2017 IL App (1st) 150029-U

SECOND DIVISION
December 12, 2017

No. 1-15-0029

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 10 CR 17488-01
	)	
JABRIEL ANDERSON,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: (i) Evidence was sufficient to convict defendant of first-degree murder on a theory of accountability. (ii) During *voir dire*, trial court properly refused defense questions that concerned matters of law and were designed to ensure that jurors were receptive to defendant's theory of defense. (iii) Trial court's brief comments regarding defense counsel, while intemperate, did not materially prejudice the defense. (iv) Prosecutor's statement that defendant was "in jail" was improper but harmless. (v) Defense counsel's misstatement that defendant fired the murder weapon was harmless where the rest of counsel's argument and the evidence made clear that defendant was not the shooter. (vi) Defense forfeited challenge to witness's alleged prior consistent statements and, in any event, defense was not prejudiced by those statements. (vii) Trial court properly refused self-defense instruction where no evidence supported the instruction. (viii) Defense counsel acquiesced in trial court's response to a jury question during deliberations and, therefore, waived any claim of error on appeal. (ix) Defendant was entitled to

resentencing where he was 17 years old at the time of the offense and his 95-year sentence was a *de facto* life sentence.

¶ 2 On May 12, 2010, 17-year-old defendant Jabriel Anderson got into a fight with Tomaras Qualls at a party. After Qualls left the party, Jabriel and several friends (including codefendants Corey Anderson (no relation to Jabriel) and Jason Burns) went looking for Qualls to fight him. The group saw a silver Monte Carlo pull up near the house where the party was taking place. Jabriel said "That was them." Burns snatched Corey's gun and fired several times at the Monte Carlo. In fact, Qualls was not in the car, but Adam Martinez, Brian Lawson, and Robert Alvarado were, and Martinez was fatally shot.

¶ 3 Following a jury trial, Jabriel was found guilty on an accountability theory of the first-degree murder of Martinez, the attempted murder of Lawson and Alvarado, and aggravated discharge of a firearm at Lawson and Alvarado. Jabriel was sentenced to 95 years' imprisonment. On appeal, he raises numerous contentions of trial error, which we discuss in detail below. Jabriel also challenges his 95-year sentence.

¶ 4 We affirm Jabriel's conviction but vacate his sentence and remand for resentencing because Jabriel's 95-year-sentence was a *de facto* life sentence imposed for an offense he committed as a juvenile.

¶ 5 BACKGROUND

¶ 6 On the evening of May 12, 2010, Xavier Smith was hosting a party at his home in Park Forest. Also present were Jabriel, Qualls (nicknamed "Blood"), Marquell Carter, and Jessica Robinson. Jabriel and Qualls got into an argument when Jabriel said "F*** Blood gang" and Qualls replied "F*** MOEBUA." (According to Carter, MOEBUA stands for "money over everything, bitches under all.") Jabriel hit Qualls in the mouth, and they scuffled briefly before

Carter and Smith broke up the fight. Shortly thereafter, Jabriel and Qualls got into another fistfight, which Jabriel was winning until Smith and Jessica pulled them apart.

¶ 7 Qualls left the party. He returned 10 to 15 minutes later with two friends and tried to convince Jabriel to come outside and fight them. Jabriel refused to leave the house but told them, "If you're at my head, I'm at yours." Faced with Jabriel's refusal, Qualls and his friends left and did not return.

¶ 8 Jabriel made a phone call to his friend Raymond Darden, asking Darden to come pick him up. According to Carter, Jabriel "was kind of mad because the people tried to come and jump on him." Jessica, who watched Jabriel making the phone call, said, "[Jabriel] was inhaling and exhaling. You could tell he was very angry."

¶ 9 Some time later, Darden arrived, accompanied by three friends: Corey, Burns, and Cortez Robinson. Carter observed that Corey had a gun in his waistband. Jabriel ran outside to meet Darden and his friends and told them about his earlier fight with Qualls. Then Jabriel, Darden, and Darden's three friends walked to Qualls's house. At trial, Darden testified that he merely intended to talk to Qualls's brother about the fight, but in his earlier sworn testimony before the grand jury and at Burns's trial, he stated that the group went to fight Qualls.

¶ 10 According to Darden[1], when the five of them reached Qualls's house, Jabriel knocked on the door and Qualls's mother answered. Jabriel threatened her, saying, "Tell your son I am going to f*** him up." Then the five of them left and walked back to Smith's house.

[1] At trial, Darden claimed not to remember much about the events of May 12 and was impeached by his prior sworn statements before the grand jury and during Burns's trial. For clarity, the substance of his testimony here reflects his sworn statements on those prior occasions. The jury was not told that Darden was a witness at Burns's trial, but that he testified in a "prior proceeding."

¶ 11 As they neared Smith's house, a silver Monte Carlo drove past. According to Darden, Jabriel said "That was them" and "Give me the cappa, give me the cappa" (*i.e.*, the gun). The Monte Carlo parked in the lot directly behind Smith's house. The group headed toward the car: Darden and Corey went around the right side of the house, while Jabriel, Burns, and Cortez took a more direct route through a gangway. Corey then reversed direction and went through the gangway with the others. Darden heard several gunshots and ran back to his car. The others came running back as well. They drove away, and Darden brought Jabriel home. On the drive back, Jabriel told Darden: "That's what I am talking about. Lord [Corey] and Folks [Burns] let them n*****s have it. *** Drop me off. *** I am happy as hell. I heard one of them say, aww, aww [moaning sound]."

