2015 IL App (2d) 130337-U
No. 2-13-0337
Order filed August 25, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LAMONT A. COLE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 11-CF-1417 Honorable Ronald J. White, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly found defendant guilty of the offenses beyond a reasonable doubt and properly imposed consecutive sentences; there was no need for a *Krankel* inquiry; and one of defendant's murder convictions violated the one-act, one-crime rule. Therefore, we affirmed in part, vacated in part, and corrected the mittimus.

¶ 2 Following a bench trial, defendant, Lamont A. Cole, was convicted of two counts of first-degree murder, four counts of attempted first-degree murder, one count of aggravated discharge of a firearm, one count of unlawful possession of a weapon by a felon, and one count of mob action. The trial court sentenced defendant to two concurrent terms of 50 years' imprisonment

for the first-degree murder convictions, four consecutive terms of 25 years' imprisonment for the attempted first-degree murder convictions, one consecutive term of 15 years' imprisonment for the aggravated discharge of a firearm conviction, one concurrent term of 14 years' imprisonment for unlawful possession of a weapon by a felon conviction, and one concurrent term of 6 years' imprisonment for the mob action conviction.

¶ 3 In this direct appeal, defendant argues that there was insufficient evidence to prove him guilty of the offenses beyond a reasonable doubt; a remand is warranted for a *Krankel* hearing; the trial court improperly imposed consecutive sentences; and one of his murder convictions must be vacated under the one-act, one-crime rule. We determine that only defendant's last contention of error has merit. Accordingly, we affirm in part, vacate in part, and order the correction of the mittimus to reflect one murder conviction.

¶ 4 I. BACKGROUND

¶ 5 On June 22, 2011, the grand jury returned a bill of indictment alleging 23 counts against defendant and/or two other individuals, Clifford Horton and Antwan Maxey, whose trials were severed. We set forth only the counts directed at defendant: counts I through III alleged that defendant committed the offense of first-degree murder in that he shot and killed Charles Spivey; counts IV through VII alleged that defendant committed the offense of attempted first-degree of Brian Spivey, Nicholas Vyborny, Sandra Solache, and Demarcus Kyles; counts VIII through XI alleged that defendant committed the offense of aggravated battery with a firearm against those same four individuals; count XII alleged that defendant committed the offense of aggravated discharge of a firearm in the direction of an occupied white van; count XIV alleged that defendant committed the offense of unlawful possession of a firearm by a street gang member; count XIX alleged that defendant committed the offense of unlawful possession of a weapon by

a felon; and count XXIII alleged that defendant committed the offense of mob action. All of the charges stemmed from an altercation following a house party in Rockford.

¶ 6 A. Trial

¶ 7 The following evidence was adduced at defendant's bench trial, which commenced on January 24, 2012. On January 22, 2011, a party with approximately 40 to 50 people occurred at a house on Sherman Avenue in Rockford. An altercation between various individuals began in the basement of the house and then continued outside. People congregated outside the house and argued, and at least five different guns were fired. Police arrived around 2:30 a.m. to find a white van stuck in a snow bank. The driver of the van, Charles Spivey, had been shot and killed, and another person in the van, Brian Spivey, was wounded. Three other wounded individuals at the scene included Nicholas Vyborny, Sandra Solache, and Demarcus Kyles.

¶ 8 Charice Hart testified that she lived near the Sherman house and looked out her window on the night of the party. Charice saw a white van, and at least one person jumped out of it. There were a lot of people outside, and they were arguing. She saw a tall, stocky person remove his black jacket. Then, Charice heard 15 to 20 gunshots from more than one gun, and she saw an individual run down the street and shoot in the direction of the Sherman house. Then, that individual and others jumped into a two-door car and drove away. She could not identify anyone because she could not see their faces.

¶ 9 Nicholas Vyborny testified that when he and others were leaving the party, he was walking down the driveway when he heard approximately five gunshots. When Nicholas ran back to the house to take cover, a bullet hit him in the left thigh. He did not see who was shooting. At the hospital, a steel rod was put in his leg, and he continued to have trouble with his leg.

¶ 10 Davon Lewis, age 20, testified as follows. He had a prior felony robbery conviction. Davon went to the party with Donnie Purifoy and his cousin, Ericton Lewis. Davon's other cousins at the party included the now deceased Charles Spivey (Glenn) and Brian Spivey, Demarcus Lewis (Lewis), Demarcus Kyles, Charles Stallworth (Cortez), Lee Kyles, and Christopher Kyles.[1]

¶ 11 During the party, an argument broke out in the basement between Glenn and Ericton, and also between Donnie and his girlfriend Sandra. Ericton and Hashim Kamau intervened in the argument between Donnie and Sandra. In addition, Davon saw that someone named "Shawn G." had a Glock .380 gun. The owner of the house told everyone to leave, and they all went outside. Hashim then choked Donnie, who pulled out a chrome .22 pistol. Demarcus was able to calm Donnie down, however, and Donnie put the gun away.

¶ 12 Donnie and Davon then walked up to a maroon Pontiac car that was parked nearby the house. Clifford Horton (Flip) was driving, Antwan Maxey (Buck) was in the front passenger seat, and defendant, otherwise known as "Monty," was in the backseat. Davon identified defendant in court. Buck looked like he had a gun on his lap, either a .9-millimeter or .40-caliber gun, or a Taurus or a Glock gun. Buck asked Davon what was going on at the party, and Davon replied "a family problem." Buck then exited the car and walked into the crowd of people outside the house. Davon did not see where Buck put his gun.

¶ 13 Defendant exited the car shortly afterwards. When asked if defendant "had anything" when he got out of the car, Davon said, "No, I didn't see, but somebody said he did." Davon then said that it "looked like" defendant "could have a gun"; he could see "black and chrome,"

[1] We refer to all of the individuals by either their first names or their nicknames. If they have duplicative first names, we refer to them by their last names.

but he did not recall. When asked where the gun was, Davon said "Like – probably, umm, like his hand."[2] The next day, Davon testified that defendant had a Colt gun. Davon could not really see it; it was chrome or black, and it was in defendant's hand.

¶ 14 Davon further testified that Buck got into an argument with Demarcus, and Demarcus took off his shirt, indicating that he was ready to fight. Buck squatted, also ready to fight. Glenn, who did not have a gun, then approached and had a conversation with Buck. Next, a shot was fired from the driveway of the house, and everyone ran. Davon did not see who fired the shot. Buck ran away and fired his gun towards the house.

¶ 15 Davon testified that Glenn got into the white van with Brian, Lee, and Christopher. Glenn drove away, and Buck continued to shoot in the direction of the house and the van; Buck fired four or five shots. Davon testified that he did not know where defendant was at this time. Although Davon did not see any other shooters, he could hear other guns being fired. Donnie, however, never shot at anyone. Davon was afraid of getting shot and ran back to the car with Ericton.

¶ 16 A couple of days later, on January 24, 2011, Davon went to the police station on his own volition and gave a statement. The police showed Davon a lineup, in which he identified defendant, Buck, and Flip as being at the party. Davon was "a little" familiar with defendant before the party.

¶ 17 On cross-examination, Davon admitted drinking a ½ pint of vodka before the party and a pint while there; he was intoxicated. He also stated that he never saw defendant with a gun; he

[2] At this time, there was an altercation outside of the courtroom, and the court decided to resume Davon's testimony the next day. It was later learned that Demarcus, a witness, was arrested for disorderly conduct.

was told by someone else that defendant had a gun. After defendant exited the maroon car, Davon did not see him again. Davon saw only Buck fire a gun, and Flip drove away in the maroon car.

¶ 18 Regarding his January 24, 2011, statement to police, Davon admitted he did not voluntarily go to the police station; he went there because the police had surrounded his house. Davon admitted saying things to the police on January 24, 2011, that were not true; he was trying to protect his family. Davon admitted writing an affidavit on October 27, 2011, that was notarized. In his affidavit, he stated that he never saw Buck shoot a gun or even have a gun.

¶ 19 On redirect, Davon was asked if his affidavit was "complete garbage," and Davon replied "somewhat." Davon testified that about a year after the shooting, on January 11, 2012, he told police that he wrote the affidavit because he was scared for his safety and the safety of his family. His affidavit was not true; he saw Buck turn around and fire his gun multiple times as Buck ran away.

