2012 IL App (5th) 090257-U

NO. 5-09-0257

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 00-CF-157
	)	
LARRY GREER,	)	Honorable
	)	James Hackett,
Defendant-Appellant,	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction and 40-year sentence in the Department of Corrections, but order that the mittimus be corrected to reflect 96 additional days' credit for time served.

¶ 2 Following a jury trial in the circuit court of Madison County, defendant, Larry Greer, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) in the shooting death of Brian Warr based on a theory of accountability. Defendant was sentenced to 40 years in the Department of Corrections. Defendant now appeals, arguing as follows: (1) the State failed to prove him guilty beyond a reasonable doubt, (2) the trial court erred in allowing plea negotiations testimony by former counsel of defendant to be introduced at trial, (3) the trial court failed to award the proper amount of credit for time served, and (4) the trial court abused its discretion by allowing a factor inherent in the offense to be used to aggravate the sentence. We affirm in part and modify in part.

¶ 3 FACTS

¶ 4 In the early morning hours of September 12, 1998, defendant and Brian Warr were sitting in Warr's car, which was parked in a nightclub parking lot in Alton. Defendant was in the passenger seat and Warr was in the driver's seat. Robert Fletcher walked up to the car and fired six shots at Warr. Five of the shots penetrated Warr. Defendant went inside the nightclub and yelled that Warr had been shot. Tonya Brown went out to the car and saw Warr in the driver's seat. Warr was moved over toward the passenger seat, so that defendant could drive the car. Brown accompanied defendant and Warr to St. Anthony's Hospital in Alton. Brown testified they did not take the shortest route to the hospital, but defendant drove fast and they arrived in two or three minutes.

¶ 5 Officer Rory Rathgeb of the Alton police department was dispatched to the hospital at 2:25 a.m. When he arrived, he saw defendant, Warr, and Brown arriving in a Grand Marquis. Warr was bleeding and nonresponsive. According to Rathgeb, Brown was "hysterical" and defendant was "calm." Warr was pronounced dead at 3:42 a.m. He died as a result of the injuries he sustained from the gunshot wounds.

¶ 6 Defendant was the only witness to the shooting. Therefore, the police asked him to give a statement. Detective Scott Golike testified that he interviewed defendant at 4:14 a.m. on the morning of the shooting. Defendant denied seeing the shooter, could not say if the shooter was black or white, could not say how many shots were fired, could not say from which direction the shots were fired, and said he did not see anyone fleeing from the area. According to Golike, it was clear defendant was not telling the truth. Golike warned defendant "with regard to lying to material facts in a homicide investigation and told him that he could be charged with obstructing justice." Around 6 a.m., defendant was charged with obstruction of justice and booked into the Madison County jail.

¶ 7 At approximately 12:42 p.m. on the day of the shooting, defendant made another

statement. Defendant denied seeing the shooter, but suggested that James Evans (a.k.a. "Raven") might have had a motive to kill Warr. Defendant testified that while he was in custody, Robert Fletcher, the shooter, turned himself in and was assigned to the same cellblock as defendant. Fletcher told him that he would have someone post bond for him if he would say that Brian Warr had a gun with an infrared laser sight. Defendant said he was scared of Fletcher and agreed to go along with Fletcher's story. After eight days, a friend of Fletcher's, Walter Dent, posted $1,500 bond and defendant was released.

¶ 8 On October 8, 1998, defendant was again in police custody after having been arrested for possession of a look-alike substance. At that time, defendant asked to speak with law enforcement officials about the events surrounding the murder of Warr. Detective Al Adams testified that defendant spoke with him about the shooting and said that Fletcher shot Warr. Defendant signed a statement in which he said that before the shooting happened he did not know of any arguments between Warr and Fletcher. He said Fletcher was told that Warr was not the person who killed Nekemar Pearson and he believed everything had been straightened out between Warr and Fletcher. After making the statement, defendant was released from custody. On October 29, 1998, defendant testified before a grand jury that Fletcher shot Warr and told the grand jury the false story about the gun with the laser sight. After giving the grand jury testimony, defendant received the $1,500 bond previously posted by Walter Dent.

