

No. 1-13-2672

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 14748
	)	
ABDULLAH BURNETT,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

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

**O R D E R**

¶ 1 *Held:* Court did not err in instructing the jury in response to its note; the instruction did not misstate the law or create a serious risk of erroneous conviction. State did not make unduly prejudicial or factually-unsupported closing argument. Erroneously-assessed fee is vacated.

¶ 2 Following a jury trial, defendant Abdullah Burnett was convicted of aggravated battery with a firearm and sentenced to eight years' imprisonment with fines and fees. On appeal,

defendant contends that the court instructed the jury erroneously in response to its note, and in particular erroneously defined a term and thus allowed the jury to convict him on insufficient evidence of accountability. Defendant also contends that the State made unduly prejudicial closing arguments that misstated the facts. Lastly, he contends that one of his fees was erroneously assessed, and the State agrees. For the reasons stated below, we vacate the erroneous fee and otherwise affirm.

¶ 3 Defendant and codefendant Malik Burnett were charged with the attempted first degree murder of Larry Gates (Larry), Anthony Gates (Anthony), Paulina Gates, Danyel Anderson, and Lonnie Jones (collectively, the victims) for shooting Larry and shooting at the other victims on or about August 2, 2010. On the same allegations, defendant and codefendant were also charged with aggravated battery with a firearm of Larry and aggravated discharge of a firearm regarding all victims. The attempted murder charges alleged that both defendants were personally armed with and discharged a firearm regarding each victim.

¶ 4 The case went to trial on charges of the attempted murder of Larry and Anthony and the aggravated battery with a firearm of Larry, with the allegation that each defendant personally discharged a firearm. Defendants were tried simultaneously by two juries in April 2013. The court admonished the juries at the commencement of trial that, in relevant part, "statements and remarks by the attorneys ordinarily are not evidence and should not be considered by you as evidence. If there are exceptions to that I will let you know."

¶ 5 Anthony Gates testified that, at about 2 a.m. on August 2, 2010, he was at a family gathering at the home of Darlesha Doyle when he argued and then fought with Yusef Jenkins. Specifically, Jenkins received a phone call from Anthony's "baby mama," prompting Anthony to accuse Jenkins of "messing with" her, and then Jenkins and Anthony argued. Jenkins pushed

Anthony, who pushed back, and they fought until Jenkins and Anthony fell to the floor. Anthony then called his mother, Pauline Gates (Pauline), to pick him up and told Jenkins "Forget it, I don't even want to fight you. It's over." However, when Jenkins was helped to his feet, he tried to strike Anthony with a glass liquor bottle and Anthony fled outside. Jenkins dropped the bottle as he brandished it, and Anthony kicked it away. Anthony again told Jenkins that he did not want to fight, but Jenkins ran back into Doyle's home and came out holding a kitchen knife, stating that he was "fittin' to kill" Anthony. As Jenkins pursued Anthony while brandishing the knife, Pauline and Lonnie Jones (Anthony's stepfather) arrived at Doyle's home. Jenkins and Anthony struggled, and Anthony knocked the knife from his hand. They argued and then fought again with Anthony now pursuing Jenkins, who threw bricks and bottles as he fled into an alley and left the scene.

¶ 6 Anthony returned to Doyle's home, where he saw Pauline, Jones, Larry (Anthony's brother) and Danyell Anderson (Larry's girlfriend). As Anthony was inside, Larry came in and reported that Jenkins was approaching by the alley with two other men. Larry went out to the alley first and Anthony followed. Larry asked Jenkins and his companions – one of whom was codefendant – what had happened, and Anderson asked if they were "tryin' to jump on" Anthony, but Jenkins was "just lookin'." Codefendant then produced a black .380 automatic pistol and thrust it into his front waistband. Anderson and codefendant argued, she put up her fists, he struck her, and she fell to the ground. When Larry helped her up, codefendant drew his gun and shot Larry in the arm. When Larry tried to run indoors, defendant appeared from the side of the building and shot Larry in the back. (On cross-examination, Anthony clarified that he saw defendant fire in Larry's direction followed by Larry exclaiming that he had been shot again.) Codefendant shot at Anthony, then Jenkins took codefendant's gun and also shot at Anthony.