¶ 12 Carter also witnessed the shooting. He was standing in the doorway of Smith's house when Jabriel, Corey, Burns, Darden, and Cortez returned from Qualls's house. Carter saw a silver Monte Carlo park and heard someone say "That's the people? Is that them?" Corey reached toward the gun in his waistband, but Carter saw Burns snatch the gun from him and fire toward the Monte Carlo.

¶ 13 Later that night, after the party, Smith took Jessica home and then went to Jabriel's house.[2] Jabriel was "boasting and bragging" about his fight with Qualls. He said to Smith, "Lord [Corey] busted that bitch, but I think we shot at the wrong guy."

¶ 14 As Jabriel belatedly realized, Qualls was not in the silver Monte Carlo that evening. Instead, the occupants were a group of friends who were not involved in the earlier fight between Jabriel and Qualls. Martinez was driving, Lawson was in the front passenger seat, and Alvarado and Andre Johnson were in the back. They were planning to go to Martinez's girlfriend's house,

[2] At trial, Smith said that he could not recall where he went after taking Jessica home. His testimony here reflects his earlier sworn grand jury testimony.

but first, they were planning to purchase marijuana from a friend in Park Forest. Martinez parked the car, and everyone but Alvarado was using their cell phones. Alvarado noticed a group of individuals staring at them. "Who that?" he said. Lawson said, "I don't know who that is. Let's get out of here." Martinez put the car into reverse. Immediately, gunshots rang out, shattering the passenger-side window. Lawson crouched down with his head between his knees. He shook Martinez's leg, saying, "Why aren't we moving? Why are we still here?" Martinez did not respond. Lawson looked up and saw Martinez bleeding profusely from a wound in the side of his head.

¶ 15 Lawson, Alvarado, and Johnson fled the car on foot. Lawson ran to a nearby house and asked the people inside to call the police. Police and paramedics responded to the scene, and Martinez was brought to the hospital, where he died. An autopsy revealed that the cause of death was a gunshot wound to the head.

¶ 16 The sole witness for the defense was Cabeza Anderson, Jabriel's mother. Cabeza testified that in May 2010, Jabriel was 17 years old and living at home with her. He was arrested on May 13 and brought to the Park Forest police department for 72 hours, after which he was released. He did not make any attempt to leave town before he was arrested again on September 1, 2010. Cabeza also stated that Jabriel is no relation to Corey and, to the best of her knowledge, did not know Corey.

¶ 17 Shortly after the jury instruction conference, Jabriel's counsel orally asked for a self-defense instruction, arguing that Jabriel was in an "ongoing fight" with Qualls when the shooting occurred. After hearing arguments, the trial court rejected the instruction, finding that there was no evidence Jabriel acted in self-defense.

¶ 18 The jury found Jabriel guilty of the first-degree murder of Martinez, the attempted murder of Lawson and Alvarado, and aggravated discharge of a firearm at Lawson and Alvarado.[3] Jabriel was sentenced to 45 years' incarceration for the first-degree murder conviction (30 years plus a 15-year firearm enhancement) and 25 years for each of the attempted murders of Lawson and Alvarado (10 years plus a 15-year firearm enhancement). The trial court imposed the sentences consecutively, for a total sentence of 95 years.

¶ 19 ANALYSIS

¶ 20 Jabriel raises eight contentions of trial error: (i) the evidence was insufficient to convict him of first-degree murder; (ii) during *voir dire*, the trial court erred by not permitting defense counsel to ask about the venirepersons' "attitude toward personal responsibility"; (iii) during *voir dire*, the trial court made improper comments about defense counsel; (iv) during opening arguments, the prosecutor improperly referenced the fact that Jabriel was in custody; (v) defense counsel was ineffective for misstating in opening arguments that Jabriel was the shooter; (vi) the State improperly bolstered Carter's credibility by introducing his prior consistent statements; (vii) the trial court improperly refused to give the jury an instruction on self-defense; and (viii) during deliberations, the trial court erred by failing to explain the law to a juror who did not understand it. Jabriel also challenges his 95-year sentence. We consider these contentions in turn.

¶ 21 Sufficiency of the Evidence for First-Degree Murder Conviction

¶ 22 Jabriel's first contention is that the evidence was insufficient to convict him of first-degree murder on a theory of accountability. He argues that Darden's credibility was suspect,

[3] Although Jabriel was also charged with aggravated discharge of a weapon and the attempted murder of Johnson, the Monte Carlo's fourth occupant, the State evidently elected not to proceed on those charges as they were not presented to the jury.

and, even if the jury chose to believe him, the State's evidence only establishes that Jabriel had a "minimal connection" with the murder of Martinez.

¶ 23 When reviewing the sufficiency of the evidence on appeal, it is not our function to retry the defendant or substitute our judgment for that of the trial court. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, we must determine " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Graham*, 392 Ill. App. 3d 1001, 1008-09 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is the jury's responsibility to assess the credibility of witnesses, determine the weight to give their testimony, and resolve conflicts or inconsistencies in the evidence. *Id.* at 1009.

