2017 IL App (4th) 141081-U

NO. 4-14-1081

FILED
December 5, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
RAJIV D. RICE,	)	No. 14CF302
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding that (1) the trial court did not err by admitting evidence that defendant was a member of a gang; (2) the prosecutor's closing and rebuttal arguments were not improper; (3) the evidence was sufficient to prove defendant guilty beyond a reasonable doubt; and (4) trial counsel was not ineffective for failing to object, on speedy-trial grounds, to the scheduling of a pretrial hearing.

¶ 2 A jury found defendant, Rajiv D. Rice, guilty of attempt (first degree murder) (720 ILCS 5/8-4(a), (c)(1)(B), 9-1(a)(1) (West 2014)), and the trial court imposed an aggregate prison sentence of 40 years: 25 years for attempt (first degree murder) plus 15 years for using a firearm during the commission of that offense. Defendant appealed, raising four claims, including a claim of ineffective assistance of counsel. In May 2017, we affirmed defendant's conviction. *People v. Rice*, 2017 IL App (4th) 141081-U, ¶ 103. As part of our analysis, we concluded, citing *People v. Veach*, 2016 IL App (4th) 130888, 50 N.E.3d 87, that the record on

appeal was insufficient for us to address defendant's claim of ineffective assistance of counsel. We explained that defendant's ineffective-assistance-of-counsel claim would be better addressed in a postconviction proceeding. *Rice*, 2017 IL App (4th) 141081-U, ¶ 78.

¶ 3 In June 2017, defendant filed a petition for rehearing, requesting us to grant rehearing in light of the supreme court's decision in *People v. Veach*, 2017 IL 120649, which reversed our decision in *Veach*, 2016 IL App (4th) 130888, 50 N.E.3d 87, and overruled the analysis we relied on in this case to determine that defendant's claim of ineffective assistance of counsel was better addressed in a postconviction proceeding. We granted defendant's motion for rehearing.

¶ 4 After rehearing, we resolve defendant's four claims in the following manner. First, he claims that his trial counsel was ineffective for failing to object when on April 10, 2014, the trial court scheduled a pretrial hearing for May 29, 2014. Defendant argues that the period of time that elapsed between the scheduling of the pretrial hearing and the occurrence of the pretrial hearing constituted a "delay" of his trial for speedy-trial purposes, which defendant "agreed to" under section 103-5(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-5(a) (West 2014)) by failing to object. We reject defendant's claim because he fails to establish prejudice.

¶ 5 Second, defendant argues the trial court committed reversible error by admitting evidence that he was a member of a gang. Without determining whether admission of the evidence was error, we conclude that any potential error did not affect the outcome of the trial and would therefore be harmless.

¶ 6 Third, defendant argues the State failed to prove him guilty beyond a reasonable doubt of attempt (first degree murder) because the State failed to prove intent, on his part, to

commit murder or to facilitate or promote a murder. However, when we regard all the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find this element to be proved beyond a reasonable doubt.

¶ 7 Fourth, defendant claims that in the prosecutor's closing and rebuttal arguments, she deprived him of a fair trial and committed plain error by asserting that defendant and his alleged coconspirator lured the victim into the open, to be shot. We find no error at all in the prosecutor's argument and conclude that she was arguing a reasonable inference from the evidence.

¶ 8 Therefore, we affirm the trial court's judgment.

¶ 9 I. BACKGROUND

¶ 10 A. The Pretrial Motion for Dismissal on Speedy-Trial Grounds

¶ 11 On July 15, 2014, defendant moved to dismiss the charge against him on the ground that he had not been "tried *** within 120 days from the date he *** was taken into custody." 725 ILCS 5/103-5(a) (West 2014). In the hearing on the motion, it was established that he had been continuously in custody since March 16, 2014. Defendant asserted that since his arrest, he had moved for a continuance of only seven days.

¶ 12 Defendant's motion raised a question, however, of whether the period from the preliminary hearing, on April 10, 2014, to the pretrial hearing, on May 29, 2014 (ultimately rescheduled to May 30, 2014), should be attributed to defendant. At the hearing on defendant's motion, defense counsel argued the answer was no. He noted that, in the preliminary hearing on April 10, 2014, it was the trial court's idea, not his idea, to schedule the pretrial hearing for May 29, 2014. Neither the prosecutor nor defense counsel moved for a continuance from April 10 to May 29, 2014; instead, the court, on its own initiative, simply consulted its calendar and set the

pretrial hearing. Therefore, defense counsel argued against any suggestion that this period was attributable to defendant.

¶ 13 The prosecutor argued, on the other hand, that if defendant had wanted an immediate trial on April 10, 2014, he could have demanded one and that, absent such a demand, the period from April 10 to May 29, 2014, was attributable to him through his acquiescence or failure to object.

¶ 14 The trial court noted that, under cases such as *People v. Cordell*, 223 Ill. 2d 380, 860 N.E.2d 323 (2006), "a defendant [could] agree to a delay through inaction, namely[,] by failing to object." The court held that, because defendant never objected to scheduling the pretrial hearing for May 29, 2014, the period from April 10 to May 29, 2014, was attributable to him. Therefore, the court denied his motion for dismissal on speedy-trial grounds.

