2018 IL App (1st) 152982-U

No. 1-15-2982

Order filed September 14, 2018

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 CR 11612
	)	
DEMETRIUS SPENCER,	)	Honorable
	)	James B. Linn,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 Held: We affirm defendant's convictions and sentences on two counts of aggravated battery with a firearm. The circuit court did not err in denying his motion to quash arrest and suppress statements. The State proved his guilt beyond a reasonable doubt. Defendant was not denied a fair trial or sentencing hearing because of the prosecutor's misstatement of fact during closing arguments.

¶ 2 Following a bench trial, defendant Demetrius Spencer was convicted of two counts of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) and was sentenced to two consecutive terms of 10 years' imprisonment. On appeal, defendant argues that: (1) the

circuit court erred in denying his motion to quash arrest and suppress evidence; (2) the State failed to prove beyond a reasonable doubt that he was accountable for the actions of his codefendant; (3) the prosecutor's misstatement of fact during closing argument deprived him of his right to a fair trial; and (4) the court improperly based its sentence on a misstatement of the facts. We affirm.

¶ 3 Defendant and codefendant David Newell were charged by indictment with multiple counts of attempted first degree murder and aggravated battery with a firearm of Tatiana Mason, Lonyae Barr, and Derrick Nicholson. Before trial, defendant filed a motion to quash his arrest and suppress statements.

¶ 4 On November 5, 2013, the court held a hearing on the motion. Defendant called Officer Bowen who testified that, on June 4, 2012, he was working with the gang enforcement unit and was assigned to apprehend an offender who was involved in a shooting that occurred on May 18, 2012. Detective Al Kennedy told Bowen that the offender had been identified by "active participants of the shooting." Bowen was not sure whether Kennedy meant that the offender had been identified by persons perpetrating the shooting or victims of the shooting. Kennedy did not give him an arrest warrant for the offender. After learning the offender's name, Bowen went to the vicinity of 55th Street and Hoyne Avenue. He toured the area searching for the offender, and found defendant, who was riding a bike and matched a picture of the offender that he had been given by Kennedy. Bowen and his partner immediately stopped defendant and asked him what his name was. When defendant gave a name that matched the name of the offender, Bowen and his partner took him into custody. Before stopping defendant, the officer did not observe

defendant commit any crimes. The officers did not have an arrest warrant before taking defendant into custody.

¶ 5 The State called Detective William Sullivan, who testified that he was assigned to investigate the shooting that took place on May 18, 2012. Sullivan visited victims of the shooting in a hospital. There, Lonyae Barr informed Sullivan that a man named "Little Dave" had been the gunman during the shooting, and that a man named Demetrius had been sitting in the front passenger seat of the car from which "Little Dave" fired the gun. She also told detectives that Demetrius was from the area of 57th Street and Hoyne Avenue. Armed with this information, detectives compiled two separate photo arrays. On May 21, 2012, after signing a lineup advisory form, Barr identified a photograph of defendant as the front seat passenger of the car. Sullivan spoke to Kennedy, who relayed the information to gang-enforcement officers. Sullivan learned that defendant was arrested on June 4, 2012.

¶ 6 On cross-examination, Sullivan testified that both conversations that he had with Barr occurred while she was receiving treatment in the hospital, and that he did not inquire whether she was on medication at the time. Barr never told Sullivan Demetrius's last name. Defendant's arrest report indicated that he was six feet tall. Sullivan was not present for any conversation that Kennedy had with gang enforcement officers. Barr told Sullivan that Demetrius had been in the front passenger seat of the car, and that Demetrius was not the shooter. Sullivan testified that he did not seek a warrant for Demetrius after he had been identified by Barr and did not attempt to contact the State's Attorney's office before defendant was arrested.

¶ 7 The trial court denied defendant's motion to quash arrest and suppress statements, noting that officers had probable cause to arrest defendant after Barr identified him as being the

passenger of a car used during a drive-by shooting. The case then proceeded to severed, but simultaneous, bench trials.

