FIRST DIVISION
DECEMBER 17, 2012

1-10-1470

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 19408
	)	
KEVIN KERBY,	)	Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying the defendant's motion for a new trial because the evidence presented at the posttrial hearing was not newly discovered evidence. The sentence enhancements applied to the defendant's sentence will not be vacated because the trial court had the authority to conduct a bifurcated proceeding, and the State provided sufficient notice of the sentence enhancements in the indictment.

¶ 2 This appeal arises from a March 16, 2010 judgment entered by the circuit court of Cook County which denied defendant-appellant Kevin Kerby's (Kerby) motion for a new trial, and found Kerby guilty of first-degree murder, attempted first-degree murder, and aggravated battery with a

firearm. On appeal, Kerby argues that: (1) the trial court erred in denying his motion for a new trial because witness Krista Caine's (Caine) testimony is newly discovered evidence that warranted a new trial; (2) this court should remand the matter for a new trial or reduce his sentence because the trial court lacked the authority to transform the trial into a bifurcated proceeding on the issue of the 15-year sentence enhancements added to his sentence; and (3) this court should remand the matter for a new trial or reduce his sentence because the State failed to provide sufficient notice of the 15-year sentence enhancements in the indictment. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On November 24, 2007, co-defendant and Latin Kings gang member Miguel Garcia (Garcia) shot victims Daniel Witting (Witting) and Melody Elias (Elias) with a handgun as they sat in Witting's car. Elias died as a result of her injuries. Several of Garcia's fellow gang members, including Kerby, were present at the scene of the shooting. After the shooting, Kerby turned himself in to the police and was arrested. Garcia and the other gang members were also arrested. The State filed a 68-count indictment against Kerby, Garcia, and six co-defendants.

¶ 5 On January 22, 2010, a jury trial commenced for this matter in the circuit court of Cook County. Calumet City Fire Department Captain Glen Bachert (Captain Bachert) testified that on November 21, 2007, he was on duty and was alerted of a car fire at 1421 Burnham Avenue. He and other firefighters responded to the scene of the fire and extinguished the fire. Captain Bachert testified that next to the burning car he noticed a half-gallon plastic container which smelled of gasoline and was also on fire. After the fire was extinguished, Captain Bachert approached the

residence of 1421 Burnham Avenue and learned that the main resident was a woman named Nancy Kerby. Captain Bachert testified that Nancy Kerby told him that the burned car belonged to her son. Nancy Kerby did not identify her son when she spoke to Captain Bachert.

¶ 6 State witness Sarah Brogdon (Brogdon) testified that around the time of the Thanksgiving holiday in 2007, she socialized with Caine, Garcia, Kerby, and other members of the Latin Kings gang. The group mostly spent time at the house of a friend called Peanut. While at Peanut's house, the group often drank alcohol and smoked marijuana. Brogdon testified that in the early morning hours of November 21, 2007, the group was at Peanut's house when Kerby received a telephone call. Kerby told the group that his mother called and told him that his car had been "blown up." Brogdon testified that Kerby said that "the Dragons" blew up his car. The Latin Dragons are a rival street gang of the Latin Kings. Kerby, Brogdon, Caine, and another friend named Lou then went for a ride in Brogdon's car. Kerby drove Brogdon's car to a house that Brogdon did not recognize in the city of Harvey, Illinois. Brogdon testified that Kerby went into the house for about ten minutes. Kerby came out of the house with Garcia, and introduced Garcia to Brogdon. Brogdon testified that Garcia was carrying a black handgun with an extended clip that came out of the handle. She stated that both Garcia and Kerby had the gun in their possession at various times.

¶ 7 Brogdon testified that during the night of November 23, 2007, she was at Peanut's house with Caine, Kerby, Garcia, and other members of the Latin Kings gang. The group was drinking alcohol and taking drugs. While the group was at Peanut's house, Kerby began talking about his car and told the other males in the group that the Dragons blew up his car. Brogdon testified that Kerby seemed angry and also said that the Dragons shot at his mother. Brogdon noticed that Garcia had the same

black handgun that she had seen a few days before. Brogdon testified that Kerby said that he was looking for Dragons and wanted to "F them up." The group then left Peanut's house. There were four cars parked outside Peanut's house, and Kerby designated which members of the group would go in each car. Kerby decided that Brogdon's car would be the lead car and that he, Brogdon, Caine, and Lou would ride in Brogdon's car. Kerby drove Brogdon's car, Brogdon was in the passenger's seat, and Caine and Lou were in the rear seats. Kerby decided that Garcia would drive the second car. Brogdon testified that Garcia had the handgun and got into the second car alone. Brogdon stated that two people drove in the third car, and three people drove in the fourth car.

