2017 IL App (1st) 150821-U

SECOND DIVISION
August 15, 2017

No. 1-15-0821

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	11 CR 15383
	)	
JOHN JONES,	)	Honorable
	)	Kenneth Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved defendant guilty of first degree murder beyond a reasonable doubt. There was insufficient evidence to establish probable cause that State's witness was an accomplice and therefore the trial court did not err in denying defendant's request for an accomplice-witness jury instruction. Prosecutor's remarks during closing argument were not improper. Trial court's failure to properly instruct jurors during *voir dire* was not plain error.

¶ 2 Following a jury trial, defendant John Jones was convicted of the first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2010)) of Robert Tate and was sentenced to natural life imprisonment. Defendant now appeals and argues: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred in refusing his request for jury instruction IPI Criminal No. 3.17; (3) the prosecutor's remarks during closing argument were improper and thus deprived him of a fair trial; and (4) the trial court committed plain error where it failed to

properly ask all the prospective jurors whether they understood the principles as required under Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), and failed to ask three jurors about the principles entirely. For the following reasons, we affirm the trial court's judgment.

¶ 3 BACKGROUND

¶ 4 John Jones was arrested on August 19, 2011, and charged with first degree murder for killing 17-year-old Robert Tate on April 12, 2010. A jury found Jones guilty of first degree murder and personal discharge of a firearm that proximately caused death. The trial court sentenced defendant to life in prison because he had a prior conviction for first degree murder.

¶ 5 At trial, Richard Thompson testified he was defendant's cousin and worked for him selling drugs. He testified that on the day of the shooting, April 12, 2010, he had multiple conversations with defendant about Tate. During one of these conversations, defendant told Thompson to beat up Tate because Tate was stealing money from his drug customers. The day before the shooting, Thompson followed Tate to tell him to stay off the corner and to stop stealing from drug customers.

¶ 6 Thompson testified that at approximately 6:30 p.m. on April 12, 2010, he was on the southeast corner of Augusta and Avers with defendant. Tate was across the street with a group of men and was "being very belligerent and talkative" and making motions towards his waist. Thompson did not see a weapon. Defendant then ran across the street into a gangway at 1007 North Avers, where Thompson's mother lived, and came out with a gun. Thompson testified that at this point he could tell Tate realized that "it was getting serious," and saw Tate "take off running" south towards Iowa Street. Defendant chased after him with the gun in his hand. Thompson saw defendant aim the gun at Tate while he was chasing Tate and fire the gun in his direction. Tate kept running, but then collapsed. Defendant got in his car and left. Thompson

also left. After the shooting, Thompson got a call from defendant who told Thompson it was his fault that the shooting happened because he "didn't take care of [his] business."

¶ 7 Thompson testified that at the time of trial he was in custody for a pending felony narcotics case. He testified he was not promised anything in exchange for his testimony. Prior to coming into the courtroom to testify, he wrote the prosecutor a note asking her if she could talk to the State's Attorney assigned to his pending case "on [his] behalf" and let them know that he "was very helpful" so that he could get a lesser sentence in that case. He testified he had been previously convicted of possession of a controlled substance and manufacture/delivery of a controlled substance.

¶ 8 On cross-examination, Thompson testified he sold heroin and drugs to support his heroin habit, admitting he was an addict in 2010, using heroin every day. He testified he did not use heroin on the day of shooting. Thompson testified that he did not talk to police on the day of the shooting or anytime thereafter until he was arrested on August 6, 2010, on a narcotics charge, though the charge was dismissed two weeks later. He testified he spoke with defense counsel on October 29, 2013, about defendant's case and told her he was a heroin addict who used heroin in 2010. He also testified he told defense counsel he was not present when Tate was shot, because "ever since this happened, I have been alienated . . . from the people in my family. They (sic) looking at me one way. They (sic) looking at him one way." Thompson reaffirmed at trial that he was present when the shooting occurred.

¶ 9 Keisha Conic testified that on April 12, 2010, she lived in a second-floor apartment at 942 N. Avers Ave. At approximately 6:30 p.m., she was standing in her bedroom watching television when she heard gunshots. She ran to her front room window and looked out the window. She looked north on Avers toward Augusta and observed a man chasing a young boy.

Conic testified she saw the right side of the man's face. She ran downstairs to her front porch and saw the young boy had collapsed several houses down. When the police arrived, she provided a general description, indicating the man chasing the boy was black, between 5 feet 8 inches and 5 feet 10 inches in height, and bald. On June 29, 2011, Conic viewed a photo array and identified defendant as the person chasing the young boy.

¶ 10 After identifying defendant in a photo array on June 29, 2011, Conic went to the police station and identified defendant in a lineup. Conic testified she had five prior convictions for possession of a controlled substance and one prior conviction for manufacture and delivery of a controlled substance.

¶ 11 On cross-examination, Conic testified she had been a drug addict for most of her life, and on April 12, 2010, she had used heroin two to three times that day. She testified that on August 21, 2013, defense counsel visited her and she gave a statement. She testified that she did not remember telling defense counsel that she wasn't sure defendant was the person on the street on April 12, 2010, because she only saw the person for a few seconds. However, Conic acknowledged that her signature was on the last page of the statement indicating her uncertainty.

