory. Again, based on Sanders' testimony, combined with Gaston's statements to police and the grand jury, and along with defendant's flight from the scene with codefendant and his failure to report the crime, we fail to find that the evidence against him can be considered closely balanced.

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Nor do we find that the trial court's responses to the jury's notes, as given and acquiesced to by the parties, prejudiced defendant so as to have affected the fairness of his trial or challenged the integrity of the judicial process. As we stated earlier, under the totality of the circumstances, the language used by the court in responding to the notes did not interfere with the jury's deliberations, nor did it pressure any minority jurors or coerce a guilty or expedited verdict.

¶ 64 As a final matter with respect to this issue, defendant insists the trial court's responses violated *People v. Prim*, 53 Ill. 2d 62 (1972), in which our state supreme court set forth instructions to be provided to deadlocked juries.² Citing *Wilcox*, 407 Ill. App. 3d 151, he argues that the notes clearly demonstrated that the jury could not reach a unanimous decision and that the court's responses of encouraging their continued deliberations were tantamount to an *Allen* charge because they insinuated that the jury's minority should succumb to the majority and did not instruct them that they had the option of returning no verdict if one could not be properly reached. Briefly, in *Wilcox*, the jury sent the trial court a note indicating that they were "11 to 1" on the propositions at issue. *Wilcox*, 407 Ill. App. 3d at 163. Instead of sending a response encouraging them to continue deliberating as the parties urged, the trial court decided on its own, over the defendant's objections, to send a note reminding the jurors of their oaths and duty and that they had "pledged to obtain a verdict." See *Wilcox*, 407 Ill. App. 3d at 163. Upon review, the defendant asserted that this response was equivalent to an *Allen* charge because it placed undue influence and pressure upon the jurors, particularly the minority. See *Wilcox*, 407 Ill. App.

²We note for the record that defense counsel did not request a *Prim* instruction after the jury's submission of any of the three notes.

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3d at 163-64. The *Wilcox* court agreed and reversed the defendant's convictions. After examining the circumstances in detail, it found that the trial court's response was coercive precisely because it indicated that being deadlocked was not an option, that the jurors' oath required that a verdict be obtained, and that they would be required to continue to deliberate until a verdict was reached. See *Wilcox*, 407 Ill. App. 3d at 164-65. Thus, even though it may not have explicitly said so, the trial court's response "gave the impression that the jurors had to reach a verdict in order to satisfy their obligations as jurors." *Wilcox*, 407 Ill. App. 3d at 165.

¶ 65 Not only is the instant cause wholly distinguishable from *Wilcox*, but the trial court's responses are also nowhere near similar to a situation that can be likened to an *Allen* charge. Totally unlike *Wilcox*, the trial court here never responded to the jury by referencing their oaths or misstating their obligations as jurors, insisting that they had pledged to obtain a verdict. It merely, and only, asked them to continue deliberating which, incidentally, was what the parties in *Wilcox* had originally asked the trial court tell that jury. See *Wilcox*, 407 Ill. App. 3d at 163. In contradistinction, the trial court's responses in the instant cause were entirely neutral and did not suggest or foreclose to the jury that they somehow did not have the option of not returning a verdict. In addition, we find that this case is more closely akin to *Boyd*, 366 Ill. App. 3d 84 (2006). There, the jury sent the trial court a note stating that it could not "agree" and that it appeared "not to be making any progress in this matter," and asked the trial court to "advise" it. *Boyd*, 366 Ill. App. 3d at 98. In response, the trial court simply told the jury to review the instructions and evidence and to "[c]ontinue to deliberate." *Boyd*, 366 Ill. App. 3d at 98. Raising the same issues as defendant herein, the *Boyd* court affirmed the defendant's convictions finding

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no error with the trial court's response and no violation of *Prim*, noting that "the jury did not say it was deadlocked" and concluding that, even if it had, the trial court's response was "neutral, and the language was not coercive or intended to 'hasten' the verdict." *Boyd*, 366 Ill. App. 3d at 99. Just as in *Boyd*, the jury in the instant cause never said in its notes that it was deadlocked and, even if it had, we have already concluded that the trial court's responses were more than appropriate according to the law on this issue.

¶ 66 Accordingly, since we find that there was no error in the trial court's responses to the jury to continue deliberating, it follows that there can be no plain error. Even assuming, *arguendo*, there was some error, pursuant to the plain error analysis under which we have proceeded, the evidence in this case was not closely balanced nor was defendant prejudiced. Therefore, any error in instructing the jury here, if any occurred, was harmless.

¶ 67 III. Ineffective Assistance of Counsel

¶ 68 Defendant's next contention on appeal is that his defense counsel was ineffective for failing to request further questioning when, as he claims, one of the jurors "showed hesitation" during polling and later indicated he felt coerced. Defendant asserts that it was evident during the polling of the jury that one of the jurors was hesitant, but that counsel did not raise this at that time and chose instead to do so in a posttrial motion after the jury had been dismissed which was "too little, too late." Defendant claims that counsel's decision to remain silent when he should have otherwise alerted the court denied him his right to a fair trial and warrants the reversal of his convictions and remand for a new trial. We disagree.