¶ 9 On March 31, 1999, defendant went to the Alton police station and showed the police a copy of a letter sent by Fletcher in which Fletcher threatened his life due to his testimony and the fact that he talked to the police about the case. Detective Simmons of the Alton police department talked to defendant about the matter and then scheduled an interview for the following day. Simmons told defendant to write everything down and come back the next day for an interview.

¶ 10 The following day, April 1, 1999, defendant returned to the jail and gave another statement to police regarding Warr's murder. According to Detective Simmons, who took the statement, defendant said that earlier in the summer James Evans (Raven) told Robert Fletcher that Warr had killed Nekemar Pearson. Fletcher was upset and wanted revenge for Pearson's death. Defendant tried to calm Fletcher down and told him to go talk to Raven to see what he had to say. Fletcher followed defendant's recommendation and talked to James Evans. After they talked, Evans and Fletcher reached an agreement whereby Evans would start supplying the Crips, a street gang, with cocaine to sell on the streets of Alton. Fletcher was a member of the Crips. James Evans blamed Warr for the death of Nekemar Pearson and offered Fletcher money to kill Warr. Defendant told the detective that prior to Warr's murder, he was aware that a "hit" was set up, but he did not think Fletcher would go through with it.

¶ 11 During the April 1, 1999, interview, defendant also said that on the night of the murder, he was partying with Warr at the Chess Club, a nightclub in Alton. Sometime after midnight, Fletcher contacted defendant and said that James Evans just paid them to do the hit on Warr, and the hit would take place later that night. Defendant said he tried to talk Fletcher out of it, but Fletcher's mind was already made up. While defendant and Warr were sitting in the car, Warr's girlfriend came up and accused Warr of talking to other girls. She told Warr she had his briefcase with all his illegal narcotics information and fake records, so Warr and defendant left to retrieve the briefcase. When they arrived back at the Chess Club, Warr got out of the car and went into the Chess Club. Fletcher then confronted defendant outside and accused him of telling Warr about the hit. Defendant told Fletcher he did not tell Warr about the hit and it was still okay to proceed.

¶ 12 Warr returned to the car where he and defendant smoked "a blunt" and listened to music. A two-door red Regal then pulled up in front of the Chess Club. Fletcher got out of

the Regal and approached Warr's car with a handgun and proceeded to shoot Warr. When defendant realized the shooting was going to occur, he slumped down on the floorboard to avoid getting shot. After the shooting, Fletcher walked toward the highway and another member of the Crips, Jesse Johnson, drove the Regal away from the scene. Defendant told Detective Simmons he was not initially truthful because he was afraid of what Fletcher and other gang members would do to him for talking to the police. Detective Simmons had the notes defendant wrote prior to giving the statement, and those were placed into evidence as People's Exhibit 17.

¶ 13 Defendant also testified again before the grand jury on April 1, 1999. Defendant testified that approximately three days before Warr was murdered Fletcher told him that James Evans was going to pay him $3,000 to kill Brian Warr. Defendant admitted that before he arrived at the Chess Club on the night of the murder he knew there was a plan to kill Warr, but he did not know that Fletcher caught up with James Evans to get the money; however, after arriving at the Chess Club, Fletcher told him he had been paid and Warr was going to be killed that night. Defendant testified: "At first I tried to tell [Fletcher] not to do it. I told him to inform me. I was trying to prevent the thing the whole time. But at the same time, I'm not going to die with Brian. Because, you know, if they want him bad enough, they would kill us both." Defendant further admitted that he did not have a problem being with Brian as long as he himself did not get killed. Defendant then testified in the same manner as in the statement he gave to Detective Simmons earlier that day. Following his grand jury appearance, defendant was released on his own recognizance.

¶ 14 On June 21, 1999, defendant was arrested for unlawful possession of a weapon by a felon. At trial, defendant admitted that he was in possession of a .38 revolver. He remained in custody on the weapons charge. On December 16, 1999, defendant wrote a note saying he wanted to admit his involvement in the Brian Warr case. The note stated as follows:

"I'm ready to admit my guilt in the Brayin [*sic*] Warr. Raven [James Evans] paid me a long time ago to set Brayin [*sic*] up. He told me to get the Crips to do it so it will look like revange [*sic*] from the Crips. I didn't give the Crips any of the money I told them I just got dope. They didn't know I got any money till somebody said that. I really need protection, because they know I played them like fools. Im [*sic*] ready to tell the whole story."