After Anthony ran indoors, he looked outside. Anderson was hovering over Larry on the ground when Jenkins and codefendant approached them and tried to shoot them; Anthony heard clicking but their guns did not fire. Codefendant and Jenkins fled, but Anthony did not pursue them for fear of an ambush. The police and an ambulance arrived as he returned to Doyle's home.

¶ 7 Anthony did not speak with the police just after the shooting because he was angry and upset. He denied discussing the shooting with his family when they were at the hospital with Larry, and he denied being present when Larry spoke with the police at the hospital. He went to the police station on the night of August 2 and viewed photographic arrays from which he identified Jenkins and defendants. On August 4, he viewed a lineup from which he identified defendants. Anthony denied telling the police during an August 2 interview that defendant shot at him (Anthony) or that he never saw codefendant holding a gun. However, Anthony admitted to testifying at the preliminary hearing that defendant shot at him (Anthony) before shooting Larry and that defendant was the one who tried to shoot Larry and Anderson with an empty gun. Anthony did not recall telling Detective Thomas Benoit in an interview that the gathering that night was a party of about 30 people. There was alcohol at the gathering and Anthony testified at trial to drinking less than a cupful of brandy, though he testified at the preliminary hearing that he did not and does not drink alcohol. Anthony admitted to a 2009 misdemeanor conviction for retail theft.

¶ 8 Pauline Gates testified that, when Anthony called her at about 1:30 a.m. on the day in question to pick him up, she and Jones went to Doyle's home to do so. On arriving, Pauline saw Anthony and Jenkins fighting with bottles, which ended when Anthony pursued Jenkins into the alley. Pauline did not phone the police during or after the fight. There was a handful of people outside the Doyle home, not 30 people. About 15 minutes later, Jenkins returned with

defendants. Codefendant had a gun and fired several shots, while neither Jenkins nor defendant had a gun visible as defendant stood next to codefendant. Pauline fainted upon hearing shots and Larry exclaiming that he had been shot. When she awoke, the ambulance took Larry to the hospital and she went there as well. She did not speak with the police that night nor discuss the shooting with her family before going later that day to the police station, where she viewed two photographic arrays from which she could not identify anyone. She returned to the police station on August 4 and viewed a lineup from which she identified codefendant. Pauline denied drinking alcohol on the day in question. Pauline had known Jenkins only for a month or two, and she denied telling the police that she knew him for years.

¶ 9 Lonnie Jones testified that, when he arrived with Pauline at Doyle's home following Anthony's call between 1 and 2 a.m., Anthony and Jenkins were fighting, throwing bottles and other objects at each other as Anthony pursued Jenkins out of Jones's view. As Anthony returned, Larry and Anderson arrived. Jenkins then returned with defendants. Anderson confronted Jenkins and defendants, telling them to leave Anthony and Larry alone, then putting up her fists. Codefendant drew and fired a gun "around," while defendant was "just standing by him" and did not have a visible gun. As Pauline fainted and Jones pulled her indoors, he saw Larry being shot. Jones phoned 911 to report the shooting and then went back outside, where Larry was on the ground and said that he had been shot; Jenkins and defendants were no longer at the scene. Jones went to the hospital after Larry was taken there, and Jones did not discuss the shooting that night with the police or his family. Jones went to the police station on August 4 and viewed a lineup from which he identified defendants. Jones admitted to being a convicted felon.

¶ 10 Danyell Anderson, Larry's former girlfriend as of trial, testified that she and Larry went at about 1 to 2 a.m. on the day in question to Doyle's home in response to a phone call from

Pauline. When they arrived, Anthony was standing outside the home with Pauline and Jones; there were not many other people present. Jenkins and defendants then approached from the direction of the alley, with codefendant carrying a gun wrapped in a white shirt and the others not visibly carrying a gun. As defendants stood with Jenkins, Anderson asked Jenkins why he was trying to fight with Anthony, then put up her fists and challenged Jenkins to fight her.

