2017 IL App (2d) 14-0667-U
No. 2-14-0667
Order filed February 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSEPH ZIEGLER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 12-CF-731 Honorable Sharon L. Prather, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel erred when he did not request an accomplice-witness instruction at defendant's second trial in connection with the testimony of two State witnesses. Defendant was entitled to an accomplice-witness instruction because there was probable cause that the two State witnesses were principal actors in or accountable for the arson charges. Further, counsel's error prejudiced defendant because the evidence was closely balanced and turned on the testimony of the two State witnesses. Therefore, we reversed and remanded for a new trial.

¶ 2 Defendant, Joseph Ziegler, was convicted of five counts of arson and one count of burglary in connection with a vehicle and house fire at Roseanne Aitken's property on August 9, 2012. On appeal, he argues he received ineffective assistance of counsel and an improper sentencing hearing. Because we hold that counsel was ineffective for failing to request an

accomplice-witness instruction, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on September 6, 2012, for theft, burglary, and multiple counts of arson. Count I charged that defendant committed the offense of aggravated arson in violation of section 20-1.1 of the Illinois Criminal Code of 2012 (Code) (720 ILCS 5/20-1.1 (West 2012)), in that defendant "while committing an arson, knowingly damaged a building of Roseanne Aitken being a residence located at 5113 Westwood Drive, McHenry, McHenry County, Illinois, knowing that one or more persons were present therein ***." Count II charged defendant with residential arson in that, while committing an arson, he "knowingly damaged the dwelling place of Roseanne Aitken ***" in violation of section 20-1.2[1] of the Code (720 ILCS 5/20-1.2 (West 2012)). Counts III through V charged defendant with arson pursuant to section 20-1(a) of the Code (720 ILCS 5/20-1(a) (West 2012)) in that he damaged Aitken's home and two motor vehicles by means of fire. Count VI charged defendant with burglary in that he entered one of Aitken's motor vehicles with intent to commit a theft in violation of section 19-1(a) of the Code (720 ILCS 5/19-1(a) (West 2012)). Count VII, the final count, charged defendant with theft of Aitkin's Garmin GPS device pursuant to section 16-1(a)(1)(A) of the Code (720 ILCS 5/16-1(a)(1)(A) (West 2012)).

¶ 5 A. First Trial

[1] This section of the Code was repealed effective January 1, 2013. P.A. 97-1108, § 10-10 (eff. Jan. 1, 2013). Residential arson is now defined under section 20-1(b) (720 ILCS 5/20-1(b) (West 2016)).

¶ 6 The case proceeded to a jury trial on November 4, 2013, on six of the seven counts.[2] The defendant was represented by a private attorney. The State argued that defendant started a fire at Aitken's home on the morning of August 9, 2012, destroying her house and two vehicles. Defendant did not know and had never met Aitken. The State argued he set fire to her property because he believed he was exacting revenge on another person, Nick Pennington; defendant was angry with Pennington because he believed that Pennington had stolen his drugs.

¶ 7 The defense's theory was that defendant was not the perpetrator, but in fact the offenses were committed by two of the State's witnesses, Dakota Wilkinson and Devin Weber. The defense argued that although defendant was dealing drugs that day, it was at Wilkinson's request. During closing argument, the defense repeatedly attacked Wilkinson's and Weber's credibility, including arguing that they had taken drugs that day; that they had an interest in the lost drugs; that they lied about who was with them and at what time events occurred; that the police apprehended them within the vicinity of the fire; and that they ran from the police but defendant did not.

¶ 8 At the end of trial, the jury found defendant guilty of burglary but was unable to reach a unanimous verdict on any of the arson charges. The court declared a mistrial on the remaining arson charges, and the State asked that the court set a new trial date. Defendant's counsel moved to withdraw as counsel, and the court granted his motion to withdraw on November 13, 2013. The court thereafter appointed a McHenry County public defender to represent defendant. On

[2] The State voluntarily dismissed the theft count prior to jury selection. The remaining counts were one for burglary and five for arson.

December 11, 2013, the court ordered that the public defender's office be provided with transcripts of defendant's first trial.

¶ 9 B. Second Trial

¶ 10 Defendant's second trial commenced on May 13, 2014. The charges against defendant were the five counts of arson originally charged in the first trial (one for aggravated arson, one for residential arson, and three for arson). Defendant was represented by public defenders Richard Behof and Angelo Mourelatos. In its opening statement, the State presented an argument similar to its argument at the first trial: namely, that defendant was "out for revenge" on Nick Pennington, who defendant believed had stolen his drugs, and started the fire that destroyed Aikten's home and vehicles under the mistaken belief that he was setting fire to Pennington's property. The State continued that Aitken's house was close to Pennington's and that it had a dark-colored SUV in the driveway, which was similar to the vehicle defendant had seen Pennington in the day before.

¶ 11 The defense put forth a similar theory to the first trial, although it did not explicitly argue that Wilkinson and Weber committed the offenses charged. They asserted defendant's innocence, arguing in part that defendant did not smell like gas; did not run from the police; and could not have carried the propane tank while riding a bicycle. The defense argued that Wilkinson and Weber lacked credibility, in part because their timeline of events conflicted with the testimony of other witnesses, including Pennington's; they both consumed alcohol and drugs the day of the fire; they were present at the scene of the crime the morning of August 9, 2012, and fled from the police unlike defendant; Wilkinson asked the police how much trouble he was in; and Weber's shirt was found at the scene of the crime.

¶ 12 The State's first witness was Roseanne Aitken, and she testified as follows. She lived at 5113 North Westwood Drive with her husband Larry. Her home was a three-bedroom ranch with a basement, and she identified her house on a map of her neighborhood. Aitken was familiar with the Penningtons, who lived on her street. She also identified their house on a map. She did not personally know defendant.

