2013 IL App (2d) 111250-U
No. 2-11-1250
Order filed August 1, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-3549
AARON CLARKE,	)	Honorable John R. Truitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting the State's request for an extension of defendant's statutory speedy-trial term to obtain DNA test results, where the evidence showed that the State exercised due diligence attempting to obtain the results. The trial court erred in admitting co-conspirators' hearsay concealment statements, where they were: (1) not proximate in time to the crimes, or (2) merely narrative of past occurrences. However, the error was harmless because the evidence was overwhelming. The trial court did not err in giving a withdrawal jury instruction (IPI, Criminal, No. 5.04), where there was sufficient evidence presented to warrant the instruction. Defendant's conviction and sentence for conspiracy to commit aggravated kidnaping are vacated, where the State confesses that defendant was improperly convicted of both the inchoate conspiracy offense and the principal offense. Affirmed in part and vacated in part.

¶ 2 Following a jury trial, defendant, Aaron Clarke, was convicted of aggravated kidnaping and conspiracy to commit aggravated kidnaping. 720 ILCS 5/8-2, 10-2(a)(3) (West 2010). He was sentenced

to concurrent terms of 20 and 10 years' imprisonment, respectively. Defendant appeals, arguing that: (1) his right to a speedy trial was violated; (2) the trial court erred in (a) giving an erroneous jury instruction—I.P.I. Criminal 5.04— defining withdrawal for purposes of accountability and (b) admitting co-conspirators' statements; and (3) his conviction and sentence for the conspiracy offense should be vacated. We affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 Defendant, along with co-defendants Sheldon Baxter, Alex Crossen, Juan Gilbert, Justin Keenan, and Joshua Huntley, was charged with two counts of aggravated kidnaping and one count of conspiracy to commit aggravated kidnaping. (Co-defendants were tried separately.) One of the aggravated kidnaping counts alleged that, on November 10, 2010, defendant and his co-defendants kidnaped Michael Johnson and inflicted great bodily harm by inserting a beer bottle into his anus. (The jury ultimately found defendant not guilty of this count.) The second count alleged that, on the same date, the group kidnaped Johnson and inflicted great bodily harm by breaking Johnson's nose. (Guilty finding.) In the conspiracy count, the State alleged that defendant and his co-defendants agreed to kidnap Johnson and inflict great bodily harm upon him by breaking his nose. (Guilty finding.)

¶ 5 A. Pre-trial Proceedings Concerning Speedy-Trial and Co-Conspirator Issues

¶ 6 On November 29, 2010, defendant, age 25, was arrested and placed in custody. On November 30, 2010, defendant appeared, but was not arraigned because there was a question concerning defense counsel's, Christopher Taylor's, potential conflict of interest: Taylor represented defendant in another case. Counsel stated that he was not entering an appearance, waived reading of the charges, and requested a date for arraignment. On January 6, 2011, the court appointed the public defender to represent defendant because the conflict issue had not been resolved. Defendant waived formal arraignment and entered a not-guilty plea. On January 12, 2011, the public defender withdrew as counsel and Taylor filed his appearance. An order reflects that the speedy-trial period was tolled on defendant's motion. Additional orders through May 25,

2011, also reflect that the speedy-trial period was attributed to defendant. On May 25, 2011, defense counsel announced that he was ready and requested the quickest trial date, but the State requested a continuance, which was granted. (On appeal, the State concedes that the period May 25, to June 30, 2011, is attributable to it.) The record also reflects that the case was continued on several occasions on the State's motion to August 2, 2011. On August 2, 2011, the case was continued on defendant's motion to September 6, 2011.

¶ 7 On September 6, 2011, the case was again continued on defendant's motion and trial was set for October 3, 2011. Also on September 6, 2011, the State moved to compel defendant to submit a buccal (*i.e.*, cheek) swab (which contains DNA), arguing that the beer bottle might contain defendant's DNA. On the same day, the trial court granted the motion. (A buccal swab had been collected from Johnson on November 17, 2010, and one was collected from defendant on September 8, 2011.) On September 9, 2011, the trial court granted the State's motion to compel defendant to submit to be fingerprinted.

¶ 8 On September 29, 2011, the State moved, pursuant to pursuant to section 5/103-5(c) of the Code of Criminal Procedure of 1963 (Code), the speedy-trial statute, to continue the trial date to obtain DNA testing. 725 ILCS 5/103-5(c) (West 2012) (if the court determines the State exercised due diligence in obtaining material evidence and that there are reasonable grounds to believe such evidence may be obtained at a later day, the court may continue the cause on the State's application for not more than 60 additional days). The State noted that, on November 23, 2010, police transported evidence to the State crime lab, including a buccal swab from Johnson, two beer bottles, swabs from locations around the crime scene, and used tissue; it requested that the lab test the evidence for DNA against Johnson's buccal swab. The State also noted that, on May 2, 2011, Blake Aper, a forensic scientist with the State crime lab confirmed that DNA was located on the beer bottles. On September 8, 2011, (about four months later), Rockford detective Stevens met with Aper to inform him of the October 3, 2011, trial date and to try to expedite the delivery of buccal swabs and print cards. On September 28, 2011, the State spoke to Aper, who stated that he believed the first stage of

DNA testing would be completed by September 29, 2011, but that the next stage would not be ready by the trial date. Asserting that the evidence was material and necessary to its case and that it timely submitted the evidence to the crime lab, the State requested that the court continue the trial date. (It further noted that, as of September 29, 2011, there were 100 days attributable to the State.)

¶ 9 The court heard arguments concerning the State's diligence in obtaining the DNA test results. Defense counsel argued that the State was not diligent: it forwarded evidence to the crime lab in November 2010, but the next activity by the lab was on May 2, 2011, confirming the presence of DNA. Counsel noted that the State did nothing to obtain further samples from the co-defendants until September. Counsel also argued that the State waited too long to obtain the buccal swabs. As to the November-to-May period, the State responded that a 6-to-9-month time frame was typical for the crime lab. The State further argued that, in May, there was no need to obtain a buccal swab from defendant or anyone else because the only person who bled during the crime was Johnson (and his swab was forwarded to the lab in November 2010). In August, the State learned that the lab personnel wanted co-defendants' swabs. The State also noted to the court that an October 17, 2011, court date would be within two days of the 120-day speedy-trial term.

¶ 10 Also on September 29, 2011, the trial court found that the State exercised due diligence in attempting to obtain the DNA test results. (It declined to find whether an October 17, 2011, trial date would be within the speedy-trial term.)

¶ 11 On October 12, 2011, defendant moved to dismiss the case, arguing that the State had failed to bring him to trial within the 120-day speedy-trial term. The trial court denied the motion and again found that the State had exercised due diligence.

¶ 12 On October 17, 2011, the State moved to introduce co-conspirator statements made by co-defendants. The statements, the State asserted, were made before and after November 9, 2010, were in furtherance of the conspiracy, and were sufficiently proximate in time to the crime. Specifically, the statements included offers of money and drugs to various individuals, including Art Buzzard, Willie Walton, Michael Powless, and

Patrick Brown, to facilitate the kidnaping, to locate and silence Johnson, and admissions concerning a plan to "get rid of" Johnson through the use of illegal drugs. Defendant filed a related motion *in limine*, requesting that the State be barred from introducing evidence of post-arrest witness intimidation allegedly carried out by co-defendants and others, but not approved of or directed by defendant. (After the State presented Johnson's testimony, the trial court found that the State had established a *prima facie* case of a conspiracy with independent evidence.) The court granted the State's motion and denied defendant's motion.

¶ 13 B. Trial

¶ 14 The jury trial commenced on October 17, 2011. Victim Michael Johnson testified that, in August 2010, he lived at 1334 7th Avenue in Rockford. He stayed at the house for free. Defendant and Alex Crossen paid the rent and agreed to put the lease in Johnson's name in exchange for letting defendant and Crossen grow marijuana there. Other friends regularly came to the house, including Justin (Spanky) Keenan, Josh Huntley, Donnie Bowling (defendant's cousin), and Sheldon Baxter. Cocaine and marijuana were kept at the house. At this time, Johnson used heroin and smoked marijuana.