Without Anderson addressing codefendant nor he saying anything to her, codefendant struck Anderson in the head with a gun and she fell to the ground. When Larry tried to pick up Anderson, codefendant told him that "this ain't no joke" and shot Larry in the arm. Codefendant then shot at Anthony and Larry as they fled; Larry was struck again and fell to the ground.

Codefendant then walked up to Anderson and tried to shoot her in the head but the gun clicked several times rather than firing. An ambulance came for Larry, and Anderson went to the hospital with him. Anderson did not speak with the police at the scene or at the hospital, but went to the police station on August 4 with Anthony, Pauline, and Jones. They had not discussed the shooting with each other before going there. They separately viewed a lineup, from which Anderson identified codefendant as the shooter. Anderson was also interviewed by the police, but she denied telling them that she saw the fight between Jenkins and Anthony.

¶ 11 Larry Gates testified that he and Anderson went to Doyle's home after Anderson received a phone call. There, Larry saw Anthony, Pauline, and Jones, and Anthony described his fight with Jenkins. Jenkins then returned to the Doyle home with defendants, and Larry told Anthony to let him speak to Jenkins. When Larry and Anderson approached Jenkins and asked him what had happened, neither Jenkins nor defendants said anything. Anderson challenged Jenkins to fight her rather than Anthony, but codefendant replied that he would fight, then produced a gun, wrapped it in his shirt, and shot Larry in the arm. Larry fled, hearing more gunshots and falling

wounded to the ground before he could reach the Doyle home. Larry saw Jones drag Pauline indoors, Anderson taking cover under a car, and codefendant pointing a gun at Anderson's head. Larry shouted "police," though there were no police present, in an effort to prevent codefendant from shooting Anderson; codefendant indeed fled. An ambulance took Larry to the hospital, where he remained for over a month; the bullet in his back was not removed and was still there as of trial. While in the hospital, Larry was shown a photographic array on which he marked defendant's photograph, but he could not recall identifying anyone due to his pain at the time. He also recalled being interviewed by a detective while in the hospital but did not recall saying that the man who Anthony fought with returned and shot Larry. Larry admitted to prior felony convictions in 2003 and 2007 for controlled-substance offenses. He also admitted on cross-examination that he and Anderson had been sharing a bottle of beer when she received the phone call that brought them to Doyle's home. Before he was shot, Larry did not see codefendant strike Anderson, nor did he see defendant or Jenkins holding a gun.

¶ 12 Paramedic Ricardo Montiel testified that he responded to the scene at about 2 a.m. on the day in question and found Larry on the ground. Larry was nervous and agitated, and he told Montiel that he had been shot. Montiel examined Larry and found him to be in critical condition from gunshot wounds to his right arm and lower back. Montiel took Larry to a hospital in an ambulance.

¶ 13 The parties stipulated that a police evidence technician would testify to photographing the scene, recovering four shell casings on the ground there, and inventorying the shell casings. Forensic scientist Fred Tomasek testified that he examined the four .40 caliber shell casings and found them to have all been fired from the same gun. He could not determine if a revolver had

been fired at the scene, as a revolver does not automatically eject shell casings when fired, nor was he provided a gun to test against the shell casings.

¶ 14 Detective Ernest Turner testified that he and Detective Thomas Benoit interviewed Anthony and Pauline on the night of August 2-3 and separately showed them a photographic array including defendant's photograph and another array including codefendant. From the arrays, Pauline made no identification while Anthony identified defendant and codefendant as the men who shot Larry. However, the police report of Anthony's interview did not reflect that he described defendant as shooting at himself (Anthony) nor described codefendant as holding or firing a gun, but instead that Jenkins and defendant shot Larry.

¶ 15 Officer Leonidas Ferreras testified that he and another officer arrested defendants in the midday of August 4 at a home and that no weapons were recovered from either defendant. While Officer Ferreras testified that defendant fled back inside the home after opening the door for the police and responding to his name, the arrest report did not so reflect. The report also stated that defendant did not resist arrest, but Officer Ferreras explained that he does not consider flight alone to be resisting arrest.