¶ 15 B. Defendant's August 2014 Jury Trial

¶ 16 On August 19, 2014, a four-day jury trial began on defendant's charges.

¶ 17 1. *The Shooting, as Katari Smith Described It in His Testimony*

¶ 18 On March 16, 2014, Katari Smith and a few others were in his girlfriend's apartment on Moundford Terrace, in Decatur, Illinois. His car was parked on the street below, and, at about 2 p.m., he heard a window of his car being broken. He looked out a window of the apartment and saw a man in a "hoodie" standing by his car. (Forensic chemical analysis would later reveal that Smith's car had been set on fire with gasoline.) Another car, gray or silver in color, was parked nearby, with its passenger door open, and a man was sitting in the passenger seat of that car.

¶ 19 Smith ran downstairs and out of the apartment building toward his car. He then got shot in the knee. He did not see who shot him and never saw a shooter. He crawled back into the apartment building.

¶ 20 2. *The Police Pursue the Gray Car*

¶ 21 About three minutes after the shooting, Decatur police officer Corey Barrows was driving north on 22nd Street when a large, four-door gray car with tinted windows went by, heading south at a high rate of speed. Because the car appeared to match the description of the car seen at the shooting, Barrows turned around and tried to catch up, with his emergency lights flashing.

¶ 22 A chase ensued through residential neighborhoods, at times reaching 60 miles per hour. On North 21st Street, about a hundred yards south of its intersection with East Locust Street, something dark fell out of the gray car. Barrows slowed down momentarily to take a look and noticed the item appeared to be shattered glass held together by window tinting.

¶ 23 The gray car finally came to a halt, and Barrows and some other police officers performed a traffic stop. The driver of the gray car was Rafael Kennedy, and defendant was his passenger. In an inventory search of the car, Barrows found two spent .45-caliber shell casings, one on the rear passenger-side floorboard and the other on the rear driver's-side floorboard.

¶ 24 The owner of the gray car, Chelsea Grider, testified she had loaned it to Kennedy so that she could use his van to move. She denied there were any shell casings in her car when Kennedy took possession of it.

¶ 25 3. *The Discovery of Two Pistols on the Side of North 21st Street*

¶ 26 Decatur police officer Jeffrey McAdam went to North 21st Street, a little south of its intersection with East Locust Street, where Barrows had seen something fall from the gray

car. On the side of North 21st Street, McAdam found the fragments of a car window and two pistols, a .45-caliber Remington and a .40-caliber Ruger.

¶ 27 If a car had been going south on North 21st Street, the passenger side of the car would have been closest to where the pistols were found.

¶ 28 4. *Items Found at the Scene of the Shooting and in the Apartment*

¶ 29 At the scene of the shooting, Detective James Wrigley found four spent .45-caliber shell casings on the road where the gray car had been parked.

¶ 30 In between the road and the back of the apartment building was a fence, which was perforated by bullet holes, apparently from rounds going both ways.

¶ 31 Inside the fenced-in area, Wrigley found 12 spent .380-caliber shell casings, two projectiles, and blood on the sidewalk.

¶ 32 Inside the apartment, he found more blood and a live bullet. In a garbage can in the kitchen, he found an empty .380-caliber ammunition box, which was stuffed inside a cereal box. Two .380-caliber pistols were in the attic.

¶ 33 5. *The Shooting of Tyheim Johnson Earlier That Day*

¶ 34 Smith was shot on the afternoon of March 16, 2014. Earlier that same day, in the morning, Tyheim Johnson was shot.

¶ 35 Detective David Pruitt testified that according to statements he had received during his investigation, Johnson was Kennedy's cousin.

¶ 36 Smith testified that he did not know Johnson, he did not know how the .380-caliber shell casings came to be in the yard of the apartment building, he did not know how the two .380-caliber pistols came to be in the attic of the apartment, and he did not know of any

dispute between gangs. He claimed to be unaware any shots were fired from the apartment building.

¶ 37 6. *Ballistics Analyses*

¶ 38 Beth Patty, a forensic scientist with the Illinois State Police, testified that one of her specialties was firearms identification. By test-firing the pistols in this case and examining the distinctive marks left on the shell casings and the projectiles, she was able to make three determinations.

¶ 39 First, the four .45-caliber shell casings found in the street behind the apartment building, where the gray car had been parked, came from the .45-caliber Remington pistol found on the side of North 21st Street.

¶ 40 Second, the .380-caliber shell casings found in the yard of the apartment building came from the two .380-caliber pistols found in the attic of the apartment.

¶ 41 Third, the nine .380-caliber shell casings found at the scene where Johnson was shot came from one of the .380-caliber pistols found in the attic of the apartment.

¶ 42 7. *Gunshot Residue*

¶ 43 The police collected particle samples from defendant's hands, Kennedy's hands, and the cuffs of Kennedy's "hoodie." Mary Wong, a forensic scientist with the Illinois State Police forensic science division, tested these samples for gunshot residue and testified to the following results.