¶ 13 Aitken and her husband owned two vehicles: a 2000 GMC Envoy and a 2000 Chevrolet pickup truck. The GMC Envoy was a darker blue. The two vehicles were parked right next to the garage between August 8 and 9, 2012, approximately two feet away from the house. Aitken kept a Garmin Nuvi GPS device in the GMC Envoy on the dashboard. She identified the Garmin device recovered by the police from defendant as the same device that had been in the Envoy.

¶ 14 On August 8, 2012, Aitken went to sleep around 11:00 p.m. Around 4:00 a.m., she woke up to "an explosion or ignition sound." She noticed an orange glow coming from the spare bedroom window. She walked over to the window and observed flames sprouting from the GMC Envoy. Her first reaction was to scream, then call 911, and then grab the dog and leave the house. Larry was not home at the time because he was a truck driver and on a job. After leaving the home, she heard popping sounds and a bigger explosion. The fire spread from the GMC Envoy to the Chevy and her house.

¶ 15 Leroy Schmitt testified as follows. He lived at 5115 North Westwood Drive,[3] and he was Aitken's neighbor. He worked with asphalt, paving parking lots and driveways. His typical workday began between 6:00 and 7:00 a.m., and he would wake up for work around 4:00 a.m. On the morning of August 9, 2012, he heard a bang outside. He started walking toward the

[3] His house was the first house directly north of Aitken's on North Westwood Drive.

window and observed an orange glow coming from outside. At first, he thought Larry may have come home and had his truck with its flashers on. Upon reaching the window, however, he observed a vehicle on fire.

¶ 16 Schmitt tried calling 911, but his call did not go through. He went next door to another neighbor's house to tell them to call the fire department. He retrieved the garden hose from his house and used it to spray water on the vehicle, but he did not have any success in putting out the flames. The fire department arrived before he had to leave for work around 6:00 a.m. At some point that morning he became aware that a propane tank was missing from his yard. The propane tank was a spare for his grill. He had not noticed that the propane tank was missing prior to August 9.

¶ 17 Michael Majercik, who was qualified as an expert in fire investigation science, testified as follows. Majercik was a battalion chief with the McHenry Township Fire Protection District, and he had been with the McHenry Township for 24 years. He responded to a 911 call around 4:45 a.m. on August 9, 2012, for a vehicle fire on Westwood Drive.

¶ 18 As Majercik approached Aitken's home on Westwood, he could see an orange glow emanating down the street. He was the second person to arrive on the scene, and he parked directly across from the fire. He observed that two vehicles were burning in the driveway at Aitken's property and that the fire was beginning to impinge upon the house. Majercik met with Aitken and one of her neighbors who told him that everyone was out of the house. Thereafter, a water tanker arrived, and the fire department began fire suppression.

¶ 19 The fire department had a difficult time putting out the vehicle fires. The fire required extra water and took about 15 or 20 minutes to suppress the fire. Normally, a vehicle fire might take 200 to 300 gallons of water to put out. The first tanker on the scene carried 1,000 gallons of

water, but the fire suppression required additional tankers. Majercik noted that there was gas leaking down driveway, and flames kept coming towards him parked across the street.

¶ 20 Majercik described the fire's progression in that the fire rolled up the side of the house and then onto the roof, where there was a large amount of black smoke and a huge ball of flame. The bottom of the house remained clear at first.

¶ 21 Neighbors told Majercik that they heard an explosion and afterward they saw the fire. There was also a propane tank found in a ditch that was burnt and split open. Based on the appearance of the propane tank and his experience, Majercik explained that a propane tank ruptured like this only when heat or flame is applied to it for a certain amount of time. The applied heat causes the gas inside to expand, which has nowhere to go and eventually causes an explosion. He believed this propane tank was exposed to a high heat source at close range, which caused it to explode.

¶ 22 Majercik further concluded that the fire began at the GMC Envoy. The Envoy had the most fire damage and was completely burned. The pickup truck next to it was burned on the side facing the Envoy. The fire spread from the cars to the side of the house.

¶ 23 Majercik opined that the fire was incendiary in origin—that is, the fire was intentionally set. He reached this conclusion based on multiple facts. First, he found the missing propane tank significant. In addition, firemen reported to him that the gas caps on both the Envoy and pickup truck were missing, and the fuel doors on both vehicles were open. This was not natural. A fire did not cause a fuel door to open or a gas cap to be removed. Finally, they found a cloth-like material stuffed into the "filler necks of the gas caps leading into both vehicles."

¶ 24 Daniel Danczyk, who was qualified as an expert in the field of fire science, also testified as follows. He was a deputy with the McHenry County Sheriff's Office. In addition to being a

policeman, he was also a certified firefighter. On August 9, 2012, he responded to a call for a fire at Aitken's residence on Westwood Drive. He arrived at the residence around 6:00 a.m., and the road was already blocked by fire trucks.

¶ 25 Danczyk investigated the scene, and he observed that the GMC Envoy sustained heavier fire damage than the Chevy pickup truck. The house sustained fire damage and there was "almost like a pattern climbing up the house from where the cars were." Based on his observations of the house, the premises, the vehicles, and the propane tank, Danczyk opined that the fire was incendiary, that is, caused by "human means."

¶ 26 Danczyk came into contact with defendant on August 9, 2012. He estimated he saw him on Westwood Drive around 9:00 a.m., walking north. He was initially alerted to defendant's presence by a neighbor yelling that somebody was hopping her fence. Defendant walked from the neighbor's yard into the road, and he was walking away from Danczyk. Danczyk yelled for him to stop, and defendant complied.