¶ 24 A person is legally accountable for the criminal conduct of another when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he or she solicits, aids, abets, agrees or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2010). To establish the requisite intent, the State must prove that either (i) the defendant shared the principal's criminal intent or (ii) there was a common criminal design between the codefendants. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 79.

¶ 25 The evidence at trial, viewed in the light most favorable to the State, provides ample evidence that Jabriel both shared Burns's criminal intent and had a common criminal design with his companions. Jabriel was "very angry" after his altercations with Qualls and threatened him, saying, "If you're at my head, I'm at yours." When Darden came to Smith's house with reinforcements in tow, Jabriel joined the group, told them about his earlier fights with Qualls,

and then proceeded with them to Qualls's house for the purpose of attacking Qualls. There, Jabriel threatened Qualls's mother, saying, "Tell your son I am going to f*** him up."

¶ 26 When the group returned to Smith's house, Jabriel spotted what he believed to be Qualls's car. He said "That was them" and "Give me the cappa, give me the cappa"—*i.e.*, he demanded to be given Corey's gun. Corey reached for the gun in his waistband, but Burns was quicker on the draw, grabbing the gun and firing multiple times at the car. After the shooting, as Darden was giving Jabriel a ride home, Jabriel openly approved of Burns's actions and commented that he was "happy as hell." It was only later that Jabriel expressed any doubt about the situation, telling Smith, "I think we shot at the wrong guy."

¶ 27 Based on this evidence—Jabriel's threats toward Qualls, his demand for Corey's gun, and his praise for Corey and Burns after the shooting—a reasonable jury could conclude that Jabriel intended to use Corey's gun to shoot the people in the Monte Carlo. Jabriel invites us to speculate that when he threatened to "f*** [Qualls] up," he desired only a fistfight and would have disapproved of lethal force. He also theorizes that he might have demanded Corey's gun so that he could *prevent* his companions from firing at the car. But the trier of fact is not required to "search out all possible explanations consistent with innocence, and raise those explanations to a level of reasonable doubt." *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Moreover, Jabriel's theory of the case is wildly implausible, given that he enlisted the aid of his companions after the initial fight with Qualls, tried to get Corey's gun himself when he thought he spotted Qualls's car, and later praised Burns for firing on the car.

¶ 28 As for common criminal design, " '[e]vidence that a 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.' " *Willis*, 2013 IL App (1st) 110233, ¶ 79 (quoting *In re W.C.*, 167 Ill. 2d 307, 338 (1995)); see also *People v. Malcolm*, 2015 IL App (1st) 133406, ¶ 44 (even if defendant does not overtly participate in criminal act, fact that defendant "attaches himself to a group bent on illegal acts" weighs toward a finding of accountability). Although Jabriel did not explicitly ask Darden to bring reinforcements, he voluntarily attached himself to the group as they went looking for Qualls to continue the fight. He also directed the group's attention to the Monte Carlo by saying, "That was them."

¶ 29 Additionally, evidence that a defendant " 'maintained a close affiliation with his companions after the commission of the crime' " weighs toward a finding of accountability. *People v. Flynn*, 2012 IL App (1st) 103687, ¶ 23 (quoting *People v. Taylor*, 164 Ill. 2d 131, 141 (1995)). Jabriel, as noted, expressly approved of his companions' actions after the fact, stating that he was "happy as hell" that Corey and Burns "let them n*****s have it."

¶ 30 Jabriel urges us to disregard Darden's prior sworn testimony, arguing that Darden had "severe credibility problems" because, at trial, he claimed not to remember significant portions of that testimony. Additionally, Darden admitted lying to police when initially questioned about the incident and testified that he drank alcohol on the day of the incident. But it is well established that "[a] conviction will not be reversed simply because the defendant tells us that a witness was not credible." *Jonathon C.B.*, 2011 IL 107750, ¶ 60 (trier of fact was entitled to believe victim's testimony regarding assault, despite defendant's argument that victim's testimony was inconsistent and flawed). As the finder of fact, the jury had the responsibility to decide whether to believe Darden's recantation at trial or his prior sworn testimony before the grand jury and at Burns's trial, which was introduced as substantive evidence. It is not the role of the reviewing court to second-guess that determination. *Graham*, 392 Ill. App. 3d at 1008-09.

Accordingly, we find that the evidence was sufficient to convict Jabriel of first-degree murder on an accountability theory.

¶ 31 *Voir Dire*

¶ 32 Jabriel argues that the trial court erred by precluding him from asking prospective jurors about their attitude toward personal responsibility. The State argues that this line of questioning was properly rejected as an attempt to impanel a jury with a particular predisposition.

¶ 33 The manner and scope of *voir dire* examination rests within the sound discretion of the trial court, and we review the trial court's decisions for an abuse of discretion. *People v. Rinehart*, 2012 IL 111719, ¶ 16. The purpose of *voir dire* is to choose an impartial jury, not to indoctrinate the jury or choose a jury with a particular predisposition. *Id.*; *People v. Reeves*, 385 Ill. App. 3d 716, 730 (2008). Accordingly, the trial court properly refuses questions that are designed to ensure that jurors are receptive to the defendant's theory of defense. *Reeves*, 385 Ill. App. 3d at 730; *People v. Karim*, 367 Ill. App. 3d 67, 92 (2006). Additionally, Supreme Court Rule 431(a) provides that "[q]uestions shall not directly or indirectly concern matters of law or instructions." Ill. S. Ct. Rule 431(a) (eff. July 1, 2012).