¶ 8 Brogdon testified that the four cars drove around for a while to look for Dragons. At one point, the cars stopped and a member of the group in a different car told Kerby that he had "seen somebody on the other block." Kerby then led the first three cars in the convoy around the block and the fourth car drove away in a different direction. As the group was driving down the next block, Brogdon saw a dark blue car parked in the street. She noticed that there was a man in the driver's seat of the dark blue car, and a woman in the passenger's seat. Brogdon testified that Kerby drove up to the dark blue car and stopped in front of it at an angle so that the dark blue car would not be able to drive forward. Garcia then stopped his car alongside the dark blue car, and the third car in the convoy stopped behind the dark blue car. Brogdon testified that due to the way the cars in the convoy were configured, the dark blue car was blocked in at its front, side, and rear.

¶ 9 Kerby then got out of Brogdon's car and approached the driver's side of the dark blue car. Brogdon testified that Kerby kicked the driver's door, swore loudly, and said "Dragon killer." Another member of the group got out of the third car and tried to open the passenger's door of the

dark blue car. Brogdon testified that Garcia got out of the second car carrying the same handgun that she had seen at Peanut's house earlier that night and days before. The dark blue car then reversed into the third car. After the dark blue car started moving, Garcia started firing the handgun at the passenger's side of the dark blue car. Brogdon saw the dark blue car drive forward up onto the curb and maneuver around the other cars. She then ducked down to avoid the gunshots. Brogdon testified that she continued to hear gunshots as Garcia chased the dark blue car while it was driving away. Kerby then returned to Brogdon's car and drove back to Peanut's house. Brogdon testified that Kerby was happy that he got revenge against the Dragons. Kerby told Brogdon and Caine not to say anything about the shooting. Garcia did not return to Peanut's house. On November 27, 2007, the police came to Brogdon's house and took her to the police station. She gave a statement to the police and testified in front of the grand jury.

¶ 10 Witting testified that in the early morning hours of November 24, 2007, he and Elias were sitting in front of Elias's house in his car. Witting then saw three cars pull up and surround his car. The first car stopped in front of Witting's car and blocked him from moving forward. Witting testified that Kerby drove the first car. Witting had known Kerby for many years prior to that night. The second car stopped alongside Witting's car and blocked his access to the street. The third car stopped behind Witting's car and blocked him in from the rear. Witting testified that Kerby got out of the first car and approached his driver's side door. Kerby swore and said "Dragon killer" loudly and aggressively. Witting understood the phrase "Dragon killer" to mean "to kill any person who's associated with the Latin Dragons." Witting testified that Kerby also kicked his door and tried to get it open. Witting then noticed two people on the passenger's side of his car. He reversed his car

and slammed into the third car that was blocking him from behind. He then heard gunshots coming from the passenger's side of his car, and noticed his windows being shattered. Witting drove his car onto the curb and proceeded through the grass to get around the first car that was blocking him from the front. He continued to hear gunshots as he maneuvered his car around the first car and back onto the street. Witting then began speeding to the hospital. He noticed that he was shot in both hands, and that Elias was not breathing. After Witting and Elias arrived at the hospital, Witting spoke briefly with the police and told them that Kerby was involved in the shooting. Witting testified that he had no affiliation with the Latin Dragons street gang or any other gang.

¶ 11 After the State rested its case, Kerby moved for a directed finding, which was denied. The State then requested to bifurcate the trial in order to separate the guilt/innocence phase of the trial from the sentence enhancement phase of the trial. The State sought to enhance any sentence Kerby would be given pursuant to 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2010) because the shooting was committed while the perpetrator was "armed with a firearm." The State argued that it would be confusing for the jury to decide at the same time whether Kerby was guilty and whether the sentence enhancement applied. Defense counsel objected to the State's request and argued that the State did not provide Kerby sufficient notice in the indictment that it would be seeking an enhanced sentence. Defense counsel also argued that it was too late for the State to request a bifurcated trial on the sentence enhancement when it did not provide Kerby notice that it would seek such a trial. The trial court agreed with the State, and decided that the trial would be bifurcated. The jury was presented only with the question of whether Kerby was guilty of first-degree murder, attempted first-degree murder, and aggravated battery with a firearm. Kerby was found guilty of all three offenses. Kerby

waived his right to have the jury decide the sentence enhancement issue. The trial court found that the evidence against Kerby was overwhelming. The court also found that for the offenses of first-degree murder and attempted first-degree murder, the State proved beyond a reasonable doubt that Kerby, or one for whose conduct he was legally responsible, was armed with a firearm. Thus, the State proved the armed with a firearm sentence enhancement.

