2018 IL App (1st) 152015-U

SIXTH DIVISION
Order filed: June 15, 2018

No. 1-15-2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 12 CR 8594
	)	
SHAQUILLE WRIGHT,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's convictions are affirmed where (1) his motion to suppress was properly denied because the physical lineup was not unduly suggestive, (2) the trial court did not abuse its discretion in denying the defendant's motion for a severance where the defenses were not antagonistic, (3) the defendant forfeited his contention regarding improper jury instructions, (4) the State presented sufficient evidence to prove the defendant guilty beyond a reasonable doubt, and (5) the defendant was not denied effective assistance of counsel.

¶ 2 Following a jury trial, the defendant, Shaquille Wright, was convicted of two counts of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)), one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)), and one count of

aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)), and sentenced to concurrent terms of 32 years' imprisonment. On appeal, he argues that (1) the court erred by not suppressing evidence from a physical lineup, (2) the court erred by denying his motion for severance, (3) the court erred in giving accountability jury instructions, (4) the evidence was insufficient to convict him beyond a reasonable doubt, and (5) trial counsel was ineffective for failing to call a witness. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 We set forth the facts necessary to provide background for the defendant's first several claims of error. Additional facts will be included as needed in later sections of this order.

¶ 5 In April 2012, the State charged the defendant and codefendant, Brian Lewis, with, *inter alia*, attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)), and aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)), based upon a shooting incident that occurred on April 3, 2012.

¶ 6 Prior to trial, the defendant moved to suppress the identification testimony of Marlo Davis, Chanee Loston, and Lenee Johnson who witnessed the shooting. A color photograph of the lineup was included in the motion to suppress. On March 24, 2014, the trial court held a hearing on the defendant's motion to suppress identifications. Following the hearing, the trial court denied the defendant's motion, finding that the physical line was not unduly suggestive.

¶ 7 On September 30, 2014, Lewis moved to sever his case from the defendant based on antagonistic defenses. Counsel for the defendant stated that she was in agreement with the severance, but the State opposed the motion, arguing that the defendant and Lewis failed to show

how their defenses were antagonistic or would result in prejudice. After hearing arguments, the trial court denied the defendant's and Lewis's motion for a severance.

¶ 8 The State presented the following evidence at a joint jury trial. On April 3, 2012, Marlo Davis, Rondale Standors, Andre Kidd, Ebony Cain, and several other individuals were playing basketball at Riverdale Park in Riverdale, Illinois. Davis testified that, around 2 p.m., three men entered the basketball court, had a five-minute conversation with Cain, and then left. Davis stated that the men were not wearing masks or anything to cover their faces and he identified the defendant and Lewis, in court, as two of the individuals who approached Cain.[1] Approximately 30 minutes later, around 2:30 p.m., Davis noticed three men in black hoodies and masks, approaching the basketball court with "guns in their hands." As soon as Davis alerted everyone about the trio, the men raised their guns and started shooting. Davis explained that everyone began to run and he could hear "shots" hitting the chain-link fence that surrounded the basketball court. Davis climbed the fence and ran toward the Metra train station at 137th Street with another man, Michael, who was also playing basketball. Davis stated that they ran up to the elevated platform where they observed one of the offenders chasing and shooting at Kidd. According to Davis, he and Michael returned to street level, ran through some backyards, met up with Kidd, and entered a side street where he observed one of the offenders approaching from 20 or 25 feet. Davis identified the "offender" as Lewis and explained that Lewis was wearing the same black hoodie that he wore during the shooting, but had no gun or mask, which allowed him to see his face. When asked what happened next, Davis testified that he ran towards a Metra police vehicle, which was on patrol in the area, and informed the officer "of what was happening." The

[1] Although the defendant had short hair at the time of trial, Davis explained that the defendant had braids or dreads in his hair on April 3, 2012.

Riverdale police arrived shortly thereafter and detained Davis, Michael, and Kidd. Davis testified that he also observed Lewis "with the police *** on [a] squad car," except this time, he was wearing a black t-shirt with a graphic design, which was the same t-shirt he was wearing when he was at the basketball court 30 minutes before the shooting.

¶ 9 Davis further testified that he viewed a physical lineup at the Riverdale police station where he positively identified the defendant and Lewis. He identified the defendant as one of the three men who came to the basketball court before the shooting and spoke to Cain, but was not able to identify the defendant as one of the shooters. Davis identified Lewis as the person who wore the black hoodie with another color on it. During his testimony, Davis acknowledged having three felony convictions.

