No. 2—09—0955
Order filed May 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—3716
ROMELLE H. GRAHAM,	)	Honorable Christopher R. Stride,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: (1) The evidence was sufficient to sustain, on an accountability theory, the defendant's first degree murder conviction. (2) The trial court did not err in its preliminary inquiry into defendant's *pro se* ineffective assistance of counsel claims. (3) Judgment of conviction should be entered only on the first degree murder count of the indictment, and three judgments of conviction on lesser murder counts must be vacated. (4) Mittimus must be corrected to accurately reflect defendant's date of arrest and credit for time served.

In May 2009, a jury convicted defendant, Romelle H. Graham, of four counts of first degree murder (720 ILCS 5/9—1(a)(1) (2008)). In June 2009, defendant filed several *pro se* posttrial motions alleging ineffective assistance of trial counsel and moving for a new trial. After hearings in

July and August 2009, the court denied defendant's *pro se* motions (and a motion for a new trial filed by defendant's counsel) and, on August 21, 2009, sentenced defendant to 60 years' imprisonment. An amended sentencing order, entered August 28, 2009, reflects that the sentence was entered on one count of the indictment, while judgments of conviction were entered on four counts of the indictment. Further, the sentencing order provides defendant with 360 days' credit for time served in custody prior to sentencing. On September 4, 2009, the court denied defendant's motion to reconsider the sentence.

On appeal, defendant argues that: (1) the evidence is insufficient to sustain his conviction; (2) the court erred in failing to appoint conflict counsel to argue his *pro se* claims of ineffective assistance of counsel; (3) the court erred in entering against him a total of four convictions, as opposed to one, first degree murder conviction; and (4) despite the sentencing order, the mittimus reflects that he received insufficient credit for time served prior to sentence. For the following reasons, we affirm in part, vacate in part, and correct the mittimus.

I. BACKGROUND

A. Trial

Trial commenced on May 4, 2009. In sum, the State's theory of the case was that, in the early morning hours of August 25, 2008, defendant and four accomplices, Ernest Hughes, Paul Alston, Nate Wise, and Mike Reed, broke into a home and shot and killed one of its occupants, Bernard Phillips. The State informed the jury in its opening statement that it would not try to establish who fired the gun that killed Phillips. Rather, the State argued that it would establish that defendant was the leader of the group and was accountable for the murder. The trial evidence and testimony is

voluminous. Thus, the following recitation seeks to summarize that evidence particularly relevant to this appeal.

1. State's Case-in-Chief

a. Shirl Palmer

Shirl Palmer, age 36, testified that, on August 25, 2008, she lived in a townhouse in the Manchester Knolls complex in North Chicago. Palmer's three children, Paris (age 19), Deja (age 13), and Danel (age 12), lived with her. In addition, Palmer lived with Phillips (the victim), her fiancé. The townhouse had a first-floor window with an air conditioning unit positioned therein. The kitchen (also on the first floor) had two entrances (one off of the living room by the front door and the other leading to a back hallway that contained a bathroom) and, off of the kitchen, were sliding glass doors that led to a patio. Upstairs, there were four bedrooms, one for each child and one shared by Palmer and Phillips.

At around 4:00 a.m. on August 25, 2008, Palmer and Phillips were sleeping in the master bedroom; Deja and Danel were sleeping in the bunk beds in Deja's room, and Paris was not home. Palmer awoke to four men in her bedroom— two or three separate voices were saying "get up, bitch," and it appeared that a flashlight was being directed onto Phillips' face. The men were holding guns. Palmer and Phillips jumped out of bed; someone shoved Palmer to the floor. Palmer was wearing a cotton nightgown, and Phillips was wearing only boxer briefs. One man pressed Palmer to the floor with his foot on her back and put a gun to her head. She reached up to push it away from her head and felt that the barrel was long and round, as opposed to short and square. The men told Phillips "Give me the money, bitch. You want to die? You want to die, bitch?" and they repeatedly hit him. Palmer could hear drawers opening, and she told the men to open the bedroom safe, which

contained only documents and jewelry. Phillips directed the men to money that he had in a drawer, but, while hitting and kicking him, they continued to say it was not enough. One man said, in a voice that sounded as if he was gritting his teeth,"On the Fo." To Palmer, the person to whom that voice belonged was the dominant person in the group.

Phillips said, "Take me downstairs, I'll give you whatever you want." Palmer was lifted off the floor and forced downstairs; Phillips and the other men were ahead of her. When she stepped out of her room, Palmer could see another (fifth) man with a gun, standing across the hall in the room with her children. She said to him "please don't hurt my children" and began praying aloud. A man pulled Palmer by her arm to the kitchen and placed her on the floor by the patio doors. A gun was pressed to her head, and she again reached up to push it away. In the process, Palmer saw that the men were wearing black clothing, masks that covered the bottom portion of their faces, but left their eyes exposed, and white, latex gloves. The man holding her down had longer hair in "plats or big cornrows" that flipped up "like Pippy Longstocking." Phillips was on the other side of the kitchen, on his knees in front of the sink, with three men around him. The men kept kicking and hitting Phillips and were upset because he kept telling them that he did not have anything to give them. As far as Palmer could tell, only one person searched for money.

At some point, one of the men said, "We're going to kill this bitch and her kids. Go get the kids. We're going to duct tape her and the kids." Palmer testified that the voice making these comments was the same "gritting-teeth" voice belonging to the man giving orders to everyone. Phillips became quiet for a moment and then said "You're not going to bother my kids or my girl. You bitches are going to have to kill me. You're going to have to kill me." Phillips jumped up, bumping into the kitchen table, and the men, including the man holding Palmer, started fighting him.

Phillips told Palmer to "run," and she began running toward the door. Palmer saw the man who had been upstairs with her children running down the stairs to help the other men; she could hear her children's voices and knew they were all right. Palmer then heard three or four gunshots—one as she was running out the door and then two or three others while pounding on neighbors' doors for help. After a neighbor said that she had called the police, Palmer came back to the house. She saw Phillips chase the men out of the townhouse and then drop to the ground in front of the door. One of the men turned back toward the window as if he was going to go back inside, but, when Palmer started screaming that the police were coming, he ran away. Palmer went to Phillips, who was shot, rolled him onto his back, and ran inside to get something to put over him. She then sat with him, held his hand, prayed, and told him an ambulance was coming. An ambulance took Phillips to the hospital, and he passed away shortly thereafter.

A few weeks prior to August 25, 2008, Palmer looked out a front window and noticed a blue, four-door vehicle that appeared to be a Cutlass Ciera, parked in her parking space. There were four people in the vehicle. Phillips went outside and, because the window was cracked, Palmer heard Phillips telling the vehicle's occupants in an agitated, upset voice, not to come over unannounced. Phillips handed the driver a case that holds CDs or DVDs. After he returned to the house, Palmer told Phillips that the car remained sitting outside; Phillips returned to the car, saying "I already told you to leave." He then stood by the house until the car left. After Phillips was killed, police showed Palmer six or seven pictures; amongst the pictures was a photograph of the person Palmer saw sitting in the driver's seat of the blue vehicle. That person was later identified as Hughes.

b. The Children - Deja and Danel Palmer

Deja Palmer testified that, in the early morning hours of August 25, 2008, she was asleep in her room in the bottom bunk bed and Danel was asleep in the top bunk bed when they awoke to their mother's screams. Deja climbed up toward Danel to see if he was all right, and then the bedroom door opened. A man dressed in black with his face covered entered the room and pointed a gun at Deja. He had a deep voice and told her to "sit the fuck down." She laid back down in her bed. Deja heard things moving downstairs, yelling, someone saying "well, where is it" and Phillips replying "it's right there. It's right there." Deja asked the man in her room "Please don't shoot or hurt anybody." He replied "Everybody's going to be all right." After 5 or 10 minutes, Deja heard someone walk about halfway up the stairs and ask the man in her room (who had stepped out of the bedroom) what he was doing, to which he replied "I'm watching the kids." A couple of minutes later, Deja heard about five or six gunshots. She got out of her bed and looked out the window and saw her mother yelling "help me." Deja and Danel went downstairs and saw Phillips lying on his back on the front lawn; there were two bullet holes in his chest and blood on his chest and face.

Danel testified consistently with Deja that his mother's screams woke him. A man entered the room and, in a deep voice, told Danel and Deja to "lay the fuck down." Danel testified that he "just was fittin' to cry and I just laid down;" he was thinking about what was going to happen to his mother and Phillips and laid there, praying and crying. Danel did not see if the man in the bedroom was holding a gun. Danel laid there and heard Phillips moaning. Danel asked about five times to see his mom; he heard more than two gunshots and heard his mother scream again. He heard "a whole bunch of footsteps" going downstairs and then left the bedroom. He noticed that his mother's bedroom was "trashed," and, as he went downstairs, the air appeared cloudy. Danel went outside

and saw Phillips laying in the grass in a lot of blood. Danel started crying and ran down the sidewalk because he did not want to look anymore.

c. Ernest Hughes

Prior to trial, Ernest Hughes, age 23, admitted that he was one of the men involved in the crimes and he pleaded guilty to home invasion. Accordingly, immediately prior to his testimony, the trial court instructed the jury:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in the [*sic*] light of the other evidence in the case."