¶ 8 Tatiana Mason testified that on May 18, 2012, she and her cousin Lonyae Barr went to the intersection of 55th Street and Winchester Avenue to meet friends before they all went out to celebrate Barr's birthday. There, Jarvis Wallace, "Swoll," and a man named James were standing and talking in the middle of the street. Mason knew that the men were members of the "Winchester Boss" or "Winchester Boys" street gang, and that Barr was "affiliated with them." The gang's territory spanned the area of 55th and Winchester to 57th and Winchester.

¶ 9 One of the men poured cups of liquor for Mason and Barr. Neither Mason nor Barr had consumed any alcohol before they arrived on the street. As the group stood in the street socializing, Mason noticed a grey, four-door car slowly drive westbound on 56th Street. It was dark out, but the area was illuminated by street lighting. Mason saw codefendant Newell sitting in the front passenger seat of the car. Newell was looking in the direction of the group. The car did not stop moving, and eventually drove out of her sight.

¶ 10 A short time later, the car that Mason had seen drive down 56th Street pulled up next to the group as they stood on Winchester. She once again saw Newell, but he was now sitting in the back seat of the car. Newell pointed a gun toward the group and began shooting. Mason was shot in the right arm and ran through an alley toward Damen Avenue. On Damen, Mason flagged down a man who was driving a car, and the man drove her to a hospital. After receiving preliminary treatment Holy Cross Hospital, she was transported to Christ Memorial Hospital, where she underwent two surgeries to repair an artery in her right arm. She testified that she was still suffering from nerve damage and had no feeling in her index finger.

¶ 11 On May 28, 2012, Mason identified a photograph of Newell as showing the man who fired a gun toward her group. On June 6, 2012, she identified Newell in a line-up.

¶ 12 On cross-examination, Mason stated that she had been standing with the group for 15 minutes before she saw the grey car drive down 56th Street. She did not know if a person was sitting in the back seat of that car when it drove by. She did not say anything about the car to the other people standing on Winchester. When the car subsequently drove up next to the group, she did not see if anyone was sitting in the front seat. Newell, who was now sitting in the back seat, did not yell anything or flash any gang signs before shooting at the group. She stated that she knew Newell was in a rival gang, but was not sure about the name of the gang with which he was affiliated. She knew that a man named Christopher Abernathy had been shot about a year before May 18, 2012. She did not know who had been responsible for the shooting of Abernathy, but "heard some talk that maybe it was the Winchester Boys."

¶ 13 Lonyae Barr testified that she and Mason went to the intersection of 55th Street and Winchester Avenue to meet up with other friends who were going out for her birthday. The pair met up with Wallace, Derrick Nicholson, also known as "Swoll," and Akines. She knew that Wallace and Akines were members of the Winchester Boys. The group stood next to Wallace's car, and Wallace poured Barr and Mason a cup of tequila. Before Barr drank the tequila, she saw a dark colored, four-door car driving west on 56th Street. She could not see the faces of anyone in the car, and the car eventually drove out of her sight.

¶ 14 About five minutes later, the same car pulled up next to the group. Barr testified that she was two to three feet away from the car. She saw defendant, whom she identified in court, sitting in the front passenger seat of the car. Her mother and defendant's mother were "God sisters" and

Barr grew up believing that defendant was her cousin. Defendant was looking in Mason's direction, but she did "not notice him doing anything in particular." She saw Newell sitting in the back seat of the car. She had known and gone to school with Newell since seventh grade. She knew that Newell and defendant were members of the Hoyne Boys because she had seen Facebook pictures in which Newell and defendant were displaying gang signs. She then noticed that Newell was pointing a black gun at the group. Newell fired one shot toward the group, which hit Barr, and she started to run toward her grandmother's house. She heard six or seven more shots behind her. Inside her grandmother's house, she called for an ambulance.

