

No. 1-08-0907

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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. 03 CR 14310
)	
JESSIE WILLIAMS,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

Held: Defendant's conviction and 43-year sentence for felony murder were affirmed where: (1) the court correctly instructed the jurors as to the elements of felony murder; (2) defendant waived review of any error in the admission of a fingerprint expert's testimony; (3) a detective's testimony was admissible to show the course of the police investigation; (4) the circuit court's blanket policy of delaying ruling on certain *in limine* motions until after defendant testified was not reviewable because defendant did not testify at trial; and (5) the State waived review as to whether the circuit court erred in merging both armed robbery convictions into the felony murder conviction.

A jury convicted defendant, Jessie Williams, of felony murder and two counts of armed robbery. The circuit court merged the armed robbery convictions into the felony murder conviction and sentenced defendant to 43 years' imprisonment. On appeal, defendant contends the circuit court

No. 1-08-0907

erred by: (1) incorrectly instructing the jurors as to the elements of felony murder; (2) admitting a fingerprint expert's testimony without adequate foundation; (3) admitting hearsay testimony; and (4) refusing to rule *in limine* on the admissibility of defendant's prior conviction until after defendant testified. The State contends defendant's sentence is void and must be remanded for resentencing because the circuit court failed to impose consecutive sentences on the felony murder conviction and on one of the armed robbery convictions. For the reasons that follow, we affirm defendant's convictions and sentence.

At trial, Carl Mays, a resident of Detroit, Michigan, testified that, on April 17, 2003, he, Donnell Mersier, and Ricardo Garr drove from Detroit to Chicago for the purpose of illegally cashing money orders through Western Union currency exchanges. They came to Chicago in Mersier's van, with Garr driving, Mays in the front passenger seat, and Mersier in back. They had perpetrated their money-cashing scheme three or four times previously in Chicago. The scheme involved recruiting persons in Chicago with valid identification (ID) cards. Mersier would take the recruit's ID card and call someone (who Mays was unable to identify) and relay the information from the ID card to that person on the other end of the line. Later, Mersier would get a phone call letting him know that money had been transferred to a Western Union account in the recruit's name. The recruit then would enter the Western Union currency exchange, retrieve the money, and give it to Mays. In return, Mays paid the recruit \$200.

Mays testified that, between 11 and 11:30 a.m., on April 17, 2003, they drove to 63rd Street and Loomis Boulevard to meet a man known as "Flash" who had helped them recruit people to send into the Western Union currency exchanges. They saw Flash in the window of an apartment

No. 1-08-0907

building, but he was unable to accompany them that day. Instead, three young men came out of the apartment building and walked over to the van. Mays identified the men as Eric Williams, defendant, and Perry Higgins. Mays spoke first with Williams and asked for his ID, which indicated he was only 19-years-old. Mays told Williams he was too young to participate in their money-cashing scheme. Mays then spoke with defendant, who said he wanted to participate in the scheme but that he did not have his ID with him. Mays asked defendant how old he was, and defendant responded that he was 20. Mays told defendant he was too young to participate. Mays then spoke with Higgins and saw that his ID indicated he was 23- years- old. Mays agreed to take Higgins, who entered the car and sat in the back seat on the driver's side.

Mays testified they also recruited two women named Diane and Felicia to participate in the money-cashing scheme that day. At various points, Higgins, Diane, or Felicia exited the van, entered a currency exchange, and returned with \$2,000 in cash that they gave to Mays in return for \$200. At approximately 8:30 p.m., the van returned to 63rd Street and Loomis Boulevard, where Higgins, Diane, and Felicia were dropped off.

Mays testified that, at approximately 8:45 p.m., Garr pulled the van over at 1215 West 63rd Street because Mersier was trying to make a phone call and he was having trouble getting a signal on his cell phone. Mays was in the front-passenger seat and Mersier was in the back seat. As they were sitting in the van, Williams knocked on the passenger-side window. Defendant was with him. Williams opened the front-passenger door and defendant opened the side doors to the van. Mays testified Williams put a gun to his head and demanded money. Mays said he did not have any money, but Williams reached into Mays' pocket and pulled out some cash. Williams then hit Mays

No. 1-08-0907

on the right side of his head with his gun. Meanwhile, defendant reached into Mersier's pockets and removed some cash.