¶ 69 Claims of ineffective assistance are examined under the two-prong test set forth in

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Strickland v. Washington, 466 U.S. 668 (1984); the defendant must demonstrate both that his trial counsel's performance was deficient and that this deficient performance substantially prejudiced him. See *People v. Enis*, 194 Ill. 2d 361, 376 (2000). To demonstrate performance deficiency, the defendant must establish that trial counsel's performance fell below an objective standard of reasonableness. See *Enoch*, 122 Ill. 2d at 202. Meanwhile, to demonstrate sufficient prejudice, the defendant must show that there is a reasonable probability that, but for his trial counsel's unprofessional errors, the result of the proceedings would have been different. See *Enoch*, 122 Ill. 2d at 202. A reasonable probability is one sufficient to undermine the confidence in the outcome. See *Enis*, 194 Ill. 2d at 376 (trial counsel's deficient performance must have rendered the result of the trial unreliable or fundamentally unfair).

¶ 70 In addition, "there is a strong presumption that the challenged action of counsel was the product of sound trial strategy and not of incompetence" (*Steidl*, 142 Ill. 2d at 240, quoting *People v. Barrow*, 133 Ill. 2d 226, 247 (1989)), and falls "within the 'wide range of reasonable professional assistance'" (*Steidl*, 142 Ill. 2d at 248, quoting *People v. Franklin*, 135 Ill. 2d 78, 116-17 (1990)). Significantly, we note that simple errors of judgment or mistakes in trial strategy do not make defense counsel's representation ineffective. See *People v. West*, 187 Ill. 2d 418, 432 (1999). In fact, trial tactics encompass matters of professional judgment and we will not order a new trial for ineffective assistance based on these claims. See *People v. Reid*, 179 Ill. 2d 297, 310 (1997). Specifically, decisions regarding whether to have a jury polled and what questions to ask are generally matters of trial strategy. See, e.g., *People v. Carter*, 85 Ill. App. 3d 818, 827 (1980); accord *People v. Hood*, 262 Ill. App. 3d 171, 178 (1994); see also *People v.*

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Watson, 2012 IL App (2d) 091328, ¶ 28. In evaluating counsel's effectiveness, we look at the totality of counsel's representation. See *People v. Eddmonds*, 101 Ill. 2d 44, 69 (1984).

¶ 71 Again, the defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to succeed on his claim of ineffective assistance of trial counsel. See *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996) (failure to prove either prong renders ineffective assistance claim untenable); *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). And, if it is determined that he did not suffer prejudice, whether trial counsel's performance was constitutionally deficient need not be decided. See *People v. Brooks*, 187 Ill. 2d 91, 137 (1999); accord *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011) (where the defendant has not suffered prejudice, examination of performance prong is not even warranted); see also *People v. Graham*, 206 Ill. 2d 465, 476 (2003) (reviewing court may reject ineffective assistance claim without reaching performance prong if it is determined the defendant has not satisfied the prejudice requirement).

¶ 72 Based upon our thorough review of the record before us, we find that the situation at hand does not amount to ineffective counsel resulting in prejudice. Moreover, the record affirmatively demonstrates that defense counsel in no way performed deficiently during defendant's trial.

¶ 73 It is a basic tenant of our legal system that a jury's verdict to convict a defendant must be unanimous. See *People v. Wheat*, 383 Ill. App. 3d 234, 237 (2008). Polling a jury safeguards this tenant, attempting to ensure that the verdict is the product of "the free and unhampered deliberations of each juror." *People v. Beasley*, 384 Ill. App. 3d 1039, 1048 (2008). A defendant has the right to poll the jury after its guilty verdict regarding whether each individual juror agreed with it. See *Wheat*, 383 Ill. App. 3d at 237. However, all that is required is the opportunity for

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the defendant to poll the jury, and the right to poll them may be waived. See *Wheat*, 383 Ill. App. 3d at 237.

¶ 74 The most oft-used question to poll jurors is "Was this then and is this now your verdict?" See *People v. Kellogg*, 77 Ill. 2d 524, 528 (1979). If a juror indicates some hesitancy or ambivalence in answering, it is the duty of the trial court to ascertain the juror's intent. See *Kellogg*, 77 Ill. 2d at 528. Before a verdict is recorded, jurors, through polling, have the right to inform the court that a mistake has been made, or to ask that the jury be permitted to reconsider their verdict, or to express disagreement with the verdict returned. See *Kellogg*, 77 Ill. 2d at 528. However, polling should not be turned into an arena for further deliberations. See *Kellogg*, 72 Ill. 2d at 529. "It is a matter for the trial judge to determine whether a juror has freely assented to the verdict." *Kellogg*, 72 Ill. 2d at 529; accord *People v. Chandler*, 88 Ill. App. 3d 644, 650 (1980) (question of whether juror freely assented to verdict is question of fact best left to trial court, and trial court's decision on jury unanimity will be upheld unless clearly unreasonable, as the manner of the poll and any subsequent questioning are conduct within the court's discretion).

¶ 75 Based on our review of the record, we fail to find that defendant was at all prejudiced by his counsel's decision not to question any of the jurors further during polling. Quite significantly, we note at the outset that defendant does not mention the specific juror he is referring to by name. It is, actually, unclear to whom he is referring. He seems to indicate at one point on appeal that he is referring to the exchange the court clerk had with juror Edward Dickman, but he also discusses a reference to perhaps a different juror in his posttrial motion (the "final witness sitting in the final seat of the jury box") and also references the third note sent to the trial court

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which was signed by juror "Salvatore Caruso." He, himself, then admits in his brief that "[d]ue to this discrepancy, it is not clear who the juror is." Without more, it is difficult for us to consider defendant's argument.