¶ 16 Detective Roger Murphy testified to meeting with Larry at the hospital on August 4 and showing him a photographic array from which he identified defendant as "one of the boys who shot me" and stated that the photograph of codefendant resembled the other shooter. Detective Murphy conducted a lineup later that day containing both defendants, which Anthony, Pauline, Anderson, and Jones viewed separately. Anthony identified both defendants as the shooters. Jones identified both defendants, with codefendant as the shooter and defendant also present. Anderson and Pauline both identified codefendant as the shooter. Detective Murphy interviewed

Anderson but did not recall her stating that codefendant approached her holding a gun wrapped in a white shirt nor that he struck her in the face with a gun, but only that he punched her.

¶ 17 The parties stipulated that Anthony testified during a preliminary hearing that codefendant did nothing after defendant shot Larry in the back.

¶ 18 Defendants moved for directed verdicts, which the court denied after brief arguments. The court noted that any discrepancy between Anthony's testimony that defendant was a shooter "and the testimony of the other witnesses is one for the jury to determine the facts."

¶ 19 Before closing arguments, the jury was admonished in relevant part that "what the lawyers say during the arguments is not evidence and should not be considered by you as evidence. You have already heard all the evidence in this case. The arguments should be confined to the evidence and to reasonable inferences to be drawn from the evidence. And any argument made by an attorney that is not based on the evidence or a reasonable inference to be drawn from the evidence should be disregarded by you."

¶ 20 During closing arguments, the State argued that defendant was at the scene because Jenkins brought him there following the fight with Anthony with the intent "to finish this fight." Anthony had the best vantage point and his account identified both defendants and Jenkins as shooters, while the forensic evidence did not exclude another gun having been fired if it was a revolver. The testimony of Pauline and Jones corroborated Anthony insofar as they identified codefendant as a shooter, and defendant was accountable for the actions of Jenkins and codefendant, with their common intent demonstrated by arriving together armed. Larry went to speak to Jenkins and defendants without even knowing if defendants had been there earlier but shooting broke out as soon as Anderson put up her fists. The State described the elements of attempted first degree murder and argued that the requisite act was shown by codefendant firing

a gun and hitting Larry with the requisite intent shown by firing though "there were no words exchanged" and "there wasn't even a conversation." Defendant objected that this was a misstatement of evidence, and the court admonished the jury that it heard the evidence and any argument not supported by the evidence should be disregarded. The State continued that "some of the witnesses \*\*\* didn't have a conversation with [defendants] so that means when those defendants got there, that was the intent." The State argued that defendant's personal discharge of a firearm was proven by Anthony's testimony.

¶ 21 Defendant argued that four of the five eyewitnesses identified codefendant as the single shooter and thus the State was trying to hold defendant responsible for his brother's actions. Presence at the scene, even with knowledge that the crime is going to happen, is insufficient basis for accountability. Moreover, there was no evidence that defendant knew what Jenkins and codefendant planned to do. Also, the State's argument that there was no conversation before the shooting, that Jenkins and defendants arrived with the intention to shoot, was contradicted by Anderson's testimony that she confronted Jenkins and challenged him to fight. When codefendant then began shooting, defendant was merely standing there according to four of the five eyewitnesses. These witnesses were not affiliated with defendant but with Anthony, and nonetheless they did not corroborate Anthony's account that defendant was a shooter. Defendant described in detail various contradictions in Anthony's accounts and noted that he is a convicted thief. As to the State's argument that a revolver would leave no shell casings so there could be more than one gun, defendant noted that no witness described a revolver at the scene. As to Larry's photo-array identification of defendant as a shooter, he was in the hospital and was in pain at the time. When the police came to arrest defendants, defendant answered the door and

responded to his name rather than hiding, and the arresting officer's report did not support his testimony that defendant briefly fled.