¶ 15 Johnson testified that, in November 2010, he stole about 20 marijuana plants from defendant and Crossen. (There remained about 19 plants.) He asked a friend to store some of the plants, and he sold the remaining plants to obtain money to purchase heroin. Johnson did not return to the 7th Avenue house because he knew that defendant and Crossen would be looking for him. On November 9, or 10, 2010, Johnson called Patrick Brown to ask if he could stay with him; he agreed. (Brown testified that, around this time, Baxter called him, offering $1,000 or drugs in exchange for handing over Johnson to him. Brown agreed to bring Johnson to Baxter. Brown never received the money or drugs.)

¶ 16 Johnson further testified that, one day after he stole the plants, Brown picked up Johnson in his car and told him, "I got you[r] back" and that Johnson could stay with him. Brown asked Johnson if they could stop at a Marathon gas station, and Johnson told him "no" because defendant and his friends liked to "hang out" there. Next, they went to a Mobil station. Johnson hid on the floor of the back seat. Brown exited the

car and stated that he was going to get gas. Juan Gilbert, defendant's friend, approached and sat in the passenger seat. He told Johnson, "you fucked up." Johnson knew that he had been caught. When Brown returned, Gilbert told him "let's go," but Brown stated that he wanted "nothing to do with this." Brown drove them to a parking lot by Saint Edward's Church. There, Baxter pulled up in his gold van; defendant and Crossen were also in the van. (Brown testified that he exited his car and walked to the curb; he was scared.) Gilbert exited Brown's car, re-entered through the back door, and started punching Johnson. The other men exited the van, and Crossen also started punching Johnson. Baxter and Gilbert pulled Johnson out of the car and put him into Baxter's van. (Brown testified that Gilbert and two others pulled Johnson out of his car and into the van. Defendant was in the van; Brown did not observe defendant do anything to anyone.) While they were doing this, Gilbert and Crossen punched Johnson. (Brown testified that he ran to his car and drove home. He did not call the police or tell anyone what happened at the time.)

¶ 17 Johnson was in the middle row of the van on the floor with Gilbert and Crossen on either side of him. Defendant sat in the front passenger seat, and Baxter drove. According to Johnson, Gilbert and Crossen continued to strike him. The men took Johnson to the 7th Avenue house, and they placed a board across the back door so that he could not leave. They took Johnson into the kitchen. Gilbert and Crossen continued to beat Johnson, and defendant and Baxter stood by and watched. Gilbert and Crossen struck Johnson's face, ribs, legs, back, "everything." Johnson testified that his eyebrow split open. At one point, Johnson gasped for air. Gilbert ripped off Johnson's clothes, and they continued to beat him.

¶ 18 Johnson further testified that Josh Huntley and Justin Keenan arrived at the house. Keenan beat Johnson. Johnson was not clothed at this time. They punched and kicked him. He had been bleeding since he was in the van. They told Johnson to get into the shower because he had bled all over their house. Gilbert stood by and turned on the cold water. They kept Johnson in the shower for about 30 minutes and verbally insulted him. After drying off with a towel, Johnson went to the kitchen and got dressed. There was a

pepper shaker on the counter, and Keenan stated that they should make Johnson snort it. Johnson replied that he could not breathe out of his nose; it was bleeding.

¶ 19 Next, Keenan grabbed a beer bottle and stated "we should shove this in your ass." Gilbert agreed and held down Johnson while Keenan pulled down Johnson's pants and pushed the bottle neck into Johnson's anus. Johnson "got it out," and Gilbert picked up the bottle and tried to shove it into Johnson's mouth. Johnson "smacked it away." Johnson was allowed to put on his clothes. He told the men "just kill me straight up." According to Johnson, Gilbert stated, "you're not worth that" and "we should keep you in the basement." Huntley then stated, "no, man, we need to get the hell out of here, we need to go."

¶ 20 The men took off the board from the back door and huddled around Johnson. According to Johnson, they told him "don't fucking try nothing, you know." Defendant, Crossen, Baxter, and Gilbert put Johnson in the back seat of the van. Gilbert and Crossen sat on either side of Johnson and continued to hit and insult him; Johnson started screaming. They drove around, dropped off Johnson, and left in the van.

¶ 21 Initially, Johnson did not know where he was. He tried to stop some cars on the road. Johnson ended up at Brewsky's, a bar where Gerald Zernicke, the manager, approached him. (Zernicke described Johnson as having cuts on his face and blood on his clothing.) Zernicke gave Johnson a cell phone, and Johnson called his stepfather, Michael Powless, to pick him up. Johnson explained that he did not call the police because he wanted to retaliate; "I was at the time living by this code of life where you don't talk to the police."

¶ 22 Powless and his girlfriend picked up Johnson. Johnson, crying, told Powless what happened. Powless "freaked out" and took Johnson to his house and then to a Red Roof Inn motel. Johnson further stated that, at the motel, he performed a self-examination of his anal area and determined there was some blood. When he woke up the next day, November 11, 2010, Johnson could not open his mouth. He telephoned Powless, and Powless drove him to the hospital. There, Johnson made up a story that he was jumped in Roscoe at a party. Johnson did not tell hospital personnel about the sexual assault and, so, he was

not given a sexual assault kit or examined in that respect. He was ashamed. He was treated for a broken nose, an injured jaw, and a split eyebrow. He did not wait for the police to arrive.

¶ 23 That evening, a police officer spoke to Johnson at the motel. Johnson testified that he was not fully truthful with the officer: he told him that several men falsely accused him of stealing *cocaine*; the rest of the information he related to the officer, however, was truthful. At this time, he told the officer about the sexual assault. Two days after his initial visit, Johnson returned to the hospital and told doctors that he was sexually assaulted; he was examined for an injury in that area. (Rockford police officer Tim Campbell testified that, on November 11, 2011, he observed bruises and welts on Johnson's chest, stomach, and back, that both of his eyes were swollen and black and blue, and that his nose was swollen. He also observed that Johnson's t-shirt contained dried blood, as did his jeans.)

¶ 24 On November 12, 2010, Johnson met with detectives and was shown photo lineups. Johnson identified defendant, Brown, Baxter, Crossen, Keenan, Gilbert, and Huntley.

¶ 25 Johnson further testified that, before Christmas 2010, Stevie Eisman contacted him and set up a meeting between Johnson and defendants. Based on something Eisman said to him, Johnson called Keenan. Keenan picked up Johnson; they drove around and smoked "weed." Also, Keenan supplied money so that Johnson could purchase heroin. According to Johnson, Keenan stated, "I just want to make everything all right so you don't have to look over your shoulder any more" and "I'm wrong for what I did and you're wrong for going to the police." Johnson agreed to speak to Keenan's attorney, Debra Schafer. Keenan told Johnson to say that "this is all a lie." About one or two days later, Keenan's father drove Johnson to see Schafer. Keenan also gave Johnson a cell phone and money to buy heroin. At Schafer's office, Johnson was suffering from heroin withdrawal and kept vomiting. Keenan dictated the contents of an affidavit Johnson signed. The statement, which was not fully truthful, related that Johnson made up his story, lied to his stepfather, and was actually jumped and beaten by some men to whom he owed money for "dope."

¶ 26 Donnie Bowling, defendant's cousin, paid for a room for Johnson at the Travelodge motel. Johnson stayed there for five days. Johnson went to Schafer's office a second time to sign the affidavit. Keenan then arranged for an apartment for Johnson in Buckingham Square. Defendant's brother Mark Clarke, Mark's girlfriend, and Keenan's girlfriend also stayed at the apartment. They provided Johnson with money and drugs on a couple of occasions. He was never left by himself, except for the morning that the detectives came to pick him up. When asked if he was free to leave, Johnson testified that "[I] felt like I had no other choice but to be there after I signed the affidavit. *** I didn't know what these guys were going to do to me." Keenan offered Johnson $5,000 for his statement. Johnson never received that money, but did receive from Keenan $500, a cell phone, and two ounces of "weed." In January 2011, detectives arrived at the apartment and took away Johnson.

¶ 27 On cross-examination, Johnson testified that he had been charged with a felony drug crime (*i.e.*, stealing marijuana from defendant) that was amended to a misdemeanor. Johnson conceded that he falsely testified to a grand jury in this case about the type of drugs he stole, but was truthful as to the remainder of his story.