¶ 10 Standors, who, at the time of trial, had a pending felony case for possession of a firearm, testified and mostly corroborated Davis's account of the events that occurred before and during the shooting. He added, however, that the group that originally approached the basketball court consisted of "about six people," and that they spoke to a person named "DeAndre." According to Standors, the three men who later participated in the shooting wore black glasses in addition to the black hoodies and masks; they were standing 15 or 20 feet from the basketball court when they commenced fire; and he ran and tripped over "the dude that was shot." On cross-examination, Standors stated that he was questioned by the Riverdale police and arrested for an outstanding warrant. And, although he initially testified that he observed three men approach the basketball court with three guns, he testified on cross that he only observed two guns being carried by two men.

¶ 11 Riverdale Police Detective Gilbert Plumey testified that, at 2:37 p.m. on April 3, 2012, he was dispatched to the basketball courts at Riverdale Park in response to a report of shots fired.

Upon arrival, he observed "complete chaos" and a man, later identified as Cain, lying on the ground with gunshot wounds to the buttocks, torso, and arm. Cain was conscious but did not provide information helpful to the investigation at that time. Detective Plumey testified that he received a description of one of the offenders from Standors, which he broadcast over the radio. Standors described the suspect as a male black, 5-foot 10-inches in height, 160 pounds, medium complexion, braided hair, wearing a black face mask, and carrying a black semiautomatic handgun with an extended magazine. On cross-examination, Detective Plumey added that Standors also stated that the offender was wearing a light-colored shirt and dark pants.

¶ 12 Chanee Loston testified that, at approximately 2:30 p.m. on April 3, 2012, she was on her third-floor balcony smoking a cigarette and talking to Lenee Johnson, who was on the adjacent second-floor balcony, when she heard gunshots. After the gunshots, Loston heard "a lot of commotion" and saw people running, including "three boys" who stood near the porch of a garden unit at 5 West 137th Place. She observed one of the men, whom she identified in court as the defendant, run into the alley where he tripped and dropped a black gun, which slid across the alley. Loston stated that the defendant retrieved the gun, threw it in a dumpster, and "tried to run back" through the gangway" at 5 West 137th Street when the police arrived. Loston explained that the police were on foot and she told one of the officers, "[t]here he go right there." She also told the officers that the defendant had thrown a gun into the dumpster and that two other men were hiding under a porch near the garden unit. Loston stated that she saw the officers detain the defendant. She testified that the defendant was wearing a black hoodie with another light color on it, gray or white; she stated that he was not wearing a mask and that she saw the defendant's face while these events unfolded. The next day, Loston went to the police station, viewed a

lineup, and identified the defendant as the one who fell and threw a gun into the dumpster. She identified Lewis as one of the men hiding under the porch at 5 W. 137th Street.

¶ 13 Lenee Johnson testified that she was outside on her balcony when she heard gunshots. She testified that she first observed a man wearing a black and gray hoodie, later identified as the defendant, running toward her through the alley. When asked if the defendant was wearing a mask or anything to cover his face, she answered in the negative. She noted that the defendant slipped and dropped a black gun near a big blue dumpster and ultimately put the gun inside the dumpster. Johnson observed the defendant's face when he tripped and fell. Later on, the defendant took the black and gray hoodie off. Johnson identified the defendant in a lineup at the police station the next day.

¶ 14 Riverdale Police Officer Lugo testified that, at approximately 2:30 p.m. on April 3, 2012, he was directed to 5 West 137th Place and helped arrest Lewis, who was crouching by a basement window. Later, he interviewed Loston, who told him that she was inside her apartment when she heard shots fired and afterwards went out to her balcony.

¶ 15 Eddie Thompson testified that, on April 3, 2012, he was painting the lower exterior windows of a two-flat residence in Riverdale when he heard a "barrage" of gunshots from two or three weapons around 2:30 p.m. He stopped painting and went to the front of the residence to discuss the shooting with his partner and, after a minute or two, returned to the rear of the building and continued painting. About a minute later, the gunfire continued again and Thompson turned around and saw a man running toward him, between the buildings. The man was wearing a black hoodie and a mask and held two firearms that looked like semi-automatic handguns. Although Thompson stated that he "removed [him]self from the area" by going to the west side of the building, he later stated that he was moving "back and forth" between the

buildings. Thompson saw the man slip and fall on a small patch of gravel, near a blue dumpster, and then heard a "clank" coming from the dumpster, like the sound of two pieces of metal hitting together. He also observed the man squat down behind the back porch of the building that he was painting, remove a mask that he was wearing, and throw it to the ground. The man, who was now wearing a white t-shirt and jeans and carrying a black and white hooded jacket in his arms, ran past Thompson and dropped the hoodie before crossing the street towards a vacant lot. Thompson also noted that the man had "dreads" or "braids" in his hair. Thompson testified that he went to the porch that he had previously seen the man squatting under and observed two guns lying under the porch that looked like the handguns he saw the man with earlier.