¶ 27 Danczyk searched defendant and found a Garmin Nuvi GPS unit in his cargo pocket. Defendant told him that the Garmin was his personal property. At the time, Danczyk did not know whether the Garmin belonged to Aitken. He observed that defendant's pants were "soaking wet." Some of the houses in the neighborhood had swimming pools.

¶ 28 Defendant told the officers at the scene that he had arrived by bicycle, and he instructed them where he had left the bicycle. The officers recovered the bicycle a few houses north of Aitken's residence—Danczyk believed it was three house north, alongside the garage. The house had a hot tub and a swimming pool. Danczyk also recovered a gray shirt and a Heineken beer bottle.

¶ 29 Jennifer Adeszko, one of Aitken's neighbors, testified as follows. She lived two houses north of Aitken's home at 5117 North Westwood Drive. She was awoken on August 9, 2012, around 4:30 a.m. by Schmitt banging on her window. The SUV at Aitken's house was on fire. A few hours later, while she was inside her house, she heard her chain link fence in her backyard rattle loudly. She looked out her window and saw defendant standing at her fence. She went outside and asked him what he was doing in her backyard. He said he was coming from a friend's house and that he had a "bum" knee, which was why he was cutting through. He eventually walked between her house and garage out to Westwood Drive. Adeszko followed him to the front yard, and defendant was walking north, away from the fire and toward the dead end of the street. She yelled to the police officers on the street that defendant had jumped her fence and that she did not know who he was. Defendant stopped and did not run when the police called to him.

¶ 30 Dakota Wilkinson testified as follows. He lived on Nippersink Drive, McHenry, Illinois. He was 20 years old at the time of trial and was 18 on August 9, 2012. At the time he was going to high school at Johnsburg High School. He knew defendant, and he described their relationship as they "used to be kind of buddy-buddy friends." He also knew Daniel Weber and Nick Pennington. He was friends with Weber but not with Pennington.

¶ 31 Wilkinson saw defendant on August 8, 2012, when he and his stepsister, Elaina, went to pick defendant up in Elmhurst. When they picked him up, defendant had a backpack, beer, and drugs on him—some type of Ecstasy. Once they were back in McHenry, they checked in with Wilkinson's parents, and then Elaina dropped him and defendant off at a Mobil gas station. It was still light outside when they arrived.

¶ 32 Weber was already at the Mobil station when he and defendant arrived. Weber had a longboard with him, which was a type of skateboard. Others were present, including Pennington, Dylan, and Cody. Dylan and Cody were Wilkinson's age, and Pennington was a year older. Dylan was driving a black, compact, four-door SUV. Defendant went to the gas station to buy some cigarettes, and Weber and Wilkinson took a walk down the street, "aimlessly walking." The next time he saw defendant, he was dropped off by Dylan's black SUV. Defendant exited the vehicle and was checking his person to make sure he had everything on him. Defendant realized that he did not. He then asked the other people in the car to empty their pockets and get out of the car because he was searching for his drugs. Defendant was worried and "kind of angry."

¶ 33 The people in the car let defendant search them, although they said they did not take anything. Defendant also searched inside the car. He made Cody and Pennington come with him in order to make sure they did not take anything. Dylan remained in the car because he was driving.

¶ 34 Wilkinson observed defendant get into a verbal altercation with Pennington. Defendant was "very demanding, very angry." He accused Pennington, saying that he knew that he had his drugs. Defendant said to give the drugs back or he was going to do something, to which Pennington responded that he was right here, so defendant should do something about it. Defendant did not do anything at the time.

¶ 35 Eventually, Pennington and Cody left, and all who remained were defendant, Weber, and Wilkinson. They then took some drugs from separate baggies that defendant had. Thereafter, they walked to Wilkinson's house where they drank beer in the backyard, "relaxing" and "minding our own business." Defendant "kept asking" Wilkinson for gas or if he knew where

any gas was. When asked why, defendant said he wanted to harm Pennington, but there was no gas in Wilkinson's yard. Defendant asked to borrow Wilkinson's bicycle. He let him borrow it but did not think that he was going to be going off anywhere far away. He did not observe in which direction defendant headed off on his bicycle. By 1:00 or 1:30 a.m. on August 9, he realized that defendant was not coming back. Wilkinson identified the bicycle that Danczyk found a few house north of Aitken's house as his bicycle.

¶ 36 While defendant was off on the bicycle, Kayla Peters came over to Wilkinson's house. Peters, Wilkinson, and Weber searched for defendant, beginning by heading toward Pennington's house. Wilkinson believed that defendant might be there. They looked for defendant for about half an hour but did not find him. At some point, Wilkinson broke off from Peters and Weber because he had the longboard and they did not. He spotted defendant on the corner of West and Pistakee, which was "down the street, basically" from Pennington's house, on his bicycle with a propane tank. He was struggling with the propane tank. He yelled out defendant's name, and defendant stopped. Defendant put the propane tank down and waited for Wilkinson to come over. He asked defendant what he was doing but did not get an intelligible answer. He told defendant to wait while he got Peters and Weber, but he was gone by the time Wilkinson returned. That was the last he saw of defendant that night. He, Peters, and Weber went toward Pennington's house and waited on the street, and Weber did a lap around the neighborhood on the longboard. They chose to go toward Pennington's house because it was a "good guess" that defendant would be there.

¶ 37 Eventually, Wilkinson, Weber, and Peters left and went back to Wilkinson's house. Peters went home, but Wilkinson and Weber stayed up—Wilkinson could not sleep, and he believed it was because of the drugs. They decided around 6:30 a.m. to go to Weber's house on

the other side of Johnsburg. The route to Weber's house took them past Pennington's, and on the way they saw fire trucks. Two police cars pulled up behind them, and they ran away on instinct. Wilkinson was on court supervision for prior offenses. He eventually stopped running and went back to the police because there was no point to running. The police took him to the police station. He did not set a fire that night nor help defendant set a fire.