¶ 20 Davon admitted saying the following in his January 24, 2011, statement to police: when defendant exited the Pontiac, he was holding a black and chrome semi-automatic gun in his hand; Davon did not know who fired the first shot at the party; the next thing Davon knew, he saw Buck running toward him and shooting a gun back toward the people standing in the street; and once Buck made it to the south side of the street, he stood and began shooting some more. Davon also admitted that he testified before the grand jury testimony that defendant was holding a black and chrome semi-automatic gun.

¶ 21 Brian testified next as follows. He was at the party with his cousins: Glenn, Cortez, Christopher, and Hashim. They all drove together in a white van. There was a small argument between Donnie and Hashim in the basement, and Donnie showed his gun, a .22-caliber Ruger.

After seeing the gun, Brian wanted to leave the party; his friends did not have guns. Donnie "charged" Hashim as they left, and Hashim pushed Donnie. Donnie then cocked his gun, and Brian and the others decided to leave.

¶ 22 As they walked back to the white van, a car with Flip, Buck, and defendant pulled up, and the three exited the car. Brian thought the car was a blue Buick LeSabre, but he was not sure. Flip had a High Point gun; Buck had a .40-caliber gun, and defendant had a gun. Then, Buck and Glenn got into an argument, and Hashim drove up in the white van. At this point, Brian saw Demarcus run in front of the van with three people chasing him. Brian then saw Donnie point his gun straight up in the air and shoot it; that was when "a lot of guns" were fired. Brian ducked down to take cover but got shot in his right thigh. When he tried to stand, Brian fell down again and could not move his leg. Brian crawled to the passenger side of the van, and Hashim and Christopher helped him get inside. Glenn got back in the driver's seat and said that "these mother f**kers shot" him again, and he drove off. There was a lot of gunfire. The van veered to the right, and Brian saw that Glenn had been shot.

¶ 23 Paramedics arrived, and Brian went to the hospital where he remained for one week. During that time, Brian had surgery and a bullet was removed; his femur bone was shattered. In addition, Brian had two bullet grazes on his calves, and he had been shot in the buttocks, although his phone blocked that bullet. Brian testified that police came to the hospital and showed Brian a photo line-up in which he identified Buck as being at the party.

¶ 24 On cross-examination, Brian admitted that he drank a pint of vodka the night of the party. Brian was asked about what he told police, and specifically Detective Nordberg, when he was in the hospital a few days after the shooting. Brian testified that he told Detective Nordberg that

defendant was at the party and that he identified defendant in a photo line-up. If Detective Nordberg claimed differently, then the Detective was lying.

¶ 25 Detectives Nordberg and Schroder testified as follows. They interviewed Brian in the hospital a few days after the incident, on January 25, 2011, and Brian was on pain medication. Brian made no mention of a backseat passenger in the car that Buck arrived in. The next day, on January 26, 2011, when Brian was shown a photo line-up with defendant and Flip, he did not identify defendant or Flip as being at the party. He was, however, able to identify Donnie and Buck in photo line-ups. When Detective Nordberg took Brian's statement two months later, on March 25, 2011, Brian mentioned a backseat passenger who exited the car with a gun.

¶ 26 Cortez testified as follows. He was 18 years old and had prior juvenile adjudications of theft and possession of a stolen car. Cortez was at the party and left briefly to get "blunts." When he returned, he saw his uncle Demarcus arguing with Buck, who had arrived in a maroon car. Buck had a black, .40-caliber gun that he put in his back pocket; Buck and Demarcus were about to fight. Then, Buck took his gun out of his back pocket and shot Demarcus. Shots from more than one gun were fired. Cortez saw that defendant, who was standing next to Buck, had a gun, as did Donnie, who had a .22-caliber gun. Cortez ran into the house and saw that a girl (Sandra) had been shot and was lying on the kitchen floor. When Cortez ran back outside, his cousin Brian's van was stuck in the snow. Cortez ran up to the van and saw Christopher holding Glenn's head.

¶ 27 On March 1, 2011, Cortez accompanied police to the station and identified defendant, Flip, and Buck in photo line-ups. Cortez told police to handcuff him when they picked him up from school because he was scared for people to see him walk away with police.[3]

[3] During Cortez's testimony, a victim advocate advised the court that Cortez had told her

¶ 28 On cross-examination, Cortez admitted drinking one-half to one cup of Remy Martin. Cortez denied seeing Donnie shoot his gun. He did not recall telling the grand jury (in May 2011) that Donnie was the first one to shoot his gun and that Donnie was standing next to Buck when he shot his gun into the air. After that, Buck shot Demarcus. Cortez also denied telling the grand jury that the only people he saw with guns that night were Donnie and Buck; he told the grand jury that other people had guns too.

¶ 29 Lamont Foster testified next as follows. He had convictions of possession of a controlled substance and aggravated battery and juvenile adjudications of armed robbery and retail theft. At the party, some guy choked Donnie outside the house, and Donnie pulled out a gun. Other people intervened, and Lamont saw someone's sleeve go into the air and shoot a gun upwards. Lamont did not know who shot the gun; he merely saw that the person was wearing a red jacket. Lamont did not know many people at the party or who was fighting. At this point, someone started shooting at the crowd, but Lamont did not get a good look at the person. Lamont ran past the shooter and got down on the ground next to the garage to take cover. Lamont got up when the shots ended, and he saw a white van near a maroon car in the street. Someone with a gun pointed at the ground was standing next to the maroon car. Lamont assumed the guy was the driver of the maroon car because the driver's car door was still open.

¶ 30 On cross-examination, Lamont admitted drinking three shots of alcohol. He did not discuss the shooting with police until March 16, 2011, when officers arrested him for a drug charge.

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that he had been threatened that he would be shot. The court then questioned Cortez about being threatened, and Cortez denied that he had been threatened. However, a security officer testified that he had heard Cortez tell the victim advocate that he had been threatened.

¶ 31 On redirect, Lamont was questioned regarding his March 16, 2011, statement to police in which he stated that Flip, the driver of the maroon car, exited and shot at the white van, which crashed into a snow drift. However, Lamont never saw that happen; all he saw was Flip standing by the maroon car, holding a gun that was pointed at the ground. Police wanted to know what Lamont heard on the streets, and that was what he had heard.

¶ 32 Lamont was also questioned regarding his May 2011 grand jury testimony, which was that the driver's side of the maroon car opened and a person shot towards the white van. Lamont explained that his grand jury testimony was exactly what he had told the police in his March 16, 2011, written statement and what others had told him. Lamont testified that he was advised that he would be in "big trouble" if he did not "stick" to his written statement.

¶ 33 On recross, Lamont testified that he never saw anyone shoot at the white van and never saw who was in the maroon car. When asked during the grand jury proceedings if he later learned that the individual he had identified in the photo line-up was Flip, he answered that he was not sure if the picture was really the guy he saw at the party; Davon and other people had told Lamont that the guy shooting was named Flip.

¶ 34 Lamont signed a subsequent statement, dated December 2, 2011. In the December 2 statement, Lamont indicated that everything in his March 16 statement was the hearsay account of Davon, which the police "ran with." Lamont did not see Flip at all that night; and the only person he saw with a gun was Donnie.

¶ 35 The court determined that Lamont's grand jury testimony, as opposed to his statements to police, could be considered substantively.

¶ 36 Christopher testified next. He had an aggravated assault felony charge pending and a prior juvenile adjudication of aggravated battery. On the night of the party, Christopher drove in

the white van with his cousins, Glenn and Brian, and his friend Hashim. Christopher's relatives at the party included his younger brother Demarcus, his nephew Cortez, and his cousins Davon and Lewis.

¶ 37 During the party, Donnie and Hashim had an altercation in which Donnie pulled out his gun, which looked like a .22-caliber revolver. Because the environment was not safe, Hashim went to get the van. At this time, a burgundy car pulled up. Flip was driving; Buck was on the passenger side; and defendant was in the back seat. Christopher knew defendant from a few years before, when they had lived in the same neighborhood. Flip exited the car with a black handgun and stood behind a tree, and Buck exited the car holding a bottle of alcohol. Defendant also exited, and Christopher shook defendant's hand. When Hashim drove the van by, Buck pulled out a .40-caliber black and chrome gun and threatened to shoot "down" the van. Once Buck realized that Hashim was driving the van, however, he put his gun away. Buck then began arguing with Glenn.

