2011 IL App (1st) 071766-U

No. 1-07-1766

FIFTH DIVISION
December 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 27165
	)	
JECORREY DUNCAN,	)	Honorable
	)	Bertina E. Lampkin,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

HELD: The trial court did not err in determining defendant failed to establish a *prima facie* case of discrimination under Batson. Defendant was not denied the right to a fair and impartial trial. Although the trial court erred in allowing hearsay evidence regarding Wells' statements implicating defendant as an offender to Officer May immediately after the shooting and to Detective O'Donovan while Wells was in the hospital, any error was harmless beyond a reasonable doubt.

¶ 1 Following a jury trial, defendant was convicted of six counts of attempt first degree murder and two counts of aggravated battery with a firearm. He was sentenced to a 42-year prison term. On appeal, defendant contends: (1) he made a *prima facie* case that the State engaged in a discriminatory use of peremptory challenges to exclude African Americans from the jury, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) he was denied his right to a fair trial before a fair and impartial judge; (3) he was denied his Sixth Amendment right of confrontation when the trial court allowed the State to admit an allegedly testimonial hearsay statement made by a non-testifying co-conspirator under the co-conspirator hearsay exception; and (4) he was denied his Sixth Amendment right to confrontation when the trial court allowed the State to elicit testimony that during a police interrogation, a non-testifying co-defendant named defendant as an accomplice in the shooting.

¶ 2 In our first order entered in this case, we found it necessary to remand the case to the trial court in order for the court to conduct further *Batson* proceedings. We withheld disposition of the other unrelated issues, retaining jurisdiction to consider them after the *Batson* proceeding was conducted on remand. Following the hearing on remand, the trial court determined defendant had not established a *prima facie* case of

racial discrimination. We are now asked to review the trial court's *Batson* findings on remand and consider the other issues we retained jurisdiction on. For the reasons that follow, we affirm defendant's convictions and sentences.[1]

¶ 3 BACKGROUND

¶ 4 Defendant and his co-defendants, Lashaun Members and Willie Wells, were tried in separate but simultaneous jury trials. The evidence adduced at defendant's trial showed that on November 14, 2001, Kenneth Burks was hanging out with Deandre Bullock, Antoine Stanford, Kenneth Woolridge, Jeffrey Pearson and Anthony Teamer near the intersection of Christiana and Huron in Chicago. Burks testified at trial that he was a member of the Gangster Disciples. According to Burks, the Traveling Vice Lords' territory was just to the east of the intersection. Just before 8 p.m., a few men pulled up in a green "Tahoe." Burks identified LaShun Members as the driver of the Tahoe. Burks also identified Willie Wells and defendant as passengers. After Wells had a conversation with some of the men standing on the corner, the men got back into the Tahoe and drove off. Burks heard Wells say "We'll be back" as the Tahoe drove away.

¶ 5 Shortly after, four policemen pulled up to the corner of

[1]Justice Aurelia Pucinski replaced Justice Michael Toomin as a member of the panel assigned to this case.

Christiana and Huron. Chicago police officers Edward May, Sean Ryan, Daniel Gorman and Jerome Turbyville were in plainclothes in an unmarked squad car. Officer Ryan testified that after he saw Pearson throw an object near a fence by the corner, he and the other officers detained the five men standing on the corner and handcuffed them. All four officers testified at trial that after Pearson was placed in the unmarked police car, they heard loud gunshots. Officer May testified that he looked east and saw four men, three of which had guns. The fourth person ran away. According to the officers' trial testimony, one man was firing a rifle, one a shotgun, and another a handgun. Officers May and Ryan testified that they yelled loudly that they were police officers and asked the men to stop shooting. The shooting did not stop, however. Officer Ryan said he dove to the ground and returned fire until the shooting stopped. Bullock was hit by gunfire. Officer Ryan said he had a puncture wound on his arm that he believed was caused by a shotgun pellet. Temeko Smith testified she was exiting a store near Homan and Huron when she heard gunfire and was struck by a bullet.

¶ 6 Officer May testified that he returned fire until he ran out of bullets. According to Officer May, the man firing the handgun and the man firing the shotgun ran southeast towards an alley. The man with the rifle, who Officer May identified in court as

Wells, also ran towards the alley, but was limping. When Wells reached the alley, he threw his rifle toward a garage. Wells fell down and Officer May noticed Wells was bleeding from his leg. Officer Turbyville handcuffed Wells. Officer May said that while Wells was lying on the ground handcuffed, someone told Wells he was "in trouble" because Officer Ryan had been shot. Officer May testified that Wells "blurted out, I didn't have a shotgun; my brother did." Prior to cross-examining Officer May, defense counsel objected to Officer May's testimony regarding Wells statement implicating defendant, his brother. The trial court held that since there had been no evidence in the record indicating defendant and Wells were brothers, there was nothing improper about the statement.