¶ 16 Metra police officer Frank Manfredo testified that he was on patrol on Illinois Street between 137th Place and 137th Street in Riverdale when he was flagged down by two people. He spoke to these individuals and continued driving north to 137th Street when he was stopped again by a different person who provided him with a description of another individual. Officer Manfredo observed a man, whom he identified in court as the defendant, that fit the description and was attempting to get into the passenger side of a white Pontiac. The defendant looked in Officer Manfredo's direction and then fled on foot through the buildings. He was wearing a black and white jacket, with blue jeans, and had short hair in dreads. He ran past 7 West 137th Place and Officer Manfredo followed him and eventually arrested him next to a bar or lounge. The defendant was not wearing the black and white jacket at the time he was apprehended, but was instead wearing a t-shirt and jeans.

¶ 17 Sergeant Anthony Padron testified that, on April 3, 2012, he responded to a call of "shots fired" at the basketball courts in Riverdale Park. He stated that he secured the crime scene, and assisted the evidence technician, Jeff Michalek, by locating evidence. Sergeant Padron found

four 9 mm shell casings on the path near the perimeter of the basketball court. He also located a "zip-up style jacket" from the area of 10 West 137th Place with a box of .22 caliber bullets inside one of the pockets. Sergeant Padron also recovered a .22 caliber revolver from a blue dumpster with six spent shell casings in the cylinder, as well as two handguns from under the porch of an adjacent building—a Springfield 9 mm that was not loaded and a black 9 mm Berretta which had a bullet in the chamber and some bullets in the extended magazine. He also recovered a mask near the two semiautomatic handguns. Sergeant Pardon further testified that, around 11 p.m. on April 3, 2012, he administered gunshot residue (GSR) tests to the defendant and Lewis. The next day, Sergeant Padron conducted a physical lineup at the police station, in which the defendant and Lewis were positively identified by Davis, Johnson, and Loston. On April 7, 2012, Sergeant Padron returned to the basketball courts with a metal detector and recovered four more shell casings. He brought the three firearms, magazines, and shell casings to the Illinois State Police crime lab for fingerprints, comparisons, and test firing. He also brought the GSR kits for analysis.

¶ 18 Forensic scientist Jeffrey Parise testified as an expert in the field of firearms and firearms identification. He examined and test-fired the three firearms that were recovered. He also examined the casings that were recovered. He concluded that all four casings were fired from the 9 mm Baretta handgun.

¶ 19 Scott Rochowicz, a forensic scientist at the Illinois State Police forensic science center, conducted a GSR analysis from the swabs of the defendants' hands. The sample from the defendant's hands had at least three tri-component particles so Rochowicz concluded that this was a positive test for GSR. He explained that a positive GSR test means the defendant discharged a firearm, contacted GSR from another item, or was within the environment of a

discharged firearm. Lewis's sample also tested positive for GSR. On cross-examination, Rochowicz testified that GSR can travel four feet or more and residue can be transferred from one part of the body to another.

¶ 20 Lauren Wicevic, an expert in latent print examination at the Illinois State Police, testified that she received three firearms, two magazines, and one cartridge to examine. After testing these items, Wicevic concluded that there were no fingerprints suitable for comparison on the firearms, magazine, and cartridge that she tested. Wicevic explained that it is not unusual to not find suitable prints on magazines, firearms, and cartridges because there are few surfaces that would receive a latent print.

¶ 21 After the State rested its case-in-chief, the defendant moved for a directed verdict, which the trial court denied. Both the defendant and Lewis rested without testifying or presenting any evidence.

¶ 22 During closing argument, counsel for Lewis challenged the credibility of Davis and Standors by arguing that they "were two felons" and their testimony about sweaters, jackets, and t-shirts was "nonsense" and serves to "hide the fact that no one saw this crime." He argued that the "bottom line" is that no one identified Lewis as the shooter except Davis, who is "a complete piece of garbage" and not a credible witness.

¶ 23 The defendant's trial counsel argued, *inter alia*, that this was a case of mistaken identity and that her client, who was 1 of 25 people in the park, was "stopped and thrown in with a bunch of ex-cons." She questioned Loston's and Johnson's ability to identify someone from "30 or 60 or 90 feet away" with obstructed views, and noted that "Davis and Lewis" are both ex-cons and the police "rounded them up." She argued in the alternative that the defendant is not legally accountable for anything Lewis did that day because the State failed to present any evidence that

the defendant knew Lewis, had a meeting with him, or otherwise "plotted to hurt or kill anyone." Trial counsel noted discrepancies between the witnesses' testimony and maintained that the evidence was conflicting as to who was wearing the black and white jacket.

¶ 24 Following closing arguments, the defendant was found guilty of attempted murder of Cain and Davis while personally discharging a firearm, aggravated discharge of a firearm in the direction of Davis and Standors, and aggravated battery with a firearm of Cain.