¶ 15 Barr spent five days in the hospital and underwent surgery to stop internal bleeding and to remove a bullet from her abdomen. Doctors were unable to remove the bullet, and Barr frequently returned to the hospital due to severe stomach pains. While she was recovering in the hospital, she told detectives who shot her and whom she had seen sitting in the car. On May 21, 2012, detectives returned to the hospital and showed her two separate photo arrays. After signing a lineup advisory form, Barr identified a photograph of Newell from the first photo array and a photograph of defendant from the second photo array. She told detectives that Newell fired the gun at her while defendant sat in the front seat of the car. On June 5, 2012, Barr went to a police station to view a physical lineup, and identified Newell as the man who shot her.

¶ 16 On cross-examination, Barr testified that, in April of 2011, she had seen a Facebook picture of defendant in which he was displaying gang signs and wearing a shirt that said "Rest in Peace" and displayed a picture of Christopher Abernathy. On the night of the shooting, she did not drink her tequila before the car pulled up next to the group because she was "busy talking." She did not see the driver of the car because she was standing closest to the passenger side of the

car. She never saw defendant with a gun in his hands, did not see defendant pass a gun to anyone else in the car, and did not hear defendant say anything before Newell fired the gun.

¶ 17 Sergeant Jimmie Smith testified that, in 2012, before he was promoted to the position of sergeant, he was assigned to the gang enforcement unit focusing on Area South, which covers the area of the city from Cermak Road to 132nd Street. During his time in Area South, Smith specialized in street gangs including the Winchester Boys and the Hoyne Boys. The territory of the Hoyne Boys was defined by Garfield Boulevard to the north, Hamilton Street to the West, Damen Avenue to the east, and 58th Street to the south. The Winchester Boys' nearby territory extended from 56th and Winchester to 58th and Winchester. The territories shared Damen as a common boundary.

¶ 18 Between 2008 and May of 2012, 20 to 30 shootings were linked to the rivalry between the Hoyne Boys and the Winchester Boys. In October 2011, Christopher Abernathy, a man looked upon as one of the leaders of the Hoyne Boys, was killed. After Abernathy's death, the violence between the gangs escalated. Smith knew defendant and Newell to be members of the Hoyne Boys, and identified multiple photographs from Facebook in which defendant and Newell can be seen displaying Hoyne Boy gang signs. He also knew Wallace, Akines, and Nicholson to be members of the Winchester Boys. Smith believed that the motive behind the shooting at issue was the longstanding rivalry between the Hoyne Boys and the Winchester Boys and specifically stated that several members of the Hoyne Boys wanted to harm Wallace.

¶ 19 Detective William Sullivan testified that he was assigned to investigate the shooting at issue. After interviewing Wallace and Akines at the scene of the shooting, Sullivan and his partner spoke to Mason at the hospital. Mason told him that "Little Dave" was the man who shot

her. The detectives went to another hospital to speak with Barr, but she was unable to speak because she had just gotten out of surgery. On May 19, 2012, the detectives returned to the hospital and interviewed Barr. Barr told the detectives that "Little Dave" had shot her from the back seat of a car and that defendant was sitting in the front seat. On May 21, 2012, the detectives returned to the hospital so that Barr could view two photo arrays that they had compiled. After signing a lineup advisory form, Barr identified Newell from the first array and defendant from the second. On May 28, 2012, detectives showed Mason a photo array, from which she identified Newell as the shooter.

¶ 20 On May 29, 2012, Sullivan contacted the gang enforcement unit and informed them that he was seeking defendant and Newell. On June 4, 2012, Sullivan learned that defendant had been arrested and taken to Area South. Sullivan went to the police station and read defendant his *Miranda* rights. After waving his rights, defendant told Sullivan that, on the evening of May 18, 2012, he was picked up by Hunter and Newell. Defendant sat in the back seat of the car, Newell sat in the front passenger seat of the car, and Hunter drove the car. He stated that "he and Melvin Hunter and David Newell" drove to the 5500 block of Winchester to look for Wallace. Defendant stated that they were looking for Wallace because he was the leader of the Winchester Boys and had been celebrating the death of Christopher Abernathy. After they saw Wallace, Barr, and Nicholson standing in the 5500 block of Winchester, defendant, Newell, and Hunter drove to a vacant lot near the intersection of 57th Street and Seeley Avenue. There, Newell got out of the car and retrieved a nine-millimeter handgun with a 30-round magazine from the wheel well of an abandoned vehicle. Newell walked back to the car, and asked defendant to switch seats. Defendant moved to the front passenger seat and Newell sat in the back seat. The men then