Hughes then testified that he usually goes by the nickname Rodie. Hughes moved to North Chicago around age 13. He "grew up*** pretty well" with Nate Wise, had known Wise for eight or nine years, and he and Wise were close. Wise is also known as Lil Nate and Nose. Hughes has known Mike Reed for four or five years, and Reed is also known as Mike Moe or Moe. Wise also "grew up with" Paul Alston, stating that he has known Alston for "a couple of years." Alston is also known as Don P. Finally, Hughes "grew up" with defendant and has known him for a couple of years. Defendant is also known as Lil One. Hughes, Alston, and Wise belonged to a gang called the Four Corner Hustlers. Reed belonged to a gang called Black Stone. Defendant belonged to a gang called the LOC, which is affiliated with the Gangster Disciples. Despite being members of three different gangs, Hughes testified that it was not unusual that they might participate together in a crime because they all knew each other pretty well and "grew up" with one another.

Before testifying to the events at issue, Hughes testified that, on August 26, 2008, the day after the crimes, he was arrested and charged with first-degree murder. Months later, Hughes entered into an agreement with the State whereby, in exchange for testifying truthfully against his co-defendants, he was allowed to plead guilty to home invasion, rather than murder. Hughes had not yet been sentenced, and he understood that the sentencing range for home invasion would be 6 to 30 years' imprisonment. He also understood that the State did not have any control over his ultimate sentence. Finally, Hughes understood that, if he received and earned good time credit, he would ultimately serve only 50% of the imposed sentence.

In the early morning hours of August 25, 2008, Hughes was in front of the house he shared with his girlfriend, Melvinesha Tucker. He, Paul Alston, Nate Wise, and defendant's brother, Lebraun Graham, were sitting in Tucker's blue, Buick Century. At around 2:00 a.m., Hughes received a call on his cell phone from defendant. Hughes has had many telephone conversations with defendant, and he recognized defendant's voice (defendant's phone number was also stored in Hughes' phone). Hughes answered, and defendant said he was going to call right back. Defendant then called a second time, three or four minutes later, and said he had "a lick for us to go hit." A "lick" is a robbery. Defendant was at Reed's house. Hughes, after dropping off Lebraun at his house, drove Wise and Alston to meet defendant and Reed. Wise was carrying a 9 millimeter semiautomatic weapon. When they arrived at Reed's house, defendant came up to the driver's side window of the car and told them that the robbery location was in the Manchester Knolls subdivision and that "Dude had some money and some drugs." Defendant eventually informed Hughes that "Dude" was Bernard Phillips. Reed went into his house, changed his clothes, and brought some black t-shirts outside. Reed ripped off the sleeves and then he, Wise, Alston and defendant used the sleeves

as masks, while Hughes used a "do-rag" as a mask. Hughes testified that defendant gave them latex gloves to wear (Hughes did not know from where defendant obtained the gloves). Defendant and Reed, driving a white Chevy Malibu that belonged to defendant's girlfriend (Deloris King or "Mary Lou"), followed Hughes in the blue Chevy to Hughes' house to pick up two additional guns—another 9 millimeter semiautomatic that actually belonged to defendant and a .38-caliber revolver that belonged to Hughes and had a long, round barrel. On cross-examination, defense counsel asked Hughes:

"Counsel: At what point in the evening did you go to Walmart?

Hughes: I never went to Walmart.

Counsel: You never went to Walmart?

Hughes: No.

Counsel: Did anybody go to Walmart?

Hughes: Not that I know of."

Hughes confirmed that, after he, Wise, and Alston met up with defendant and Reed, they followed each other to Hughes' house and then to Manchester Knolls without going anywhere else.

When they arrived at Manchester Knolls, about 45 minutes after defendant's second telephone call, the two cars backed into parking spots about one minute away from Phillips' house. All five men exited the vehicles, and defendant led the way up to the house. The men were wearing their gloves and masks, and they were carrying the three guns tucked into their pants. Defendant and Reed took the air conditioning unit out of the front window. Defendant climbed in through the window and unlocked and opened the front door. They searched the first floor, using a flashlight on

Hughes' cell phone for light, but did not find what they were looking for. Hughes led everyone upstairs.

Once in the master bedroom, they woke Palmer and Phillips and ordered them to the ground. Hughes testified that Reed stood over Palmer, and the other four men stood around Phillips. When, on cross-examination, Hughes was asked who was watching the kids, he replied "No one, to my knowledge. I don't know. *** I wasn't really paying attention. There was too much chaos going on." They briefly searched the room and then all went downstairs to the kitchen. While Hughes was in the kitchen, he hit Phillips a couple of times and defendant hit Phillips one time. According to Hughes, during the incident, the three guns were passed around between the five men. Hughes gave defendant the 9 millimeter weapon he had been holding and began searching the living room. Hughes testified that Reed stood over Palmer, and defendant and Wise stood over Phillips. Hughes could not find anything during his search; Wise handed Hughes a 9 millimeter gun and then Wise began to exit the kitchen to search the living room. As Wise was walking out, defendant, who was still standing over Phillips, said something like "go get the duct tape." Phillips rose to his feet, striking his shoulder on the table and saying "something like he wasn't taking this shit." According to Hughes, when Phillips hit the table, the table lifted up and slammed to the floor. The loud noise happened so fast that Hughes, trying to scare Phillips, fired one shot at the ground. He did not hit Phillips and did not intend to hit Phillips. Defendant was still standing over Phillips.

Hughes then ran out of the kitchen to the window in the living room that defendant had used to enter the house. As Hughes was trying to climb out of the window to exit the house, his hand hit the window frame and he dropped his cell phone. Hughes climbed out the window, turned around, and tried to feel the floor inside for his phone. He heard two or three more gunshots come from the

kitchen and, when he did not find the phone after a few seconds, he ran to the blue car. Hughes testified that he thought that defendant and Reed were running ahead of him, Wise ran in a different direction, and he did not know where Alston ran. Ultimately, defendant and Reed drove off in their car, and Hughes and Alston drove off in the blue Chevy. Wise was not in either car.

Hughes did not go straight home; rather, he stopped in an alley in North Chicago to meet with defendant and Reed. Hughes told them that he had dropped his cell phone in the house. Defendant replied "Shit. Damn. Make a police report and say that you was robbed." Hughes and Alston went to Hughes' house, and Wise showed up a bit later. Hughes went inside and spoke to his girlfriend, Melvinesha Tucker. She asked him why he was breathing hard, and he told her that he had just been robbed. She called the police to make a report. Hughes went outside to where Wise and Alston were waiting and told them the police were coming over to make a report. They left and, when an officer came, Hughes told him that he was robbed. Hughes had brought a 9 millimeter gun back to his house; he wrapped it in a pair of pants and put it under Tucker's younger brother's bed. Later that morning, Hughes went to defendant's house. Hughes told defendant that he heard that Phillips had died, and defendant replied "Shit. I don't know. I seen him shaking on the ground before I ran up out of there." Defendant told Hughes that he had hidden his gun behind the fence of his house, but was planning to move it.

Hughes was arrested on August 26, 2008. On August 29, 2008, while in custody at the Lake County jail, Hughes telephoned Anton Gullett and asked him to go to Tucker's house to retrieve and dispose of the 9 millimeter gun. That telephone conversation was recorded, and a transcript of the conversation was admitted into evidence.

Hughes testified that August 25, 2008, was not the first time he visited Phillips' house. Specifically, a few weeks earlier, Hughes, driving the blue Buick Century, went with defendant and Gullett to Phillips' house to buy some DVDs from him. They never exited the vehicle.

Hughes testified that he lied several times to detectives in his pre-trial statements. For example, he agreed that he did not, in his first, videotaped conversation with the State on August 26, 2008, admit that he had fired a gun inside Phillips' house. Further, and contrary to his trial testimony, Hughes previously told police that: (1) only one car, the white Malibu, was involved; (2) defendant fired the gun that killed Phillips (whereas at trial Hughes testified that he was no longer in the kitchen when the shots that killed Phillips were fired); (3) after the shooting, they all met at defendant's house (as opposed to an alley in North Chicago); (4) defendant told Hughes over the phone to report his cell phone as stolen (whereas, at trial, he testified that the conversation happened in person); (5) someone knocked the phone out of his hand when he was climbing out the window (as opposed to the phone falling when his hand hit the window frame); (6) while in the house, he simply stood by the window and did not do anything; (7) he was not wearing a mask or gloves; and (8) he did not know where any of the weapons could be found. Hughes further agreed that he lied to police when he told them his phone was stolen.