Mays testified Williams leaned across him, pointed the gun at Garr, and told Garr to hand over his money. Garr replied that he did not have any money. Williams cocked the gun and again told Garr to hand over his money. Williams then reached into Garr's pocket, but did not find any cash. Williams pointed the gun back at Mays, took the keys out of the ignition, and told Mays to exit the van. Mays replied that he could not exit the van because he was an amputee. Williams again slapped Mays on the head with the gun. During this time, defendant remained standing next to Williams. After that, Mersier came across the seat and hit Williams in the face. Williams responded by firing his gun one time at Mersier. Williams and defendant ran away.

Mays testified that, Mersier said he had been shot, so they drove him to a hospital. Garr went into the hospital while Mays waited in the van. Garr returned to the van and said the doctors were working on Mersier. Mays and Garr then drove back to Detroit. On the way to Detroit, they learned Mersier had died. The autopsy indicated the cause of death was a gunshot wound to the chest, and the manner of death was homicide.

Garr testified to the circumstances of the shooting and his account was substantially the same as Mays' testimony.

Both Mays and Garr testified it was their understanding they would not be prosecuted for their participation in the thefts from the Western Union currency exchanges.

Mays testified that, on April 19, 2003, he returned to Chicago and went to the police station to view a lineup. He identified Williams in the lineup as the person who had shot Mersier. Mays

No. 1-08-0907

also identified a photograph of defendant on that day.

The parties stipulated that, if called as a witness, Investigator M. Bruce with the Detroit Police Department would testify he took signed statements from Mays and Garr on April 18, 2003. Neither Mays nor Garr told him that Williams cocked the gun and leaned over Mays to go through Garr's pockets.

Diane Perkins testified that, on April 17, 2003, she agreed to participate in the Western Union money-cashing scheme with Felicia and Higgins. They rode in a white van with Mays, Mersier, and the driver who she did not know. She obtained \$2,000 from a Western Union currency exchange, returned to the van, and gave the money to Mersier. Mersier gave her \$200 in return. At approximately 8 p.m., she, Higgins, and Felicia, were dropped off at the 6300 block of South Loomis Boulevard. Perkins got into a car with Higgins and another man and asked them to give her a ride home. Instead of driving her home, they drove for approximately 5 to 10 minutes and eventually parked the car at 63rd Street and Racine Avenue.

Perkins testified that, from where they were parked, she could see Mays' and Mersier's white van parked on 63rd Street. She saw two men standing outside the van, one of whom she identified as defendant. She saw defendant go in and out of the side door of the van and she heard a gunshot coming from the direction of the van. Higgins then drove Perkins away and dropped her off at 64th Street and Ogden Park.

Perkins testified that, when she spoke to police on April 19, 2003, she told them about her participation in the Western Union money-cashing scheme, but failed to mention that she later saw defendant by the white van and that she had heard a gunshot. She did not mention anything about

No. 1-08-0907

defendant and the gunshot until police interviewed her again on May 8, 2003.

Officer Leroy Horton testified that, at approximately 8:45 p.m. on April 17, 2003, he and his partner, Officer Robert Haile, were on duty at 6314 South Elizabeth Street in a secluded alley. The officers were in plainclothes in an unmarked car doing narcotics surveillance. From their position, they could see all the way down to 63rd Street. Officer Horton heard a gunshot and looked north in the direction of the shot, where he saw a white van parked on 63rd Street with its side door open. He saw two men backing away from the passenger side of the van. One of the men was holding a gun.

Officer Horton testified he and his partner activated their emergency lights and began to follow the two men. The unarmed man ran westbound down an alley while the man with the gun ran straight toward a fence. He threw the gun over the fence and proceeded to jump over the fence. Officer Horton exited his vehicle and eventually caught and arrested the man who had thrown the gun. Officer Horton later learned that the man he had arrested was Eric Williams. Officer Haile recovered the gun. The unarmed man was not caught during the chase. Officer Horton did not get a good look at the unarmed man's face, but described him as a black male, approximately six-feet-tall, with a thin build and a medium-dark complexion.

Detective Timothy O'Brien testified that, on April 17, 2003, he was assigned to investigate Mersier's shooting. Detective O'Brien and his partner, Detective Joseph Struck, went to the 7th District police station and spoke with Williams. Officers transported Williams to the Area One police station, where Detective O'Brien spoke with him several more times. At approximately 4 a.m., Detective O'Brien and Detective Struck went to 63rd Street and Loomis Boulevard to look for

No. 1-08-0907

two men nicknamed "Flash" and "Elbow." After speaking with Flash, Detective O'Brien again spoke with Williams at approximately 8 a.m. on April 18, 2003, and then obtained a photograph of defendant. Detective O'Brien had yet another conversation with Williams, after which the detective went to locate defendant.