¶ 34 On the first day of *voir dire*, near the start of the defense's examination of the venire, defense counsel stated:

> "DEFENSE COUNSEL: Now, let me ask [veniremember] a question—and this kind of goes to everyone else. What is the meaning of personal responsibility to you? What does that mean?
>
> THE COURT: Objection sustained. You are not going to go into that. Move on."

Defense counsel asked for a sidebar. He explained that he wanted to ask "several" prospective jurors the question "What does personal responsibility mean to you?" because Jabriel did not

personally fire the murder weapon but was charged on a theory of accountability. The trial court replied:

"THE COURT: It is a question of law. It is a definition of accountability, so you are not going to go into that.

DEFENSE COUNSEL: Could I ask them about when would you find somebody accountable or responsible for the actions of another?

THE COURT: No.

DEFENSE COUNSEL: So nothing at all about accountability?

THE COURT: Yes."

¶ 35 The defense's question was improper because it was designed to discover whether the prospective jurors would be receptive to Jabriel's theory of defense—namely, that he was not accountable for Burns's actions. *Reeves*, 385 Ill. App. 3d at 730 (trial court properly refused *voir dire* question designed to indoctrinate jurors); *Karim*, 367 Ill. App. 3d at 92 (trial court properly refused to allow *voir dire* questions regarding prospective jurors' attitudes toward self-defense; such questions would serve no purpose other than improperly preeducating and indoctrinating jurors as to defendant's theory of the case). Additionally, counsel's proposed question about "when would you find somebody accountable or responsible for the actions of another" concerned a matter of law—*i.e.*, the legal definition of accountability—and was properly excluded under Rule 431(a). Ill. S. Ct. Rule 431(a) (eff. July 1, 2012). Accordingly, we find no error in the trial court's refusal of this line of questioning.

¶ 36 *People v. Valladares*, 2013 IL App (1st) 112010, is inapposite. In that case, the trial court (not defense counsel) gave prospective jurors a brief summary of accountability principles and inquired as to whether the jurors could follow the law and apply those principles. *Id.* ¶ 100.

On appeal, defendant argued that this constituted reversible error because the trial court's statement of the law was incomplete. *Id.* We disagreed, finding that the inquiry was within the trial court's discretion and any error was harmless because the jury was fully instructed on a later occasion. *Id.* ¶ 105. *Valladares* did not hold that a trial court *must* permit the venire to be instructed on accountability principles, merely that it was not an abuse of discretion for the judge to do so. Moreover, in this case, the defense did not ask the trial court to give the venire a neutral summary of the relevant law but was fishing for jurors' predispositions by asking them about their attitude toward personal responsibility. The trial court did not abuse its discretion in refusing this line of questioning.

¶ 37 Trial Court's Comments Regarding Defense Counsel

¶ 38 Jabriel next argues that during *voir dire*, the trial court made improper comments about his lawyer in the presence of the venire, thus prejudicing the defense. Specifically, the court stated that counsel was "trying to brainwash this jury" and that counsel was "pestering" a prospective juror.

¶ 39 Every defendant is entitled to a trial that is free from improper and prejudicial comments on the part of the trial judge. *People v. Tatum*, 389 Ill. App. 3d 656, 662 (2009). Because jurors are "ever watchful of the attitude of the trial judge" (*People v. Burgess*, 2015 IL App (1st) 130657, ¶ 180 (internal quotation marks removed)), the judge must take care not to display unnecessary antagonism or favor toward any party. *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 76. Nevertheless, even where the judge makes improper comments, reversal is not warranted unless the defendant has been prejudiced as a result. *Id.* (citing *People v. Heidorn*, 114 Ill. App. 3d 933, 937-38 (1983) (judge's improper remarks were harmless error where, in view of the total circumstances of the case, they had no effect on the jury's verdict)); see also

People v. Williams, 209 Ill. App. 3d 709, 720 (1991) (although it was improper for judge to comment on defense counsel's unprofessional conduct in presence of jury, error was harmless in light of strong evidence of defendant's guilt). The defendant bears the burden of proof to show prejudice. *Johnson*, 2012 IL App (1st) 091730, ¶ 76.

¶ 40 After viewing the complained-of comments in context, we do not find that they constitute reversible error. The court's comment regarding "trying to brainwash" the jury occurred in the context of defense counsel's repeated exhortations to the venire to "be fair" in rendering a verdict. Over the two days of jury selection, the trial court asked each prospective juror whether he or she could listen to the evidence, apply the law, and render a fair and impartial decision. They all responded in the affirmative. Nevertheless, at the start of his examination, the defense asked of one prospective juror:

"DEFENSE COUNSEL: Do you have any doubt whatsoever that you are able to be fair? It is your duty to tell us. Do you understand that?

PROSPECTIVE JUROR: I understand.

Q. You have gone through—your cousin was murdered ten years ago. You hesitated when the judge asked you these questions: Could you be fair? You said you would try your best.

A. Uh-huh.

Q. Do you understand that trying your best is not good enough?

A. I understand.

Q. That question goes for everybody in this room here. Several of you hesitated, and several of you said "I'll try our best." Does everybody have any problems whatsoever—not trying your best. This has to be absolute: I have nothing in my mind. I

can be fair. The past be damned. You have to tell me. You owe it to us. You owe it to Jabriel.