¶ 28 According to Johnson, Powless did not like that Johnson had been friends with co-defendants, against whom Powless had a grudge. Addressing the attack, Johnson stated that Keenan was in charge (but Johnson robbed defendant and Crossen). He conceded that his story about stealing cocaine would have been consistent with causing Keenan to be angry with him. After Keenan was arrested, Keenan's father paid some of the money to Johnson.

¶ 29 Addressing the attack, Johnson testified that defendant exited the van, but did not touch him at any point. Defendant never placed a hand on Johnson; he did, though, appear to be angry. Johnson stated that Baxter, Crossen, and Gilbert shoved him into the van. When asked if defendant was giving orders, Johnson testified: "He wasn't giving order[s], but they were like, come on, come on. They were all saying, come on,

come, on." Defendant appeared angry in the van. At the house, defendant did not touch Johnson. However, at one point during the beating, defendant told his friends to stop, but they did not listen to him.

¶ 30 Michael Powless, Johnson's step-father, testified that, on November 9, 2010, he received a call from a person who identified himself as "Aaron." Powless believed the person to be defendant because he was the only "Aaron" Powless knew and because he recognized his voice; he had met defendant in jail in 2007. Powless testified that defendant stated that he had a "thousand dollar bounty on your son's head. Could you please tell him[?]" Powless called Johnson, and, about 45 minutes later, Johnson called back and said, "They got me." Powless instructed him to call 911. Powless testified that, during the call, he heard Johnson getting hit.

¶ 31 Around midnight, Powless received another call from Johnson and went to pick him up at Brewsky's Bar. Johnson was bloody and crying. Powless did not think that Johnson needed medical attention. Powless drove Johnson to Powless's home, but, because Johnson is not allowed in Powless's home, he then took Johnson to a motel. He did not check Johnson in in his own name because he did not want him to be found. The next day, at Johnson's request, Powless's girlfriend took Johnson to the hospital and then back to the motel. The following day, a Rockford police officer came to Powless's house, and Powless told him how to find Johnson. The day after that, Keenan called Powless, asking where Johnson was "or it's gonna come back on you." He also asked why the police came to Powless's house. Powless told Keenan that they were looking for Johnson. Keenan asked if Johnson was dead, and Powless replied that he was not. Keenan then stated that the worst thing that would happen to him was that he would be convicted of "ramming a bottle up Johnson's ass."

¶ 32 Powless moved Johnson to various motels so that he would not be found. Keenan, in subsequent conversations, offered Powless $5,000 for Johnson to change his story to one where "six black guys did it." Before Christmas 2010, Keenan again called Powless and stated that he was going to turn himself in and that, if Johnson did not change his story, Keenan would "get" Powless. During a final conversation, Keenan told

Powless that Johnson had accepted his offer. Powless then went to the motel where Johnson had been staying, but Johnson was gone.

¶ 33 Powless further testified that Johnson told him that he stole something from Crossen; he did not mention defendant.

¶ 34 Dr. Troy Shaffer, the emergency room physician who initially examined Johnson on November 11, 2010, testified that Johnson had multiple contusions (*i.e.*, bruises) around his face and forehead and abrasions (*i.e.*, scratches) on scalp. He also had three nasal fractures. On November 12, 2010, Shaffer again examined Johnson after Johnson returned and reported that he had been sexually assaulted. Dr. Shaffer found no signs of trauma or injury in Johnson's rectal and perineal area; he explained that the area heals rather quickly. He further testified that, if someone had a beer bottle violently inserted into his or her anus while resisting, he would not expect evidence of that to have disappeared within one day. He saw no evidence corroborating Johnson's story of having a beer bottle violently inserted into his anus. However, Dr. Shaffer conceded that bruising, tears, or bleeding do not always occur as a result of such an incident.

¶ 35 Rockford police detective Brian Shimaitis testified that he executed a search warrant at the 7th Avenue house on November 15, 2010. Officers had to force entry through the front door because the door was blocked with wooden boards. (The home's rear door had similar wooden boards across metal brackets to reinforce the door.) In the bathroom sink, Shimaitis saw a blood-stained tissue or toilet paper with a reddish-brown stain and a yellow stain. In the kitchen, Shimaitis observed small reddish-brown stains on the wall; they appeared to be blood stains. There were also blood stains on the bare, wood sub-floor in the northwest corner of the kitchen.

¶ 36 Shimaitis recovered a pepper shaker from the kitchen counter, receipts from a kitchen cabinet, a box of .45-caliber ammunition (containing 37 live rounds) in a kitchen cabinet, a magazine for a semi-automatic handgun in a cabinet, a handgun holster on top of the refrigerator, and a partially-full Budweiser beer bottle from the refrigerator. One of the receipts was from Autozone and was in defendant's name. He also

recovered a Bud Light beer bottle from the living room trash can and five live rounds of .45-caliber ammunition in a bag in a kitchen cabinet.

¶ 37 Upstairs in the residence, Shimaitis smelled a very heavy odor of marijuana. In one of the bedrooms, Shimaitis discovered potted marijuana plants and high-intensity grow lights with reflectors. Plastic was taped over the windows. Shimaitis also saw chemical fertilizers and power inverter boxes that were used to step up the amperage and wattage to feed to high intensity lights.

¶ 38 Christine Aper, a forensic scientist with the State police, testified that she specializes in latent print examination. Aper testified that her lab received the beer bottles on May 2, 2011. The crime lab had received them on November 23, 2010. She identified one latent impression suitable for comparison from the empty Budweiser beer bottle. Aper recovered six latent prints suitable for comparison from the Bud Light beer bottle, one of which matched Johnson. Aper was not able to identify or eliminate the fingerprints of defendant or co-defendants.

¶ 39 Blake Aper, a forensic scientist with the State police, testified that he works in the forensic biology and DNA section of State laboratory and is Christine's husband. Aper stated that his lab first received the evidence in this case in November 2010, but he did not begin his DNA analysis until the end of September 2011 because: (1) the laboratory had a backlog; (2) he had to obtain permission from the State to consume the exhibits (*i.e.*, use the entire swab from the beer bottles and, thereby, foreclose any future testing on them), which he received mid-September 2011; and (3) there was a request for buccal swabs from certain individuals, including defendant and Johnson. Aper also tested a blood sample from the kitchen floor. The DNA from the neck of the Budweiser bottle (from the refrigerator) matched defendant's DNA, and the blood recovered from the kitchen floor matched Johnson's DNA profile. Addressing the additional profiles that were requested in the case in August 2011, Aper testified that they were necessary to complete the DNA analysis: "Usually we like to have standards from any individual involved in the case."

¶ 40 Aper opined that the more forcefully an object is inserted into the anus, the more likely that DNA would be left on the object. However, he also testified that some people tend to leave a lot of DNA, whereas others do not. Here, Johnson's DNA was not found on either of the beer bottles. No DNA at all was obtained from the Bud Light bottle.

¶ 41 Art Buzzard testified that he knows defendant and Baxter from the neighborhood. In November 2010, before Thanksgiving, Buzzard called defendant. Defendant told Buzzard that he had been robbed by his roommate, who was addicted to heroin. Defendant further related that his roommate stole some of defendant's marijuana plants. Defendant stated "that they fucked his ass up;" Buzzard believed that defendant was referring to something in which he had participated. Defendant told Buzzard that he was out of town because the police were looking for him; he was going to turn himself in after Thanksgiving.

¶ 42 Buzzard stated that, in late 2010 and early 2011, on defendant's instructions, he spoke to Mark Clarke, defendant's brother. Buzzard met Mark outside a Florida Drive apartment building. He told Buzzard that "I got the guy in here that we—that I did that shit to." Buzzard understood that Mark was referring to Johnson. Mark further told Buzzard that he was keeping Johnson in the apartment, "doped up on heroin so they could give him fentanyl while he was all doped up and he would end up dead and it would look like he overdosed" and there would be no victim in the case.

¶ 43 Buzzard further testified that the activities in the apartment occurred in January (while defendant was in the county jail). Buzzard acknowledged that he had recently been arrested for a drug offense. The police told him that, in exchange for his cooperation in defendant's case, they would not put him in jail or make him post bond. Although the State had not made him any promises, he hoped that his testimony would persuade the State not to prosecute him.