Detective O'Brien testified that, on April 18, 2003, he contacted the Detroit Police Department and subsequently received copies of the statements Mays and Garr gave in Detroit. Detective O'Brien learned that the van had been located in Detroit, and he received an envelope from the Detroit police department containing a palm print lifted from the window of the van. Detective O'Brien inventoried the print and turned it over to the forensic services section of the Chicago Police Department.

Stanley Moadlo, a fingerprint technician for the state's attorney's office, testified that, on July 27, 2004, he received an order to obtain palm prints from defendant, Williams and Higgins. Each individual was properly identified and their palm prints obtained. After each palm print was obtained and placed on a palm print card, the cards were turned over to the Chicago Police Department. Deborah McGarry, a forensic scientist for the Illinois State Police, testified she received the cards of palm prints taken from defendant, Williams, and Higgins and determined that defendant's print matched the print taken from Mersier's van.

Marc Pomerance, a forensic scientist specializing in firearms and tool mark identifications for the Illinois State Police, testified he examined the gun recovered from Williams, as well as a fired shell casing recovered from the crime scene, and the fired bullet recovered from Mersier during the autopsy. After test-firing the gun, Pomerance determined that the shell casing and bullet were fired

No. 1-08-0907

from the recovered handgun.

Detective Amato testified he arrested defendant on June 4, 2003. Mays testified that, on June 6, 2003, he identified defendant in a lineup as the person who "went through [Mersier's] pockets." Garr testified he also viewed the lineup on June 6, 2003, and identified defendant as the person who had been standing by the van's side door at the time of the shooting.

Following all the evidence, the jury convicted defendant of the armed robbery of Mersier and of Mays, and of the first-degree felony murder of Mersier. The circuit court subsequently merged the armed robbery convictions into the first-degree murder conviction and sentenced defendant to 43 years in prison. Defendant filed this timely appeal.

First, defendant contends the circuit court erred in its instruction to the jury regarding the elements of felony murder. The circuit court's determination as to the instructions given to the jury will not be disturbed absent an abuse of discretion. *Howat v. Donelson*, 305 Ill. App. 3d 183, 186 (1999). The test for determining whether the circuit court properly instructed the jury is whether, taken as a whole, the instructions were clear enough so as not to mislead and whether they fairly and accurately stated the applicable law. *Howat*, 305 Ill. App. 3d at 186.

The circuit court gave the jury the "Accountability-Felony Murder" instruction, Illinois Pattern Jury Instructions, Criminal, No. 5.03A (4th ed. 2000) (hereinafter IPI Criminal 4th No. 5.03A):

"To sustain the charge of first degree murder, it is not necessary for the State to show that it was or may have been the original intent of the defendant or one for whose conduct he is legally responsible to kill the deceased, Donnell Mersier.

It is sufficient if the jury believes from the evidence beyond a reasonable doubt that the defendant and one for whose conduct he is legally responsible combined to do an unlawful act, such as to commit armed robbery, and that the deceased was killed by one of the parties committing that unlawful act."

Defendant contends this instruction was contrary to the felony murder statute, which states that the predicate felony for felony murder must be a "*forcible felony* other than second degree murder." (Emphasis added.) 720 ILCS 5/9-1(a)(3) (West 2002). Defendant argues that, according to the instruction given to the jury, the predicate felony for felony murder was not limited to a forcible felony, but to any "unlawful act" including, but not limited to, armed robbery. Defendant argues "where much of the State's evidence centered on the non-forcible felony of [theft by deception from the Western Union currency exchanges], the jury needed to be instructed that it could convict [him] of first degree murder only if it found the death occurred during the course of the armed robbery." Defendant contends the circuit court erred during the jury instruction conference when it refused his oral request to give a modified IPI Criminal 4th No. 5.03A deleting the reference to "unlawful act" and specifically defining the predicate offense as armed robbery. We note defendant failed to tender a written instruction containing the proposed modified IPI Criminal 4th No. 5.03A. The State makes no argument that defendant waived review by tendering an oral instruction instead of a written instruction.