¶ 44 The samples from defendant's hands consisted merely of "particles characteristic of background samples"—that is, "particles *** also found in everyday life"—leading Wong to conclude that defendant did not fire a firearm or, if he did so, the gunshot residue particles were

removed by activity, were not deposited in the first place, or were not detected by the electron scanning microscope.

¶ 45 Likewise, in the samples from Kennedy's hands, she found merely "particles characteristic of background samples."

¶ 46 In the samples from Kennedy's "hoodie," however, she found "a minimum of three tricomponent particles" (lead, barium, and antimony), "as well as consistent particles," leading her to conclude that the "hoodie" "was either in the vicinity of a discharged firearm or it came in contact with a primer gunshot residue related item."

¶ 47 She explained that particles pertaining to gunshot residue get lost within six hours after they have been deposited on a live subject. Instead of getting lost all at once, the particles got lost "exponentially," "by the tenfold": 100 particles in the first hour, 10,000 particles in the second hour, and so forth.

¶ 48 By her understanding, 4 1/2 hours passed before a gunshot residue kit was collected from defendant, and 1 hour and 55 minutes passed before one was collected from Kennedy.

¶ 49 8. *DNA Analysis*

¶ 50 Jennifer Aper was a forensic scientist with the Illinois State Police, and her specialty was analyzing deoxyribonucleic acid (DNA).

¶ 51 She testified that another forensic scientist, Cory Formea, had collected DNA standards from defendant and Kennedy. Formea also had swabbed the four pistols: the .45-caliber Remington pistol, the .40-caliber Ruger pistol, the .380-caliber Browning pistol, and the .380-caliber Ruger pistol.

¶ 52 In the skin cells collected from the grip of the .45-caliber Remington pistol, Aper found "a mixture of DNA from at least three people, so three people were contributing DNA to this." One person had contributed more DNA than the others, so she "was able to interpret this profile as a major contributor." Of the 16 different areas of DNA that she examined, she "was only able to interpret this major contributor at [5] of those areas." She testified: "I compared the known standards from this case to that major DNA profile, and [defendant] cannot be excluded from being the contributor. Rafael Kennedy can be excluded from being that major contributor."

¶ 53 After arriving at the conclusion that defendant could not be excluded from being the major contributor of DNA on the .45-caliber Remington pistol, the next step, Aper explained, was to "determine how common or how rare that profile [was] in the population." She testified:

> "And I calculated that for this major contributor from the handgun, approximately 1 in 74,000 unrelated African American individuals cannot be excluded for having contributed to that major profile.
>
> One in 240,000 unrelated Caucasian individuals cannot be excluded. And 1 in 600,000 unrelated southwest Hispanic individuals cannot be excluded from being a contributor of that major DNA profile.
>
> Q. When you say someone has been excluded, can you just explain what that means.
>
> A. Um, if I'm saying that somebody is excluded, I'm saying that DNA did not come from that person.

* * *

Q. (BY MS. DOMASH [(prosecutor)]: And if you say that someone cannot be excluded, then we just turn to the statistical probability that you just mentioned?

A. Yes. When I say somebody cannot be excluded, I'm just saying that this person is a possible source of that DNA profile, and we assign a frequency to it so you'll know how many people in the population could be the donor of that DNA profile."

¶ 54 As for the swab from the .40-caliber Ruger pistol, it contained a mixture of DNA from at least four people, and Aper "was not able to either include or exclude [defendant] or Rafael Kennedy from being a donor of the mixture of DNA profiles."

¶ 55 Both .380-caliber pistols had a mixture of DNA from different people, but, because the "data [was] incomplete," she "[could not] use it for any interpretations or comparison."

¶ 56 9. *The Picture on Defendant's Cell Phone of Someone Posing with the .40-Caliber Ruger Pistol*

¶ 57 Detective David Dailey testified that, on November 20, 2013, he "extracted," from defendant's cell phone, "[a] photograph of what appeared to be an African American holding what appeared to be a handgun." "The metadata on the image showed that the photograph was taken [on] October 11, 2013," in the 500 block of West North Street, in Decatur. "From simply viewing the photograph," Dailey was not "able to determine the identity of the person holding the handgun." But the serial number of the handgun was visible in the picture, and Dailey forwarded the picture to Detective Scott Cline, who was in charge of tracing firearms.

¶ 58 The State next called Cline, who testified the serial number was that of the .40-caliber Ruger pistol found on the side of North 21st Street.

¶ 59 10. *Defendant's Statement to the Police*

¶ 60 Detective Eric Ethell testified that on March 16, 2014, in the police station, defendant signed a *Miranda* waiver (see *Miranda v. Arizona*, 384 U.S. 436 (1966)), after which Ethell interviewed him.