¶ 7 Officer May said that although he got a good look at all three shooters, he did not send out a description of the remaining two suspects because his radio was broken. Officer Turbyville said he used his radio to call for backup, but could not remember sending out a description of the two remaining suspects. Officers Ryan and Gorman testified they did not call in a description of the remaining two suspects, nor did they give a description to the officers interviewing them at the scene. Officers May, Ryan and Gorman identified defendant in court as the man who fired the shotgun.

¶ 8 Detective Patrick O'Donovan testified he accompanied Wells in the ambulance to the hospital. O'Donovan said he interviewed Wells several times. After the fifth interview, Wells agreed to give a handwritten statement. Over defense counsel's objection, Detective O'Donovan was allowed to testify that after Wells provided his statement, the police were looking for defendant and another man known as Luv as possible offenders. Detective O'Donovan said Wells was shown a series of photographs. When the State asked Detective O'Donovan whom he was looking for after Wells looked at the photos, he said defendant and Members.

¶ 9 On November 29, 2001, Members turned himself into police. Officers May and Ryan identified Members in a lineup the next day as the person they had seen firing the handgun. Sometime after the shooting, defendant's photograph was published in the police daily bulletin as a suspect.

¶ 10 Detective Jim Hennigan testified that on November 10, 2003, he went to Georgia to extradite defendant. While in Georgia, Detective Hennigan met with defendant in an interview room and told him why they were there. Defendant denied involvement in the shooting. He told Detective Hennigan he was at a Target store with a female friend whose name he could not remember when the shooting occurred. Defendant told Detective Hennigan that he knew Wells, his half-brother, had been shot in that incident.

¶ 11 Detective Hennigan said that on November 11, 2003, defendant was taken back to the Area 4 police station in Chicago, where he was identified in a lineup by Officers May, Turbyville, and Gorman. Officer May admitted he had seen defendant's picture in the police daily bulletin after the shooting, but "a long time before the lineup."

¶ 12 Following the lineup, defendant was interrogated by Detectives Hennigan and O'Donovan. Detective Hennigan told defendant he had been identified in the lineup. On November 12, 2003, Detectives Hennigan and O'Donovan interrogated defendant for the fourth time. Defendant admitted he had been involved in the shooting. Defendant told Detective Hennigan that he, Members, and Wells went to the corner of Christiana and Huron and began firing. Defendant told Detective Hennigan that he heard someone say police, but kept firing. Defendant told Detective Hennigan he was firing the rifle, Members the shotgun, and Wells the handgun. Defendant said he fled the area and stayed with relatives until he went to Georgia. Detective Hennigan said defendant told him to tell the officers he was sorry, and that he did not know they were police officers when he started firing. Detective Hennigan admitted on cross examination, however, that he had said in his police report that defendant told him they all began to run when they heard police.

¶ 13 Assistant State's Attorney Bregenzer testified defendant agreed to give a handwritten statement after being informed of his *Miranda* rights. Outside the presence of the detectives, defendant told ASA Bregenzer he had been treated well. Defendant's handwritten statement, which was read to the jury, was substantially the same as the statement he gave to Detectives Hennigan and O'Donovan. According to the written statement, defendant identified and signed photographs of Members and Wells as accomplices to the shooting. Defendant said in the statement that Wells is his brother.

¶ 14 Police investigators processed the crime scene area and recovered a forty-five-caliber handgun, a 20 gauge sawed-off shotgun, and a 30-caliber carbine rifle. Shotgun shells recovered from the scene were consistent with shells from the recovered shotgun, but were not a conclusive match. A latent palm print recovered from the shotgun matched defendant's print.

¶ 15 Defendant testified that on November 14, 2001, Wells and Members picked him up in a green Tahoe. They went to a store, and later a restaurant. Wells and Members dropped defendant off at around 6 p.m., and defendant then went to Target with his cousins's girlfriend, Nicole. A little after 8 p.m., someone called Nicole and told her Wells had been shot. Defendant said he and Nicole went to the hospital to see Wells, but they were

not allowed to see him. Defendant said he stayed in Chicago until February 2003, when he moved to Georgia.

¶ 16 Defendant said that after he was extradited to Chicago, Detectives Hennigan and O'Donovan interrogated him repeatedly for two days. Defendant did not remember making the incriminating statement to Detective Hennigan. Defendant testified that he told ASA Bregenzer that he did not want to speak with her. Defendant said he did not read the handwritten statement before signing it. He only remembered signing one or two pages. He admitted on cross-examination, however, that his signature appeared on each page, as well as on various photographs presented during the interrogation. Defendant said he was hungry and tired when he signed the statement. Defendant said he was not involved in the shooting. He admitted the shotgun and rifle recovered from the scene were his, and that he stored the weapons at his grandmother's house. He said the last time he handled the guns was about three weeks before the shooting. Defendant admitted on cross-examination that he and his half-brother Wells were once members of the Traveling Vice Lords street gang, but denied being affiliated with the gang in 2001.