¶ 44 Rockford police detective Jeff Schroder testified that he interviewed Johnson on November 12, 2010, and that Johnson gave two versions of defendant's involvement in the incident, specifically, that: (1) defendant was present when he was kidnaped at the Mobil gas station (this statement appears in a sworn

statement Johnson gave); and (2) defendant did not show up until Johnson was taken to the 7th Avenue apartment (this statement appears in Schroder's report summarizing his interview with Johnson).

¶ 45 Willie Walton testified that, on January 1, 2011, he was in jail for possession of a controlled substance and had previously been convicted of the same offense. Walton first met defendant in the holding facility and later was housed in the same deck as defendant. Throughout the week, Walton spoke to defendant daily. Defendant told Walton that he was in jail for kidnaping and assault and that someone had stolen from him. According to Walton, defendant stated that "the stupid mother Fer had stole from him and he was gonna pay for it." Defendant explained that Mike or "little Mike" had betrayed him, stolen from him, that he felt disrespected, and that "the street would give him no credibility for what this guy had did and got away with it." Defendant further stated that he set up a meeting to speak to Mike and let him know that everything was okay, but then apprehended him with three or four individuals (including Juan and Spanky). Defendant further told Walton that "they" beat up Mike until he was unconscious and that the others came up with the idea "to stick a bottle up his ass *** to wake him up." Defendant told Walton that "they broke a couple of ribs and his jaw and really destroyed him down at the rectum part." He felt that the assault was disorderly and not well-handled; however, defendant's friends had apprehended the victim, taken him to "Dan Cain's" office, and had him fill out an affidavit.

¶ 46 Close to the time that Walton was about to be released from jail, he agreed to help defendant. (Walton agreed to "deal with a situation" or problem for defendant.) In exchange, defendant offered Walton crack cocaine, marijuana, and money. Defendant gave Walton Sheldon Baxter's telephone number. Prior to his release on January 14, 2011, Walton gave police detectives the number. On January 15, or 16, 2011, after he was released, Walton called the number and an individual named Kyle answered (as defendant had informed Walton he would). Kyle passed him on to Baxter. They set up a meeting, but Walton never followed through with it because the police told him to cancel it. Johnson was in a safe house in police custody.

¶ 47 Walton denied that he was testifying in hopes of receiving some benefit for himself. He came forward because he did not believe that a human being should be treated like Johnson was treated. Defendant never told Walton that he himself did anything to Johnson. However, defendant told Walton that Johnson "had to be taught a lesson because don't nobody fuck with the Clarkes." Walton further testified that Johnson would not be a credible witness because he was a drug addict. Defendant knew that Johnson had signed the affidavit because both defendant's brother and his attorney had told him about it during visits to the jail.

¶ 48 Detective Schroder was recalled by the State and testified that he interviewed Walton several times. He took statements from Walton on January 4, 2011, when Walton was in custody, and on January 14, 2011, after Walton had been released. Walton was released on January 13, 2011, and, the same day, went to the police public safety building to speak with Schroder. At this time (January 13), police were searching for Johnson. Walton showed Schroder a piece of paper with a phone number (and the name "Hank," whom Schroder knows is defendant) written on it and asked if he should call the number. Schroder told him not to do anything. Schroder testified that police were also speaking to Buzzard, who had an idea where Johnson was being kept. Police located Johnson and did not need Walton's assistance; they did not follow up on the phone number Walton had given them.

¶ 49 Schroder agreed that Walton was trying to help the police because he was also trying to help out himself: "I mean that's obviously. I mean he's up in jail." However, he also testified that Walton never asked police for a deal; he was more concerned about "these guys" asking him to get rid of Johnson. Walton did not have plans to get rid of Johnson.

¶ 50 The State rested its case. For the defense, the parties stipulated that jail records showed that Mark Clarke, defendant's brother, never visited defendant while he was in the facility.

¶ 51 C. Verdict and Subsequent Proceedings

¶ 52 On October 20, 2011, the jury found defendant not guilty of aggravated kidnaping (beer bottle), but guilty of aggravated kidnaping (broken nose) and conspiracy to commit aggravated kidnaping.

¶ 53 On November 28, 2011, a hearing was held on defendant's post-trial motion for a new trial. Defense counsel called Cathy Fashingbauer, a forensic scientist with the State police lab in Rockford, in support of his argument that the trial court erred in finding that the State exercised due diligence and, thereby, in extending the speedy-trial term. Fashingbauer testified that the crime lab received the records in this case on November 23, 2010. The next communication occurred on May 2, 2011, when lab personnel requested a permission-to-consume letter from the Rockford police (required for DNA analysis to begin). If a prosecutor calls about a specific case, that call is documented in the case file. There is no record of any communications between the State's Attorney's office and the crime lab between May 2, and September 7, 2011. Fashingbauer testified that the lab received the permission letter from the State's Attorney's office on September 13, 2011; she was unaware how long it took for the police to send the request to the State's Attorney's office. However, on September 7, 2011, a pre-trial conference was held at the lab; two assistant State's Attorneys and Sergeant Jay Stevens visited the lab. At that meeting, the State asked Blake and Christine Aper to complete their analyses in time for a mid-October court date. Blake asked for all of the standards to be presented earlier than they normally would be in order to expedite having full results by the court date. The Apers had vacation time scheduled in mid-September; Blake was off on two vacations during that time. Blake began DNA testing on September 28, 2011. The lab's policy is that the same analyst will work on a case once testing has begun; it is rare that someone steps in for another forensic scientist. (The State filed an amended motion for a continuance on September 29, 2011.)

¶ 54 Fashingbauer explained that the *biology* backlog time is 3 1/2 to 4 months. However, there are procedures to expedite an analysis. In this case, there was no request to expedite until the September 7, 2011, meeting. Fashingbauer explained that there is no policy for scheduling work if someone is on vacation.

Here, before September 7, 2011, the lab did not receive any communication requesting that the case be expedited.

¶ 55 The trial court denied defendant's motion, finding with respect to the speedy-trial issue that defendant was tried within the 120-day term and also that the State had exercised due diligence. Also on November 28, 2011, the trial court sentenced defendant to 20 years' imprisonment on the aggravated kidnaping count (count IV) and 10 years' imprisonment on the conspiracy count (count V), both to be served concurrently.[1]

¶ 56 II. ANALYSIS

¶ 57 A. Speedy-Trial Term - DNA Delay

¶ 58 Defendant argues first that the trial court abused its discretion in finding that the State exercised due diligence in its efforts to obtain DNA test results and thereby granting the State's motion for a continuance based on its inability to obtain the results within the speedy-trial term. The State responds that it exercised due diligence. There is no dispute that, if the State acted with due diligence such that the court's extension of the speedy-trial term under section 103-5(c) was proper, defendant was brought to trial within the speedy-trial term. For the following reasons, we reject defendant's argument.

¶ 59 A defendant possesses both constitutional and statutory rights to a speedy trial. See U.S. Const. amends. VI, XIV; Ill. Const.1970, art. I, § 8; 725 ILCS 5/103-5(a) (West 2012). While these provisions address similar concerns, "the rights established by each of them are not necessarily coextensive." *People v. Kliner*, 185 Ill. 2d 81, 114 (1998). Here, defendant asserts a violation only of his statutory right to a speedy trial and not any constitutional concerns. Accordingly, we turn to the speedy trial statute.