¶ 76 Accordingly, we will turn, as defendant describes, to "[t]he only exchange in the record that shows a hesitation," namely, the polling of juror Dickman. In doing so, we note that defendant clearly mischaracterizes what occurred here. Based on the record before us, we fail to find that there was any such hesitancy or nonresponsiveness on the part of juror Dickman during polling or that anything even remotely improper occurred here. Rather, as the record demonstrates, following the reading of the verdicts, the trial court asked defendant if he wished to have the jury polled, to which his counsel responded affirmatively. The clerk then polled each juror individually, asking "Was this then and is this now your verdicts?," as our courts have determined is proper. See *Kellogg*, 77 Ill. 2d at 528. When the clerk asked juror Dickman this question, apparently, he did not immediately answer and, as the clerk asked if he wanted the question repeated, he replied, "Yes." Key here is the fact that juror Dickman did not reply "No," or that the verdicts rendered were not his verdicts. Not only did his affirmative answer reveal that he did not need the question to be repeated to him again by the clerk, but also that these were without question his verdicts. There is no other connotation to be had from this exchange, and any inference that juror Dickman was at all hesitant in affirming his verdicts as presented, and in accord with the unanimity of the rest of the jurors, would be pure speculation. See *People v. Hill*, 14 Ill. App 3d 20, 22 (1973) (during jury polling, hesitating before answering "yes" cannot be construed as answering "no;" "[i]f the hesitation proves anything it is that the juror was careful

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about her answer"). Accordingly, because juror Dickman never answered in a manner to indicate that the verdicts rendered were not his, there was no reason for defense counsel to press the issue further and, thus, there could be no prejudice and, consequently, no ineffective assistance here.

¶ 77 Defendant further argues that his counsel's error in failing to raise this issue of juror hesitation earlier was compounded by other circumstances of the trial, including the jury's notes, the fact that the juror in question was "slumped in his seat," and the court's conversation at the time of the jury's dismissal which indicated that one of them was "saying no" in response to the court's hope that they had a good experience in spite of "conditions out of our control" which caused the duration of the trial to last "longer than it should have." All of this, however, amounts to nothing more than speculation on defendant's part. While these circumstances may have occurred throughout trial, the fact remains that when each juror was polled, every one of them, including juror Dickman, affirmed that the verdicts rendered were their individual verdicts. And, ultimately, these verdicts were unanimous. Defendant fails to establish the requisite prejudice because, for the reasons set forth herein, there is no reasonable probability that, had his counsel further questioned juror Dickman during polling, there would have been a different outcome.

¶ 78 Even if defendant could somehow show sufficient prejudice, he still could not demonstrate the other required prong of *Strickland*, since, based on our thorough review of the record, there is nothing therein to even remotely indicate that his counsel performed deficiently. Rather, counsel clearly advocated unrelentingly on defendant's behalf. Counsel filed multiple pretrial motions and argued extensively for them, including a motion to quash arrest and suppress evidence, a motion for reduction of bond, and a motion for discovery. Counsel participated

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vigorously during jury selection and presented a cohesive opening argument. During trial, counsel thoroughly cross-examined every witness presented at length, and even recross-examined the victim, who was the linchpin in the State's cause against defendant. Counsel raised numerous objections when appropriate, focused the jury's attention on the forensic evidence which was in defendant's favor, moved for directed verdict and presented a convincing closing argument before the jury in line with the theory on his case. Following trial, counsel filed a motion for a new trial, raising the very issue therein that defendant states counsel neglected. Counsel also filed a motion to reconsider defendant's sentence.

¶ 79 Ultimately, and in addition to our review of the totality of defense counsel's representation of defendant (see *Eddmonds*, 101 Ill. 2d at 69), which we find to have been both thorough and zealous, we hold that defendant received effective representation and any claim to the contrary, particularly regarding counsel's decision not to ask any further questions of juror Dickman after he reaffirmed his verdict during jury polling, is without merit under the circumstances of this cause.

¶ 80 IV. Gaston's Statements

¶ 81 Defendant's fourth contention on appeal is that the trial court denied him a fair trial by permitting the State to introduce "cumulative prior inconsistent statements" made by Gaston, namely, his written statement to police and his grand jury testimony, both of which he recanted at trial. Although admitting that these statements were admissible, defendant argues that allowing both of them essentially resulted in the admission of "prior consistent statements" which was improper because they unduly bolstered Gaston's credibility. In addition, defendant argues that,

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regardless, these statements constituted the admission of cumulative evidence causing an effect on his trial that was more prejudicial than probative.

¶ 82 Again, as a threshold matter, the State points out, and defendant admits, that he has waived this issue for review since he failed to properly preserve it (see *Enoch*, 122 Ill. 2d at 186), but he asks that we consider it under the plain error doctrine, asserting both prongs by insisting that the evidence in his cause was closely balanced and that this alleged error so affected the integrity of his trial that it caused him unfair prejudice. We have already discussed the requirements for a review under plain error, and we repeat that the burden under either prong is squarely upon defendant. See *Herron*, 215 Ill. 2d at 187, and *Piatkowski*, 225 Ill. 2d at 565 (under first prong, he must prove that there was plain error and that the evidence was so closely balanced that this error alone severely threatened to tip the scales of justice against him; under second prong, he must prove that there was plain error and that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process). We further recall, with emphasis, that before a plain error analysis may be undertaken, defendant must show that an error occurred, for, absent error, there can be no plain error. See *McGee*, 398 Ill. App. 3d at 794, citing *Herron*, 215 Ill. 2d at 187; see also *Piatkowski*, 225 Ill. 2d at 565 ("the first step is to determine whether error occurred"). Because there was no error in the instant cause in the trial court's admission of Gaston's prior statements, we find no plain error here.