¶ *25* The defendant filed a motion for new trial, which was denied. He was subsequently sentenced to 32 years' imprisonment. This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 A. Motion to Suppress

¶ 28 On appeal, the defendant first contends that the trial court erred in denying his motion to suppress the lineup identification because it was inherently suggestive. He maintains it was "unduly suggestive because of the way the individuals were dressed." According to the defendant, he, Lewis, and one other person were dressed in white shirts that distinguished them from four other people who wore darker shirts.

¶ 29 Our review of the trial court's ruling on a motion to suppress presents questions of both fact and law. *People v. McCarty*, 223 Ill. 2d 109, 148 (2006). The trial court's factual determination that an identification procedure was not unduly suggestive will not be disturbed on review unless it is against the manifest weight of the evidence. *People v. Moore*, 2015 IL App (1st) 141451, ¶ 16. However, the trial court's ultimate ruling on a motion to suppress is a question of law which we review *de novo*. *People v. Close*, 238 Ill. 2d 497, 504 (2010).

¶ 30 A witness' pretrial identification of an accused must be suppressed only where the procedure was unnecessarily suggestive, and there was a substantial likelihood of

misidentification. *People v. Lawson*, 2015 IL App (1st) 120751, ¶ 39. It is the defendant's burden to prove that the pretrial identification was impermissibly suggestive. *People v. Brooks*, 187 Ill. 2d 91, 126 (1999). If he does so, the burden then shifts to the State to show by clear and convincing evidence that the witness identified the defendant based on his or her own independent recollection of the offense. *Id.*

¶ 31 When reviewing a claim of an unduly suggestive identification, the court must consider the totality of the circumstances. *Lawson*, 2015 IL App (1st) 120751, ¶ 39. The court may also consider the evidence presented at trial as well as the suppression hearing. *Id.* "Participants in a lineup are not required to be physically identical." *People v. Love*, 377 Ill. App. 3d 306, 311 (2007). Differences in the appearances of the participants go to the weight of a witness' identification, not to its admissibility. *People v. Jones*, 2012 IL App (1st) 100527, ¶ 24.

¶ 32 Here, the record reveals that the trial court's determination that the lineup was not unduly suggestive was not against the manifest weight of the evidence. Although the defendant was wearing a white t-shirt, he was not the only individual in the lineup wearing a white t-shirt shirt. Two other men had a white t-shirts, and one of them also had a dark jeans and braided hair like the defendant. The police were not required to find individuals with white t-shirts identical to the defendant. Moreover, some of the witnesses' descriptions of the offender did not include any indication of whether or not he was wearing a white t-shirt. Rather, the witnesses informed police that the offender wore a black hooded sweatshirt and a black mask around his face. Therefore, it is quite possible that some witnesses did not see the defendant's t-shirt during the shooting, and there is no indication that they identified the defendant during the lineup on that basis.

¶ 33 The record shows that the clothes worn by the defendant during the lineup were those he

was wearing when arrested. He was not ordered to wear the lighter clothing by police, but instead, merely wore his own clothing. The fact that the other men were wearing darker shirts and pants was not by any design of the police to highlight the defendant, and thus, was not unduly suggestive. See *Larson*, 2015 IL App (1st) 120751, ¶ 40. In fact, the darker shirts worn by three of the other men during the lineup more closely matched the description given by the witnesses.

¶ 34 Furthermore, although the defendant has a somewhat slighter build than the other men, the difference is not so significant as to render the lineup suggestive. The police were not required to find other individuals who were physically identical to the defendant. The photograph shows that all of the men in the lineup are male black, they are roughly the same height, they have similar complexions and hair color, and four out of seven men have braided hair. In addition, Sergeant Padron testified that all of the witnesses were told that the suspect may or may not be in the lineup, and that they were not required to identify anyone.

¶ 35 When considering the totality of the circumstances, we find that the trial court's determination that the lineup was not unduly suggestive was not against the manifest weight of the evidence. Based on this record, we conclude that the trial court correctly denied the defendant’s motion to suppress his identification.

¶ 36 B. Severance

¶ 37 The defendant next argues that the trial court erred in denying his motion for severance, because codefendant Lewis’s defense was antagonistic toward his defense.

¶ 38 The Code of Criminal Procedure (Code) provides for the joinder of related prosecutions if the offenses and defendants could have been joined in a single charge (725 ILCS 5/114-7 (West 2012)), and for severance if it appears that a defendant or the State is prejudiced by such

joinder (725 ILCS 5/114-8 (West 2012)).