drove back to the 5500 block of Winchester. When the car was parallel to the group standing on the block, Newell discharged the gun toward the group five times. The men then drove back to 57th Street and Hoyne Avenue, where defendant got out of the car.

¶ 21 Sullivan further testified that, at 1:15 a.m. on June 5, 2012, Assistant State's Attorney (ASA) Alexandria Gillespie interviewed defendant, and defendant agreed to give a written statement. At 1:45 a.m., defendant's statement to Gillespie was reduced to writing, and defendant, Gillespie, and Sullivan signed each page of the statement. The statement was admitted into evidence and published in open court.

¶ 22 In the statement, defendant acknowledged that he, Hunter, and Newell belonged to the Hoyne Boys. On May 18, 2012, he called Hunter's cell phone and asked him to pick him up from his house. Hunter arrived at his house at 9:30 p.m. in a black Nissan Maxima. Newell was sitting in the front passenger seat. Newell got out of the front seat and into the back seat because defendant had recently been shot in the ankle. The men decided to go to the 5500 block of Winchester because that was where members of the Winchester Boys, their rival gang, hung out. There, they saw Wallace, Akines, Nicholson, and Barr. After they saw the group standing on Winchester "they all decided" to go and get the "gang gun" that was hidden in a vacant lot near 57th and Seeley. When they got to the lot, Newell got out of the car and retrieved the gun. Defendant did not get out of the car at the lot.

¶ 23 The men then drove back to Winchester Avenue. Defendant stated that he knew Newell was going to shoot at the Winchester Boys. When they got close to the group of people standing on Winchester, Newell began shooting the gun. Defendant saw Nicholson and Barr hit by the gunfire. After the shooting, Hunter dropped defendant off at the intersection of Hoyne and 57th,

where he drank and socialized with other people. Defendant did not tell anyone about the shooting and did not call the police.

¶ 24 On cross-examination, Sullivan testified that it was possible that defendant did not sleep before being interviewed by Gillespie and that defendant did not tell him that he ordered Newell to shoot the firearm.

¶ 25 The State then proceeded by way of stipulation. The parties stipulated that Mason had been shot in the right arm and underwent surgery to repair a brachial vein. Barr underwent surgery to repair her transverse colon associated with a gunshot to the abdomen. Although the bullet was visualized during the surgery, it was not removed from her abdomen.

¶ 26 During rebuttal argument, the prosecutor argued that defendant:

> "accompanie[d] Newell and the confederate to get the gun. He stayed with the — I'll call it the shooter vehicle while the gun was retrieved. There is safety in numbers. This court has heard that argued countless times before. Not only is there safety in numbers but there is more security and an extra pair of eyes that can keep a look out on the area while the shooter is going to retrieve that gun.
>
> * * *
>
> Had any law enforcement or rival gang members, anybody else, any other potential witnesses happened upon the scene while Mr. Newell was retrieving that gun, [defendant] was clearly in a position to warn Mr. Newell about that."

Defendant objected to this argument on the grounds that it was speculative, but the trial court overruled the objection, stating "It's inference. Go ahead. Inference from the evidence. He can argue this."

¶ 27 The circuit court found defendant not guilty of all counts relating to Derrick Nicholson, and not guilty of the counts alleging attempted murder of Mason and Barr, but guilty of the counts alleging aggravated battery with a firearm of Mason and Barr. The court noted that "[defendant] was with [Newell] before during and after the shooting. He always talked about we went together to get the gun. We went looking for Winchester Boys. He was part and parcel of this case."

