

2015 IL App (4th) 130802-U

NO. 4-13-0802

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 24, 2015
Carla Bender
4th District Appellate
Court, IL

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
ANTHONY L. MEADS,)	No. 12CF1317
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Pope and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed and remanded for a new trial, concluding the State presented sufficient evidence upon which a jury could find defendant guilty of first degree murder, but it engaged in prosecutorial misconduct that so seriously undermined the fairness of the trial that a new trial is warranted.

¶ 2 In May 2013, a jury convicted defendant, Anthony L. Meads, of first degree murder in the death of Desirae Austin following the Parkland Community College (Parkland) fireworks display on July 4, 2012. The trial court subsequently sentenced him to 50 years' imprisonment.

¶ 3 Defendant appeals, asserting (1) the State failed to prove him guilty of murder beyond a reasonable doubt, (2) the State engaged in prosecutorial misconduct during the trial, and (3) trial counsel committed ineffective assistance of counsel by advising defendant not to testify. We reverse and remand for a new trial.

¶ 4

I. BACKGROUND

¶ 5 In August 2012, the State charged defendant with three counts of first degree murder arising from the death of Desirae on July 4, 2012. Count I charged defendant with felony murder, alleging he, or one for whose conduct he was legally responsible, while committing the forcible felony of mob action and armed with a firearm, knowingly and by the use of force disturbed the public peace by discharging a firearm in the direction of Johnnie Campbell and Rajon Campbell, thereby causing the death of Desirae (720 ILCS 5/9-1(a)(3) (West 2012)). Count II charged defendant with intentional murder, alleging he, without lawful justification and with the intent to kill or do great bodily harm to Desirae or another, discharged a firearm in Desirae's direction, thereby causing her death. (720 ILCS 5/9-1(a)(1) (West 2012)). Count III charged defendant with reckless murder, alleging he, without lawful justification, discharged a firearm in the direction of Desirae or another, knowing the act created a strong probability of death or great bodily harm, thereby causing Desirae's death. (720 ILCS 5/9-1(a)(2) (West 2012)).

¶ 6

A. Trial

¶ 7 In May 2013, defendant's jury trial commenced, at which time the jury heard the following evidence.

¶ 8

1. *Tasha Hughes*

¶ 9 Tasha Hughes, Desirae's cousin, testified she last saw Desirae at church the Sunday before her death. At the prompting of the prosecutor, Tasha testified Desirae was married, and her husband was a member of the United States military stationed in Kentucky. According to Tasha, Desirae and her husband had two children, ages two and three, and Tasha provided their names to the jury. Tasha further stated Desirae had two sisters and three brothers.

¶ 10

2. *Stipulation as to Cause of Death*

¶ 11 The parties stipulated that on July 4, 2012, Desirae suffered a gunshot wound while standing near the intersection of Cruising Lane and Thornton Drive. She was transported to the hospital, where a doctor determined she suffered a fatal gunshot wound to the chest. The round was still inside her chest, which police collected as evidence. Forensic pathologist Amanda Youman performed the autopsy and confirmed the cause of death was a gunshot wound to the chest.

¶ 12 *3. Johnnie Campbell*

¶ 13 Johnnie Campbell admitted he had a 2010 robbery conviction, and the State paid his transit costs to assure his appearance at trial.

¶ 14 Johnnie testified he attended the Parkland fireworks display on July 4, 2012. Afterward, he walked back to his aunt's home on Thornton Lane, near the intersection of Thornton Drive and Cruising Lane, where he was joined by Tiffany Dishman and Desirae. Johnnie's girlfriend, Mycharrae Kirkwood, also arrived at the house, and the two of them began arguing. Mycharrae's sister, Riesha Howard, saw the exchange and became upset. Riesha left, walking down Cruising Lane, and Kirkwood followed. Johnnie watched Riesha approach Antwon Anderson and Phil Myrick, who were standing in the street at 1607 Cruising Lane. Upon seeing the exchange, Johnnie walked toward Mycharrae, but Antwon and Phil, with whom he had a history of animosity, told him to stay away from her. At this point, Johnnie said he was standing around 1605 or 1606 Cruising Lane. The men took off their shirts to signal their intention of fighting Johnnie, at which point Johnnie retreated to enlist assistance from his brother, Rajon Campbell, who was on a nearby street.

¶ 15 Johnnie testified he rounded the corner onto Thornton Drive and called out to Rajon. Along with Rajon, several other family members appeared and followed Johnnie back to

1607 Cruising Lane. Johnnie testified neither he nor Rajon carried any weapons. As he walked back, he observed Phil and Antwon walking toward a white car, later identified as defendant's Buick LeSabre, parked in the driveway at 1607 Cruising Lane. At that point, Johnnie said he observed an unspecified number of people coming around the corner and carrying guns.

Specifically, he observed Treshaun Jake with a gun. Johnnie testified he began to retreat because he had no firearm. Treshaun joined Antwon and Phil in the driveway of 1607 Cruising Lane.

The trio was often seen together.

¶ 16 After realizing Johnnie did not possess a firearm, Treshaun agreed to fight Johnnie and laid his gun down in the middle of the road. As Johnnie approached for the fight, Treshaun retrieved the gun. Johnnie again retreated, and Treshaun fired his handgun into the air. Johnnie and his brother began moving away from Treshaun. Johnnie testified he heard someone say, "Nah, shoot at 'em, shoot at 'em." He and Rajon ran as "[b]ullets started *** flying everywhere." He heard a bullet whiz close by his shoulder before they took cover behind a neighbor's pickup truck. He believed Treshaun was shooting at him. He did not observe Phil or Antwon to have guns. Johnnie specifically stated he did not see defendant at the scene.