¶ 38 After the altercation between Buck and Glenn died down, Buck began arguing with Christopher's brother Demarcus. Demarcus took off his coat to fight Buck, and Christopher tried to separate the two by pushing Demarcus away. Buck was ready to fight anyone who would fight. Then, all of the shots started, and Christopher crawled back to the van. Nearby, Brian was bleeding, crawling, and yelling, and Christopher and Hashim grabbed Brian and pulled him behind the van. The three of them then got into the van, and Glenn drove away. The van was under a lot of gunfire; all of them were dodging bullets and trying to take cover. After driving about 20 meters, the van windows exploded, and Glenn "went down." Christopher tried to grab the steering wheel, and the van hit the snow ditch. Christopher then jumped out of the van and into the front seat where he held Glenn's head until he died.

¶ 39 Christopher did not see defendant do anything after he exited the car with Buck and Flip; there was so much commotion with Demarcus that Christopher lost track of defendant. Christopher first told police what happened one year after the incident, shortly before trial, on January 20, 2012.

¶ 40 On cross-examination, Christopher admitted smoking cannabis the night of the party but taking only one sip of alcohol. Christopher was taken to the police station after the incident but was too upset to give a statement. When he provided a written statement in January 2012, one year after the incident, he did not mention defendant getting out of the car, but he did mention shaking defendant's hand. Christopher testified that he shook defendant's hand and said, "What's up?" and then stood by Buck. Defendant did not have anything in his hand.

¶ 41 Demarcus testified as follows. He was 23 years old and had a juvenile adjudication of burglary. Demarcus, who was Glenn's cousin, went to the party with some friends. At the party, when people were standing outside, Donnie pulled out a gun. Demarcus gave Donnie a bear hug and walked him out to the street. At this point, a maroon car drove up, and the front passenger (Buck) jumped out to "clarify what was going on." Demarcus did not know Buck and whether there were others in the maroon car. Buck asked Demarcus what was going on at the party; Buck wanted to fight. Demarcus did not back down and threw his coat off, but Demarcus's brother Christopher and Demarcus's friend Dallas intervened and said to "get off the nonsense" and go home. Demarcus was angry but listened to his brother and Dallas and started looking for his coat. When he stepped into the street, he got shot in the leg and fell. He also got shot in the buttocks but his wallet redirected the bullet. Demarcus's friend helped him crawl back to the car.

¶ 42 Demarcus was taken to the hospital and given a Tetanus shot and pain medication. After being shot, he was in a lot of pain and "bleeding severely out" of his leg.

¶ 43 On cross-examination, Demarcus admitted drinking Tequila and being buzzed, but he was not drunk. His friends drove him to the hospital because he was injured, and Demarcus spoke to an officer. Demarcus admitted that he never mentioned anything about a maroon car to the officer. He also admitted that he did not tell the officer he saw anyone, other than Donnie, with a gun.

¶ 44 Ericton Lewis, age 19, testified as follows. He had prior convictions of aggravated use of a weapon and felony aggravated fleeing. At the party, he saw Flip, Buck, and a third person he did not know walking up the driveway to the house. Ericton shook hands with Flip and Buck because he knew them. At the party, Ericton and Glenn had a conversation about money in the basement. Also, Donnie got into an argument with his girlfriend Sandra, and Ericton grabbed Donnie to intervene. They all went upstairs and outside. Because Glenn was arguing with Ericton, Donnie looked Glenn "up and down." Glenn took offense and walked after Donnie down the driveway. Ericton then had a brief conversation with his brother Lewis and walked to his car. As he opened his car door, a shot was fired. Ericton took cover by his car as 40 to 50 shots were fired; he then drove away.

¶ 45 A few days after the incident, on January 27, 2011, Ericton made a statement to police that Flip, Buck, and defendant were walking up the driveway towards the house. During his testimony, Ericton identified defendant's photo from a line-up as someone who was at the party. However, when asked if he saw defendant in court, Ericton said "no." Ericton did not see anyone with a gun on the night of the shooting.

¶ 46 On cross-examination, Ericton testified that a few days after the incident, on January 27, 2011, police showed him a photo line-up. Ericton identified Flip, Buck, and Donnie in the photo line-up; he did not identify defendant. Ericton was aware of defendant's name through others at

the party, and then the officer told Ericton defendant's name. Ericton gave police a statement indicating that Flip, Buck, and defendant were walking up the driveway towards the Sherman house. Ericton testified that some of his January 27 statement was true, and some of it was not true.

¶ 47 Dallas Perry testified as follows. Dallas had prior convictions of possession of a controlled substance and possession of a firearm. Dallas was at the party with Nicholas. Dallas saw Donnie pull a gun on Glenn, and Dallas told Donnie to put the gun away. When Dallas walked to the front of the Sherman house, he saw Hashim driving the white van. When Hashim got out of the van, Dallas told Hashim to get Glenn in the van because people were arguing. Then, the shooting began. Dallas did not see who was shooting or where the gunfire was coming from. He did see one person shooting a gun down the street, but he did not know the person. Dallas ran inside the house to find his friends. When he came back out of the house, he saw the white van driving away.

¶ 48 Hashim testified as follows. He had a conviction of felony aggravated fleeing and was still on probation. Hashim went to the party with Glenn and Brian. There were a few altercations in the basement, and then people went outside. Outside, there was more arguing, and someone fired shots into the air. Hashim and Glenn wanted to leave, and Glenn gave Hashim the keys and told him to go get the van. As Hashim went to get the van, more shots were fired, and "a girl" (Sandra) was hit. Hashim laid the girl down in the grass. He then brought the van around, parked it near another car, and exited it. Once he saw that Glenn and Brian were all right, Hashim ran back to the injured girl and heard more shots. The girl told Hashim that she was dying and to call for help. More shots were fired, and Brian was hit. Christopher helped Brian into the van, and Hashim got into the van, along with Glenn, who

drove. Glenn, who said he had been shot, drove away. At this point, a car driving in the opposite direction started shooting at the van. Glenn was hit in the head and killed. The windows shattered, and the van drifted into a snow bank.

¶ 49 Lewis, age 17, testified as follows. Lewis was Ericton's brother. He went to the party with his cousins, Davon and Darrell Lewis. Donnie had a gun and was arguing with someone at the party, as was Glenn. Everyone went outside, and Lewis saw a white van in the street in front of the Sherman house. Lewis was not sure who was driving the white van but thought it was Glenn, who got out and yelled. Then, someone behind Lewis shot a gun into the air. After that, Lewis heard more gunfire from different guns, and he ran behind a car in the driveway. Lewis surmised that the shots were coming from the street because two people "dropped" when they got shot; he could not see who was shooting. Once the shooting died down, Lewis tried to run away but the police brought him back to the Sherman house.

¶ 50 On cross-examination, Lewis admitted that he was "really intoxicated" that night.

¶ 51 Sandra suffered a gunshot wound to her hip or back area and underwent surgery to remove the bullet.

¶ 52 Russell McLain, an employee of the Rockford forensic science lab, testified that it was possible to match spent bullets or spent shell casings to a particular firearm. In his opinion, five firearms, at a minimum, were fired at the scene of the incident. Russell and other State witnesses testified that various shell groupings at the scene were distinct and indicative of at least five different guns, including a Glock pistol, a non-Glock .40-caliber pistol, and a Ruger.

¶ 53 The parties stipulated that defendant was a convicted felon (aggravated battery with a firearm).

¶ 54 At the close of the State's evidence, defendant moved for a directed finding. The trial court denied defendant's motion, stating that there was "no question" that defendant possessed a handgun.

¶ 55 The defense case was comprised of several police officers who testified regarding the witnesses' statements. Defendant did not testify.