¶ 12 Paula Washington testified that she is Robert Tate's aunt and the sister of Tate's mother, Cynthia. Paula testified she had two prior drug-related felony convictions and was a recovering heroin addict. She testified that she and Cynthia lived in the same apartment complex and shared a back porch. She stated that on April 12, 2010, she arrived at her home at 3605 W. Augusta and saw defendant at her front door having a confrontation with her nephew, Tate, who was leaning out the window of her second-floor apartment. Paula knew defendant by the nickname "Jodi," and identified him in court. Paula testified she asked defendant what was going on, to which he responded "your nephew was down there whoopin' on my joint," which Paula understood to

mean he was selling phony drugs to customers. Paula further explained that "joint" referred to the spot where defendant sold drugs and that the area of Augusta Avenue and Avers Avenue was a high narcotics area. Defendant told Paula that "[y]ou need to talk to your nephew. Motherfuckers get killed for doing shit like that," and that he needed to talk to Cynthia. Paula testified that defendant followed her to her apartment and stood in the doorway.

¶ 13 Defendant and Tate eventually left. Several hours later, Paula's son told her Tate had just been shot. Paula testified she went to the scene of the shooting and saw police, but did not speak to them. Paula first spoke to police on May 9, 2011, when she identified the person she knew as "Jodi" in a photo array. She identified defendant on August 21, 2011, in a lineup as the person who came to her house on April 12, 2010.

¶ 14 Cynthia, Tate's mother, testified that her son's nickname was "C Murder," and that he had a tattoo on his right arm that said, "Get Money or Die." Tate also had a tattoo that said "Avers." On the afternoon of April 12, 2010, she was asleep in her apartment, where she lived with her son Robert, when her sister Paula came into her apartment and told her someone wanted to talk to her about her son. She testified that when she got to her sister's apartment, defendant, who she identified in open court, was talking to Paula and was very angry. Cynthia stated she knew defendant from a long time ago, but did not know his name at that time. According to Cynthia, defendant told her that she needed to talk to her son "about taking cluckers' money," which she interpreted as taking drug customers' money. She testified that Paula and Tate were both present for the conversation. She later told Tate that what he was doing was wrong and he should stay out of trouble.

¶ 15 Cynthia testified that later that afternoon, her nephew told her Tate had been shot. Cynthia went to Avers and Augusta and then to the hospital. She did not speak to any police

officers at the hospital. She later returned to the scene of the shooting and testified she spoke to a plain-clothes detective but did not remember him asking her if Tate had problems with anyone or telling the detective that she did not know of any problems with anyone. She testified that she did not know that Tate had any problems until the day of the murder. Cynthia testified she told police that somebody had been to the house, but did not say that it was defendant because she did not know defendant's name. Cynthia testified that the next day, April 13, 2010, she spoke to a detective who was in a car at Avers and Augusta and "told them what [she] had heard." The State and defendant stipulated that no report, memo, or note memorialized this conversation, nor has any officer acknowledged that Cynthia approached him or her and provided information about the shooting.

¶ 16 Cynthia testified that on May 7, 2011, police came to her apartment and she told them that on April 12, 2010, defendant came and spoke to her in the doorway of her sister's apartment. She stated defendant did not threaten her son. That same day, Cynthia went to the police station and identified defendant in a photo array. On August 19, 2011, Cynthia again went to the police station and identified defendant in a lineup as the person who came to her sister's house on April 12, 2010.

¶ 17 Detective Patrick Golden testified that at approximately 6:30 p.m. on April 12, 2010, he received an assignment to investigate a man shot on the 900 block of North Avers Avenue. When he arrived at the scene, the victim had already been transported to the hospital. After he completed his investigation at the scene he went to the Forest Park police station and had a conversation with Marquise Jackson. After speaking with him, Detective Golden attempted to locate Cynthia Washington.

¶ 18 On August 6, 2010, after learning that Richard Thompson had information about the

murder of Robert Tate, Detective Golden spoke with him. Thereafter, the investigation was ongoing.

¶ 19 Detective Golden testified that he interviewed Cynthia Washington on May 7, 2011, and she told him there was no confrontation or name calling in the apartment on April 12, 2010. After viewing a photo array, Cynthia identified defendant as the person who came to her apartment on April 12, 2010, and threatened her son. Golden testified he interviewed Paula on May 9, 2011, and she also identified defendant as the person who came to her apartment on April 12, 2010, several hours before the murder looking for her nephew Tate.

¶ 20 The State then rested. Defendant's motion for a directed finding was denied.

¶ 21 Dominique Davis testified for defendant and stated that on April 12, 2010, she lived at 2942 North Avers Avenue in the first-floor apartment below Keisha Conic. Between 6:30 and 6:45 p.m., she arrived home, and was walking in her gate to go up the stairs when there was a loud noise that sounded like a firecracker. She testified she looked around and saw two males to the north, towards Augusta Avenue, about three or four houses down. She testified they were both running: one went north towards Augusta, while the other ran south towards Iowa. Davis said she did not get a good look at the man running north, other than that he was a black male, weighed 200 to 220 pounds, and in his mid 20s to 30s. On May 27, 2011, Davis was unable to identify anyone in a photo array

¶ 22 LaTasha Binion testified that on April 12, 2010, around 6:30 or 7:00 p.m., she was outside on the 900 block of North Avers Avenue when she heard two gunshots coming from the north on Avers. Binion looked north and saw two men in the middle of the street running; one was running towards her while the other ran the opposite direction. She testified she did not see the person who ran away from her. She stated that as she got to the person running towards her,

he stumbled and said he got shot, and fell to the ground. When police arrived, Binion told them what she saw. On August 21, 2011, she was unable to make identification when she viewed a physical lineup. Defendant was in the lineup.