¶ 17 After fleeing the street for his aunt's house, Johnnie heard someone shout that someone had a shotgun. A group of people sought refuge in Johnnie's aunt's home, at 1510 Thornton Drive, where they remained hidden until police arrived.

¶ 18 *4. Rajon Campbell*

¶ 19 Rajon testified he viewed the Parkland fireworks display with his brother and other family members on July 4, 2012. After the fireworks, he and Johnnie went separate ways. While Rajon was at his cousin's house, he heard Johnnie calling his name. Rajon and several other people ran toward Johnnie's voice. He met up with Johnnie on the corner of Cruising Lane

and Thornton Drive. Rajon observed there had been a confrontation in the area based on the "loud talking" and individuals without shirts. Rajon then saw an unknown person with a gun.

¶ 20 At that point, the unknown person began shooting. Rajon identified Phil as being with the shooter. However, he did not know the shooter. He also did not identify defendant as being present during the shooting. Upon hearing the shots fired, Rajon and Johnnie began running. They ducked behind a pickup truck, then, when the shooting stopped, they ran to their aunt's house. En route to his aunt's house, Rajon noticed Desirae on the ground in the road. Once inside, he sent Gwannecia Allen and another woman out to check on Desirae.

¶ 21 *5. Tiffany Dishman*

¶ 22 Tiffany Dishman testified, prior to the July 4, 2012, altercation that resulted in Desirae's death, she observed Treshaun shooting his gun into the air at 1607 Cruising Lane. Later, while in the area of Cruising Lane and Thornton Drive, Tiffany observed Johnnie and Mycharrae having an altercation, at which time Riesha ran to 1607 Cruising Lane. When Riesha approached Treshaun and the other men standing outside, Tiffany, Johnnie, and Desirae began to walk toward Riesha. Tiffany testified she and Desirae urged Johnnie not to engage with Treshaun. Treshaun stepped into the middle of the road and took off his shirt. The men started arguing, at which time Rajon heard the commotion and came around the corner. At that point, Tiffany testified, she started hearing gunshots. She identified Treshaun as the shooter. She also identified Phil and Antwon as being with Treshaun. While familiar with the defendant, Tiffany failed to mention him when asked to indicate who was present during the altercation between Johnnie and Treshaun.

¶ 23 When the shooting stopped, Tiffany discovered Desirae lying in the middle of Cruising Lane. She called 9-1-1 and remained with Desirae until police arrived. Tiffany

testified, while she was on the phone with dispatchers, defendant approached her. This occurred approximately two to three minutes after the shooting stopped. According to Tiffany, defendant pointed a rifle at her head and said, "where those n***s at?" She said she did not know what he was talking about. He then walked to the edge of Hedge Road and Thornton Drive before shooting two to three shots into the air. On cross-examination, Tiffany acknowledged she did not mention her encounter with defendant to police the first time they interviewed her but raised it instead during a later interview.

¶ 24

6. *Gwannecia Allen*

¶ 25 Gwannecia Allen testified she attended the Parkland fireworks on July 4, 2012. Afterward, she walked down Thornton Drive toward her friend's house on Hedge Road. When she reached her friend's house, she remained to socialize with Rajon and a few other people. After awhile, she heard someone calling for Rajon. She went toward the voice with Rajon, which led them to Thornton Drive and Cruising Lane. A couple of minutes after her arrival, Gwannecia observed Johnnie and Treshaun arguing. According to Gwannecia, Treshaun then began shooting, at which time she and the other individuals on the street began running. She recognized Antwon and Phil with him.

¶ 26 After the shooting ended, Gwannecia noticed Desirae lying in the middle of the street. Gwannecia thought Desirae had fainted and went to help her. Tiffany called 9-1-1 while Gwannecia sat with Desirae. At the time, Desirae was alive, so Gwannecia held her hand until Desirae fell unconscious. According to Gwannecia, while she and Tiffany assisted Desirae, defendant approached them. He asked, "where them n***s go?" and pointed a shotgun in their direction. She believed he was referring to Johnnie and Rajon. He then walked away, shooting the gun three to four times. Gwannecia testified she did not know defendant well, but she was

aware that he was friends with Treshaun, Antwon, and Phil. On cross-examination, Gwannecia acknowledged she did not speak to police until several days following the shooting.

¶ 27

7. Raneice Fondia

¶ 28 Raneice Fondia testified, on July 4, 2012, she lived at 1605 Cruising Lane. She had been watching the fireworks at Parkland with her family. Upon returning home, she walked past 1607 Cruising Lane. She observed Treshaun and Antwon shooting firecrackers. While she and her family were inside the house, she heard a commotion outside. Raneice went outside and observed Rajon, Tiffany, Johnnie, and about 30 other people standing in front of her house. They were arguing with Treshaun and Antwon. It appeared the fight was Treshaun and Antwon versus Rajon and Johnnie. From her porch, she observed Treshaun with a gun, shooting approximately three times into the crowd. She ran back inside with her children and reemerged once the shooting stopped. Treshaun and Antwon remained in the street. Raneice overheard Antwon say, "you shot that girl," and Treshaun responded either, "yeah, so" or "I don't give a f***."

¶ 29

Raneice called 9-1-1, which is when she observed a man walking around the corner with a shotgun. He was walking angrily toward her neighbor's house. Reneice further testified she did not know defendant.

¶ 30

8. Phillip McDonald

¶ 31

Phillip McDonald testified he was a patrol officer with the Champaign police department. On July 4, 2012, he was dispatched to investigate a shooting near Cruising Lane and Thornton Drive. Upon arrival, an unknown female approached him, screaming for help. An unconscious female, later identified as Desirae, was lying on her back in the road with her eyes open. Several other officers arrived on the scene immediately after Officer McDonald. Officer

McDonald testified the streets were lined with people yelling and attempting to approach him and Desirae's body. The State then played a video from Officer McDonald's squad-car dashcam showing officers' attempts to resuscitate Desirae.