¶ 28 At defendant's sentencing hearing, Sergeant Michael Santos testified that, on March 17, 2007, he witnessed defendant punch an undercover officer in the face during a narcotics investigation. When defendant was subsequently arrested and searched, he was found to be in possession of $20 of prerecorded funds that the undercover officer had given him, as well as three small bags of suspected crack cocaine and a small bag of marijuana. Defendant was charged with robbery and was adjudicated delinquent.

¶ 29 Detective William Sullivan identified a photograph of defendant from his arrest on June 4, 2012. In the photograph, defendant was wearing a t-shirt honoring Christopher Abernathy, a member of the Hoyne Boys gang who had been killed in 2011. He also identified a photograph of a tattoo on defendant's chest that read "HBCZ." He understood "HBCZ" to stand for "Hoyne Boys Crazy."

¶ 30 During the State's arguments in aggravation, the following exchange took place:

> "[ASSISTANT STATE'S ATTORNEY]: He went looking to shoot a rival gang member and shot two innocent victims, Judge, two young ladies that are —
>
> THE COURT: The evidence was he was not the shooter in this case.

[ASSISTANT STATE'S ATTORNEY]: I'm sorry. That he was instrumental in shooting, thank you.

THE COURT: He helped provide the gun and went along with looking out and —

[ASSISTANT STATE'S ATTORNEY]: Correct, changed places with the shooter.

THE COURT: Making all kinds of encouragement and aided and abetted the shooter throughout and he was intimately responsible in securing the gun for this crime."

¶ 31 The trial court sentenced defendant to two consecutive terms of 10 years' imprisonment, stating that "[defendant] was not the shooter, but this crime I do not believe would have been possible without [defendant's] involvement."

¶ 32 On appeal, defendant first contends that the court erred in denying his motion to quash arrest and suppress statements because the police did not have probable cause to arrest him.

¶ 33 Review of a court's ruling on a motion to quash arrest and suppress evidence raises mixed questions of fact and law. *People v Jones*, 215 Ill. 2d 261, 267 (2005). Reviewing courts accord great deference to the trial court's factual findings, which should be reversed only if those findings are against the manifest weight of the evidence. *People v. Duran*, 2016 IL App (1st) 152678, ¶ 2 (citing *People v. Sutherland*, 223 Ill.2d 187, 196-97 (2006)). However, the ultimate legal question of whether police had probable cause to arrest the defendant is reviewed *de novo*. *Id*. A reviewing court is not limited to the evidence presented during the suppression hearing, but may also consider evidence that was presented during the defendant's trial. *People v. Shinohara*, 375 Ill. App. 3d 85, 94 (2007) (citing *People v. Sims*, 167 Ill.2d 483, 500 (1995)).

¶ 34 An arrest must be supported by probable cause. *People v. Sims*, 192 Ill. 2d 592, 614 (2000). Probable cause exists when the facts known to the officer at the time of the arrest are

sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime. *Sims*, 192 Ill. 2d at 614. Whether probable cause exists is governed by commonsense considerations, rather than proof beyond a reasonable doubt. *People v. Hopkins*, 235 Ill. 2d 453, 472 (2009). " 'Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false.' " *Id.* (quoting *People v. Wear*, 229 Ill. 2d 545, 564 (2008)). In determining whether an officer had probable cause to arrest, the officer's factual knowledge, based on law enforcement experience, is relevant. *People v. Grant*, 2013 IL 112734, ¶ 11. " 'Where officers are working together in investigating a crime, the knowledge of each constitutes the knowledge of all, and probable cause can be established from all the information collectively received by the officers.' " *In re Edgar C.*, 2014 IL App (1st) 141703, ¶111 (quoting *People v. Ortiz*, 355 Ill. App. 3d 1056, 1065 (2005)).