¶ 61 In the interview, which was video-recorded, defendant told Ethell the following. He was a passenger in Kennedy's car. They were en route to a birthday party for Kennedy's daughter. Kennedy told defendant he needed to stop along the way and do some unspecified errands. Defendant did not know what was going on. He did not know of any conflict or disagreement. He had no idea why Kennedy stopped at the apartment building and got out of the car. Defendant was minding his own business, leaning back in the passenger seat and looking at his cell phone, browsing Facebook and sending text messages, when he heard gunshots. Three of the rounds flew by his head, and another three rounds went through the window next to where he was sitting. He ducked down and wetted himself (in the police station, Ethell saw no indication of this), and he felt a burning sensation on his back where fragments of the passenger window had fallen down on him. Kennedy hurriedly returned to the driver's seat, stomped on the gas, and drove them away from there.

¶ 62 11. *The East Side Gang and the West Side Gang*

¶ 63 a. Defendant's Motion *in Limine*

¶ 64 At the beginning of the second day of trial, defense counsel made an oral motion *in limine*, asking the trial court to bar the State from presenting evidence that defendant was a member of a gang. Defense counsel argued that the evidence would be inflammatory to the jury and that, before allowing the State to present the evidence, the court should require a showing of

relevance: "that activity or membership in the gang in some way [was] related to the criminal charge here, or in some way [was] related to advancing the purpose of the gang."

¶ 65 Agreeing that the relevance of gangs had to be shown, the trial court asked the prosecutor for her response. She explained that evidence of gang membership was relevant to prove a motive for the crime. The motive, she suggested, was revenge: the West Side Gang avenging the shooting of one of its members, Johnson, by the East Side Gang. Johnson was shot at 11 a.m. on March 16, 2014, and Smith was shot only a few hours later that same day. Smith was a member of the East Side Gang, and the shooting of Johnson was forensically linked to the apartment where Smith was present when Kennedy torched Smith's car, inducing Smith to come out of the apartment building so he could be shot. The rounds fired at Johnson earlier in the day had been fired from one of the .380-caliber pistols found in the attic of that very same apartment, which was the apartment of Smith's girlfriend. Defendant and Kennedy were members of the West Side Gang, and, as gang members, the prosecutor argued, they had a motive to retaliate against Smith for the shooting of their fellow gang member, Johnson.

¶ 66 Defense counsel rejoined: "But there's nothing tied together that the activity which [defendant] took part in was related to that earlier shooting that day or that he even had any knowledge of this shooting that day."

¶ 67 The trial court asked the prosecutor if Johnson (the victim of the earlier shooting) could identify his assailant. The prosecutor answered no. Even so, the prosecutor argued relevance on the basis of (1) "[t]iming" and (2) "the link[,] ballistically[,] between the firearm used in [the] shooting [of Johnson] and where that firearm was recovered."

¶ 68 On the basis of these representations by the prosecutor and on the assumption that the evidence would bear out these representations (if it did not, there could be a mistrial, the trial

court warned), the court concluded that "membership or activity of a gang [was] related to the crime charged" by providing a motive, namely, "retaliation between two gangs." In the court's view, this relevance to motive outweighed the possibility of unfair prejudice. Therefore, the court denied defendant's motion *in limine*. In support of its ruling, the court cited *People v. Pikes*, 2013 IL 115171, 998 N.E.2d 1247, and the court quoted from *People v. Patterson*, 154 Ill. 2d 414, 458, 610 N.E.2d 16, 36 (1993).

¶ 69 b. Evidence Adduced Regarding Gangs

¶ 70 The prosecutor called Pruitt to the stand, but, before the prosecutor began questioning him, the trial court gave the jury a limiting instruction. The court instructed the jury that evidence would be received regarding defendant's gang affiliation and that the jury should consider this evidence only for purposes of "defendant's identification and motive," giving the evidence whatever weight, for those limited purposes, the jury saw fit to give it.

¶ 71 Pruitt testified that on the basis of his investigations, which included "looking at the Facebook pages of specific individuals," he "believe[d] this defendant to be involved in" the West Side Gang of Decatur.

¶ 72 Also, Pruitt recounted a telephone call that defendant made from the Macon County jail, on June 20, 2014, and which was recorded, in which defendant said he had gotten into a fight with some other inmates, who had identified themselves as being members of the East Side Gang. On cross-examination, however, Pruitt admitted that, in this telephone call, defendant never mentioned he was a member of the West Side Gang.

¶ 73 The State next called Officer Kyle Daniels, and the trial court repeated its limiting instruction regarding gang affiliation. Daniels testified that during his five years as a patrol officer for the Decatur police department, he had learned of the existence of the East Side Gang

and the West Side Gang, which were antagonistic toward each other. The central location of the West Side Gang—which also went by the initials "U.S.M.G.," for "Union Street Murder Gang"—was the 1200 and 1300 blocks of North Union Street. The central location of the East Side Gang was "the 1100 block of East Leafland [Avenue] and Walnut and Lowber [Streets]." On the basis of his personal experiences and his Facebook and YouTube investigations, Daniels testified that defendant, Kennedy, and Johnson were members of the West Side Gang and that Smith was a member of the East Side Gang.

¶ 74 12. *Closing Arguments*

¶ 75 In her closing argument to the jury, the prosecutor claimed that defendant and Kennedy "went to this apartment with one objective, and that was to kill somebody." Repeatedly, the prosecutor argued they went to the apartment with "a plan," which they "enacted": Kennedy set fire to Smith's car to lure him out of the apartment, while "the other person," defendant, was "lying in wait to shoot [Smith]" when he came out.