¶ 32 While officers were attempting to revive Desirae, Officer McDonald was approached by two different subjects: defendant and Treshaun. According to McDonald, defendant was upset and appeared to be crying. Defendant said he thought the victim was his sister. After receiving a description of defendant's sister, Officer McDonald indicated the deceased was not defendant's sister.

¶ 33 *9. Marshall Henry*

¶ 34 Officer Marshall Henry with the Champaign police department testified he was with the community-action team on July 4, 2012, when he responded to a shooting at Cruising Lane and Thornton Drive. Officer Henry began searching for evidence, such as shell casings and potential witnesses. During his search, defendant flagged him down in front of 1607 Cruising Lane. Defendant was concerned the victim was his sister, and Officer Henry informed him the victim was not his sister. Treshaun was with defendant at the time.

¶ 35 When defendant walked away, Officer Henry noticed defendant kick a spent shell casing. Officer Henry then noticed other spent shell casings in the driveway. He and other officers immediately detained defendant, Treshaun, and another individual.

¶ 36 *10. Corey Phenicie*

¶ 37 Officer Corey Phenicie of the Champaign police department testified, on July 4, 2012, he was assisting in securing the crime scene. While canvassing for evidence near 1607 Cruising Lane, he learned Officer Henry had discovered a shell casing. He then noticed additional shell casings in the driveway. He and other officers then detained defendant,

Treshaun, and Kahindae Jake. While searching defendant, Officer Phencie located a .45-caliber handgun in defendant's waistband. A live round was located in the chamber.

¶ 38 *11. Patrick Funkhouser*

¶ 39 Investigator Patrick Funkhouser testified as an expert in firearms. He examined a .45-caliber semiautomatic pistol found on defendant's person at the time of his arrest. He testified that, following a shot, the empty casing would eject onto the ground. He also examined the shotgun. Once a shot was fired, the shooter would have to manually move the gun's slide to eject the empty shell.

¶ 40 *12. Russell Beck*

¶ 41 Officer Russell Beck with the Champaign police department testified, on July 4, 2012, he was dispatched to the area of Thornton Drive and Cruising Lane to investigate a shooting. While collecting evidence, he recovered a projectile from the floorboard of a pickup truck that had been located on Cruising Lane at the time of the shooting. He also recovered a projectile from the bed of the truck. Officer Beck recovered various shell casings from a .40-caliber gun in the street in front of 1603 Cruising Lane, the area in which the pickup truck had been parked at the time of the shooting. Additionally, he recovered a shotgun shell in the street in front of Thornton Drive. Inside defendant's white Buick LeSabre, which was parked at 1607 Cruising Lane, Officer Beck recovered a shotgun and shell casings from the trunk.

¶ 42 *13. Art Miller*

¶ 43 Art Miller, a police officer and crime-scene technician for the Champaign police department, testified he recovered from the driveway at 1607 Cruising Lane (1) numerous shell casings from a 9-millimeter Luger, (2) a spent shotgun shell, and (3) spent .45-caliber shell casings.

¶ 44

14. *Forensic Evidence*

¶ 45 The parties stipulated the pistol, shotgun, and shell casings recovered from the scene failed to produce any latent fingerprints or deoxyribonucleic acid (DNA). Vickie Reels from the Illinois State Police forensic-sciences command testified as an expert in the field of firearms. She determined the 12-gauge shell casings were from the shotgun recovered from the Buick. The .45-caliber shell casings were fired from the Luger in defendant's possession at the time of his arrest. The bullet that killed Desirae was also fired from the Luger.

¶ 46

15. *Robb Morris*

¶ 47 Detective Robb Morris testified he interviewed defendant in reference to the shooting. The interview was audio and video recorded; however, while the video played for the jury, the video malfunctioned at an unspecified point and the remainder would not play.

¶ 48 Detective Morris testified defendant told him he had been with Treshaun, Darian Jake, and Antwon on July 4, 2012, at Antwon's home at 1607 Cruising Lane. He drove over in his white Buick LeSabre. The group walked over to view the fireworks after sunset, then returned to Cruising Lane afterwards. Defendant explained tensions were high in the neighborhood due to, he believed, a dispute between the Gangster Disciples and Black Pea Stones gangs. He observed both gangs calling each other names. According to Detective Morris, defendant said he associated with members of Gangster Disciples, as did Treshaun.

¶ 49 During the altercation, defendant said he heard gunshots and saw people running. Defendant said the Black Pea Stones were shooting at Gangster Disciples. Defendant told Detective Morris he hid behind his Buick LeSabre when the shooting began, at which time he grabbed a stick to protect himself. He identified the shooters as "little Mike," "KG," and "Taz"; however, police were never able to find any individuals with those nicknames. Defendant

offered to look at police photographs to identify the shooters, but police did not provide him with any photographs from which he could select the alleged suspects. According to defendant, when "KG" approached him while carrying a shotgun, defendant started swinging his stick. During the melee, defendant said "KG" dropped the shotgun, at which time defendant grabbed it and threw it in his trunk. Defendant was unsure where Treshaun was located during the shooting.

¶ 50 According to defendant, the Gangster Disciples began chasing the Black Pea Stones toward Mattis Street, and defendant trailed behind them. He heard a scream and someone told him a girl had been shot. Concerned the victim was his sister, he turned back toward the screams. Defendant denied ever firing a gun that evening. Defendant said both gangs were in the wrong for shooting at one another, especially with the "little girl" caught in the crossfire. En route to where the girl had been shot, defendant said he discovered a .45-caliber handgun in the road, which he picked up and placed in his waistband. Before placing the gun in his waistband, he looked at the magazine and determined it was a .45-caliber handgun. He thought he might try to sell the gun the next day. He then approached the unconscious girl lying in the road, but police pushed him away. An officer verified the victim was not his sister. Upon returning to Antwon's house, Antwon told him to pull the Buick out of the driveway and into the street.