¶ 17 The jury found defendant guilty of six counts of attempt first degree murder and two counts of aggravated battery with a firearm. Following a sentencing hearing, the trial court

sentenced defendant to six concurrent 30-year prison terms for the attempt murder convictions, to one 12-year term for one of the aggravated battery convictions to be served consecutive to the 30-year terms, and to one 8-year term for the other aggravated battery conviction to be served concurrently with the 12-year term. Defendant appeals.

¶ 18 ANALYSIS

¶ 19 I. *Batson* Violation

¶ 20 Defendant contends he made a *prima facie* case that the State engaged in a discriminatory use of peremptory challenges by using all three of its peremptory challenges to exclude African-Americans from the jury.

¶ 21 A three-step process exists for evaluating whether the State's use of a peremptory challenge resulted in the removal of venirepersons on the basis of race. *People v. Davis*, 231 Ill. 2d 349, 360 (2008); *People v. Hogan*, 389 Ill. App. 3d 91, 99 (2009). First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. *Davis*, 231 Ill. 2d at 360, citing *Batson*, 476 U.S. at 96. To determine whether racial bias motivated a prosecutor's decision to remove a potential juror, "a court must consider 'the totality of the relevant facts' and 'all relevant circumstances' surrounding the peremptory strike to see if they give rise to a

discriminatory purpose." *Davis*, 231 Ill. 2d at 360, quoting *Batson*, 476 U.S. at 93-94, 96-97. The threshold for establishing a *prima facie* claim under *Batson* is not high. *Davis*, 231 Ill. 2d at 360. " '[A] defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.' " *Davis*, 231 Ill. 2d at 360, quoting *Johnson v. California*, 545 U.S. 162, 170 (2005).

¶ 22 Although striking even a single prospective juror for a discriminatory purpose is forbidden, the "mere fact of a peremptory challenge of a black venireperson who is the same race as defendant or the mere number of black venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination. *Davis*, 231 Ill. 2d at 360-61. Therefore, it is well settled that a *Batson prima facie* case cannot be established merely by noting the number of black venirepersons stricken by the State. *People v. Gutierrez*, 402 Ill. App. 3d 866, 891 (2010). Instead, court's look to the following factors to assist in evaluating whether a *prima facie* case exists:

> " '(1) the racial identity between the party exercising the peremptory challenge and the excluded venirepersons; (2) a pattern of

> strikes against African-Americans on the venire; (3) a disproportionate use of peremptory challenges against African-Americans; (4) the level of African-American representation in the venire compared to the jury; (5) the prosecutor's questions and statements of the challenging party during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim and witness.' "
> *Hogan*, 289 Ill. App. 3d at 99-100, quoting *Davis*, 231 Ill. 2d at 362.

¶ 23 If the moving party establishes a *prima facie* case, the burden shifts to the nonmoving party to provide a race-neutral explanation for excusing the venireperson. *Hogan*, 389 Ill. App. 3d at 100, citing *Mack v. Anderson*, 371 Ill. App. 3d 36, 44 (2006). Once the nonmoving party provides a race-neutral reason, the court must then determine whether the moving party has carried his burden of establishing purposeful discrimination. *Hogan*, 389 Ill. App. 3d at 100.

¶ 24 In our initial order in this matter we held that, similar to *Hogan*, the trial court never allowed defendant to make a *prima facie* showing that the State exercised its peremptory challenges on the basis of race following his *Batson* objections. Instead, the trial court interrupted defendant each time he raised a *Batson* objection and made a judicial determination--without allowing defendant an opportunity to properly comply with the first step of *Batson*--that the State was not engaging in discrimination. We held that although the trial court may have viewed defendant's *Batson* objections as "absurd," the court should have conducted a proper first-step *prima facie* hearing prior to reaching a determination on the issue. See *Hogan*, 389 Ill. App. 3d at 101-02. Accordingly, we remanded this cause to the trial court for an expedited hearing for the limited purpose of allowing the trial court to conduct the proper *Batson* analysis.

¶ 25 During the *Batson* hearing conducted by the trial court on remand, defendant argued a *prima facie* case had been established because: (1) defendant and the excluded venire persons were black, while the four police officers defendant allegedly shot at were white; (2) while the shooting also involved two black victims, the most serious charges involved the white police officers and the heart of the State's case revolved around white

witnesses; (3) the State used three peremptory challenges against black prospective jurors while not using any strikes against white prospective jurors, which resulted in a pattern of strikes and a disproportionate use of challenges against blacks; (4) there were 24 people in the venire and five were black, resulting in a percentage of 21% black, while only 13% of the 15 member jury was black; and (5) the excluded black venire members were a "heterogeneous group sharing race as their only common characteristic." Defendant admitted the State had not questioned any of the individual jurors during *voir dire*.