¶ 12 On February 26, 2010, Kerby filed a motion for a new trial. That same morning, Caine approached defense counsel for the first time and stated that she wanted to recant the testimony she gave in front of the grand jury. The court appointed an Assistant Public Defender to represent Caine and continued the proceedings to a later date.

¶ 13 On March 16, 2010, Kerby filed a supplemental motion for a new trial based on newly discovered evidence. That same day, at the hearing on the motion for a new trial, Caine testified. Caine testified that on November 21, 2007, she was at Peanut's house with Kerby, Brogdon, and Lou. Caine was present when Kerby got a call from his mother saying that the Dragons blew up his car. Caine testified that she did not see Garcia and did not know who Garcia was at that point. She also testified that she did not see a handgun that day. On November 23, 2007, Caine went back to Peanut's house with Brogdon and Lou. Caine testified that she met Garcia for the first time at Peanut's house on November 23, 2007. Caine noticed that Garcia had a handgun at Peanut's house. Kerby and other members of the Latin Kings gang were also present at Peanut's house. Caine testified that Kerby was not angry that night, just that he was disappointed that his mother had to deal with the issue of his car being blown up. Caine also testified that Kerby did not say that he wanted to attack some Dragons.

¶ 14 Caine testified that the group decided to leave Peanut's house because it was getting late and because Garcia needed someone to "ride him out" of Calumet City. Caine stated that two of the cars parked outside of Peanut's house were stolen, including the car that Garcia was driving. Thus, the group needed to drive a legal car in the front and back of the two stolen cars so that the police would not be able to detect the two stolen cars. Caine testified that Kerby dictated the order of the cars. Caine rode in Brogdon's car with Kerby, Brogdon, and Lou. Kerby drove Brogdon's car. Caine testified that while they were driving, a member of the group from another car told Kerby that he had "seen two dudes" on the other block. Kerby drove to the next block and pulled up in front of a parked car so that the car could not drive forward. A second car stopped alongside the parked car and a third car stopped behind the parked car. Caine testified that Kerby got out of Brogdon's car and approached the driver's side door of the parked car. Kerby began to hit and kick the window of the driver's side door. Caine stated that Kerby did not yell "Dragon killer." Caine testified that something came over Kerby, and he went back to Brogdon's car and shut the door. Caine stated that Garcia then started to shoot and Kerby said " '[W]hat the fuck. What is he doing? Why [sic] what is he doing that for?' " Caine testified that Kerby was already in Brogdon's car when Garcia started shooting. The man in the parked car reversed and hit the car behind him, then drove away as Garcia continued shooting. Caine testified that Garcia chased the fleeing vehicle, but Kerby drove away in a different direction because they "wanted nothing to do with it."

¶ 15 Caine testified that two days later her father took her to the police station. Caine stated that her father and the police told her what to say. Caine testified that she gave the statement that her father and the police wanted her to give because she did not want to go to jail and mess up her life.

Caine then testified before the grand jury. Caine stated that she did not tell the grand jury the same story that she was telling at the hearing on the motion for a new trial. Caine testified that she went along with a story that was not the truth in front of the grand jury because she did not want to go to jail. Caine said that she did not testify at trial because no one contacted her after she appeared in front of the grand jury. She stated that she came forward after the trial because she was in a very bad car accident and almost died. Caine testified that while she was in the hospital, she began feeling guilty about lying in front of the grand jury.

¶ 16 On cross examination, the State questioned Caine about her previous grand jury testimony. The State read Caine several of portions of her grand jury testimony that contained statements that were very similar to the statements Brogdon gave in her trial testimony. Caine testified that almost all of the grand jury statements read to her by the State were lies.

¶ 17 In ruling on the motion for a new trial, the trial court found Caine's testimony completely unbelievable. The trial court believed that Caine's grand jury testimony was credible, and her testimony at the hearing on the motion for a new trial was completely incredible. Thus, the trial court denied the motion for a new trial.