Defendant's argument is unavailing because it considers the accountability-felony murder instruction in isolation, rather than viewing the instructions as a whole. Viewed as a whole, the instructions apprised the jury of the correct legal principles. Specifically, the record indicates that

No. 1-08-0907

the court gave the jury IPI Criminal 4th No. 7.01, "Definition of First Degree Murder," which stated:

"A person commits the offense of first degree murder when he kills an individual if, in performing the acts which cause the death, he is committing the offense of armed robbery."

The court also gave the jury IPI Criminal 4th No. 7.02, "Issues in First Degree Murder (When Second Degree Murder Is Not Also An Issue)", which stated in pertinent part:

"To sustain the charge of first degree murder, the State must prove the following propositions:

First: That the defendant, or one for whose conduct he is legally responsible, performed the acts which caused the death of Donnell Mersier; and

Second: That when the defendant, or one for whose conduct he is legally responsible, did so, he was committing the offense of armed robbery."

Taken as a whole, the instructions adequately informed the jury that, to convict defendant of felony murder, it must find that he (or someone for whose conduct he was legally responsible) caused Mersier's death during the commission of the predicate forcible felony of armed robbery. This case is similar to *People v. Ramey*, 151 Ill.2d 498 (1992). In *Ramey*, the defendant there was convicted of murder, home invasion, aggravated unlawful restraint, and possession of a stolen motor vehicle. *Ramey*, 151 Ill.2d at 509-10. The circuit court gave the following instruction to the jury using the language that is now IPI Criminal 4th No. 5.03A, but which at that time was a non-IPI instruction:

"The Court instructs the Jury as a matter of law that in this case to constitute the crime of murder it is not necessary for the State to show that it was or may have been the

original intent of the defendant or his accomplice to kill the deceased, Derrick Quincy Wilkinson.

It is sufficient if the jury believe [*sic*] from the evidence beyond a reasonable doubt that the defendant and his accomplice combined to do an unlawful act, such as to commit a home invasion and that the deceased was killed by one of the parties committing that unlawful act." *Ramey*, 151 Ill.2d at 535.

The defendant in *Ramey* contended the instruction was erroneous because it did not limit the predicate offense to home invasion, but to any "unlawful act." *Ramey*, 151 Ill.2d at 538. The supreme court disagreed, noting that the defendant's argument was premised on examining the instruction in isolation. *Ramey*, 151 Ill.2d at 538. The supreme court found that, while the instruction did mention "an unlawful act," the instruction immediately thereafter referenced home invasion. *Ramey*, 151 Ill.2d at 538. Also, the circuit court gave IPI Criminal 2d Nos. 7.01 and 7.02, which instructed the jury that it could find defendant guilty of murder if he was "committing the offense of home invasion." *Ramey*, 151 Ill.2d at 538. Viewing the instructions in their entirety, the supreme court held that they adequately apprised the jury of the correct legal principles regarding felony murder. *Ramey*, 151 Ill.2d at 538-39.

Similarly, in the present case, the jury instruction at issue, IPI Criminal 4th No. 5.03A "Accountability-Felony Murder" mentioned "an unlawful act" as the predicate offense for felony murder, but immediately thereafter referenced armed robbery as the predicate offense. As in *Ramey*, the circuit court also gave IPI Criminal 4th Nos. 7.01 and 7.02, which instructed the jury that it could find defendant guilty of murder if he, or one for whose conduct he was legally responsible,

No. 1-08-0907

performed the acts causing Mersier's death while "committing the offense of armed robbery." As in *Ramey*, the instructions here, viewed as a whole, adequately apprised the jury of the correct legal principles regarding the elements of felony murder. There was no instructional error here.

Next, defendant contends the circuit court erred by admitting the fingerprint expert's (Deborah McGarry's) testimony that a latent print found on the deceased's van was left by defendant. Defendant contends the expert failed to provide any foundation for her opinion. Defendant admits he waived review by failing to object at trial (*People v. Enoch*, 122 Ill.2d 176, 186 (1988)), but he asks us to consider the issue for plain error. An issue may be reviewed for plain error under either of two prongs: (1) where the evidence is closely balanced; or (2) the error is of such magnitude to deprive defendant of a fair and impartial trial and remedying the error is necessary to preserve the integrity of the judicial process. *In re R.A.B.*, 197 Ill.2d 358, 363 (2001). Under the first prong, the evidence here was not closely balanced, where Mays and Garr positively identified defendant as the person who accompanied Williams in approaching the van at 63rd Street, opening the side door and robbing Mersier. Mays and Garr both testified defendant was standing next to Williams when Williams shot Mersier, and that defendant and Williams ran away after the shooting. Diane Perkins also testified to seeing two men, one of whom was defendant, standing outside the van parked on 63rd Street. Consistent with Mays' and Garr's testimony, she testified that she saw defendant leaning in and out of the side door of the van near the time of the shooting. Defendant questions Mays', Garr's, and Perkins' credibility; however, the credibility of the witnesses is a matter for the trier of fact to determine (*People v. Steidl*, 142 Ill.2d 204, 226 (1991)) and in this case the jury clearly found their testimony identifying defendant to be credible. Further, Officer Horton corroborated Mays',