¶ 23 At the jury instruction conference, the court denied the defense's requests to include the accomplice witness instruction, IPI 3.17, and two non-pattern instructions about the reliability of the testimony of drug addicts. Defense counsel promptly objected to the court's denial.

¶ 24 Following closing arguments, the jury found defendant guilty of first-degree murder and found that he personally discharged the firearm. The defense made a motion for a new trial alleging, *inter alia*, that the State failed to prove defendant guilty beyond a reasonable doubt, and that the court erroneously denied defense's request for IPI 3.17. The court denied the motion, and subsequently sentenced defendant to natural life in prison.

¶ 25 ANALYSIS

¶ 26 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt of first degree murder. In assessing the sufficiency of evidence on appeal, a reviewing court considers whether, after viewing the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The reviewing court "determine[s] whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 280 (emphasis added) (quoting *Jackson*, 443 U.S. at 318). The court's function is not to retry the defendant. *Collins*, 106 Ill. 2d at 261. For a reviewing court to reverse a criminal conviction due to insufficient evidence, the evidence presented must be "so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's

guilt." *People v. Rowell*, 229 Ill. 2d 82, 98 (2008).

¶ 27 Defendant asserts that the evidence was insufficient to convict him of first degree murder where the conviction was based on the incredible testimony of Thompson, Conic, Paula, and Cynthia. When the resolution of the defendant's guilt or innocence depends on the credibility of the witnesses and the appropriate weight to give their testimony, it is "well settled" that such determinations are "exclusively within the province of the jury." *Collins*, 106 Ill. 2d at 261-62. This is so because the jury is in the best position to view and judge the credibility of witnesses, and "due consideration" must be given to the fact that it was the jury that saw and heard the witnesses while they were being questioned. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). It follows that a jury's credibility determinations are entitled to significant weight. *Id.* at 115.

¶ 28 Defendant argues Thompson was an incredible witness because he was impeached by statements he made to defendant's attorney that he was not present when Tate was shot, he had a motive to testify falsely because at the time of trial he was in custody on a pending charge, he had an interest in protecting defendant's drug business, he participated in the planning of the shooting of Tate, and because he was a three-time convicted felon and habitual drug user.

¶ 29 Thompson testified at trial that he was defendant's cousin and worked for him selling drugs on the corner of Augusta Avenue and Avers Avenue. Thompson testified that he was a heroin addict and sold drugs to support his heroin habit. Thompson testified that he had several conversations with defendant on the day of the shooting, April 12, 2010, as well as the day before the shooting, concerning Tate stealing money from defendant's drug customers. According to Thompson, defendant asked him to beat up Tate and tell him to stay off the corner and to stop stealing from defendant's drug customers. Thompson testified that at 6:30 that evening, Tate was across the street from him and defendant and was acting belligerently and

being very talkative. Thompson testified that at that point defendant ran across the street into a gangway and reappeared with a gun and chased after Tate, who ran south on Avers Avenue. Thompson testified that he saw defendant shoot Tate in the back and then flee.

¶ 30 During Thompson's testimony, defense counsel elicited that he first told police about his knowledge of the shooting when he was arrested for a narcotics charge on August 6, 2010, four months after the incident occurred. Thompson testified he spoke with Detective Golden on May 4, 2011, when Golden came to interview him about the case, and that he tried to tell Golden he was not there, but after Golden stated he was lying, he told them what he thought they wanted to hear.

¶ 31 The jury in this case clearly found Thompson credible and chose to believe his trial testimony over his prior recantation. Where the jury's determination is dependent upon eyewitness testimony, its credibility determinations are entitled to great deference and will be upset only if unreasonable. *Cunningham*, 212 Ill. 2d at 280. The jury has the latitude to believe as much, or as little, of any witness' testimony as it sees fit. *People v. Mejia*, 247 Ill. App. 3d 55, 62 (1993). Whether eyewitness testimony is trustworthy is typically within the common knowledge and experience of the average juror. *People v. Clark*, 124 Ill. App. 3d 14, 21 (1984). We will not disturb the jury's finding.

¶ 32 Defendant next argues that Thompson's testimony is incredible because he participated in the planning of the shooting. Defendant's argument is essentially that Thompson was an accomplice, which Defendant raises as his second issue presented for review. For the reasons that will be discussed in ¶ ¶ 51-59, *infra*, we are not convinced there was probable cause to believe Thompson was an accomplice to defendant's crime.

¶ 33 Defendant argues that neither Thompson nor Conic were credible witnesses because they

were habitual drug users. Thompson testified that although he was a heroin addict, he did not use heroin on April 12, and had not used heroin for several weeks prior to that date. Conic testified she had used heroin at least twice on the day of the shooting.

¶ 34 The fact that a witness is addicted to drugs may be used at trial in an attempt to diminish the witness's credibility. *People v. Kliner*, 185 Ill. 2d 81, 130 (1998). Such testimony of a drug addict may be viewed with suspicion. *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). However, the testimony of a drug addict may be enough to sustain a conviction if it was credible in view of the surrounding circumstances. *Id.* See also *People v. Givens*, 135 Ill. App. 3d 810, 825 (1985) (witness-drug addict was extensively cross-examined concerning his drug usage, and the jury could assess the evidence in determining his credibility).