¶ 56 C. *Pro se* Motions

¶ 57 In October 2012, during the bench trial, defendant filed *pro se* motions to dismiss all charges against him. In addition, he requested the appointment of counsel.[4] The court read defendant's motion requesting the appointment of counsel in which defendant stated that he had the right to appointed counsel because he was financially unable to obtain counsel. The court noted that defendant was in the middle of his trial. Defense counsel[5] then stated, "[Defendant] can stop me if I am incorrect, I believe [defendant] and I, *** may have had a brief breakdown in the attorney-client relationship." Defense counsel continued, "And I think that since that time I've gone up to speak to [defendant], and I believe that if [defendant] filed a motion for appointment of counsel he does not wish to proceed with that motion. Would I be correct?" Defendant answered "Yes."

¶ 58 The following month (November 2012), also during trial, defendant filed a *pro se* motion to reconsider his motion for appointment of counsel and two *pro se* motions asserting ineffective assistance of counsel. The court noted that there were "various motions filed *pro se* by the defendant," which the court tendered to defense counsel. The court advised defendant "not to

[4] The motion does not appear in the record.

[5] Defendant was represented by private counsel.

file any motions. You are represented by counsel, so any motions should go through him, and he can present those motions; do you understand?" Defendant said "Yes."

¶ 59 D. Trial Court's Decision

¶ 60 The trial court issued its decision on December 20, 2012. It noted that defendant's case depended on his accountability for the acts of Flip and Buck.

¶ 61 At the outset, the court found that Charice's testimony corroborated the other witnesses in that she looked out her window and saw a lot of people outside the Sherman house; she heard arguing; she saw a white van with people jumping out; she saw someone take off their coat; and then she heard shooting from more than one gun. Charice saw a person shooting back towards the party, whom the court determined to be Buck. The court noted that one of the State's exhibits illustrated the path taken by Buck, and described by Charice, as he fired towards the people in the front yard of the Sherman house and towards the white van. One of these bullets struck Glenn as he drove away in the van, killing him.

¶ 62 The court summarized the sequence of events as follows. The altercation in the basement involving Donnie, Sandra, and others continued outside the house. Donnie pulled out a chrome pistol, and Demarcus helped calm the situation. Then, according to Davon's testimony, Donnie ran up to the parked car containing Flip (the driver), Buck (the front seat passenger), and defendant (in the backseat). The court noted that Davon gave a sophisticated description of Buck's gun as "a 9 or a 40" type gun. Davon further testified that they had a conversation and then Buck and defendant got out of the car. Davon testified that it "looked like a gun" in defendant's hand. Regarding Davon's testimony that it "looked like a gun," the court noted that Davon and the other witnesses, in general, were "reluctant." In watching the witnesses'

demeanor, the court understood that they did not want to be involved and that they "knew everybody" at the party.

¶ 63 Continuing on with Davon's testimony, the court noted that he testified that Buck got into an altercation with Demarcus, who took off his shirt, which was corroborated by Charice. Then, Glenn approached Buck, and a shot was fired from the driveway of the Sherman house. The court determined that Donnie, after going up to the maroon car and talking to Buck, fired the initial shots into the air. The court noted that three or four shell casings in that area supported this conclusion.

¶ 64 After Donnie's initial shots, the "fight was on." Shots were fired both from the driveway and from the street area. Davon testified that Buck ran away and fired his gun towards the house and towards the white van on the street. The court found that there were about 20 spent shell casings by the driveway of the house and that Buck was the one shooting from that location. According to the court, one of these bullets hit Nicholas, as evidenced from the bullet recovered from his wound, and Sandra was also injured. In addition, Buck fired towards the white van, with one of the bullets striking and killing Glenn. Davon testified that Buck fired four or five shots in the direction of the white van, which was corroborated by the dents to that vehicle and the shattered window. The court noted that Davon identified defendant in a photo line-up two days after the incident.

¶ 65 Turning to Brian's testimony, the court found it similar to Davon's testimony, in that a car drove up with Flip, Buck, and defendant. All three had guns, and Brian testified specifically as to the type of guns Flip and Buck had. All three exited the car, and Buck argued with Glenn. At this point, Hashim pulled up in the white van, and Brian saw three guys chasing Demarcus. Then, Donnie pointed his gun into the air and fired, which, again, was supported by the shell

casings found in that area. After that, Brian testified that "hell broke loose," and he suffered two gunshot wounds. Brian got back into the white van, and Glenn drove until he was struck by a bullet.

¶ 66 The court further noted that a few days after the incident, on January 26, 2011, Brian identified Buck in a photo line-up. The court stated it was aware of inconsistencies regarding what Brian told police when he was in the hospital. The court noted Brian had been shot and was in the van and that "no complete statement" was taken in the hospital.

¶ 67 The third witness to put defendant at the scene with a gun was Cortez. He saw Demarcus arguing with Buck, who had a black, .40-caliber gun. Buck shot Demarcus, causing Demarcus to fall to the ground. According to Cortez, defendant was standing next to Buck and had a gun. Still, the court noted that no one testified that defendant had fired a gun.

¶ 68 Christopher saw a "burgundy" car with Flip driving, Buck in the front passenger seat, and defendant in the back seat. According to Christopher, all three exited the car, and Buck and Flip had guns. Brian was hit, and Christopher and Hashim got Brian into the van. Glenn drove away, and the van was under a lot of gunfire. The court acknowledged that Christopher, who was a very credible witness, never testified that defendant had a gun. Nevertheless, the court noted that it could understand "some inconsistencies, why some witnesses see something that others don't see."

¶ 69 In addition, Demarcus saw a maroon car. The front seat passenger (Buck), whom Demarcus did not know, got out of the car and demanded to know what was going on at the party. Demarcus accepted Buck's call to fight, until Christopher intervened and told Demarcus it was time to leave. Demarcus listened and started looking for his coat, which was when he was shot. The court noted that Demarcus was shot in the thigh and buttocks area and did not know

where the shot came from. According to the court, Demarcus's testimony was consistent with Cortez's testimony that Buck shot Demarcus. Although Demarcus did not know whether other people were in the maroon car, the court found that his testimony corroborated the other witnesses.

¶ 70 Regarding Lamont and Dallas, the court found as follows. Lamont was not "completely truthful." He did not want to be testifying; he was "very evasive"; and he "didn't answer questions, both on direct and cross-examination, [and] redirect." That said, Lamont did see a maroon car and a white van. Dallas, like Lamont, did not want to testify. He did not see defendant at the scene but did see Hashim driving a white van, and people arguing. Although Dallas testified that he did not see who was shooting, the court discredited his testimony and submitted that he did see who was shooting. Thus, the court stated that when Dallas testified, it considered it "for that purpose, very reluctant."

¶ 71 Turning to the testimony of Hashim and Lewis, the court stated as follows. Hashim testified that Glenn gave him the keys to pull the van around, and he parked it near another car. Christopher was helping Brian get into the van, and Glenn drove the van away. At this point, Hashim testified that a car driving in the opposite direction started shooting at the van. According to the court, it was a reasonable inference that the car driving in the opposite direction was the maroon car, with Flip driving and shooting. The court noted that the van was assaulted on both sides, with Flip shooting it on one side and Buck on the other. The court recognized that neither Hashim nor Lewis identified Flip, Buck, or defendant as being at the scene. In addition, although Lewis testified regarding a white van and people arguing, his time frames were a little different than the other witnesses. Still, Lewis did testify that someone shot into the air, which the court identified as Donnie.

¶ 72 Overall, the court blamed inconsistencies in the witnesses' versions of events on the nature of the scene, multiple shots being fired, and people running in different directions. For example, the witnesses' inconsistencies regarding the locations of the different people at the scene were understandable given the amount of shots that were fired. In addition, the court found no evidence that the witnesses who identified defendant "conspired together to place this defendant" with Flip and Buck at the scene. In other words, there was no evidence that the witnesses had a problem with defendant or a motive to place him at the scene with Flip and Buck. The court stated it "kept listening for that," because everyone knew each other at the party.

¶ 73 Based on the above findings, the court found defendant guilty of the following counts: count I (first-degree murder of Glenn while armed with a firearm), count III (first-degree murder of Glenn while committing the forcible felony of mob action while armed with a firearm), count IV (attempted first-degree murder of Brian while armed with a firearm), count V (attempted first-degree murder of Vyborny while armed with a firearm), count VI (attempted first-degree murder of Sandra while armed with a firearm), count VII (attempted first-degree murder of Demarcus while armed with a firearm), count XII (aggravated discharge of a firearm in the direction of the van), count XIX (unlawful possession of a weapon by a felon), count XXIII (mob action).