Defendant's counsel asked whether anything Hughes had told the officers was true, and he replied that most of it was true and that the fact that all five of the men were involved in it was true. On re-direct examination, Hughes agreed that the *first* time that he spoke to police, he identified the men involved as himself, defendant, Alston, Reed, and Wise. Those names never changed in any of the subsequent interviews. Also in all interviews, Hughes said that defendant was the man who planned the crime.

d. Detective Charles Schletz

Detective Charles Schletz testified that he interviewed Hughes on August 26, 2008. In the recorded interview, Hughes initially denied any involvement in the robbery. Later in that interview and without any prompting on names (because Hughes was the first suspect interviewed and the officers did not yet know who might be involved), Hughes stated that he was out with defendant, Alston, Wise, and Reed in defendant's white, Chevy Malibu. Defendant told the group that they should rob a place he knew should have some drugs and money and that defendant drove them to Phillips' house. They wore masks, but Hughes wore a "do-rag," they brought three guns (two 9 millimeters, one that was defendant's with a light affixed to the bottom of the barrel, and .38 revolver), defendant pulled out the air conditioner, climbed in, and opened the door, etc. Hughes stated that he did not see who fired the shots, but, after shots were fired, Hughes ran toward the door and someone else knocked into him, causing him to drop his cell phone. Two days later, Hughes requested to speak with Schletz again. Hughes told Schletz that he had left out some details in his initial statement. In another recorded interview, Hughes stated that he had actually been driving the blue Buick. He also stated that he did, in fact, see defendant shoot Phillips in the chest area when Phillips began to stand up.

e. Michael Reed

Prior to Michael Reed's testimony, the court, as it did prior to Hughes's testimony, instructed the jury that Reed's testimony is subject to suspicion and should be carefully examined and considered with caution.

Reed, age 25, testified that he and Wise used to live next door to each other and more or less grew up together. He had known Hughes for seven or eight years, Alston for five or six years, and

defendant for seven or eight years. Prior to August 25, 2008, Reed hung out with defendant almost every day for two or three years because the mother of Reed's children was Deloris King's (defendant's girlfriend's) sister. Reed testified that he and defendant were very close.

Reed testified that he had entered into an agreement with the State whereby, in exchange for testifying truthfully against his co-defendants, he was allowed to plead guilty to home invasion. Reed agreed that he understood that the sentencing range for home invasion is 6 to 30 years' imprisonment and that the State did not have any control over his sentence. He agreed that he understood that he would be eligible for good time credit.

Reed confirmed that, in the early morning hours of August 25, 2008, he was in a white Malibu vehicle with defendant, who was driving. Defendant spoke to Reed about robbing Phillips in the Manchester Knolls neighborhood. Defendant then telephoned Hughes about the robbery. According to Reed, defendant drove them to meet Hughes at Hughes' house; Hughes was present with Alston (who wore braids in his hair) and defendant's brother, Lebraun. They spoke about the robbery, and then defendant and Reed left and went to defendant's house. There, they cut up t-shirt sleeves to use as masks and obtained some latex gloves. They returned to Hughes' house, where Wise had arrived in a green Bonneville. Defendant handed out the masks and gloves, and Hughes went inside to retrieve two handguns. Defendant drove Reed and Wise in the white Malibu to Manchester Knolls. Hughes drove a blue, Buick Century with Alston; Lebraun asked to be dropped off. When they arrived at Manchester Knolls, the cars backed into parking spots less than a two-minute walk to Phillips' house. As they walked toward the house, defendant told the group that there might be children in the house. They all wore t-shirt sleeves as masks, except for Hughes, who wore a "do-rag". Reed testified that defendant and Alston worked to remove the air conditioner and that he did

not help; rather, he waited in a walkway. Reed testified that, while the air conditioner was being removed and especially when they were inside the house, the three guns they brought were passed around between the five of them. Reed testified that none of the guns belonged to him. Defendant climbed in first and then opened the front door for the rest of the group.

They searched the first floor; Hughes used the flashlight on his phone to help them see. Eventually, they all went upstairs, with Hughes leading the way. According to Reed, when they reached the top, Hughes told Wise to watch out for the children and defendant told Wise to go into the room with the children. Wise entered the children's room.

Hughes found the room where Phillips and Palmer were sleeping, peeked his head in, and told the group "this is the room, this is the room." They all entered the room; Reed stood near the door and could see down the hall that Wise was in the children's room, holding a gun. Reed's testimony regarding the events in the adults' bedroom was, overall, consistent with Hughes' testimony, except that, according to Reed, he searched the dressers and safe while Hughes stood over Palmer (with a gun) and defendant and Alston (who had a gun) stood over Phillips. Reed heard someone saying "On the Fo," and recognized the voice as Alston's.

Reed testified that, after finding nothing in the adults' bedroom, everyone except Wise, who stayed with the children, went downstairs to the kitchen. At first, defendant and Alston stood over Phillips, Hughes stood over Palmer, and Reed searched the living room. Then, Reed and Hughes switched places. Soon thereafter, when Hughes found nothing, he returned and they again switched places, with Reed watching over Palmer. Reed heard Phillips saying "stop" and saw defendant kicking Phillips. Later, Reed was in the hallway by the rear kitchen entrance. He heard defendant say something about killing and "Get the duct tape. Get the duct tape." Reed then heard Phillips say

something like "I'm not going like that." Reed heard a sound like the kitchen table being bumped and saw Phillips trying to get up. He heard two or three gunshots; he could see that Alston was firing the shots. Reed testified that he ran through the hallway, the living room, and then out the front door—taking him an estimated total time of six seconds. He claimed that, when he exited, Palmer was still on the floor in the kitchen, Phillips was already lying in the grass on his back and shaking, defendant was running in front of Reed, Alston was behind him, and he did not know where Hughes or Wise were. Reed ran to the white Malibu; Hughes, Alston, and defendant ran near him. Wise was not running with them. Reed got into the car, and defendant drove. Hughes drove the blue Chevy with Alston in the passenger seat. Both cars were driven to defendant's house, with defendant leading the way. According to Reed, they did not stop in an alley in North Chicago. When they arrived, Hughes told defendant that he had lost his cell phone. Defendant told Hughes to make a report that he had been robbed. Alston and Hughes gave defendant two of the weapons, and defendant took them into the house.

According to Reed on direct examination, it was unusual that he and the other men would commit a crime together because they were members of three different gangs. Nevertheless, it happened "spur of the moment" because they had known each other for years. On cross-examination, Reed denied that it was a little strange for members of separate gangs to commit a crime together.

A couple of days after the robbery, but before he was arrested, Reed met with defendant at or near a place called JJ's. Defendant told Reed that he was "fittin' to leave town." The next day, Reed received a phone call from defendant. Defendant told Reed that he should "get little 'cause dude, dude talking. He got caught and he talking." Reed explained that to "get little" means to get away and leave town.

On September 24, 2008, while in a class at the Lake County jail, someone handed Reed a note. Reed put the note in his notebook to read later, but he never had a chance to read it because the jail officers found it and took it from him.

On cross-examination, counsel confirmed with Reed that, in his initial conversations with police, he initially denied any involvement in the robbery and then provided details different from those presented in his trial testimony (*e.g.*, prior to trial, Reed told police that: (1) prior to the robbery, they were all outside drinking in Reed's yard; (2) Hughes was already present at Manchester Knolls when Reed and defendant arrived; (3) Wise, not defendant, was kicking Phillips; and (4) he heard two or three shots but only saw Alston fire one, "I know [Alston] shot from his gun at least once or twice"). Reed agreed that he had lied to police. Further, Reed testified that, prior to arriving at Manchester Knolls, he, defendant, Hughes, Alston, and defendant's brother (but not Wise) stopped at Walmart to buy tools. Reed testified that he was certain that Hughes was present when they stopped at Walmart. Reed agreed that the first time he mentioned the conversation that he had with defendant at JJ's was on May 5, 2009 (the day before trial commenced). The first time he mentioned being present when defendant told Hughes to file a false police report was April 3, 2009.

