

NOTICE
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2012 IL App (4th) 100140-U

Filed 1/17/12

NO. 4-10-0140

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
EMMANUEL D. LEWIS,)	No. 07CF462
Defendant-Appellant.)	
)	Honorable
)	Lisa Holder White,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

- ¶ 1 *Held:*
1. The State presented sufficient evidence for a rational trier of fact to find defendant guilty of first degree murder.
 2. Defendant forfeited his argument the trial court erred in allowing the State to introduce evidence of a hearsay statement by Thesis Jones and plain error rule did not apply.
 3. Judgment order should be modified to show the 15-year statutory add-on was included within defendant's 40-year sentence.

¶ 2 In December 2009, a jury convicted defendant, Emmanuel D. Lewis, of first degree murder. In February 2010, the trial court sentenced defendant to 40 years' imprisonment. Defendant appeals, arguing the following: (1) the State failed to prove his guilt beyond a reasonable doubt because the evidence was insufficient to show defendant was legally accountable for Brandon Read's death; (2) the trial court abused its discretion in allowing the

State to introduce Thesis Jones's hearsay statement as it did not fall within the co-conspirator exception to the hearsay rule; and (3) an amended mittimus should be issued because the Department of Corrections's (DOC) records reflect defendant is serving a 55-year sentence. We affirm defendant's conviction but remand for the trial court to amend the judgment order.

¶ 3

I. BACKGROUND

¶ 4 Defendant was tried in December 2009 for the murder of Brandon Read, who died as a result of a gunshot wound received on March 29, 2007. At defendant's trial, Kevun Campbell testified defendant, Christopher Graves, and Thesis Jones were his friends. Kevun testified defendant, Graves, and Jones were riding around together in a car, which belonged to Jones, on the day Read was shot. Defendant was driving. Kevun testified he saw Jones firing a gun during the day in the vicinity of Union and Center Streets. Kevun saw defendant, Jones, and Graves again after that incident in the same vehicle at the corner of Union and Division. Jones asked Kevun where his sister Earleta was. Kevun took Jones inside to see Earleta. Kevun testified he heard about another shooting occurring at the corner of Edward and Center Streets later that day.

¶ 5 Earl Campbell, brother to Kevun and Earleta, testified he saw defendant, Jones, and Graves a couple of times in the area of Union and Division near his house on March 29, 2007. According to Earl, the second time he saw "them", Jones said, "On the G, I'm going to get that nigger." Earl explained "on the G" means someone is serious. Jones did not specify who he was referring to when he said "that nigger." No one asked Earl who was present when this statement was made.

¶ 6 Earl testified Jones and Graves each had a gun. Earl testified defendant was

driving, Jones was in the front passenger seat, and Graves was in the back seat. Earl stated he heard about Read being shot about 30 minutes after defendant, Jones, and Graves left his house. Earl also testified he saw Jones firing shots from his car at Union and Center Streets earlier in the day, prior to Read being shot. When these shots were fired, defendant was driving the car.

¶ 7 The State also presented evidence of an ongoing rivalry between the "Mob Squad" and the "Goon Squad." Earl testified Stashawn Wheeler, who was a member of the "Mob Squad," lived at the house where Read was shot. Earl testified defendant, Jones, and Graves were members of the "Goon Squad."

¶ 8 Earleta Campbell testified she was holding a gun for Christopher Dandy on March 29, 2007. Although she said she knew little about guns, she testified the gun appeared to be "a cowboy gun" or a revolver. On the day Read was shot, Jones came to her house to get the gun. Earleta testified she called Dandy to see if he wanted her to give Jones the gun. Dandy said yes. Jones gave her \$100, which she later gave to Dandy, for the gun.

¶ 9 Keirsean Bond testified he was at Stashawn Wheeler's house the day Read was shot. According to his testimony, he went there after school about 3 p.m. While he was standing on the front porch of the house, he saw Jones's car turn off Edward Street onto Center Street. Bond testified he saw the front passenger window of the car begin rolling down. He ran into the house and heard gunshots. He later left the house and went to a barber shop before coming back to the same area later that day. Bond testified he witnessed another shooting while he was at the corner of College and Center Streets. This time Jones's car drove slowly down Edward Street and did not turn onto Center Street. Bond stated he heard approximately three gun shots and saw Read fall. Bond ran to Read and helped carry him into Stashawn Wheeler's house.

¶ 10 DeAndri Burton testified he was with Read outside of Stashawn Wheeler's house when Read was shot. After he heard the shots, he turned and saw Thesis Jones's car speed away from the scene. He saw defendant driving the vehicle.