¶ 74 E. Additional *Pro Se* Motions

¶ 75 After the court reached its decision, but prior to defense counsel's motion for a new trial, the State brought up the two previous *pro se* motions filed by defendant alleging ineffective assistance of counsel. At the time, defendant had a pending motion to substitute judge. The State requested that, before proceeding on defendant's motion to substitute judge, "an inquiry

needs to be made of the defendant whether he wishes to represent himself." When the court asked defendant, he replied "No." When the court clarified, "No what? No, you're not choosing to represent yourself?" Defendant replied "No."

¶ 76 Later, just prior to sentencing, the court noted that defendant had again filed various *pro se* motions. The court agreed with the State that the motions should not be filed but returned to defense counsel. (Only one of these motions, entitled Motion to Vacate Judgment/Abuse of Discretion" appears in the record.) The State then advised the court that one of the motions alleged ineffective assistance of counsel, which meant that "defendant either must withdraw that, if he doesn't wish to proceed on that, or the Court must inquire whether he wishes to proceed." The State pointed out that if defendant wished to proceed on the motion, the court needed to conduct "a *Krankel* hearing" under *People v. Krankel*, 102 Ill. 2d 181 (1984). The following colloquy occurred:

> THE COURT: All right. [Defendant], you have filed, which I haven't read, ineffective assistance of counsel. May I see that motion.
>
> MR. JAZWIEC [Defense counsel]: Yes, Your Honor.
>
> THE COURT: And do you wish to proceed on that?
>
> THE DEFENDANT: Nah. It's on the record.
>
> THE COURT: I'm sorry?
>
> THE DEFENDANT: Nah. No.
>
> THE COURT: You don't want to proceed on the ineffective assistance of counsel?
>
> THE DEFENDANT: No, sir. They on the record. It's on the record.

> THE COURT: All right. Let me read this for a moment here. And again, for the record I haven't read this here. It was filed by the defendant. You allege in your motion regarding ineffective assistance of counsel that [defense counsel] failed to argue during the second motion for substitution of judge. You allege that [defense counsel] failed to argue or file motions to dismiss the felony mob action. You allege that [defense counsel] failed to subpoena and/or have [*sic*] State subpoena certain witnesses, and you allege that [defense counsel] failed to argue certain motions in this case. Do you wish to proceed on this? Are you saying [defense counsel] is ineffective, or do you not wish to present any argument to the Court on why [defense counsel] was ineffective?"

Defendant responded, "Nah. They on the record." Noting that defendant said that he did not want to proceed on the motion for ineffective assistance of counsel, the court tendered defendant's motions to defense counsel.

¶ 77 F. Sentencing

¶ 78 Following a sentencing hearing, the trial court imposed two concurrent terms of 50 years' imprisonment for the first-degree murder convictions, four consecutive terms of 25 years' imprisonment for the attempted first-degree murder convictions, one consecutive term of 15 years' imprisonment for the aggravated discharge of a firearm conviction, one concurrent term of 14 years' imprisonment for the unlawful possession of a weapon by a felon conviction, and one concurrent term of 6 years' imprisonment for the mob action conviction.

¶ 79 II. ANALYSIS

¶ 80 A. Sufficiency of the Evidence

¶ 81 Defendant's first argument on appeal is that there was insufficient evidence to find him guilty, beyond a reasonable doubt, of the offenses. He argues that the evidence was insufficient

to prove that he was: (1) present at the scene; (2) armed; and (3) accountable for the actions of Flip and Buck.

¶ 82 As stated, defendant was found guilty on accountability principles for two counts of first-degree murder (murder of Glenn while armed with a firearm and murder of Glenn while committing the forcible felony of mob action), four counts of attempted first-degree murder of Nicholas, Brian, Demarcus, and Sandra, one count of aggravated discharge of a firearm in the direction of the occupied white van, and one count of mob action (disturbing the public peace by shooting people at a party). Essentially, the only offense not based on accountability was unlawful possession of a weapon by a felon, and the court found defendant guilty of this offense as well. Because defendant's argument that there was insufficient evidence that he was accountable for the actions of Buck and Flip hinge on whether there was sufficient evidence that he was present at the scene and armed, we consider those issues first.

¶ 83 When reviewing a challenge to the sufficiency of the evidence, we consider whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). We will not retry a defendant when considering a sufficiency of the evidence challenge; the trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court that saw and heard the witnesses. *Id.* at 114-15. A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Id.* at 115.

¶ 84 In determining defendant's guilt, the trial court summarized the testimony of each witness. We note that the eyewitness testimony consisted of eleven witnesses and one witness

(Charice) who lived nearby the house. All of the witnesses testified to multiple gunshots from different guns, and Russell testified that at least five guns were fired based on the groupings of the shell casings. Eight of the eleven eyewitnesses testified to an altercation involving Donnie and his gun in the basement; nine witnesses, including Charice, testified to seeing the white van that was found at the scene; five witnesses testified to seeing a maroon car; five witnesses testified that Flip, Buck, and defendant were at the scene; three witnesses testified that Demarcus removed his jacket to fight Buck, and Charice also saw someone remove his jacket; and four witnesses, including Charice, saw someone shooting towards the street and the Sherman house.

¶ 85 Of the five witnesses who testified that defendant was at the scene, three testified that defendant was armed. The trial court relied on these three witnesses (Davon, Brian, and Cortez) in determining that defendant was present at the scene and armed. Defendant, however, argues these witnesses were not credible. We disagree.

¶ 86 Beginning with Davon, defendant argues that he contradicted himself when testifying as to whether he actually saw defendant with a gun; he did not speak to police until his house was surrounded, and he admitted telling the police things that were not true; he wrote an affidavit stating that he never saw Buck shooting or with a gun; and he was intoxicated.

¶ 87 Defendant is correct that Davon waffled at trial regarding whether he saw defendant with a gun. On direct examination, Davon testified that it "looked like" defendant "could have a gun," but then on cross-examination, Davon testified that he never actually saw defendant with a gun. The trial court explained Davon's testimony that it "looked like" defendant had a gun on his reluctance to testify. The court specifically noted that Davon's demeanor, like several of the other witnesses, was that he did not want to be involved in the case or testifying in court because the witnesses from the party all knew each other. In fact, the court had to continue the case

during Davon's testimony based on an altercation with a witness (Demarcus) outside the courtroom in the hallway. The trial court's finding that Davon was reluctant to testify was supported by his testimony.

¶ 88 While testifying, Davon admitted fear for his safety and the safety of his family. He explained that he did not voluntarily talk to police two days after the incident; rather, the police surrounded his house. He admitted telling the police things that were not true because he was trying to protect his family. Even so, when Davon first met with police, he identified defendant, Buck, and Flip in a photo line-up and said that defendant was holding a black and chrome semi-automatic gun. Davon's statement to police about defendant having a gun was consistent with his grand jury testimony. However, Davon testified that his fear over safety prompted him to submit an affidavit nine months after the incident, in October 2011, in which he stated that Buck never fired his gun or even had a gun. Davon then admitted in January 2012 that his affidavit was not true and that he saw Buck fire multiple shots. Therefore, it was reasonable for the court to assess Davon as a reluctant witness who was fearful of testifying that defendant had a gun, despite his initial statement to police and his grand jury testimony that defendant did have a gun.

¶ 89 Regarding defendant's argument that Davon was intoxicated, Davon did admit that he was intoxicated at the party. Nevertheless, the trial court found that Davon provided a sophisticated description of Buck's gun and a version of events that was corroborated by other witnesses. Again, it was up to the trial court to assess Davon's credibility. See *Wheeler*, 226 Ill. 2d at 114-15 (the trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court that saw and heard the witnesses).

¶ 90 Defendant next attacks Brian's testimony on the basis that he did not mention defendant to police on the night of the incident or the next day at the hospital; when he did talk to police two months later, he said that the back seat passenger of a blue LeSabre had a gun; and he never identified defendant in a photo line-up as he claimed.