¶ 60 Pursuant to section 103-5 of the Code, a defendant in custody must be tried within 120 days from the date he or she was taken into custody. See 725 ILCS 5/103-5(a) (West 2012). If he or she is not, then

[1]The court also found that the conduct leading to the aggravated kidnaping conviction resulted in great bodily harm to the victim. 730 ILCS 5/3-6-3(a)(2)(iii) (West 2012).

the defendant must be discharged. See 725 ILCS 5/103-5(d) (West 2012). There are only two exceptions to this rule. The first is if the defendant "occasion[s] the delay;" in such an instance, the running of the speedy trial-period is tolled and then resumes once the delay is over. 725 ILCS 5/103-5(a) (West 2012. A "delay occasioned by the defendant" is one where the defendant does something to cause or contribute to the postponement of his or her trial. See *People v. Hall*, 194 Ill. 2d 305, 326-27 (2000). This also includes his express agreement to a continuance. See *Kliner*, 185 Ill. 2d at 114, 115-16 (when the defendant and the State agree to a continuance as a cause proceeds to trial, this "constitutes an affirmative act of delay attributable to the defendant which tolls the speedy-trial term"). The other exception to the 120-day speedy-trial term may be exercised by the State. As relevant here, the State may petition the trial court for up to a 120-day extension of the term to obtain DNA test results. See 725 ILCS 5/103-5(c) (West 2012). To obtain this extension, the State must show that it has been unable to obtain the results of DNA testing that is material to its case and that there are reasonable grounds for the court to believe that it will be able to obtain the results at a later date. See 725 ILCS 5/103-5(c) (West 2012). While there is no specific, bright-line definition of the due diligence the State must exert, the key test is whether the State began its efforts to locate the cited evidence before the speedy-trial term was set to end. See *People v. Terry*, 312 Ill. App. 3d 984, 990-91 (2000).

¶ 61 The trial court's decision to grant a speedy-trial term extension pursuant to the State's petition is within its discretion. *Id.* at 990. Accordingly, we will not reverse the trial court's decision in this respect absent a clear showing of abuse of discretion. *Id.* A trial court abuses its discretion where no reasonable person would take the trial court's view. *People v. Garcia-Cordova*, 392 Ill. App. 3d 468, 487-88 (2009). Moreover, we are to examine and consider the entire record as it existed at the time the trial court considered the State's petition.[2] *Id.* Ultimately, " '[w]hether the State has exercised due diligence is a question that

[2]Thus, we do not consider Fashingeaur's testimony, which was given at the hearing on defendant's motion for a new trial and not at the time of the State's motion to continue.

must be determined on a case-by-case basis after careful review of the particular circumstances presented.' " *Bonds*, 401 Ill. App. 3d at 674 (quoting *People v. Swanson*, 322 Ill. App. 3d 339, 342 (2001)); see also *People v. Spears*, 395 Ill. App. 3d 889, 895 (2009) (refusing to adopt Fifth District's three-part test set forth in *People v. Battles*, 311 Ill. App. 3d 991, 998 (2000), because due diligence must be determined on a case-by-case basis); *accord People v. Colson*, 339 Ill. App. 3d 1039, 1048 (2003) (Fourth District).

¶ 62 Here, the crime lab received certain evidence, including the beer bottles and Johnson's DNA sample, on November 23, 2010. Johnson was the only individual known to have bled at the scene. However, it was not until May 2, 2010, that Blake Aper, the forensic scientist who ultimately conducted the DNA tests, first confirmed that DNA was present on the beer bottles. The State asserted at the September 29, 2011, pre-trial hearing on due diligence that it learned in August 2011 that lab personnel wanted co-defendants' buccal swabs. On September 8, 2011, Rockford detective Stevens and two assistant State's Attorneys met with Blake to inform him of the then-scheduled October 3, 2011, trial date and to request the expediting of the delivery of the buccal swabs and fingerprint cards tests. On September 28, 2011, the State spoke to Aper, who informed them that the first stage of DNA testing would be completed by September 29, 2011, but that the next stage would not be ready by the October 3, 2011, trial date. Blake testified at trial that he did not begin his analysis until the end of September 2011 because: (1) the lab has a backlog (according to the State at the hearing, six to nine months; thus, here, ending between May and August 2011[3]); (2) he had to obtain the State's permission to consume the exhibits, which he did not receive until mid-September 2011; and (3) there was an outstanding request (from August 2011) for buccal swabs from certain individuals including defendant (these were necessary, according to Blake, because "we like to have standards from any individual

[3]Fashingeaur testified that the *biology* backlog time was 3 1/2 to 4 months. However, this evidence was not before the trial court at the hearing on the State's motion to continue and we cannot consider it. Further, defendant has not challenged the State's assertion that the *total* backlog time for the State crime lab (to process DNA and fingerprints) was up to nine months.

involved in the case"). The State moved to compel defendant to submit a buccal swab on September 6, 2011, and the trial court granted the motion on the same day; it was collected two days later. (A swab was collected from Johnson in November 2010.)

¶ 63 At the September 29, 2011, due diligence hearing, the State noted that there were a "flurry" of telephone calls on September 6, 2011, between the State and the lab, with the State inquiring why the testing had not yet been completed. The State asserted that it was at that time that the lab "insisted," pursuant to lab policy, that no DNA testing would commence until all co-defendants' DNA swabs were provided to it. The State informed the court that it then "immediately expedited" the case, had the co-defendants swabbed, and sent the swabs to the crime lab. The State also noted that it had learned that day (September 29, 2011), that Blake and Christine would be out of the office and the lab's policy was that no other scientist would take over the testing.

¶ 64 Defendant argues that it is undisputed that, as of May 2, 2011, the State knew that there was DNA evidence to be tested. On May 25, 2011, defense counsel requested a trial date and the case was set for trial on July 5, 2011. However, the State did not communicate with the lab, defendant asserts, until August 2011 or the first week of September 2011 and it was only then that the State found out that the lab required additional swabs from all defendants to complete the testing. Defendant asserts that the absence of any communication between the State and the lab from May until September 2011 precludes a finding that the State made reasonable and prudent efforts to have the DNA testing timely completed and its late efforts to expedite the testing in September did not excuse its earlier lack of due diligence.

¶ 65 The State responds that it made serious efforts to secure the lab results in a timely manner after it became aware there was a problem. It notes that, on September 6, 2011, defense counsel noted to the court that he understood that the lab was not going to move forward with the DNA testing because it had not received defendant's swab.

¶ 66 We conclude that the record, as it existed at the time the trial court considered the State's motion for a continuance, does not show that the court abused its discretion in finding the State acted with due diligence. It is undisputed that Johnson's DNA sample and the beer bottles were sent to the State lab in November 2010. It is also undisputed that the lab first informed the parties of the presence of DNA on the beer bottles in May 2011. Further, it is undisputed that the State first learned of the lab's request for defendant's and co-defendants' DNA samples in August or early September 2011. Finally, it appears to be undisputed that the State took actions to expedite the testing as soon as it learned of the request for the additional swabs. We disagree with defendant's argument that the State's inaction from May to September 2011 necessarily reflects a lack of diligence by the State. See, *e.g.*, *Spears*, 395 Ill. App. 3d at 895-96 (trial court did not abuse its discretion in granting permission to extend speedy-trial term to complete DNA testing, where need for DNA testing became apparent late in the term, the assistant State's Attorney was on vacation during that time, and, although there was a slight delay in addressing the matter upon her return to work, the report was turned over to the defendant just over one week after that and the State then promptly moved to extended the term when the lab informed her that up to 120 days were needed to complete the testing). Defendant does not argue that, for example, the State knew of the lab's need for additional swabs and concealed this fact or inadvertently delayed informing the court of the lab's request.

¶ 67 Defendant argues that the State offered no explanation of how the backlog affected its ability to bring the case to trial within the speedy-trial term. Defendant suggests that, had the State communicated with the lab between May and September 2011, it would "be expected" that lab personnel would have informed the State of its need for the additional swabs and that the testing "could have been performed within the speedy-trial term." We reject this argument as speculative. *Cf. People v. Exson*, 384 Ill. App. 3d 794, 800-03 (2008) (the State made its first unsuccessful attempt to locate the chemist who performed the analysis of the substances at issue on the 119th day after the defendant was taken into custody, and it then requested a 30-day continuance; the State had taken for granted that the defendant would stipulate to the results of the forensic

testing, because it was customary in bench trials; appellate court held that the trial court abused its discretion in finding the State was diligent and granting the continuance; State's failure to timely ask defense counsel about his willingness to stipulate showed a lack of diligence). Under the facts of this case, we decline to hold that the State should have inquired as to the status of the DNA testing during the four-month period at issue. The backlog period to which Aper attributed *part* of the delay was (according to the State) up to nine months long. The lab received the evidence in late November 2010. If the testing was not completed, assuming no other delays, until the end of the backlog period, the State would have received the results in August 2011. It was about this time (late August or early September) that the State had conversations with the lab to inquire about the status of the testing.