On January 18, 2000, defendant discussed Warr's murder with Detective Golike.

¶ 15 At that time, defendant stated that James Evans gave him $5,000 and 4½ ounces of crack cocaine to pay Fletcher to kill Brian Warr. Defendant said he kept the $5,000 but turned over the crack cocaine to Fletcher. Several days later, Fletcher came to defendant's house looking for James Evans. Fletcher was upset because Evans promised him $3,000 as payment for the murder of Warr. Defendant suggested to Fletcher that if he was going to kill someone, he should kill Evans instead of Warr. Defendant again stated that prior to Warr's shooting, Fletcher told him, "It's on tonight." Fletcher asked defendant where he and Warr were going when they left the Chess Club because Fletcher did not want to shoot Warr at the Chess Club. Defendant told Fletcher to give him some time and he would find out where they were going.

¶ 16 After defendant and Warr arrived back at the Chess Club at about 1:30 a.m., Fletcher accused defendant of telling Warr about the plan to kill him. Defendant denied telling Warr anything about the plan and calmed Fletcher down. Defendant was aware Fletcher was going to shoot Warr, but did not think he would do it in the Chess Club parking lot. Shortly thereafter, Fletcher walked up to the car and said, "I'm tired of you all playing with me." Fletcher then fired six shots at Warr.

¶ 17 Jody Wesley, a cellmate of defendant, testified that while they were in the county jail, defendant told him that he had been paid $1,500 and an ounce of cocaine to make sure that

Brian Warr was at the Chess Club, so Fletcher could kill him. Defendant also told him that once he got Warr to the Chess Club, Fletcher came up and shot Warr five times. Defendant then walked into the club and asked if anybody called 9-1-1, and then "walked back to the car, and got in and drove [Warr] to the hospital the long way, make sure that he died." The prosecutor asked Wesley if those were defendant's words, and Wesley responded that defendant "said make sure he bled out." Wesley admitted he was a convicted felon. On cross-examination, defense counsel showed that pending Madison County charges of unlawful restraint and aggravated battery against Wesley were dismissed on February 9, 2000.

¶ 18 Steven Thomas, the stepfather of Nekemar Pearson, testified that the afternoon following Brian Warr's shooting, Robert Fletcher came to his home and said "he smoked that fool last night, and he put six into him." Fletcher told him that defendant was also in the car, but Fletcher did not indicate that defendant had anything to do with the murder. Fletcher let Thomas know that he killed Warr in retaliation for Pearson's death.

¶ 19 At trial, defendant testified on his own behalf. He denied receiving $5,000 or crack cocaine from James Evans. He testified the statement he made to Detective Golike on January 18, 2000, was not true. Defendant believed he was held on the June 21, 1999, charge for so long because he refused to "go along" with the murder-for-hire story being concocted by the police and prosecutor. After nearly six months of being held, he was ready to say what they wanted to hear. Defendant said that every time he gave the police and prosecutor a story, they would let him go, but then he would go back to jail because they would want a little bit more. According to defendant, by the time of Fletcher's trial, they were wanting a "$10,000.00 murder for hire story."

¶ 20 At Fletcher's trial for the murder of Brian Warr, defendant refused to testify to the statement he made on January 18, 2000. However, the State did not call defendant as a

witness at Fletcher's trial. Instead, Fletcher attempted to call defendant as a witness, but defendant asserted his fifth amendment right against self-incrimination (U.S. Const., amend V.).

¶ 21 At defendant's trial, defendant's former attorney, Mr. Hildebrand, testified that defendant "wouldn't have been charged in the–with any involvement in the murder that Mr. Fletcher was charged with if he came in here, told the truth, and then we'd work out the other cases that he had floating around." According to attorney Hildebrand, defendant wanted a deal that let him out of jail that very day. He refused to testify because the State would not agree to that, but was considering a sentence in the range of six years. Fletcher was convicted of the murder of Brian Warr. The day after refusing to testify at Fletcher's trial, defendant was charged in the instant case.