¶ 83 The exact same arguments defendant raises here have been raised by other defendants in several recent cases before our very court, which has repeatedly and consistently rejected them. See *People v. Donegan*, 2012 IL App (1st) 102325 ¶¶ 57-63; *People v. White*, 2011 IL App (1st)

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092852, ¶¶ 49-54; *People v. Johnson*, 385 Ill. App. 3d 585, 607-08 (2008); see also *People v. Santiago*, 409 Ill. App. 3d 927 (2011); *People v. Perry*, 2011 IL App (1st) 081228; *People v. Maldonado*, 398 Ill. App. 3d 401 (2010). Defendant acknowledges these cases and their principles, but, just as those other defendants, insists they were poorly reasoned because they ignore the bolstering effect that the repetition of prior inconsistent statements can have on each other and, thus, should not be followed. We wholly disagree.

¶ 84 We turn first to *Johnson*, in which the instant discussion originated and which is factually identical to the instant cause. There, the defendant was charged with first degree murder of one victim and aggravated battery with a firearm of a second victim, Williams, during a drive-by shooting. At trial, the State called Williams, who testified that he did not see the shooter, thereby recanting both his prior written statement to police and his grand jury testimony wherein he had affirmatively identified the defendant as the shooter. Accordingly, the State then called the assistant state's attorney who had handwritten Williams' signed statement to police and the assistant state's attorney who had presented him before the grand jury; each read his prior statement to the jury at trial, and the defendant was convicted. On appeal, just as defendant here, the defendant conceded that the prior statements were admissible under section 115-10.1 of the Illinois Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2006)), which described an exception for prior inconsistent statements under the hearsay rule. See *Johnson*, 385 Ill. App. 3d at 607. However, he argued that it was the repetition—the admission of both of these prior statements—that resulted in a violation of evidentiary rules prohibiting the admission of prior consistent statements which otherwise lend undue credence to a witness' trial testimony

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and result in prejudice to the defendant. See *Johnson*, 385 Ill. App. 3d at 607. Noting at the outset that the admission of evidence is within the sound discretion of the trial court and that its decision will not be overturned absent an abuse of that discretion, the *Johnson* court provided the seminal rationale for rejecting such claims. Briefly, we stated:

"The defense is confusing apples with oranges, or more specifically, *inconsistent* statements with *consistent* ones. The defense is absolutely right that there is a long-established evidentiary rule against admission of a prior consistent statement, unless there has been a charge of recent fabrication or a motive to testify falsely. However, at issue here are prior *inconsistent* statements, or statements inconsistent with the witness' trial testimony.

Consistency is measure against a witness' trial testimony: inconsistent statements are inconsistent with trial testimony; consistent statements are consistent with it. The rule against admission of consistent statements exists because they needlessly bolster the witness' trial testimony. Obviously, inconsistent statements cannot bolster a witness' trial testimony. Thus, application of the rule makes no sense here." [Citations omitted.] *Johnson*, 385 Ill. App. 3d at 608 (emphasis in original).

¶ 85 We were again presented with the same issue in *White*, wherein the defendants asked us to create a bright-line rule prohibiting the admission of any prior inconsistent statement under section 115-10.1 where that statement is consistent with a witness' previously admitted prior inconsistent statement. See *White*, 2011 IL App (1st) 092852, ¶ 50. Recognizing the tension

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between the admission of multiple prior inconsistent statements as substantive evidence under section 115-10.1 and the rule barring the admission of prior consistent statements that bolster trial testimony, we again rejected the defendants' arguments, providing further explanation to this issue. See *White*, 2011 IL App (1st) 092852, ¶ 51. Significantly, we based our decision, and our subsequent doctrine, on our finding that prior consistent statements and prior inconsistent statements "stand on very different evidentiary grounds." *White*, 2011 IL App (1st) 092852, ¶ 52. We noted that the former serve no purpose other than to bolster trial testimony—they are merely consistent with it. See *White*, 2011 IL App (1st) 092852, ¶ 51. However, prior inconsistent statements "are a vital tool to challenge witness credibility by contradicting and discrediting trial testimony." *White*, 2011 IL App (1st) 092852, ¶ 52 (these are meant to prevent a "turncoat witness" from denying an earlier statement when it was made under circumstances indicating it was likely to be true). Thus, we explained, while prohibiting prior statements consistent with a witness' trial testimony makes sense because they have little value, "applying that same general bar to inconsistent statements that are consistent with each other would frustrate the legislature's goal of discouraging recanting witnesses." *White*, 2011 IL App (1st) 092852, ¶ 53 (concluding that "the underlying rationale for the rule against prior consistent statements does not justify obstructing the operation of section 115-10.1"). We further noted, in light of the defendants' argument that the number of prior inconsistent statements that may be admitted under section 115-10.1 would now be "limitless," that this was not what we meant; instead, just as with all questions regarding the admission of evidence, we left it to the trial court's discretion to limit the number of such statements that may be introduced. See *White*, 2011 IL App (1st) 092852, ¶ 54.

