2014 IL App (1st) 113295-U

SIXTH DIVISION
September 26, 2014

No. 1-11-3295

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	07 CR 16601 (02)
	)	
WILLIE STARKS,	)	Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

HELD: Defendant was denied a fair trial when the trial court improperly admitted certain audio-videotaped statements from State witness Paul Davis as substantive evidence under section 115-10.1 (c) (2) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (c) (2) (West 2008)). The evidence was sufficient to sustain defendant's conviction and therefore there is no double jeopardy impediment to retrial. Defense trial counsel was not ineffective for failing to seek a dismissal of the murder charge based on speedy-trial grounds.

¶ 1 Defendant Willie Starks and codefendant Gregory Quinn, aka "Little Greg," were charged with first-degree murder in the shooting death of Mrs. Carmella Lipinski. Approximately a week prior to defendant's trial, Quinn was found not guilty of the murder in a separate jury trial.[1]

¶ 2 Following a jury trial, defendant was convicted of first degree murder under an accountability theory for the actions of codefendant Quinn in the fatal shooting of Mrs. Lipinski. Defendant was sentenced to 45 years' imprisonment. After defendant's motion to reconsider his sentence was denied, he filed a timely notice of appeal. This appeal followed.

¶ 3 On appeal, defendant contends: (1) the evidence was insufficient to support his conviction for first-degree murder based on accountability; (2) he was denied a fair trial when the trial court improperly admitted audio-videotaped statements from State witness Paul Davis as substantive evidence under section 115-10.1 (c) (2) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (c) (2) (West 2008)); (3) his trial counsel was ineffective for failing to seek a dismissal of the charges based on speedy-trial grounds; and (4) the matter should be remanded for an evidentiary hearing to determine if any of the jurors who found him guilty,

[1] "Generally, in a joint trial before the same trier of fact the acquittal of a codefendant raises a reasonable doubt as to the defendant's guilt where the evidence presented against each defendant is identical in all respects." *People v. Wehmeyer*, 155 Ill. App. 3d 931, 943 (1987). However, "[w]here there is the slightest difference in the evidence against codefendants, the acquittal of one does not raise a reasonable doubt of the other's guilt." *People v. Winchel*, 159 Ill. App. 3d 892, 901 (1987).

authored a letter sent to the trial court admitting that racial prejudice played a part in his verdict. For the reasons that follow, we reverse defendant's conviction and remand for a new trial.

¶ 4 The following evidence was presented at trial. On January 30, 2003, Mrs. Lipinski sustained multiple gunshot wounds after shots were fired into the house she lived in with her husband and son, John Lipinski. The house was located in Sauk Village, Illinois. Nine days after the shooting, Mrs. Lipinski died from her wounds.

¶ 5 The fatal shooting allegedly stemmed from a drug debt owed by the victim's son John Lipinski, aka "Johnny Wacko." Johnny was a manic schizophrenic who used illegal drugs he purchased from local drug dealers. Johnny supported himself with a social security disability check he received the first of each month. Johnny's sister, Cheryl Rogers, testified that drug dealers would either knock on his bedroom window, come to the front door, or call him to sell and deliver their drugs. Rogers identified defendant as one of the drug dealers. Defendant claimed he refused to sell drugs to Johnny because he did not "front" drugs on credit.

¶ 6 No one was initially arrested in connection with the Lipinski murder and it remained a "cold case" for approximately four years until February 2007, when the Forest County Sheriff's Department in Crandon, Wisconsin arrested a man named Paul Davis for possession of cannabis and bail jumping. Davis was also being investigated in connection with a child sex abuse case. A man named Brian Branch was housed in the county jail with Davis. Davis and Branch knew each other from the neighborhood in Sauk Village, Illinois.

¶ 7 On February 2, 2007, Davis requested to speak with Forest County deputies regarding information he allegedly had about certain crimes in Illinois, one of which was the murder of Mrs. Lipinski. Davis claimed he requested to speak with the deputies because he wanted to go

home to his disabled son, he had never served time in prison and he feared that if he was sent to prison his fellow inmates would discover the pending child sex abuse charges. Davis spoke with Sergeant Jeff Marvin.