¶ 26 Following the hearing on remand, the trial court determined defendant had not established a *prima facie* case of racial discrimination. Defendant appeals from that decision.

¶ 27 A trial court's finding as to whether a *prima facie* case has been established will not be overturned on review unless it is against the manifest weight of the evidence. *People v. Gutierrez*, 402 Ill. App. 3d 866, 892 (2010).

¶ 28 In support of its decision that a *prima facie* case had not been established, the court recognized three individuals who were African-American–-including one alternate–-did make it on to the 15-member jury panel, which weighed against a finding of a *prima facie* case of discrimination. The court noted the fact that the State made no attempt to strike those three African-American

venire members from the jury--though the State still had four peremptory strikes available–-strongly indicated the State had not intended to act in a discriminatory manner. The court also noted that while three of the victims of the shooting were white police officers, the case also involved several witnesses and victims who were African-American. The court found that defendant had been given a chance to establish a *prima facie* case on remand, and, after considering all of the relevant factors presented and the jury selection process as a whole, that defendant had been unable to do so.

¶ 29 After reviewing the record of the hearing conducted by the trial court on remand, we cannot say the trial court's decision was against the manifest weight of the evidence. Accordingly, we find defendant's *Batson* claim is without merit.

¶ 30 Because we retained jurisdiction to consider the other unrelated issues defendant raised in his initial appeal after further *Batson* proceedings were conducted by the trial court on remand, we now find it necessary to address those remaining issues in detail.

¶ 31 II. Judicial Bias

¶ 32 Defendant contends he was denied his right to a fair trial before a fair and impartial judge. Specifically, defendant contends the trial court's comments during jury selection suggest

the court abandoned its role as a neutral arbitrator, made incorrect rulings in favor of the State, applied inconsistent standards with regards to each party's respective *Batson* motions, made stereotypical statements about African-American jurors, and denigrated the presumption of innocence.

¶ 33 Because it is an abuse of discretion for the trial court to assume the role of an advocate, the abuse of discretion standard–-rather than a *de novo* standard, as defendant suggests –-applies to this issue. *People v. Taylor*, 357 Ill. App. 3d 642, 647 (2005).

¶ 34 A defendant is entitled to a trial free from a judge’s improper or prejudicial comments. *People v. Garrett*, 276 Ill. App. 3d 702, 712 (1995). A trial judge, however, is not a mere referee; the court has wide discretion in controlling the proceedings before it. *People v. Jackson*, 250 Ill. App. 3d 192, 204 (1993); *People v. Martin*, 24 Ill. App. 3d 710, 716 (1974). " 'The right of a defendant to an unbiased, open-minded trier of fact *** is rooted in the constitutional guaranty of due process of law and entitles a defendant to a fair and impartial trial before a court which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial.' " *People v. Phuong*, 287 Ill. App. 3d 988, 993-94 (1997), quoting *People v. Eckert*, 194 Ill. App. 3d 667, 673 (1990). Any showing

of bias against one of the parties or their counsel constitutes reversible error. *Phuong*, 287 Ill. App. 3d at 994.

¶ 35 In our initial order in this matter, we found it necessary to remand defendant's case to the trial court in order for the court to conduct further *Batson* proceedings. Our finding was based on the fact that the court failed to conduct a proper *Batson* hearing and improperly provided its own race-neutral justifications for the peremptory challenges. While we recognize the court's comments during the *voir dire* proceedings were improper in the context of a proper *Batson* hearing, we cannot say the court's comments indicated it had abandoned its role as a neutral arbitrator and demonstrated a bias towards the State.

¶ 36 The comments simply reflected the trial court's belief that the State had not engaged in purposeful discrimination when striking the African-American jurors. While the trial court clearly failed to conduct a proper *Batson* hearing during the jury selection process, we see nothing in the record to suggest the trial court's errors stemmed from any bias against the defendant.

¶ 37 Accordingly, we find defendant's contentions are without merit.

¶ 38 III. Confrontation Clause

¶ 39 Defendant contends he was denied his constitutional right to confrontation when the trial court allowed the State to elicit

evidence at defendant's trial regarding co-defendant Wells' statement to Officer May that "The shotgun wasn't mine, it was my brother's," in violation of *Crawford v. Washington*, 541 U.S. 36 (2004). Defendant also contends the trial court erred in allowing Officer May to testify regarding Wells' statement under the co-conspirator exception to the hearsay rule.

¶ 40 The sixth amendment's confrontation clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amend. VI. In *Crawford*, the Supreme Court held the confrontation clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68.