¶ 35 Here, the record reveals that the jury was fully apprised of both Thompson's and Conic's drug usage. The record further shows that, in light of the surrounding circumstances, the jury could find them both credible despite their drug usage. It was undisputed that Thompson worked for defendant selling drugs on the corner of Avers and Augusta, and that Thompson knew defendant well because he was his cousin, thus dispelling any doubt in Thompson's ability to recognize defendant. Moreover, Thompson never wavered in his version of the events either before or during trial. Each time he explained what he saw, he stated that defendant had an issue with Tate, that at 6:30 on the evening of April 12, 2010, defendant went into a gangway, grabbed a gun, chased Tate south on Avers Avenue, and shot him in the back.

¶ 36 Similarly, Conic's testimony never wavered. She testified that she was in her apartment, heard gunshots, ran to the window, and saw a man chasing a boy running south on Avers. Conic's statement to defense counsel that she was not sure defendant is the person she saw on the street the night of the shooting, because she only saw him for a matter of seconds and

because her identification of defendant came 14 months after the incident, was elicited by defense counsel. "The lapse of time goes only to the weight of the testimony, a question for the jury, and does not destroy the witness's credibility." *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972) (upholding an identification that occurred two years after the offenses). See also *People v. Holmes*, 141 Ill. 2d 204, 242-42 (18 months); *People v. Malone*, 2012 IL App (1st) 110517, ¶ 36 (nearly 44 months). The jury heard Thompson's and Conic's testimony and found that the State had proven defendant guilty beyond a reasonable doubt.

¶ 37 Defendant next contends that Conic's identification of defendant from her second floor apartment was not reliable because two other witnesses, Davis and Binion, could not identify defendant while they were standing at street level. We find this argument unpersuasive.

¶ 38 Simply because Conic was one story above Davis and Binion does not mean she had any less of a vantage point to see defendant; if anything, it could be reasonably inferred that she had a better vantage point. Davis testified she heard a "pop" to the north of her towards Augusta, and saw two black men roughly 75 feet away; one was running north towards Augusta while the other ran south towards her. Binion testified she heard two gunshots and looked north towards Augusta. She saw one man run east on Augusta and the other run south towards her on Avers. She testified that she only saw the man who ran east on Augusta for "a split second." All three witnesses—Conic, Davis, and Binion—heard a pop or gunshot to the north towards the intersection of Avers and Augusta. All three saw one man run south on Avers while the other ran in the opposite direction. Davis was 75 feet away while Binion only saw defendant for a "split second." Their testimony is no less believable than Conic's, who had a second-story vantage point and saw defendant for longer than either Davis or Binion.

¶ 39 Defendant also argues that Conic's identification of him 14 months after the murder

weighs against her identification. As the State notes, Illinois courts have upheld convictions involving much longer delays. See *People v. Holmes*, 141 Ill. 2d 204, 242 (1990) (and cases cited therein). Here, 14 months was not an unreasonable delay and does not render Conic's identification unreliable.

¶ 40 Lastly, defendant argues that Conic's identification of defendant was impeached by her statement to defense counsel that "I am not sure he is the person that was out on the street on April 12, 2010. I only saw the person for a matter of seconds, and it was such a long time before both the photographs and the lineups."

¶ 41 At trial, Conic identified defendant as the person who she saw chasing Tate after she heard gunshots. She identified defendant in a photo array on June 29, 2011, as the person she saw chasing Tate. She further identified defendant in a lineup on August 19 as the person she saw chasing Tate. Two years later, on August 21, 2013, Conic was interviewed by defense counsel and gave a signed statement. She testified that she did not remember telling defense counsel that she was not sure that defendant was the person that was out on the street on April 12, 2011. Conic recalled telling defense counsel that she only saw the person for a few seconds. She did admit that she signed the statement that stated that she was "not sure he is the person that was out on the street" the day of the shooting.

¶ 42 Again, when a jury's determination is dependent upon eyewitness testimony, the jury's credibility determinations are entitled to great deference and will be upset only if unreasonable. *Cunningham*, 212 Ill. 2d at 280. The jury has the latitude to believe as much, or as little, of any witness' testimony as it sees fit. *People v. Mejia*, 247 Ill. App. 3d 55, 62 (1993). Whether eyewitness testimony is trustworthy is typically within the common knowledge and experience of the average juror. *People v. Clark*, 124 Ill. App. 3d 14, 21 (1984). We will not disturb the

jury's credibility findings.

¶ 43 Defendant contends that Cynthia's testimony and Paula's testimony were incredible because each was impeached with prior inconsistent statements and there was an unexplained delay in relaying their information to the police.

¶ 44 Cynthia and Paula testified that defendant came to Paula's apartment on April 12, 2010, looking to speak with Tate about Tate taking money from defendant's drug customers. Cynthia testified she spoke with a detective later that night after returning from the hospital where her son, Tate, had been taken. Cynthia testified she spoke with a detective the following day, April 13, 2010, although there is no record indicating this conversation took place. She testified that on May 7, 2011, police came to her apartment and interviewed her about what happened on April 12, 2010. Paula testified she spoke with police about the April 12, 2010, encounter for the first time on May 9, 2011.