¶ 11 Burton testified Stashawn Wheeler was a member of the "Mob Squad" and defendant, Jones, and Graves were members of the "Goon Squad." He testified members of the "Mob Squad" and the "Goon Squad" were arguing with each other one week before Read was shot.

¶ 12 While working off-duty as security for the Decatur Housing Authority, Decatur police Detective David Pruitt testified he heard a report from dispatch concerning an individual being shot at 432 West Center Street. Later Detective Pruitt received a description of a suspect vehicle, a purple Dodge Stratus, in the 700 block of East Main. Detective Pruitt testified East Main does not have a 700 block. However, he went to the 800 block of East Main and started driving east. He located a vehicle matching the suspect vehicle description in the 1000 block of East Main. He identified what appeared to be bullet holes on the passenger side of the car. Bobby Jones and Latrice Jones approached Detective Pruitt. Bobby Jones was told the vehicle was possibly involved in a shooting incident. He then advised the officers present his son had been shot at on Edward Street.

¶ 13 Bobby Jones left and came back with his son, Thesis Jones. Detective Pruitt testified he also spoke to defendant and Graves. Defendant told Detective Pruitt he, Jones, and Graves had been shot at on Edward Street. Detective Pruitt testified he later searched Jones's home for a gun but did not find one.

¶ 14 Detective Scott Cline of the Decatur police department testified he located a black

nylon bag containing a .22 caliber Savage handgun on the back porch area of the residence of Dora Halliburton and Latrice Jones at 1036 East Main Street the day after the shooting. The handgun looked like a revolver but the cylinder did not rotate. It was actually a single shot weapon according to Detective Cline. The pistol contained a spent .22 caliber cartridge in the chamber. Toni Mabon, who was living with Jones and pregnant with his child at the time of Read's death, testified she had seen Jones, Graves, and defendant all with the black bag in which the pistol was found.

¶ 15 Ashley Wheeler testified she was walking with 15 to 20 of her friends on the night Read was shot. When they walked by the Campbell house, Jones, Graves, and defendant were parked in front of the house. Her friend Joy and Jones started arguing. Graves was playing with a gun. According to Ashley, Graves told her and her friends if they did not get off the block he was going to shoot them. Ashley and her friends ran to the corner of Church and Center Street and then the corner of Edward and Center Streets. While at that intersection, she saw Jones's car driving south on Edward Street. It slowed down as it approached the intersection with Center Street. She heard gunshots come from Jones's car. She looked over at the car and saw Jones, Graves, and defendant inside. Defendant was driving. Wheeler testified she heard more than two gunshots. The only shots she heard came from Jones's car. Graves was the only person she saw shooting from the car. After the shots were fired, Jones's car increased its speed and proceeded south on Edward Street. She testified she ran when the shots were fired but came back and saw Read had been shot.

¶ 16 The State also introduced a videotape of defendant's interrogation by the police. At the start of the interrogation, defendant claimed no one fired any shots from the vehicle while

he was driving. However, he said Stashawn Wheeler and others shot at him, Jones, and Graves. Defendant also initially denied being in the area where Read was shot when the shooting occurred. However, he eventually admitted Jones and Graves had guns and fired them down Center Street when Read was shot.

¶ 17 The State also introduced a video from a cell phone in which defendant, Graves, and Jones appeared. In the video, the "Goon Squad" was rapping about the "Mob Squad." The video included threats directed at the "Mob Squad."

¶ 18 Defendant testified he did not see any guns while he was in the car with Jones and Graves. He testified not everything he told the police during his interrogation was true because he was scared. Defendant stated he did not know what was going to happen when he drove down Edward Street. He also testified he did not know the purple Dodge Stratus had been shot until the officers apprehended him after Read was killed. According to his testimony, he only drove by the intersection of Edward and Center Streets one time on the day Read was shot. However, he admitted being in control of the purple Dodge Stratus from 3 or 4 p.m. to 8:15 p.m. on the day Read was killed.

¶ 19 Defendant testified the video in which he, Graves, and Jones appeared was just an example of free-style rap, meaning they did not have anything written down. He acknowledged saying "fuck Mob Squad" and "they can suck my dick" on the video.

¶ 20 The jury found defendant guilty of first degree murder. The jury also found either defendant or someone for whose conduct he was legally responsible was armed with a firearm when the incident occurred.

¶ 21 In February 2010, the trial court sentenced defendant to 40 years in prison.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Sufficiency of the Evidence

¶ 25 When reviewing a challenge to the sufficiency of the evidence supporting a criminal conviction, we view the evidence presented in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt based on that evidence. *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985).