¶ 18 After the motion for a new trial was denied, Kerby was sentenced to 40 years in prison for first-degree murder plus an additional 15 year enhancement for being armed with a firearm. Kerby was also sentenced to 15 years in prison for attempted murder plus an additional 15 year enhancement for being armed with a firearm. Kerby was sentenced to a total of 85 years in prison.

¶ 19 On April 14, 2010, Kerby filed a motion to reconsider his sentence. On May 3, 2010, the trial court denied Kerby's motion to reconsider his sentence. On May 21, 2010, Kerby filed a notice

of appeal.

¶ 20 ANALYSIS

¶ 21 On May 21, 2010, Kerby filed a timely notice of appeal following the trial court's order that denied his motion to reconsider his sentence. Therefore, we have jurisdiction to consider Kerby's arguments on appeal pursuant to Illinois Supreme Court Rules 603 (eff. Oct. 1, 2010) and 606 (eff. Mar. 20, 2009). We first address Kerby's argument that the trial court erred in denying his motion for a new trial because Caine's testimony is newly discovered evidence that warranted a new trial. A defendant is entitled to a new trial based on newly discovered evidence when the evidence: (1) has been discovered since the trial; (2) is of such character that it could not have been discovered prior to the trial through the exercise of due diligence; (3) is material to the issue and not merely cumulative; and (4) is of such character that it will probably change the result on retrial. *People v. Salgado*, 366 Ill. App. 3d 596, 605, 852 N.E.2d 266, 274 (2006). We apply the abuse of discretion standard of review to the trial court's denial of a motion for a new trial based on newly discovered evidence. *Id*. at 606, 852 N.E.2d at 274. "An abuse of discretion occurs only where the [trial] court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Leak*, 398 Ill. App. 3d 798, 824, 925 N.E.2d 264, 287 (2010).

¶ 22 Kerby argues that Caine's testimony at the hearing on the motion for a new trial was discovered after the trial and could not have been discovered earlier because Caine first approached defense counsel after the trial concluded, but before sentencing. Kerby claims that Caine's testimony is newly discovered even though he knew Caine was an eyewitness to the shooting prior to trial. In support of this argument, Kerby cites several cases. See *People v. Munoz*, 406 Ill. App. 3d 844, 941

N.E.2d 318 (2010); *People v. Knight*, 405 Ill. App. 3d 461, 937 N.E.2d 789 (2010); *People v. Ortiz*, 235 Ill. 2d 319, 919 N.E.2d 941 (2009); and *People v. Molstad*, 101 Ill. 2d 128, 461 N.E.2d 398 (1984). However, these cases are inapplicable to the case at bar. In *Munoz* and *Ortiz*, the defendant was unaware that the newly discovered eyewitnesses had witnessed the crime until *after* the trial had concluded. (Emphasis added.) See *Munoz*, 406 Ill. App. 3d at 851, 941 N.E.2d at 325; *Ortiz*, 235 Ill. 2d at 334, 919 N.E.2d at 950. In *Knight*, the defendant knew of the newly discovered eyewitnesses before trial, but the eyewitnesses could not come forward before the trial ended because they were in a gang in prison and feared that they would be killed if they testified. *Knight*, 405 Ill. App. 3d at 468, 937 N.E.2d at 795. In *Molstad*, the newly discovered eyewitnesses were co-defendants who did not testify on the defendant's behalf during trial because they could not be forced to violate their Fifth Amendment right to avoid self-incrimination. *Molstad*, 101 Ill. 2d at 135, 461 N.E.2d 402. All of the cases cited by Kerby contain facts that are dissimilar to the instant case. Therefore, we will not rely on those cases for guidance.

¶ 23 In this case, Caine's testimony at the hearing on the motion for a new trial primarily addresses Kerby's conduct before and during the shooting. Kerby argues that he was unaware of Caine's testimony before she approached defense counsel for the first time after his trial concluded. However, he was certainly aware of his own conduct before, during and after the shooting. At the hearing on the motion for a new trial, Caine testified that she was with Kerby at Peanut's house on the night of the shooting, and also rode in Brogdon's car while Kerby drove. Also, Caine testified that she was in the car when Kerby drove away from the scene of the shooting. These facts are directly corroborated by Brogdon's testimony. Further, Caine testified in front of the grand jury

before trial. Thus, Kerby was certainly aware before trial, that Caine witnessed the shooting.