¶ 68 Again, under the facts in this case, we cannot conclude that the trial court's extension of the speedy-trial term was unreasonable. Accordingly, we reject defendant's argument. Further, because we affirm the court's granting of the speedy-trial extension, we need not address defendant's alternative argument that the trial court erred in calculating the speedy-trial term (by erroneously attributing various periods to defendant).

¶ 69 B. Admission of Co-Conspirators' Statements

¶ 70 Defendant argues next that he was denied his right to a fair trial where the trial court erroneously admitted his co-conspirators'/co-defendants' hearsay statements, specifically, certain testimony from Johnson, Buzzard, and Powless concerning co-defendants' efforts to conceal the crime and other matters. Before trial, defendant sought to exclude evidence of his co-conspirators' efforts to conceal the crime; these efforts had occurred over one month after the alleged offenses and while defendant was in custody. At the same time, the State filed a motion *in limine*, seeking to present co-conspirator hearsay statements that were made both during and after the offense. The trial court allowed the State's motion and denied defendant's motion. Here, defendant argues that, as a result of the court's rulings, extensive testimony about his co-conspirators' efforts to conceal the crime was presented at trial. He argues that the evidence was not proximate in time to the original conspiracy and, because there was no direct evidence that defendant was

involved in these efforts, the evidence did not fall within the co-conspirator exception to the hearsay rule. Ill. R. Evid. 801(d)(2)(E) (eff. Jan. 1, 2011). Defendant further contends that, because the jury may have relied on this improper evidence in finding him guilty, the error in admitting it requires that his convictions be reversed and the cause remanded for a new trial. For the following reasons, we agree that the trial court erred in admitting the statements, but we agree with the State's argument that the error was harmless.

¶ 71 We review evidentiary rulings for an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). " 'Moreover, even where an abuse of discretion has occurred, it will not warrant reversal of the judgment unless the record indicates the existence of substantial prejudice affecting the outcome of the trial. [Citation.]' " *People v. Jackson*, 232 Ill. 2d 246, 265 (2009) (quoting *In re Leona W.*, 228 Ill. 2d 439, 460 (2008)).

¶ 72 The co-conspirator exception to the hearsay rule provides that "any declaration by one coconspirator is admissible against all conspirators where the declaration was made during the pendency of and in furtherance of the conspiracy." *Kliner*, 185 Ill. 2d at 141; *People v. Meagher*, 70 Ill. App. 3d 597, 601 (1979) ("The acts and declarations of a co-conspirator in furtherance of the conspiracy are admissible against another who is a defendant, even when the acts and declarations are made out of the presence of the defendant."); see also Ill. R. Evid. 801(d)(2)(E) (eff. Jan. 1, 2011) (a statement is not hearsay if the "statement is offered against a party and is *** a statement by a coconspirator of a party during the course and in furtherance of the conspiracy").

¶ 73 "The coconspirator hearsay exception does not extend to a statement which is merely a narrative of past occurrences and which does not further any objective of the conspiracy." *Kliner*, 185 Ill. 2d at 141. "[A] mere narrative of past occurrences can not further any objective, whereas in distinction, concealment will further the conspiracy by allowing the conspirators to escape punishment." *Meagher*, 70 Ill. App. 3d at 603-04.

¶ 74 "Statements made in furtherance of a conspiracy include those that have the effect of advising, encouraging, aiding or abetting its perpetration." *Kliner*, 185 Ill. 2d at 141. A statement made after the crime is complete is not admissible under the exception, unless it was made during the concealment phase of the crime. *People v. Parmly*, 117 Ill. 2d 386, 393 (1987). "Statements relating to attempts at concealment further the objective of the conspiracy, which implicitly includes escaping punishment." *Kliner*, 185 Ill. 2d at 141.

¶ 75 As relevant here, "subsequent efforts at concealment of the crime, *where sufficiently proximate in time to the offense*, are considered as occurring during the course of the conspiracy." (Emphasis added.) *Kliner*, 185 Ill. 2d at 141. The proximate-in-time requirement is narrowly applied. See, *e.g.*, *id.* at 141-42 (concealment statement that was made on the same day as murder was sufficiently proximate in time to the offense and properly admitted); *People v. Thomas*, 178 Ill. 2d 215, 238 (1997) (statement made immediately after murder admissible); *People v. Columbo*, 118 Ill. App. 3d 882, 948 (1983) (statements made the morning after murders admissible); *People v. Link*, 100 Ill. App. 3d 1000, 1006 (1981) (statements made two days after crime admissible); *Meagher*, 70 Ill. App. 3d at 603 (statement made morning after crime admissible); *cf. People v. Childrous*, 196 Ill. App. 3d 38, 52-53 (1990) (actions 5 days after robbery—attempt to dispose of gun—and 20 days after robbery—attempted disposal of checks taken in robbery—not sufficiently proximate); *People v. Eddington*, 129 Ill. App. 3d 745, 774 (1984) (tapes of conversations that occurred three months after the offense inadmissible).[4]

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[4]There appears to be a narrow exception to the proximate-in-time requirement for concealment testimony in murder-for-hire schemes. Our supreme court has held that statements made one and six months after a murder and that concerned the collection of the payment for the murder were admissible under the co-conspirator exception because the "real objective" of the conspiracy included obtaining the insurance proceeds from the victim's husband as payment for the murder. *Kliner*, 185 Ill. 2d at 143. At the time of the statements, the goal of the conspiracy had not

¶ 76 Here, defendant notes that the conspiracy to commit the aggravated kidnaping of Johnson was alleged to have occurred around November 10, 2010. He complains, however, that "a significant part" of the State's case consisted of evidence of his co-conspirators' efforts at concealment one-and-one-half-to-two months after the principal offense was over. Defendant points to testimony from Johnson, Buzzard, and Powless. He first notes that Johnson testified that, before Christmas 2010, about one-and-one-half months after the crime, Keenan (a co-defendant) offered him $5,000 to meet with Schafer, Keenan's attorney, and sign an affidavit wherein he admitted that he lied about the offense. Johnson further testified about how he provided the affidavit in exchange for drugs and money from Keenan. He also stated that Bowling, Keenan's cousin, took him to Mark Clarke's apartment (to hide Johnson there).

¶ 77 Defendant further notes that Buzzard gave additional testimony about the conspiracy. He testified that, on January 11, 2011, (about two months after the crimes) he met Mark Clarke at his apartment, and Mark told him that he had Johnson in his apartment and that "they" were keeping him "doped up" on heroin and that "they" would give Johnson fentanyl so that he would die, but that it would appear that he overdosed. Buzzard conceded that Mark never told him that defendant knew, or approved of, what Mark was doing with Johnson. Defendant argues that Johnson's and Buzzard's testimony should not have been admitted against him because the efforts at concealment were not proximate in time to the original offense such that it constituted an ongoing conspiracy in which he was involved. He contends that he was prejudiced as a result. Defendant argues that he "became bound by Keenan's acts of bribery and Mark Clarke's purported plan to kill [ ]Johnson, despite the fact that these actions were taken long after the main objectives of the conspiracy to commit aggravated kidnaping had been accomplished and were done outside [defendant's] presence."

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yet been accomplished. *Id.*; see also *People v. Byron*, 164 Ill. 2d 279, 291 (1995) (no error in admitting statements concerning murder-for-hire scheme because statements were made during the course of and in furtherance of the conspiracy).

¶ 78 The only link between defendant and the co-conspirator's concealment, defendant urges, came from Walton, a jailhouse informant, whose statements he concedes were admissible and who testified that defendant told him that he knew his friends had apprehended Johnson and that Johnson had signed an affidavit retracting his story. Defendant asserts that, even if he was aware of his co-conspirators' efforts to conceal the crime, there was no evidence that he expressly agreed to them and they were too far removed from the original offenses to impute those acts to him. Defendant also points to Walton's testimony that defendant accepted his offer to help him and told Walton to drive Johnson to Chicago and to call Baxter to help "get rid of [defendant's] problem." Conceding that this statement was admissible as a statement against interest, defendant argues that it nevertheless did not link him to Keenan's and Mark Clarke's acts of concealment. He argues that it lent further support to the conclusion that he was *not* included in an ongoing conspiracy or combination of minds with them because he was proceeding separately and by himself.