¶ 91 The court found that Brian's trial testimony was similar to Davon's testimony, in that a car drove up with Flip, Buck, and defendant. Brian testified that all three had guns and exited the car, which he thought was a blue Buick LeSabre but was not sure. Consistent with Davon's testimony, Brian testified that Buck and Glenn argued. Hashim pulled up in the white van, and Donnie fired his gun into the air. Then, the gunfire started. Brian was hit, and he got back into the white van.

¶ 92 The court noted that a few days after the incident, Brian indentified Buck (and Donnie) in a photo line-up but not Flip and defendant. The court explained any inconsistencies in what Brian told police at the hospital on the fact that he was shot twice at the scene and then helped into the white van. The court noted that the police did not take a complete statement at the hospital. Rather, a complete statement was not taken until a couple of months after the incident (March 2011), when Brian mentioned a backseat passenger who exited the car with a gun. Thus, Brian's trial testimony and March 2011 statement to police supported the court's finding that defendant was at the scene and armed.

¶ 93 Regarding Cortez, defendant argues that he did not mention defendant to police on the night of the incident; when he identified defendant in the photo line-up, he did not identify defendant as acting criminally; and his trial testimony that defendant had a gun was inconsistent with his grand jury testimony that defendant did not have a gun.

¶ 94 On cross-examination, Cortez admitted talking to the police on the night of the incident. However, he denied telling his version of events that night because he told the police he needed to go to the hospital to be with his family. For this reason, Cortez did not tell the police his version of events until a few weeks later (March 1, 2011), when they picked him up from school. While defendant attempts to downplay Cortez's identification of defendant in the photo line-up, Cortez's identification of defendant being at the party with Buck and Flip was consistent with his trial testimony that all three were at the party.

¶ 95 In addition, Cortez's failure to tell the grand jury that defendant had a gun may be explained by Cortez's fear of retaliation. Cortez testified that when police picked him up from school, he told them to handcuff him because he was scared for people at school to see him walk away with police. Likewise, when testifying at defendant's trial, Cortez advised the victim advocate that he had been threatened. Finally, regarding defendant's argument that Cortez was intoxicated, Cortez testified that he drank one-half or one cup of Remy. However, he never testified that he was intoxicated or could not remember what transpired at the party.

¶ 96 In sum, the court recognized and considered the inconsistencies in the three eyewitnesses' testimony but still found them credible regarding defendant's presence at the scene with a gun. See *People v. Day*, 2011 IL App (2d) 091358, ¶ 26 (the reviewing court will not substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses).

¶ 97 Moreover, Ericton and Christopher also placed defendant at the scene, and the court found Christopher "very credible." Although defendant points out that Christopher testified that both Buck and Flip had a gun but defendant did not, the court acknowledged Christopher's testimony to that effect, reasoning that "some inconsistencies" were understandable. According

to the court, certain witnesses saw things that other witnesses did not see. The court explained the inconsistencies in the witnesses' versions of events on the chaotic nature of the scene, the number of bullets fired, and the fact that people were in different locations and trying to take cover.

¶ 98 Regarding defendant's general argument that the witnesses who were related to Glenn were biased, the trial court specifically found that the witnesses did not conspire to place defendant with Buck and Flip at the scene. Because everyone knew each other at the party for the most part, the court listened for a motive on behalf of witnesses to falsely implicate defendant. However, the court found no evidence that the witnesses had a problem with defendant or a motive to place him at the scene with Flip and Buck.

¶ 99 Defendant also makes the general argument that the court's factual findings are entitled to less deference because the court improperly determined that defendant had a gun at the party when ruling on defendant's motion for a directed finding. Defendant's argument lacks merit, because there is no evidence that the trial court did not apply the proper standard in considering defendant's motion for a directed finding.

¶ 100 Based on the above, it was reasonable for the court to find that defendant was present at the scene and armed, meaning there was sufficient evidence to find defendant guilty of unlawful possession of a weapon by a felon. Therefore, we next consider whether the evidence was sufficient evidence of defendant's accountability for the actions of Buck and Flip, thus establishing his guilt on the remaining offenses.

¶ 101 Section 5-2(c) of the Criminal Code of 1961 states that a person is legally accountable for the criminal conduct of another when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees,

or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2010). The underlying intent of this statute is to incorporate the principle of the common-design rule. *People v. Fernandez*, 2014 IL 115527, ¶ 13. The State may prove that a defendant possessed the intent to promote or facilitate the crime by presenting evidence that either (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design. *Id*. "Under the common-design rule, if 'two 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 design or agreement and all are equally responsible for the consequences of the further acts.' " *Id*. (quoting *In re W.C.*, 167 Ill. 2d 307, 337 (1995)). " 'Evidence that a defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another.' " *Id.* (quoting *In re W.C.*, 167 Ill. 2d at 338.).

¶ 102 Defendant argues that there was insufficient evidence of accountability, based on either the shared intent rule or the common-design rule. Defendant points out that neither Flip nor Buck testified; nothing about defendant's actions suggested he was acting as part of a plan with Flip and Buck; mere presence at the scene, even coupled with flight, is not enough to establish accountability, and the court acknowledged that there was no testimony that defendant fired a gun.

¶ 103 The court made the following findings regarding the sequence of events. Donnie was involved in an altercation in the basement with Sandra and others. As a result, Donnie pulled out a chrome pistol, but people at the party were able to calm him down. When the party spilled outside, Davon testified that Donnie ran up to the maroon car with Flip, Buck, and defendant.

After they talked, all three got out of the car with guns. After Buck got into an altercation with Demarcus, Glenn approached. Donnie then fired the initial shot into the air, and shell casings where Donnie was located supported that conclusion. After that, the gunfire began, with Buck running away and firing his gun towards the house and towards the white van. Approximately 20 shell casings were located in the area where witnesses stated that Buck was firing his gun. The shots Buck fired struck Demarcus, Nicholas, and Sandra, as well as Glenn as he drove away in the white van. Flip then drove the maroon car in the opposite direction of the white van and fired at it, thus supporting the evidence that the van was hit on both sides.

¶ 104 While defendant is correct that there is no direct evidence of a common design, we note that a defendant's accountability may be proven by circumstantial evidence. See *People v. Cooper*, 194 Ill. 2d 419, 435 (2000) (proof of the common purpose or design need not be supported by words of agreement, but may be drawn from the circumstances surrounding the commission of the unlawful act); see also *People v. Bolar*, 229 Ill. App. 3d 560, 562 (1992) (a defendant's accountability may be proven by circumstantial evidence).

¶ 105 In this case, it is reasonable to infer that Buck, Flip, and defendant arrived at the party together to avenge the prior altercation involving Donnie. The three showed up to the party while illegally possessing guns, exited the car with their guns, and Buck demanded to know what had just transpired. Various witnesses testified that Buck was ready to fight and got into an altercation with Demarcus and then Glenn. After that, Donnie shot his gun into the air, and then Buck and others started shooting. Though the trial court recognized that there was no evidence that defendant fired his gun, he acted in concert with the others by riding to the party in the same car, carrying a gun, and exiting the car with his gun to physically retaliate against the people at the party who had been arguing with Donnie. See *Cooper*, 194 Ill. 2d at 435-36 (a conviction

under accountability does not require proof of a preconceived plan if the evidence indicates involvement by the accused in the spontaneous acts of the group).

¶ 106 Afterwards, defendant fled the scene and did not report the shooting to police. Although defendant is correct that mere presence at the scene is not enough to establish accountability, presence at the scene and subsequent flight does constitute circumstantial evidence that tends to prove his accountability. See *People v. Foster*, 198 Ill. App. 3d 986, 993 (1990) (though something more than mere presence and subsequent flight must be shown before any person may be held accountable for a crime; they do constitute circumstantial evidence which may tend to prove and establish a defendant's guilt based on accountability); see also *Cooper*, 194 Ill. 2d at 436 (sufficient evidence of accountability where the defendants, armed with weapons, acted in concert to retaliate against a rival gang, actively participated in shooting, fled from the scene, and failed to report the crime to police).