Now, does anybody have that problem other than those who already told us about that?

THE VENIRE: (No response.)"

¶ 41 Continuing his questioning, the defense asked another prospective juror whether she could be fair. She replied, "Yes," but counsel continued to exhort her: "Like I told the lady over there, it is very important Jabriel has to have a fair trial. If [you] have any hesitancy, it is your duty to speak up now."

¶ 42 Shortly afterwards, defense counsel returned to the theme of fairness in questioning a prospective juror whose relative was murdered:

"DEFENSE COUNSEL: You are one of the people who said they would try to be fair.

PROSPECTIVE JUROR: Yes.

Q. Again, I don't mean to tell you again how important that is in this matter. This is a murder case—

THE COURT: Counsel, we all know that. Come on.

DEFENSE COUNSEL: Judge, I need her answer.

THE COURT: You know what, you are trying to brainwash this jury. Move on.

DEFENSE COUNSEL: Are you able to give Jabriel a fair trial?

PROSPECTIVE JUROR: Yes.

Q. Bottom line.

A. Bottom line, yes."

The defense moved for a mistrial because of the court's comment about "trying to brainwash the jury," which the court denied.

¶ 43 On the second day of jury selection, one of the prospective jurors had a husband who was a retired police officer, but she told the trial court she would be able to put that aside and render a fair and impartial decision. Defense counsel asked her if her husband had told her stories that would influence her ability to be fair. She responded, "No." Defense counsel then said: "Do you understand, and this question goes to all of you, if you have any problems whatsoever being fair, it's really your duty to tell us right now, because—"

¶ 44 The trial court interrupted and called for a sidebar, in which it admonished defense counsel to refrain from repeating questions to which the venire had already responded. The court said, "I have gone over those questions and they said they can be fair and give him a fair trial. You are not going to go into it again." Defense counsel asked if he could continue the line of questioning with the prospective juror, saying, "She didn't say no to me." The trial court responded, "Fine, her only. That's it."

¶ 45 Back in open court, the following colloquy occurred:

"DEFENSE COUNSEL: I asked you if you had any problems being fair and impartial, and you seemed, to me, to hesitate.

PROSPECTIVE JUROR: I could be fair. I mean, you know, I hate to say no. I could be fair, but it's difficult hearing about criminal cases involving murder.

Q. This is what we need to know now, and if you have any—I mean, I know you want to be fair, but in the middle of the trial, it's too late.

A. I understand.

Q. If you have any doubt, now is the time to say it.

A. Okay. I would say that I could have some difficulty.

Q. Thank you.

THE COURT: Ma'am, are you saying that because he's pestering you or because you could not—

DEFENSE COUNSEL: Judge, I object to that. That is out of line. That is absolutely out of line. I have an absolute right—

THE COURT: Sit down.

You initially indicated to this court that you could be fair. Is there a problem with that, being fair?

PROSPECTIVE JUROR: Well, he asked me an extended question to that, and so I'm saying I could be fair, but I could have difficulty hearing about a murder case.

THE COURT: Thank you."

In a sidebar, defense counsel moved to strike the entire venire. The court denied the motion but, upon defense request, dismissed the prospective juror for cause.

¶ 46 Initially, although the trial judge's choice of words in front of the venire was intemperate, we agree with his characterization of the defense's colloquy. First, it is apparent that defense counsel was attempting to sway the jury with his repeated speeches about giving Jabriel a fair trial. Thus, the trial judge acted properly in telling defense counsel to "[m]ove on" (see *Reeves*, 385 Ill. App. 3d at 730 (defense question during *voir dire* was properly refused where it would have improperly indoctrinated prospective jurors to defendant's affirmative defense)), although the judge's comment before the venire about "trying to brainwash this jury" was uncalled for. Second, defense counsel was, in fact, "pestering" a prospective juror on the second day of *voir dire*. Although the prospective juror told both the trial court and the defense that she could be

fair, defense counsel continued to repeatedly question her on that point until she gave a contrary answer. Under those circumstances, it was proper for the trial court to inquire as to whether the prospective juror's change of answer was genuine or merely a response to counsel's repetitive questions.

¶ 47 More importantly, given the strength of the evidence against Jabriel, he cannot demonstrate that the complained-of comments were a material factor in his conviction. The court's comments were brief, isolated, and had no bearing on the evidence or on the issue of Jabriel's guilt; they did not reflect any opinion as to the credibility of any witness or any defense theory. Thus, the error, if any, was harmless beyond a reasonable doubt. See *Heidorn*, 114 Ill. App. 3d at 937-38; *Williams*, 209 Ill. App. 3d at 720.

¶ 48 *People v. Eckert*, 194 Ill. App. 3d 667 (1990), is distinguishable. *Eckert* held that the trial court's repeated disparagement of defense counsel throughout the trial deprived defendant of a fair trial. Among other comments, the trial judge ridiculed the defense's theory of the case, saying that counsel was "shooting goose shot hoping to hit something" and "trying to louse up the case"; the judge also openly mocked defense counsel in front of the jury, saying, "Look at poor Paul, he'll be in jail." *Id.* at 672-73. Additionally, the judge repeatedly denied defense counsel's offer of proof, telling him: "Turned off my hearing aid, can't hear a word you are saying." *Id.* at 670. This pervasive hostility toward defense counsel cannot be credibly compared with the trial judge's two brief comments during *voir dire* in the present case.