Reed testified that the more he spoke with police, the more truthful he became. Reed agreed that, prior to pleading guilty in this case, he met twice with the police and once with the assistant State's Attorneys. He met again with the assistant State's Attorneys after pleading guilty. In the *first* interview (prior to any deal) Reed told police that the men involved included himself, defendant, Alston, Hughes, and Wise. Those names never changed in any of the subsequent interviews. Also, in all interviews, Reed said that defendant was the man who planned the crime.

f. Detective Gianni Giamberduca

Detective Gianni Giamberduca testified that, on September 2, 2008, he interviewed Reed three times. Giamberduca and Reed were familiar with each other and, when Reed saw him, he said "What's up, Gianni? How you been?" Reed was first interviewed on camera for about five minutes, but, on that video, he said that he did not want to be videotaped because he feared for his family and for his own safety. In the second interview, Reed said he had nothing to do with Phillips' murder. Giamberduca told Reed that it was not a question of whether he was involved but, rather, what his role was. Reed eventually confessed to his involvement, stating that defendant had picked him up and said he wanted to do a robbery. Defendant gave him a mask and drove to a parking lot where they met up with Alston, Hughes, and Wise. Giamberduca had not mentioned any of those names to Reed before Reed listed them. Reed stated that Alston, Hughes, and Wise were in a blue car. Reed stated that, at Manchester Knolls, Wise removed the air conditioning unit and that, once inside, Reed did not go upstairs with the others. Reed did not see who fired the shots.

After the second interview, Giamberduca determined that details were missing. Giamberduca returned to interview Reed for a third time. In the third interview, Reed added that he and the other four men were drinking at his house before defendant mentioned wanting to commit the robbery. Hughes, Alston, and Wise were inside Hughes' car, and Hughes said he had to go somewhere to get something; he left, and then they met up in the parking lot at Manchester Knolls. Once they arrived, defendant and Wise took out the air conditioning unit and defendant led them into the residence. This time, Reed admitted going upstairs with the other men. He stated that, in the kitchen, defendant and Alston were by Phillips and he was by Palmer; when he heard the two or three gunshots, he saw Alston shoot at least one time. Giamberduca testified that, during the second interview, Reed's statement was very broad and he appeared to minimize his involvement, which is not, in

Giamberduca's experience, unusual. According to Giambeduca, in neither full interview did Reed state that: (1) after they ran away from the crime, he went to defendant's house before going home; (2) they stopped in an alley after leaving Manchester Knolls; (3) they went to Walmart to purchase tools; (4) when the shots were fired, he was in the back hallway; or that (5) Lebraun Graham had been with him that evening.

g. Investigation Evidence

On August 25,2008, at around 4:30 a.m., Lieutenant Richard A. Theis received a dispatch about the shooting. Shortly thereafter, at around 5:04 a.m., a communication from dispatch revealed that there was a call pending that a man, later identified as Hughes, had made a robbery report. Theis went to meet Hughes at Hughes' house. Hughes described being robbed by multiple persons who put him on the ground, hit, kicked, and punched him, went through his pockets, and stole his cell phone, identification and some cash. Theis observed that Hughes appeared very calm while describing the event, nothing was wrong with his clothing, and he had no marks on him reflecting bruising or other injuries.

Testimony by various investigators and officers revealed that: (1) Officer Ralph Goar, upon entering the residence to photograph the scene, heard a phone ringing and located a silver cell phone in the southeast corner of the living room; (2) Sergeant Terry Richards found cocaine at the scene; (3) Officer James Yanecek performed a search of Hughes' house and, while he found no weapon, he found in the bathroom an open box of size medium Medline rubber gloves, and, on a shelf separating the living and dining rooms, another rubber glove; (4) a 1988 blue, Buick Century was parked behind Hughes' apartment and a search revealed blood evidence in the car and a latex glove in the glove compartment; (5) a search of the white, Chevy Malibu revealed an insurance card and receipt in the

glove box reflecting the insurance holder as Deloris King; (6) no DNA evidence matched defendant's DNA, however, the blood found inside the Buick's front passenger seat and front passenger panel matched Alston; and (7) the bullets found on Phillips' kitchen floor and inside Phillips' body were fired from either a .38 or .357 revolver, both were fired from the same revolver, and a projectile recovered from the fence by the patio was fired from either a 9 millimeter gun or a .38 or .357 revolver.

The parties stipulated to numerous phone records from the co-defendants' phones. As to defendant's phone, the records reflected five calls between defendant and Hughes on August 25, 2008, specifically, at 1:59 a.m., 2:06 a.m., 2:07 a.m., 2:14 a.m., and 10:30 a.m. In addition, the records reflected two calls between defendant and Reed on August 24, 2008 (7:09 p.m. and 7:31 p.m.), 11 calls between defendant and Reed on August 25, 2008 (11:47 a.m., 2:20 p.m., 2:29 p.m., 2:44 p.m., 2:57 p.m., 3:00 p.m., 4:38 p.m., 4:39 p.m., 7:02 p.m., 8:42 p.m, and 8:44 p.m.), two calls between defendant and Wise on August 25, 2008 (5:09 and 5:10 p.m.), and two calls between defendant and Alston on August 25, 2008 (7:09 p.m. and 7:24 p.m.).

h. Defendant's Arrest and Subsequent Letter and Phone Conversations

Officer Schletz, by using information from Deloris King's cell phone, later received information regarding defendant's location; specifically, that defendant was at a Motel 6 in Davenport, Iowa. On September 6, 2008, defendant was arrested at the Motel 6.

King testified that defendant is her boyfriend and the father to her two children. King identified the voices on two recorded telephone conversations as hers, defendant's, and Montrell Thomas's ("Trell's"). Those recorded conversations were played for the jury. In the first conversation, November 3, 2008, between defendant, King, and Trell, they discussed the

circumstances of defendant's arrest. Defendant commented that "I'm good tho' . . . .you know, I mean, I wadn't there, I mean shit they ain't got no . . . it's my word against theirs," and he stated that, when the police found him in the motel room, he told them that his name was Floyd J. Gooden. When one of the officers replied "What's up Romelle," defendant said "awww, man, it's over with." In the second conversation, December 11, 2008, defendant told King that the police had traced King's cell phone and that is why he was found in the motel in Iowa. "They was tracing the numbers you called. I knew it too, man. Something was telling me to tell you to quit calling that mother fucking room from your phone."

Officer Steven Upton testified that he is a Lake County corrections officer. Upton intercepted the message Reed placed in his notebook while he was in the jail. The letter that Reed received and Upton recovered stated:

> "Man Bra, what up? You ain't sent me no kyte. You keeping your head up? Life ain't over. Just chill. It's going to be a sit-down, but stay focused. We don't know shit. But make an affidavit saying the law showed dude and Nate statements. Send me and Paul one to give my lawyer. Give yours one. They wasn't posed to do that. They could throw it out just 'cuz of that. But dude out of there. They got prints on him. I got Johnny Cochran over here. Do that ASAP. One-four, nigger."

Officer Sharon Churchill works at the Lake County jail; her duties include searching incoming mail for contraband prior to releasing mail to the inmates. On February 23, 2009, two envelopes of incoming mail arrived—one addressed to Wise from "Nita Tucker" listing Hughes' address as the return address and the other addressed to Hughes from Melvinesha Hughes, again listing Hughes' address as the return address. Each envelopes enclosed a four-page, handwritten document entitled

"motion to suppress confession." Churchill did not immediately forward the mail to Wise and Hughes because she noticed some irregularities; namely, that the mail was addressed to two inmates who were meant to be kept separate from one another, that, although the sender's names were different, the handwriting appeared to be from the same person, the paper upon which the motions were written appeared similar to the type of paper inmates are allowed to get out of the commissary and, accordingly, would have been accessible to any inmate within the jail, and that, upon scanning it, the contents appeared to be written from one inmate to another because it used lingo or words that inmates would use with one another. She gave the mail to her supervisor. On cross-examination, Churchill agreed that the paper was white notebook paper that the general public could purchase at a store. The letter Churchill confiscated that was addressed to Hughes stated, in relevant part:

> "They ain't got shit. They trying to get everybody to turn on everybody. We sit it out, go to trial, everybody come out on top. They got to prove you didn't get robbed. Next time the State asks you to get on the stand, tell to let you walk out the door. Shit, my nigger, how that's go look, testifying against somebody you called your brothers. I can see if they told you get down on dude and them. They go to trial soon, too. Fuck them. Nose, Moe, Don P. and me, we all said we going to trial. Don't cop to shit. *** The day you want to go to the dungeon, tell Lil Sis. Have her call Mary Lou. I call everyday, so I'll know if you want to holler at me. *** Send a message through Mary Lou. She'll tell me. *** Keep your head up and quit letting these crackers send you off."

Melvinesha Tucker, Hughes' girlfriend, testified that she knows defendant and that his nickname for her is "Bird." In February 2009, Tucker received a phone call from defendant. She recognized his voice; he called her "Bird." Defendant told Tucker that he was going to send

something to her and that she should send it to Hughes and Wise. Three or four days later, Tucker received an envelope in the mail, addressed to her from defendant. Inside the envelope were two letters. She put the letters in another envelope and mailed them to Hughes and Wise. Tucker confirmed that the envelopes that listed Nita Tucker and Melvinesha Hughes as the senders were the envelopes that she had addressed.