¶ 45 Defendant points to numerous inconsistencies in both Cynthia's and Paula's testimony at trial and their conversations with police in the days and months following the April 12, 2010, encounter. Specifically, defendant targets discrepancies between Cynthia and Paula's testimony concerning whether: (1) defendant and Tate were arguing and threats were made and, if so, whether Cynthia was present for it; (2) Paula went to get Cynthia, or instead Cynthia came to Paula's apartment without being summoned by Paula; (3) the conversation took place in Paula's apartment, or instead at street level; and (4) Paula left the conversation after Cynthia approached Tate, and thus was not present for any of the conversation, or instead Cynthia left Paula with Tate and defendant after admonishing Tate.

¶ 46 While we acknowledge that there were some discrepancies in Paula's and Cynthia's testimony, we do not believe that they are significant enough to raise a reasonable doubt of

defendant's guilt. The contradictions involve minor points or collateral issues, such as whether Paula went to get Cynthia or Cynthia came on her own, and whether the conversation happened just inside Paula's home or just outside it.

¶ 47 Similarly, the fact that Paula and Cynthia were inconsistent concerning what each heard defendant say and their interpretation of those statements does not render their testimony false. A witness's testimony need not be unimpeached, uncontradicted, or crystal clear in order to establish guilt beyond a reasonable doubt. *See People v. Watkins*, 238 Ill. App. 3d 253, 257 (1st Dist. 1992). A witness's story may be clear and convincing as long as the inconsistencies do not diminish the reasonableness of the story as a whole. *Id.*

¶ 48 Regardless of what was said and who heard it, Paula was consistent in her testimony that when she arrived to her home on April 12, 2010, she saw defendant at her front door having a confrontation with Tate. Whether or not Paula remained in place to listen to Cynthia's conversation with defendant, it is reasonable to believe that as Paula walked into her apartment she was able to hear a portion of their conversation. Similarly, Cynthia consistently stated that she had a conversation with Tate and defendant about drug money at some point during defendant's visit to Paula's apartment. Simply because Cynthia told police that no threats were made does not mean that the conversation about drug money never took place.

¶ 49 Moreover, these discrepancies are rendered less significant because of the fact that Cynthia and Paula unequivocally identified defendant in a lineup as the person who came to Paula's apartment on April 12, 2010. Though their identification came many months after that day, the delay in identification goes to the weight of their testimony and is not, by itself, sufficient to establish reasonable doubt in this case. See *Rodgers*, 53 Ill. 2d at 214; *Holmes*, 141 Ill. 2d 204, 242 (1990) (and cases cited therein).

¶ 50 Here, the State presented sufficient evidence to establish guilt beyond a reasonable doubt. The jury heard all inconsistencies and impeaching evidence and it was the jury's function to assess the credibility of the witnesses and weigh the evidence. The evidence viewed in the light most favorable to the State was sufficient to establish defendant's guilt beyond a reasonable doubt.

¶ 51 Defendant next claims the trial court erred in refusing to give the jury the "accomplice witness instruction" contained in IPI Criminal 4th No. 3.17. IPI 3.17 provides: "[w]hen a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." IPI Criminal No. 3.17 (4th ed. 2000).

¶ 52 In determining whether the accomplice jury instruction should have been given, the trial court considers whether there is probable cause to believe that the witness was guilty of the offense either as a principal or as an accessory. *People v. Harris*, 182 Ill. 2d 114, 144 (1998). If, under the totality of the evidence and the reasonable inferences drawn therefrom, the evidence establishes probable cause to believe the witness was present at the crime, failed to disapprove of the crime, *and* that he participated in the planning or commission of the crime, the accomplice jury instruction should be given. *People v. Caffey*, 205 Ill. 2d 52, 116 (1990). An individual's presence at the scene of the crime, knowledge the crime is being committed, close affiliation to the defendant before and after the crime, failing to report the crime, and fleeing from the scene of the crime may be considered in determining whether the individual may be accountable for the crime or shared a common criminal plan or agreement with the principal. *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995). After the trial court reviews all the evidence and determines there is

insufficient evidence to justify the giving of a particular jury instruction, its determination will not be overturned except for a finding of an abuse of discretion. *People v. McDonald*, 2016 IL 118882, ¶ 42.

¶ 53 Defendant argues that the accomplice witness instruction should have been given because there was probable cause to believe Thompson was guilty of the murder on the theory of accountability under section 5-2(c) of the Criminal Code of 1961. 720 ILCS 5/5-2 (c) (West 2014). Section 5-2(c) provides that a person is legally accountable for the conduct of another when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense."

¶ 54 Defendant argues that there is probable cause to establish that Thompson acted as an accomplice in the shooting death of Tate. Defendant highlights that Thompson admitted that he was involved in defendant's drug business, discussed Tate's threat to the business with defendant prior to the shooting, and admitted that defendant asked him to beat up Tate. Furthermore, defendant argues that the gun used to shoot Tate was retrieved by defendant from Thompson's mother's house. In addition, defendant points to the fact that Thompson was present during the shooting and fled immediately thereafter, and did not immediately report the shooting to the police.

¶ 55 "To constitute one an accomplice he must take some part, perform some act or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime." *Henderson*, 142 Ill. 2d at 314. Further, one is not an accomplice merely because he "has guilty knowledge or who was even an admitted participant in a related but distinct offense." *Id.*

¶ 56 Here, the evidence does not establish that Thompson participated in the planning or

commission of the murder. Thompson did not physically take part in the commission of chasing and shooting of Tate, nor is there any evidence that Thompson knew ahead of time that defendant planned to kill Tate; indeed, it appears defendant's decision to do so was spontaneous. Similarly, there is no evidence that defendant's instructions to Thompson to "beat up" Tate suggested that he kill him, nor is there any evidence that Thompson interpreted it that way. Moreover, the fact that the murder weapon came from Thompson's house does not give rise to probable cause. There is no evidence that Thompson gave permission to use the gun, or knew that defendant was going to go and shoot Tate.