¶ 41 The Court declined to specifically define what constitutes a "testimonial" statement. However, it gave some examples of testimonial statements--testimony at preliminary hearings, testimony before a grand jury or at a prior trial, in-court guilty plea statements of co-conspirators to show existence of a conspiracy, and statements made during police questioning, including accomplice statements and statements against penal interest. *Crawford*, 541 U.S. at 68; *People v. Thompson*, 349 Ill. App. 3d 587, 594 (2004).

¶ 42 Because defendant also contends the trial court erred in allowing the statement under the co-conspirator exception to the hearsay rule, we must first address whether the testimony regarding the statement was properly admissible under an exception to the hearsay rule before determining whether the statement was testimonial in nature.

¶ 43 Defendant contends Wells' statement to Officer May at the scene of the shooting was not made in furtherance of a conspiracy, and, therefore, does not fall within the co-conspirator exception to the hearsay rule.

¶ 44 The admission of evidence lies within the sound discretion of the trial court, and we will not reverse a court's decision to admit evidence absent an abuse of that discretion. *People v. Phillips*, 392 Ill. App. 3d 243, 272 (2009). An abuse of discretion occurs where the court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Phillips*, 392 Ill. App. 3d at 272.

¶ 45 Under the co-conspirator exception to the hearsay rule, any declaration by one co-conspirator is admissible against all co-conspirators if the declaration was made during the course of, and in furtherance of, the conspiracy. *People v. Leak*, 398 Ill. App. 3d 798, 824-25 (2010), citing *People v. Kliner*, 185 Ill. 2d

81, 140 (1998). To establish a *prima facie* showing of conspiracy, the State must show that: (1) two or more persons intended to commit a crime; (2) they engaged in a common plan to accomplish the criminal goal; and (3) an act or acts were done by one or more of them in furtherance of a conspiracy. *People v. Brown*, 341 Ill. App. 3d 774, 783 (2003).

¶ 46 Defendant does not suggest the State failed to establish the existence of a conspiracy; instead, defendant contends Wells' statement fell outside the co-conspirator exception because it was merely a narrative of what had already been done designed to minimize his blame for the crime. The State counters Wells' statement constituted a statement of a co-conspirator made in furtherance of covering up his actions and covering up the conspiracy, therefore clearly bringing it within the parameters of the co-conspirator exception to the hearsay rule.

¶ 47 "Statements made in furtherance of a conspiracy include those that have the effect of advising, encouraging, aiding or abetting its perpetration." *Leak*, 398 Ill. App. 3d at 825. The exception requires the statement must be in furtherance of the common design, and not merely a narrative of what has already been done. *People v. Boyle*, 161 Ill. App. 3d 1054, 1091-92 (1987), citing *People v. Davis*, 46 Ill. 2d 554 (1970). However, "[s]tatements that relate to attempts at concealment further the

objective of the conspiracy, which implicitly includes escaping punishment. Moreover, subsequent efforts at concealment of the crime, where sufficiently proximate in time to the offense, are considered as occurring during the course of the conspiracy." *Kliner*, 185 Ill. 2d at 141.

¶ 48 In *People v. Parmly*, 117 Ill. 2d 386, 392-93 (1987), the defendant was convicted of first degree murder. Prior to trial, the defendant moved to prevent Cook, the State's key witness, from testifying regarding any hearsay statements Foutch, an alleged co-offender in the murder, made to Cook on the day after the murder occurred. The trial judge denied the motion *in limine*. Cook was allowed to testify that when he saw Foutch the day after the killing, Foutch told him that while he was in the victim's house he took out a gun and shot the victim. Foutch told Cook that the defendant then took the gun from Foutch and "finished [the victim] off" by putting the gun to the victim's head and firing. Cook said Foutch told him the victim was still alive after Foutch fired the first shot. Foutch, who pleaded guilty in a separate proceeding, did not testify at the defendant's trial.

¶ 49 The defendant contended on appeal that Cook's testimony regarding Foutch's statements on the day after the murder should have been excluded as impermissible hearsay. The State countered

the statements fell within the co-conspirator exception to the hearsay rule. While the State recognized Foutch's statements occurred after the real object of the conspiracy–-the robbery and murder of the victim–-was completed, the State sought to admit them as furthering a subordinate conspiracy or an extension of the conspiracy to conceal the offenses. *Parmly*, 117 Ill. 2d at 393. The supreme court noted that even assuming the co-conspirator exception encompassed so-called "concealment phase" statements, "Foutch's hearsay statements implicating defendant would not fall within the exception since they were not made in furtherance of any effort at concealment." *Parmly*, 117 Ill. 2d at 393.