No. 1-08-0907

Garr's, and Perkins' testimony in important respects, as he testified to hearing a gunshot and seeing two men backing away from the white van parked on 63rd Street. Officer Horton testified to apprehending the gunman, who he identified as Williams (consistent with Mays' and Garr's testimony). The firearms evidence also confirmed that the shell casing recovered from the scene, and the bullet recovered from Mersier, came from the handgun recovered from Williams. As the evidence here was not closely balanced, any error in the admission of the fingerprint expert's testimony did not rise to the level of plain error under the first prong.

Under the second prong, on the facts of this case, defendant has failed to show the alleged error in the admission of the fingerprint expert's testimony was of such magnitude as to deprive him of a fair and impartial trial sufficient to warrant reversal under the plain error rule. During her re-cross examination, the fingerprint expert admitted she could not determine when defendant left his fingerprint on Messier's van; thus, defendant could have left the fingerprint on the morning of the shooting, when he approached the van to take part in the money-cashing scheme, as opposed to the evening when the shooting occurred. Defendant argued as such during closing arguments, when he reminded the jury that the expert could not "determine whether that print was left in the morning or at night." Thus, the fingerprint evidence was of limited, if any, value to the prosecution and its admission did not rise to the level of plain error. See also *People v. DeLuna*, 334 Ill. App. 3d 1, 21 (2002) (holding that the failure to lay a proper foundation for expert testimony did not amount to a violation of defendant's substantial rights warranting reversal under the plain error rule.) Accordingly, plain error review is not applicable here. Defendant has waived review of this issue.

Next, defendant contends his confrontation rights as set forth in *Bruton v. United States*, 391

No. 1-08-0907

U.S. 123 (1968) and *Crawford v. Washington*, 541 U.S. 36 (2004), were violated when the circuit court admitted certain hearsay testimony from Detective O'Brien indicating that non-testifying co-defendants Eric Williams and Perry Higgins had implicated defendant in the crime.

In *Bruton*, the United States Supreme Court held that the admission of a statement, at a joint trial, by a nontestifying co-defendant that expressly implicates the defendant in the crime violates the defendant's constitutional right to confront witnesses against him. *Bruton*, 391 U.S. at 137. In *Crawford*, the Supreme Court held that the confrontation clause bars the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify, and defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68.

The State argues that, although the admission of Detective O'Brien's testimony was discussed in a motion *in limine* by defendant, defendant waived review by failing to object when the evidence was offered at trial. We hold there was no waiver. Even in the absence of an objection at trial, an issue is preserved for review where, as here, it is raised both: (1) in a motion *in limine*; and (2) in the post-trial motion. *People v. Maldonado*, 398 Ill. App. 3d 401, 414-16 (2010). Accordingly, we review the issue on the merits.

In *People v. Peoples*, this court determined that the initial inquiry in determining if a defendant's confrontation clause rights were violated was to determine whether the testimony was hearsay. *Peoples*, 377 Ill. App. 3d 978, 983 (2007). A detective in *Peoples* stated that, after he spoke to an individual, Marcel White, who was arrested, the detective utilized a computer base to identify the third suspect, who was the defendant. *Peoples*, 377 Ill. App. 3d at 982. The *Peoples* court reasoned "if an out-of-court statement made by White was offered for the purpose of proving