¶ 39 Illinois courts have recognized two independent grounds for severance. *People v. James*, 348 Ill. App. 3d 498, 507 (2004). The first involves an interference with the defendant's right of confrontation where a codefendant has made out-of-court statements which implicate the defendant, and the second involves a situation where the defenses are so antagonistic that one of the codefendants cannot receive a fair trial if they are tried jointly. *Id.* at 507. In this case, the defendant bases his claim on the second ground, which requires actual hostility between the two defenses. *People v. Gabriel*, 398 Ill. App. 3d 332, 347 (2010). Actual hostility occurs where one defendant targets the other as the actual perpetrator of the offense or where each protests his innocence in condemning the other. *Id.* at 347; *People v. Edward*, 128 Ill. App. 3d 993, 1000-01 (1984).

¶ 40 In ruling on the motion for severance, the trial judge must make a prediction about the likelihood of prejudice at trial, taking into account the papers presented, the arguments of counsel, and any other knowledge of the case developed from the proceedings. *People v. Daugherty*, 102 Ill. 2d 533, 541 (1984). The decision to grant a separate trial is within the sound discretion of the trial court, and will not be reversed absent an abuse of discretion. *People v. Lee*, 87 Ill. 2d 182, 186 (1981). A trial court abuses its discretion only when its ruling was arbitrary, fanciful or so unreasonable that no reasonable person would agree with the view adopted by the trial court. *People v. Chambers*, 2016 IL 117911, ¶ 68.

¶ 41 In this case, the record reflects that the defendant and Lewis requested a severance at a hearing on a motion *in limine* regarding a photograph found on Lewis's cell phone, which depicted the defendant, Lewis, and a third individual each holding a firearm. Regarding the photograph, the trial court determined that the search of Lewis's cell phone violated Lewis's

Fourth Amendment rights and ordered the State to redact or "block out" the faces of Lewis and the third individual. Counsel for Lewis then argued that redaction was not enough because the jury would be informed that the photograph came from Lewis's phone. Counsel for the defendant joined Lewis's motion for a severance, which the trial court denied.

¶ 42 In his brief on appeal, the defendant abandons his argument that the admission of a redacted photograph rendered his defense so antagonistic as to deprive him of a fair trial. Instead, the defendant asserts that severance was appropriate because this is a "complex case" and that "a mass of evidence" against Lewis was used to convict him. He also complains that Lewis's attorney "spent a great deal of time" implying that the defendant "was guilty of the shooting."

¶ 43 Initially, we note that the defendant and Lewis did not testify or present any evidence at trial and, therefore, never directly implicated each other through sworn testimony. Some case law suggests that our analysis should stop here and find no error in denying the defendant's motion for a severance. In fact, this court has observed on more than one occasion that "antagonistic defenses have been confined to those instances where one codefendant *testifies* implicating the other." (Emphasis added.) *People v. Bramlett*, 211 Ill. App. 3d 172, 179 (1991); *People v. Precup*, 50 Ill. App. 3d 23, 29 (1977); see also *People v. Murphy*, 93 Ill. App. 3d 606, 609 (1981) ("Antagonistic defenses have been confined to those instances where one or more codefendants *testify* implicating the other.") (emphasis added). Likewise, our supreme court has referred to the problem of antagonistic defenses, in the context of a motion to sever, as one where "*a codefendant takes the stand* to point a finger at the defendant as the real perpetrator of the offense." (Emphasis added.) *Lee*, 87 Ill. 2d at 187.

¶ 44 But even if we continued our analysis, the defendant has not demonstrated that the trial court abused its discretion in denying the motions to sever. Based upon our review of the record,

we note that the defendant does not argue that the State introduced substantial evidence against Lewis that was *inadmissible* against him. We also question whether Lewis's attorney actually implicated the defendant in the shooting. Rather, both the defendant and Lewis essentially relied on the defense of reasonable doubt by attacking the credibility of the State's witnesses and evidence and pointing out the discrepancies therein. At no time during the trial did the defendants become opponents or implicate their co-defendant while proclaiming their own innocence. Thus, the antagonism and resultant prejudice which the defendant alleged in his motion to sever never manifested itself at trial.

¶ 45 It is true that, in his cross-examinations of various witnesses, Lewis's attorney emphasized that it was the defendant, not Lewis, who threw the revolver into the blue dumpster and was wearing the black and white hooded jacket with .22-caliber bullets. Obviously, this testimony and argument did not help the defendant and, at least to some degree, hurt the defendant's case. But the key here is that the overwhelming evidence against the defendant did not come from Lewis or even from questions asked by Lewis's attorney, but rather from the State's witnesses on direct examination. These witnesses—Davis, Standors, Edwards, Johnson, Loston, Detective Padron, and forensic scientist Parise—repeatedly identified the defendant as the one who was armed, who participated in the shooting, who fled the scene, and who was found hiding near a garden unit before being arrested in a vacant lot. Lewis's attorney merely emphasized those same points to the jury in cross-examination. It was cumulative testimony; any negative incremental impact on the defendant's case would have been negligible at best.