¶ 22 In rebuttal, the State argued that it was not in dispute that defendant was at the scene that night – all the eyewitnesses agreed he was there – so the issue was his responsibility. The State argued that Anthony's account was not contradicted by the other eyewitnesses. Pauline fainted after the first shot, and Jones was dragging her to safety indoors and thus his focus was on her rather than the shooting. Anderson's testimony supported that there was not a conversation before the shooting: she and her family were talking to Jenkins, but neither Jenkins nor defendants responded because they came to the scene with their intent already formed. Once codefendant struck Anderson and she fell to the ground, followed quickly by codefendant shooting her boyfriend Larry, her focus was elsewhere so that she did not see defendant shooting. Lastly, Larry was shot in the back as he fled from the first gunshot to his arm so he would not have seen who fired the second shot. The State argued that there was circumstantial evidence of a plan or intent: Jenkins' return to the scene of the fight with Anthony after the fight was over showed that he was seeking revenge, and common sense indicates that Jenkins had to have some kind of conversation with defendants to induce them to accompany him to the scene. Defendant's silence when met by Larry shows that Jenkins and defendants had already formed a plan, that did not entail talking, before arriving. It is reasonable to infer that there was a revolver used in the crime when witnesses described multiple gunshots but only four shell casings were found. As to defendant's argument that the jury should disregard the arresting officer's testimony of his flight, defendant "probably thought that the code of the street was going to be in control this time." Defendant objected, and the court overruled. The State continued: defendant believed that the police were not there to arrest him for this offense "because whatever happened between

him and the Gates[es] probably would be settled out on the streets some other way," and then ran when he realized that they were there regarding this case. The State argued that it proved aggravated battery with a firearm even if it did not prove that defendant intended to kill someone because it is sufficient that he or someone for whom he is responsible injured another by firing a gun. In conclusion, the State argued that Larry "came to be a peace-maker that night" while defendant "came to be a back-up, a heavy."

¶ 23 The jury instructions included 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." IPI Criminal No. 1.03. The jury was also instructed on accountability:

"A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of the offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of the offense. The word conduct includes any criminal act done in furtherance of the planned and intended act." IPI Criminal No. 5.03.

¶ 24 During deliberations, the jury sent the court a note: "Is there a legal definition for 'aiding in the planning'?" The State suggested instructing the jury that it had the law and should continue deliberating. The court noted that Black's Law Dictionary defines aid as "to support, help, assist, or strengthen, act in cooperation with, supplement the efforts of others." The State had no objection to this definition, and defendant initially had no objection ("That's fine") but suggested that the court also define planning. The court noted that a plan is defined as:

"a delineation, a design, a draft form or representation. A representation of anything drawn on a plan, as a map or a chart, a scheme, a sketch. Also a method of design or action, procedure or arrangement for accomplishment of a particular act or object. For example, organization plan in bankruptcy proceeding, method of putting into effect an intention or proposal."

The State argued that this definition is "a bit wordy and confusing." Defendant objected to giving an instruction that did not define planning, but the court found the definition of plan to be "more confusing than helpful" and sent the jury a note with the aforesaid definition of aid alone.

Following further deliberations of less than a half-hour,<sup>1</sup> the jury found defendant not guilty of the attempted murder of Larry or Anthony and guilty of aggravated battery with a firearm.

¶ 25 Codefendant's jury, having received its own closing arguments and instructions, found codefendant not guilty of all charges.

¶ 26 Defendant's timely post-trial motion, as supplemented, challenged the sufficiency of the evidence, the jury instructions on accountability, and the overruling of defense objections during closing arguments, but not the court's response to the jury note. At the motion hearing, the parties' arguments focused on the insufficiency of the evidence and the accountability instructions. The court denied the post-trial motion, finding that it was undisputed that defendant was at the scene so the case concerned his participation in events, and that there was evidence to support both a jury instruction on accountability and a conclusion that defendant fired a gun. The court immediately held the sentencing hearing and, after hearing evidence and arguments in aggravation and mitigation, sentenced defendant to eight years' imprisonment with fines and

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<sup>1</sup> Discussion of the note began at 5:55 p.m. and the jury returned its verdict at 6:22 p.m.

fees. Defendant's timely motion to reconsider his sentence was denied, and this appeal timely followed.

¶ 27 On appeal, defendant first contends that the court instructed the jury erroneously in response to its note when it defined "aid" in a manner that allowed the jury to convict him on insufficient evidence of accountability, by not addressing intent in the response and by including the word "strengthen" that allowed the jury to convict defendant for strengthening codefendant's actions by his mere presence.