¶ 8 Deputy John P. Huettle followed up on the information Davis provided to the sergeant and began monitoring phone calls Davis made from county jail. In some of the monitored phone calls Davis made to individuals back at Sauk Village, he attempted to divert attention away from himself as an informant by accusing Branch of snitching and providing police with the information about the Lipinski murder; information Davis was actually providing to police. Davis testified that in order to protect himself, he blamed Branch for giving police information about the murder.

¶ 9 On March 7, 2007, Deputy Huettle interviewed Davis. Captain Bob Jarvis participated in the interview. Prior to the interview, Davis was advised of and waived his *Miranda* rights. The interview was video-recorded on a compact disc (CD) in what became People's exhibit No. 56.

¶ 10 In the interview, Davis stated that on January 30, 2003, he was in Sauk Village, Illinois at Brian Branch's house playing cards when defendant and Quinn came into the house. According to Davis, he, defendant, and Quinn were close friends associated with the same street gang. Davis stated that defendant normally carried a 9mm Taurus handgun with him for protection from rival gangs, and that the group of them shared the firearm during the six to seven months the gang possessed the gun.

¶ 11 Davis claimed he was aware that Johnny owed defendant and Quinn money for drugs sold to him on credit. Davis stated that defendant and Quinn told him they were going to get the disability check Johnny received the first of each month because he was "slow." Davis believed

it was defendant's idea to go to Johnny's house and that Quinn was defendant's "soldier." Davis claimed defendant left with the firearm.

¶ 12 Davis stated that defendant and Quinn walked to Johnny's house and shot at the front of the house. Davis claimed he was "pretty positive that they shot the main window." Davis claimed that when defendant and Quinn returned to Branch's house later that evening, they were both sweating and told him they had "solved the problem." They said, "We did it. We shot through the house." Quinn had the gun. According to Davis, defendant and Quinn each shot three times into the house; however, he later claimed he was unsure of who actually fired the gun at the house. Defendant told Davis to hide the gun, which he did at his father's nearby house. Davis stated the gun smelled like it had recently been fired.

¶ 13 Approximately a week later, defendant made a gun trade with a man named Brandon McCarter, aka "Killer B," who was from Ford Heights, Illinois, trading the 9mm Taurus for a .38 caliber handgun. Davis claimed the 9mm Taurus could be found at the Ford Heights police department. Police authorities from the Sauk Village police department eventually recovered a 9mm Taurus handgun from the Ford Heights police department. Eight shell casings and a fired bullet recovered outside the Lipinski house were positively matched to the recovered firearm.

¶ 14 In April 2007, Detective Robert Grossman from the Sauk Village police department and Assistant State's Attorney (ASA) Nick D' Angelo traveled to Wisconsin to interview Davis. On April 26, 2007, the ASA conducted an interview of Davis. Detective Grossman and Deputy Huettle participated in the interview. The interview was recorded on a CD, People's exhibit No. 57. Davis' account of the shooting was substantially similar to the account he gave in his

previous interview, with the following additional details. Davis claimed defendant and Quinn had funded Johnny with $40-$50 worth of crack cocaine.

¶ 15 Johnny kept promising to pay the drug debt, but defendant and Quinn got tired of waiting. Defendant had the gun when he and Quinn left Branch's house, and when they returned, Quinn had the gun. Davis stated that when defendant and Quinn returned to Branch's house they were sweating and looked nervous. Defendant told Davis to "get rid of this," which meant for him to hide the gun. Quinn then gave Davis the gun. Davis stated the gun felt warm and smelled like it had been fired. Davis took the gun to his father's house and then returned back to Branch's house. Defendant and Quinn told Davis "they handled it." Davis stated that a week or two after the shooting, they got rid of the gun in a trade with Brandon McCarter, aka "Killer B." Davis claimed defendant and Quinn got rid of the gun because they knew it was used to kill Johnny's mom.