¶ 26 The jury convicted defendant of first degree murder based on an accountability theory. The State presented no evidence defendant personally possessed or fired a weapon. Section 5-2(c) of the Criminal Code of 1961 (Criminal Code) states an individual is legally accountable for the conduct of another when:

"(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2006).

This court has stated:

"In order to establish guilt based upon a theory of legal accountability, the State must prove beyond a reasonable doubt: (1) the defendant solicited, aided, abetted, agreed, or attempted to aid another person in the commission of an offense; (2) such

participation must have taken place either before or during the commission of the offense; and (3) such participation was with the concurrent, specific intent to promote or facilitate the commission of the offense. *** Although mere presence at the scene of an offense or mere acquiescence in another's actions is ordinarily insufficient to establish accountability, one may be held to aid and abet without physically participating in the overt act. [Citation.]

Contrary to the defendant's assertions, it need not be shown that the defendant had a specific intent to kill or participated in a preconceived plan to commit murder. Under the well-established 'common design rule,' if several individuals conspire to commit an unlawful act and a death occurs during the prosecution of the common objective, all participants are guilty of murder. [Citations.] Express words of agreement are not essential to establish such a common purpose. A common design can be inferred from the circumstances surrounding the perpetration of the unlawful conduct. [Citation.]" *People v. Watts*, 170 Ill. App. 3d 815, 824-25, 525 N.E.2d 233, 240 (1988).

Factors pertinent to establishing a common design include the following: (1) presence at the crime scene without disapproving or opposing the criminal action; (2) associating with the perpetrators after the criminal act; (3) failing to report the incident to the authorities; and (4) concealing or destroying evidence of the crime. *Watts*, 170 Ill. App. 3d at 825, 525 N.E.2d at

240.

¶ 27 According to defendant, while the evidence showed he was driving the car from which Graves and possibly Jones fired weapons, the evidence did not establish beyond a reasonable doubt "defendant solicited, aided, abetted, agreed, or attempted to aid [Graves] and [Jones] in the shooting, or that he intended to aid the commission of any offense." We disagree. Based on the evidence in this case, we find a rational trier of fact could have found defendant guilty of first degree murder based on accountability.

¶ 28 Defendant's argument is based on his testimony regarding the events of the afternoon and evening of March 29, 2007. According to defendant, the evidence does not show this was anything other than a spontaneous shooting or that he knew either Jones or Graves had guns before Read was shot and killed.

¶ 29 However, defendant's version of events, as evidenced by his testimony and the arguments in his brief, is contradicted by the testimony of numerous witnesses, as well as his own statements to police the night of the shooting. Numerous witnesses testified defendant, Jones, and Graves were together in the hours preceding Read's death and when Read was shot. Further, numerous witnesses testified they saw shots being fired from Jones's vehicle while defendant was driving prior to Read being shot.

¶ 30 For example, Kevun Campbell testified he saw Jones firing shots from his vehicle while defendant was driving. This was in the same area where Read was shot later that same day. Earl Campbell also testified he saw Jones shooting from the vehicle driven by defendant prior to Read being shot. Keirsean Bond testified shots were fired from Jones's vehicle while defendant was driving sometime after 3 p.m. in the same area where Read was shot later that

day. A rational trier of fact could have reasonably found, based on this evidence, defendant knew the other people in his vehicle had at least one gun and were shooting in a wilful manner in the area of Stashawn Wheeler's home.

¶ 31 In addition, the State presented testimony defendant slowed the car before the shot that killed Read was fired. Ashley Wheeler testified she saw defendant slow down prior to Read being shot. DeAndri Burton also testified he heard two shots come from defendant's vehicle and then saw defendant's vehicle speed up and drive away. Based on this testimony, a rational trier of fact could have found defendant aided Jones and Graves by slowing down the vehicle as it proceeded past the intersection.

¶ 32 The jury in this case also had other evidence to consider, which included the following: (1) the heated rivalry between the "Goon Squad" (of which defendant, Jones, and Graves were members) and the "Mob Squad" (of which Stashawn Wheeler was a member); (2) evidence defendant, Jones, and Graves had been shot at earlier that day; (3) a video of the "Goon Squad", including defendant, rapping about committing violent acts on the "Mob Squad"; (4) defendant's videotaped statement which showed him constantly changing his story, exhibiting a consciousness of guilt (see *People v. Milka*, 211 Ill. 2d 150, 181, 810 N.E.2d 33, 51 (2004)); and (5) defendant's testimony, which was thoroughly discredited by the State's use of his videotaped statement to police.