No. 1-08-0907

that defendant was the gunman, the confrontation clause protects defendant's right to cross-examine White, because the confrontation clause prohibits the use of hearsay evidence." *Peoples*, 377 Ill. App. 3d at 983. However, "testimony about an out-of-court statement that is being offered for a purpose other than to prove the truth of the matter asserted is not hearsay" and "[a]dmissible nonhearsay does not implicate the confrontation clause." *Peoples*, 377 Ill. App. 3d at 983. The *Peoples* court also noted, a police officer's testimony recounting steps in the investigation leading to defendant's arrest does not constitute inadmissible hearsay where such testimony is necessary to fully explain the State's case to the jury. *Peoples*, 377 Ill. App. 3d at 984. Such testimony is not hearsay because it is within the police officer's personal knowledge. *Peoples*, 377 Ill. App. 3d at 984. The officer's testimony is admissible even though his description of the investigatory steps might suggest that non-testifying witnesses implicated defendant; however, the testimony is inadmissible if it gratuitously reveals the substance of the statements made by the nontestifying witnesses. *Peoples*, 377 Ill. App. 3d at 985-86; *People v. Ivory*, 333 Ill. App. 3d 505, 514 (2002). The *Peoples* court held that, in the case before it, the detective's testimony was offered to show the course of the police investigation leading to the defendant's arrest and therefore the testimony was not hearsay and did not violate *Crawford*. *Peoples*, 377 Ill. App. 3d at 986.

In the present case, Detective O'Brien's testimony regarding Williams and Higgins similarly showed the course of the police investigation and, therefore, did not constitute hearsay. Detective O'Brien testified that after speaking with Williams on April 17, 2003, he obtained a photograph of defendant and went out to locate him. Detective O'Brien also testified that after speaking with Higgins on April 29, 2003, an investigative alert for defendant was issued several days later, on May

No. 1-08-0907

4, 2003. Detective O'Brien did not testify to the substance of the statements made by Williams and Higgins, but merely recounted steps in the investigation ultimately leading to defendant's arrest. Detective O'Brien's testimony regarding these investigative steps was not hearsay because it was within his personal knowledge; accordingly, there was no confrontation clause/*Crawford/Bruton* violation here. Further, Detective O'Brien's testimony regarding the police investigation was relevant to show why defendant was arrested and placed in a lineup where he later was identified by Mays and Garr. As such, Detective O'Brien's testimony was properly admitted to fully explain the State's case to the jury.

Defendant cites cases in which the appellate court held testimony was inadmissible because it disclosed the substance of statements made by nontestifying witnesses. See *People v. Jura*, 352 Ill. App. 3d 1080 (2004); *People v. Sample*, 326 Ill. App. 3d 914 (2001); and *People v. Armstead*, 322 Ill. App. 3d 1 (2001). Each of these cases are distinguishable. In *Jura*, the prosecution elicited hearsay testimony by three officers that they responded to a call of a "person with a gun," described as "a male White with a tattoo with a teardrop on his face," and defendant "matched that description." *Jura*, 352 Ill. App. 3d at 1085-86. The appellate court held it "could accept the State's argument that it used the hearsay merely to explain the investigation undertaken by the police had the State not elicited the hearsay repeatedly through the testimony of not one, but three witnesses; relied upon the hearsay in opening statement; relied upon the hearsay in closing argument; and repeated the 'fact' the hearsay description matched the defendant although the trial judge had sustained objection to this question and that 'fact' was not in evidence." *Jura*, 352 Ill. App. 3d at 1088-89. In *Sample*, the State asked "serial questions" of a police officer regarding codefendants'

No. 1-08-0907

identification of defendant's name and nickname. *Sample*, 326 Ill. App. 3d at 921-22. The appellate court held, "the repetition of strong inferences that his codefendants implicated defendant in the crimes, the use of those statements to build a substantive link in the State's case, and the State's several comments on the upcoming testimony during opening statement lead us to conclude that the boundaries set for the investigative process hearsay exception were breached." *Sample*, 326 Ill. App. 3d at 924. In *Armstead*, a police officer specifically testified that, after speaking with a nontestifying witness, the officer learned the identify of the shooter, learned what had happened, filled out a case report naming the offender, and was looking for defendant. *Armstead*, 322 Ill. App. 3d at 7-8. The appellate court held, the "questioning clearly revealed the substance of the conversation between [the nontestifying witness and the officer] and implicated defendant as the shooter. *** We hold that this testimony as to statements made by a nontestifying party identifying the defendant as the shooter is inadmissible hearsay." *Armstead*, 322 Ill. App. 3d at 12-13.