¶ 76 Defense counsel pushed back against that argument. He insisted there was no evidence that defendant knew Kennedy was going to set Smith's car on fire or that he knew Kennedy was going to shoot Smith. Defendant testified he was with Kennedy only because he thought they were going to a birthday party for Kennedy's daughter. Defense counsel noted that the victim, Smith, never claimed he saw anyone lying in wait; instead, all he saw was one person standing beside his car and a second person sitting in another car.

¶ 77 The jury found defendant guilty of attempt (first degree murder), and the trial court imposed an aggregate prison sentence of 40 years: 25 years for attempt (first degree murder) plus 15 years for using a firearm during the commission of that offense.

¶ 78 C. Proceedings on Appeal

¶ 79 Defendant appealed, and in May 2017 we affirmed his conviction. *Rice*, 2017 IL App (4th) 141081-U, ¶ 103. As part of that decision we declined to address defendant's claim that trial counsel was ineffective for failing to object to a delay of his trial on speedy-trial grounds. *Id.* ¶¶ 76-82. Relying on *Veach*, 2016 IL App (4th) 130888, 50 N.E.3d 87, we concluded defendant's claim of ineffective assistance was more amenable to postconviction proceedings where further fact-finding could occur. *Rice*, 2017 IL App (4th) 141081-U, ¶ 78.

¶ 80 Later in May 2017, the supreme court reversed our decision in *Veach*. *Veach*, 2017 IL 120649, ¶ 54. In that decision, the supreme court rejected the analysis we used in this case to defer deciding defendant's claim of ineffective assistance of counsel. *Id.* ¶¶ 31-51.

¶ 81 In June 2017, defendant filed a petition for rehearing in light of the supreme court's decision in *Veach*. We granted that petition.

¶ 82 On rehearing, we again affirm defendant's decision after considering the merits of his claim of ineffective assistance of counsel.

¶ 83 II. ANALYSIS

¶ 84 A. Alleged Ineffective Assistance of Counsel in Failing To Object to a Delay

¶ 85 On April 10, 2014, when the trial court scheduled the pretrial hearing for May 29, 2014, defense counsel did not object. In that respect, defendant argues, defense counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Defendant believes that the lack of an objection to the 49-day "delay" from April 10 to May 29, 2014, caused the "delay" to be attributable to him and thereby deprived him of a dismissal of the charges, pursuant to section 103-5(a) of the Code (725 ILCS 5/103-5(a) (West 2014) ("Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless

delay is occasioned by the defendant ***.")). He reasons that the only other period of time attributable to him from the date of his arrest (March 16, 2014) to the date of the hearing on his motion for dismissal (July 31, 2014) was the seven-day continuance from March 20 to 27, 2014, which the trial court had granted on his motion so that he could obtain private counsel. (The filing of the motion for dismissal, on July 15, 2014, caused no additional delay, because the day before, on July 14, 2014, the court granted the State's motion to continue the trial until August 20, 2014.) It was 137 days from March 16 to July 31, 2014, and subtracting the 7 days attributable to him would have left a difference of 130 days, which would have exceeded the 120-day deadline in section 103-5(a), assuming that no more days were attributable to him. But the lack of an objection on April 10, 2014, made the days from that date to May 29, 2014, attributable to him, or so he argues in this appeal. Thus, on July 31, 2014, when his motion for dismissal was heard, the hand of the speedy-trial clock was pointing at day 91 instead of day 130, by his reckoning (130 days minus 49 days equals 91 days). See *id.* ("Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record.").

¶ 86 1. *Ineffective Assistance of Counsel Standard*

¶ 87 To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) defendant was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). We address those two prongs, in turn.

¶ 88 2. *Counsel's Effectiveness in the Context of the Statutory Right to a Speedy Trial*

¶ 89 a. Section 103-5(a) of the Code

¶ 90 Section 103-5(a) of the Code provides the following:

> "(a) Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant ***. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2014).

¶ 91 The burden is on the State to ensure that a trial is conducted within the 120-day period demanded by section 103-5(a). *People v. Wade*, 2013 IL App (1st) 112547, ¶ 16, 987 N.E.2d 426. If a trial is not conducted within that timeframe, the trial court must dismiss the charges, upon the defendant's motion. 725 ILCS 5/103-5(d) (West 2014); *People v. Ladd*, 185 Ill. 2d 602, 607, 708 N.E.2d 359, 361 (1999).

¶ 92 As section 103-5(a) explicitly provides, the 120-day time period is tolled by any "delay *** occasioned by the defendant." 725 ILCS 5/103-5(a) (West 2014). Section 103-5(a) provides further that "[d]elay shall be considered to be agreed to by the defendant unless he or she objects to the delay" by demanding trial. *Id.*

¶ 93 b. Counsel's Duty

¶ 94 Several cases have held that counsel provides deficient performance by failing to move for dismissal of criminal charges when the 120-day period has run. See, *e.g.*, *Wade*, 2013 IL App (1st) 112547, ¶¶ 10-14, 987 N.E.2d 426; *People v. Cordell*, 223 Ill. 2d 380, 385, 860 N.E.2d 323, 327 (2006); *People v. Workman*, 368 Ill. App. 3d 778, 784, 858 N.E.2d 886, 891 (2006); *People v. Peco*, 345 Ill. App. 3d 724, 729, 803 N.E.2d 561, 565 (2004).