¶ 22 After hearing all the evidence, the jury found defendant guilty. On November 14, 2000, defense counsel filed a posttrial motion. On March 8, 2001, defense counsel filed an amended posttrial motion. The motion was denied on April 6, 2001. On December 18, 2000, defendant filed a *pro se* motion for ineffective assistance of counsel in which he alleged that his counsel was ineffective for failing to file motions to dismiss on the basis that he did not receive a preliminary hearing and he was held longer than 120 days before trial. On April 6, 2001, defendant was sentenced to 40 years in the Department of Corrections and given 554 days' credit for time served.

¶ 23 On May 7, 2001, defendant filed a motion for reduction of sentence. On May 30, 2001, a motion to withdraw the appeal and modify sentence was filed. On May 30, 2001, the trial court granted the motion to withdraw the appeal and denied the motion to reduce sentence. On June 20, 2001, a notice of appeal was filed. On August 7, 2003, this court dismissed defendant's appeal for lack of jurisdiction because defendant's *pro se* motion for ineffective assistance of counsel was still pending in the trial court.

¶ 24 On January 20, 2004, defendant filed a *pro se* motion for leave to supplement his motion for ineffective assistance of counsel. On August 26, 2006, defendant filed a *pro se* supplemental posttrial motion. On December 19, 2007, defendant filed a second *pro se* supplemental posttrial motion. On December 15, 2008, defendant filed a *pro se* motion to supplement his posttrial motion. On January 2, 2008, defendant filed a third *pro se* supplemental posttrial motion. On April 27, 2009, the trial court denied all of defendant's posttrial motions for ineffective assistance of counsel.

¶ 25 On May 13, 2009, the trial court ordered the clerk to prepare a notice of appeal and reflect defendant's desire to appeal his October 19, 2000, conviction and his subsequent 40-year sentence, as well as the orders denying his posttrial motions, denying his motion to reduce sentence, and denying his *pro se* motion for ineffective assistance of counsel. The circuit clerk filed a timely notice of appeal, but incorrectly stated the nature of the appeal. On March 30, 2010, an amended notice of appeal was denied. On May 3, 2010, our supreme court issued a supervisory order, allowing this appeal.

¶ 26 ANALYSIS

¶ 27 I. REASONABLE DOUBT

¶ 28 Defendant first contends that the State failed to prove him guilty beyond a reasonable doubt of first-degree murder pursuant to an accountability theory. Defendant argues the only evidence presented was his own inconsistent statements and the unreliable statements of a jailhouse informant. Defendant insists no credible evidence was presented that he was legally responsible for the actions of Robert Fletcher in killing Brian Warr, and his conviction must be vacated. We disagree.

¶ 29 When confronted with a challenge to a criminal conviction based upon sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30, 743 N.E.2d 521, 536 (2000). The standard of review is

"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387, 748 N.E.2d 166, 172 (2001). It is the responsibility of the trier of fact to resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Jackson*, 443 U.S. at 319.

¶ 30 A person is legally accountable for another person's criminal conduct when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 1998); *People v. Perez*, 189 Ill. 2d 254, 266, 725 N.E.2d 1258, 1264 (2000). In order to prove the defendant possessed the intent to promote or facilitate the crime, the State must present evidence establishing beyond a reasonable doubt that either the defendant shared the criminal intent of the principal or there was a common criminal design. *Perez*, 189 Ill. 2d at 266, 725 N.E.2d at 1264-65. Intent may be inferred not only from the character of the defendant's actions but also from the circumstances surrounding the commission of the offense. *Perez*, 189 Ill. 2d at 266, 725 N.E.2d at 1265.

¶ 31 Initially, defendant denied seeing the shooter, even though he was sitting right next to the victim when he was shot. Defendant could not even tell the police whether the assailant was black or white or how many shots were fired. The police immediately suspected defendant was lying and told defendant he could be charged with obstruction of justice. After defendant's initial denial of any knowledge of the shooting, defendant began to gradually change his story and eventually implicated himself.