¶ 49 Prosecutor's Opening Argument

¶ 50 Jabriel argues that he was denied a fair trial because, during opening argument, the prosecutor improperly referenced the fact that Jabriel was in custody. Specifically, the prosecutor said: "[Y]ou will hear from Raymond Darden that he visited Jabriel Anderson just last

week in jail. So they're still friends." The prosecutor then went on to outline Darden's expected testimony.

¶ 51 The defense did not make a contemporaneous objection but, at the start of the second day of trial, moved for a mistrial based on the prosecutor's comment. The prosecutor explained that she intended to point out Darden and Jabriel's friendship because it was relevant to Darden's bias and his reluctance to testify, but she admitted, "I should not have said 'in jail.' " The trial court offered to give a limiting instruction, but defense counsel indicated that he did not want one. The trial court then denied the motion for mistrial.

¶ 52 Jabriel argues that the prosecutor's use of the phrase "in jail" was both irrelevant and prejudicial. The State concedes that the prosecutor's choice of words was improper but argues that the error was harmless in context. See *People v. Thompson*, 2016 IL App (1st) 133648, ¶ 47 (prosecutor's opening statement must be viewed in its entirety and any challenged remarks viewed in context). We agree with the State. This case is analogous to *People v. Daniels*, 2016 IL App (4th) 140131, ¶ 85, where the defendant argued that the trial court abused its discretion by admitting evidence that his codefendants visited him in jail. *Daniels* found no abuse of discretion, explaining:

> "Evidence that defendant was visited in jail by his close friends—who happened to also be his codefendants—is not terribly surprising or prejudicial. *** Although we fail to see how this evidence was particularly probative, it was still admissible because the *de minimis* prejudicial effect of the evidence did not substantially outweigh its probative value." *Id.* ¶ 87.

¶ 53 Likewise, the prosecutor's statement that Jabriel was in jail after having been charged with first-degree murder and multiple counts of attempted murder could not have been

particularly surprising to the jury. Moreover, the mention of jail was brief—consisting of two words in an otherwise proper argument—and not referenced thereafter by either party, and the court instructed the jury that arguments do not constitute evidence. See *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 64 (prosecutor's improper comment did not warrant reversal where it was brief, surrounded by proper argument, and the jury was properly instructed that arguments do not constitute evidence). Thus, particularly in light of the State's ample evidence of Jabriel's guilt, we find no reversible error here. See *People v. Evans*, 209 Ill. 2d 194, 224-25 (2004) ("ill-advised" prosecutorial comments did not constitute reversible error where the State's case was strong and the evidence was not closely balanced).

¶ 54 Jabriel also argues that his counsel was ineffective for failing to raise a contemporaneous objection to the prosecutor's misstatement. To establish ineffective assistance of counsel, a defendant must prove that (i) counsel's performance was objectively unreasonable and (ii) but for counsel's errors, the outcome of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81 (citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

¶ 55 Jabriel cannot meet either prong of the *Strickland* test. In assessing the first *Strickland* prong, it is well established that counsel's strategic decisions are afforded considerable deference. *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007) (quoting *Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.")). Under the circumstances, Jabriel's counsel could reasonably have chosen not to object to the prosecutor's statement so as to avoid drawing undue attention to the fact that Jabriel was in jail. As for the prejudice prong of *Strickland*, as noted, any prejudicial effect of the complained-of statement was *de minimis*. See *Daniels*, 2016 IL App

(4th) 140131, ¶ 87. Accordingly, Jabriel's counsel was not ineffective for failing to raise a contemporaneous objection to the prosecutor's statement that he was in jail.

¶ 56 Defense's Opening Statement

¶ 57 Jabriel argues that his counsel was ineffective for misstating in his opening statement that Jabriel was the one who shot Martinez. Jabriel's argument focuses on the following portion of his lawyer's opening statement:

> "Jabriel Anderson is not responsible for the death of Adam Martinez. Jabriel Anderson did not shoot Adam Martinez. Jabriel Anderson did not bring the gun that was fired that killed Adam Martinez. Jabriel Anderson never told anybody to shoot that gun. And there's pretty good evidence, although you will have to wait to hear it from the witness stand, whether Jabriel Anderson even knew before the shooting that there was a gun.
>
> * * *
>
> But Corey gives Jason [Burns] the gun. He's known Jason for about ten minutes at this point. And *Jabriel* shoots into that car, and unfortunately, Adam Martinez is killed. We can't do anything about that, but let me put it this way. Jason Burns, who shot the gun, was arrested and charged with that shooting. Nobody said—Jabriel didn't ask for this gun—I mean, let me make this point. He never encouraged Jason Burns to shoot. *** Jason Burns did this on his own.
>
> * * *
>
> Ladies and gentlemen, the State wants you to make Jabriel responsible for what Jason Burns did. He's not." (Emphasis added.)