¶ 33 Defendant's reliance on *People v. Estrada*, 243 Ill. App. 3d 177, 611 N.E.2d 1063 (1993), is not persuasive. Without commenting on the First District's reasoning in that case, we find the fact situation in this case distinguishable. The situation in *Estrada* did not involve a drive-by shooting. Instead, in *Estrada*, the vehicle stopped, the defendant exited the vehicle with

a tire iron, and then the individuals still in the vehicle fired shots from the vehicle. *Estrada*, 243 Ill. App. 3d at 185, 611 N.E.2d at 1068. The First District stated: "Although [the defendant's] acts indicate that he intended to intimidate Sanchez, there is no evidence that he was aware that Portillo intended to shoot at Sanchez. In fact, it is less likely that [the defendant] would leave the car to pursue Sanchez if he knew that Portillo intended to fire at Sanchez." *Estrada*, 243 Ill. App. 3d at 185, 611 N.E.2d at 1068-69.

¶ 34 The evidence in this case is different. As stated previously, the evidence here indicates this was a drive-by shooting. Defendant slowed the vehicle down when he approached the intersection of Edward and Center Streets. Further, shots had been fired from and at the same vehicle earlier that day in the same area where Read was killed. The State presented sufficient evidence from which a rational trier of fact could find defendant guilty of first degree murder based on his accountability for the actions of his passengers.

¶ 35 B. Hearsay Statement

¶ 36 Defendant next argues the trial court abused its discretion in allowing Earl Campbell to testify Jones told him, "On the G, I'm going to get that nigger." Earl testified this statement was made prior to Read being shot. At trial, defendant objected to this testimony. The State argued this hearsay statement was admissible under the exception for statements of a co-conspirator. The court agreed and overruled defendant's objection.

¶ 37 Defendant argues the trial court erred in admitting this evidence under the co-conspirator exception to the hearsay rule because the evidence presented by the State during the trial was insufficient to establish a conspiracy or that the statement was made in furtherance of that conspiracy. According to our supreme court, the declarations of co-conspirators exception

to the hearsay rule provides such "declarations are admissible against all conspirators upon an independent, *prima facie* evidentiary showing of a conspiracy or joint venture between the declarant and one of the other defendants, insofar as such declarations are made in furtherance of and during the pendency of the conspiracy, even in the absence of a conspiracy indictment." *People v. Goodman*, 81 Ill. 2d 278, 283, 408 N.E.2d 215, 216 (1980). "Statements made in furtherance of a conspiracy include those that have the effect of advising, encouraging, aiding or abetting its perpetration." *People v. Kliner*, 185 Ill. 2d 81, 141, 705 N.E.2d 850, 881 (1998).

¶ 38 Defendant concedes he forfeited this argument by failing to raise the issue in his post-trial motion. See *People v. McLaurin*, 235 Ill. 2d 478, 485, 922 N.E.2d 344, 349 (2009). However, defendant argues we should review this issue as a matter of plain error.

"The plain-error doctrine allows a reviewing court to remedy a 'clear or obvious error' in two circumstances, regardless of the defendant's forfeiture: (1) where the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. [Citations.] *** Before addressing either of these prongs of the plain-error doctrine, however, we must determine whether a 'clear or obvious' error occurred at all." *McLaurin*, 235 Ill. 2d at 489, 922 N.E.2d at 352-53.

Defendant has the burden of establishing whether the underlying forfeiture should be excused. *People v. Johnson*, 238 Ill. 2d 478, 485, 939 N.E.2d 475, 480 (2010). In this case, the trial

court's decision to allow Earl Campbell to testify to Jones's statement was not a clear or obvious error.

¶ 39 Section 8-2 of the Criminal Code (720 ILCS 5/8-2 (West 2006)) states "[a] person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense." Based on the evidence in this case, the State made a *prima facie* evidentiary showing that defendant, Jones, and Graves agreed to engage in drive-by shootings in the neighborhood where Read was killed on March 29, 2007. Multiple witnesses testified defendant, Jones, and Graves were driving around in the neighborhood where Read was killed, shooting from the vehicle during the afternoon and early evening hours of March 29, 2007. The State also introduced a rap video in which defendant, Graves, and Jones appeared. The content of this video displayed the animosity between the "Goon Squad" and the "Mob Squad" and included threats to the "Mob Squad." This video showed defendant, Jones, and Graves had at least thought about harming members of the "Mob Squad." The State also introduced evidence defendant slowed down as they approached the intersection of Edward and Center Streets when the shot was fired that killed Read. Read was shot while near the home of a member of the "Mob Squad."

¶ 40 Defendant also argues the trial court should not have allowed the hearsay statement because the State did not establish the statement was made in furtherance of the conspiracy. According to defendant's brief:

“When Thesis said, 'On the G. I'm going to get that nigger,' that statement did not advance or promote any alleged conspiracy.