¶ 24 Kerby argues that he could not have located Caine to testify at trial by exercising due diligence because the State failed in its attempt to subpoena her. However, Kerby made no mention of his efforts, if any, to locate Caine himself. During Caine's testimony at the hearing on the motion for a new trial, she stated that she had known Kerby for four years and that he was "like a brother" to her. Kerby is clearly very familiar with Caine. He cannot now rely on the State's failure to achieve service of process to show that she could not have been located to testify at trial without at least some showing *some* attempt to secure her testimony. Therefore, Kerby is unable to show that Caine's testimony at the hearing on the motion for a new trial is of such character that it could not have been discovered prior to the trial through the exercise of due diligence.

¶ 25 Next, Kerby argues that Caine's testimony at the hearing on the motion for a new trial is of such character that it will probably change the result on retrial. As Kerby points out, for this requirement the new evidence does not necessarily need to establish the defendant's innocence; rather, a new trial is warranted if all of the facts, surrounding circumstances, and new evidence warrant closer scrutiny to determine the guilt or innocence of the defendant. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1033, 944 N.E.2d 834, 842 (2011). However, applications for a new trial based on newly discovered evidence are not looked upon favorably by the court and must be closely scrutinized. *Id*.

¶ 26 Kerby claims that Caine's testimony is conclusive to warrant a new trial because it flatly contradicts Brogdon's trial testimony and would play a large role in the jury's determination of Kerby's guilt. He claims that the case at bar is analogous to *Ortiz* and *Molstad*. However, both *Ortiz*

and *Molstad* are distinguishable from the instant case.

¶ 27 In *Ortiz*, the defendant was convicted of first-degree murder. *Ortiz*, 235 Ill. 2d at 322, 919 N.E.2d at 943. During a bench trial, two eyewitnesses for the State testified that they gave statements to the police that declared that they saw the defendant shoot the victim. *Id*. at 322-24, 919 N.E.2d at 943-44. However, both eyewitnesses recanted their previous statements during their trial testimony. *Id*. The trial court found that the eyewitnesses' recantations "carried 'little weight for believability,' " and that their prior statements were corroborative of the forensic and ballistics evidence. *Id*. at 324, 919 N.E.2d at 344-45. Ten years later, in a third *pro se* postconviction petition, the defendant presented the affidavit of an eyewitness who stated that he witnessed the crime, and that the defendant was not present during the crime. *Id*. at 326-27, 919 N.E.2d at 945-46. The new eyewitness stated that he did not report his story before trial because he feared for his safety and moved away to Wisconsin. *Id*. at 327, 919 N.E.2d 946. The eyewitness returned to Chicago in 2003, ran into the defendant's mother, and wrote out his affidavit to relieve his feelings of guilt. *Id*. The supreme court held that the newly discovered eyewitness's testimony was conclusive to warrant a new trial because it directly contradicted the recanted testimony of the two State eyewitnesses. *Id*. at 336-337, 919 N.E.2d at 951-52.

¶ 28 In the instant case, there was corroboration between Brogdon's and Witting's testimonies. Unlike the State eyewitnesses in *Oritz*, neither Brogdon nor Witting recanted statements that were made prior to trial. The recantation that occurred came from Caine's testimony at the hearing on the motion for a new trial. Also, the newly discovered eyewitness in *Ortiz* swore in his affidavit that the defendant was not at the scene of the crime. In the case at bar, Caine's testimony at the hearing on

the motion for a new trial not only placed Kerby at the scene of the shooting but corroborated many aspects of Brogdon's and Witting's testimony. Thus, *Ortiz* is not instructive in this case.

¶ 29 In *Molstad*, the defendant was convicted of aggravated battery and criminal damage to property. *Molstad*, 101 Ill. 2d at 130, 461 N.E.2d at 400. At trial, the defendant testified that he was not at the scene of the crime and his parents provided alibi testimony. *Id*. at 132, 461 N.E.2d at 401. One eyewitness testified that she saw the defendant participating in the crime. *Id*. at 131, 461 N.E.2d at 400. In a posttrial motion for a new trial, the defendant presented the affidavits of four convicted co-defendants and one acquitted co-defendant that stated that the defendant was not present at the scene of the crime. *Id*. at 132, 461 N.E.2d at 401. The trial court denied the defendant's motion for a new trial. *Id*. at 131, 461 N.E.2d at 400. The appellate court held that the affidavits of the co-defendants were likely to produce a different result on retrial because the trial court would now have to weigh the testimony of one eyewitness against the testimony of the defendant, his parents, and five other co-defendants. *Id*. at 135-36, 461 N.E.2d at 402.