¶ 58 Viewing this argument as a whole, although counsel mixed up the names "Jabriel" and "Jason" on one occasion, he repeatedly and vigorously argued that Burns was the shooter and Jabriel should not be held responsible for Burns's actions. The State likewise stated in its opening argument that Burns was the one who shot Martinez, and this was borne out by the evidence at trial. Under these facts, there is no reasonable probability that counsel's misstatement would have caused the jurors to mistakenly believe that counsel conceded that Jabriel was the shooter. Thus, Jabriel's ineffective assistance claim fails. *Patterson*, 2014 IL 115102, ¶ 87 (rejecting ineffective assistance claim where defendant failed to establish the prejudice prong of the *Strickland* test).

¶ 59 Carter's Prior Consistent Statements

¶ 60 Jabriel argues that the State improperly bolstered Carter's credibility by introducing his prior consistent statements in which he identified Burns and Corey. The State contends that Jabriel has forfeited this argument and, in any case, the complained-of statements were properly admitted as prior identifications under section 115-12 of the Code of Criminal Procedure (725 ILCS 5/115-12 (West 2012) (statements of identification are an exception to the hearsay rule if the declarant testifies at trial and is subject to cross-examination regarding the statements)). See *People v. Temple*, 2014 IL App (1st) 111653, ¶ 34 (rule against introducing a witness's prior consistent statements "does not apply to statements of identification").

¶ 61 Three days after the shooting, on May 15, 2010, Carter went to the Park Forest Police Department and identified Burns and Corey in photo arrays. At trial, the prosecutor presented Carter with the photo arrays and asked:

> "PROSECUTOR: Did you make a notation, did you actually physically write something next to the photograph of Jason Burns?

CARTER: Yes.

Q. And what did you write?

A. 'This is the person I saw get the gun from Lord [Corey] and shot at the Monte Carlo.' "

The prosecutor then showed Carter the photo array in which he identified Corey and asked:

"Q. And can you tell the jury, what did you write on this photo array?

A. 'This is the person I know as Lord. He told me his name was Lord. I saw a gun in his waistband. The other guy took the gun from Lord and shot at the Monte Carlo.' "

¶ 62 Jabriel did not object to this testimony, nor did he raise a claim of error in his posttrial motion. Accordingly, he has forfeited review of this issue. *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010). Jabriel argues that we may still consider the issue under the plain error doctrine, which allows us to review "clear and obvious" unpreserved errors when either (i) the evidence is so closely balanced that the error threatened to tip the scales against the defendant, or (ii) the error "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). But Jabriel does not argue for either prong of plain-error review beyond an unsupported one-sentence assertion that both prongs are "clearly" satisfied. "[P]lain-error review is forfeited when a defendant fails to present an argument on how either prong of the plain-error doctrine is satisfied." (Internal quotation marks omitted.) *People v. Walsh*, 2016 IL App (2d) 140357, ¶ 17. We shall therefore honor Jabriel's forfeiture of this issue.

¶ 63 Jabriel also argues that his counsel was ineffective for failing to object to Carter's statements. But to the extent the statements were properly admitted as statements of

identification under section 115-12, counsel cannot be deemed ineffective for failing to object. *People v. Edwards*, 195 Ill. 2d 142, 175 (2001). Moreover, we find that the admission of Carter's statements did not prejudice Jabriel. *Patterson*, 2014 IL 115102, ¶ 87 (rejecting ineffective assistance claim where defendant failed to establish the prejudice prong of the *Strickland* test). For Jabriel's purposes, it does not matter which of his companions brought the gun, nor does it matter which of them fired at the Monte Carlo. Rather, the material facts are that Jabriel pointed out the Monte Carlo, demanded the gun, and then one of his companions fired—all of which was established through Darden's prior sworn testimony and the testimony of the surviving victims. Therefore, the defense's failure to object to Carter's testimony was, at worst, harmless.

¶ 64 Self-Defense Instruction

¶ 65 Jabriel contends that the trial court erred by finding that there was insufficient evidence to justify the giving of a self-defense instruction. We review the trial court's finding for an abuse of discretion. *People v. McDonald*, 2016 IL 118882, ¶ 42.

¶ 66 A defendant is entitled to have the jury instructed on a defense theory if there is some evidence in the record to support it. *Id.* ¶ 25. For a claim of self-defense, defendant must establish the following elements:

> "(1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *People v. Lee*, 213 Ill. 2d 218, 225 (2004).

¶ 67 The trial court properly denied Jabriel's request for a self-defense instruction because there was no evidence that the victims acted in a threatening manner, nor was there any evidence that Jabriel and his companions believed that they were in any type of danger. After Martinez parked his car in the parking lot near Smith's house, none of them exited the car or said anything to Jabriel and his companions. When Jabriel pointed out the car and asked for the gun, Burns grabbed the gun from Corey and fired without any provocation from the car's occupants.

¶ 68 Jabriel nevertheless asserts that he was in an "ongoing fight" with Qualls at the time of the shooting. The record flatly contradicts this assertion. According to the testimony at trial, Jabriel was the aggressor during the party at Smith's house, instigating the oral confrontation with Qualls, which turned physical when he threw the first punch. Later, when Jabriel refused Qualls's request to come out of Smith's house to fight, Qualls and his friends left and did not return. They were no longer on the scene when Darden arrived with his reinforcements. Thus, when Jabriel, Darden, and their compatriots set out in pursuit of Qualls, it cannot be said that they were acting in self-defense; instead, they were attempting to re-instigate a conflict that had already ended. "[T]he right of self-defense does not permit one to pursue and inflict injury upon even an initial aggressor after the aggressor abandons the quarrel." *People v. Guja*, 2016 IL App (1st) 140046, ¶ 54; see also *People v. Durden*, 231 Ill. App. 3d 84, 86 (1992) ("Neither shooting in retaliation nor revenge is permitted as self-defense."). Accordingly, the trial court did not abuse its discretion in refusing to instruct the jury on self-defense.