¶ 50 In reaching its conclusion, the court noted: "Foutch's obvious motive in telling Cook that the defendant fired the second shot was not to conceal the crime but to ensure that primary blame for the crime fell on the defendant." *Parmly*, 117 Ill. 2d at 394. The court held Foutch's statements describing the events inside the victim's house were not calculated to conceal the offense and had no relevance to such a purpose. *Parmly*, 117 Ill. 2d at 394. The court determined that no matter how broadly it read the co-conspirator exception, what Foutch told Cook did not fall within that exception. *Parmly*, 117 Ill. 2d at 394. Accordingly, the court held the trial court erred in

allowing Cook to testify regarding Foutch's statements detailing defendant's involvement in the killing.

¶ 51 Here, similar to *Parmly*, Wells' statements to Officer May at the scene of the shooting were obviously not intended to conceal the fact that a crime had occurred; rather, Wells' obvious motive in telling Officer May "The shotgun wasn't mine, it was my brother's" was to ensure primary blame for the police officer's shooting fell on his "brother." Subsequent evidence admitted at trial by both defendant and the State established defendant was Well's "half-brother." Besides attempting to minimize his own involvement in the crime, we find Wells' statement implicating defendant was clearly not calculated to "conceal" the offense and had no relevance to such a purpose. See *Parmly*, 117 Ill. 2d at 394-95. Accordingly, we find the trial court erred in allowing Wells' hearsay statement to be admitted into evidence under the co-conspirator exception to the hearsay rule.

¶ 52 Notwithstanding, the State contends Wells' statement to Officer May was also admissible as an excited utterance. The State correctly notes we can affirm the trial court's ruling on any ground warranted in the record, regardless of the reasons ultimately relied upon by the court. See *People v. Gunartt*, 327 Ill. App. 3d 550, 553 (2002).

¶ 53 For a hearsay statement to be admissible under the

spontaneous declaration or excited utterance exception to the hearsay rule, "(1) there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, (2) there must be an absence of time for the defendant to fabricate the statement, and (3) the statement must relate to the circumstances of the occurrence." *People v. Williams*, 193 Ill. 2d 306, 352 (2000). Courts consider several factors when applying the above elements, including " 'the nature of the event, the mental and physical condition of the declarant, and the presence or absence of self interest." *Id*, citing *People v. House*, 141 Ill. 2d 323, 382 (1990).

¶ 54 In *People v. Georgakapoulos*, 303 Ill. App. 3d 1001 (1999), the defendant contended a shooting victim's statements to witnesses and a police officer at the scene of the shooting that the defendant was the person who shot him did not qualify as a spontaneous declaration. Specifically, the defendant contended the victim was motivated by self-interest and by his gang membership to identify a rival gang member as the shooter. The defendant also contended the statement was not a spontaneous declaration because the victim was repeatedly questioned when he made the statement, and because the statement to the police officer was too remote in time from the startling occurrence.

¶ 55 This court determined the victim's statement identifying the

defendant as the shooter was "made under conditions which would foreclose any opportunity to fabricate." *Georgakapoulos,* 303 Ill. App. 3d at 1013. In support, the court noted the first statement was made almost immediately after the victim was shot, and while the victim lay seriously wounded and bleeding on the ground. The court held "[o]ne who has suffered such injuries could hardly be concerned with gang loyalty and revenge." *Georgakapoulos,* 303 Ill. App. 3d at 1013. The court also rejected the defendant's contention that the victim's statements were not excited utterances because they were made in response to questions posed by the witnesses and police officer. *Georgakapoulos,* 303 Ill. App. 3d at 1014. The court recognized "[t]he fact that a statement is made in response to a question does not automatically negate the statement's spontaneity, but instead is a factor to be considered in determining its reliability." *Georgakapoulos*, 303 Ill. App. 3d at 1014, citing *People v. Damen*, 28 Ill. 2d 464, 472 (1963).

¶ 56 Although we recognize being shot certainly constitutes a sufficiently startling event, we note the self-interested nature of Wells' statement implicating his "brother" as the person who had the shotgun indicates the statement was not a spontaneous and unreflecting statement. Unlike the defendant in *Georgakapoulos*, Wells had a strong motive to potentially fabricate his response

to a police officer's comment that Wells was "in trouble," namely to shift blame away from himself for the officer's shooting.

¶ 57 Moreover, while we recognize Wells' statement was made shortly after he was shot, we note a sufficient amount of time elapsed between the shooting and the statement to suggest Wells had an opportunity to fabricate his response. The record reflects Wells was caught by Officers May and Turbyville after he fled down an alley and disposed of the rifle he was carrying. Officer Turbyville then handcuffed Wells. While Wells was lying on the ground in handcuffs, someone told him he was “in trouble” because Officer Ryan had been shot. Officer May testified it was at that point that Wells “blurted out, I didn’t have a shotgun; my brother did.” In light of the record before us, we cannot say there was an absence of time for Wells to fabricate the statement implicating defendant after he was shot.