Officer Michael Young testified that he is the chief evidence technician for the Lake County Major Crimes Task Force. On March 17, 2009, Young had defendant provide several samples of his handwriting over a three-hour period. On numerous occasions, Young noticed defendant retracing certain letters and/or numbers.

Stephen McKasson testified that he is a document examiner, meaning that he examines and compares documents to identify the source of the document or who wrote the document. He has been a document examiner for 38 years and was accepted by the court as an expert in the area of forensic document examination. McKasson testified, based upon a comparison of defendant's handwriting samples and the two notes received in the jail through the mail, that the notes received by the jail were written by the same person and that the author was "probably" defendant. McKasson testified that the reason his conclusion was that defendant "probably" wrote the letters, as opposed to conclusively wrote them, was based upon the fact that there was evidence of disguise in the samples that defendant provided to the police, *i.e.* attempts to alter or change the author's natural handwriting (for example, by increasing pressure, overwriting to change the appearance of a characteristic, and changes in speed and fluency). McKasson noted that the evidence that the samples were completed at a very slow pace was supported by the fact that it took defendant 3½ hours to complete six pages of handwriting sample.

2. Defendant's Case

Defendant's motion for a directed verdict was denied. Defendant called his girlfriend, Deloris King, to the stand. King testified that defendant did not live with her, but he sometimes stayed the night. At 4:30 a.m. on August 25, 2008, King's alarm clock rang to wake her for work. According to King, defendant was in the bed. She specifically recalls that defendant was in the bed because it was a Monday morning and her garbage is picked-up that day; she woke him to bring the garbage around to the front. King agreed that she told investigators that, at 9:00 p.m. on August 24, 2008, defendant was not home. King agreed that she never mentioned an alarm clock until trial.

Defendant's mother, Minerva Graham, testified that, on August 24, 2008, at around 9:00 p.m., defendant went with her to play cards with their family in Antioch. There was alcohol at the party, and they left at 3:00 a.m. Defendant was dropped off at King's house at around 3:40 or 3:45 a.m. the next day. On cross-examination, Graham agreed that, even though she had a conversation with defendant in September 2008 and knew he had been charged with murder, it was not until April 30, 2009, five days before his trial started, that she told any official that defendant was with her on the morning of the crime.

Tucker testified that, on August 25, 2008, her boyfriend Hughes came to the house where she lived with her mother, brother, and her children. Hughes told Tucker that he had been robbed by three men wearing black. Tucker denied that she dialed the police for Hughes. Around September 3, 2008, police searched Tucker's house and found a box of white latex gloves. According to Tucker, the gloves belonged to her father, who worked as a dog groomer. Tucker testified that her father does not bring the dogs to the house.

Defendant testified that, on August 24, 2008, at 9:00 p.m., he went to Antioch. There, he and his family played games, drank, smoked marijuana, and then left the Antioch residence around 3:00 or 3:30 a.m. Defendant was dropped off at King's house at around 4:00 a.m. When he arrived, King's white Malibu was parked in the driveway. Defendant went upstairs and went to sleep a short while after 4:00 a.m. King later woke him up to tell him to take out the garbage.

Defendant claimed he had no relationship with Hughes and just knew him from "around." Similarly, he claimed Reed was "just my baby mama sister baby daddy." Nevertheless, defendant agreed that he telephoned Hughes on August 25, 2008. He testified that the purpose of the call was to ascertain why Hughes had called defendant several times the night before. Defendant's phone reflected missed phone calls from Hughes. Defendant denied that he made a call to Hughes at around 2:00 a.m. on August 25, 2008. As to the record reflecting that such a call was made, defendant testified that he was positive that "that would be impossible." He testified that he had absolutely nothing to do with the murder and that the fact that there were, in total, more than 20 phone contacts between his phone and the four co-defendants' phones on the day of the murder was merely coincidence. Defendant testified that he did not meet with Reed at JJ's after August 25, 2008.

Defendant testified that he knew Phillips and where Phillips lived. However, he testified that he did not go to Phillips' house a couple of weeks prior to Phillips' murder and that he never went to Phillips' residence with Hughes and Anton Gullet. After August 25, 2008, he heard about Phillips' murder because people in the neighborhood were talking about it. At some point, he became aware that he was a suspect in the case. He was scared and went to Davenport, Iowa, because King was expecting his baby, he wanted to see his baby's birth, and because "I didn't want to go to jail for something I didn't—that I was implicated in and I had nothing to do with." Defendant explained that,

when police came to his hotel room, he gave them a fake name because he did not want to go to jail for something he did not do, he was scared, and that was the first thing that came to his mind.

Defendant denied authoring the letters introduced by the State and testified that he does not know who wrote those letters. He denied calling Tucker in February 2009 and asking her to pass something to Hughes. Defendant denied being involved in the burglary and murder of Bernard Phillips.

3. Closing Arguments

After the jury instruction conference and prior to closing arguments, defendant stated to the court that he wanted to ask "about my additional witnesses. Like they're supposed to writ back Gullett and Javard Miller or something. They weren't never called." Defense counsel informed the court that she had considered what, if anything, those witnesses could have offered and, as a matter of trial strategy, determined that it was not in defendant's best interest to call those witnesses.

In its closing argument, the assistant state's attorney stated to the jury:

> "Now, despite the fact that you have heard a week and a half of evidence, there is only one question that you must answer in this case. Literally, only one question that you must answer in this case. And that one question is this: Did the defendant help in any way? That is it, literally. Did the defendant help in any way?"

Thereafter, the assistant State's Attorney explained that the jury would be provided an accountability instruction. He then read aloud—twice—the accountability jury instruction (and apparently also presented as a demonstrative exhibit a poster depicting, with some words highlighted, the contents of the instruction).[1] After reading the instruction twice, the assistant State's Attorney

[1] IPI 5.03 provides: "A person is legally responsible for the conduct of another person when,

commented that, what the instruction means is that, if defendant helped in any way at all, he is guilty. "He didn't have to pull the trigger, but if he helped in any way with the events the led up to that, he is guilty of first-degree murder. *** We do not need to prove exactly what happened in that house and who did what." He repeated that the one question the jury needed to answer was whether defendant helped in any way.

In response, defense counsel, in closing, argued that, while the State did not need to prove who shot and killed Phillips, it did need to prove "exactly what this man did. What did he do? What part did he have?" Later, counsel argued that the State needed to prove "not just a matter of was he there, it's a matter of what did he do? What specific acts did he do to aid, abet, conceal? What conduct did he do? And based upon what you have heard, you can't say what he did, if anything, because these two guys have changed their stories so much."

Before deliberations, the trial court provided the jury with numerous instructions, including the accountability instruction and the instruction, given prior to Hughes' and Reed's testimonies, that their testimonies should be viewed with caution and suspicion. The jury found defendant guilty of first degree murder.

B. Post-trial Motions

After trial but before sentencing, defendant filed *pro se* posttrial motions, including a motion for a new trial and motions alleging ineffective assistance of trial counsel. Defense counsel filed a response to defendant's ineffective assistance claims. On July 24, 2009, defendant and his counsel

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either before or during the commission of the offense, and with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of the offense."

appeared before the court on the motions. The court noted that it first needed to conduct a hearing as to whether appointment of new counsel was appropriate or necessary in order to address defendant's ineffective-assistance claims. The court summarized three guidelines for conducting such hearings (asking trial counsel about the facts and circumstances related to the allegations, asking the defendant for more information, and relying on the court's own knowledge of counsel's trial performance as it related to the defendant's allegations), and stated that it planned to utilize all three methods.

The court first asked defendant to explain why he felt that counsel was ineffective for failing to call as a witness Anton Gullet (*i.e.*, the person who, according to Hughes, went with Hughes and defendant to Phillips' house a few weeks before the murder and the person Hughes asked to dispose of the gun he hid under Tucker's brother's bed). Defendant explained that he thought Gullet would have been able to contradict Hughes' testimony that, prior to the murder, Hughes, defendant, and Gullet went to Phillips' house. Defendant stated that Gullet would have been able to testify that defendant did not go with Gullet and Hughes to Phillips' house and, accordingly, it would not have appeared to the jury that defendant was hanging around Phillips' house. He stated that counsel said both that she did not know why, despite a writ having issued, Gullet was not brought in from the Department of Corrections (DOC) and also that she did not think he would be a good witness for defendant, which defendant felt reflected a contradiction and poor preparation. The court noted that the testimony regarding the visit to the house reflected only a non-criminal purpose, *i.e.*, a DVD purchase and "no one said you were under the cover of night casing the residence." Defendant agreed that Hughes testified only that, when they went to Phillips' house prior to the murder, they purchased a DVD.

