2016 IL App (4th) 140283-U

NO. 4-14-0283

FILED
June 6, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
GERALD R. UTTERBACK,	)	No. 12CF274
Defendant-Appellant.	)	
	)	Honorable
	)	William O. Mays,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part, vacated in part, and remanded with directions, concluding (1) a witness's use of the word "gang," and admission of alleged evidence of gang violence did not deprive defendant of a fair trial, and (2) an officer's improper identification testimony did not constitute plain error. However, the appellate court vacated several fines, remanded for recalculation of those fines, and ordered the trial court to apply $345 in *per diem* credit to defendant's creditable fines.

¶ 2 In July 2012, the State filed a bill of indictment, charging defendant, Gerald A. Utterback, with numerous offenses stemming from a single incident in which defendant, along with several other members of his motorcycle club, allegedly robbed two members from a rival club. Prior to trial, defendant filed a motion *in limine* to prevent the State from referring to the motorcycle clubs as "gangs," which the trial court granted.

¶ 3 During the January 2014 trial, the trial court denied defendant's motion for mistrial after a State's witness violated the motion *in limine* by using the word, "gang," finding its

instruction to the jury was sufficient to cure the error. In addition to other evidence, a detective identified defendant's motorcycle riding to and from the scene of the robbery after viewing a surveillance video and personally examining defendant's motorcycle.

¶ 4 Following the presentation of evidence, the jury found defendant guilty of aggravated robbery, robbery, and theft from the person. The trial court subsequently sentenced him to five years' imprisonment.

¶ 5 Defendant appeals, asserting (1) he was denied a fair trial where the State introduced gang evidence in violation of the motion *in limine*, (2) a detective's identification testimony improperly invaded the province of the jury, and (3) certain fines should be vacated and recalculated and a $5 *per diem* incarceration credit applied. We affirm in part, vacate in part, and remand for the recalculation of certain fines and application of $5 *per diem* incarceration credit.

¶ 6 I. BACKGROUND

¶ 7 A. Charges

¶ 8 In July 2012, the State filed a bill of indictment against defendant and three codefendants: Timothy Jackson, Zane Liggett, and Joseph Teel. The charges all stemmed from a single incident occurring in May 2012. Count I alleged defendant committed an armed robbery in that he, or one for whose conduct he was legally responsible, while carrying a firearm on his person, knowingly took Tunnel Rats motorcycle club vests from Joseph Cowman and Michael Baehr, Jr., by threatening the imminent use of force. 720 ILCS 5/18-2(a)(2) (West 2010). Count II charged defendant with aggravated robbery, alleging he, or one for whose conduct he was legally responsible, indicated verbally to Cowman and Baehr that he had a gun. 720 ILCS 5/18-5(a) (West 2010). Count III alleged defendant, or one for whose conduct he was legally

responsible, committed a robbery by taking Cowman's motorcycle vest by threatening the imminent use of force. 720 ILCS 5/18-1 (West 2010). The State did not proceed to trial on count IV, which charged defendant with unlawful use of a weapon. 720 ILCS 5/24-1(a)(7)(ii) (West 2010).

¶ 9 In April 2013 and again in September 2013, defendant filed a motion *in limine*, requesting the trial court direct the parties to refer to the Midwest Percenters and the Tunnel Rats as motorcycle clubs rather than motorcycle gangs. The State confessed the motion, which the trial court thereafter granted. In September 2013, the court ordered defendants' cases severed, and defendant proceeded to trial alone.

¶ 10 B. Jury Trial

¶ 11 Defendant's jury trial spanned four days in January 2014. Due to the extensive nature of the proceedings, we will summarize only the evidence necessary to the disposition of this appeal.

¶ 12 1. *Baehr*

¶ 13 Baehr testified, in May 2012, he was a member of the Tunnel Rats motorcycle club. On May 20, 2012, he attended a meeting at the Tunnel Rats' clubhouse. Among those in attendance were Cowman and his wife, Elizabeth. Both Baehr and Cowman were wearing leather vests depicting the Tunnel Rats emblem. After the meeting, at approximately 2 p.m., Baehr, Cowman, and Elizabeth decided to ride their motorcycles to Baehr's house. Baehr rode alone, while Elizabeth rode on the back of Cowman's motorcycle. Baehr admitted his recollection of the time they left the meeting was not always consistent, but watching a surveillance video refreshed his memory that he left the meeting around 2 p.m.

¶ 14 En route to Baehr's house, the group rode past Kelly's Restaurant on Broadway Street, where a motorcycle show was ongoing. They then turned from Broadway onto 12th Street. While stopped at a stoplight at 12th and Hampshire Streets, Baehr testified he heard motorcycles approaching. He then saw 8 to 14 motorcycles approaching from behind. At that point, four motorcyclists, whom he recognized as members of the Midwest Percenters motorcycle club, pulled around Baehr's and Cowman's motorcycles. According to Baehr, Jackson pulled in front of Cowman, while defendant parked behind Cowman. Liggett stopped in front of Baehr, and Teel pulled in behind Baehr. Baehr said he recognized all four individuals due to his prior association with the Midwest Percenters from August 2008 through November 2010, at which time he was voted out of the group.