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¶ 86 Soon after *White*, we were again presented with the same issue in *Donegan*, where both the handwritten statements and grand jury testimony of three witnesses were admitted at trial following their contradictory testimony on the stand. The defendant argued that the evidentiary rule prohibiting the substantive use of prior consistent statements should apply equally to the substantive use of any prior inconsistent statement that is consistent with a witness' previously admitted prior inconsistent statement. See *Donegan*, 2012 IL App (1st) 102325, ¶ 60.

Summarily and succinctly dismissing this claim, we cited *White* and its distinction between prior consistent and inconsistent statements, its rationale for refusing to apply the same general bar to these two categories, and its attestation that its decision does not fling open the door to the admission of prior inconsistent statements without limit. See *Donegan*, 2012 IL App (1st) 102325, ¶¶ 61-62. As the defendant raised no new arguments other than those already presented in *White*, we reaffirmed our decision therein and found no error in the trial court's admission of both the witnesses' prior handwritten statements and their grand jury testimony at trial. See *Donegan*, 2012 IL App (1st) 102325, ¶ 63.

¶ 87 The instant cause mirrors *Johnson*, *White* and *Donegan* and merits the same result. At trial, Gaston testified that he fell asleep in defendant's car and woke up upon hearing defendant arguing with Sanders on Sanders' porch. He further stated that he did not remember seeing defendant walk back to the car, nor him giving any order or saying anything to codefendant about shooting Sanders; Gaston testified that he only remembered an argument and gunshots, whereupon he ducked down in the back seat of the car until the incident was over. However, inconsistent with Gaston's trial testimony was his prior written statement to police, which he

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disavowed at trial. As detective Hobik testified, on the day of the shooting, Gaston provided a written statement of the incident, which Gaston reviewed and signed. In this statement, he stated that, after falling asleep in the car and waking up to hear defendant arguing with Sanders, Gaston did, indeed, see defendant walk back to the car and heard him say to codefendant, "F*ck that n*gger, shoot," followed by seven or eight gun shots. Also inconsistent with his trial testimony was Gaston's testimony before the grand jury, which he, again, attempted to repudiate at trial. As ASA O'Mara testified, during the grand jury hearing, Gaston had testified that he fell asleep in defendant's car and woke up to the sound of an argument between defendant and Sanders.

Gaston further testified that, after defendant left Sanders' porch, Gaston saw him walk back to the car and heard him say "F*ck you all n*ggers. Shoot that n*gger" to codefendant, followed by seven or eight gunshots from right outside the car.

¶ 88 Contrary to defendant's characterization, and likewise contrary to the defendants' same assertions in *Johnson*, *White* and *Donegan*, Gaston's statements were not "prior consistent statements" invoking the concerns regarding the bolstering of a witness' trial testimony. Instead, while Gaston's written statement to police and his grand jury testimony were consistent with each other, they were both, separately and independently, inconsistent with his trial testimony in this cause which, as *Johnson* explained, is the true measure at play here. See *Johnson*, 385 Ill. App. 3d at 608. As such, and particularly in the instant cause, Gaston's prior inconsistent statements were vital. Although Sanders testified he, too, heard the order, of the witnesses testifying at trial, Gaston was physically closest to defendant as he walked back to the car from the porch right before the shooting began; Sanders was on the porch and Trotta was leaving the area. Thus, what

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Gaston heard defendant say at this time was critical and went to the corroboration of Sanders' testimony. In addition, Gaston's credibility was crucial; at trial, he rejected his written statement to police and his grand jury testimony citing harassment by authorities—he stated that he just "told everybody what they wanted to hear" to avoid going to jail. Accordingly, Gaston's prior inconsistent statements were a vital tool in the challenge of his credibility by contradicting and discrediting his trial testimony. And, of course, his prior inconsistent statements became substantive evidence under section 115-10.1, thereby preventing Gaston, a classic "turncoat witness," from merely denying them as he attempted to do on the stand.

¶ 89 Defendant additionally argues, apart from his misconstruction that Gaston's statements constituted "prior consistent statements," that Gaston's grand jury testimony should have been excluded regardless as cumulative evidence since it was merely repetitive of his written statement to police and, thus, the prejudicial effect of its admission substantially outweighed its probative value. However, defendant's argument is, again, not new; the defendants in *White* argued the exact same point in the exact same context before this very Court. See *White*, 2011 IL App (1st) 092852, ¶ 43. There, we acknowledged that parties should refrain from introducing needlessly repetitive statements from a witness. See *White*, 2011 IL App (1st) 092852, ¶ 44. However, we were quick to point out that the prior inconsistent statements at issue were not "merely cumulative" or needlessly repetitive; rather, they were different and they bore upon the witness' credibility regarding the events at issue. *White*, 2011 IL App (1st) 092852, ¶ 44. And, we further noted that, even if the second inconsistent statement (*i.e.*, the grand jury testimony) could be considered unnecessarily repetitive, the defendants failed to cite to any case where a

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court found that the prejudicial effect of a substantively admitted prior inconsistent statement substantially outweighed its probative value merely because it was repetitive of a previously admitted prior statement. See *White*, 2011 IL App (1st) 092852, ¶ 44. In fact, we noted that our Court "has found that even when the State presented a prior inconsistent statement that was 'unnecessarily repetitive' of another, the repetition did not rise to the level of prejudice." *White*, 2011 IL App (1st) 092852, ¶ 44, citing *Fields*, 285 Ill. App. 3d at 1028.