Counsel then explained that, for strategic reasons, she did not want to call Gullet because the testimony at trial reflected that Hughes had telephoned Gullet to ask him to dispose of one of the guns. She feared that calling Gullet could have resulted in him saying where the gun was, which, if the gun was recovered, could have resulted in physical evidence damaging to defendant's case, given that Hughes and Reed stated that defendant had handled the gun at various points throughout the evening. Further, counsel thought that Gullet's potential testimony that defendant was not present at Phillips' house prior to the murder was irrelevant, given that Palmer could only identify Hughes as having been present in that car. Counsel further noted that she learned that Gullet might have information about the case approximately one week prior to the trial, that the writ issued the first day of trial, and the DOC probably did not have time to bring Gullet to court. In any event, if Gullet had appeared, she would not have called him.

Defendant disagreed that the first time he notified counsel that he wanted Gullet to testify was one week prior to trial. Further, he stated that, even if the testimony was not that he was there to stake out the house, it simply looked bad to the jury for a witness to say that he and defendant were at the victim's house prior to the incident when he had never before been there with Hughes.

The trial court, based on defendant's explanation, counsel's response, and its own knowledge of counsel's performance, found the allegation of ineffective assistance based on counsel's failure to call Gullet was spurious and insufficient on its face. Counsel's explanation reflected reasonable trial strategy, given that it was unknown what Gullet, who was incarcerated, would testify to.

Next, the court addressed defendant's allegations that counsel was ineffective for failing to prepare the case until one week prior to trial. Defendant explained that counsel was appointed to his case in December 2008, and it was not until one week prior to trial that she visited him to discuss

strategy. He further asserted that counsel failed to file motions to dismiss based on perjured grand jury testimony and a motion for a speedy trial.

Counsel denied defendant's allegation that she waited until one week before the trial to prepare, noting that she reviewed discovery with him on several occasions, had several conversations with him, and went to visit him. She noted that, at trial, she knew "that information backwards and forwards and that doesn't happen over a week. That happens over several months. The minute I got the case I started working on it, and I didn't stop until the trial was over." At that point, the assistant State's Attorney asked if he might interject the fact that, from the time defense counsel received the case, she was in constant contact with his office and, one month prior to trial, while he was working late nights and "into the wee hours of the morning," counsel would call or text him about the case.

The court, having considered defendant's and counsel's comments and relying on its own recollection of her performance as it related to preparedness, found defendant's allegations spurious. The court noted:

> "I would say this for the record that [defense counsel] at each turn during the trial appeared at all times to know the case, to know the nuances of the case; and when you are talking about five co-defendants, two of whom testified, in addition to [defendant's] testimony, plus the testimony of three lay witnesses as it relates to events in that house that evening *** each of those witnesses that testified, the co-defendants and those occurrence witnesses, were impeached with inconsistencies. [Defense counsel] knew exactly where the soft spots were, and she went after them. That only happens as a result of knowing the file, knowing the case jacket, knowing what the witnesses' prior testimony would be."

Accordingly, the court found there was no weight to the allegation that counsel was in any way unprepared for trial.

Next, defendant asserted that counsel was ineffective for failing to seek funds for a handwriting expert. The court asked defendant to explain. Defendant explained that counsel knew that the State had secured an expert, and he asserted that she was "supposed" to get a handwriting expert to rebut the State's expert. He noted that the State's expert had only concluded that the handwriting was "probably" defendant's.

Counsel explained that the decision was strategic. Namely, that to request funds would have delayed trial and would have given the State time to possibly secure Wise as a witness against defendant. Wise, in her opinion, would have been the most damaging co-defendant against defendant, because his written and audiotaped confessions were the most thorough. Accordingly, given that she knew the State's handwriting witness could not state conclusively that the handwriting was defendant's, she deemed it more important to proceed with trial than to provide the State with more testimony from co-defendants. Further, she noted that it was possible that, upon securing a handwriting expert, that expert could have offered an opinion *against* defendant's interest.

Defendant asked if he could speak, and the court agreed. Defendant asserted that Wise's testimony was also inconsistent and that his attorney should have known that. He questioned why counsel could not have found an expert to rebut the State's expert and to get samples from the co-defendants.

The court noted for defendant that, occasionally, defense experts become State experts because, assuming the expert is honest, there is no "expert store" where counsel can simply pick an expert who will testify a certain way. Defendant interjected some additional questions, and the court

explained further that counsel did argue that the expert's testimony was unable to conclude with certainty that the handwriting was defendant's. The court concluded that, after considering defendant's comments, counsel's explanation, and the court's knowledge of counsel's performance, that the allegation of ineffective assistance based on failure to hire a handwriting expert was spurious, without merit, and did not warrant appointment of conflict counsel.

Defendant waived his allegation that counsel was ineffective because it was her first murder trial. Nevertheless, the court noted that defense counsel was one of five conflict attorneys appointed by the Lake County criminal division, that she was vetted before being appointed, and that "if that was [counsel's] first murder trial, you could have fooled me. I felt that she was prepared, organized, skillful, aggressive, zealous, and appropriate in the manner in which she offered and provided a vigorous and zealous defense for the defendant."

The court proceeded in a similar manner with defendant's remaining allegations that counsel was ineffective for: (1) failing to present to the jury that Hughes' motivation for testifying against defendant might have related to defendant's prior drug sales to Hughes; (2) failing to sufficiently highlight certain facts in closing argument; (3) using an allegedly ineffective private investigator; (4) failing to send a private investigator to the scene to conduct an investigation; (5) failing to object when the assistant State's Attorney misled a witness; (6) failing to object to the presence of police officers and investigators in the courtroom gallery during closing argument and not allowing his brother-in-law to be present in the courtroom; (7) failing to call his sister-in-law as a witness because she allegedly could have supported his alibi; (8) not speaking with King directly and telling her to give her statements to the investigator; (9) rushing defendant to trial because she feared other co-defendants

would "flip;" (10) failing to object to perjured grand jury testimony; (11) playing Hughes' videotaped confession for the jury; and (12) failing to call a witness named Douglas Alexander.

With each allegation, the court asked defendant to explain the allegation, asked counsel for her response, occasionally heard—at defendant's request—defendant's reply (sometimes lengthy exchanges resulted), and then ruled that each allegation was spurious, counsel's performance was not ineffective, and none of the allegations required (per *People v. Krankel*, 102 Ill. 2d 181 (1984) and *People v. Nitz*, 143 Ill. 2d 13 (1991)) appointment of conflict counsel to further investigate defendant's claims of ineffective assistance.

Thereafter, the court denied defendant's *pro se* motion for a new trial, as well as the motion for a new trial filed by defendant's counsel.

C. Sentencing

On August 21, 2009, the court sentenced defendant to 60 years' imprisonment. The court noted that, despite the fact that the jury found defendant guilty on several counts of the indictment, it was entering judgment on count 6 of the indictment. The court ordered the attorneys to calculate the amount of credit for time-served to which defendant was entitled and to put that number in a written order stating that the DOC shall give defendant credit for all the time he spent in police custody.

On August 28, 2009, the parties returned, and the court was informed that count 6 of the indictment actually pertained only to Alston. Therefore, the court corrected the sentencing order to reflect a judgment of conviction and a sentence of 60 years' imprisonment on count 1 of the indictment

"and the sentences imposed on count 1." Moreover, "[j]udgment will be entered on counts 3, 4, and 5 and that will be followed necessarily by the period of mandatory supervised release of three years." The court explained to defendant that it was merely entering judgment and sentence on one particular count, with only a judgment of conviction being entered on the other three counts for the record.

The assistant State's Attorney noted: "Just for the record[,] I did include in that order the credit for 360 days which was pretty much September 5th of 2008 all the way through this upcoming Monday, August 31st and any time awaiting transport."

On September 4, 2009, the trial court denied defendant's motion to reconsider the sentence. On September 15, 2009, defendant filed his notice of appeal.

II. ANALYSIS

A. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to sustain his conviction. Specifically, defendant notes that the State failed to produce any physical evidence linking him to the crime scene. He argues that Reed and Hughes, the only two witnesses who testified to his involvement in the home invasion and murder, had criminal records, testified pursuant to plea bargains that allowed them to completely escape culpability for Phillips' death, and were repeatedly impeached. Relying on this court's decision in *People v. Washington*, 375 Ill. App. 3d 1012, 1025 (2007), defendant argues that the trial evidence did not establish his role in the crime and, therefore, that his accountability conviction must be reversed. For the following reasons, we disagree.