¶ 95 The situation in this case is different. Here, defendant argues that counsel was ineffective for failing to object to the scheduling of the May 29 pretrial hearing, which defendant

claims was a delay that tolled the speedy-trial period for purposes of section 103-5(a). Defendant reasons that if counsel had objected to the scheduling of the pretrial hearing, the 120-day speedy-trial period would have run before defendant's trial occurred, and counsel could have successfully moved to dismiss the charges. So, the issue in this case involves counsel's failure to object to a "delay" of trial instead of counsel's failure to file a motion to dismiss charges on speedy-trial grounds.

¶ 96 Defendant has cited no case, and we are aware of none, that supports a claim of ineffective assistance of counsel for counsel's failing to object to the delay of a trial. We suggest at least two reasons that might explain why no such case exists. First, counsel's decision to object to a potential delay is arguably a matter of trial strategy, which cannot support a claim of ineffective assistance of counsel. See *People v. Manning*, 241 Ill. 2d 319, 327, 948 N.E.2d 542, 547 (2011) ("Matters of trial strategy are generally immune from claims of ineffective assistance of counsel."). In this case, for example, counsel may have decided not to object to the pretrial hearing because he was still requesting and receiving discovery from the State and thought a pretrial hearing was useful or necessary.

¶ 97 Second, as we explain in more depth in the section below, establishing the prejudice prong of an ineffective-assistance claim in this context would be entirely speculative.

¶ 98 3. *Prejudice*

¶ 99 To show the prejudice necessary to establish a claim of ineffective assistance of counsel, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In this case, defendant has failed to establish a reasonable probability that the

outcome of the proceeding would have been different had counsel objected on speedy-trial grounds to the scheduling of the pretrial hearing.

¶ 100 Assuming, *arguendo*, that (1) the scheduling of the pretrial hearing constituted a delay and (2) counsel was deficient for failing to object to that delay, defendant cannot establish prejudice. To establish prejudice in this case, defendant must show that if counsel had objected to the scheduling of the pretrial hearing, the trial would nonetheless have occurred outside the 120-day speedy-trial period, creating a situation in which defendant could bring a meritorious motion to dismiss the charges on speedy-trial grounds. That conclusion is speculative. In particular, defendant's prejudice argument presumes that, had defendant's objection resulted in the speedy-trial clock running from April 10, 2014, through May 29, 2014, the trial would have nonetheless begun on the same date—August 19, 2014—outside the 120-day period. We conclude that a more likely scenario is that the State and the trial court would have adjusted the scheduling of the trial to comply with the 120-day mandate of section 103-5(a). Defendant's assumptions do not create the reasonable probability of a different outcome necessary to establish prejudice.

¶ 101 Because we conclude that defendant has not established prejudice, his claim of ineffective assistance of counsel fails and we need not determine whether the scheduling of the pretrial hearing constituted a "delay" for purposes of section 103-5(a) of the Code. See *People v. Hale*, 2013 IL 113140, ¶ 17, 996 N.E.2d 607 ("[W]e may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance.").

¶ 102 In addition, we note that defendant, in his appellate brief, does not challenge the trial court's denial of his motion to dismiss on speedy-trial grounds. Rather, his claim of

ineffective assistance of trial counsel presupposes the correctness of the denial. Therefore, we will not review the denial of the motion for dismissal.

¶ 103 B. The Admission of Evidence That Defendant Was a Member of a Gang

¶ 104 Defendant next argues that the trial court abused its discretion and committed reversible error by allowing the State to present evidence tying him to a gang. Defendant contends that such evidence was irrelevant and unfairly prejudicial because there was no evidence that the crimes of which he was charged had anything to do with a gang.

¶ 105 In response, the State contends that the gang evidence was admissible as part of a continuing narrative of the events leading up to defendant's shooting of Smith and provided a motive for that shooting. Citing *People v. Pikes*, 2013 IL 115171, ¶¶ 20-27, 998 N.E.2d 1247, and *People v. Johnson*, 368 Ill. App. 3d 1146, 1155-56, 859 N.E.2d 290, 299-300 (2006), the State contends that the earlier gang-related shooting, as well as the evidence about defendant's gang membership, "provided a context and backdrop against which the instant offense was committed." We agree. In *Pikes*, the supreme court ruled that earlier gang-related events were properly admitted as a continuing narrative to explain why the defendants in that case attacked the victim. *Pikes*, 2013 IL 115171, ¶ 18, 998 N.E.2d 1247. In *Johnson*, this court deemed other-crimes evidence admissible as a continuing narrative to show that the defendant attacked the victims by mistake when he intended to target members of a different gang. We held in *Johnson* that the seemingly random attack in that case would be completely inexplicable without gang evidence that tended to explain why the defendant on trial was motivated to commit the crimes he did. *Johnson*, 368 Ill. App. 3d at 1155, 859 N.E.2d at 299. The same analysis applies to defendant's behavior in this case.