¶ 107 In sum, there was sufficient circumstantial evidence of defendant's accountability for the acts of Buck and Flip under the common-design rule. See *People v. Terry*, 99 Ill. 2d 508, 515 (1984) (the supreme court rejected the defendant's request to abolish the common-design rule given that it imposes liability for murder even if only a misdemeanor were intended); see also *Phillips*, 2014 IL App (4th) 120695, ¶ 45 (the "common-design rule provides harsh medicine for those who willingly join with others to engage in criminal acts."). Therefore, once the court determined that Buck shot and wounded Nicholas, Brian, Demarcus, and Sandra; shot and killed Glenn; shot at the white van (as did Flip); and shot at people at the party, defendant was accountable for the offenses of first-degree murder, attempted first-degree murder, aggravated discharge of a firearm, and mob action.

¶ 108 B. *Krankel* Inquiry

¶ 109 Defendant's next argument is that the trial court erred by failing to make a preliminary inquiry into his *pro se* motions alleging ineffective assistance of counsel. Defendant requests that this court remand the case to the trial court, as required by our supreme court's decision in *Krankel*, 102 Ill. 2d 181. The State responds that no *Krankel* hearing was warranted because defendant abandoned his claim.

¶ 110 In *Krankel*, after the defendant's trial counsel failed to contact an alibi witness or to present an alibi defense at trial, the defendant made a *pro se* allegation of ineffective assistance of counsel. *Id*. at 188. The defendant and the State agreed that the trial court should have appointed counsel different from his originally appointed counsel to represent him at the posttrial hearing regarding his claim of ineffective assistance of trial counsel. *Id*. at 189. Accordingly, the supreme court remanded the case to the trial court for a hearing on the defendant's motion with newly appointed counsel. *Id*.

¶ 111 Years later, the supreme court decided *People v. Moore*, 207 Ill. 2d 68 (2003), in which it discussed *Krankel* and its progeny. The rule that had developed in interpreting *Krankel* was that new counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. *Id*. at 77. Rather, the trial court should first examine the factual basis of the defendant's claim. *Id*. at 77-78. According to the court, "[t]he operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Id*. at 77-78. There are three ways in which the trial court may conduct its evaluation: (1) the court may ask defense counsel about the defendant's claim and allow counsel to "answer questions and explain the facts and circumstances surrounding" the claim; (2) the court may have a "brief discussion" with the defendant about his claim; or (3) the court may base its evaluation "on its

knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *People v. Buchanan*, 2013 IL App (2d) 120447, ¶ 19. The issue of whether the trial court should have conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28; *Moore*, 207 Ill. 2d at 75.

¶ 112 At the outset, we note that we are considering defendant's *pro se* motions alleging ineffective assistance of counsel in the context of the posttrial proceedings. See *Moore*, 207 Ill. 2d at 75 (considering the defendant's *pro se* posttrial motion); see also *Krankel*, 102 Ill. 2d at 189 (same). The State, as previously mentioned, argues that defendant abandoned his *pro se* claims at the posttrial hearing. Defendant disagrees, arguing that the record is not clear that he understood what his options were during the posttrial proceeding. Because defendant relies on the prior proceedings to support his position, we briefly summarize the sequence of events.

¶ 113 During trial, when defendant first requested the appointment of counsel, he stated on the record that he did not wish to proceed with that motion. Defense counsel explained that there had been a brief breakdown in their relationship that had essentially been cured. The next month, defendant filed additional *pro se* motions, which sought to reconsider the motion for appointment of counsel that he had previously abandoned, and which alleged that defense counsel was ineffective. The trial court admonished defendant not to file motions because he was represented by counsel. When asked if he understood, defendant said that he did.

¶ 114 The trial court rendered its decision the following month. Shortly after the court's decision, the State brought up defendant's *pro se* motions referred to above. The State indicated that the court needed to inquire whether defendant wished to represent himself. Twice, defendant replied "No" to the question of whether he wished to represent himself. Finally, prior

to sentencing, defendant again filed various *pro se* motions, one of which alleged ineffective assistance of counsel. The State noted that if defendant did not withdraw his *pro se* motion and proceeded on it, the court would need to conduct a *Krankel* hearing. For this reason, the trial court specifically questioned defendant regarding whether he wished to proceed with the *pro se* ineffective-assistance-of-counsel claim. Four times, defendant indicated that he did *not* wish to proceed, stating that "they [*sic*] on the record."

¶ 115 Defendant argues that the "record is not clear that [he] understood what his options were at that point of the proceedings." He points out that he had previously been admonished by the court not to file *pro se* motions and that he believed his claims were "on the record." We disagree.

¶ 116 The trial court's inquiry as to defendant's intention regarding his *pro se* motion was anything but cursory. Not only did the trial court summarize his *pro se* allegations of how trial counsel was ineffective, the court specifically asked defendant whether he wished "to proceed" on the motion. As stated, defendant replied either "Nah" or "no" four times. Then, when tendering defendant's *pro se* motions to defense counsel, the court reiterated defendant's statement that he did not wish to proceed on the motion for ineffective assistance of counsel. Therefore, we agree with the State that defendant abandoned his *pro se* allegations that trial counsel was ineffective. *Cf. People v. Allen*, 409 Ill. App. 3d 1058, 1076-77 (2011) (a defendant who fails to bring such a claim to the trial court's attention forfeits it notwithstanding having presented it in letter to the court).

¶ 117 Defendant's abandonment of his *pro se* claim distinguishes this case from *Krankel* and *Moore*, in which the defendants did not withdraw their *pro se* claims of ineffective assistance of counsel, and makes it more akin to *People v. McGee*, 345 Ill. App. 3d 693 (2003). In *McGee*, the

defendant withdrew his *pro se* motion alleging numerous claims of ineffective assistance of counsel. *Id*. at 699. Though the defendant in *McGee* admitted withdrawing the motion, he argued that once the court was put on notice of such allegations, it had a duty to make a preliminary inquiry into the validity of those allegations and into the withdrawal of the motion. *Id*. The court rejected the defendant's argument, stating "the defendant withdrew his motion and effectively prevented the trial court from any substantive review of the motion." *Id*.

¶ 118 We reach the same result here. Because defendant abandoned his claim, the trial court cannot be faulted for failing to conduct a *Krankel* inquiry.

¶ 119 C. Sentencing

¶ 120 1. Consecutive Sentencing

¶ 121 Defendant next argues that the trial court erred by imposing consecutive sentences for three of the attempted murder convictions and for the aggravated discharge of a firearm conviction.

¶ 122 Section 5-8-4(d)(1) of the Unified Code of Corrections provides, "The court shall impose consecutive sentences in each of the following circumstances: (1) [o]ne of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(d)(1) (West 2010). "When a defendant's convictions bring him within the purview of section 5-8-4, the mandatory sentencing requirement is triggered and consecutive sentences must be imposed." *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 47. Furthermore, any consecutive sentences imposed for triggering offenses must be served prior to, and independent of, any sentences imposed for nontriggering offenses. *People v. Senko*, 2012 IL 114163, ¶ 19.

¶ 123 Defendant's first argument is that there was insufficient evidence that three of the victims, namely Brian, Demarcus, and Sandra, suffered severe bodily injury. (Defendant concedes that Nicholas suffered severe bodily injury and thus that that attempted murder conviction qualified as a triggering offense for consecutive sentences.) In support of his position, defendant points out that the trial court used the wrong standard under section 5-8-4(d)(1), in that it referred to "serious bodily injury" as opposed to "severe bodily injury." As a result, defendant argues that these three attempted murder convictions for Brian, Demarcus, and Sandra were not triggering offenses mandating consecutive sentences. Defendant further argues that the court's use of the wrong standard, coupled with the undisputed facts, entitles this issue to *de novo* review. See *People v. Daniels*, 187 Ill. 2d 301, 307 (1999) (when the issues raised are purely issues of law, the *de novo* standard of review is appropriate).

¶ 124 At the outset, we reject defendant's request to review this issue *de novo*. In *People v. Williams*, 335 Ill. App. 3d 596, 601 (2002), the court specifically noted that because the question of the severity of the injury was factual in nature, the trial court was in the best position to determine the appropriate sentence. Accordingly, "we grant great deference to the trial court's sentencing decision, and we will not substitute our judgment for that of the trial court unless we find an abuse of discretion." *Id*. at 598.