¶ 90 The same is true here. The presentation of Gaston's grand jury testimony was not, contrary to defendant's assertion, merely cumulative of what was before the jury. True, his written statement to police, which was similar to his grand jury testimony, had already been admitted into evidence. However, weeks or months after providing that written statement in the presence of detective Hobik, Gaston provided separate testimony, under oath, to the grand jury. The jury in defendant's trial was tasked with the duty to assess not only Gaston's credibility as the only witness (other than the victim) next to defendant at the time he allegedly gave the order to codefendant to shoot Sanders, but also Gaston's assertions on the stand that he had been harassed by authorities with the threat of jail and that he had not told them the truth but only what they wanted to hear. Gaston's claims of what happened at Sanders' home that day were critical, and the jury had to assess what happened via his recounting of the events. Accordingly, we do not agree with defendant that his grand jury testimony added nothing to what was already before the jury at trial. And, even if we did agree, defendant, just as the defendants in *White*, points to no precedent holding that the prejudicial effect of a substantively admitted prior inconsistent statement substantially outweighs its probative value simply because it is repetitive of a

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previously admitted prior statement. Just as we held in *White*, the very opposite is true and there is no such prejudice. See also *People v. Harvey*, 366 Ill. App. 3d 910, 913-15 (2006) (evidence was not "cumulative" when trial court admitted as prior inconsistent statements both grand jury testimony and prior written statements for each witness).

¶ 91 Ultimately, not only does defendant not raise any new argument here, he cannot demonstrate any prohibition against the admission of more than one prior inconsistent statement. To the contrary, our courts have specifically held that there is none. Rather, it is for the trial court to determine in its sound discretion how many such statements should be admitted into evidence. Based upon our review of the instant cause, we find that the trial court here did not err in allowing the State to introduce both Gaston's written statement to police and his grand jury testimony, which constituted prior inconsistent, not prior consistent, statements and which were in no way cumulative. Accordingly, without any such error, we find, in turn, no plain error here, and defendant's claims regarding Gaston's statements have no merit.³

¶ 92 V. One-Act, One-Crime Doctrine

¶ 93 Defendant's next contention is that his conviction for aggravated battery with a firearm must be vacated because it violates the one-act, one-crime doctrine. He notes that, because both his conviction for attempted first degree murder and his conviction for aggravated battery with a

³Even if we could somehow find some error here, which there was none, defendant still cannot meet his burden under the plain error analysis. We have already discussed at length that the evidence presented here was more than sufficient to support the verdict. Additionally, we reaffirm our declaration that any "unnecessary repetition" of Gaston's statements do not, and cannot, rise to the level of prejudice. See *White*, 2011 IL App (1st) 092852, ¶ 44. Thus, any error here, if it even existed, would only be harmless.

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firearm were based on the same, and sole, physical act of codefendant's shooting of the victim, these multiple convictions cannot stand. As the State concedes, defendant is correct.

¶ 94 Briefly, we note that our state supreme court set forth the one-act, one-crime doctrine in *People v. King*, 66 Ill. 2d 551, 566 (1977), which held that multiple convictions are improper if they are based on precisely the same physical act and, since then, our courts have made clear that a defendant may not be convicted of multiple offenses based on the same act. See *People v. Johnson*, 237 Ill. 2d 81, 97 (2010); *People v. Crespo*, 203 Ill. 2d 335, 342-43 (2010); accord *People v. Burney*, 2011 IL App (4th) 100343, ¶ 86 (where a single act is involved, multiple convictions are improper); see also *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

¶ 95 In the instant cause, defendant was found guilty of two counts; as the State admits, the first charged that defendant, “with intent to kill, did an act, to wit: shot at [Sanders], while armed with a firearm,” and the second charged that he, “in committing a battery, knowingly caused injury to [Sanders] by means of the discharging of a firearm, to wit: shot [Sanders] about the body.” Clearly, these charges, and defendant's resulting convictions, were based on the same physical act—(codefendant's) shooting at Sanders. And, as the State further admits, it never attempted at trial to apportion multiple counts in the indictment to particular shots fired, nor did it argue at trial that multiple convictions for each shot fired were appropriate. Rather, the State only argued that defendant was accountable for committing a series of closely related acts that were not separated by any other event. See *Crespo*, 203 Ill. 2d at 345; *King*, 66 Ill. 2d at 566.

¶ 96 Therefore, and in line with the State's concessions on this issue, we hold that defendant's conviction for aggravated battery with a firearm violated the one-act, one-crime doctrine.

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Accordingly, as defendant's mittimus reflects one 35-year term for his attempted first degree murder conviction and a second 35-year term for his aggravated battery with a firearm conviction, we correct the mittimus to vacate the latter conviction and sentence.

¶ 97 VI. Propriety of Defendant's Sentence

¶ 98 Defendant's last contention on appeal is that his sentence was excessive. He cites his substantial potential for rehabilitation and the disparity between his sentence and that of codefendant, and he also asserts that the trial court improperly considered the use of a firearm as an aggravating factor in determining his sentence even though it was inherent in the crimes charged. He claims that, based on all this, his sentence must be reversed and reduced or, at the very least, remanded for resentencing. However, based on our review of his sentencing hearing, we, for the final time, disagree.