¶ 38 Devin Weber testified next as follows. He was 17 years old on August 9, 2012, and he was friends with Wilkinson and acquaintances with defendant. He saw them both on August 8, 2012, at a park next to a Mobil gas station in the middle of Johnsburg around 8:00 p.m. They "hung out" and walked down the street. At some point, defendant got into a black SUV—a four-door Ford Explorer[4]—down the street from the Mobil station. He could remember two people that were in the SUV: Pennington and Dylan Leshinger. Weber did not get in the SUV with defendant. After defendant exited the SUV, he realized he left his bag in the vehicle and returned to search for it. Once he got his bag, he began walking down the street until he realized drugs were missing from his bag. He began to "freak out" and then called the people from the SUV. The SUV returned and defendant searched the vehicle and the people who were inside it. Defendant was "very aggressive, very angry." He did not find the drugs.

¶ 39 Weber, Wilkinson, defendant, Pennington, and Dylan all walked together down the street. Defendant started yelling at Pennington, and Pennington was yelling back. Defendant was yelling that he knew Pennington stole his drugs, and Pennington was yelling that he did not. They were "in each other's face the whole time." Defendant said he wanted to fight Pennington.

[4] Pennington later testified that the vehicle was a Chevrolet Trailblazer.

After their verbal altercation ended, they walked their separate ways, with Pennington returning to his SUV and Weber, Wilkinson, and defendant returning to Wilkinson's house.

¶ 40 On the way to Wilkinson's house, defendant was upset about losing his drugs and said that he wanted to set fire to Pennington's house or blow it up. He said this numerous times. Weber "blew it off" that defendant was simply upset and was overreacting. Back at Wilkinson's house, they all drank in the backyard. Defendant was looking around for something to make a bomb with, including in Wilkinson's shed.

¶ 41 At some point, they all went for a ride around the neighborhood, but defendant was on a bicycle and Wilkinson and Weber had only skateboards. Defendant took off—Weber turned around and he was simply gone. They searched for defendant on their way back to Wilkinson's house but could not find him. Wilkinson and Weber returned to Wilkinson's house, and Peters arrived some time later. They hung out for about 30 minutes before deciding to go look for defendant again. They began looking in the direction of Pennington's house. At some point, Wilkinson went ahead on the longboard, and he reported that he saw defendant with a propane tank. When all returned to where Wilkinson had seen defendant, defendant was no longer there. Weber never personally saw defendant. They then went to Westwood Drive to continue looking for defendant but did not find him, and they eventually returned to Wilkinson's house.

¶ 42 Around 6:30 a.m., Weber and Wilkinson left Wilkinson's house for Weber's. Peters had gone home some time earlier. The drugs had kept Wilkinson awake, and in turn Wilkinson had kept Weber awake. Weber had used marijuana and drank alcohol. The route to his home went past Pennington's house, and while riding down the street, they saw fire trucks. They were stopped by police officers and put in the squad car; Weber was "terrified." He had never been in such a situation in his life and was worried he was in trouble.

¶ 43 Weber identified the gray shirt that Danczyk found near Wilkinson's bicycle as his own shirt. Weber had not worn the shirt that day, but he claimed that the shirt was within his backpack that he had with him almost the entirety of August 8 and 9, 2012. He had put the backpack down in Wilkinson's yard by the shed around the time defendant was searching for materials to make a bomb.

¶ 44 Kayla Peters testified next as follows. She drove over to Wilkinson's house around 1:00 a.m. on August 9, 2012. She, Weber, and Wilkinson hung out and then went walking to find drugs. Around 1:30 or 2:00 a.m., they went to look for defendant. While searching, Wilkinson broke off from her and Weber to look for defendant down Pistakee Road. He was gone for about 20 minutes, and when he returned he was "freaking out." She never personally saw defendant, and she went home around 3:00 a.m.

¶ 45 Next, Nicholas Pennington testified as follows. He lived at 5107 Westwood Drive, in Aitken's neighborhood.[5] He met defendant for the first time on August 8, 2012. He saw him at the Mobil gas station in Johnsburg. At the time, Pennington was with his friend, Dylan Leshinger. Dylan had driven Pennington to the station in his black, four-door Trailblazer, which was a type of SUV, in order to buy some cigarettes and something to drink. At some point, they picked up defendant and drove to a park, and defendant asked him and Dylan whether they wanted any of his drugs. Defendant said he had some type of synthetic Ecstasy and Methadone tablets, and he showed them the drugs. They declined.

[5] Pennington's house was the second house south of Aitken's on Westwood Drive, McHenry, Illinois.

¶ 46 They dropped defendant off at a bar and went to pick up Pennington's "buddy" Cody. While picking him up, he got a call from defendant that he needed to come back because something was missing and they needed to search the car. Pennington and his friends complied and met defendant near where they dropped him off. Defendant searched him, Cody, and Leshinger's pockets and the vehicle. Defendant was "kind of angry." Pennington then took a walk with defendant for what "seemed like forever." He and defendant got into an altercation, with defendant saying that if he did not find his drugs he was "going [to] beat everyone's ass." Pennington responded that defendant was not going to do anything. Defendant started pointing at him, saying that he stole the drugs and that he would come to his house. Pennington replied that he would "beat his ass," and they got in each other's face. However, the altercation did not turn physical. After some time, they "got sick of it" and everyone parted. That was the last that Pennington saw of defendant that evening.