¶ 32 For example, on October 8, 1998, defendant was in custody on an unrelated drug charge. At that time, defendant made a statement to Detective Adams of the Alton police

department in which he identified Robert Fletcher as the shooter and explained that the shooting might have been in retaliation for the shooting of Nekemar Pearson. The story further evolved when defendant testified for the first time before the grand jury. At that time, defendant lied to the grand jury that Brian Warr had a gun with a laser light locked onto Fletcher and that this precipitated the murder. During subsequent testimony before the grand jury, defendant admitted he lied when he testified under oath about the gun with the laser light. Defendant said he lied because Robert Fletcher promised him that if he corroborated the story about the laser, Fletcher would ensure that defendant would be bonded out of jail and he would not be harmed by gang members.

¶ 33 Defendant further admitted under oath that he knew there was a plan to kill Brian Warr for money, and he did nothing to prevent it. During the grand jury testimony on April 1, 1999, the following colloquy ensued between the prosecutor and defendant:

"Q. Did you know that something was going to happen to Brian Warr at that time?

A. Before we arrived att the Chess Club or when we got to the Chess Club?

Q. Before you arrived at the Chess Club?

A. Before I arrived, I knew there was a plan, but I didn't think that they had caught up with Raven to get the money yet.

Q. Okay. And what happened when you arrived at the Chess Club?

A. When I arrived at the Chess Club, Brian went in. I sat in the car, and then I was talking to D-Run [Robert Fletcher] because he was down there. And he told me that it was on tonight.

Q. Who told you that?

A. Fletcher

Q. D-Run told you that it was on for tonight?

A. Yeah, he said it was on tonight. He said that he seen dude. So basically in so many words he was telling me that they had the change from dude, and that they were going to do it tonight. And he asked me where we were going when we left. I told him that I didn't know. He asked me to find out, and I told him okay. At first I tried to tell him not to do it. I told him to inform me. I was trying to prevent the thing the whole time. But at the same time, I'm not going to die with Brian. Because, you know, if they want him bad enough, they would kill us both.

Q. So essentially you knew that D-Run was going to kill Brian that night?

A. Yeah.

Q. And you didn't have a problem being with Brian as long as you didn't get killed?

A. Right."

Defendant then explained Fletcher was suspicious that he tipped off Brian Warr about the impending shooting. Defendant said he calmed Fletcher down and told him that he had not alerted Warr. Defendant then testified about the shooting and was specifically asked and answered as follows:

Q. Did you ever receive any part of that money that D-Run got for shooting Brian?

A. I guess if you count the money that they used to come up there and get me out. And the only reason why they brought the money up there to get me out was because I agreed to the story. So if [I] wouldn't have agreed to the story, I wouldn't have seen nothing. And even though from a long time ago every deal that he made and everything that he did, I automatically would get half because that's just the way it's always been."

But even this was not all of the story.

¶ 34 On December 16, 1999, defendant was in jail on an unrelated charge when he delivered a handwritten note to the police in which he stated that he was ready to admit his guilt in the shooting of Brian Warr. He said that James Evans paid him a long time ago to set up Warr. Evans told defendant to get gang members to do the shooting, so it would look like revenge. Defendant said he did not give any of the money he received from Evans to the Crips; he told them he just received "dope." He explained that he was now in trouble and needing protection "because they [Crips] know I played them like fools. Im [*sic*] ready to tell the whole story."

¶ 35 On January 18, 2000, defendant then gave another statement to police. At trial, Detective Golike testified that defendant told him that James Evans gave him $5,000 and 4½ ounces of crack to pay Fletcher to kill Warr. Defendant kept the $5,000 and only gave Fletcher the crack. Several days later, Fletcher came to defendant's house looking for Evans. Fletcher was upset because Evans promised him $3,000 to shoot Warr, and Fletcher had yet to receive the money. Defendant suggested to Fletcher that if he was going to shoot someone, it should be Evans, not Warr. Defendant also admitted that on the night of the shooting, Fletcher alerted him that Warr was going to be shot that night.