¶ 57 Defendant relies on *People v. Love*, 285 Ill. App. 3d 784 (1996) to support his position that the jury should have been instructed using IPI 3.17. In *Love*, the State's theory was that the defendant killed the victim to keep peace at the scene of the drug business. *Id.* The trial court found probable cause to believe one of the State's witnesses was an accomplice, basing its finding predominately on the fact that the witness was part of defendant's drug operation, acting mainly as a security guard, in an effort to further its interests. *Id.*

¶ 58 We find *Love* factually distinguishable. The witness who was found to be an accomplice in *Love* worked security for a drug operation taking place in a vacant lot. *Id.* at 787-88. His role was to stand on the corner near the place where the drugs were being sold and to watch for police. *Id.* at 188. Here, Thompson merely sold drugs for defendant and served no security function.

¶ 59 Furthermore, any perceived error stemming from the trial court's refusal to instruct the jury using IPI 3.17 was negated by the instruction that was given to the jury requiring the jury to consider "any interest, bias or prejudice" in assessing the testimony of any witness. The jury was provided with the following instruction:

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in light of all the evidence in the case."

We find that the trial court did not err in refusing to instruct the jury using IPI Criminal No. 3.17 (4th ed. 2000).

¶ 60 Defendant claims the prosecutor's comments during closing argument were improper and denied him a fair trial. Specifically, defendant claims the State (1) encouraged the jury to consider the societal problems of gun violence; (2) commented on defendant's invocation of his constitutional rights not to testify; and (3) shifted the jury's attention to the motives of trial counsel, while suggesting these motives were improper. Because defense counsel did not object to the State's closing arguments and did not include them in a posttrial motion, defendant has forfeited review of every claim. Therefore, these issues are reviewed only for plain error. *People v. Herron*, 215 Ill. 2d 167, 178 (2005).

¶ 61 The plain error doctrine is a narrow and limited exception to the waiver rule. *Id.* at 177 (quoting *People v. Hampton*, 149 Ill. 2d 71, 100 (1992)). The plain-error doctrine permits a reviewing court to consider unpreserved error when either: (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). With either prong, the burden of persuasion falls on the defendant. *Herron*, 215 Ill. 2d at 186-87. Before considering either prong, however, the reviewing court must first find that an error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 62 In general, prosecutors have wide latitude in the content of their closing arguments. *People v. Evans*, 209 Ill. 2d 194, 225 (2004). The prosecutor may remark on the evidence and on any fair and reasonable inference the evidence may yield, even if the suggested inference reflects negatively on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Reviewing courts will not focus on selected phrases or remarks in isolation, but rather consider the closing argument as a whole. *Evans*, 209 Ill. 2d at 225.

¶ 63 We recognize the conflict regarding the correct standard for reviewing a prosecutor's remarks during argument. See *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (suggesting *de novo* review of prosecutorial misconduct in closing argument); *People v. Hudson*, 157 Ill. 2d 401, 441 (1993) (suggesting review of the same issue for an abuse of discretion). Here, the result is the same regardless of what standard is applied.

¶ 64 Defendant first argues that the prosecutor's reference to the general societal problem of gun violence was improper. Defendant takes specific offense to the way the prosecutor opened his closing argument. The prosecutor said:

> "Every day we hear about numbers, statistics. You read about them in the news. 5 people shot here, 2 dead here, 13 shot this week, 4 then. We often hear about these things and read about them, and many times we may feel unsure what to do, is there any way to stop it, the nonsense.
>
> What Robert Tate became on April 12, 2010 is a statistic, is a number, a victim of a violent crime. John Jones wanted to have his corner, wanted to keep his joint, this man sitting right here. He wanted to make sure that nobody interferes in his business, even it's a 17-year-old boy, kid."

¶ 65 Defendant relies heavily on *People v. Johnson*, 208 Ill. 2d 53 (2003), wherein the

prosecutor argued during closing argument that:

> "They think they run this society. Ladies and gentlemen, we are going to ask that you respond affirmatively that they do not. We as a society do not have to live in their twisted world. We do not have to accept their values. We don't have to allow that to happen in our community. We don't have to allow these guys blasting sawed off shotguns at other human beings. We as a people can stand together and say, no, you're not going to do it here. And if you do, you have the—you will be held responsible for your actions.
>
> Consider what the defense is suggesting that you do. Consider the message that they want you to send. That by allowing him to escape responsibility for the actions that he has placed in motion, think about what message would be sent out to the streets. Hey, go ahead and get those sawed off shotguns. Go ahead and plan those murders. Grab your best Tec 9s, your best .38 and get them all over to the drug spots, deal dope and go ahead and blast away.
>
> And when you blast away, go ahead and flee. Flee to another location because there if a police officer responds and gets killed, don't worry, just say, not me, had nothing to do with it.
>
> Think about that message." *Id.* at 77.