¶ 30 In this case, unlike *Molstad*, there are not sworn statements from multiple co-defendants stating that the defendant was not present at the scene of the crime. Moreover, in this case, Kerby did not deny that he was present at the scene of the shooting and did not present any exculpatory evidence other than Caine's testimony at the hearing on the motion for a new trial. Therefore, *Molstad* is not instructive in this case.

¶ 31 Most notably, the trial court found Caine's testimony at the hearing on the motion for a new trial to be completely unbelievable. As the State points out, it is well settled in Illinois that recantation testimony is generally considered inherently unreliable. *People v. Steidl*, 142 Ill. 2d 204,

253-54, 568 N.E.2d 837, 858 (1991). A court will usually deny a new trial where it is not satisfied that the recantation testimony is true. *Id*. In this case, the trial court had the opportunity to observe and listen to Caine as she gave her testimony at the hearing on the motion for a new trial. Caine recanted almost all of the statements she made in front of the grand jury. She claimed that she was motivated to testify at the hearing on the motion for a new trial because she nearly died in a car accident and realized in the hospital that she should not have lied to the grand jury. The trial court did not believe these aspects of Caine's testimony. In ruling on the motion for a new trial, the trial court stated that the evidence against Kerby was overwhelming. The trial court's observations of Caine's testimony led it to conclude that Caine was not telling the truth at the hearing on the motion for a new trial. We cannot say that no reasonable person would adopt the view of the trial court.

¶ 32 Moreover, even if Caine's testimony at the hearing on the motion for a new trial was entirely true, we do not believe that it is exculpatory evidence. During her testimony, Caine stated that: Kerby was not angry about his car being blown up; he did not say that he wanted to attack some Dragons; he did not yell "Dragon killer"; he re-entered Brogdon's car before Garcia started shooting and said "what is he doing that for?"; and he drove away in another direction as Garcia chased Witting's car. However, during the same testimony, Caine still stated that: Kerby dictated the order of the convoy of cars; he led the convoy to Witting's car; he blocked in Witting's car from the front; and he got out of Brogdon's car and started kicking Witting's driver's side door. Caine's testimony at the hearing on the motion for a new trial still establishes Kerby as a significant participant in the shooting of Witting and Elias. Considering Brogdon's testimony, Witting's testimony, and the other evidence at trial, we do not believe that Caine's testimony warrants closer scrutiny to determine

Kerby's guilt. Therefore, Kerby is unable to show that Caine's testimony is of such character that it would probably change the result on retrial.

¶ 33 Kerby has failed to show that Caine's testimony at the hearing on the motion for a new trial satisfies the requirements that entitle a defendant to a new trial based on newly discovered evidence. Therefore, we hold that the trial court did not abuse its discretion by denying Kerby's motion for a new trial.

¶ 34 We next consider Kerby's argument that this court should remand the matter for a new trial or reduce Kerby's sentence because the trial court lacked the authority to transform the trial into a bifurcated proceeding on the issue of the 15-year sentence enhancements added to his sentence. At trial, after the State rested its case, Kerby moved for a directed finding which was denied. The State then requested to bifurcate the trial in order to separate the guilt/innocence phase of the trial from the sentence enhancement phase of the trial. The State sought to enhance any sentence Kerby would be given pursuant to 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2010) because the shooting was committed while the perpetrator was "armed with a firearm." Defense counsel objected, and one of his arguments was that it was too late for the State to request a bifurcated trial on the sentence enhancement when it did not provide Kerby notice that it would seek such a trial. The trial court agreed with the State, and decided that the trial would be bifurcated. The jury found Kerby guilty of first-degree murder, attempted first-degree murder, and aggravated battery with a firearm. Kerby waived his right to have the jury decide the sentence enhancement issue. The trial court found that the State proved beyond a reasonable doubt that Kerby, or one for whose conduct he was legally responsible, was armed with a firearm. Thus, the trial court applied the 15-year sentence

enhancement to Kerby's sentence for first-degree murder and attempted first-degree murder.