¶ 15 Baehr testified Jackson demanded he and Cowman remove their vests, saying, "This isn't a fucking game, boys." Teel then said, "Give them the vests or I'll blow your fucking heads off." Baehr could not see whether Teel had anything in his hands at the time. Cowman and Baehr subsequently handed their vests to Jackson. Throughout the exchange, defendant said nothing. However, Baehr recalled defendant getting off his motorcycle and standing next to it during the exchange. After receiving the vests, the Midwest Percenters rode away together. Baehr did not see where Jackson placed the vests before riding away. The entire confrontation lasted approximately 30 seconds.

¶ 16 Baehr and Cowman immediately returned to the clubhouse, where the police were called. Baehr also realized his cellular phone and house keys had been inside the vest he handed over to Jackson. Later that day, Baehr participated in a showup where he identified all four codefendants as those who participated in the robbery.

¶ 17 2. *Cowman*

¶ 18 Like Baehr, Cowman testified when he and Baehr stopped at a stoplight on 12th and Hampshire, four motorcyclists wearing Midwest Percenters vests stopped around them. In all, he noticed eight to nine motorcycles nearby.

¶ 19 Cowman testified Jackson stopped in front of him and he identified defendant in open court as the person who stopped behind him. Liggett stopped in front of Baehr, and Teel was behind Baehr, wielding a snub-nosed revolver. He thought another Midwest Percenter had been positioned between Jackson and Liggett, and he acknowledged he previously stated defendant was located behind Baehr. According to Cowman, Jackson demanded their vests, saying, "This is not a game. We'll fucking kill you." Teel added, "Give 'em up or I'll blow your fucking head off." Baehr and Cowman subsequently handed their vests to Jackson. The Midwest Percenters then rode away together. According to Cowman, defendant did not say or do anything during the encounter.

¶ 20 Cowman testified, at a showup conducted later that day, he identified Liggett, Teel, and defendant as those responsible for taking his vest. However, in a prior proceeding he testified he had been unable to identify Jackson and defendant at that showup.

¶ 21 3. *Elizabeth*

¶ 22 Elizabeth testified she noticed the motorcycles approaching when Cowman's back tensed at the stoplight at 12th and Hampshire. She ducked her head as four motorcycles encircled them. Elizabeth identified Jackson as the person who demanded the vests, as she recognized him from a prior meeting. She could not identify the other individuals; however, she noted the person standing behind Baehr, later identified to be Teel, held a shiny object that appeared to be a gun. After Jackson and the others took the vests and rode away, she, Cowman, and Baehr returned to the clubhouse. Because she was distraught, a friend took her home.

¶ 23 4. *Liggett*

¶ 24 Liggett testified he was a member of the Midwest Percenters in May 2012. On May 20, 2012, he was at Kelly's for a motorcycle show when he saw either Jackson or defendant signal for the Midwest Percenters to gather and follow. The group exchanged no verbal communication. Liggett then joined several others, including defendant, as they rode after two members of the Tunnel Rats motorcycle club. The Midwest Percenters, with Liggett in the lead, followed the Tunnel Rats and stopped around them at the corner of 12th and Broadway. Jackson pulled to the front left side of the Tunnel Rats, and Liggett pulled to the front right. Defendant then stopped behind Liggett, while Teel stopped behind both Cowman and Baehr. The remainder of the Midwest Percenters stopped behind the group.

¶ 25 Jackson demanded Baehr and Cowman hand over their motorcycle vests, saying, "We can do this the easy way or the hard way." Liggett then overheard Teel make a statement, of which he only understood part, including, "do it now," and the word, "head." Baehr and Cowman subsequently handed over their vests. Liggett recalled defendant stepping away from his motorcycle, approaching Jackson, and taking one of the vests. Liggett testified the purpose of following and surrounding the Tunnel Rats was to harass them. After the incident, Liggett testified the group left the scene together, returned briefly to Kelly's, then rode to their clubhouse in Liberty.

¶ 26 Liggett acknowledged he initially told police he was not present for any altercation with the Tunnel Rats. It was only after he reached a plea agreement that he gave inculpatory statements to police. Further, he acknowledged he had received probation for the offense of felony mob action in exchange for his cooperation with the State. Liggett testified he

was no longer a member of the Midwest Percenters, as he left the group approximately one month after this incident.

¶ 27 5. *Officer Michael Blazinic*

¶ 28 Officer Michael Blazinic testified he was a conservation officer but also a sworn police officer. On May 20, 2012, he was on duty when he heard his police radio broadcast an alert regarding nine suspects who were part of a "motorcycle gang." He subsequently drove past five motorcyclists wearing "motorcycle gang paraphernalia" riding in the opposite direction at a high rate of speed. Officer Blazinic executed a U-turn, requested backup, and followed the motorcyclists into the Village of Liberty. At that point, Officer Blazinic said one member of the "gang" stopped at the gas station, while the remaining four continued into town. Officer Blazinic continued his pursuit of the remaining four riders until they stopped at a brick building and went inside.