Thesis did not say whom he was 'going to get.' Thesis did not

elaborate on how he was 'going to get' someone. Earl Campbell, who testified that he heard Thesis make that statement, did not indicate that Thesis was referring to anyone specific.

Because [Jones's] statement that he was going to get someone did not advise, encourage, aid, or abet the alleged conspiracy to commit a shooting here, the trial judge abused her discretion in admitting it under the co-conspirator exception to the hearsay rule.”

We disagree. Based on the evidence in this case, a reasonable inference can be made Jones was talking about Stashawn Wheeler or another member of the "Mob Squad" who was at Wheeler's home. Witnesses testified multiple shots were fired either at or in the area of Stashawn Wheeler's home prior to Jones making this statement. In addition, according to defendant's statement to police, Stashawn Wheeler shot at them earlier in the day.

¶ 41 Defendant states in his brief Earl's testimony did not indicate defendant heard Jones's statement or was even within earshot when the statement was made. However, Earl's testimony did not indicate defendant failed to hear Jones's statement or that he was not present when the statement was made. In essence, defendant is now arguing the State failed to lay a proper foundation for the statement because Earl did not specifically testify defendant heard or was within earshot of Jones when the statement was made. However, defendant did not make this argument at trial.

¶ 42 The trial court initially heard arguments on defendant's hearsay objection at a side-bar conference which was not transcribed by the court reporter. However, the court later

allowed defense counsel to preserve his arguments on the record outside the presence of the jury.

Defense counsel stated the following for the record:

"Your Honor, my objection was, I think it would have called for a hearsay answer, that the statement made makes no reference to any conspiracy or any type of group action that Mr. Lewis was supposedly involved in with Mr. Jones."

We note defense counsel did not express any concern defendant was not present for this statement or did not hear this statement. Had defendant raised this concern in his objection, the State could have addressed this concern in its direct examination of Earl. Regardless, based on Earl's testimony, a reasonable inference can be made defendant was present and did hear Jones's comment. Reasonable inferences can also be made this statement was made both to advise Graves and defendant he intended to shoot at Stashawn Wheeler again and to encourage his co-conspirators to do one more drive-by.

¶ 43 Because the trial court did not make a clear or obvious error in allowing the introduction of this hearsay statement, the plain error rule does not apply.

¶ 44 Defendant also argues this court should find his trial counsel was ineffective for failing to argue in his posttrial motion the trial court erred in allowing the State to introduce Jones's hearsay statement. A defendant alleging ineffective assistance of counsel must establish both his counsel's performance was objectively unreasonable and defendant was prejudiced by the unreasonable performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Based on the evidence in this case, defendant cannot establish he was prejudiced or that counsel's performance was objectively unreasonable. We have found the trial court did not err in allowing

the statement into evidence and counsel is under no obligation to preserve issues for review where no error occurred.

¶ 45 We note our supreme court has stated the following: "[O]n a claim of ineffective assistance of counsel for failing to properly preserve issues for review, defendant's rights are protected by Supreme Court Rule 615(a), which allows a court to review unpreserved claims of plain error that could reasonably have affected the verdict." *People v. Coleman*, 158 Ill. 2d 319, 349-50, 633 N.E.2d 654, 670 (1994). We have already stated the plain error rule does not apply here because no error occurred. In addition, regardless of the hearsay statement, the evidence in this case was not close. Multiple witnesses saw defendant, Jones, and Graves driving together around the neighborhood prior to the shooting of Read. A gun was fired from the vehicle. In addition, the State presented witnesses who saw defendant slow down as he was passing the intersection of Edward and Center Streets when shots were fired from the vehicle, one of which hit and killed Read. This single isolated statement did not affect the outcome of the case.

¶ 46 C. Judgment Order

¶ 47 Finally, defendant argues an amended judgment order should be issued to accurately reflect the sentence imposed by the trial court. The court sentenced defendant to 40 years' imprisonment (25 years plus a 15-year statutory add-on pursuant to section 5-8-1(a)(1)(d)(i) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2006)). However, DOC records show defendant is serving a 55-year sentence. The State concedes the judgment order should be clarified to reflect an aggregate total of 40 years in prison, which includes the mandatory 15-year firearm enhancement.

¶ 48

III. CONCLUSION

¶ 49 For the reasons stated, we affirm defendant's conviction but remand for the trial court to issue an amended judgment order reflecting an aggregate total of 40 years in prison, inclusive of the mandatory 15-year firearm enhancement. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 50 Affirmed and remanded with directions.