¶ 79 Finally, defendant points to Powless's testimony that, two days after the incident, Keenan called him and asked if Johnson was dead when the police arrived at Powless's home. When Powless said that he was not, Keenan said he did not care because the worst that could happen to him was he would be convicted of "ramming a bottle up [Johnson's] ass." This statement, according to defendant, was not in furtherance of the conspiracy, but, instead, a description of what had allegedly already been done; thus, it did not fall within the co-conspirator hearsay exception.

¶ 80 The State agrees that the time lapse here is longer than that in the case law finding co-conspirator statements admissible. It focuses, instead, on the fact that the statements at issue were made in furtherance of concealing the crime. However, the fact that one element is met does not excuse the fact that the proximate-in-time requirement is not met.

¶ 81 We conclude that the trial court abused its discretion in admitting the co-conspirator statements (through Johnson's, Buzzard's, and Powless's testimony). Although they unquestionably concerned the concealment of the crimes, the statements were not made as close in time as the case law requires and, thus,

their admission was erroneous. Johnson testified to events that occurred, as defendant notes, at least one-and-one-half months after the crimes.

¶ 82 We reject the State's argument that the co-conspirator exception has no application to Johnson's testimony (concerning statements made to him) because Johnson was the victim and not a co-conspirator himself. The State cites no authority for this proposition. Further, the co-conspirator exception does not contain such a limitation. See Ill. R. Evid. 801(d)(2)(E) (eff. Jan. 1, 2011) (a statement is not hearsay if the "statement is offered against a party and is *** a statement by a coconspirator of a party during the course and in furtherance of the conspiracy"). Nor does the case law. See, *e.g.*, *People v. Swerdlow*, 269 Ill. App. 3d 1097, 1101 (1995) (the co-conspirators' statements, which were recorded by and offered by a former co-conspirator who had become an undercover government agent, were erroneously excluded); see also M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 801.22, at 837 (10th ed. 2010) ("Provided that the declarant and the defendant are members of the conspiracy, the declarant's statement otherwise meeting the requirements of the co-conspirator hearsay exception may be testified to by anyone, including an undercover police officer, an informer, or a member of the conspiracy now cooperating with the prosecution."). (Curiously, the State does not also raise a similar claim in arguing that Walton's and Powless's statements were admissible because the exception did not apply to their testimony.)

¶ 83 As to Buzzard's statements, he testified that he spoke with defendant before Thanksgiving and defendant stated that his roommate was addicted to heroin and had stolen some of defendant's marijuana plants. Defendant told Buzzard "that they fucked his ass up." However, Buzzard also testified concerning events in late 2010/early 2011 (about one-and-one-half to two months later). At that time, he met Mark Clarke, defendant's brother, outside the Florida Drive apartment building. Mark told Buzzard that he was keeping Johnson in apartment "doped up on heroin so they could give him fentanyl *** and he would end up dead and it would look like he overdosed." These statements were not sufficiently proximate in time to be admissible.

¶ 84 As to Powless's testimony, we conclude that it was improperly admitted because, although it related to a conversation that occurred only two days after the incident, it was merely a description or narrative of what had already allegedly occurred. *Kliner*, 185 Ill. 2d at 141; *Meagher*, 70 Ill. App. 3d at 603-04. Powless testified that, two days after the incident, Keenan asked him if Johnson was dead when the police arrived at his home. According to Powless, Keenan replied that he was unconcerned because the worst that would happen to him was that he would be charged with "ramming a bottle up Johnson's ass."

¶ 85 Although we agree with defendant that the trial court erred in admitting the co-conspirators' statements, for the following reasons, we agree with the State that the error was harmless.

¶ 86 To establish that an error was harmless the "State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). When deciding whether error is harmless, a reviewing court may: (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008). Addressing the second approach, the State argues that, even without the concealment testimony, the jury had compelling evidence of defendant's (accountable) guilt for the aggravated kidnaping and would not have returned a different verdict had the evidence not been admitted. Addressing the jury's not-guilty finding on the charge involving the beer bottle, it argues that it was "no doubt" due to the lack of evidence of great bodily harm (particularly given the medical testimony).

¶ 87 At trial, the State argued that defendant was guilty of aggravated kidnaping under an accountability theory. Defendant argued that he was merely present during the offenses and, thus, was not legally responsible for his co-conspirators' actions. To convict a defendant under an accountability theory, the State must prove beyond a reasonable doubt that the defendant: (1) solicited, aided, abetted, or agreed or attempted to aid another person in the planning or commission of the offense; (2) did so before or during the

commission of the offense; and (3) did so with the concurrent, specific intent to promote or facilitate the commission of the offense. 720 ILCS 5/5-2(c) (West 2012); *People v. Smith*, 278 Ill. App. 3d 343, 355 (1996). "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 omitted.) *People v. Perez*, 189 Ill. 2d 254, 268 (2000). The mere presence of a defendant at the scene is insufficient to establish accountability for the offense. *Id*. However, "a person's presence at the scene of a crime *** may be considered with other circumstances by the trier of fact when determining accountability." 720 ILCS 5/5-2(c) (West 2012). A person is not accountable for an offense if, before its commission, he or she terminates his or her effort to promote or facilitate that commission and: (1) wholly deprives his or her prior efforts of effectiveness in that commission; (2) gives timely warning to the proper law enforcement authorities; or (3) otherwise makes proper effort to prevent the commission of the offense. 720 ILCS 5/5-2(c)(3) (West 2012).

¶ 88 We conclude that the erroneous inclusion of the co-conspirator testimony did not substantially prejudiced defendant such that it affected the outcome of the trial. We agree with the State that the properly admitted evidence concerning defendant's involvement in the offenses was overwhelming and, thus, the erroneous admission of the co-conspirators' statements was harmless.

¶ 89 Although there were witness credibility issues at trial, the properly admitted evidence overwhelmingly reflected that defendant aided in the planning or commission of the kidnaping before and during the offense and with the requisite intent. See 720 ILCS 5/5-2(c) (West 2012). Specifically, the evidence showed that defendant, who was angry that Johnson stole drugs from him, told Walton that Johnson "was gonna pay for it." Further, Walton testified that defendant told him that he set up the meeting at the gas station during which Johnson was kidnaped. Defendant was present when the others arrived in the van at the gas station to apprehend Johnson. Although Johnson gave conflicting testimony about the timing of defendant's presence (he testified both that defendant was present when the van arrived and that defendant did not appear until he was taken to the apartment), Brown testified that defendant was in the van. Johnson

also testified that, during the assault in the kitchen, defendant, who was *again* present (albeit he lived in the apartment), did not touch him, but appeared angry and "[t]hey were all saying, come on, come on." Thus, defendant was encouraging the activities. Although, during the assault, defendant told his friends to stop, he did not take any further actions to terminate the offense and he remained a part of the group until Johnson was dropped off. See *People v. Johnson*, 32 Ill. App. 3d 685, 690 (1975) ("defendant knowingly attached himself to a group bent on an illegal act, shows a specific act of aiding and abetting, and clearly supports an inference that defendant intended to engage in said criminal activity with the perpetrators of the crime by facilitating the commission of said offense."). We further note that Powless's identification of defendant as the "Aaron" who called him and told him that there was a $1,000 bounty on Johnson was corroborated by the fact that, at that time, defendant had a motive to be angry with Johnson and that defendant and his group assaulted Johnson shortly after the Powless received the call.

¶ 90 In summary, defendant's presence during Johnson's apprehension and his assault in the kitchen, along with other circumstances—specifically, his statement to Walton that he set up the meeting/kidnaping and Johnson's testimony that defendant voiced words of encouragement—constituted overwhelming evidence that he aided in the planning/commission of the kidnaping. Accordingly, the error in admitting the co-conspirator testimony was harmless.

¶ 91 C. Jury Instruction

¶ 92 Defendant's next argument is that the trial court erred in giving a pattern jury instruction defining withdrawal. He contends that there was no evidence that he legally withdrew from the offenses at issue and that, rather, his defense at trial was that he did not help plan or commit the charged offenses.

¶ 93 "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). The trial court has the discretion to decide whether the evidence in the record raises a particular issue and whether an instruction on that issue should be given.