¶ 69 Jury Question During Deliberations

¶ 70 Jabriel next argues that the trial court abused its discretion by failing to explain the law to a juror who did not understand it. The State argues that Jabriel has forfeited this issue by failing

to raise it in his posttrial motion, and, in any case, defense counsel acquiesced in the court's response.

¶ 71 During deliberations, the jury sent a note to the judge stating: "We have a jury member who does not understand the law even though we tried explaining it. He is asking that the judge come in & explain it." The court read this note to counsel, and then the following colloquy occurred:

> "THE COURT: I am going to tell him, 'You have all the law. Continue deliberating.' All right.
>
> DEFENSE COUNSEL: That's fine."

The trial court sent back a note that stated, "You have the law continue to deliberate." Jabriel now argues that the trial court committed prejudicial error by failing to explain the law to the juror.

¶ 72 Despite Jabriel's failure to preserve this issue for review (see *Thompson*, 238 Ill. 2d at 611-12 (to avoid forfeiture, defendant must both object at trial and raise the issue in a posttrial motion)), Jabriel argues that we may review it as plain error, asserting without elaboration that the trial court's response meets "all criteria" of the plain error doctrine. But Jabriel fails to acknowledge that his counsel *agreed* to the trial court's response, thereby waiving any claim of error. "When a defendant acquiesces in the trial court's answer to a question from the jury, the defendant cannot later complain that the trial court's answer was an abuse of discretion." *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010) (citing *People v. Emerson*, 189 Ill. 2d 436, 491-92 (2000)). Since Jabriel's counsel said that the trial court's response was "fine," Jabriel cannot seek reversal based on that same response, which was, in any event, appropriate.

¶ 73 Jabriel's 95-Year Sentence

¶ 74 As noted, Jabriel was sentenced to 95 years' imprisonment: 45 years for the first-degree murder of Martinez (30 years plus a 15-year firearm enhancement) and 25 years for each of the attempted murders of Lawson and Alvarado (10 years plus a 15-year firearm enhancement), which the trial court imposed consecutively. Jabriel raises five challenges to his sentence: (i) the 15-year firearm enhancements were improperly imposed where they were not pled in the indictment; (ii) it was error to impose firearm enhancements for both the murder and attempted murder convictions, since they both involved the same firearm and the same sequence of events; (iii) Jabriel's 95-year sentence is a *de facto* life sentence and therefore unconstitutional, since he was 17 years old at the time of the offense; (iv) the trial court applied an improper aggravating factor; and (v) Jabriel's sentence was excessive in light of his age, background, and the fact that he was not the shooter.

¶ 75 Jabriel's first contention is without merit. His indictment for first-degree murder states that he "shot and killed Adam Martinez while armed with a firearm." Likewise, his indictments for attempted murder state that he "shot at Brian Lawson while armed with a firearm" and "shot at Robert Alvarado while armed with a firearm." Accordingly, the indictments provided proper notice of the alleged facts used as a basis for the enhancement. See *People v. Jackson*, 2014 IL App (1st), 123258, ¶¶ 60-62.

¶ 76 Jabriel's second contention is not supported by any authority and is therefore forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). We remind counsel that this court is entitled to have issues clearly defined, with pertinent authority cited, and is not simply a depository into which an appellant may dump the burden of argument and research. *In re Marriage of Baumgartner*, 237 Ill. 2d 468, 474-75 (2010).

¶ 77 Jabriel next argues that his 95-year sentence is a *de facto* life sentence and therefore unconstitutional under *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (eighth amendment to the United States Constitution "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). See also *People v. Reyes*, 2016 IL 119271 (mandatory minimum sentence of 97 years, with the earliest opportunity for release after 89 years, was "the functional equivalent of life without the possibility of parole" and therefore unconstitutional for a juvenile offender under *Miller*). Although the 95-year sentence was not mandatory, the State agrees that resentencing is required, as does this court. See *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 56 (although trial court exercised discretion in imposing *de facto* life sentence on juvenile, resentencing was required so that trial court could consider the characteristics of defendant's youth "through the lenses of *Miller*"); *People v. Buffer*, 2017 IL App (1st) 142931, ¶ 63 (*de facto* life sentence imposed on juvenile offender was unconstitutional where "although the trial court exercised discretion in imposing the petitioner's sentence, nothing in the record supports the State's position that the court's reasoning comported with the juvenile sentencing factors recited in *Roper, Graham*, [and] *Miller*").

¶ 78 Accordingly, we vacate Jabriel's sentence and remand for resentencing. We therefore need not consider Jabriel's remaining contentions of sentencing error.

¶ 79 CONCLUSION

¶ 80 For the reasons stated above, we affirm Jabriel's convictions, but we vacate Jabriel's 95-year sentence and remand for resentencing.

¶ 81 Affirmed in part, vacated in part, and remanded.