¶ 106 Although the issue in *Johnson* was whether other-crimes evidence committed by the defendant on trial would be admissible under the continuing narrative exception to the prohibition against admitting such evidence, we note that in *People v. Daniels*, 2016 IL App (4th) 140131, ¶¶ 75-82, 58 N.E.3d 902, this court recently held that the continuing narrative exception for other-crimes evidence also applies to general relevancy considerations, as in the present case, not just when other-crimes evidence is at issue.

¶ 107 Assuming, *arguendo*, that the admission of defendant's gang membership was error, reversal does not automatically follow. As in the case of any nonconstitutional error, we ask if there is a reasonable probability the jury would have acquitted defendant but for the error. See *People v. Forrest*, 2015 IL App (4th) 130621, ¶ 57, 40 N.E.3d 477. We conclude that the evidence against defendant was strong enough that, even if any and all mention of gangs had been excluded from the trial, there is no reasonable probability the jury would have acquitted him. Specifically, the presence of defendant's DNA on the grip of the .45-caliber Remington pistol with which Smith had been shot, and the throwing of the pistols out of the passenger window of the fleeing gray car—juxtaposed with defendant's incredible, know-nothing statement to the police—almost certainly would have yielded a guilty verdict, regardless of the evidence of gang affiliation.

¶ 108 C. The Sufficiency of the Evidence

¶ 109 One of the elements of attempt (first degree murder) is that defendant intended to murder Smith. "A person commits the offense of attempt when, *with intent to commit a specific offense*, he or she does any act that constitutes a substantial step toward the commission of that offense." (Emphasis added.) 720 ILCS 5/8-4(a) (West 2014). Defendant contends that the State failed to prove he intended to murder Smith or assist in the murder of Smith.

¶ 110 We disagree. Defendant's DNA was on the grip of the .45-caliber Remington pistol—the pistol with which Smith was shot—and two spent .45-caliber shell casings were on the back floorboard of the gray car. Ballistic analysis revealed that these shell casings had been ejected from that pistol. Defendant was sitting in the passenger seat of the gray car at the time of the shooting—with the passenger door open, according to Smith's testimony. When we consider this evidence in the light most favorable to the prosecution, as we are supposed to do (see *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985)), we can reasonably infer that defendant shot Smith with the .45-caliber Remington pistol. An intent to kill can be inferred from the use of a deadly weapon. *People v. Barnes*, 364 Ill. App. 3d 888, 896, 847 N.E.2d 679, 695 (2006).

¶ 111 And, arguably, defendant's conduct in the immediate aftermath of the shooting tends to increase the likelihood that he was the shooter. Because he was the one sitting in the passenger seat of the fleeing gray car, it was apparently he who threw the pistols out the passenger window, including the .45-caliber pistol bearing his DNA. This attempt by him to conceal evidence could reasonably be regarded as showing a consciousness of guilt. See *People v. Gambony*, 402 Ill. 74, 80, 83 N.E.2d 321, 325 (1948); *People v. Modrowski*, 296 Ill. App. 3d 735, 741, 696 N.E.2d 28, 33 (1998).

¶ 112 A deliberately false statement is another form of concealment that can evince a consciousness of guilt. *People v. Wilson*, 8 Ill. App. 3d 1075, 1079, 291 N.E.2d 270, 273 (1972). Defendant's statement to the police could come across to a reasonable trier of fact as unbelievable and, therefore, untruthful. It could strain a jury's credulity that defendant remained totally unaware of what was going on in his immediate surroundings until the moment when shots began to be fired. Supposedly, he never noticed Kennedy removing a container of gasoline

from the gray car. Smith, who was upstairs, in his girlfriend's apartment, heard the window of his car being broken, but, supposedly, defendant, who was sitting in the passenger seat of a car parked near Smith's car, heard nothing and saw nothing. Supposedly, after Kennedy broke the window of Smith's car, defendant never noticed him dowsing the car with gasoline and setting it on fire.

¶ 113 The jury had a right to be skeptical of this near-total obliviousness. It could have regarded defendant's statement to the police as an exercise in concealment. He never told the police about handling the pistols, either, although, as it turned out, his DNA was on one of the pistols, and it was probably he who threw the pistols out the passenger window. Arguably, defendant was extensively and materially untruthful to the police, and he was untruthful because he had something to hide, namely, his guilt of attempt (first degree murder). See *id.* His statement to the police, by reason of its incredibility, was most likely a damaging item of evidence against him. See *id.*

¶ 114 In sum, when we consider all the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find, beyond a reasonable doubt, that defendant intended to murder Smith. See *Jackson*, 443 U.S. at 319; *Collins*, 106 Ill. 2d at 261, 478 N.E.2d at 277.