¶ 51 Detective Morris testified defendant wavered on whether his DNA would be on the shotgun because he had adjusted the stock. However, DNA analysis, fingerprint analysis, and gunshot-residue kits failed to produce any evidence. Detective Morris noted one of the officers allowed defendant to wash his hands prior to the police testing his hands for gunshot residue. Based on the shell casings recovered, Detective Morris stated they believed four weapons had been involved in the shooting.

¶ 52 During a later interview, in August 2012, Detective Morris stated defendant told him he had been in a fight for his life on July 4, 2012. The detective did not recall any further details.

¶ 53 B. Jury Deliberations

¶ 54 During deliberations, the jury asked to review twice the dashcam footage depicting the officers' resuscitation attempts on Desirae. Defendant did not object. Before watching the recording a second time, the jury requested photographs of defendant and Treshaun. The prosecutor indicated those photographs were contained in People's exhibits A, B, and C. Defendant did not object, and the photographs were provided to the jury. However, though People's exhibits B and C depicted defendant and Treshaun, People's exhibit A was a photograph of Desirae prior to her death.

¶ 55 Following deliberations, the jury found defendant guilty of first degree murder.

¶ 56 C. Posttrial Proceedings

¶ 57 1. *Posttrial Motion*

¶ 58 In May 2013, trial counsel filed a motion for a new trial, asserting the evidence was insufficient to support a guilty verdict. Following a June 2013 hearing, the trial court denied the motion despite defendant's assertion he wanted to discharge trial counsel due to ineffective assistance. The court thereafter appointed new counsel to represent defendant for purposes of sentencing. The same month, defendant filed a *pro se* motion for judgment notwithstanding the verdict or, in the alternative, a new trial, asserting the evidence was insufficient to support the jury's guilty verdict. Defendant also alleged trial counsel provided ineffective assistance of counsel. Upon the appointment of new counsel, defense counsel filed a supplemental motion for acquittal or, in the alternative, a new trial. The supplemental motion alleged, in part, trial

counsel was ineffective for incorrectly advising defendant he could be impeached by a home-invasion charge that had been dismissed. Further, the supplemental motion contended the evidence was insufficient to support the jury's verdict.

¶ 59 *2. Ineffective Assistance of Counsel*

¶ 60 In August 2013, the trial court held a hearing on defendant's allegations of ineffective assistance of counsel. In part, defendant asserted trial counsel advised him not to testify because he would be impeached by a prior home-invasion conviction. However, defendant did not have a prior conviction for home invasion. Defendant argued, if not for trial counsel's erroneous advice, he would have testified on his own behalf.

¶ 61 As an offer of proof, defendant explained he would have testified he went to the July 4, 2012, fireworks with Treshaun and Antwon. After the fireworks, they returned to the area of Cruising Lane and Thornton Drive. He knew Johnnie but did not see Johnnie walking down the street that evening. He also was unaware of any argument between Johnnie, Rajon, Treshaun, Antwon, and Phil. Defendant would have testified he did not provide a gun to Treshaun or tell him to shoot at or toward Johnnie and Rajon. He was unaware that Treshaun, Phil, or Antwon possessed guns that evening.

¶ 62 According to defendant, he would have testified, at some point that evening, he learned of a nearby shooting. He immediately attempted to find out who was shot. He heard from someone the victim might have been his sister. Defendant further stated his testimony would have clarified some of the statements he made to police during his recorded interview. Also, defendant would testify he did not wash his hands at the police station; therefore, his hands could have been properly tested for gunshot residue.

¶ 63 Trial counsel testified he did not recall telling defendant he would be impeached by a home-invasion conviction if he testified. Rather, trial counsel said he advised defendant not to testify because, "I didn't think [defendant] could do any better testifying than he had on the video."

¶ 64 After recounting the testimony from the witnesses, the trial court found defendant failed to establish his claim for ineffective assistance of counsel. The court thereafter proceeded to the sentencing hearing.

¶ 65 *3. Sentencing Hearing*

¶ 66 After considering the evidence in aggravation and mitigation, the trial court sentenced defendant to 50 years' imprisonment on count I, the felony-murder charge. Later that month, defendant filed a motion to reconsider the sentence, which the trial court denied in September 2013.

¶ 67 This appeal followed.

¶ 68 **II. ANALYSIS**

¶ 69 On appeal, defendant argues (1) the State failed to prove defendant guilty beyond a reasonable doubt, (2) the State engaged in prejudicial prosecutorial misconduct, and (3) trial counsel provided ineffective assistance of counsel. We address these arguments in turn.

¶ 70 **A. Sufficiency of the Evidence**

¶ 71 Defendant first asserts the State presented insufficient evidence for the jury to find him guilty of first degree murder on any of the three counts beyond a reasonable doubt.

¶ 72 In a jury trial, the State bears the burden of proving the defendant guilty of every element of the offense beyond a reasonable doubt. *People v. Maggette*, 195 Ill. 2d 336, 353, 747 N.E.2d 339, 349 (2001). "A reviewing court will not set aside a criminal conviction on grounds

of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *Id.* In other words, where a jury finds a defendant guilty, our inquiry is whether, in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004).

¶ 73 In this case, the jury found defendant guilty of three counts of first degree murder: (1) felony murder (720 ILCS 5/9-1(a)(3) (West 2012)), (2) intentional murder (720 ILCS 5/9-1(a)(1) (West 2012)), and (3) reckless murder (720 ILCS 5/9-1(a)(2) (West 2012)). Because the trial court entered judgment on the felony-murder count, we begin our analysis there.