¶ 46 In *Lee*, 87 Ill. 2d at 189, our supreme court held that the trial court did not err in refusing to sever the defendant's trial, *even after a codefendant took the stand and testified that the defendant had forced him to commit the fatal shooting*, because the codefendant's testimony was

cumulative—it merely repeated testimony already received from two other witnesses. Likewise, in *People v. Zambetta*, 132 Ill. App. 3d 740, 746 (1985), this court found no error in denying a motion to sever, even though a codefendant testified and implicated the defendant in the drug transaction, because "the codefendant's testimony was merely cumulative of the evidence presented at trial," including two independent eyewitnesses to the drug transaction.

¶ 47 If sworn testimony by a codefendant implicating another defendant is not enough to warrant severance when it is cumulative, we fail to see how cumulative testimony from non-party State witnesses on cross-examination would warrant severance, either. In the end, while we recognize that Lewis's attorney emphasized points that may have been harmful to the defendant, they were nothing more than that—emphasis. The cross-examination revealed nothing new.

¶ 48 In sum, the supposedly damaging cross-examination and argument by Lewis's attorney was overwhelmingly cumulative of the evidence already introduced by the State, and to the limited extent it was not, it was not antagonistic to the defendant's case. The defendant cannot demonstrate that any meaningful difference resulted in this case from being tried jointly with Lewis. And more to the point for the purposes of our review, the defendant has not demonstrated an abuse of discretion—that the trial court's decision to deny him a severance was so arbitrary or unreasonable that no reasonable judge would have ruled the same way. We conclude, therefore, that the trial court did not abuse its discretion in denying the pretrial motion for a severance.

¶ 49 C. Accountability Jury Instruction

¶ 50 Next, the defendant argues that the trial court erred by giving an accountability instruction. He asserts that these instructions were prejudicial because they permitted the jury to find him guilty based on the actions of Lewis.

¶ 51 Initially, we note that the defendant forfeited this issue for review by failing to include it

in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Moreover, the defendant has forfeited his request that we review his claim under the plain error doctrine because he failed to request plain-error review in his opening brief. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2017) ("[p]oints not argued are forfeited and shall not be raised in the reply brief"). When a defendant declines to put forth an argument articulating how either of the two prongs of plain-error review is satisfied, he forfeits plain-error review. *People v. Nieves*, 192 Ill. 2d 487, 502-03 (2000). As a consequence, he has forfeited plain-error review.

¶ 52 Forfeiture aside, however, the defendant has not established that he is entitled to relief on the merits. Even if we found, *arguendo*, that the accountability instruction was improper, it is well-established that "an accountability instruction which is inappropriately given does not constitute reversible error where sufficient evidence existed from which the jury could have found defendant guilty as a principal." *People v. Andrews*, 95 Ill. App. 3d 595, 598 (1981) (citing *People v. Dukett*, 56 Ill. 2d 432, 451 (1974)). For the reasons we have explained, the evidence adduced at trial was more than sufficient to sustain the defendant's convictions based on testimony describing his own conduct, not that of Lewis. As such, the defendant's challenge to the accountability instruction is meritless.

¶ 53 D. Sufficiency of the Evidence

¶ 54 The defendant next contends that the State failed to prove him guilty beyond a reasonable doubt. We disagree.

¶ 55 When considering a challenge to the sufficiency of the evidence in a criminal case, our function is not to retry the defendant. *People v. Washington*, 2012 IL 107993, ¶ 33. Rather, our inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable

doubt. *Id*. This means that we must draw all reasonable inferences from the record in favor of the prosecution. *Id*. We will not reverse a conviction unless " 'the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *Id.* (quoting *People v. Ross*, 229 Ill. 2d 255, 276 (2008)).

¶ 56 At the outset, we note that the defendant was convicted of attempted first-degree murder, aggravated discharge of firearm, and aggravated battery with a firearm. In his brief on appeal, the defendant fails to set forth the elements of each offense and also fails to identify which elements the State failed to prove at trial. As a consequence, the defendant has forfeited this claim by failing to comply with Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2017). It is well settled that "a reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented." (Internal quotation marks and citations omitted.) *People v. Macias*, 2015 IL App (1st) 132039, ¶ 88. "The appellate court is not a depository in which the appellant may dump the burden of argument and research." *Id*. Forfeiture aside, the defendant's sufficiency-of-the-evidence argument lacks merit.

¶ 57 In order to prove the defendant guilty of attempted first-degree murder, the State was required to prove that he, or one for whose conduct he is legally responsible, (1) performed an act which constituted a substantial step toward the commission of murder, and (2) possessed the criminal intent to kill the victim. *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39.