¶ 47 The defense called one witness: John Oaf. He testified as follows. Oaf was an electrical engineer, and he lived near Aitken's house at 807 West Eastern Avenue.[6] He was asleep the morning of August 9, 2012, with his bedroom window open. He was awoken that morning by the sound of something dragging across the road in front of his bedroom window. He was unsure of the time, but his wife was still in bed, and she typically woke up at 4:00 a.m. When he looked out the window he saw three boys, although he could not "swear by it." They appeared to

[6] His house was at the southeast corner of Westwood Drive and Eastern Avenue. Aitken's home was on the western side of Westwood, approximately three houses south of the intersection of Westwood Drive and Eastern Avenue.

be "taller male kids." Two were talking and the third was trailing with a skateboard. They were heading east, away from Westwood Drive. Shortly thereafter he went back to bed.

¶ 48 Oaf was awoken again a little later by a "constant horn going off." He jumped out of bed, thinking there had been a head-on collision, but when he looked out the window he did not see anything. He went outside to look around, and at that point he heard an explosion. He looked toward Westwood Drive and could see that the vehicles in Aikten's driveway were on fire.

¶ 49 At the end of trial, the court instructed the jury on the law. The State requested accountability language be included in its arson instructions, arguing that it could advance the alternative theory that Wilkinson and Weber committed the crimes and defendant helped them. The State cited evidence that may persuade a jury that Wilkinson and Weber were responsible for the fire, including that they knew where Pennington lived and that Wilkinson's bicycle was found near the scene. The State further argued that defendant still had the GPS device in his pocket, so "he at least aided in going into that car before it was incinerated, meaning that we can make the argument that he was a co-conspirator." The court granted the State's request, explaining that there was sufficient circumstantial evidence for an accountability instruction. In particular, the court explained that Weber's shirt was found at the scene; Weber ran from the police; Oaf witnessed three individuals on the street that morning; and there was testimony that Wilkinson and Weber were sitting in front of Pennington's house that night. The court also instructed the jury that only they were the judges of believability of witnesses and the weight to

be given testimony, and that the jury may take into account the interests, bias, or prejudice that witnesses may have.[7]

¶ 50 The jury returned a guilty verdict on all five arson counts: one for aggravated arson, one for residential arson, and three for arson (one each for the real property, the GMC Envoy, and the Chevy pickup truck).

¶ 51 The court held a sentencing hearing on July 2, 2014, for the five arson-related counts and one count for burglary. The court sentenced defendant to 12 years imprisonment for aggravated arson (count I), 4 years for arson (count IV), 4 years for arson (count V), and 4 years for burglary (count VI), with all sentences to be served concurrently.

¶ 52 Defendant timely appealed.

¶ 53 II. ANALYSIS

¶ 54 Defendant makes several arguments on appeal. He argues that counsel provided ineffective assistance when failing to request an accomplice-witness jury instruction at both trials; failing to elicit helpful evidence from the first trial or impeach key witnesses at the second trial; and failing at the second trial to object to a jury instruction that included a lesser mental state than the mental state charged in his indictment. Finally, he argues that even if his conviction is upheld, we should remand for a new sentencing hearing because the court improperly considered an aggravating factor that was inherent to the offense—that is, arson's threat of harm. Because we resolve this case on the failure to request an accomplice-witness instruction at the second trial, we do not address the other arguments.

¶ 55 A. Ineffective Assistance

[7] Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000).

¶ 56 A defendant arguing ineffective assistance of counsel must meet the two-pronged test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cherry*, 2016 IL 118728, ¶ 31. The *Strickland* test requires that a defendant show that counsel's representation was (1) objectively unreasonable under prevailing professional standards and (2) there was a reasonable probability that but for counsel's deficient representation, the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81. A claim of ineffective assistance of counsel must be viewed under the totality of circumstances in each particular case. *People v. Shatner*, 174 Ill. 2d 133, 147 (1996). The first prong requires that defendant overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). The second prong requires a showing of actual prejudice, not "simply speculation that defendant may have been prejudiced." *Patterson*, 2014 IL 115102, ¶ 81. A "reasonable probability" is one sufficient to undermine confidence in the outcome, rendering the result unreliable or fundamentally unfair. *Id.* Ineffective assistance claims may be resolved by failure to satisfy either prong, and prejudice may be examined first. *Id.*; *People v. Guerrero*, 2011 IL App (2d) 090972, ¶ 60.

¶ 57 Defendant argues as follows that his counsel was ineffective. Counsel did not request that the jury receive an "accomplice witness" instruction at either trial, despite testimony from State witnesses that could also have been charged with arson. While the State's primary theory at both trials was that defendant committed the charged offenses by himself, its alternative theory was that he committed them with the help of State witnesses Wilkinson and Weber. Accomplice testimony is "fraught with serious weakness." *People v. Lewis*, 240 Ill. App. 3d 463, 466 (1992). An accomplice-witness instruction informs a jury that the testimony of a witness involved in the commission of a crime with a defendant should be considered with

suspicion and caution, and it should be examined in light of the other evidence in the case. Therefore, the failure to request an accomplice-witness instruction was unreasonable.

¶ 58 Defendant continues that he was entitled to receive an accomplice-witness instruction because the totality of the evidence established probable cause that Wilkinson and Weber participated in the charged offenses, either as a principal or as an accessory. Moreover, defendant contends that their testimony was indispensible to the State's case. They helped establish defendant's motive; they were the only witnesses to testify that defendant said he wanted to blow up Pennington's house and that he was searching for gas or something to cause an explosion; and Wilkinson was the only witness to testify seeing defendant with a propane tank near Aitken's house. Therefore, he argues that counsel's failure to request the accomplice-witness instruction prejudiced him.