¶ 74 *1. Felony Murder*

¶ 75 The parties do not dispute Treshaun fired the shot that ultimately killed Desirae. Thus, with respect to the felony-murder count, the central question for the jury was whether and, if so, to what extent defendant participated in the mob action that resulted in Desirae's death.

¶ 76 To prove defendant committed mob action as charged in the information, the State had to prove defendant engaged in "the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law." 720 ILCS 5/25-1(a)(1) (West 2012). Defendant asserts the State failed to meet its burden. We disagree.

¶ 77 Although no witnesses specifically identified defendant as participating in the street fight—*i.e.*, the mob action—sufficient circumstantial evidence existed to support a conviction. The record clearly demonstrates those participating in the altercation were yelling at

one another and preparing to fight as Treshaun began shooting, which is sufficient to prove the offense of mob action.

¶ 78 As for defendant's participating in the mob action, defendant told police he was with Treshaun and others at the fireworks and upon returning from the fireworks. He represented they returned to 1607 Cruising Lane, where his 1983 Buick LeSabre was parked. He was with Treshaun again when police arrested them shortly after the shooting. In fact, defendant was in possession of the murder weapon at the time of his arrest. Gwannecia and Tiffany testified they observed defendant coming from the area of the shooting carrying a shotgun within minutes of the shooting, when he approached them as they assisted Desirae. According to Gwannecia and Tiffany, he then shot the gun into the air as he walked away. Raneice also recalled a male walking down the street shooting a shotgun after the initial shooting ended. Defendant's constant presence both before and after the mob action raises a reasonable inference that he was present during the mob action.

¶ 79 Circumstantial evidence also supports a finding that defendant was present during the mob action, despite no witnesses noting his presence. Johnnie specifically noted defendant was not present, and other witnesses did not identify defendant as one of the individuals with Treshaun. However, Johnnie noticed Phil and Antwon approaching defendant's car prior to the fight, which supports the inference that defendant was present at 1607 Cruising Lane just prior to the shooting. As Johnnie and Rajon approached Treshaun to fight, Rajon, who was not familiar with defendant, noticed five or six unspecified individuals on Cruising Lane getting ready to fight.

¶ 80 Even if the witness testimony was insufficient to place defendant at the scene, as previously indicated, defendant told police he was present at 1607 Cruising Lane during the

¶ 84 "A person is legally 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." 720 ILCS 5/5-2(c) (West 2012). Words of agreement are not necessary to demonstrate this shared purpose; it can be inferred from the surrounding circumstances. *People v. Cowart*, 2015 IL App (1st) 113085, ¶ 31, 27 N.E.3d 209. The State need not prove the existence of a preconceived plan where the evidence suggests the group participated in spontaneous criminal acts. *Id.* The trier of fact may consider, among other factors, the defendant's presence during the commission of the offense, his continued close association with other members of the group after the commission of the offense, or his failure to report the crime. *Id.* The defendant's mere presence at the scene is insufficient to prove accountability; however, it may constitute circumstantial evidence for the trier of fact to consider in determining the defendant's guilt. *Id.* A defendant is not accountable for the underlying offense if his involvement occurred after the commission of that offense. See *People v. Clark*, 221 Ill. App. 3d 303, 308, 581 N.E.2d 722, 726 (1991).

¶ 85 As noted above, defendant associated with Treshaun both immediately before and immediately after the shooting occurred and, in fact, police located the murder weapon in his waistband upon his arrest. Despite gunshots being fired, defendant did not report the offense. In defendant's own statement to police, he was present at 1607 Cruising Lane when the shots were fired and picked up a weapon—a stick—to participate in the altercation. Additionally, Johnnie testified he saw numerous individuals carrying guns just prior to the shooting, and defendant was spotted carrying and firing a shotgun within minutes after the shooting. Although the prosecution presented no evidence to demonstrate Treshaun and defendant entered into an

express agreement to engage in an altercation with the Campbells, the group's spontaneous criminal acts of arming themselves with firearms provides sufficient circumstantial evidence upon which the jury could find defendant accountable for Treshaun's illegal acts. Thus, we conclude sufficient evidence supported defendant's conviction for intentional and reckless murder.

¶ 86

B. Prosecutorial Misconduct

¶ 87

Defendant next contends his conviction should be reversed for prosecutorial misconduct. Specifically, defendant alleges the State committed misconduct by (1) prompting the life witness to provide extensive background information on Desirae's family, (2) playing the recording of police unsuccessfully attempting to revive Desirae, (3) providing prejudicial cumulative evidence of Desirae's death, (4) sending Desirae's photograph back to the jury after the jury requested photographs of Treshaun and defendant, and (5) misstating the evidence in closing argument.

¶ 88

Defendant did not raise any of these issues before the trial court. Therefore, these issues are forfeited. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129 (1988) (failure to raise an issue before the trial court results in forfeiture of appellate review). However, we may consider an otherwise forfeited issue where the defendant demonstrates a plain error or defect affected his substantial rights. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). To prove plain error, a defendant must first show a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410 (2007). If so, the next inquiry is whether (1) in a closely balanced case, "the error alone threatened to tip the scales of justice against the defendant"; or (2) the error "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Id.* at 565, 870

N.E.2d at 410-11. Thus, we turn to whether the prosecutor's conduct constituted a clear or obvious error.

¶ 89 "The duty of a public prosecutor is to seek justice, not merely to convict." Ill. Rs. Prof'l Conduct R 3.8 (eff. Jan. 1, 2010). Where a prosecutor engages in misconduct that seriously undermines the integrity of the judicial proceedings, the defendant's conviction may be reversed under the plain-error doctrine. *People v. Johnson*, 208 Ill. 2d 53, 64, 803 N.E.2d 405, 412 (2003). We review *de novo* the allegations of prosecutorial misconduct. See *People v. Ramsey*, 239 Ill. 2d 342, 438, 942 N.E.2d 1168, 1221 (2010).