¶ 16 At trial, Davis attempted to repudiate and undermine some of the statements he made during his interviews with police. In answer to the following question asked on direct examination: "on January 30th, 2003, do you remember that evening?" Davis responded, "I had a severe alcohol and drug problem. I was drinking a pint to a pint and a half a day by myself straight alcohol. It would be extremely hard to -- I was a drunk, severe drunk." When he was asked on direct examination if he ever told investigators that defendant and Quinn told him they were going over to Johnny's house to take care of their problem, Davis replied, "Yes, I said that, correct, but I made it up." Davis stated, "About the fact that they supposedly shot at that house, and that they had a -- that I seen them with a 9 that day. I didn't see nobody."

¶ 17 When he was asked on direct examination if he ever told investigators that he told defendant and Quinn it was stupid to shoot into the house, Davis replied, "I'm not sure. I was saying anything. As long as they wanted to listen, I just wanted to go. Yeah, I just wanted to go home." When asked on cross-examination if he ever saw defendant with a gun on the date of the shooting, Davis responded, "I was drunk. I was drunk. I never seen [defendant] that night with a gun at all." Davis answered "No" to the following questions on cross-examination: "Did [defendant] say, we're going down Johnny Wacko's house to take care of our business?" "Did [defendant] ever come back and say we took care of our business?" and "Did [defendant] ever say we went down there and say we shot up the house?"

¶ 18 During the State's direct examination of Deputy Huettle, the CDs of Davis' interviews with police were played for the jury over defense counsel's objections that certain recorded statements made by Davis were inadmissible hearsay.

¶ 19 Detective Grossman testified that following his interviews with Davis, he returned to Sauk Village and continued his investigation. He confirmed that Johnny received a social security disability check the first of each month. The detective also interviewed Brandon McCarter on three separate occasions. After the final interview, the detective went to the Ford Heights police department on June 27, 2007, where he recovered a 9mm Taurus handgun. Ballistics testing revealed that shell casings and a fired bullet recovered in this case matched the firearm. Based on this information, police arrested defendant on July 18, 2007.

¶ 20 On July 18 and 19, 2007, Detectives Grossman and Holevis interviewed defendant. Prior to the interviews, defendant was advised of his *Miranda* rights, which he waived. The interviews

were recorded on six digital video discs (DVDs) in what became People's exhibit No. 62. A written transcript of the interviews was admitted as People's exhibit No. 63.

¶ 21 The recordings reflect that over the course of the interrogation defendant changed his story several times, but in the end consistently told detectives the following version of events, a portion of which was played for the jury.[2] On the evening of January 30, 2003, defendant and Quinn left Brian Branch's house headed to their respective homes. Defendant was carrying the 9mm Taurus handgun. When defendant and Quinn reached defendant's house, Quinn asked for the firearm. Defendant stated he gave Quinn the gun, believing he was going home. Quinn then told defendant he was going to Johnny's house to get his money.

¶ 22 Defendant claimed he would not have given Quinn the gun if he had known Quinn was going to Johnny's house because he knew Quinn liked to "show out." Defendant stated, "I didn't think the boy was gonna shoot nobody house up. I really didn't. I wouldn't have gave him the gun if I thought that. I was home." "I didn't know nothing about no shooting was gonna happen or nothing." "[H]e didn't tell me what he was fitting to do, you know what I'm saying, he tell me afterwards, after he done got the gun and everything."

¶ 23 Defendant told Quinn "don't do nothing stupid" and then said "as a matter of fact, I'm going with you." Defendant told Quinn to wait for him while he went inside his house to get some food. Defendant came out of his house carrying a plate of food. Quinn was waiting for him at the corner. Defendant caught up with Quinn and the two started walking down the street.

[2] It is unclear from the record which portion of the over ten hours of videotape was actually played for the jury.

Quinn told defendant that Johnny owed him $50 and he was going to get his money. Defendant again told Quinn not to do anything stupid.