¶ 35 Here, we find that police had probable cause to arrest defendant. Sullivan testified that Barr told him that Newell shot her during a drive-by shooting and that defendant, whom she had known her whole life, was sitting in the front passenger seat of the car during the shooting. On May 21, 2012, Barr identified a photograph of defendant and told Sullivan that defendant was from the area of 57th Street and Hoyne Avenue. That knowledge, coupled with commonsense considerations, would have led a reasonably cautious person to believe that defendant had committed a crime. See *Hopkins*, 235 Ill. 2d at 472. Sullivan communicated this information to Detective Kennedy, who relayed the information to gang enforcement officers. Armed with this information and a picture of defendant, on June 4, 2012, Officer Bowen went to the area of 55th Street and Hoyne Avenue. There, he found a man who matched the photograph of the suspect. Bowen and his partner immediately stopped the man and asked him what his name was.

Defendant gave his name, and Bowen and his partner took him into custody. This evidence demonstrates that the police had probable cause to arrest.

¶ 36 Defendant next argues that the State failed to prove beyond a reasonable doubt that he was accountable for the aggravated batteries committed by Newell because there was no evidence that he shared Newell's intent or facilitated the offense in any form. He contends that the evidence presented at trial shows that he was merely present for the commission of the offense.

¶ 37 The due process clause of the fourteenth amendment to the United States constitution protects defendants against conviction in state courts except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. *People v. Brown*, 2013 IL 114196, ¶ 48; *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). When ruling on a challenge to the sufficiency of the evidence, a reviewing court " 'is not required to search out all possible explanations consistent with innocence or be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. On the contrary, we must ask, after considering all of the evidence in the light most favorable to the prosecution, whether the *** evidence [in the record] could reasonably support a finding of guilt beyond a reasonable doubt.' " *People v. Grant*, 2014 IL App (1st) 100174-B, ¶ 24 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 116-17 (2007)). In doing so, we must draw all reasonable inferences from the record in favor of the prosecution, and " '[w]e will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *People v. Lloyd*, 2013 IL 113510, ¶ 42 (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)).

¶ 38 As relevant here, a person commits the offense of aggravated battery with a firearm when, in committing a battery, he knowingly discharges a firearm and causes injury to another person. 720 ILCS 5/12-3.05(e)(1) (West 2012). A person is legally accountable for the conduct of another when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2012).

¶ 39 "[T]o prove that a defendant possessed the intent to promote or facilitate the crime, the State may present evidence that either (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design." *People v. Fernandez*, 2014 IL 115527, ¶ 13. When two or more persons engage in a common criminal design or agreement, any acts committed by one party in furtherance of that common design are considered to be the acts of all parties to the common design and all parties are equally responsible for the consequences of those further acts. 720 ILCS 5/5-2(c) (West 2012). "Words of agreement are not required to prove a common design or purpose between codefendants; a common design may be inferred from the circumstances surrounding the crime." *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 52 (citing *People* v. *Batchelor*, 171 Ill. 2d 367, 376 (1996)). Presence at the scene of the crime and flight therefrom do not constitute *prima facie* evidence of accountability; however, they do constitute circumstantial evidence which may tend to establish a defendant's guilt. *People v. Cowart*, 2017 IL App (1st) 113085-B, ¶ 34.

¶ 40 Here, we find that the evidence presented at trial, construed in the light most favorable to the prosecution, was sufficient to lead a rational trier of fact to conclude that defendant was accountable for the shooting because he shared Newell's criminal intent, was a part of a common

criminal design, and aided Newell in the planning and preparation of the offense. Barr identified defendant as the front passenger of the car used in the shooting. The testimony of Mason, Barr, and Smith established that defendant and Newell were members of the Hoyne Boys; that Wallace, Nicholson, and Akines were members of the Winchester Boys; and that the shooting was motivated by a rivalry between the gangs. In his written statement, defendant stated that he, Hunter, and Newell went to 5500 block of Winchester to see if any members of the Winchester Boys were on the street. After they saw Wallace, Akines, and Nicholson, whom defendant knew to be members of the Winchester Boys, "they all" decided to go and get the gang gun from a vacant lot near the intersection of 57th and Seeley Avenue. Defendant stayed in the car while Newell retrieved the gun from the vacant lot. Sullivan testified that defendant told him that he then moved to the front seat of the car at Newell's request. In his written statement, defendant admitted that he knew that Newell was going to shoot at the Winchester boys. After the shooting, Newell and Hunter drove defendant back to Hoyne Boy territory. This evidence, and the reasonable inferences flowing from it, were sufficient to allow a rational trier of fact to conclude that defendant shared Newell's criminal intent and was, therefore, guilty of aggravated battery of a firearm. *Lloyd*, 2013 IL 113510, ¶ 42.