¶ 29 Due to the allegation the suspects had committed an armed robbery, Officer Blazinic said he put on a bulletproof vest and readied his AR-15 rifle. The rider who stopped for gas soon drove up to the building, and Officer Blazinic noticed him wearing Midwest Percenters "gang" paraphernalia. Despite Officer Blazinic commanding the rider to stop, the individual turned around and rode away. Eventually, the riders left the brick building, and after ignoring several commands from Officer Blazinic to lie on the ground, the riders finally complied. Shortly thereafter, a fourth individual also exited the building, and after being given several verbal commands by Officer Blazinic, he too went to the ground. The individuals apprehended were identified as defendant, Jackson, Liggett, and Teel.

¶ 30 6. *Motion for Mistrial*

¶ 31 During Officer Blazinic's testimony, defendant made a motion for a mistrial after Officer Blazanic used the word "gang" four times in violation of the motion *in limine*. The trial court denied the motion but instructed the jury to disregard the use of the word "gang" by Officer Blazinic. Later that day, defendant requested the motion *in limine* encompass any evidence suggesting the Midwest Percenters were a gang, which the trial court granted.

¶ 32 7. *Beverly Liggett*

¶ 33 Liggett's wife, Beverly, testified, on May 20, 2012, she drove to Kelly's Restaurant to meet Liggett shortly after 2 p.m. Upon her arrival, she noticed Liggett walking across the parking lot. She also noticed Jackson walk across the parking lot and hand a bundle of black leather to John Kimbrell. Liggett and Jackson then told her to return home with Kimbrell and his girlfriend. After returning home for 30 minutes or so, Beverly drove her adult son, Christopher Henderson, and Kimbrell to a birthday party being held at defendant's house. Upon arrival at defendant's house, Kimbrell told her he needed to dispose of the leather items. Beverly then drove Kimbrell and Henderson to a viaduct near PASA Park, at which time the two men exited the vehicle carrying the leather items and a shovel. They returned a few minutes later without the leather items.

¶ 34 Beverly acknowledged she did not hear the exchange between Jackson and Kimbrell. At no time did defendant direct her to do anything. Beverly also admitted she did not make any statements to police until Liggett had secured a plea agreement.

¶ 35 8. *Henderson*

¶ 36 Henderson, Beverly's son and Liggett's stepson, also provided testimony regarding his involvement in the events of May 20, 2012. Henderson stated, that day, his mom arrived home with Kimbrell and his girlfriend. The group stayed at the house for 45 minutes or

so, at which time Beverly, Henderson, and Kimbrell drove to defendant's house for a birthday party. Prior to leaving, Kimbrell told Henderson to grab a shovel because he had items to bury.

¶ 37 While at the party, Henderson and Kimbrell took a pair of leather vests from Beverly's car and hid them under a bundle of hay in defendant's barn. Defendant never appeared for the party, and the attendees learned he had been arrested. Due to defendant's arrest, Henderson and Kimbrell recovered the leather vests and took them to an area near PASA Park in Barry, Illinois. As he removed the leather vests from the car, Henderson observed a semiautomatic handgun fall from the folds of the leather. Henderson said he returned the handgun to the bundle of leather and buried the items with a shovel. He did not recall whether he told the police about seeing the handgun, but he did remember telling the State's Attorney. According to Henderson, a couple of weeks later, Jackson and other members of the Midwest Percenters—not including defendant—asked Henderson to show them the location of the leather vests. Henderson retrieved the leather vests from the site and gave them to Jackson.

¶ 38 Like Beverly, on cross-examination Henderson admitted he did not contact the police until April 2013, which was after Liggett had secured a plea agreement. On redirect, when the State asked why Henderson waited so long to contact police, Henderson responded, "Because I had heard their [the Midwest Percenters'] numbers had went down and there's not as *** many of them."

¶ 39 9. *Kimbrell*

¶ 40 Kimbrell testified, in May 2012, he was a probationary member of the Midwest Percenters. On May 20, 2012, he was at Kelly's Restaurant for the motorcycle show. At some point, he noticed a group of Midwest Percenters leave on their motorcycles and return soon thereafter. One of the riders, Jackson, called Kimbrell over, handed him a bundle of leather, and

told him to hide the bundle. Kimbrell admitted he did not closely examine the bundle to know whether it consisted of leather vests. Consistent with the testimony of Henderson, Kimbrell first attempted to hide the leather bundle in defendant's barn, but he retrieved the bundle and buried it in PASA Park after learning of defendant's arrest. Unlike Henderson, Kimbrell never saw a handgun in the leather bundle. Afterwards, Jackson reached out to him, telling him to lay low and stay quiet. Kimbrell acknowledged that he was never approached by defendant to take any actions.

¶ 41 Kimbrell admitted he did not speak with police until April 2013, at the urging of the Liggetts after Liggett had secured a plea agreement. He also acknowledged he was no longer a member of the Midwest Percenters after club members made several ongoing threats regarding an unrelated incident.

¶ 42 10. *Detective Cathy Martin*

¶ 43 Detective Cathy Martin testified she was assigned to investigate the May 20, 2012, incident. As part of her investigation, she obtained surveillance footage from a bank located on Broadway Street. Detective Martin utilized both the video and still images taken from the video in her testimony.