¶ 90 *1. Life Witness Testimony*

¶ 91 Defendant argues the prosecutor committed clear or obvious error by eliciting extensive testimony from the life witness regarding Desirae's family. We agree. The supreme court "has consistently condemned the admission of evidence that the deceased left a spouse and a family. Evidence of this nature has no relationship to the guilt or innocence of the accused, but normally serves only to prejudice the defendant in the eyes of the jury." *People v. Hope*, 116 Ill. 2d 265, 275, 508 N.E.2d 202, 206 (1986). The admission of such evidence is both irrelevant and so highly prejudicial that the trial court has the duty to refuse the evidence on its own motion. *Id.* That being said, "[i]n certain instances, *depending upon how this evidence is introduced*, such a statement can be harmless; this is particularly true when the death penalty is *not* imposed." (Emphases in original.) *Id.* at 276, 508 N.E.2d at 207.

¶ 92 The State's first witness, Tasha, testified as Desirae's life witness. The prosecutor asked if Desirae was married. After Tasha responded that Desirae was married, the prosecutor asked for the name of her spouse. The prosecutor then asked, "And where is he located?" Tasha responded he was in "the service" in Kentucky. The prosecutor also inquired as to the number of

Desirae's brothers and sisters. Further, the prosecutor asked whether Desirae had any children, the ages of those children, and the names of those children. None of this information was relevant to the trial.

¶ 93 The State asserts these questions were foundational and "in no way dwelled on the victim's family or attempted to improperly inflame the jury." The State further contends the purpose of Tasha's testimony was to establish Desirae died on July 4, 2012. We disagree. The prosecutor's "foundational" questions had no bearing on the facts of the case, and the State intentionally elicited information that would inflame the emotions of the jury—particularly, that Desirae's husband was in the service and that she had two very young children. The prosecutor also ensured the jury knew the names of the immediate family members Desirae left behind, including the names of her young children. The prosecutor asked numerous questions regarding Desirae's family, and only one question regarding Desirae's death, which belies the State's assertion that the purpose of Tasha's testimony was to establish the date of Desirae's death. Given the State opened its case with this testimony and intentionally elicited prejudicial information to increase the jury's compassion for Desirae, this evidence was not harmless. To the contrary, eliciting such statements was improper.

¶ 94 *2. Resuscitation Video*

¶ 95 Defendant next asserts the dashcam video depicting officers attempting to revive Desirae served only to inflame the emotions of the jury. Exhibits are admissible if they tend to prove a material fact and the probative value of the exhibit outweighs the potential prejudice to the defendant. *People v. Blue*, 189 Ill. 2d 99, 122, 724 N.E.2d 920, 932 (2000). "[W]here spectacular exhibits having little probative value are offered for the principal purpose of arousing prejudicial emotions they should be promptly excluded." (Internal quotation marks omitted.) *Id.*

¶ 96 The State asserts the video not only showed the officers' attempts to revive Desirae, but also showed the size of the crowd around the time of the shooting, which was relevant to the case. However, nothing in the record supports the State's argument that the crowd when police arrived in any way resembled the crowd at the time of the shooting. No witnesses disputed there was a large crowd at the scene when the shooting occurred. In fact, other than those who remained with Desirae, the witnesses stated they dispersed during the shooting. Moreover, the video focused squarely on Desirae's body, with the crowd barely in the periphery of the video. Thus, the State's argument that the video also depicted the crowd is unpersuasive.

¶ 97 In laying the foundation for the video, the prosecutor asked Officer McDonald, "Does [the video] fairly and accurately describe your efforts to help the victim that night at Cruising and Thornton Drive?" Based on the prosecutor's focus on the officers' attempts to resuscitate Desirae as she lay unconscious in the street and the video squarely centering on Desirae's body, we conclude the principal purpose for showing this video was to improperly arouse the prejudicial emotions of the jury.

¶ 98 Exacerbating the prejudice of the video, the jury was permitted to view the video twice more during deliberations. Based on the jury's request to see the photographs of Treshaun and defendant immediately before viewing the video, we assume the jurors were looking for Treshaun or defendant to appear in the video. Both parties agree defendant was depicted in the video approaching the officers as they attempted to resuscitate Desirae. Regardless, our review of the video, which shows several minutes of officers attempting to revive Desirae by repeatedly pumping on her chest area, depicts defendant for only a few seconds. There also existed no dispute that defendant approached officers as they attempted to revive Desirae. Though the video of the resuscitation attempts was not graphic, as Desirae's body was covered, the jurors

could clearly see officers attempting resuscitation. The prejudicial effect of showing the jury the video depicting officers' futile attempts to save Desirae's life—three times—far outweighed any probative value. We therefore conclude the prosecutor improperly used the video as evidence.

¶ 99

3. *Cumulative Evidence of Death*

¶ 100 Defendant next contends the cumulative evidence of death prejudiced defendant. Specifically, defendant argues the life witness, stipulation as to Desirae's death, and the video depicting officers attempting to revive Desirae prejudiced defendant by presenting unnecessary cumulative evidence of her death.