¶ 59 The State responds at follows. Its alternative theory at the second trial was that defendant committed arson with Wilkinson and Weber as accomplices. Accordingly, it requested a jury instruction on accountability. Defendant's argument fails to consider that defense counsel's argument at trial was to separate defendant from Wilkinson and Weber—to argue that Wilkinson and Weber committed the crimes without defendant as an accomplice. The State stresses that defense counsel's theory that defendant was not tied to Wilkinson and Weber was a legitimate trial strategy, and an accomplice-witness instruction that would accept and accent such a relationship between defendant and the two State witnesses would fail to advance the defense's theory of innocence. Therefore, defense counsel did not commit error for failing to request the instruction.

¶ 60 The State continues that defendant was not prejudiced. The evidence of defendant's guilt was, as the court put it, "pretty overwhelming." Furthermore, the defense had already attacked

Wilkinson and Weber's version of events and their credibility at the second trial. Defense counsel argued that Wilkinson and Weber had taken drugs and alcohol on the day of the offense; that discrepancies existed in the time that witnesses reported events to have occurred that night, including when Wilkinson and Weber went to search for defendant that night; that they ran from the police; that Wilkinson said he knew that the police were coming for them and asked the police how much trouble he was in; and that Weber's shirt was found at the scene of the crime. In light of these arguments before the jury, the accomplice-witness instruction was unnecessary.

¶ 61 We agree with defendant that counsel's failure to request an accomplice-witness instruction at the second trial constituted ineffective assistance with respect to the five arson charges. As we explain, counsel unreasonably erred in not requesting an accomplice-witness instruction, and the error prejudiced defendant.

¶ 62 The accomplice-witness instruction states:

> "When 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." Illinois Pattern Jury Instruction, Criminal, No. 3.17 (4th ed. 2000).

This instruction should be given if the totality of the evidence and the reasonable inferences drawn therefrom establish probable cause to believe the witness participated in the commission of the crime. *People v. Gwinn*, 366 Ill. App. 3d 501, 520 (2006). Participation in the crime may be as a principal or under a theory of accountability. *People v. McCallister*, 193 Ill. 2d 63, 89 (2000). Probable cause is a commonsense consideration of the probability of criminal activity; it does not require proof beyond a reasonable doubt, and it does not even require a showing that the occurrence of criminal activity was more likely true than untrue. *People v. Jackson*, 232 Ill. 2d

246, 275 (2009). In other words, a defendant is entitled to the instruction if a witness could have been indicted either as a principal or under a theory of accountability, or if the witness admits his presence at the scene of the crime. *Gwinn*, 366 Ill. App. 3d at 520. If this standard is met, a defendant is entitled to the instruction even if the witness denies involvement in the crime. *People v. Wheeler*, 401 Ill. App. 3d 304, 313 (2010). The instruction functions to apprise the jury that testimony of an accomplice is "fraught with serious weakness," including the promise of leniency and malice toward the defendant. *Lewis*, 240 Ill. App. 3d at 466. However, even if a promise or expectation of leniency is denied, its existence is always expected, and an instruction is warranted to caution the jury's consideration of accomplice testimony. *People v. Riggs*, 48 Ill. App. 3d 702, 705 (1977) (citing 2 J. Wigmore, Evidence § 2057 (3d ed. 1940)).

¶ 63 Based on the totality of the circumstances in this case, counsel should have requested the accomplice-witness instruction. The defense repeatedly attacked the credibility of Wilkinson and Weber, including Wilkinson's observation that defendant was carrying a propane tank by himself on a bicycle. Importantly, no witness observed the actual commission of the crimes; Weber's shirt and Wilkinson's bicycle were found near the scene of the fire; testimony placed Wilkinson and Weber near Aitken's house in the early morning of August 9; and police apprehended them around 6:30 a.m. on August 9, after they fled the scene of the fire (defendant was not found near the scene until around 9:00 a.m.). The primary evidence linking defendant to the arsons that could not also link Wilkinson and Weber was defendant's possession of the Garmin GPS device in his pocket. Nevertheless, the State requested and was granted an accountability instruction, based on the alternative theory that Wilkinson and Weber committed the crimes, and the GPS device demonstrated that defendant was a co-conspirator if not a principal actor. These facts established probable cause that Wilkinson and Weber were involved

in the crimes charged, either as principals or under a theory of accountability. Therefore, defendant was entitled to an accomplice-witness instruction. *Campbell*, 275 Ill. App. 3d at 997 ("Where the witness, rather than the defendant, could have been the person responsible for the crime, the defendant is entitled to have the accomplice-witness instruction given to the jury.").

¶ 64 We reject the State's argument that the failure to request an accomplice-witness instruction was sound trial strategy. The State argues that the defense theory was to separate defendant from Wilkinson and Weber, and therefore an accomplice-witness instruction ran counter to the defense's trial strategy. This argument misses two critical points: (1) the primary defense strategy at the second trial was to discredit the testimony of Wilkinson and Weber; and (2) the accomplice-witness instruction primarily serves to caution the jury's consideration of the witness's testimony (see *People v. Davis*, 353 Ill. App. 3d 790, 798 (2004) (explaining that the purpose of the accomplice-witness instruction is to warn the jury that witness may have a strong motivation to provide false testimony for the State)). A jury instruction from the court carries more weight than the argument of counsel. See *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 36 (explaining that misstatement of law during closing argument does not usually lead to reversible error because circuit court instructions carry more weight)), and therefore an accomplice-witness instruction would have bolstered the defense's strategy to question Wilkinson and Weber's testimony. Here, the defense discredited Wilkinson and Weber in part by linking them to the crime—pointing to Weber's shirt, Wilkinson's bicycle, and their apprehension near the scene of the crime—and the court instructed the jury that it could convict defendant on a theory of accountability for Wilkinson and Weber's actions. Therefore, we conclude that failure to request an accomplice-witness instruction was unreasonable and satisfies the first *Strickland* prong.