¶ 58 Examining the totality of the circumstances surrounding Wells' statement to Officer May, we cannot say the statement should have be admitted as evidence under the excited utterance exception to the hearsay rule. See *People v. Simon*, 953 N.E. 2d 1, 24 (2011).

¶ 59 Even though we find the trial court abused its discretion by allowing Officer May to testify regarding Wells' statement implicating defendant immediately after the shooting, we

ultimately find the error was harmless beyond a reasonable doubt. See *People v. Rush*, 401 Ill. App. 3d 1, 16-17 (2010); *People v. Sample*, 326 Ill. App. 3d 914, 924-25 (2001) ("admission of hearsay is harmless if there is no 'reasonable probability the verdict would have been different had the hearsay been excluded.' "), quoting *People v. McCoy*, 238 Ill. App. 3d 240, 249 (1992).

¶ 60 At trial, all four police officers identified defendant as one of the men who shot at them on November 14, 2001. All four officers also testified defendant was the individual holding the shotgun at the time of the shooting. Moreover, defendant confessed to his involvement when he spoke with the police and ASA Bregenzer following his arrest and agreed to memorialize his statement in a handwritten statement. Defendant's fingerprints were also found on the recovered shotgun used in the shooting. Although we recognize defendant recanted his confession and testified he was not present for the shooting during his trial, we note the additional evidence presented against him–-even absent Wells' statement–-overwhelmingly established defendant's guilt beyond a reasonable doubt. We cannot say a reasonable probability existed that the verdict would have been different had the hearsay been excluded. See *Sample*, 326 Ill. App. 3d at 924-25.

¶ 61 Turning back to the issue of whether Officer May's testimony

regarding Wells' statement violated the confrontation clause, we note confrontation clause-based errors are also subject to a harmless error analysis. Confrontation clause errors are harmless when " 'properly admitted evidence is so overwhelming that no fair-minded jury could reasonably have voted to acquit the defendant.' " *Sample*, 326 Ill. App. 3d at 924, quoting *People v. Singletary*, 273 Ill. App. 3d 1076, 1086 (1995).

¶ 62 Even assuming Officer May's testimony regarding Wells' statement constituted a "testimonial" statement violating the confrontation clause, we again note we cannot say a reasonable probability existed that the verdict would have been different had testimony regarding Wells' statement been excluded. See *Sample*, 326 Ill. App. 3d at 924-25. Accordingly, we find any confrontation clause violation created by the admission of testimony regarding Wells' statement immediately following the shooting amounted to harmless error.

¶ 63 IV. *Bruton* Violation

¶ 64 Defendant contends the trial court erred in allowing the State–-over defense counsel's objection–-to elicit testimony from Detective O'Donovan suggesting Wells implicated defendant as an accomplice in the shooting when questioned following his arrest, in violation of his confrontation rights under *Crawford* and *Bruton v. United States*, 391 U.S. 123, 136 (1968). While

defendant recognizes the trial court admitted Detective O'Donovan's testimony to show the officer's course of investigation, defendant contends the "course of investigation" concept does not allow an officer to testify to the substance of a hearsay statement, especially when the statement implicates the defendant. See *People v. Jura*, 352 Ill. App. 3d 1080, 1087-88 (2004).

¶ 65 In *Bruton*, the defendant and a co-defendant were jointly tried for armed robbery. The co-defendant did not testify at trial. The Supreme Court found the admission of a witnesses' testimony that the co-defendant had confessed and implicated the defendant violated the defendant's right to confront and cross-examine witnesses presented against him. *Bruton*, 391 U.S. at 137. The Court held a co-defendant's incriminating statements are not only "devastating to the defendant but their credibility is inevitably suspect *** [and][t]he reliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Bruton*, 391 U.S. at 136.

¶ 66 Illinois courts have interpreted *Bruton* to mean "testimony by witnesses recounting the inculpatory substance of conversations with non-testifying persons (often, but not always, co-defendants) could be reversible error." *Sample*, 326 Ill. App.

3d at 920; *People v. Gacho*, 122 Ill. 2d 221 (1988). Our supreme court has recognized that "when the substance of the conversation with the declarant goes to the essence of the dispute at trial 'it would inevitably go to prove the matter asserted' were a witness permitted to recount it." *Sample*, 326 Ill. App. 3d at 920, quoting *People v. Jones*, 153 Ill. 2d 155, 160 (1992).

¶ 67 However, an exception to *Bruton* developed with regards to police officers testifying to procedures undertaken during their investigations. *Sample*, 326 Ill. App. 3d at 920. Testimony used to explain the progress of the police investigation is not offered to prove the truth of the matter asserted, and, therefore, is not hearsay. *Sample*, 326 Ill. App. 3d at 920. "Testimony that recounts the substance of a conversation is not within the officer's knowledge and is inadmissible hearsay." *Gacho*, 122 Ill. 2d at 248. Therefore, "testimony should be limited to the fact that there was a conversation, without disclosing its content and to what the police did after the conversation concluded." *Sample*, 326 Ill. App. 3d at 921.