¶ 101

"Evidence is considered cumulative when it adds nothing to what was already before the jury." *People v. Ortiz*, 235 Ill. 2d 319, 335, 919 N.E.2d 941, 950 (2009). First, we note Hughes testified regarding Desirae's death prior to the parties submitting to the jury a stipulation that Desirae indeed died from a gunshot wound on July 4, 2012. Defendant agreed to the stipulation, so he cannot complain of it now. See *People v. Johnson*, 334 Ill. App. 3d 666, 680, 778 N.E.2d 772, 784 (2002) (A defendant forfeits his right to complain of an error when, on appeal, he takes a position inconsistent with his position at an earlier court proceeding.). As to the video depicting officers attempting to resuscitate Desirae, we agree the video was needlessly cumulative. That officers attempted to revive Desirae had no bearing on the fact that she was killed by a gunshot wound. Accordingly, we conclude the repeated evidence of Desirae's death improperly provided unnecessarily cumulative evidence.

¶ 102

4. *Photograph of Desirae*

¶ 103

Defendant argues the prosecutor engaged in prejudicial misconduct by sending Desirae's photograph to the jury during deliberations even though the photograph was not requested. When the jury requested photographs of Treshaun and defendant, the prosecutor

informed the trial court the photographs were contained in People's exhibits A, B, and C. Although exhibits B and C did depict defendant and Treshaun, exhibit A depicted Desirae's photograph. The photograph had no relevance to the substantive evidence in the case and, moreover, the jury did not request it. The only purpose in sending back the photograph would be to inflame the emotions of the jury.

¶ 104 The State asserts the prosecutor did not intentionally send a picture of Desirae to the jury and, regardless, trial counsel acquiesced to the photograph being sent to the jury. We disagree as to both arguments. First, the jury requested two photographs, but the State represented to the trial court those *two* photographs were contained in *three* exhibits. Thus, the prosecutor made a misrepresentation to the court regarding the exhibits which contained the requested photographs. Second, trial counsel did not acquiesce to sending Desirae's photograph to the jury. Rather, trial counsel acquiesced to sending back the photographs of Treshaun and defendant, which the prosecutor misrepresented to the court and counsel as being contained in People's exhibits A, B, and C. Nowhere in the exchange did trial counsel agree to the jury viewing the photograph of Desirae, nor does the record reflect trial counsel viewed the exhibits prior to agreeing to send them to the jury. The result of the jury viewing that photograph during a crucial phase of deliberations was prejudicial and contributed to denying defendant a fair trial. Thus, we find the State's arguments unpersuasive and conclude the prosecutor's conduct was improper.

¶ 105 *5. Closing Arguments*

¶ 106 Finally, defendant points to numerous aspects of the State's closing arguments as further representation of prosecutorial misconduct.

¶ 107 "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419 (2009). In reviewing a closing argument, we must consider the argument in its entirety and the statements in context. *People v. Wheeler*, 226 Ill. 2d 92, 122, 871 N.E.2d 728, 745 (2007). Thus, defendant's failure to object to an improper remark does not preclude our review of the improper remark. *Id.* at 123, 871 N.E.2d at 745. "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Id.* A prosecutor's misconduct during closing arguments requires reversal where "the improper remarks constituted a material factor in a defendant's conviction." *Id.* We now turn to the prosecutor's statements challenged by defendant.

¶ 108 a. Defendant's Involvement in the Mob Action

¶ 109 Defendant asserts the prosecutor misstated the evidence with respect to defendant's involvement in the mob action. For example, defendant argues the prosecutor improperly stated Treshaun, Antwon, Phil, and *defendant* gathered in the street to fight Johnnie. Given our discussion of the evidence above, we conclude the prosecutor's argument consisted of a reasonable inference based on the evidence adduced during trial. See *Glasper*, 234 Ill. 2d at 204, 917 N.E.2d at 419 (a prosecutor may argue reasonable inferences drawn from the evidence). Despite defendant's argument to the contrary, Johnnie testified he noticed several people with guns acting on behalf of Treshaun, Antwon, and Phil. Though Johnnie did not observe defendant in the group, defendant told police he was in the driveway at 1607 Cruising Lane when the shooting occurred. Defendant also testified he used a stick to strike one of the shooters. From

this, the jury could have determined defendant was indeed present and participating in the underlying mob action.

¶ 110 Moreover, we are not troubled by the prosecutor, when describing the brewing fight in the streets, indicating Tiffany "knows some of these people involved. She knew of [defendant]." When we consider Tiffany's encounter with defendant following the shooting as well as the context in which the statement was made we find nothing improper. It was appropriate to suggest the jury should infer that defendant, someone Tiffany knew, engaged in postshooting conduct that supported his involvement in the preceding mob action.

¶ 111 b. Forensics

¶ 112 Defendant contends the prosecutor also made misstatements regarding the forensic evidence. During closing argument, the prosecutor explained the lack of forensic evidence recovered from the firearms by inaccurately stating that shooting a firearm erases DNA and fingerprint evidence. The State concedes the prosecutor's remark was improper but asserts it was not substantially prejudicial. However, as defendant asserts, this misstatement of evidence excused the jury from considering the lack of physical evidence obtained from the handgun and shotgun.

¶ 113 c. Theory of Accountability

¶ 114 Defendant next argues the prosecutor's statements in closing argument equated the theory of accountability with defendant's actions after the mob action. By discussing defendant's actions after the mob action, defendant argues, the prosecutor led the jury to believe defendant could be found guilty because he (1) possessed and fired the shotgun after the mob action ended, and (2) possessed the murder weapon at the time of his arrest. However, the State made these arguments to support its theory that defendant's actions after the mob action were

consistent with his involvement in or accountability for the initial mob action. This was a reasonable inference to be drawn from the evidence and, therefore, not improper.