¶ 28 The State responds that defendant has forfeited this claim by not objecting to the court's use of the dictionary definition of "aid" including "strengthen," and by failing to raise the claim in his post-trial motion. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). While defendant objected that the note did not define "plan," he made no objection to using the "aid" definition with "strengthen" in it. An objection to an instruction must be sufficiently specific to make clear the nature of the objection. *People v. Daniel*, 2014 IL App (1st) 121171, ¶¶ 14, 60; *People v. Crite*, 261 Ill. App. 3d 1041, 1049 (1994). The trial court did not have an "opportunity to address defendant's essential claim" (*Daniel*, 2014 IL App (1st) 121171, ¶ 14) because he did not raise the instant claim in the trial court.

¶ 29 However, under Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013), a claim is not forfeited when a jury instruction suffers from a substantial defect or constitutes plain error; that is, when the instruction created a serious risk that the defendant was erroneously convicted because the jury did not understand the applicable law and either (1) the erroneous instruction was given in a case where the evidence was closely balanced, or (2) the flaw in the instruction is so serious that it denied the defendant a substantial right and undermined the integrity of the judicial process. *People v. Salazar*, 2014 IL App (2d) 130047, ¶ 61, citing *Herron*, 215 Ill. 2d at

178-79. Defendant contends that his claim constitutes plain error under both prongs, while the State argues that there is no clear or obvious error here. We note that the first step in plain-error analysis is determining whether an error occurred at all. *Herron*, 215 Ill. 2d at 184.

¶ 30 The function of a jury instruction is to convey to the jury the law as it applies to the trial evidence, and instructions should not be misleading or confusing. *Herron*, 215 Ill. 2d at 187-88. The correctness of jury instructions is not a function of whether defense counsel can imagine a problematic meaning but whether ordinary persons serving as jurors would fail to properly understand them. *Id.* Although jury instructions are generally reviewed for an abuse of discretion, we review *de novo* the question of whether the applicable law was accurately explained to the jury. *Salazar*, 2014 IL App (2d) 130047, ¶ 61.

¶ 31 Section 5-2 of the Criminal Code provides that a person is criminally accountable for the conduct of another when:

"either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense.

When 2 or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the common design or agreement and all are equally responsible for the consequences of those further acts. Mere presence at the scene of a crime does not render a person accountable for an offense; a person's presence at the scene of a crime, however, may be considered with other circumstances by the trier of fact when determining accountability." 720 ILCS 5/5-2(c) (West 2012).

¶ 32 While presence at the scene of a crime does not by itself render a person accountable for the acts of a companion, it may be considered with other circumstances including maintaining a close affiliation with the companion after the crime is committed, flight from the scene, and the failure to report the crime. *People v. Batchelor*, 171 Ill. 2d 367, 375-76 (1996); *People v. Jaimes*, 2014 IL App (2d) 121368, ¶ 38. Active participation in an offense is not required for accountability. *Id.* A jury may infer a defendant's accountability from his approving presence at the scene of the crime and his conduct showing his design to aid in the crime. *Jaimes*, 2014 IL App (2d) 121368, ¶ 38, citing *People v. Tinoco*, 185 Ill. App. 3d 816, 823 (1989). Thus, a defendant was properly convicted on an accountability basis when the evidence showed that he was "mindful of what was going on before and during the time [the offense] was happening, and that he was there to help." *Batchelor*, 171 Ill. 2d at 377-78.