¶ 24 At an intersection near Johnny's house, defendant told Quinn to give back the gun, but Quinn refused and took off running toward Johnny's house. Defendant claimed he was not about to chase Quinn, especially with a plate of food in his hands. Defendant walked down the street toward Johnny's house and eventually threw his plate in a yard housing a dog named "Shaq." When defendant reached the top of the block where Johnny's house was located, he saw Quinn either go to the side of the house or go up to the door. Quinn ran back into the middle of the street, looked both ways, and then started firing the gun. Defendant stated, "I saw him shoot, I don't know what he hit though." Defendant claimed that after he heard the first gunshot, he turned and ran back to his house.

¶ 25 Defendant stated that when he reached his house, instead of going inside the house, he went inside a van parked in his driveway and lit up a cigarette. Defendant took about "three pulls" on the cigarette when he saw Quinn walking up the driveway. Quinn told defendant, "I just shot up Johnny Wacko momma house." Defendant stated he responded, "what the f**k you do that for."

¶ 26 Defendant and Quinn started walking back to Branch's house, but when they heard sirens, they started running to his house. Quinn still had the gun. When they arrived at Branch's house, defendant took the gun from Quinn and gave it to Davis, telling him to hide it. Defendant, Quinn, and Davis remained at Branch's house for about two hours getting "high" before leaving. After defendant learned that Mrs. Lipinski had died, he got the gun back from Davis and traded it with Brandon McCarter, aka Killer B.

¶ 27 After the State rested, the defendant moved for a directed verdict, which the trial court denied. Defendant did not testify and did not present any witnesses or evidence on his behalf. The jury found defendant guilty of first degree murder under a theory of accountability for the actions of Quinn. Defendant filed a motion for a new trial.

¶ 28 A few weeks after the verdict, the trial court received an anonymous letter purportedly from a juror claiming that the respective races of the juror, victim and the defendant affected his/her judgment as well as the judgments of some other jurors. Defense counsel filed a supplemental motion for a new trial based on the anonymous letter. The trial court allowed defense counsel to investigate the allegations made in the anonymous letter.

¶ 29 On September 26, 2011, defense counsel advised the trial court that his investigator had reached out to all twelve jurors but only seven responded. The investigator interviewed these seven jurors. The investigator questioned the jurors as to whether race played a role in their verdict. The jurors responded in the negative.

¶ 30 Defense counsel acknowledged he was unable to prove there was any outside interference with the jury deliberations and advised the trial court that he would be proceeding on the original motion for a new trial. The trial court denied defendant's motion for a new trial. Defendant was sentenced to 45 years' imprisonment. After defendant's motion to reconsider his sentence was denied, he filed a timely notice of appeal and this appeal followed.

¶ 31 ANALYSIS

¶ 32 In his second issue on appeal, which we address first, defendant contends he was denied a fair trial when the trial court improperly admitted certain portions of Davis' audiotaped statements as substantive evidence under section 115-10.1 (c) (2) of the Code (725 ILCS 5/115-

10.1 (c) (2) (West 2008)). Defendant claims that those portions of Davis' prior inconsistent statements in which he told police that defendant admitted shooting into the victim's house were inadmissible as substantive evidence under section 115-10.1 of the Code because Davis lacked personal knowledge of who actually fired into the house. We agree.

¶ 33 As an initial matter, we reject the State's contention that defendant waived this issue for review on the ground that defense counsel made only a general objection to the admission of Davis' prior inconsistent statements. A general objection usually results in waiver of the claim of error unless: (1) the grounds for the objection were clear from the record; (2) trial counsel's assistance was ineffective; or (3) there was plain error. *People v. Simms*, 168 Ill. 2d 176, 193 (1995). In this case, it is clear from the record that the trial court and the State understood the nature of defense counsel's objection. Moreover, because waiver is a limitation on the parties, but not upon this court, we can address the merits of defendant's claims despite any alleged waiver. *People v. Thomas*, 354 Ill. App. 3d 868, 882-83 (2004).