¶ 44 Detective Martin testified the relevant part of the video ran from 2:02 p.m. to approximately 2:04 p.m. At 2:02:16 and 2:02:17, Detective Martin observed two bikers riding south on Broadway Street, whom she identified as Baehr and Cowman. At 2:02:24, she identified another motorcycle heading south that she determined belonged to defendant. However, she acknowledged defendant's motorcycle was not custom made but rather a factory model that could be bought from a dealership. Detective Martin noted she personally inspected the motorcycles belonging to all defendants after their arrest, which was how she was able to

identify them on the video. At 2:02:25 through 2:02:27, she observed the motorcycles belonging to Liggett, Jackson, and Teel traveling south on Broadway Street. She observed the rider of Jackson's motorcycle looked consistent with Jackson's appearance. Detective Martin noted the same set of motorcycles returned around 2:04 p.m., riding north on Broadway Street.

¶ 45 During Detective Martin's testimony, the State introduced numerous pictures of the motorcycles belonging to defendants. Defendant objected to People's exhibit No. 33, which depicted the motorcycle belonging to Teel with a Hell's Angels bumper sticker affixed to it. Defendant argued, by allowing the jury to see the picture with the bumper sticker, the State was "backdooring gang material" in violation of the motion *in limine*. The trial court overruled defendant's objection. Throughout the testimony, neither the State nor Detective Martin mentioned the bumper sticker.

¶ 46 Detective Martin also identified the motorcycle vests collected from defendants following their arrest. Detective Martin noted defendant's vest had "Enforcer" and "Whatever it takes" written on it. She also recalled Cowman telling her, during the incident, defendant was next to Teel on the right side of Cowman and Baehr, which was inconsistent with his trial testimony. Detective Martin testified Cowman told her the firearm he saw was a revolver, which would have a cylindrical shape, whereas the firearm Henderson said he found in the vests was a rectangular semiautomatic handgun.

¶ 47 11. *Detective Paul Hodges*

¶ 48 Detective Paul Hodges of the Quincy police department testified he accompanied Baehr to the showup where Baehr identified all four codefendants, including defendant. He then interviewed defendant, who denied all knowledge of a robbery occurring on May 20, 2012. According to Detective Hodges, defendant said he was at Kelly's when two Tunnel Rats rode by

and gave the Midwest Percenters "the finger," but he was not among the Midwest Percenters who pursued them. Rather, he stayed behind, then returned to the clubhouse with Jackson, Teel, and Liggett around 2:30 p.m., which was when he learned of the incident.

¶ 49 12. *Larry Williams*

¶ 50 Larry Williams, a member of the Midwest Percenters, testified he was at Kelly's for the bike show on May 20, 2012. He was showing his motorcycle, so he was in the parking lot from 10 a.m. until 4 or 5 p.m. along with approximately 300 bikers.

¶ 51 Williams testified he did not see Cowman or Baehr ride by, but he noticed Jackson, defendant, and Zane when they returned to the parking lot as a group. Williams described Jackson, Liggett, Teel, and defendant as his "club brothers."

¶ 52 According to Williams, after returning to the parking lot, Jackson stopped nearby, where Williams and Steven Thiele, another member of the Midwest Percenters, spoke with Jackson for several minutes before Jackson left for the clubhouse. During that period of time, during which Williams said he saw Jackson the entire time, Williams did not see Jackson or defendant carry anything or approach Kimbrell.

¶ 53 13. *Steven Thiele*

¶ 54 Thiele testified he was a member of the Midwest Percenters until April 2011, so he viewed defendant as a friend and a "club brother." He recalled the day Baehr was voted out of the club in late October 2010, stating Baehr was upset and threatened to make the club pay.

¶ 55 On May 20, 2012, Thiele was at Kelly's from 9 a.m. to 5 p.m. selling motorcycle magazines and photographing the motorcycles as part of his employment with a magazine. In the afternoon, he saw Baehr and Cowman ride by, at which time Baehr gave the group "the finger." Teel, Jackson, defendant, and Liggett rode after them but returned shortly thereafter,

close to 2:30 p.m. On their return, Thiele testified the codefendants parked 15 to 20 yards away and joined him and Williams. Thiele said he saw no bundle of leather and no one exchanging any items.

¶ 56 Thiele, a defense witness, testified the first time he had spoken with defense counsel was on the morning of his testimony. He had, however, spoken with defendant about the case. On cross-examination, Thiele could not recall the people who came and went from the parking lot throughout the day; he could only specifically recall the movement of the codefendants. He also acknowledged he was aware of defendant's arrest shortly afterward but did not come forward with his information until the time of trial.

¶ 57 14. *Jury Instructions and Verdict*

¶ 58 During the jury-instruction conference, the trial court permitted defendant to submit a lesser-included offense of theft from the person. Following deliberations, the jury found defendant guilty of (1) aggravated robbery, (2) robbery, and (3) theft from the person. The jury found defendant not guilty of the armed-robbery charge.

¶ 59 C. Posttrial Proceedings and Sentencing

¶ 60 In February 2014, defendant filed a motion for judgment notwithstanding the verdict, alleging the evidence was insufficient to prove defendant guilty beyond a reasonable doubt. At the same time, defendant also filed a motion for a new trial, asserting, in part, (1) a State's witness improperly referred to the Midwest Percenters as a "motorcycle gang" on five occasions in violation of the trial court's ruling on the motion *in limine*, and (2) the State improperly introduced photographs depicting the Midwest Percenters as a gang. The next month, the court denied defendant's posttrial motions.