¶ 33 Here, defendant contends that the court's definition of "aid" for the jury, and particularly the reference to "strengthening," misstated the law and misled the jury. Defendant argues that the court's definition of "aid" did not address intent. However, the jury had already been instructed on intent in the general instructions and did not ask the court about intent or *mens rea* but about an aspect of *actus reus* – aiding – for accountability. The court answered the question about aid by giving a dictionary definition of aid and was not required to re-instruct the jury on intent when the jury expressed no confusion about intent. Defendant also argues that the word "strengthening" in the response allowed the jury to convict him on an accountability basis for mere presence. However, as noted above, this court has interpreted accountability to encompass an approving presence at the scene of a crime. The term "strengthening" reasonably encapsulates the difference between mere presence and an approving presence; that is, an approving presence strengthens an accomplice. Defendant was not merely present at the scene but came to the scene

with Jenkins and codefendant, as Jenkins was returning to the scene of his potentially deadly street fight with Anthony only minutes earlier. It is reasonable to infer from the trial evidence that Jenkins was there to confront Anthony and defendant "was there to help" (*Batchelor*, 171 Ill. 2d at 378) with at least his approving presence. We conclude that the court's instruction in the note at issue did not create a serious risk of an erroneous conviction and find neither error nor plain error therein.

¶ 34 Defendant also contends that the State made closing arguments that misstated the facts: that no words were exchanged before the shooting and that defendant believed he would be protected by a "code of the street."

¶ 35 In a criminal trial, the State has wide latitude in making its closing argument and may comment on the evidence and any fair, reasonable inferences it yields, though the State may not argue assumptions or facts not based on the evidence. *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 38, citing *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). In reviewing a challenge to remarks made in closing arguments, we view the remarks in context and consider the closing argument in its entirety. *Id.* A jury is presumed to follow the court's instructions. *Glasper*, 234 Ill. 2d at 201. Improper remarks in closing argument are substantial and warrant reversal if the improper remarks constituted a material factor in the defendant's conviction. *People v. Jones*, 2014 IL App (3d) 121016, ¶ 37, citing *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007).

¶ 36 Here, defendant argues that the State's reference in its closing arguments to defendant believing that he would be protected by "the code of the street" was unsupported by evidence and unduly prejudicial in that it implies he is a "hardened street criminal." However, there was undisputed evidence that Anthony and Jenkins fought in the street with potentially deadly objects including glass bottles and yet nobody who witnessed the fight, notably including Anthony's

mother Pauline and her boyfriend Jones, called 911. Such a call was not made until gunshots had been fired and two persons had fallen to the ground. It is reasonable to infer from the evidence that Anthony's family members were not unconcerned or indifferent to him or his fight, as they immediately came to the scene at his call, but until shots were fired considered it a matter to be dealt with (or already dealt with when Jenkins fled) without calling the police. Similarly, Jenkins' return to the scene of the fight with defendants demonstrates silently but powerfully a belief that neither Anthony nor anyone else at the Doyle home would have called the police to the scene. In sum, the evidence supports a reasonable inference that persons on both sides of the incident had been addressing the conflict not by resorting to formal legal methods but figuratively – and in this case literally – on the street. That inference may in turn be reasonably summarized as a "code of the street."

¶ 37 Defendant also argues that the evidence does not support the State's remarks that no words were exchanged before the shooting began. However, Anderson testified that she and Larry confronted Jenkins and defendants, who stood silent until she put up her fists and codefendant struck her. Larry testified that Jenkins and defendants said nothing until codefendant said that he would fight and then drew and fired his gun. While the other eyewitnesses did not completely agree with Anderson's account in every aspect, the gist of the accounts was that codefendant resorted to violence when little had been said between the parties and most if not all of that by Larry and Anderson. In short, there was an evidentiary basis for the State's argument that Jenkins and defendants had nothing to say before codefendant employed violence. Moreover, the court repeatedly admonished the jury that it would hear or had heard the evidence and should disregard arguments unsupported by evidence. Notably, one of those admonishments

followed the defense objection to this remark. We conclude that the State's remarks in question were not improper and did not constitute a material factor in defendant's conviction.

¶ 38 Lastly, defendant contends, and the State agrees, that his \$5 electronic citation fee was erroneously assessed. The fee applies in "any traffic, misdemeanor, municipal ordinance, or conservation case" and thus not to defendant's felony offense. 705 ILCS 105/27.3e (West 2012).

¶ 39 Accordingly, we vacate the \$5 electronic citation fee and, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), direct the clerk of the circuit court to correct the order assessing fines and fees to reflect that vacatur. The judgment of the circuit court is otherwise affirmed.

¶ 40 Affirmed in part, vacated in part, and order corrected.