¶ 34 Turning to the merits, "in general, a prior inconsistent statement is admissible solely for impeachment purposes, not as substantive evidence of the truth of the matter asserted." *Thomas*, 354 Ill. App. 3d at 884. However, paragraph (c) (2) of section 115-10.1 of the Code allows a witness's prior inconsistent statement to be admitted as substantive evidence if the statement "narrates, describes, or explains an event or condition of which the witness had personal knowledge." 725 ILCS 5/115-10.1 (c) (2) (West 2008). In order for the "personal knowledge" requirement to be satisfied, the witness must have personally observed the subject matter of his statement. *People v. Coleman*, 187 Ill. App. 3d 541, 547 (1989); *People v. McCarter*, 385 Ill. App. 3d 919, 930 (2008).

¶ 35 "The personal knowledge requirement is not satisfied when the witness merely testifies as to what another claims to have done." *People v. Morales*, 281 Ill. App. 3d 695, 700 (1996). "[T]he witness must have observed the events being spoken of, rather than simply hearing about them afterwards." *McCarter*, 385 Ill. App. 3d at 930. "Such statements carry an indicia of reliability because a witness is less likely to repeat another's statement if he witnessed the event and knows the statement is untrue." *Morales*, 281 Ill. App. 3d at 701.

¶ 36 In the instant case, Davis' allegations that defendant admitted shooting into the victim's house and that defendant and Quinn each shot three times into the house were inadmissible as substantive evidence under section 115-10.1 (c) (2) of the Code because the allegations were not based on Davis' personal knowledge. Davis did not witness the shooting and his version of what purportedly happened was merely a recitation of what he allegedly heard or was told. The information in the recorded statements concerning the events surrounding the shooting was derived solely from what Davis was allegedly told by defendant and Quinn. Because Davis lacked any personal knowledge of the events surrounding the shooting, those portions of his taped interviews concerning the circumstances of the shooting were inadmissible as substantive evidence under section 115-10.1 (c) (2) of the Code, and the trial court erred in allowing their admission as substantive evidence.

¶ 37 We decline the State's invitation to reexamine this court's prior decisions defining "personal knowledge" in the context of section 115-10.1 of the Code. See *Morgason*, 311 Ill. App. 3d at 1011-1013. Moreover, we do not find that the admission of the challenged statements was harmless. Davis' statements were the only evidence directly tying defendant to the shooting into the victim's house. The competent evidence supporting defendant's conviction on an

accountability theory is circumstantial at best. The closeness of the competent evidence and the State's reliance upon Davis' improperly admitted prior inconsistent statements leads us to conclude that the defendant's conviction may well have resulted from the evidentiary error. Defendant was prejudiced by the erroneous admission of these statements. As a result, the trial court committed reversible error by admitting the statements as to the circumstances surrounding the shooting as substantive evidence under section 115-10.1 of the Code.

¶ 38 The next question is whether remand for a new trial is barred by the double jeopardy clause. " ' The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' " *People v. Taylor*, 76 Ill. 2d 289, 309 (1979) (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)). Although the double jeopardy clause prohibits retrial after a conviction is reversed due to legally insufficient evidence to support that conviction, it does not preclude retrial where a conviction is set aside because of an error in the proceedings leading to the conviction. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). "Moreover, retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted." *Id*. at 393. For purposes of double jeopardy, all of the evidence submitted at the original trial may be considered in determining the sufficiency of the evidence. *People v. Hernandez*, 362 Ill. App. 3d 779, 789 (2006).

¶ 39 Defendant contends the State's evidence was insufficient to prove him legally accountable for the conduct of Quinn in shooting into the victim's house. When reviewing the sufficiency of the evidence in a criminal case, the standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the