¶ 61 Following a March 2014 sentencing hearing, the trial court sentenced defendant to five years' imprisonment on the count of aggravated robbery. The court also ordered defendant to pay various fines and fees.

¶ 62 This appeal followed.

¶ 63 II. ANALYSIS

¶ 64 On appeal, defendant asserts (1) he was denied a fair trial where the State introduced gang evidence in violation of the motion *in limine*, (2) a detective's identification testimony improperly invaded the province of the jury, and (3) certain fines should be vacated and recalculated and a $5 *per diem* incarceration credit applied. We address these assertions in turn.

¶ 65 A. Gang Evidence

¶ 66 Defendant first argues he was deprived of a fair trial where the State repeatedly presented prejudicial evidence of gang violence. Specifically, defendant points to the prejudice that resulted from (1) Officer Blazinic's use of the word "gang" four times; (2) admitting a photograph of Teel's motorcycle, which had a Hell's Angels bumper sticker; (3) Officer Blazinic's testimony that he "prepared himself for a possible gun battle"; and (4) Henderson's testimony that he failed to approach police because of the number of Midwest Percenters.

¶ 67 Generally, evidence a defendant was a gang member or participated in gang-related activities "is admissible to show a common purpose or design, or to provide a motive for an otherwise inexplicable act." *People v. Smith*, 141 Ill. 2d 40, 58, 565 N.E.2d 900, 907 (1990). Such evidence may be admitted so long as it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. *People v. Johnson*, 208 Ill. 2d 53,

102, 803 N.E.2d 405, 433 (2003). Evidentiary rulings regarding the admission of gang-related evidence are reviewed for an abuse of discretion. *Id.*

¶ 68 1. *Use of the Word "Gang"*

¶ 69 In this case, the trial court granted defendant's motion *in limine* precluding the introduction of gang evidence. Thus, when Officer Blazinic mentioned the word "gang" four times in his testimony, defendant sought a mistrial as a sanction for the State violating the motion *in limine*. The court should grant a mistrial "only as the result of some occurrence at trial of such character and magnitude that the party seeking it is deprived of his right to a fair trial. [Citation.]" *People v. Hall*, 194 Ill. 2d 305, 341, 743 N.E.2d 521, 542 (2000). The court should grant a mistrial only where it appears "the jury has been so influenced and prejudiced that it would not, or could not, be fair and impartial and the damaging effect of the evidence cannot be remedied by admonitions or instructions." *People v. Camden*, 219 Ill. App. 3d 124, 136, 578 N.E.2d 1211, 1220 (1991). We will not overturn the court's decision to grant or deny a motion for mistrial absent an abuse of discretion. *People v. Phillips*, 383 Ill. App. 3d 521, 547, 890 N.E.2d 1058, 1081 (2008).

¶ 70 Throughout the four-day trial, numerous witnesses testified, some of them at great length. All of the witnesses except for Officer Blazinic properly referred to the motorcycle groups as "clubs" rather than "gangs." Officer Blazinic, apparently unaware of the motion *in limine* immediately ceased using the word "gang" after defendant brought the issue to the trial court's attention. In considering how to handle Officer Blazinic's statements, the court determined mistrial too harsh a sanction, and opted instead to instruct the jury to disregard Officer's Blazinic's use of the word "gang." Such a decision was not an abuse of discretion.

¶ 71 Though the witnesses were not always entirely consistent in their testimony, Baehr, Cowman, and Liggett all testified defendant was in the group of Midwest Percenters who participated in the robbery. Baehr and Liggett both recalled defendant standing beside his motorcycle during the exchange where Jackson demanded Baehr and Cowman hand over their club vests. In fact, Liggett recalled defendant taking one of the vests from Jackson at one point. Regardless of whether defendant remained seated or stood, the same three witnesses testified defendant participated in surrounding Baehr and Cowman so they would be unable to leave the scene. Moreover, the surveillance video showed defendant's motorcycle in the group of motorcyclists riding after Baehr and Cowman. Elizabeth, Cowman, and Baehr all testified that Teel threatened to shoot them if they did not cooperate with Jackson's order to hand over the club vests. Other witnesses, Thiele and Williams, observed defendant return to Kelly's parking lot with the other codefendants after the robbery occurred. The evidence at trial directly contradicts defendant's statement to police that he was not present when the robbery occurred.

¶ 72 Based on the overwhelming evidence at trial, we find the minimal impact of Officer Blazinic's use of the word "gang" supported the trial court's decision to deny defendant's motion for mistrial. Accordingly, the court did not abuse its discretion by instructing the jury to disregard the use of the word "gang," as the minimal impact of the word did not deprive defendant of a fair trial.

¶ 73 2. *The Hell's Angels Bumper Sticker*

¶ 74 Defendant argues the State improperly introduced prejudicial gang evidence by showing a photograph of Teel's motorcycle, which had a Hell's Angels bumper sticker affixed to it. The trial court found this particular evidence was not precluded by the motion *in limine*.

¶ 75 We disagree with defendant's contention the bumper sticker shows evidence of gang activity. In this case, Detective Martin viewed the motorcycles belonging to defendants in an attempt to determine whether the same motorcycles were depicted in the surveillance video. Part of that identification would require Detective Martin to observe any unique features, such as bumper stickers, on those motorcycles. The need for proper identification makes the exhibit relevant.