People v. Mohr, 228 Ill. 2d 53, 65 (2008). The State and the defendant are both entitled to have the jury instructed on their theories of the case, and an instruction is warranted if there is even slight evidence to support it. *People v. Barnard*, 208 Ill. App. 3d 342, 349-50 (1991). It is error to submit to the jury an instruction when there is no evidence to support it. *People v. Williams*, 168 Ill. App. 3d 896, 902 (1988).

¶ 94 Defendant notes that Johnson testified that defendant never hit or touched him during the offense and that, at one point while co-defendants were beating Johnson, defendant told the others to stop. Based on this evidence, the trial court allowed the State to submit IPI No. 5.04, which advised the jury that defendant could be held legally responsible for his co-defendants' conduct if he failed to take steps to terminate his involvement in the offense and legally withdraw. Defendant asserts that his defense was not that he was initially involved and then withdrew; rather, it was that the State's evidence showed, at most, that he was merely present during the crime and not involved in the planning or commission of it. Further, defendant argues that the instructions that were given properly instructed the jury on the State's accountability theory, including non-IPI instructions stating that mere presence at a crime scene is not sufficient on its own to establish defendant's guilt, but may be considered with other factors in determining accountability. He argues that, due to the court's error in giving the instruction, he was improperly burdened with showing an effective withdrawal from the offense and was, thus, denied a fair trial by a properly instructed jury. He requests a new trial.

¶ 95 Defendant notes that he objected to the instruction at trial but that he failed to include this error in his posttrial motion. Generally, a defendant forfeits review of any supposed jury instruction error if he or she does not object to the instruction or offer an alternative at trial and does not raise the issue in a posttrial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Accordingly, absent plain error, defendant has forfeited review of this issue. Under the plain-error exception to the forfeiture rule, a reviewing court may consider a forfeited error when the evidence is closely balanced or the error is so fundamental and of such magnitude that the accused was denied his or her right to a fair trial. *People v. Harvey*, 211 Ill. 2d 368, 387

(2004). The first step in plain-error review, however, is to determine whether error occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶ 96 Illinois Pattern Jury Instruction (IPI), Criminal, No. 5.04 (Responsibility For Act Of Another—Withdrawal), provides as follows:

> "A person is not legally responsible for the conduct of another, if, before the commission of the offense charged, he terminates his effort to promote or facilitate the commission of the offense charged and *[(wholly deprives his prior efforts of effectiveness in the commission of that offense) (gives timely warning to the proper law enforcement authorities) (makes proper effort to prevent the commission of that offense)]*. (Emphasis in original.) Illinois Pattern Jury Instructions, Criminal, No. 5.04 (4th ed. Supp. June 2013).

The Committee Note to the instruction states that it is to be given in conjunction with Instruction No. 5.03,[5] which defines accountability and which was also given here, when there is evidence of withdrawal. Here, in allowing IPI No. 5.04, the trial court noted that there was evidence that defendant told co-defendants to stop beating Johnson and further noted the Committee Note's instruction that No. 5.04 be given when the accountability instruction is also given.

¶ 97 Defendant relies on *People v. Hammond*, 214 Ill. App. 3d 124 (1991). There, the defendant was convicted under an accountability theory of fraud on an insurance company. His defense was that he was not involved in the charged offenses. On appeal, the defendant argued that the trial court had erred in giving

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[5]That instruction provides: "A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of *[(an) (the)]* offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of *[(an) (the)]* offense." (Emphasis in original.) Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. Supp. June 2013).

IPI, Criminal, No. 5.04. The appellate court agreed, holding that the instruction "should be given only where the defendant's defense is that, even though he was initially involved in the offense, he thereafter took steps to terminate his involvement. [Citation.] Such an instruction is wholly inappropriate in the case at bar where the defendant's position is that he was never involved in the offenses charged." *Id.* at 136. Here, defendant argues that, as in *Hammond*, his primary defense was that he was not guilty of aggravated kidnaping under the State's theory of accountability. By giving the withdrawal instruction, the jury could have found, he urges, that, even if he was merely present at the scene, defendant was still legally responsible for the conduct of co-defendants because he did not timely warn law enforcement or make proper efforts to prevent the crime. See, *e.g.*, *People v. Gilbert*, 194 Ill. App. 3d 184, 188 (1990) (mere presence at the scene coupled with subsequent flight, without more, does not prove accountability; however, "one may aid and abet without actively participating in the overt act. *** [Mere] presence at the scene of a crime without disapproving or opposing it can be considered together with other circumstances in determining" accountability); *People v. Lacey*, 49 Ill. App. 2d 301, 307 (1964) ("A person who encourages the commission of an unlawful act cannot escape responsibility by quietly withdrawing from the scene.").

¶ 98 We conclude that the trial court did not err in giving the withdrawal instruction. "The State is entitled to appropriate jury instructions in presenting its side of the case, as long as sufficient evidence is presented to warrant giving the instructions." *People v. Brown*, 406 Ill. App. 3d 1068, 1079 (2011). "[V]ery slight evidence" is sufficient to meet the evidentiary requirement. *People v. Wallace*, 100 Ill. App. 3d 424, 430 (1981); see also *Barnard*, 208 Ill. App. 3d at 349-50. The fact that defendant's defense was that he did not participate in the crimes does not negate the State's right to present its case: that defendant was guilty under an accountability theory and did not effectively withdraw from the criminal enterprise. See, *e.g.*, *People v. Johnson*, 110 Ill. App. 3d 965, 968 (1982) (rejecting defendant's argument that jury instruction should not have been given because he did not raise intoxication defense); *People v. Loden*, 27 Ill. App. 3d 761, 764 (1975) (upholding giving of voluntary intoxication instruction even though not raised as an

affirmative defense because "the State was entitled to an instruction that protected against any adverse inferences which might have been drawn from the evidence of intoxication presented by defendant."); see also *People v. Santiago*, 161 Ill. App. 3d 634, 641 (1987) (instructions concerning an aggressor's justifiable use of force may be given if the State presents evidence that the defendant was the aggressor, or even if there is a question as to whether the defendant was the initial aggressor). To the extent that *Hammond* holds otherwise, we decline to follow it.

¶ 99 The trial court could reasonably have found there was sufficient evidence to support giving the instruction. As noted, Johnson testified that defendant never touched or beat him and told his co-defendants, during the beating, to stop. However, as the State notes, there was also evidence that defendant attached himself to the group, continued his association with them through several location changes during the kidnaping and battery, and continued his association with them afterwards. At a minimum, defendant was present at the house and then rode with the group (*i.e.*, maintained his association with them) to the drop-off location, which can lead to an inference that he was more than merely present at the scene. His continued presence added to the group's size, thereby giving emotional support to the group's acts and decreasing the likelihood of outside interference or Johnson's escape. In sum, the question of defendant's mere presence was for the trier of fact to decide.

¶ 100 The trial court did not abuse its discretion in giving the withdrawal instruction. Accordingly, because there was no error, there can be no plain error to excuse defendant's forfeiture of this issue. *Piatkowski*, 225 Ill. 2d at 565.

¶ 101 D. Conspiracy Conviction

¶ 102 Defendant's final argument, which the State concedes, is that he was improperly convicted of both the inchoate offense of conspiracy to commit aggravated kidnaping and the principal offense of aggravated kidnaping. See 720 ILCS 5/8-5 (West 2012) ("No person shall be convicted of both the inchoate and the principal offense."). Defendant requests that we vacate his conviction and sentence for conspiracy to commit

aggravated kidnaping. See *People v. Love*, 60 Ill. App. 3d 16, 21 (1978). He concedes that he did not raise this issue before the trial court, but argues that a conviction on both offenses constitutes plain and reversible error. See *People v. Castaneda*, 299 Ill. App. 3d 779, 781 (1998). We review *de novo* the issue of multiple convictions. See *People v. Caballero*, 206 Ill. 2d 65, 87-88 (2002) (purely legal issues are reviewed *de novo*). We agree with defendant, and we vacate his conviction and sentence for conspiracy to commit aggravated kidnaping.

¶ 103 III. CONCLUSION

¶ 104 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed in part and vacated in part.

¶ 105 Affirmed in part and vacated in part.