¶ 65 Defendant must also satisfy the second *Strickland* prong by demonstrating that counsel's error prejudiced him. That is, defendant must show a reasonable probability that, but for counsel's failure to request the accomplice-witness instruction, the result of the second trial would have been different. See *People v. Hale*, 2013 IL 113140, ¶ 18. Failure to tender an accomplice-witness instruction does not necessarily constitute ineffective assistance of counsel. *Campbell*, 275 Ill. App. 3d at 998. On one hand, the lack of a particular instruction is harmless where the evidence against a defendant is overwhelming. *Campbell*, 275 Ill. App. 3d at 996. On the other hand, a failure to request an accomplice-witness instruction when the facts are closely balanced may undermine our "confidence in the outcome." *McCallister*, 193 Ill. 2d at 98 (quoting *Strickland*, 466 U.S. at 694). A general instruction on witness credibility does not alone cure the errant omission of an accomplice-witness instruction (*id.* at 96), although it may militate against a finding of prejudice (*Davis*, 353 Ill. App. 3d at 798). We look to the totality of the evidence to determine whether defendant was prejudiced by counsel's error. *Id.* at 796.

¶ 66 Several cases aid our determination on prejudice. In *People v. Campbell*, the defendant was convicted of burglary and criminal damage to property, in connection with breaking into and vandalizing a church. *Campbell*, 275 Ill. App. 3d at 994. Two State witnesses received leniency in the form of a lesser sentence and a dismissal of charges related to the same burglary and damage to the church. *Id.* at 995. The witnesses testified that the defendant entered the church and caused damage, while denying that they caused any damage to the church. *Id.* Their testimony was corroborated by a third party, who placed defendant at the church at the time it was vandalized. *Id.* at 996. Defense counsel did not request an accomplice-witness instruction. *Id.* at 995.

¶ 67 The *Campbell* court reversed, holding that the failure to tender the instruction was error that prejudiced the defendant. *Id.* at 999. The court reasoned that had the instruction been given, the jury would have examined the two key State witnesses' testimony in a different light, and it would have given different consideration to the testimony of the defendant himself. *Id.*

¶ 68 Our supreme court distinguished *Campbell* in *People v. McCallister*, 193 Ill. 2d at 98. In *McCallister*, the defendant was convicted of three counts of first degree murder and sentenced to death. *Id.* at 67. James Williams, a State witness, provided eyewitness testimony of the murders and events leading up to the murders. *Id.* at 70-72. Williams' testimony was corroborated by physical evidence and other witnesses. *Id.* at 67-68, 73-77. The defendant testified, claiming self-defense and claiming that Williams had also shot the third victim. *Id.* at 78-83. On appeal, defendant argued that his counsel was ineffective for failing to request an accomplice-witness instruction for Williams. *Id.* at 89.

¶ 69 The *McCallister* court disagreed, concluding that defendant was not prejudiced by the failure to request the instruction. *Id.* at 90. The court explained that the defendant's version of events was repeatedly contradicted by the forensic evidence at the scene of the murders, and his testimony was impeached by the statement he gave police at the time of his arrest. *Id.* at 91-94. Moreover, the accomplice-witness instruction would not have pertained to three other State witnesses that corroborated Williams' testimony and contradicted the defendant's, and the court had instructed the jury with a general instruction on witness credibility. *Id.* at 95-96. *Campbell* was distinguishable because there, the two State witnesses received leniency from the State for their testimony; the defendant's testimony was not at odds with the physical evidence; the defendant was not impeached by prior inconsistent statements; and the only witnesses that testified that the defendant damaged the church were the two accomplice witnesses. *Id.* at 97-98.

¶ 70 In *People v. Davis*, 353 Ill. App. 3d at 797, the court considered whether the defendant's claim of ineffective assistance was more like the claim in *Campbell* or *McCallister*. In *Davis*, the defendant was convicted of financial identity theft, computer fraud, and theft, related to the use of credit cards in the victim's name. *Id.* at 791. Police found the victim's credit cards at the house of defendant's fiancée, Jonyell Daniels, who the defendant said he was living with. *Id.* at 792. They also found letters addressed to the victim, a credit card with the victim's name in a leather wallet, and a list of individuals' personal information in a purse. The police arrested the defendant and Daniels, and both provided written statements. The defendant's statement admitted to obtaining a list of individuals' personal information and using it to obtain a credit card in the victims' name. *Id.*

¶ 71 At trial, Daniels testified for the State that defendant showed her the list of individuals' personal information and told her they could be better off using the information to obtain credit cards. *Id.* at 792-93. He gave her one of the credit cards, but she said she did not use it. Daniels also testified that she pleaded guilty to theft. *Id.* at 793. The defendant recanted his prior written statements, claiming the police physically coerced him. *Id.* He still admitted to making the list of customers' personal information and he admitted to calling the bank to remove the fraud alerts on the victim's credit cards. On appeal, the defendant argued that his counsel was ineffective for not requesting an accomplice-witness instruction for Daniels.