¶ 76 Moreover, we find no evidence of prejudice here. Neither party even mentioned the bumper sticker, which was largely illegible in the photograph. Even if the jury closely studied the bumper sticker, it mentions nothing about gangs or violence, nor did any witnesses testify that the bumper sticker indicated gang affiliation. Accordingly, we conclude the trial court properly admitted the photograph of Teel's motorcycle because the evidence was not prejudicial.

¶ 77 3. *Officer Blazinic Preparing for a Gun Battle*

¶ 78 Defendant also raises two other instances of allegedly prejudicial behavior—Officer Blazinic's statement that he prepared for a gun battle and Henderson's statement regarding the number of Midwest Percenters. We note defendant failed to preserve these issues in a posttrial motion, so all of these issues are deemed forfeited. *People v. McCarty*, 223 Ill. 2d 109, 122, 858 N.E.2d 15, 25 (2006). However, we may consider a forfeited claim where the defendant demonstrates plain error occurred. *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d 403, 412 (2010). To prove plain error, a defendant must first demonstrate a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007).

¶ 79 Defendant asserts Officer Blazinic's testimony that he prepared himself for a gun battle was prejudicial and deprived him of his right to a fair trial. Defendant argues such a

statement implies the defendants were inherently more dangerous than other suspects he generally encountered. We disagree.

¶ 80 The information provided to Officer Blazinic through dispatch indicated nine suspects had just committed an armed robbery. Officer Blazinic then happened across five motorcyclists who met the general description of the suspects. Four of those suspects entered a brick building, and Officer Blazinic waited outside for backup to arrive.

¶ 81 Therefore, as he awaited backup, Officer Blazinic, as the sole officer confronting four armed-robbery suspects, reasonably prepared himself by donning a bulletproof vest and arming himself with an AR-15 rifle. Further, his testimony was relevant to the narrative describing the events leading to defendant's arrest and subsequent identification by Baehr. See *People v. Gonzalez*, 142 Ill. 2d 481, 488, 568 N.E.2d 864, 867 (1991). We therefore find unpersuasive defendant's argument that Officer Blazinic's reaction implied the defendants were more dangerous than other suspects. Accordingly, defendant has failed to demonstrate a clear or obvious error occurred.

¶ 82 4. *Henderson's Statement Regarding Number of Midwest Percenters*

¶ 83 Defendant next argues Henderson's testimony that he originally failed to tell police about his locating a weapon during his attempt to hide the leather vests until the number of Midwest Percenters decreased was prejudicial. Defendant contends this statement implies Henderson was somehow at risk of physical harm from the Midwest Percenters, a fact unsupported by the record.

¶ 84 Even if we were to accept defendant's assertion that Henderson's statement implied a fear of physical harm, we disagree with defendant's argument that the Midwest Percenters could inflict physical harm was unsupported by the record. The uncontradicted

testimony at trial from Baehr, Cowman, Liggett, and Elizabeth provided defendants, as members of Midwest Percenters, surrounded the motorcycles of Baehr and Cowman on a public highway, and took their club vests by threatening the use of force. Baehr and Cowman both testified Teel threatened to shoot them if they failed to comply. Thus, the implication that the Midwest Percenters could inflict physical harm was supported by the record.

¶ 85 Regardless, defendant opened the door to this line of questioning by asking Henderson about his failure to tell Detective Martin until approximately four months before trial about a semiautomatic handgun falling from the vests as he removed them from the car. On redirect, the State was entitled to attempt to rehabilitate Henderson by asking him to explain the reason for the delay in providing the information. See *People v. Thompkins*, 121 Ill. 2d 401, 444, 521 N.E.2d 38, 57 (1988) ("where the door to a particular subject is opened by defense counsel on cross-examination, the People may, on redirect, question the witness to clarify or explain the matters brought out during the previous cross-examination."). Accordingly, we find no clear or obvious error with regard to this issue.

¶ 86 We therefore conclude the trial court committed no error with regard to allowing this evidence.

¶ 87 B. Silent-Witness Testimony

¶ 88 Defendant next asserts Detective Martin's identification testimony improperly invaded the province of the jury.

¶ 89 Defendant did not raise this issue in a posttrial motion, which would ordinarily result in forfeiture of the issue on appeal. *McCarty*, 223 Ill. 2d at 122, 858 N.E.2d at 25. However, we may consider a forfeited claim where the defendant demonstrates plain error occurred. *Thompson*, 238 Ill. 2d at 611, 939 N.E.2d at 412. To prove plain error, a defendant

must first demonstrate a clear or obvious error occurred. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 411. If the defendant proves a clear or obvious error occurred, we will reverse only where (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error;" or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Id*. at 565, 870 N.E.2d at 410-11. We review *de novo* whether the State's witness properly narrated the video. *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 30, 972 N.E.2d 1272.

¶ 90 Where no witness has personal knowledge as to the events a particular recording or photograph depicts, the parties may still introduce those photographs and video recordings as substantive evidence so long as the proper foundation is laid. *People v. Taylor*, 2011 IL 110067, ¶ 32, 956 N.E.2d 431. This evidence is admitted under the silent-witness theory, as the contents speak for themselves. *Id.*

¶ 91 In this case, defendant does not challenge the foundation for the admission of the photographs and video recording. Rather, defendant argues Detective Martin violated the silent-witness theory by narrating the video surveillance with identification testimony where she had no personal knowledge of the event.