¶ 41 Defendant argues that his use of the word "they" in his written statement, *e.g.*, that "they" were looking for Winchester Boys, did not include himself, and was used only to refer to Hunter and Newell. We note that, on appeal, we view the evidence in the light most favorable to the State, not defendant. In this light, and read in conjunction with Detective Sullivan's testimony that defendant stated that "he and Melvin Hunter and Newell" drove around looking for Wallace, the evidence demonstrates that the word "they" in his written statement referred to all three men,

not just Hunter and Newell. Based on the court's finding of guilt, it is clear that it interpreted the written statement in this fashion. See *People v. Gray*, 2017 IL 120958, ¶ 35 ("it is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts").

¶ 42 Defendant next argues that he was denied a fair trial when the prosecutor misstated the evidence during closing arguments to exaggerate his involvement in the offense by arguing that he acted as a lookout while Newell retrieved the gang gun.

¶ 43 Initially, defendant concedes that, although he objected to the prosecutor's comments during closing argument, he did not include the issue in a post-trial motion. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion"). He argues, however, that we may review his claim under either prong of the plain error doctrine, which allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant or (2) that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 18. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Id*. at ¶ 19. A reviewing court conducting plain error analysis must first determine whether an error occurred, as "[w]ithout reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 44 "Every defendant is entitled to fair trial free from prejudicial comments by the prosecution." *People v. Young*, 347 Ill. App. 3d 909, 924 (2004). However, a "defendant faces a

substantial burden in attempting to achieve reversal based upon improper remarks made during closing argument." *People v. Moore*, 358 Ill. App. 3d 683, 693 (2005). " 'Generally, prosecutors have wide latitude in the content of their closing arguments.' " *People v. James*, 2017 IL App (1st) 143036, ¶ 46 (quoting *People v. Evans*, 209 Ill. 2d 194, 225 (2004)). "It is, of course, error for a prosecutor to misstate the evidence." *People v. Darr*, 2018 IL App (3d) 150562, ¶ 71. However, prosecutors may comment on the evidence and reasonable inferences from the evidence. *People v. Williams*, 2015 IL App (1st) 122745, ¶ 12. A prosecutor's closing argument must be viewed in its entirety and any challenged remarks must be viewed in context. *People v. Thompson*, 2016 IL App (1st) 133648, ¶ 47. Improper remarks by a prosecutor are only cause for reversal if they " 'engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them.' " *James*, 2017 IL App (1st) 143036, ¶ 46 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007)).

¶ 45 Initially, we note that it is unclear whether the proper standard of review for prosecutorial misconduct in closing arguments is de novo or abuse of discretion. *People v. Phillips*, 392 Ill. App. 3d 243, 274-75 (2009) (comparing *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) ("Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*."), with *People v. Blue*, 189 Ill. 2d 99, 132 (2000) ("[W]e conclude that the trial court abused its discretion" by allowing various prosecutorial remarks during closing argument)). Regardless, we need not resolve this issue at this time because the outcome here is the same under either standard. *Phillips*, 392 Ill. App. 3d at 275.