¶ 35 The State argues that Kerby forfeited his argument that the trial court lacked the authority to bifurcate his trial because Kerby did not present the argument in his motion for a new trial or his motion to reconsider his sentence. See *People v. Coleman*, 227 Ill. 2d 426, 433, 882 N.E.2d 1025, 1028-29 (2008) (holding that in order to preserve an issue for appellate review, the defendant must both object at trial and present the same issue in a written posttrial motion). However, Kerby argues that because the trial court lacked the authority to bifurcate his trial, its order to bifurcate is void. See *People v. Watson*, 318 Ill. App. 3d 140, 142, 743 N.E.2d 147, 149 (2000) (holding that "[w]hen a court enters an order that it lacks the inherent power to enter, the order is void"). A void order may be attacked at any time, either directly or collaterally. *People v. Thompson*, 209 Ill. 2d 19, 25, 805 N.E.2d 1200, 1203 (2004). Because Kerby is attacking the trial court's order to bifurcate his trial based on voidness, we shall consider his argument on appeal.

¶ 36 Kerby argues that pursuant to Illinois Supreme Court Rule 451(g) (eff. July 1, 2006), the trial court did not have the authority to bifurcate his trial without first holding a pretrial hearing. Rule 451(g) states:

> "When the death penalty is not being sought and the State intends, for the purpose of sentencing, to rely on one or more sentencing enhancement factors which are subject to the notice and proof requirements of section 111-3(c-5) of the Code of Criminal Procedure, the court may, within its discretion, conduct a unitary trial through verdict on the issues of guilt and on the issue of whether a

> sentencing enhancement factor exists. The court may also, within its discretion, upon motion of a party, conduct a bifurcated trial. In deciding whether to conduct a bifurcated trial, the court must first hold a pretrial hearing to determine if proof of the sentencing enhancement factor is not relevant to the question of guilt or if undue prejudice outweighs the factor's probative value." Ill. S. Ct. R. 451 (g) (eff. July 1, 2006).

However, as the State correctly points out, the Committee Comments of Rule 451 explicitly state "[p]aragraph (g) does not apply when the court serves as the trier of fact on sentencing enhancement factors." Ill. S. Ct. R. 451, Committee Comments (eff. July 1, 2006). In this case, Kerby waived his right to have the jury decide the sentence enhancement issue and the trial court served as the trier of fact. Thus, pursuant to the Committee Comments, paragraph (g) of Rule 451 no longer applied and the trial court was not required to hold a pretrial hearing before bifurcating Kerby's trial. Therefore, Kerby's argument on this issue fails and the trial court did have the authority to conduct a bifurcated trial.

¶ 37 Kerby next argues that this court should remand the matter for a new trial or reduce his sentence because the State failed to provide sufficient notice of the 15-year sentence enhancements in the indictment. Kerby claims that the State failed to properly charge him with the sentence enhancements in the indictment as required by section 111-3(c-5) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/111-3(c-5) (West 2008)). Section 111-3(c-5) of the Code states that:

> "[I]f an alleged fact (other than the fact of a prior conviction)

> is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt." 725 ILCS 5/111-3(c-5) (West 2008).

It is well settled in Illinois that a defendant must be notified of the offense charged with reasonable certainty. *People v. McDonald*, 401 Ill. App. 3d 54, 63, 927 N.E.2d 253, 261 (2010). "[T]he criminal complaint must set out the offense in the language of the statute or specifically describe the facts which constitute the crime, so that the defendant is sufficiently informed of the specific offense and can prepare a defense." *Id*.

¶ 38 Kerby claims that in order to comply with section 111-3(c-5) of the Code, the State needed to allege either: (1) Kerby committed the offense "while [himself] armed with a firearm"; or (2) an accomplice committed the offense "while armed with a firearm" and the defendant is accountable for the accomplice's conduct. See 720 ILCS 5/8-4(c)(1)(B) (West 2008); 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2008). Kerby argues that the State failed to make either of these allegations against Kerby in the indictment. In support of this argument, Kerby cites to *People v. Beasley*, 307 Ill. App. 3d 200, 717 N.E.2d 420 (1999) and *People v. Smith*, 264 Ill. App. 3d 82, 637 N.E.2d 1128 (1994). Kerby claims that pursuant to *Beasley* and *Smith*, the State's failure to comply with the notice requirements of section 111-3(c-5) of the Code should result in this court vacating the 15-year

sentence enhancements that were added to his sentence.