¶ 58 Viewing the evidence in the light most favorable to the State, as we must, we find the evidence sufficient to prove the defendant guilty of attempted first-degree murder beyond a reasonable doubt. The testimony of Davis and Standors established that, around 2:30 p.m. on April 3, 2012, the defendant, Lewis, and a third individual were wearing masks and black hooded jackets when they started shooting at a group of individuals playing basketball at

Riverdale Park. Detective Plumey's testimony established that Cain sustained gunshot wounds to the buttocks, torso, and arm. The State's evidence further established that the defendant and his accomplices fled on foot to an alley near 5 West 137th Place where Johnson, Loston, and Edwards observed the defendant remove his mask and hooded jacket, and also watched as he tripped and fell while running in an alley. The same witnesses observed a gun slide across the alley, and then saw the defendant retrieve the gun and throw it into a blue dumpster. The defendant was arrested moments later and Davis, Johnson, and Loston each positively identified him in a physical lineup at the Riverdale Police Department the following day. In addition, Sergeant Padron recovered a .22-caliber revolver with six spent shell casings from the blue dumpster and forensic testing of the defendant's hands tested positive for gunshot residue, both of which supports the jury's finding that the defendant personally discharged a firearm. In our view, a reasonable trier of fact could reasonably conclude that the defendant committed attempted first-degree murder of Cain and Standors.

¶ 59 The evidence was also sufficient to prove the defendant guilty of aggravated discharge of firearm. To sustain the charge of aggravated discharge of a firearm, the State had to prove that the defendant, or one for whose conduct he is legally responsible, discharged a firearm in the direction of another person. 720 ILCS 5/24-1.2(a)(2) (West 2012). Here, the evidence established that the defendant and his two accomplices, each brandishing a firearm, started shooting at a group of 5 or 10 individuals who were playing basketball at Riverdale Park. Davis testified that he observed all three men raise their guns and start shooting, while Edwards testified that he heard a "barrage" of gunfire coming from two or three guns. Davis and Standors both stated that gunshots struck the fence that surrounded the basketball court and people were running everywhere. Moreover, the .22-caliber revolver that the defendant was carrying was later

recovered from a blue dumpster and had six spent shell casings. Viewed in a light most favorable to the State, this evidence establishes that the defendant discharged a firearm in the direction of Davis and Standors.

¶ 60 Finally, to convict the defendant of aggravated battery with a firearm beyond a reasonable doubt, the State was required to show that the defendant, or one for whose conduct he is legally responsible, in committing a battery, knowingly discharged a firearm and caused injury to another person. 720 ILCS 5/12–3.05(e)(1) (West 2012). As discussed above, the evidence establishes that the defendant and his two accomplices discharged their firearms and caused injury to Cain by striking him in the buttocks, torso, and arm.

¶ 61 Nonetheless, the defendant contends that the evidence was insufficient to sustain any of his convictions because (1) Cain did not testify at trial and, immediately after the shooting, did not identify the shooter to Officer Plumey; (2) neither Davis nor Standors testified that they observed the defendant shooting a gun, and both lacked credibility due to their criminal histories and inconsistent testimony regarding the number of people who originally approached the basketball court and whether they spoke to Cain or DeAndre; and (3) the physical evidence was inconclusive. Additionally, the defendant maintains that Loston's and Johnson's testimony lacked reliability because Officer Lugo contradicted Loston's claim that she was on her balcony when the shooting occurred; Officer Manfredo contradicted Loston's testimony that officers arrested the defendant by her porch; and Loston and Johnson contradicted each other as to the number of individuals in the alley following the shooting. The defendant's arguments, however, amount to nothing more than an invitation for this court to reweigh the evidence, something we are not permitted to do. See *People v. Brown*, 2013 IL 114196, ¶ 48. Moreover, the trier of fact is not required to seek all possible explanations consistent with innocence and elevate them to

reasonable doubt (*In re Jonathon C.B.*, 2011 IL 107750, ¶ 60), and it is well-established that "[m]inor inconsistencies in the testimonies do not, of themselves, create a reasonable doubt." *People v. Adams*, 109 Ill. 2d 102, 115 (1985). Here, viewing all the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found that the State proved the defendant guilty of attempted first-degree murder, aggravated discharge of a firearm, and aggravated battery with a firearm beyond a reasonable doubt.

¶ 62 E. Ineffective Assistance of Counsel

¶ 63 Lastly, the defendant contends that trial counsel was ineffective for failing to call Cain as a witness at trial. The following background is necessary for understanding the defendant's argument.

¶ 64 The record shows that, immediately after the defendant's motion for new trial was denied, he informed the trial court that he intended to file a *pro se* motion alleging, *inter alia*, that trial counsel was ineffective for failing to call Cain as a witness. In particular, the defendant represented that trial counsel informed him that Cain told her that "I didn't do it." The trial court held a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), where the following colloquy occurred between the judge and trial counsel:

> "Q. Is that true that the victim said that [the defendant] was not the person [who shot him]?
>
> A. No.
>
> Q. Okay. Anything else?
>
> A. The victim said that he didn't want to participate in the trial and that he would inform the State of that. That was our conversation."