When a defendant challenges the sufficiency of the evidence supporting his or her conviction, the inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). It is the function of the trier of fact to weigh and resolve conflicts in the evidence and draw reasonable inferences therefrom. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). A person may be accountable for the criminal actions of another when, during the commission of the offense, the person intends to facilitate the crime and aids or abets or attempts to aid the commission of the offense. 720 ILCS 5/5—1, 5—2(c) (West 2008). Intent to promote or facilitate a crime can be shown where the defendant shared the principal's criminal intent or there was a common criminal design. *People v. Perez*, 189 Ill. 2d 254, 266 (2000). In determining a defendant's legal accountability, the trier of fact may consider: (1) the defendant's presence during the offense; (2) whether the defendant maintained a close affiliation with his companions after the crime; (3) whether the defendant failed to report the crime; and (4) whether the defendant fled from police. *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995). "Mere presence at the scene of a crime does not render a person accountable for an offense; a person's presence at the scene of the crime, however, may be considered with other circumstances by the trier of fact when determining accountability." 720 ILCS 5—2(c) (West 2008).

In *Washington*, the defendant was present in a van that was involved in a drive-by shooting. At trial, the State produced no physical evidence that the defendant fired the gun, nor any objective eyewitnesses who could identify the defendant as either the driver or the shooter. Instead, the State presented three alleged accomplices who had been in the van and who testified pursuant to plea bargains that greatly reduced their sentences. Those witnesses testified inconsistently, not only with

each other and with their own prior statements, but also *within* their own trial testimony. Critically, the witnesses did not establish whether the defendant was the shooter, such that he committed the acts that formed the basis of the charges, or the driver of the van, such that he could be accountable for the acts of another. Nor did those witnesses establish any other manner in which the defendant aided the crime. Noting that mere presence is insufficient to convict a defendant on an accountability theory, and that there was insufficient evidence to establish anything *other* than the defendant's presence this court reversed the defendant's convictions for attempt first degree murder, aggravated battery with a firearm, and aggravated discharge of a firearm. *Washington*, 375 Ill. App. 3d at 1032.

Defendant is correct that, here, like the facts presented in *Washington*, there was no physical evidence (a weapon, DNA evidence, etc.) establishing his role in the crimes and that the co-defendants, who testified pursuant to plea agreements, were repeatedly impeached. For the following reasons, however, we conclude that, unlike *Washington*, the evidence in this case was clearly sufficient for the jury to find defendant accountable and, thus, we uphold defendant's murder conviction.

First, we address the co-defendants' testimonies. Without question, Reed and Hughes often testified inconsistently, were repeatedly impeached, and were present at trial only as a result of plea agreements with the State. As to the plea agreements, however, the jury was fully informed that those agreements, and the fact that Reed and Hughes were allegedly defendants' accomplices, might motivate them to testify untruthfully. Defense counsel, as noted by the trial court, did a laudable job exposing the fact that the co-defendants might, because of their deals, have ulterior motives for testifying. Moreover, the court, prior to each witness' testimony and before deliberations instructed the jury to consider the testimony with caution and suspicion. We note, too, that the jury might have reasonably concluded that the deals did not necessarily lessen the veracity of Reed's and Hughes' testimonies

because it knew that, although Reed and Hughes had pleaded guilty to lesser crimes, they had not yet been sentenced and were each facing up to 30 years' imprisonment. As such, the jury might not have believed that Hughes and Reed were simply trying to get off "easy" and, therefore, were lying.

Clearly, on several points, Reed's and Hughes' descriptions of the events changed over time and were contradictory (prior to the crimes, did Hughes drive to meet defendant or vice versa, did the men stop at Walmart, did one man watch over the children, etc.). However, those many inconsistencies and defense counsel's thorough impeachment of each witness' testimony were also highlighted for the jury. Moreover, what distinguishes this case from *Washington* is the critical fact that the *consistencies* between Reed's testimony and Hughes' testimony were sufficient for the jury to reasonably conclude beyond a reasonable doubt that defendant was accountable for Phillips' murder. Specifically, the jury could have found convincing that, prior to their deals and, indeed, during their very first police interviews, both Reed and Hughes identified defendant as the planner and leader of the crimes. Despite all of their other inconsistencies, neither Reed nor Hughes ever wavered (at trial or in any of their pre-trial statements) on this point. Further, both testified, for example, that defendant: (1) at around 2:00 a.m., telephoned Hughes about committing a robbery; (2) drove to the scene in a white Malibu vehicle belonging to his girlfriend; (3) removed the air conditioner from the window; (4) owned one of the three guns that were brought to the scene and held a gun at some point during the commission of the crimes; (5) watched over Phillips upstairs and downstairs and, at some point, kicked or hit Phillips; (6) was the person who yelled to "get the duct tape;" (7) fled the scene in the white Malibu; and (8) told Hughes to file a false police report that he was robbed and his phone was stolen. The jury, charged with weighing the evidence, could have reasonably concluded that these consistencies in Reed's and

Hughes' overall depiction of the night's events outweighed their inconsistencies such that defendant, at a minimum, aided and facilitated the crimes.

Second, while we do not recount all of the evidence here, several threads of the testimony proffered by Reed and Hughes were, to some extent, corroborated by other evidence. For example, Reed and Hughes provided an overall description of events within the home that largely, though not perfectly, matched Palmer's description of the events. Reed and Hughes testified that defendant planned and organized the robbery and that he was the person who ordered someone to "get the duct tape." Palmer, in turn, testified that the voice that said to "get the duct tape" belonged to the man who seemed to be in charge. Hughes testified that, after climbing out of the window, he reached back to look for his cell phone. Palmer similarly noted that one man exited the home and then headed back toward the home. Cell phone records reflected, consistent with Reed's and Hughes' testimonies, a call from defendant's phone to Hughes' phone at around 2:00 a.m. on the morning of the crimes. Hughes testified that, after the shooting, he and Alston fled in the blue, Buick Century. Alston's blood was found in that car. Both Reed and Hughes testified that the men wore white latex gloves during the crimes. White latex gloves were found both in the glove compartment of the Buick and in Tucker's house, where Hughes stayed.[2] Both Reed and Hughes testified that they went to Phillips' house for drugs and money—cocaine was found at the scene. Thus, while defendant argues that the aforementioned evidence was flawed and that the only evidence linking *him* to this case is the testimony

[2] We note that it would not have been unreasonable for the jury to reject the explanation that the white latex gloves found in Tucker's home belonged to her father, given that she did not list her father as someone who lived with her and she specifically testified that her father never, in the performance of his job as a dog groomer, brought dogs to her house.

of his alleged accomplices, he ignores that, to the extent that the accomplices' testimonies on the details of the crime were corroborated by other evidence, their overall credibility was bolstered. As such, they jury might have found credible their testimonies that defendant was involved and instrumental in assisting the crimes.

Further, we note that two factors the jury could consider in determining defendant's accountability were whether he maintained a close affiliation with his companions after the commission of the crime and whether he fled from the police. *Taylor*, 164 Ill. 2d at 140-41. Here, the evidence reflected that, despite his downplaying of his relationship with his co-defendants, over 20 phone calls were made between the five co-defendants in the relevant time period. Further, Reed testified that he met with defendant a few days after the robbery, defendant told him he was planning to leave town, and defendant advised Reed to do the same. Thereafter, defendant fled to Iowa, where he was later apprehended and gave a false name, two factors the jury could reasonably have found indicative of consciousness of guilt. Moreover, and also regarding consciousness of guilt, the jury could have considered that jail officers found letters asking Reed to write an affidavit declaring police pressured him during interrogation, and urging Hughes to sit it out and not testify against his brothers so that they would all "come out on top." An expert in handwriting analysis concluded that the author of those letters was "probably" defendant. To the extent that there were weaknesses in that witness's testimony, they were explored by defense counsel, and, ultimately, that testimony was corroborated by Tucker. Tucker explained that defendant asked her to mail something to Hughes and Reed and, when she received an envelope with letters in it from defendant, she followed his instructions and mailed them to his co-defendants. Tucker's potential bias, *i.e.*, that she was Hughes' girlfriend, was well-known to the jury. Further, the letter to Hughes mentioned Nose (Wise), Moe (Reed), Don P. (Alston) and "me."

The jury could have reasonably believed that the "me" was likely defendant, particularly given the letter mentions talking every day to "Mary Lou" (King), defendant's girlfriend.