¶ 92 A lay witness may only testify to events of which he or she has personal knowledge. Ill. R. Evid. 602 (eff. Jan. 1, 2011). Such testimony must be "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Ill. R. Evid. 701 (eff. Jan. 1, 2011). Further, Illinois Rule of Evidence 704 (eff. Jan. 1, 2011) provides, "Testimony in the form of an

opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

¶ 93 Defendant asserts Detective Martin's narrative identification testimony was inappropriate because it was not rationally based on her perception of the witness, nor was it helpful to a clear understanding of a fact in issue, as the jury could just as easily view the video and make its own determinations. In support, defendant relies upon *Sykes*, 2012 IL App (4th) 111110, 972 N.E.2d 1272, where this court reversed the defendant's conviction due to the introduction of improper lay witness testimony. In *Sykes*, a loss-prevention officer, who did not personally witness the defendant committing a theft, testified he reviewed surveillance footage depicting the defendant committing a theft from the register. *Id.* ¶ 6. At the trial, the State showed a video of inferior quality that rendered the defendant's actions particularly blurry. *Id.* ¶ 9. This court held the loss-prevention officer should not have been permitted to narrate the video because he lacked personal knowledge of the event and was in no better position than the jury to view the events on the video. *Id.* ¶ 42.

¶ 94 By contrast, the State relies on *People v. Starks*, 119 Ill. App. 3d 21, 26, 456 N.E.2d 262, 266 (1983), which held the narrative testimony of a corrections officer who did not personally view a prison fight was admissible, as the officer had personal knowledge of the defendant and could aid the jury in identifying him in a video of poor quality. This court went on to note the defendant could also provide witnesses challenging the identification of the defendant. *Id.* The State also relies on *People v. Mister*, 2015 IL App (4th) 130180, ¶ 18, 27 N.E.3d 97, in which a surveillance employee at a casino found a video depicting the defendant leaving the casino behind an individual who had just won several thousand dollars. *Id.* ¶¶ 5, 22. This court held "a lay witness may testify regarding the identity of a person depicted in a

surveillance video if there is some basis for concluding the witness is more likely to correctly identify the individual from the videotape than is the jury." *Id.* ¶ 68. We point out that *Starks* has been overruled by the supreme court's ruling in *People v. Thompson*, 2016 IL 118667, 49 N.E.3d 393, which addresses the issue of law-enforcement officers providing identification testimony. In addition, the appellate court has been directed to vacate its judgment in *Mister* and reconsider the matter in light of *Thompson*. See *People v. Mister*, 2016 IL 118934, 48 N.E.3d 668 (Mem) (non-precedential supervisory order on denial of petition for leave to appeal).

¶ 95 In *Thompson*, numerous officers identified the defendant as the person depicted in a video recording or photograph carrying a bucket and a soda bottle with a hose, items commonly used to steal anhydrous ammonia. *Id.* ¶¶ 8, 11, 13, 17-18, 21. In holding there is no *per se* rule against admission of a law enforcement officer's identification testimony, the supreme court also held,

> "[W]hen the State seeks to introduce lay opinion identification testimony from a law enforcement officer, the circuit court should afford the defendant an opportunity to examine the officer outside the presence of the jury. This will provide the defendant with an opportunity to explore the level of the witness's familiarity as well as any bias or prejudice. Moreover, it will allow the circuit court to render a more informed decision as to whether the probative value of the testimony is substantially outweighed by the danger of unfair prejudice." *Id.* ¶ 59.

¶ 96 In applying this rule, the *Thompson* court held the trial court erred in admitting the officers' identification testimony without first engaging in precautionary measures as required

for law enforcement witnesses. *Id*. ¶ 62. However, the supreme court also determined such an error was harmless, particularly because defendant confessed to the offense and made other incriminating statements about his conduct in the months prior to his arrest. *Id*. ¶ 67.

¶ 97 In this case, Detective Martin provided her identification testimony without the trial court first engaging in the necessary precautionary measures as required for law enforcement. Thus, the question before this court is whether the absence of the cautionary steps set forth under *Thompson* constitutes plain error requiring reversal.

¶ 98 Under the first prong of plain error, the defendant must demonstrate "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error." *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410.

¶ 99 Here, Detective Martin's identification testimony identified the motorcycles in the surveillance video as belonging to defendants. However, as noted above, her identification testimony only served to support the testimony of three eyewitnesses who placed defendant and his codefendants at the scene of the robbery. Defendant asserts Detective Martin's identification of him as leading the pack tipped the scales of justice, as it implied he was leading the group in the robbery. Defendant points out that Liggett testified to being in the lead, not defendant. Defendant also argues the evidence of defendant's participation in the robbery was closely balanced, as Cowman did not see defendant take any action during the robbery. See *People v. Taylor*, 186 Ill. 2d 439, 446, 712 N.E.2d 326, 329 (1999) ("a person may not be held accountable for a crime merely for being present"). We disagree.