¶ 39 As the State points out, Kerby's reliance on *Beasley* and *Smith* is misplaced. Both *Beasley* and *Smith* addressed section 111-3(c) of the Code (725 ILCS 5/111-3(c) (West1996)) as opposed to section 111-3(c-5) of the Code. Section 111-3(c) of the Code requires that "[w]hen the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant." 725 ILCS 5/111-3(c) (West 1996). Section 111-3(c) of the Code is a separate statutory provision with different notice requirements than section 111-3(c-5) of the Code. The appellate court's application of section 111-3(c) in the cited cases is inapplicable to this case, and we do not look to those decisions for guidance in addressing Kerby's argument.

¶ 40 Further, it is clear that State provided sufficient notice of the alleged facts that supported the 15-year sentence enhancements. Count 1 of the indictment charged Kerby and co-defendants with:

> "First degree murder in that they, without lawful justification, intentionally or knowingly shot and killed Melody Elias with a han[d]gun, in violation of Chapter 720 Act 5 Section 9-1(a) (1), of the Illinois Compiled Statutes 1992 as amended and contrary to the statute and against the peace and dignity of the same People of the State of Illinois."

Count 13 of the indictment charged Kerby with:

> "First degree murder in that he, or one for whose conduct he is legally responsible without lawful justification, intentionally or

> knowingly shot and killed Melody Elias with a handgun in violation of Chapter 720 Act 5 Section 9-1(a) (1), of the Illinois Compiled Statutes 1992 as amended and contrary to the statute and against the peace and dignity of the same People of the State of Illinois."

Count 34 of the indictment charged Kerby and co-defendants with:

> "Attempt first degree murder in that they, with intent to kill, does an act, to wit: shot Daniel Witting about the body with a handgun which constituted a substantial step towards the commission of the offense of first degree murder, in violation of Chapter 720 Act 5 Section 8-4(a)\(720-5/9-1), of the Illinois Compiled Statutes 1992 as amended and contrary to the statute and against the peace and dignity of the same People of the State of Illinois."

¶ 41 The language of these counts clearly alleges that the offenses were committed with a firearm. The rule states that if the indictment does not set out the offense in the language of the statute, it must specifically describe the facts which constituted the crime. See *McDonald*, 401 Ill. App. 3d at 63, 927 N.E.2d at 261. Although counts 1, 13, and 34 of the indictment do not specifically state the words "armed with a firearm," they do specifically state that both Elias and Witting were shot with a handgun. The plain language of the term "shot with a handgun" describes an act committed with the use of a firearm. Furthermore, as the State points out, count 34 of the indictment for attempted first-degree murder cites to the attempt statute which states that if the defendant is found guilty, 15 years will be added to the defendant's sentence if the offense was committed while armed

with a firearm. See *People v. Mimes*, 2011 IL App (1st) 082747, ¶ 31, 953 N.E.2d 55, 65; 720 ILCS 5/8-4(c)(1)(B) (West 2008). Thus, we hold that the indictment provided Kerby with sufficient notice of the 15-year enhancements for being armed with a firearm.

¶ 42 We note that even if we were to hold that the State did not comply with the notice requirement of section 111-3(c-5) of the Code, the lack of compliance would not cause this court to automatically vacate the sentence enhancements that were applied to Kerby's sentence. Due to the timing of Kerby's challenge of the indictment, the State was not required to strictly comply with section 111-3(c-5) of the Code. When an indictment is challenged for the first time at trial, and the indictment was obtained in accordance with the rules of criminal procedure, the defendant must show that he was prejudiced in preparation of his defense. *People v. Cuadrado*, 341 Ill. App. 3d 703, 711-12, 793 N.E.2d 139, 145-46 (2003). Kerby argues that had he been given proper notice of the sentence enhancement in the indictment, he could have considered a host of options at trial, including: whether to request a bifurcated proceeding; whether to have the jury decide his guilt or innocence; whether to testify during the guilt or innocence phase of the trial; and whether to testify during the sentence enhancement phase of the trial. However, at no point during the trial or on appeal did Kerby argue that a firearm was not used in the commission of the offenses charged. The fact that Witting and Elias were shot with a firearm was established at trial and conceded many times by Kerby. This is a fact that Kerby is unable to rebut. None of the options that Kerby claims he would have considered could or would have affected the fact that the offenses in this case were committed with a firearm. Thus, Kerby cannot show that any failure by the State to comply with section 111-3(c-5) of the Code prejudiced the preparation of his defense. We decline Kerby's

invitation to vacate the 15-year sentence enhancements or reduce his sentence for being armed with a firearm.

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 44 Affirmed.