¶ 72 The *Davis* court rejected defendant's argument, holding that he was not prejudiced. It reasoned that this case was closer to *McCallister* than to *Campbell*. *Id.* at 797. Like in *McCallister*, the defendant's testimony was full of objectively discernible weaknesses, including inconsistent prior statements, uncorroborated facts, and it was at odds with the physical evidence. *Id.* On the other hand, Daniels' testimony was consistent with the evidence and with prior

statements to the police. *Id.* at 798. The purpose of the accomplice-witness instruction would have been to warn the jury of Daniels' motivation to provide false testimony. However, the court reasoned that she had already pleaded guilty and been sentenced for theft, and therefore her expectation of leniency was "virtually nonexistent." *Id.* Finally, the jury received a general credibility instruction, which factored against prejudice under the circumstances of the case. *Id.*

¶ 73 Here, we find that the facts of our case are more similar to *Campbell* than *McCallister* or *Davis*.[8] Importantly, the State's case against defendant relied upon the testimony of two witnesses—Wilkinson and Weber—to establish defendant's motivation, opportunity, and method for arson. See *Wheeler*, 401 Ill. App. 3d at 314 (holding defendant was prejudiced where facts were closely balanced and State's case rested on the credibility of key witness, despite court providing a general witness credibility instruction). Wilkinson and Weber were the only witnesses with defendant after his altercation with Pennington, and they were the only witnesses to testify that he continued to be angry about losing his drugs. Wilkinson testified that defendant said he wanted to harm Pennington and that defendant "kept asking" for gasoline or where he

[8] We also distinguish this case from our decision in *People v. Hunt*, 2016 IL App (2d) 140786, where we found the failure to request an accomplice-witness instruction did not prejudice the defendant. Importantly in *Hunt*, there was sufficient corroborating evidence that defendant committed the charged robbery, including that the police found the victim's missing engagement ring on his person; the State argued that its accomplice-witness was "a liar" and that the jury should not convict the defendant on her testimony alone; and the jury received an additional instruction on the believability of witnesses not received here (Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000)). *Id.* ¶¶ 3-4, 21, 61-63.

could find some while at Wilkinson's house. Moreover, Wilkinson was the only witness to testify that he saw defendant carrying a propane tank that night. Weber also testified that defendant wanted to set fire to Pennington's house or blow it up and that he was looking for material to cause an explosion.

¶ 74 The physical evidence against defendant was not strong but instead closely balanced, relying upon the testimony of Wilkinson and Weber to connect the dots. The physical evidence demonstrated only that somebody set fire to Aiten's property on the morning of August 9, 2012. No flammable liquids were found on defendant. There was no eyewitness to the commission of arson. The circumstantial evidence linking defendant to the arson was his presence near the scene around 9:00 a.m. and his possession of the Garmin GPS device, which was never explained. Unlike in *McCallister* and *Davis*, defendant did not testify, and therefore we cannot evaluate whether his testimony was contradictory or uncorroborated.

¶ 75 Unlike the witnesses in *McCallister* and *Davis*, Wilkinson and Weber's testimony lacked corroboration on key facts, including seeing defendant with a propane tank, and supported their involvement in the charged offenses. Wilkinson and Weber testified to consuming drugs and alcohol; defendant was found with Wilkinson's bicycle; Weber's shirt was found near the scene of the crime; Wilkinson and Weber were apprehended by police near the scene of the fire; they fled from the police whereas the defendant did not; they testified to their presence near Aitken's house within hours of the arson; and Aitken's neighbor Oaf testified to seeing three "taller male kids" walking together early that morning before hearing an explosion later that morning.

¶ 76 Like in *Campbell*, the credibility of the State's key witnesses was the lynchpin for conviction. See also *People v. Montgomery*, 254 Ill App. 3d 782, 791 (1993) (explaining that the absence of an accomplice-witness instruction was not harmless where evidence was close and

the State's case rested on credibility of the key accomplice witness). The court's general witness credibility instruction did not affirmatively admonish the jury to consider Wilkinson and Weber's testimony with suspicion (see *id.* at 791), and a general instruction cannot by itself cure the errant omission of an accomplice-witness instruction (*McCallister*, 13 Ill. 2d at 96 (explaining that if a general credibility instruction was sufficient on its own, the accomplice-witness instruction would be rendered "essentially meaningless")). Counsel's failure to request an accomplice-witness instruction under the facts of this case, cautioning the examination of Wilkinson and Weber's testimony, had a reasonable probability of affecting the outcome of trial. Accordingly, the prejudice prong of *Strickland* is met.

¶ 77 We do not hold, however, that counsel's failure to request an accomplice-witness instruction at the first trial constituted ineffective assistance on his burglary conviction. First, defendant has not developed his argument that the absence of an accomplice-witness instruction would have prejudiced him with respect to his burglary conviction.[9] Undeveloped arguments are forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan 1, 2016). Nevertheless, we do not believe that an accomplice-witness instruction would have affected the reasonable probability of the burglary conviction, because the testimony of Wilkinson and Weber was not the lynchpin for the burglary

[9] Defendant simply argues in his brief that "[t]he defendant's possession of the [GPS] device was never explained. The first jury, which found the defendant guilty of only the burglary charge *** apparently used his possession of the device to infer that he had participated in that offense. But the first jury reached that verdict without having the benefit of the accomplice witness instruction." Defendant concludes that with the instruction, some jurors may have refused to find him guilty of burglary.

conviction. Their testimony concerned why defendant may have wanted to start a fire and suggested that he did so on August 9. They gave no testimony regarding defendant stealing a GPS device, and, in fact, defendant's possession of the device remains unexplained. We agree with the State's argument that "the fact that the defendant was found near the scene at about 9:00 a.m. on the morning of the fire with the stolen GPS device in a pocket of his cargo pants supported his burglary conviction from the first trial, irregardless [*sic*] of how the jury was advised to view the testimony of any witness."

¶ 78 Because we hold that defendant received ineffective assistance of counsel at his second trial based on the failure to request an accomplice-witness instruction, we do not address his remaining arguments for ineffective assistance at his second trial or for improper sentencing at his second trial.

¶ 79 III. CONCLUSION

¶ 80 Defendant received ineffective assistance of counsel at his second trial when counsel failed to request an accomplice-witness instruction for two State witnesses. Accordingly, the judgment of the McHenry County circuit court is reversed on the arson charges, affirmed on the burglary charge, and remanded for further proceedings.

¶ 81 Reversed and remanded.