Finally, we note that the circumstances surrounding these crimes are markedly different from those in *Washington*, where the defendant was present in a van involved in a drive-by shooting. Theoretically, in a drive-by shooting scenario, an individual might be *merely present* in a vehicle, with no knowledge when the crime occurs of any alleged co-defendant's intention to commit a shooting or even the presence of a gun. Here, however, the jury could have reasonably believed that the crime was carefully planned, orchestrated, and executed—masks, gloves, and guns were acquired, cars were deliberately parked a safe distance away from the scene, the home was invaded, and the perpetrators either held watch over the children or Palmer and Phillips to complete the intended purpose of the invasion. Accordingly, while there were several inconsistencies as to who did what and when within the home, no version of the events given by either Reed or Hughes (or Palmer or her children) suggests that *anyone* present was unaware of the intent to commit a crime and, indeed, all of the aforementioned actions taken (holding guns, watching over the home's occupants, breaking into the home, etc.) aided in the commission of the crimes. Thus, while defendant correctly argues that mere presence is insufficient to establish guilt on an accountability theory, each man who went to that house, entered that house, and did *any* of the things described as having happened therein, was not merely present. Rather, the evidence reflects the existence of a common criminal design. *Perez*, 189 Ill. 2d at 266.

In sum, this case is simply not like *Washington*. Viewing all of the evidence in the light most favorable to the State, a reasonable jury could have found beyond a reasonable doubt that defendant was accountable for Phillips' murder.[3]

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[3]We reject defendant's argument that the State's closing argument failed to mention the

B. Defendant's Ineffective Assistance Claims

Defendant next argues that the trial court erred where it conducted hearings on his *pro se* post-trial motions without appointing new counsel, thereby compelling him to present his claims without counsel. Specifically, defendant asserts that he was placed in the position of presenting, supporting, and arguing his positions, while the trial counsel against whom his claims pertained defended her position. Defendant argues that the trial court's actions exceeded the scope of a preliminary inquiry into the factual basis for his claims. For the following reasons, we disagree.

When a *pro se* motion asserts ineffective assistance of counsel, the trial court should conduct a preliminary investigation to determine whether the claim is valid. *People v. Cabrales*, 325 Ill. App. 3d 1, 5 (2001).[4] At the preliminary hearing, the trial court must examine the factual matters underlying the defendant's claim. *People v. Cummings*, 351 Ill. App. 3d 343, 351 (2004). In doing so, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *People v. Moore*, 207 Ill. 2d 68, 78 (2003).

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requisite mental state for accountability and that the jury might, therefore, have rendered its verdict based on an incorrect understanding of accountability. The State's closing argument repeatedly referenced verbatim the accountability instruction, defense counsel also explained accountability, and the jury was instructed by the trial judge of the requirements to find defendant guilty by accountability. There is nothing to suggest that the jury did not understand these repeated instructions.

[4] This preliminary investigation is often called a *Krankel* hearing. See *Krankel*, 102 Ill. 2d at 181.

Alternatively, "[a] brief discussion between the trial court and the defendant may be sufficient." *Moore*, 207 Ill. 2d at 78. The trial court may also base its evaluation of the defendant's *pro se* allegations "on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 79. "At a minimum, the trial court must afford the defendant an opportunity to specify and support his complaints." *Cummings*, 351 Ill. App. 3d at 351.

A *pro se* defendant alleging ineffective assistance of counsel is not *per se* entitled to the appointment of new counsel to assist with the motion. *People v. Moore*, 389 Ill. App. 3d 1031, 1040 (2009); *Cummings*, 351 Ill. App. 3d at 351. If the allegations lack merit or pertain to matters of trial strategy, the motion may be dismissed. *Cummings*, 351 Ill. App. 3d at 351. The court need only appoint new counsel to assist in the motion if the court's examination reveals that the defendant's allegations show possible neglect of the case. *Cummings*, 351 Ill. App. 3d at 351; *People v. Bull*, 185 Ill. 2d 179, 210 (1998). Appointed counsel may then argue the defendant's ineffective assistance claims at an evidentiary hearing. See *e.g.*, *Nitz*, 143 Ill. 2d at 134-35.

On review of the sufficiency of the preliminary hearing, our concern is whether the trial court conducted an adequate inquiry into defendant's allegations. *People v. Dixon*, 366 Ill. App. 3d 848, 854 (2006); *People v. Young*, 341 Ill. App. 3d 379, 382 (2003). Here, and in light of the foregoing authority, it is clear that it did. The court, when presented with defendant's *pro se* ineffective assistance claims, was required to examine the factual underpinnings of those claims to determine whether further action was necessary. The court did so after explicitly stating it planned to use all three of the aforementioned options: (1) briefly discussing defendant's claim with him to understand the basis of his claims; (2) using the permitted and "usually necessary" technique of questioning defense counsel regarding the facts and circumstances of the allegedly ineffective representation; and (3) relying on its

own knowledge of counsel's performance. It appears that, although the court was required to "at a minimum" afford defendant "an opportunity to specify and support his complaints" (*Cummings*, 351 Ill. App. 3d at 351), defendant complains that the court permitted *too much* inquiry into those claims such that defendant was forced to *argue* the claims without counsel. We disagree. The record reflects that the court provided defendant the opportunity to explain the basis of each claim. To the extent that a lengthy dialogue ensued, it was often the case that defendant asked questions or replied to counsel's explanations and the trial court provided defendant an opportunity to air his concerns and to have his questions answered. Indeed, the trial court might have feared that *not* permitting defendant to fully explain his claims or actually *cutting off* defendant when the dialogue continued, would have failed to afford defendant a sufficient opportunity to present his claims. The trial court properly conducted an inquiry into the basis of the claims to allow it to determine that none of the claims warranted the appointment of counsel.

Ultimately, it appears that defendant's central argument on appeal is that the court erred in deciding that certain claims did not require further action. We disagree. The record reflects that the court's systematic inquiry into defendant's claims revealed that those claims were simply spurious (*e.g.*, that counsel was unprepared) or that counsel's challenged decisions reflected trial strategy (*e.g.*, not presenting evidence that defendant sold drugs to Hughes). As defendant notes, whether a failure to investigate and present evidence is incompetent depends upon the value of the evidence. See *People v. DeRossett*, 262 Ill. App. 3d 541, 545 (1994). Having reviewed the record in its entirety, we cannot conclude that the court's ruling that counsel's decisions did not reflect neglect of the case and, therefore, that defendant's claims did not require appointment of counsel or further action was manifestly erroneous. See *e.g.*, *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008) ("[t]he trial

court's decision to decline to appoint new counsel for a defendant based on a judgment that the ineffective assistance claim is spurious shall not be overturned on appeal unless the decision is manifestly erroneous"). In sum, we reject defendant's argument that the court erred in its assessment of his *pro se* ineffective assistance claims.

C. Sentence—Number of Convictions

Defendant next asserts that the trial court's August 28, 2009, sentencing order reflects convictions on four counts of the indictment. This is error, he argues, because, where only one murder occurred, only one conviction may be entered. See *People v. Fuller*, 205 Ill. 2d 308, 346 (2002). Therefore, only a conviction for the most culpable count, *i.e.*, intentional murder may be entered and the convictions for felony murder and other lesser murder counts must be vacated. The State responds that defendant was sentenced on only one count of first degree murder, a fact confirmed by DOC records. Nevertheless, if defendant's remaining un-sentenced convictions stand, the State confesses error and requests this court to vacate defendant's three lesser murder convictions.

As the State notes, it appears that defendant was sentenced only on the first degree murder conviction. Nevertheless, the order entered by the court on August 28, 2009, reflects that judgment would be entered on counts 3, 4, and 5 of the indictment, to be necessarily followed by the period of mandatory supervised release of three years. The court, in its explanation to defendant of the sentence, explained that it was merely entering judgment and sentence on one particular count, with only a judgment of conviction being entered on the other three counts for the record. Accordingly, it appears that, in addition to the first degree murder conviction on count 1 of the indictment, convictions were also entered on counts 3, 4, and 5 of the indictment. Thus, we vacate defendant's convictions on counts 3, 4, and 5 of the indictment.

D. Sentence—Credit for Time Served

Defendant's final argument is that he was provided insufficient credit for time served prior to sentencing. He notes that he was arrested on September 5, 2008, and that the amended sentence was entered on August 28, 2009. The trial court ordered that he receive 360 days of credit against his sentence; however, the transfer report provides for only 332 days of credit. According to the DOC website, he asserts, his sentence is being calculated from September 30, 2008, and *not* from September 5, 2008. Thus, he argues, he is not receiving full credit and we should order proper sentencing credit. The State agrees that this court should correct defendant's custody date to the date of his arrest.

Defendants are "entitled to the credit for each day or part of a day spent in jail prior to the imposition of the sentence." *People v. Schneider*, 403 Ill. App. 3d 301, 304 (2010). Thus, we correct the mittimus to reflect that defendant was arrested on September 5, 2008, and that he is entitled to 360 days of credit for time served prior to sentencing.

III. CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed in part, vacated in part, and the mittimus is corrected.

Affirmed in part and vacated in part; mittimus corrected.