¶ 66 The court held that the prosecutor's comments were improper because "broader problems of crime in society should not be the focus of a jury considering the guilt or innocence of an individual defendant, lest the remediation of society's problems distract jurors from the awesome responsibility with which they are charged." *Id.* at 77-78. The court interpreted theses comments as an improper effort to "identify and merge [the prosecutor's] position, on some

irrelevant and ethereal level, with the jury, the society and the community." *Id*. at 79. The court distinguished comments that "made clear to the jury that its ability to effect general and specific deterrence is dependent solely upon its careful consideration of the specific facts and issues before it," from the prosecutor's comments which "blur[red] that distinction by an extended and general denunciation of society's ills," challenging the jury to send a message. *Id.*

¶ 67 Defendant analogizes the prosecutor's comments in this case to those in *Johnson*, arguing that here the prosecutor focused on the broader problems of crime in society and encouraged the jury to "send a message." We disagree and find significant differences between this case and *Johnson.* Here, the prosecutor's remarks were limited to the particular facts of this case and unlike *Johnson*, the prosecutor was not asking the jury to use its power to send a message to society in general and to deter future gun violence. Unlike the prosecutor in *Johnson*, here the prosecutor did not engage in an extended and general condemnation of society's ills. Accordingly, we do not agree with defendant's contention that the prosecutor's statements amounted to error.

¶ 68 Defendant next argues the prosecutor improperly commented on his right to a jury trial and his right not to testify. We disagree.

¶ 69 An accused has a constitutional right not to testify as a witness on his own behalf, and the prosecutor is forbidden to make direct or indirect comments on the exercise of that right. *Griffin v. California*, 380 U.S. 609 (1965); *People v. Arman*, 131 Ill. 2d 115, 125-26 (1989). However, the prosecutor may comment and argue upon the facts and circumstances proved in the case and draw all legitimate inferences from those proven facts. *People v. Johnson*, 35 Ill. App. 3d 666, 668 (3d Dist. 1976). In determining whether the prosecutor made an improper comment about defendant's failure to testify, a court considers whether the reference was intended or calculated

to shift the jury's attention to the defendant's neglect to avail himself of his legal right not to testify. *Arman*, 131 Ill. 2d at 126. In making that determination, a reviewing court should examine the challenged comments not in isolation, but in the context of the entire trial. *Id.*

¶ 70 Here, the prosecutor made the following comments: "One of the things the defendant did after this murder, after he shot is to get into a car and flee. Yes, he is sitting in front of you today and he has sat in front of you for the past several days, but in a sense he is still fleeing." The prosecutor then argued that the jurors "have the opportunity to stop him and hold him accountable for what he did on April 12, 2010."

¶ 71 Viewing these comments in the context of the entire proceeding, we are not convinced that the prosecutor directly or indirectly commented on defendant's right not to testify. The comment was based on evidence at trial that defendant fled from the scene of the shooting and eluded police until his arrest. These comments are not like those found improper in other cases. See, *e.g.*, *People v. Edgecombe*, 317 Ill. App. 3d 615, 620-22 (2000) (prosecutor repeatedly argued by inference that the victim was the only person who provided testimony about the robbery, and focused upon the fact that "no one" contradicted certain aspects of the State's evidence: "[T]here has been no evidence whatsoever from that witness stand that says $60 wasn't taken . . . . No one says $60 wasn't taken from them . . . , there's no one that got up there that said anything different . . . ."); *People v. Smith*, 402 Ill. App. 3d 538, 542 (2010) (prosecutor directly mentioned that defendant did not testify: "Have you heard any evidence that he didn't know they were the police? . . . You didn't hear anything from that witness stand. You didn't hear any evidence that he didn't know they were the police. . . . Similarly you didn't hear any evidence that he wasn't trying to kill anyone."). Without some direct reference or reasonable inference drawn therefrom, we fail to see how a single, isolated comment about "fleeing," when

read in context, was aimed at highlighting defendant's failure to testify or suggested to the jury that it should focus its attention on defendant's failure to take the stand. Such an argument is attenuated at best and accordingly, we do not find any error.

¶ 72 Defendant also argues that the prosecutor improperly shifted the jury's attention away from the evidence and to defense counsel's motives, while at the same time implying defense counsel's strategy was improper.

¶ 73 During closing argument, defense counsel stated, "Robert Tate lived a very dangerous life. He was so tied to that street that he had the street name tattooed on his arm. It's dangerous enough just dealing in drugs and being around drugs and selling drugs. Now you add to that that you're ripping people off. You're going to make a lot of enemies. It's get money or die. That's what the 17-year-old had on the other arm."

¶ 74 During rebuttal, the prosecutor argued that defense counsel had put the victim, Tate, on trial. The prosecutor argued: "Apparently this case has become the People of the State of Illinois versus Robert Tate instead of the People of Illinois versus John Jones." The prosecutor went on: "Because you've heard a lot about Robert Tate. He had tattoos. He had a nickname. He may have been stealing from drug customers. He was a 17-year-old kid, and he was going down the wrong path no doubt about it, but does that mean that that's ok, it's all right? John Jones you can shoot him in the back as he is running away." The prosecutor ended: "He is not on trial. His character is not on trial."