The trial court then denied the defendant's motion.

¶ 65 The matter proceeded to a sentencing hearing, where the defendant was represented by new counsel. At the hearing, the defense called Cain as a witness and sentencing counsel questioned him as follows:

"Q. Mr. Kane [sic], just a couple quick questions. On the date in question when—I believe you were shot that day?

A. Yes.

Q. Okay. On the day that you were shot, did you see my client shoot you?

A. No.

Q. Do you have anything you want to tell the judge regarding his sentencing after has been found guilty of shooting you?

A. Him and his cousin was on the [basketball c]ourt when the shooting happened, and they didn't shoot me. They say it was other people that shot me. So…"

A. Thank you."

¶ 66 On cross-examination, Cain stated that he did not know who shot him, but "it wasn't them because they was on the court when the shooting happened." Cain also acknowledged that he never came forward and told the police that the defendant did not commit the crime. Rather, he stated that he reported this information to "the attorneys that was up in here." When asked what he told "the attorneys," Cain stated: "The attorneys up in here wanted me to say that it was them. They wanted me to say it was them that shot me, but I know it wasn't them that shot me because they was on the court when it happened." Cain clarified that the attorneys were the defendant's attorneys and that "they wanted me to blame—say it was them [*sic*]." Cain also admitted that he was not present at trial. Following arguments, the judge commented that Cain's

testimony "makes no sense" because he appeared to claim that the defendant's attorneys wanted him to implicate the defendant.

¶ 67 The defendant argues on appeal that, based on Cain's testimony at the sentencing hearing, trial counsel was ineffective for failing to call him as a witness at trial because he would have testified that the defendant was not the shooter. The State responds that trial counsel's decision not to call Cain as a witness did not constitute ineffective assistance because, during the defendant's *Krankel* hearing, trial counsel denied that Cain informed her that the defendant was not the shooter and stated, instead, that Cain did not want to participate in the trial. Additionally, the State maintains that Cain's testimony at the sentencing hearing was "vague" and that the jury would have viewed his evidence with the same suspicion expressed by the judge.

¶ 68 Claims for ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11. Under this test, a defendant must establish that (1) "counsel's performance fell below an objective standard of reasonableness," and (2) "a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. "A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *Id*.

¶ 69 In general, trial counsel has "a professional duty to conduct 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *People v. Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland*, 466 U.S. at 691). "Where the circumstances known to counsel at the time of his investigation do not reveal a sound basis for further inquiry in a particular area, it is not ineffective for the attorney to forgo additional investigation." *People v. Orange*, 168 Ill. 2d 138, 150 (1995). Our supreme court has explained

that "strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable." *People v. Towns*, 182 Ill. 2d 491, 514 (1998). Strategic choices include, *inter alia*, "[d]ecisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf." *People v. West*, 187 Ill. 2d 418, 432 (1999). These decisions ultimately rest with trial counsel and are generally immune from claims of ineffective assistance, except where the chosen strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing. *Id.* at 432-33.

¶ 70 In this case, as noted, the defendant made a *pro se* motion alleging that trial counsel was ineffective for failing to call Cain as a witness because, according to the defendant, Cain told trial counsel that the defendant did not shoot him. The trial court conducted a *Krankel* hearing, during which trial counsel denied that Cain told her the defendant was not the shooter and, instead, reported that Cane stated that he did not want to participate in the trial. Subsequently, at the defendant's sentencing hearing, sentencing counsel called Cain as a witness and he testified that the defendant did not shoot him. While an attorney's performance "may be deficient where she fails to call known witnesses whose testimony may exonerate the defendant" (*People v. Brown*, 2017 IL App (3d) 140921, ¶ 32), in this case, trial counsel's representations reveal that, based on the facts known to her following her investigation, Cain's trial testimony would not have been exculpatory. Thus, her decision not to call Cain as a witness at trial, viewed in light of then-existing circumstances, was a matter of strategy and not so unsound as to constitute deficient performance. See *People v. Perry*, 224 Ill. 2d 312, 344 (2007) ("a reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight"); see also *People v. Norton*, 244 Ill. App. 3d 82, 86 (1992) (defense counsel may have

made strategic decision not to subpoena witness out of concern that she might react by giving unhelpful testimony). Because trial counsel's performance in this regard was not objectively unreasonable, the defendant cannot establish the elements of ineffective assistance and his claim, therefore, fails.

¶ 71 For the reasons stated herein, we affirm the defendant's convictions and sentence for attempted first-degree murder, aggravated discharge of a firearm, and aggravated battery with a firearm.

¶ 72 Affirmed.