essential elements of the offense beyond a reasonable doubt. *People v. Lamborn*, 185 Ill. 2d 585, 590 (1999); *People v. Cooper*, 194 Ill. 2d 419, 430-31 (2000). In making this determination, the trier of fact is charged with weighing the evidence, assessing the credibility of the witnesses, and resolving conflicts in the evidence. *People v. Kyles*, 303 Ill. App. 3d 338, 352 (1998). A reviewing court will not reverse a conviction on grounds of insufficient evidence unless the evidence is so improbable or unsatisfactory as to raise a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 40 In Illinois, a person is legally accountable for another's criminal conduct if "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2 (c) (West 2012); *People v. Fernandez*, 2014 IL 115527, ¶ 13. "Accountability focuses on the degree of culpability of the offender and seeks to deter persons from *intentionally* aiding or encouraging the commission of offenses." (Emphasis in original.) *People v. Perez*, 189 Ill. 2d 254, 268 (2000). "Unless the accomplice *intends* to aid the commission of a crime, no guilt will attach." (Emphasis in original.) *People v. Shaw*, 186 Ill. 2d 301, 322 (1999). To prove that the defendant possessed the requisite intent, the State must present evidence establishing beyond a reasonable doubt that either: (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design. *Perez*, 189 Ill. 2d at 266.

¶ 41 In the instant case, we acknowledge the absence of any direct evidence that anyone other than Quinn fired the fatal gunshots. However, evidence of accountability may be circumstantial. *People v. Cooks*, 253 Ill. App. 3d 184, 188 (1993). "Circumstantial evidence is proof of facts or

circumstances that give rise to reasonable inferences of other facts that tend to establish guilt or innocence of the defendant." *People v. Edwards*, 218 Ill. App. 3d 184, 196 (1991). A defendant can be convicted solely on circumstantial evidence. *Id.* at 196. Here, there was sufficient circumstantial evidence for a rational trier of fact to find defendant guilty of first-degree murder under an accountability theory.

¶ 42 In his interviews with police, Davis stated that on the date of the incident, he was playing cards at Branch's house when defendant and Gregory Quinn came into the house. Davis stated that defendant and Quinn told him they were going to get the disability check Johnny received the first of each month because he was "slow." Davis believed it was defendant's idea to go to Johnny's house and that Quinn was defendant's "soldier." Davis claimed defendant left the house carrying a 9mm handgun. According to Davis, defendant normally carried the firearm with him for protection from rival gangs.

¶ 43 Defendant now contends on appeal that, at best, Davis' statements establish that he and Quinn left Branch's house to collect a debt from Johnny. We disagree. Based on Davis' statements, a jury could have reasonably concluded that defendant and Quinn planned on using the firearm to collect the drug debt. "The fact finder may infer a common design from the circumstances surrounding the unlawful conduct." *Curtis*, 296 Ill. App. 3d at 1001.

¶ 44 Proof that a defendant was present at the scene of the offense, voluntarily maintained a close affiliation with his cohort before and after the crime was committed, failed to report the crime and flight from the scene are all factors the trier of fact may consider in determining defendant's accountability. *People v. Taylor*, 164 Ill. 2d 131, 141 (1995). The evidence presented at trial established that defendant was present during the shooting, he ran from the

scene of the shooting, he maintained a close association with Quinn after the shooting, he helped Quinn conceal the firearm used in the shooting, and he failed to report the shooting incident.

¶ 45 Defendant contends that when he accompanied Quinn to the victim's house he did not share the same criminal intent as Quinn or engage in a common criminal design with Quinn to shoot into the house. In his interviews with police, defendant acknowledged that when he and Quinn left Branch's house, he was carrying the 9mm handgun. However, defendant denies that he knew Quinn was planning on going to Johnny's house to collect a drug debt. Defendant stated that when he and Quinn left Branch's house, they were headed to their respective homes. When defendant and Quinn reached defendant's house, Quinn asked for the gun. Defendant stated he gave Quinn the gun, believing he was going home. Defendant claimed it was at this point that Quinn told him he was going to Johnny's house to get his money.

¶ 46 Defendant told detectives he would not have given Quinn the firearm if he had known Quinn was going to Johnny's house because he knew Quinn liked to "show out." Defendant stated, "I didn't think the boy was gonna shoot nobody house up. I really didn't. I wouldn't have gave him the gun if I thought that. I was home." "I didn't know nothing about no shooting was gonna happen or nothing." "[H]e didn't tell me what he was fitting to do, you know what I'm saying, he tell me afterwards, after he done got the gun and everything."