¶ 99 The trial court has broad discretionary powers to determine a defendant's sentence. See *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Its decision merits great deference because the trial judge is in the best position to make a reasoned judgment, weighing factors such as its direct observations of the defendant and his character. See *Fern*, 189 Ill. 2d at 53; accord *People v. McDonald*, 227 Ill. App. 3d 92, 100 (1992). A reviewing court must not substitute its judgment with respect to sentencing for that of the trial court merely because it would have weighed factors differently or desires to invoke clemency. See *Fern*, 189 Ill. 2d at 53 (reviewing court "must proceed with great caution" in deciding whether to modify sentence); *People v. Hayes*, 159 Ill. App. 3d 1048, 1052 (1987); accord *People v. Coleman*, 166 Ill. 2d 247, 258 (1995) (trial court's decision with respect to sentencing

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“is entitled to great deference”). Therefore, a sentence imposed by the trial court will not be altered absent an abuse of discretion. See *Stacey*, 193 Ill. 2d at 209-10.

¶ 100 In determining an appropriate sentence for a defendant, the sentencing court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2008). When such factors have been presented to the court, it is presumed that they have been considered, absent some contrary indication. See *People v. Sutherland*, 317 Ill. App. 3d 1117, 1131 (2000); see also *People v. Cord*, 239 Ill. App. 3d 960, 969 (1993) (when mitigating factors have been presented, it is presumed court considered them in fashioning sentence and burden rests with the defendant to prove that court failed to do so). Moreover, the sentencing court is not required to recite or assign a value to each factor in mitigation or aggravation that forms part of the record. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 14; *People v. Hindson*, 301 Ill. App. 3d 466, 476 (1998). Ultimately, a sentence within the prescribed statutory range is presumed to be appropriate and will not be deemed excessive unless the defendant affirmatively shows that his sentence varies greatly from the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. See *Fern*, 189 Ill. 2d at 54; accord *Stacey*, 193 Ill. 2d at 210.

¶ 101 Attempted first degree murder is generally punishable by a term of 6 to 30 years in prison; however, when it is accompanied by an enhancement, as in the instant cause, the applicable sentencing range is 21 to 45 years in prison. See 730 ILCS 5/5-4.5-25(a) (West 2009); 720 ILCS 5/8-4(c)(1)(B) (West 2008). Defendant here was sentenced to 35 years in prison. Clearly, this was well within sentencing range and, thus, is presumed proper.

¶ 102 In challenging his sentence, defendant first asserts that the trial court failed to properly

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consider his rehabilitative potential. He stresses the evidence presented at his sentencing hearing noting that he has strong family ties, he is a "productive member" of society with a full-time job and college credits, he has no felony background and only one misdemeanor which has been resolved, he was only 20 years old at the time of the incident, and he repeatedly expressed remorse for what occurred. Defendant is correct, and the record verifies, that all these circumstances were evident at the time of sentencing. For example, defendant's mother and brothers were present in court to support him. Undeniably, defendant had full-time employment at a hospital at the time of the incident and was enrolled in college courses. He was only 20 years old, had no relevant criminal background, and did, indeed, make it a point to express his remorse for what occurred from the moment he was taken into custody (when he insisted it be recorded in the written statement he gave to detective Worley) to the time of his allocution at sentencing when he stood before the court and expressed that he was "terribly sorry" and asked for its "mercy."

¶ 103 However, contrary to defendant's claims here, there is no indication that the sentencing court failed to consider these factors. Instead, the opposite is true. The record clearly demonstrates that defendant's counsel made it a point to highlight not only his strong family ties by having his mother and brothers stand up in court, but his counsel also discussed his age as a contributing factor in "a lapse of judgment" as the basis for what occurred. Moreover, the court had a front seat for defendant's allocution and, thus, heard first-hand his sincerity in remorse. Most importantly, in handing down his sentence, the trial court specifically acknowledged there were various "positive things" on defendant's behalf and referred to, in particular, his education

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and lack of criminal background. Yet, after considering all this, the court counterbalanced this against the fact that, as demonstrated in the evidence at trial, he directed the shooting, as well as against the "protection of the public" from people like him that "encourag[e] others to shoot." Ultimately, while it is true that a sentencing court is to keep in mind the "objective of restoring the offender to useful citizenship" (Ill. Const. 1097, art. 1, § 11), it is not required to give that more weight than the seriousness of the crime, protection of the public and punishment. See *People v. Harris*, 294 Ill. App. 3d 561, 569 (1998). Nor is it required to do this with a defendant's rehabilitative potential (see *People v. Wilburn*, 263 Ill. App. 3d 170, 185 (1994)), his youth (see *People v. Hoskins*, 237 Ill. App. 3d 897, 900 (1992)), or his lack of a criminal history (see *People v. Tijerina*, 381 Ill. App. 3d 1024, 1041 (2008)). Thus, without more, we fail to find that the trial court ignored defendant's rehabilitative potential.