¶ 46 During rebuttal argument, the prosecutor argued that defendant acted as a lookout when Newell retrieved the gang gun from a vacant lot. We find that this remark was not improper,

because it was a reasonable inference based on the evidence presented at trial. The State presented evidence that defendant, Hunter, and Newell were members of the Hoyne Boys, and that they decided to retrieve the gang gun after they spotted members of the Winchester Boys congregating on the street. Defendant's written statement makes clear that this was a collective decision. When the men went to a vacant lot near the intersection of 57th Street and Seeley Avenue, defendant stayed in the car while Newell retrieved the gun. Even without direct evidence that defendant was watching for police or other gang members, after considering the circumstances, it was reasonable to infer that he was serving as a lookout for Newell. See *People v. Johnson*, 12 Ill. App. 3d 1020, 1026 (1973) (reasonable to infer that the defendant, who stayed inside of a vehicle while his brother stole personal property from a residence, was acting as a lookout).

¶ 47 As we have found that no error occurred, there can be no plain error. See *McGee*, 398 Ill. App. 3d at 794 ("[w]ithout reversible error, there can be no plain error"). Defendant claims that his trial counsel was ineffective for failing to preserve this issue in a post-trial motion. However, because we have found that the prosecutor's remarks were not improper, defendant is unable to establish the prejudice prong of the *Strickland* test. See *People v. Glasper*, 234 Ill. 2d 173, 216 (2009) (finding that the defendant could not satisfy the prejudice prong of the *Strickland* test where the prosecutor's remarks did not deprive him of a fair trial and did not amount to plain error); see also *People v. Stewart*, 365 Ill. App. 3d 744, 750 (2006) ("An attorney's performance will not deemed ineffective for failing to file a futile motion").

¶ 48 Finally, defendant contends that the circuit court deprived him of a fair sentencing hearing when it "repeat[ed] and embellish[ed] upon" the prosecutor's misstatements, and relied

on those misstatements in fashioning his sentence of two consecutive terms of 10 years' imprisonment.

¶ 49 Initially, defendant concedes that he failed to preserve this issue for appeal by not objecting to the court's oral pronouncements or including the issue in his motion to reconsider sentence. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). Nonetheless, he argues that we may review this issue under the plain error doctrine.

¶ 50 To establish plain error in the context of sentencing, a defendant must show that a clear or obvious error occurred and "that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Id.* A reviewing court conducting plain error analysis must first determine whether an error occurred, as "[w]ithout reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). Again, we find no error.

¶ 51 A court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference on review. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). However, when sentencing a defendant, a court " 'must exercise care to insure the accuracy of information considered.' " *People v. Jackson*, 149 Ill. 2d 540, 549 (1992) (quoting *People v. Adkins*, 41 Ill. 2d 297, 300 (1968)). Apart from showing that a court misstated evidence at sentencing, a defendant must demonstrate that the court "relied on the particular improper fact" when it sentenced the defendant. *People v. Valadovinos*, 2014 IL App (1st)

130076, ¶ 47. Even if the court considers a misstated fact, remand is not required if the weight given to the factor "is so insignificant that it did not lead to a greater sentence." *People v. Cotton*, 393 Ill. App. 3d 237, 266 (2009). "[A] reviewing court should not focus on a few words or statements made by the trial court, but must consider the record as a whole." *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010).

¶ 52 Here, after considering the record as a whole, we find that the court did not err in sentencing defendant to two consecutive terms of 10 years' imprisonment. The court's statements that defendant was "making all kinds of encouragement and aided and abetted the shooter throughout" and was "intimately responsible in securing the gun for this crime" are supported by inferences from the evidence. Although there is no direct evidence that defendant was the instigator behind the shooting, the statements to Sullivan and Gillespie demonstrate that he, Hunter, and Newell made the collective decision to look for rival gang members, secure the "gang gun," and return to the area where the gang members were. As discussed above, it was also reasonable to infer that defendant acted as a lookout while Newell retrieved then gun from the vacant lot. Thus, we find that the court's sentence was not based on a misstatement of the evidence and defendant was not deprived of a fair sentencing hearing. As the court did not commit an error, defendant cannot show plain error. See *McGee*, 398 Ill. App. 3d 789 ("[w]ithout reversible error, there can be no plain error").

¶ 53 We affirm the judgment of the circuit court of Cook County.

¶ 54 Affirmed.