¶ 68 The following colloquy occurred between the State and Detective O'Donovan during defendant's trial:

> "[ASA]: And backing up –- I'm backing up to that last interview with the handwritten statement. Following that statement that was

taken from Mr. Wells, whom were you looking for as possible offenders?

[Detective O'Donovan]: A subject by the name of Jecorrey Duncan as well as a subject who was known–-

[Defendant's defense counsel]: I have an objection.

[The court]: All right that objection is overruled. You can have a seat.

[ASA]: And who else?

[Detective O'Donovan]: As well as the subject by the nickname of LUV."

¶ 69 Detective O'Donovan also testified Wells was shown a series of photographs. When the State asked Detective O'Donovan whom he was looking for after Wells looked at the photos, he said that: "After the interview the focus of the investigation now sought out a Mr. Jecorrey Duncan as well as a Mr. Lashun Members."

¶ 70 Defense counsel argued to the jury in closing that the police officers' physical descriptions of the offenders were nondescript and too broad to narrow down the potential suspects to defendant. During rebuttal closing argument, the prosecutor argued to the jury that:

"Oh, and what else do we know?

> Detective O'Donovan is speaking with Willie Wells on the evening of –- actually, into the early morning of November 15thth of 2003, speaking with Willie Wells at Mt. Sinai Hospital. Who did Detective O'Donovan tell you that the Chicago Police were looking for on November 15th –
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: That objection is sustained, counsel. You can go on.
>
> [ASA]: Folks, the name LaShun Members and Jecorrey Duncan, the officers knew on the night of November 15th of 2001. What further description than the name Jecorrey Duncan and even LaShun Members, what further description do you need to have broadcasted out over the radio?"

¶ 71 In *Sample*, the defendant contended the State's questioning of a detective fell outside the boundaries of the investigative procedure hearsay exception. *Sample*, 326 Ill. App. 3d at 922. This court agreed, noting the State had "elicited testimony that contained a strong inference that Walsh and Ashford had implicated defendant in their statements" to the detective. *Id*.

We found the State had not simply conducted a *Gacho*-style exchange concerning the investigatory process, but, instead, "asked serial questions to build the inference that defendant was named by his criminal cohorts." *Id*. We held that on balance, the repetition of strong inferences that his co-defendant implicated the defendant in the crimes, the use of those statements to build a substantive link in the State's case, and the State's several comments on the upcoming testimony during opening statements, led us to conclude the boundaries set for the investigative process hearsay exception had been breached. *Id.*

¶ 72 We went on to note, however, that any error in admitting the hearsay evidence was harmless beyond a reasonable doubt. *Id* at 925. The fact that the defendant was identified as the offender by a witness both in the courtroom and in a line-up prior to trial, mixed with his own confession to shooting the victim, led us to conclude there was no reasonable probability the verdict would have been different had the hearsay been excluded. *Id*.

¶ 73 Here, similar to *Sample*, we find the State's questioning of Detective O'Donovan elicited testimony that contained a strong inference that Wells had implicated defendant in his statement. The colloquy we found "disturbing" in *Sample* almost completely parallels the line of questioning at issue in this case. While we recognize–-as we did in *Sample*–-that the very existence

of the investigatory procedure hearsay exception suggests some inferences that the nontestifying witness implicated the defendant will be put before the jury, we note Officer O'Donovan's testimony here created more than a mere suggestion that Wells implicated defendant. We find Detective O'Donovan's testimony regarding his conversation with Wells at the hospital, mixed with the State's rebuttal closing argument highlighting that evidence to the jury, tends to suggest the State improperly stretched the boundaries of the investigative procedure hearsay exception here. See *Sample*, 326 Ill. App. 3d at 924-25.

¶ 74 Notwithstanding, we find any error in admitting the hearsay evidence here was harmless beyond a reasonable doubt. Again, we note all four police officers identified defendant in court and in a pretrial line-up as one of the men who shot at them on November 14, 2001. Defendant also confessed to his involvement when he spoke with the police and ASA Bregenzer following his arrest and agreed to memorialize his statement in a handwritten statement. Defendant's fingerprints were also found on the recovered shotgun used in the shooting. While defendant recanted his confession at trial and testified he was not present for the shooting, we note the additional evidence presented against him overwhelmingly established his guilt beyond a reasonable doubt. Because we cannot say a reasonable probability existed that the

verdict would have been different had the hearsay been excluded, we affirm defendant's convection. See *Sample*, 326 Ill. App. 3d at 924-25.

¶ 75 CONCLUSION

¶ 76 We affirm defendant's convictions and sentences.

¶ 77 Affirmed.