¶ 115 d. Gang Affiliation

¶ 116 Defendant asserts the prosecutor inaccurately stated Treshaun, Antwon, Phil, and defendant were all associated with a gang, which prejudiced defendant due to the negative connotation of gang association. See *People v. Smith*, 141 Ill. 2d 40, 58, 565 N.E.2d 900, 907 (1990) ("particularly in metropolitan areas, there may be strong prejudice against street gangs"). However, "[i]t is generally held that evidence indicating the defendant was a member of a gang or was involved in gang-related activity is admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act." *Id.* "Evidence of gang related activity is only admissible where there is sufficient proof that such activity is related to the crime charged." *People v. Maldonado*, 398 Ill. App. 3d 401, 420, 922 N.E.2d 1211, 1226 (2010).

¶ 117 In this case, some evidence existed as to gang affiliation, as defendant described the entire altercation as resulting from gang activity. According to Detective Morris, defendant admitted he and Treshaun were affiliated and friends with other members of the Gangster Disciples. Thus, the prosecutor's reference to defendant and his group participating in gang activity was a reasonable inference based on the evidence. Even if the prosecutor's statement was improper, it was not enough to constitute clear or obvious error because defendant's statements to police introduced the theory of gang activity, and defendant himself admitted affiliation with a gang. Accordingly, he cannot demonstrate substantial prejudice resulted from the prosecutor referring to him and his friends as members of a gang.

¶ 118 e. Shell Casings

¶ 119 Defendant also argues the prosecutor's closing argument mischaracterized the presence of numerous shell casings recovered from the driveway at 1607 Cruising Lane as demonstrating a "gun battle" took place and inferred defendant had fired his shotgun from the driveway during the altercation. We disagree. Given "[a] prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields" (*Glasper*, 234 Ill. 2d at 204, 917 N.E.2d at 419), the prosecutors remarks were proper. The evidence showed at least four different weapons were discharged during this altercation. Describing the evidence as indicative of gun battle was a reasonable inference to be drawn from the evidence. We recognize the prosecutor's statement that the shells automatically ejected from the shotgun upon firing was an inaccurate recollection of Investigator Funkhouser's expert testimony, as he stated the shells had to be manually ejected. However, given the statement in no way changed the number of shells located or any other aspect of the physical crime scene, this statement did not constitute a material factor in defendant's conviction.

¶ 120 f. "Running Right Behind" Johnnie

¶ 121 Finally, defendant argues the prosecutor misstated the evidence by remarking Johnnie and Rajon "made the right decision" by returning to their aunt's house after the shooting because defendant was "running right behind" them with a shotgun. This is a fair characterization of the evidence adduced at trial. According to Gwannecia, shortly after the shooting, while she and Tiffany assisted Desirae, defendant approached them. He asked, "where them n***s go?" and pointed a shotgun in their direction. She believed he was referring to Johnnie and Rajon. A reasonable inference to be drawn from the evidence was that the conflict was ongoing and defendant was in pursuit of or running after Johnnie and Rajon. Thus, the prosecutor's statement was not improper.

¶ 122 The State asserts any impropriety during closing arguments was cured by the instruction that opening and closing arguments are not evidence. We agree in part. The majority of the errors complained about failed to rise to the level necessary to create a pattern of prosecutorial misconduct. We find nothing in the record to support the proposition jurors disregarded the trial court's instruction that opening and closing arguments are not evidence and to disregard any statement inconsistent with the evidence. However, with respect to the prosecutor's misrepresentation of the forensic evidence, we conclude those improper remarks may have constituted a material factor in defendant's conviction. Given the fact the jury received no contradictory evidence concerning the impact the firing of a weapon would have on DNA or fingerprint evidence, it would not be unreasonable for the jury to accept the prosecutor's inaccurate representation.

¶ 123 *6. Cumulative Error*

¶ 124 Even if none of the improper statements, examinations, or evidence, on their own, were sufficient to warrant reversal, the cumulative impact of the prosecutor's misconduct warrants a new trial. In examining the prosecution's errors, we examine whether the cumulative errors "created a pervasive pattern of unfair prejudice to defendant's case." *Blue*, 189 Ill. 2d at 139, 724 N.E.2d at 941. Here, the prosecutor (1) elicited improper personal information about Desirae's family from Tasha, (2) admitted prejudicial video footage of officers attempting to revive Desirae, (3) provided prejudicial and cumulative evidence of death, (4) misrepresented which exhibits contained the requested photographs of Treshaun and defendant such that Desirae's photograph was sent back to the jury, and (5) made misstatements about the evidence in closing argument. We therefore conclude, in this case, the prosecution's actions created such a pervasive pattern of unfair prejudice to defendant as to constitute error. Having determined a

clear or obvious error exists, we next turn to whether the error requires reversal under the plain-error doctrine.

¶ 125 In determining whether an error is substantial enough to result in plain error, "[w]e ask whether a substantial right has been affected to such a degree that we cannot confidently state that defendant's trial was fundamentally fair." *Id.* at 138, 724 N.E.2d at 940-41. If so, reversal is warranted, regardless of the strength of the evidence. *Id.* at 139, 724 N.E.2d at 941.

¶ 126 We have already determined the prosecutor's errors created a pervasive pattern of unfair prejudice such that it constituted clear or obvious error. Accordingly, we cannot confidently state defendant's trial was fundamentally fair. Particularly in this circumstance, where the State presented only tenuous evidence of defendant's participation in the murder, the prosecutor's misconduct impacted the fundamental fairness of the trial. Accordingly, as defendant's substantial right to a fair trial has been compromised, fundamental fairness requires us to reverse defendant's murder conviction. Because we have already determined sufficient evidence was presented to support defendant's conviction, double jeopardy does not bar the retrial of defendant.

¶ 127 C. Ineffective Assistance of Counsel

¶ 128 Because we have reversed on other grounds, we need not examine defendant's complaint of ineffective assistance of counsel.

¶ 129 III. CONCLUSION

¶ 130 For the foregoing reasons, we reverse and remand for a new trial.

¶ 131 Reversed and remanded.