¶ 75 We find the prosecutor's comments in the case at bar distinguishable from *People v. Emerson*, 97 Ill. 2d 487, 497 (1983), upon which defendant relies. In *Emerson*, our supreme court concluded that a prosecutor's comments required reversal where, among other things, the prosecutor suggested that defense counsel laid down a smokescreen " 'composed of lies and

misrepresentations and innuendoes' " and that counsel, like all defense attorneys, tried to " 'dirty up the victim.' " *Id*. The *Emerson* court held that "[u]nless based on some evidence, statements made in closing arguments by the prosecution which suggest that defense counsel fabricated a defense theory, attempted to free his client through trickery or deception, or suborned perjury are improper." *Id.*

¶ 76 Unlike the prosecutor in *Emerson*, the prosecutor in this case did not allege that defense counsel had deliberately lied to the jury or had fabricated a defense. Instead, the prosecutor's comments were in direct response to defense counsel's attack on Tate's character and an attempt to return the jury's focus back to evidence presented in the case. Taking into account the content and context of the comment and its relationship to the evidence, we are not convinced the prosecutor's comments were improper. Accordingly, we do not find any error.

¶ 77 Defendant's final argument is that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), and that such failure requires this court to reverse his conviction and remand for a new trial. To preserve an issue for appeal, a defendant must raise an objection at trial and raise the issue in a post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defense counsel failed to object at trial and did not preserve the error in the post-trial motion. Consequently, we consider defendant's claim under the plain error doctrine.

¶ 78 Under the standards articulated *supra* ¶ 61, we first address whether any error occurred. At the beginning of jury selection, the trial court stated that it was essential that each prospective juror understood and embraced the following principles: (1) That all persons charged with a crime are presumed to be innocent; (2) That it is the State's burden to prove the defendant guilty beyond a reasonable doubt; (3) That the defendant has no obligation to testify on his own behalf or to call any witnesses in his defense; and (4) The fact that the defendant does not testify must

not be considered in arriving at a verdict. The court did not however, ask the venire if they understood or accepted these principles.

¶ 79 Next, during jury selection, the court asked the majority of jurors individually, or in small groups of three to four, if they "agree[d] with and accepte[ed]" the four principles. The court did not ask three individuals who served on the jury about these principles at all. The court did not ask one individual, who also sat on the jury, about the principle that the defendant is presumed innocent.

¶ 80 Illinois Supreme Court Rule 431(b) provides:

> "(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section."
>
> Ill. S. Ct. R. 431(b) (eff. May 2007).

The trial court must ensure that each juror both understands and accepts each of these four principles. *Belknap*, 2014 IL 117094, ¶ 44-46.

¶ 81 Defendant argues, and the State concedes, that the trial court failed to adhere to Rule

431(b). The trial court did not expressly ask the jurors whether they *understood* the four principles, and failed to ask three of the jurors whether they accepted *and* understood the four principles. Moreover, the trial court failed to ask one juror about the presumption of innocence principle. This was a clear error. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). We therefore must consider whether the error amounted to plain error.

¶ 82 Defendant argues that the evidence was so closely balanced that the error alone severely threatened to tip the scales against him. *Herron*, 215 Ill. 2d at 193. In determining whether the evidence at trial was closely balanced, a reviewing court must evaluate the totality of the evidence, making a qualitative and rational assessment of it within the entire context of the case. *People v. Sebby*, 2017 IL 119445, ¶ 53. We must keep in mind that "[w]hether the evidence is closely balanced is, of course, a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge." *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). Our inquiry into the closeness of evidence involves an assessment of the charged offense, along with any evidence regarding witness credibility. *Sebby*, 2017 IL 119445, ¶ 53.

¶ 83 Defendant argues the evidence was closely balanced for the same reasons that he was not proved guilty beyond a reasonable doubt—the witnesses connecting him to the crime were incredible and impeached. We disagree.

¶ 84 The State presented Thompson who testified he was defendant's cousin and knew defendant well. Thompson also stated that he sold drugs for defendant and had conversations with defendant concerning Robert Tate, who was stealing money from defendant's drug customers. Thompson further testified that he saw defendant emerge from the gangway with a gun, chase down Tate, and shoot him in the back. Conic testified she saw two men running

around the intersection of Augusta and Avers. She saw this from an unobstructed vantage point on the second floor of her apartment approximately 75 feet away. Conic later picked out defendant in both a photo array as well as a lineup. Cynthia and Paula testified that defendant came to Paula's apartment on the day of the shooting and had a confrontation with Tate about him stealing from defendant's drug customers, providing a motive for defendant's actions. Cynthia and Paula both identified defendant in a lineup as the person who was at Paula's apartment on April 12, 2010 and spoke with them and Tate.

¶ 85 Defendant presented Binion and Davis, who testified that they heard a pop or gunshots, saw two men running in the intersection of Augusta and Avers, and that Tate, who was running towards them, fell to the ground. Defendant presented no other evidence that contradicted what Thompson, Conic, Cynthia, and Paula saw and heard on April 12, 2010.

¶ 86 While defendant points to certain inconsistencies, as well as other evidence that could be used to impeach certain witnesses, none of these witnesses wavered in their testimony or told different stories. In sum, the evidence presented was not closely balanced, as there was substantial evidence that provided defendant with a motive to shoot Tate, evidence placing defendant in the intersection of Augusta and Avers on April 12, 2010, and eyewitness testimony establishing that defendant retrieved a gun and chased Robert Tate and shot him in the back. Accordingly, we find that the evidence in his case was not closely balanced and no plain error occurred.

¶ 87 CONCLUSION

¶ 88 For the foregoing reasons, defendant's conviction is affirmed.

¶ 89 Affirmed.