¶ 100 As previously discussed, Baehr testified he saw defendant stand beside his motorcycle, and Liggett testified defendant took one of the leather vests from Jackson. Three

eyewitnesses all testified defendant blocked Baehr and Cowman from leaving while the Midwest Percenters engaged in the robbery of the leather vests. This uncontradicted testimony is sufficient evidence of his participation in the crime. See 720 ILCS 5/5-2(c) (West 2010) (a defendant is accountable for the conduct of another where he "solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense").

¶ 101 Moreover, the testimony offered by Detective Martin only went to the identification of defendants' motorcycles on the way to the robbery, where the eyewitness testimony concerned defendant's participation in the robbery. Her identification did not extend to any aspect of the crime itself, which was outside the scope of the recording. We therefore conclude the evidence was not closely balanced.

¶ 102 We next turn to the second prong of plain error, wherein defendant argues the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11.

¶ 103 The supreme court "equate[s] the second prong of plain-error review with structural error, asserting that automatic reversal is only required where an error is deemed 'structural,' *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotations omitted.) *Thompson*, 238 Ill. 2d at 613-14, 939 N.E.2d at 413.

¶ 104 Here, defendant contends Detective Martin's testimony constituted structural error because it improperly invaded the province of the jury. We disagree that such an error constitutes a structural error.

¶ 105 As noted above, Detective Martin provided no identification testimony regarding the robbery itself, as the recording only depicted the motorcyclists riding by the bank. The uncontradicted eyewitness testimony that he helped to surround Baehr and Cowman's motorcycles to prevent them from fleeing the robbery provided the evidence of his participation in the robbery. Thus, we conclude defendant has failed to demonstrate a structural error necessary for reversal under the second prong of plain error.

¶ 106 Finally, we decline to address defendant's argument that his attorney committed ineffective assistance of counsel for failing to raise this issue, concluding this claim would be better pursued in a postconviction action where a complete record can be made. See *People v. Pelo*, 404 Ill. App. 3d 839, 870, 942 N.E.2d 463, 490 (2010).

¶ 107 C. Fines and Fees

¶ 108 Finally, defendant challenges the calculation of certain fines imposed by the trial court. Specifically, defendant asserts (1) the court improperly imposed a Crime Stoppers fine and, as a result, the lump-sum surcharge and violent crimes victims assistance (VCVA) fine must be recalculated; and (2) he is entitled to $5 *per diem* incarceration credit against his creditable fines. Our review of the trial court's imposition of fines and fees is *de novo*. *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 34, 13 N.E.3d 1280.

¶ 109 The State concedes the trial court improperly imposed the Crime Stoppers fee, and it must therefore be vacated. We accept the State's concession, as the Crime Stoppers fee should only be imposed where a defendant receives a community-based sentence. *People v. Beler*, 327 Ill. App. 3d 829, 837, 763 N.E.2d 925, 931 (2002).

¶ 110 The State also agrees the VCVA fine and lump-sum surcharge require recalculation as a result of this court vacating the Crime Stoppers fee, but the parties disagree as

to the amount of the recalculation. The State has asked this court to reclassify some of the assessed fees as constituting fines, which would result in an increase of defendant's VCVA fine and lump-sum surcharge. Defendant asks us to deny the State's request in light of the supreme court's recent decision in *People v. Castleberry*, 2015 IL 116916, 43 N.E.3d 932. We agree with defendant's position.

¶ 111 In *Castleberry*, the supreme court held the State could no longer request an increase of defendant's sentence upon appeal, as it was not a cross-appellant to the proceedings. *Id*. ¶ 22. Rather, if the State contests a defendant's sentence, it may pursue an alternative remedy such as *mandamus* relief. *Id.* ¶ 27.

¶ 112 In this instance, the State does not simply allege that recalculation of the VCVA fine and lump-sum surcharge will yield a mathematically different result from the result proposed by defendant. Instead, the State asks us to consider whether certain fees actually qualify as fines, which would then result in an increase of the VCVA fine and lump-sum surcharge. We conclude this approach would allow the State to impermissibly attempt to enlarge its own rights while lessening defendant's rights. See *id*. ¶ 22. Based on the supreme court's decision in *Castleberry*, we decline to undertake such an analysis. We therefore vacate the VCVA fine and lump-sum surcharge and remand for the trial court to reimpose those charges after deducting the Crime Stoppers fee from the total.

¶ 113 Defendant also asserts he is entitled to $365 of pretrial incarceration credit based on his 69 days spent in pretrial custody. The State concedes this issue and we accept the State's concession as modified. A defendant is entitled to $5 *per diem* credit for each day spent in pretrial detention, which can be applied to his creditable fines. 725 ILCS 5/110-14(a) (West

2012). However, our calculation reveals defendant is actually entitled to an incarceration credit of $345 (69 days at $5 per day), not the $365 he requested.

¶ 114 We therefore (1) vacate the $10 Crime Stoppers fee, VCVA fine, and lump-sum surcharge; (2) remand to the trial court for recalculation of the VCVA fine and lump-sum surcharge after deducting the Crime Stoppers fee; and (3) order the court to apply $345 incarceration credit toward any creditable fines.

¶ 115 III. CONCLUSION

¶ 116 For the foregoing reasons, we affirm the trial court's judgment in part, vacate in part, and remand with directions regarding the imposition of fines, fees, and pretrial incarceration credit. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 117 Affirmed in part and vacated in part; cause remanded with directions.