¶ 125 That said, defendant is correct that not all gunshot wounds are severe because they are gunshot wounds. *Id*. at 599. Rather, it is necessary to take a look at the extent of the harm done by the gunshot in the particular case. *Id*. A review of the record in this case shows that there was sufficient evidence that Brian, Demarcus, and Sandra suffered "severe bodily injury." All three received immediate medical attention, and two of the three had surgery to remove the bullet. *Cf. Williams*, 335 Ill. App. 3d at 601 (remanding the case for a severe bodily injury

inquiry as to two of the victims where the victims were shot but did not receive immediate medical attention and where it was unclear why the trial court imposed consecutive sentences).

¶ 126 Regarding Brian's injury, he testified that he was shot in his right thigh and that his femur bone was shattered. After he was shot, he could not stand on his leg, move it, or get into the van on his own. In addition, Brian had two bullet grazes on his calves. Brian spent one week in the hospital, underwent surgery, and the bullet was removed. Accordingly, it was reasonable for the trial court to find that Brian suffered severe bodily injury.

¶ 127 Demarcus, too, was shot in the leg, causing him to fall, and a friend had to help him crawl back to the car. Demarcus testified that his friends drove him to the hospital, where he was given pain medication and a Tetanus shot. Demarcus testified that after he was shot, he was in a lot of pain and that his leg bled severely. Based on this evidence, it was reasonable for the trial court to find that Demarcus's gunshot wound constituted severe bodily injury.

¶ 128 Finally, Sandra suffered a gunshot wound to her hip or back area. Although defendant is correct that she did not testify at trial, other witnesses' testimony illustrated that the gunshot wound was severe. For example, Hashim testified that a female get shot while ducking in front of the van. Because Sandra was the only female victim listed in the charges against defendant, we agree with the State that we can infer that Hashim's testimony referred to Sandra. According to Hashim, he laid Sandra down in the grass and then checked on his friends. When he returned, Sandra was still lying in the grass and said that she was dying and to call for help. When an officer responded to the scene, the officer found Sandra inside the house, lying on the kitchen floor. Sandra was then transported to the hospital, where she underwent surgery and a bullet was removed. Again, it was reasonable for the trial court to find that Sandra's gunshot wound constituted severe bodily injury.

¶ 129 Next, while defendant is correct that the trial court misspoke when stating that the sentencing statute provided for "serious bodily injury" as opposed to "severe bodily injury," the error was harmless. See *People v. Pardo*, 83 Ill. App. 3d 556, 565 (1980) (trial court's misstatement during sentencing hearing was harmless error). We agree with the State that "serious" and "severe" are closely related terms and that defendant cannot show how he was prejudiced. As stated, this case was a bench trial in which the court took extensive notes. Prior to its sentencing decision, the court stated that it had dedicated "many hours preparing for this sentencing hearing" and had "given it [the court's] complete thought and consideration." The court further stated that it had reviewed "everything," including the presentence report and its notes from trial and that its decision was "not easy." Accordingly, there is no evidence that the trial court misapplied the law in rendering its sentencing decision.

¶ 130 Defendant next argues that the aggravated discharge of a firearm conviction could not serve as a triggering offense for consecutive sentences. The indictment in this case alleged that defendant knowingly discharged a firearm in the direction of the white van that he knew to be occupied; no victim was specified. The evidence at trial was that Glenn, who had already been shot, was driving the van when the fatal shot struck him. The State therefore argues that Glenn's death was the necessary severe bodily injury needed to trigger the offense of aggravated discharge of a firearm as a consecutive sentence. In response to the State's argument, defendant argues that because first-degree murder is already a triggering offense under section 5-8-4(d)(1), the same injury that caused the death of Glenn should not be used again to serve as the severe bodily injury that rendered aggravated discharge of a firearm a triggering offense.

¶ 131 We agree with the State that the aggravated discharge of a firearm was a triggering offense for consecutive sentences. In *People v. Orasco*, 2014 IL App (3d) 120633, relied on by

the State, the court stated that it interpreted section 5-8-4(d)(1) "to require consecutive sentences in two situations: (1) where the defendant was convicted of first-degree murder; and (2) where the defendant was convicted of a *** Class X or Class 1 felony, and the defendant inflicted severe bodily injury during the commission of that felony." *Id.* ¶ 34.

¶ 132 In *Orasco*, the defendant was convicted of several offenses, including the first-degree murder of one victim (Terdic), the attempted first-degree murder of a second victim (Vasilakis) by shooting him in the head, home invasion, and armed robbery. *Id.* ¶ 3. The reviewing court determined that all four sentences for these convictions had to be served consecutively, reasoning as follows. *Id.* ¶ 35. The first-degree murder of Terdic was a triggering offense under section 5-8-4(d)(1). *Id.* Next, the attempted first-degree murder of Vasilakis was a Class X felony, and the gunshot to Vasilakis's head was a severe bodily injury, making it a triggering offense as well. *Id.* Likewise, the home invasion and armed robbery were both Class X felonies, and critical here, the court relied on the gunshot to Vasilakis's head as the severe bodily injury inflicted during the commission of those offenses. *Id.* Aside from Vasilakis's severe bodily injury, the court also noted that Terdic's death sufficed as a severe bodily injury that was inflicted during the commission of the home invasion and armed robbery. *Id.* Accordingly, the *Orasco* court concluded that section 5-8-4(d)(1) required that all four sentences be served consecutively, and the defendant conceded the issue. *Id.* ¶¶ 33, 35.

¶ 133 The same reasoning applies here. Aggravated discharge of a firearm is a Class 1 felony, and the severe bodily injury was the fatal gunshot to Glenn. Defendant's argument that the gunshot that caused Glenn's death cannot result in two triggering offenses for consecutive sentences is without merit. In other words, the fatal gunshot to Glenn rendered both the first-

degree murder and the aggravated discharge of a firearm triggering offenses for consecutive sentences.

¶ 134 2. One-Act, One-Crime

¶ 135 Defendant's final argument is that because only one death occurred (Glenn's death), the mittimus must be corrected to reflect only one first-degree murder conviction, not two. See *People v. King*, 66 Ill. 2d 551, 566 (1977) (one-act, one-crime rule prohibits multiple convictions where the convictions have been carved from the same physical act); see also *People v. McLaurin*, 184 Ill. 2d 58, 104 (1998) (where but one person has been murdered, there can be but one conviction for murder). Defendant points out that the court found him guilty of both (intentional) first-degree murder (count I) and felony murder based on mob action (count III), and he argues that this court should vacate the felony murder count. See *id*. (where charges of intentional, knowing, and felony murder have been proved, intentional murder is the deemed the most serious offense); *People v. Rodriguez*, 336 Ill. App. 3d 1, 13 (2002) (where multiple convictions for murder are obtained for offenses arising out of a single act, only the conviction and sentence for the most serious murder charge will be upheld). For this reason, defendant argues that plain error occurred. See *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009) (holding that the respondent had satisfied her burden to show that plain error occurred, as it was well-established that a one-act, one-crime violation affected the integrity of the judicial process, thus satisfying the second prong of the plain-error test).

¶ 136 The State concedes error and agrees that the mittimus should be corrected. Although the State advocates remanding the case to the trial court to correct the mittimus, we note that a reviewing court may correct the mittimus without remanding the cause to the trial court. See *People v. Lee*, 2012 IL App (1st) 101851, ¶ 55 (noting that under Illinois Supreme Court Rule

615(b)(1) (eff. Aug. 27, 1991), a reviewing court may modify the judgment or order from which the appeal is taken). Accordingly, we vacate the conviction for felony murder (count III) and order the correction of the mittimus to reflect one conviction for first-degree murder (count I). See *People v. Jones*, 371 Ill. App. 3d 303, 310 (2007) (reviewing court ordered the correction of the mittimus).

¶ 137 III. CONCLUSION

¶ 138 For all of these reasons, we affirm the Winnebago County circuit court judgment as to all of defendant's convictions except for count III, the felony murder count, which we vacate. We order the correction of defendant's mittimus to reflect one conviction for first-degree murder (count I).

¶ 139 Affirmed in part, vacated in part; mittimus corrected.