¶ 47 Our court has determined that where a defendant's statements are allegedly the sole evidence of what occurred, the trier of fact is not obligated to accept all or any part of the statement, but may assess the probabilities, the reasonableness of any defense offered and reject any or all of defendant's account in favor of the State's circumstantial evidence of guilt. *People v. Falls*, 252 Ill. App. 3d 1080, 1089 (1993). After reviewing the evidence in the light most

favorable to the State, we find there was sufficient circumstantial evidence for a rational trier of fact to reject defendant's version of events and instead find him guilty of first degree murder under an accountability theory. As a result, we find that the principles of double jeopardy do not preclude defendant's retrial. *People v. Parker*, 317 Ill. App. 3d 845, 852-53 (2000).

¶ 48 Next, we reject defendant's argument that his trial counsel was ineffective for failing to invoke his speedy-trial rights to dismiss the murder charge. In Illinois, the right to a speedy trial is protected by both the constitution and statute. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; section 103-5(a) of the Code of Criminal Procedure of 1963 (Speedy Trial Act) (725 ILCS 5/103-5(a) (West 2010)); *People v. Wade*, 2013 IL App (1st) 112547, ¶ 15. In this case, defendant raises a violation of his statutory right to a speedy trial, not his constitutional rights.

¶ 49 Section 103-5(a) of the Speedy Trial Act provides that a defendant must be tried within 120 days from the date he was taken into custody. However, any delay occasioned by defendant temporarily suspends the running of the 120-day period until the expiration of such delay. 725 ILCS 5/103-5(a), (f) (West 2010). A defendant occasions delay if he requests a continuance, agrees to a continuance, or his actions otherwise cause or contribute to a delay. *People v. Patterson*, 392 Ill. App. 3d 461, 467 (2009).

¶ 50 Defendant was arrested on July 18, 2007. The State filed an indictment on August 9, 2007, and the case was transferred to district six on August 28, 2007. Defendant was arraigned on that date and the case was continued by agreement to September 20, 2007. The State agrees with defendant that the 39 days from defendant's arrest to his arraignment are attributable to the prosecution. The State also agrees with defendant that the period from August 28, 2007 to

September 16, 2009, totaling 751 days is attributable to defendant as the continuances were either by agreement or motion of defendant.

¶ 51 Defendant now argues that the only question left for our court is whether the period from September 16, 2009 to November 9, 2009, 55 days of pre-trial delay is attributable to defendant or the State. The State contends that the delay is attributable to the defendant where his counsel failed to make a written or oral demand for trial on the record on September 16, 2009, and the case was continued by agreement for jury trial.

¶ 52 A review of the record reveals that on September 16, 2009, defense counsel agreed with the trial court that the case had been continued and set for a jury trial on November 9, 2009. Defendant maintains that since the November 9th trial date was made within the 120-day period, this was not a delay attributable to him and therefore his continuance did not toll the speedy-trial clock. We must disagree.

¶ 53 Our court has determined that an agreed continuance tolls the speedy trial period, whether or not the case has been set for trial, where the defendant both actually agrees to the continuance and fails to make an objection or demand for his speedy-trial rights. *Wade*, 2013 IL App (1st) 112547, ¶ 26. Likewise, in this case, defense counsel did not make a written or oral demand for trial on the record on September 16, 2009, and agreed to the case being continued to November 9, 2009. As such, defendant's agreement to the continuance tolled the speedy trial period.

¶ 54 Defendant's trial commenced on March 21, 2011. On that date, only 102 days of the 120 day speedy-trial period had expired. Therefore, defendant's right to a speedy trial was safe guarded. As a result, there was no lawful basis for asserting a speedy-trial violation and

defendant's ineffective assistance of counsel claim must fail. See *People v. Cordell*, 223 Ill. 2d 380, 392-93 (2006).

¶ 55 Accordingly, for the foregoing reasons we reverse the defendant's conviction and sentence and remand for a new trial. Our resolution of the issues make it unnecessary for us to address the defendant's final issue regarding the typed letter sent to the trial court allegedly authored by one of the jurors.

¶ 56 Reversed and remanded for a new trial.