Jura, *Sample*, and *Armstead* are inapposite, where the testimony at issue here came from only one witness, Detective O'Brien; where the State did not ask serial questions revealing the substance of the statements made by the nontestifying witnesses, nor did it elicit specific testimony that the nontestifying witnesses identified defendant as the offender; and where defendant did not reference Detective O'Brien's testimony in his opening statement. Unlike in *Jura*, *Sample*, and *Armstead*, Detective O'Brien's testimony did not disclose the substance of the nontestifying witnesses' statements, but rather recounted only the investigative steps leading to defendant's arrest. The circuit court did not err in admitting Detective O'Brien's testimony.

Defendant also contends the prosecutor made improper remarks during closing arguments

No. 1-08-0907

by commenting on Detective O'Brien's testimony that after talking to Williams, he obtained a photograph of defendant and went looking for him. Defendant waived review of one of these remarks by failing to object at trial. *Enoch*, 122 Ill.2d at 186. As to the other remark, prosecutors have great latitude in making their closing arguments, and such arguments are proper if they are based on the record or are reasonable inferences drawn therefrom. *People v. Moya*, 175 Ill. App. 3d 22, 24 (1988). Prosecutorial comments constitute reversible error only if they "engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments." *People v. Nieves*, 193 Ill.2d 513, 533 (2000). The prosecutor's comments here were properly based on Detective O'Brien's testimony and did not constitute error.

Moreover, even if we were to hold that the admission of Detective O'Brien's testimony, and the prosecutorial comments thereon, were error, any such error was harmless given the overwhelming evidence against defendant. See our discussion above concerning defendant's identification by Mays, Garr, and Perkins, along with corroborating forensic evidence and corroborating testimony from Officer Horton. Also, any error in the prosecutorial comments was harmless in light of the court's instruction to the jury that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded." See *People v. Scott*, 194 Ill. App. 3d 634, 645 (1990).

Next, defendant contends he was deprived of his constitutional right to testify because the circuit court refused to determine, prior to trial, the admissibility of his prior conviction as impeachment. The circuit court in this case had a blanket policy of withholding its ruling on this type of motion until the trial had commenced and defendant testified. In *People v. Averett*, 237 Ill.2d

No. 1-08-0907

1 (2010), our supreme court addressed "whether a defendant may be entitled to relief on appeal after choosing not to testify at trial if the trial court had a 'blanket policy' of deferring rulings on motions *in limine* to exclude prior convictions for impeachment until after the defendant testified." *Averett*, 237 Ill.2d at 5. In *Averett*, both defendants Warren Averett and David Tucker chose not to testify in their respective trials after the trial court refused to rule on their motions *in limine* until it heard their trial testimony. *Averett*, 237 Ill.2d at 6-8. The supreme court noted its earlier ruling in *People v. Patrick*, 233 Ill.2d 62, 74-75 (2009) that, except in rare cases, a trial court abuses its discretion by failing to make a pretrial ruling on such motions *in limine*. *Averett*, 237 Ill.2d at 10. The court applied this holding to the cases of *Averett* and *Tucker*, holding that the trial courts abused their discretion by using a blanket policy to defer ruling on defendants' motions until after they actually testified. *Averett*, 237 Ill.2d at 12.

On the question of whether the *Averett* defendants were entitled to relief despite their choice not to testify, the court first determined that the trial courts' blanket policy of deferring ruling on defendants' motions *in limine* until they actually testified was not a structural error requiring automatic reversal. *Averett*, 237 Ill.2d at 14. The court also held that the trial courts' blanket deferral policy was not an error of constitutional dimension, because defendants were not prevented from testifying nor were they deprived of their due process right to the "guiding hand of counsel." *Averett*, 237 Ill.2d at 17. The court then rejected Averett's argument for plain error review and reaffirmed its holding in *Patrick* that a defendant's decision not to testify rendered the trial court's decision unreviewable because otherwise a reviewing court would be forced to speculate on the substance of defendant's testimony and the questions that the prosecution would ask upon cross-examination.

No. 1-08-0907

Averett, 237 Ill.2d at 18. Finally, the court held that article I, section 12 of the Illinois Constitution (Ill. Const. 1970, art. I. §12), which provides that "[e]very person shall find a certain remedy *** for all injuries and wrongs," does not require a specific remedy for the error in deferring a ruling on a motion *in limine*. *Averett*, 237 Ill.2d at 21-22.