¶ 104 Defendant's next challenge to his sentence is that it is impermissibly disparate to codefendant's sentence. He argues that it "defies logic" that he, someone who never touched the gun used in this cause, is somehow considered to be more responsible for what occurred and received a 35-year sentence (14 years over the minimum), than codefendant, who was the actual shooter and received the minimum sentence of 21 years. Defendant is correct that, generally, similarly situated defendants should not receive grossly disparate sentences. See *People v. Spriggle*, 358 Ill. App. 3d 447, 455 (2005). However, equal sentences are not required for all participants in the same crime, and a mere disparity of sentences is not, in and of itself, a violation of fundamental fairness. See *Spriggle*, 358 Ill. App. 3d at 455, citing *People v. Caballero*, 179 Ill. 2d 205, 216 (1997), and *People v. Godinez*, 91 Ill. 2d 47, 55 (1982). Rather, a

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difference in sentences may be justified by the relative character and history of the codefendant, rehabilitative potential, criminal records, or the degree of culpability assigned to each participant. See *Spriggle*, 358 Ill. App. 3d at 455. "It is not the disparity that controls, but the reason for the disparity." *Spriggle*, 358 Ill. App. 3d at 455.

¶ 105 In the instant cause, we again note that defendant's sentence, just as codefendant's, fell within the prescribed available range and, thus, is presumed proper. Moreover, contrary to his argument, defendant and codefendant were not "similarly situated" here. Instead, the sentencing court assigned an entirely different degree of culpability to defendant than it did to codefendant. Undisputably, codefendant was the one who fired the shots at the victim. However, the court specifically found that defendant was "more responsible for what happened" than the actual shooter, based on the evidence presented. That is, it was defendant who knew the victim and who purposefully went over to his house to confront him. Admitted by all involved was the fact that codefendant did not even know Sanders, let alone where he lived. Thus, but for defendant, there was no reason for codefendant to have gone to Sanders' house that day and, thus, to have shot at him. Defendant was the one who chose to pick up codefendant and Gaston and drive to Sanders' house. He got into a further argument with Sanders after having done so earlier over the phone which, he admitted in his statement to police, made him angry. He then, according to both the victim and Gaston, ordered codefendant to shoot Sanders. And, he waited until the spray of bullets was over to then drive his cohorts away from the scene with the specific intent to avoid police. From all this, the court found defendant to be "really the influence in this case" since he "caused it all to happen." It was this much higher degree of culpability that formed the basis of

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the sentencing court's decision here. Thus, because the reason for the disparity was wholly made clear by the sentencing court, we will not, without more, conclude that his "disparate" sentence was unjustified.

¶ 106 Defendant's last challenge to his sentence is his insistence that the sentencing court improperly considered as a factor in aggravation the fact that the offense was committed with a gun, which was inherent in the offense as charged. Citing as his basis for this the court's comments that "for the deterrent to stop – to just stop all of these people from shooting, to stop people from encouraging others to shoot that a minimum sentence is not appropriate in this case," he claims that this amounted to improper double enhancement. However, not only did defendant waive this argument for review, but he cannot demonstrate plain error and, even if he could, he mischaracterizes the court's comments and cannot otherwise show that a double enhancement occurred here.

¶ 107 Defendant concedes in his brief that he has forfeited this argument for review since he did not properly preserve it by raising it in his posttrial motion (see, *e.g.*, *Enoch*, 122 Ill. 2d at 186), but argues that plain error analysis is warranted. However, as we noted earlier, absent error, there can be no plain error (see *McGee*, 398 Ill. App. 3d at 794, citing *Herron*, 215 Ill. 2d at 187; see also *Piatkowski*, 225 Ill. 2d at 565), and we find no error here. While it is true that a factor inherent in an offense should not also be used as an aggravating factor at sentencing, the proper penalty in a cause must be based on the particular circumstance of each case, including the nature and extent of each element of the offense as committed by the defendant. See *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 15. Therefore, a sentencing court "is not required to

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refrain from any mention of the factors which constitute elements of an offense, and the mere reference to the existence of such a factor is not reversible error." *Andrews*, 2013 IL App (1st) 121623, ¶ 15. And, we as the reviewing court, are not to focus on a few words or sentences of the sentencing court but, rather, should consider the record as a whole. See *Andrews*, 2013 IL App (1st) 121623, ¶ 15.

¶ 108 The sentencing court in the instant cause did not reconsider the use of a gun as an aggravating factor when it made the cited comments. Instead, it is clear that the court was referring to the concepts of deterrence, appropriate punishment and, most importantly in its determination, the protection of the public. The court highlighted these concepts repeatedly in its succinct colloquy, and each of them was wholly proper. Nowhere did the court state that it was considering the use of a gun in shooting the victim as an aggravating factor, and defendant's characterization of its comments as stating so is a mischaracterization. Rather, the court did nothing more than comment on the nature and circumstances of the crime, which it had the right to do. Moreover, even if error did somehow occur here, we have already, at length, described that the evidence presented in this cause was more than sufficient to support defendant's conviction, and as we have just noted, we do not find that trial court's comments or consideration on sentencing prejudiced defendant so as to have affected any fairness to him or to the judicial process. The court did not rely on any improper factors in determining defendant's sentence here.

¶ 109 Therefore, based on all this, we reject defendant's arguments regarding the court's alleged failure to consider his rehabilitative potential, its imposition of an inappropriately disparate sentence, and its reliance on an improper double-enhancement factor and find, instead, that his

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sentence, which was properly within the applicable sentencing range for the crimes charged, was, contrary to his contention, not excessive in light of the circumstances presented.

¶ 110

CONCLUSION

¶ 111 Accordingly, for all the foregoing reasons, we affirm defendant's conviction for attempted first degree murder and vacate his conviction for aggravated battery with a firearm, and we affirm his sentence, with the modification to his mittimus that his second 35-year term for his conviction for aggravated battery with a firearm is vacated.

¶ 112 Affirmed in part, vacated in part, mittimus corrected.