¶ 115 D. The Prosecutor's Closing Argument

¶ 116 "[I]t is improper for a prosecutor to argue inferences or facts not based upon the evidence in the record." *People v. McGee*, 2015 IL App (1st) 130367, ¶ 56, 44 N.E.3d 510. According to defendant, that is what the prosecutor did when she argued to the jury that Kennedy had lured Smith outside while defendant was lying in wait to shoot him. Defendant acknowledges that because defense counsel never objected while the prosecutor was making this

argument to the jury, the doctrine of procedural forfeiture normally would preclude defendant from complaining now. See *People v. Basler*, 193 Ill. 2d 545, 549, 740 N.E.2d 1, 4 (2000). He invokes the doctrine of plain error, however, claiming that the evidence was closely balanced. See *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410 (2007).

¶ 117 There can be no plain error without an error; thus, the usual first step, which we choose to follow in this case, is to determine whether this line of argument by the prosecutor was erroneous at all. See *id.* Defendant insists it was. He argues:

> "There was never any evidence presented that Kennedy set fire to the victim's car so that [defendant] could shoot the victim when he came outside to investigate. No evidence was presented that [defendant] knew why Kennedy chose to park on Moundford Terrace. The evidence presented showed that Kennedy was more likely to have fired a gun than [defendant]. The evidence also suggests that shots were exchanged in two directions, and there is no indication as to which side may have shot first."

¶ 118 One possible inference is that Kennedy intended only to vandalize Smith's car, nothing more, and that he decided to shoot back only after he was fired upon. That inference, however, is not without its problems. One problem is that Kennedy and defendant came to Moundford Terrace armed (two persons, two loaded pistols, one of which was pictured in defendant's cell phone). Another problem is that, apparently, Kennedy waited around long enough for Smith to come downstairs and out of the apartment building. Surely, it was but a moment's work to break the car window, and gasoline catches fire pretty quickly. So, arguably, a more convincing inference is that the vandalism was intended as a means of luring Smith outside, to be shot. Even if Smith or his friends, upon emerging from the apartment building,

managed to get off the first shots, that event would not retroactively negate a murderous intent that Kennedy had in the first place.

¶ 119 Defendant argues that, even if Kennedy had this murderous intent, there was no evidence that he, defendant, shared it. Again, we point out the presence of defendant's DNA on the grip of the .45-caliber Remington pistol, and we point out the empty .45-caliber shell casings on the rear floorboard of the gray car. Granted, Wong found gunshot residue particles only on Kennedy's sweatshirt (or "hoodie") and none on defendant's hands, but that is explainable: 1 hour and 55 minutes passed before a gunshot residue kit was collected from Kennedy, whereas 4 1/2 hours passed before one was collected from defendant. A reasonable jury could find it was defendant who shot Smith with the .45-caliber Remington pistol and that, when he did so, Kennedy was close enough to defendant (3 to 12 feet was the radius, according to Wong) that gunshot residue particles landed on Kennedy's sweatshirt, though not on Kennedy's hands.

¶ 120 Alternatively, if the jury found Kennedy to be the shooter of Smith, the jury could have reasonably found defendant to be accountable for Kennedy's attempt (first degree murder). A defendant is accountable for the conduct of another if, "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate that commission, [the defendant] 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 2014). This court has written the following:

> "Circumstances especially pertinent to the establishment of a common design include: presence at the scene of the crime without disapproval or opposition [citations]; a continued close association with perpetrators after the criminal act [citations]; a failure to report the incident to the authorities

[citations]; and/or the subsequent concealing or destroying of evidence of the crime [citations]. The existence of a common design is a question of fact for the jury." *People v. Watts*, 170 Ill. App. 3d 815, 825, 525 N.E.2d 233, 240 (1988).

¶ 121 It does not appear that defendant expressed any disapproval or opposition when Kennedy broke the window of Smith's car and set the car on fire with gasoline. He did not disassociate himself from Kennedy at that point. He did not get out of the gray car and walk away. Instead, he stayed in the passenger seat. As a squad car was in pursuit, he tried to help out by throwing the pistols out of the passenger window. Granted, this attempted concealment of evidence occurred after the offense, but it is nevertheless evidence of a common design. "Although accountability requires that the assistance of an accused occur prior to or during the commission of the unlawful act, such assistance may be inferred from activities occurring after the offense." *Modrowski*, 296 Ill. App. 3d at 741, 696 N.E.2d at 33.

¶ 122 If indeed Kennedy was the one who shot Smith, defendant covered for him, as best as he could, in his statement to the police, feigning ignorance of what had happened before his very eyes and omitting any mention of Kennedy wielding a gun. Thus, contrary to defendant's contention, not only could a prosecutor reasonably argue a common design by defendant and Kennedy to murder Smith, but a jury could reasonably find such a common design. In our *de novo* review of the prosecutor's closing and rebuttal arguments, giving her the "wide latitude" to which she is entitled, we find no misconduct or impropriety—and, hence, no plain error. *People v. Schronski*, 2014 IL App (3d) 120574, ¶ 26, 15 N.E.3d 506.

¶ 123 III. CONCLUSION

¶ 124 For the foregoing reasons, we affirm the trial court's judgment, and we assess $50 against defendant as costs of this appeal.

¶ 125 Affirmed.