In accordance with *Averett*, we hold that the issue of the circuit court's reservation of its ruling on defendant's motion *in limine* regarding the admissibility of his prior conviction is not reviewable because defendant chose not to testify. Accordingly, we hold that the facts of this case do not present reversible error as alleged by defendant.

Finally, the State contends defendant's sentence is void and must be remanded for resentencing because the circuit court failed to impose consecutive sentences on the felony murder conviction and on one of the armed robbery convictions. The State cites section 5-8-4(a) of the Unified Code of Corrections (730 ILCS 5/5-8-4(a) (West 2002)) in effect at the time of defendant's offense, which provided that when a defendant commits multiple offenses as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, and at least one of those offenses is a triggering offense under the statute, then "the court shall enter sentences to run consecutively." 730 ILCS 5/5-8-4(a) (West 2002). The State argues that the first-degree murder and armed robbery convictions were triggering offenses requiring the imposition of consecutive sentences, and that the circuit court's failure to impose consecutive sentences rendered his sentence void and subject to correction on appellate review. See *People v. Arna*, 168 Ill.2d 107, 113 (1995) (holding that a sentence that does not conform to a statutory requirement is void and may be corrected by the appellate court "at any time.")

However, our supreme court has held that "[i]n order for a sentence to be consecutive there must be at least one other sentence involved" and "the consecutive sentencing portion of section 5-8-4(a), by its nature, concerns more than one sentence." *People v. Curry*, 178 Ill.2d 509, 538 (1997). In the present case, the circuit court merged both armed robbery convictions into the felony murder conviction and imposed a single 43-year sentence for felony murder. As only one sentence was imposed, the consecutive sentencing portion of section 5-8-4(a) is not applicable. The consecutive sentencing portion of section 5-8-4(a) only applies if we decide, as a threshold issue, that the circuit court erred by merging both armed robbery convictions into the felony murder conviction and by failing to impose a separate sentence on one or both of the armed robbery convictions. Accordingly, we proceed to examine whether the circuit court erred by merging both armed robbery convictions into the felony murder conviction and imposing only a single sentence thereon.

Our supreme court has held that "the predicate felony underlying a charge of felony murder is a lesser-included offense of felony murder. Thus *** a defendant convicted of felony murder may not be convicted on the underlying felony. In such instances, the predicate offense will not support a separate conviction or sentence." *People v. Smith*, 233 Ill.2d 1, 17 (2009). In the present case, the State did not specify in the indictment or the jury instructions which of the underlying armed robbery offenses was the predicate offense for the felony murder. At sentencing, the circuit court merged both armed robbery convictions, as the predicate offenses, into the felony murder conviction. The issue here, as framed by the State, is whether the circuit court was correct in determining that both armed robbery convictions were lesser included, predicate offenses that merged with the felony murder conviction, or whether the court should have merged only one of the armed robbery

No. 1-08-0907

convictions into the felony murder conviction and then sentenced defendant on the remaining armed robbery conviction. The State concludes that the circuit court should have merged one of the armed robbery convictions and sentenced defendant on the other. However, the State makes no arguments and cites no precedents in support of its conclusion. Supreme Court Rules 341(h)(7) and 341(I) require that partes submitting briefs to the appellate court must support their issues with arguments and citations to relevant authority or risk having the issues waived. Ill. S. Ct. R. 341(h)(7), (i) (eff. Sept. 1, 2006). In the absence of any argument or citation to authority, the State has waived review of whether the court erred in merging both armed robbery convictions into the felony murder conviction. The State has additionally waived review of the merger issue by failing to raise any objections thereto during sentencing or at the hearing on defendant's motion to reconsider sentence. *People v. Exson*, 384 Ill. App. 3d 794, 803 (2008); *People v. Bryant*, 369 Ill. App. 3d 54, 59 (2006); *People v. Holloway*, 86 Ill.2d 78, 91 (1981). In fact, during the hearing on the motion to reconsider sentence, the State agreed that the sentencing order was correct, asserting, "Judge, it is our position, as well as the trial, that there are no mistakes in the sentence." Accordingly, based on the State's waiver, we affirm the circuit court's decision merging the armed robbery convictions into the felony murder conviction and imposing a single sentence thereon. As we are affirming the circuit court's merger order and its sentencing of defendant on only the felony murder conviction, we need not address the State's argument concerning consecutive sentencing, as that argument was premised on the circuit court having erred in merging the convictions and imposing a single sentence.

For the foregoing reasons, we affirm the circuit court.

Affirmed.