¶ 36 At trial, defendant denied that he received $5,000 or any money. His motive was that the murder-for-hire scheme was concocted by the police and the prosecutor. However, Jody Wesley, who shared a cell with defendant, testified that defendant told him that he was paid $1,500 and an ounce of cocaine to set up Warr and to make sure that Warr was at the Chess Club on the night of the shooting. Wesley further testified that defendant said he drove the long way to the hospital to make sure Warr "bled out." Tonya Brown also testified that defendant did not take the shortest route to the hospital on the night of the shooting. A police officer who arrived at the hospital described Brown as "hysterical" and defendant as "calm."

¶ 37 Defendant insists that his confession was unreliable and Wesley's testimony was not

credible; however, defendant's arguments merely go to the weight, not to the admissibility, of such evidence. Considering the deferential standard on review, the jury could have found beyond a reasonable doubt that defendant was guilty of murder based upon a theory of accountability where the evidence not only showed defendant was present at the scene of the crime but also showed he set up his friend, Brian Warr, and even received compensation for the death of Warr. Accordingly, we find sufficient evidence in the record to support the jury's determination of guilt.

¶ 38 II. PLEA NEGOTIATION TESTIMONY

¶ 39 Defendant next contends that the trial court erred in allowing plea negotiation testimony by former counsel to be introduced at trial. The State replies that because defendant made numerous baseless accusations against the State, it was allowed to rebut them by presenting the complete story to the jury. The State further asserts that defendant actually opened the door to the testimony about which he now complains, did not object to it at trial, and even elicited such testimony on cross-examination of Thomas Hildebrand; therefore, no error occurred, by its introduction. We agree with the State.

¶ 40 Generally, both an objection at trial and a written posttrial motion are required to preserve an error for review. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). Because defendant failed to raise the issue complained of here either at trial or in a posttrial motion, the issue is waived. Even assuming *arguendo* the issue is not waived, we find it without merit.

¶ 41 A review of the record supports the State's assertion that defendant invited the testimony of which he now complains. During his direct examination defendant accused the police and the prosecutor of encouraging him to lie to the grand jury, paying him to identify the shooter, and talking to him and other defendants *ex parte* even though they were represented by counsel. For example, defendant accused the prosecutor and the police of

reducing his $1,500 bond to a recognizance bond and then writing him a check for $1,500. Defendant's theory was that the prosecutor and police raised the instant charges against him because he was unwilling to go along with their murder-for-hire story at Robert Fletcher's trial and refused to testify against Fletcher. Defendant insisted that the police and prosecutor wanted him to lie in order to implicate James Evans. Defendant testified, "[T]hey said that's the only way they was going to be able to get Raven charged for this crime is if I was the one who said he paid me and Robert Fletcher some cocaine and money to have Brian Warr killed."

¶ 42 With regard to defendant's alleged January 18, 2000, statement to police, defendant testified in the following manner that it was not true:

> "No, it was–it was Keith Jensen [prosecutor] and Jason Simmons' story put together. Everytime that–every time I gave them a story, they let me go. They wanted me to–then I'd get locked up again. They say, well, you want–you want to go, just give us a little bit more. Give–just make yourself a little bit more involved. We're not going to charge you, but they would always say we've got enough evidence to charge you with murder right now, but we're not. He'd say we're not going to charge you with murder. We Just want this. We want this $10,000.00 murder for hire story."

Defendant said because he refused to go along with this story, he was charged with murder the next day:

> "They charged me with murder the next day. First, they were going to give me home monitor. They were going to give me six year sentence where I had to do 20 months left, and they said, well, I'll give you home monitor, and I said I'm not taking that. I'm not going to get up here and say that. I will never get up there and say that. That's my best friend and there ain't no way in the world I had nothing to do with even participate in no garbage story that they even made up."

Defendant then testified he had nothing to do with the murder and said he loved Warr "like a brother."

¶ 43 While statements made in the course of plea negotiations are generally inadmissible (see *People v. Hill*, 78 Ill. 2d 465, 401 N.E.2d 513 (1980)), where the defendant is the first to enter into the subject of plea negotiations, the State has the right to question a witness about the topic in order to give the jury an understanding of the whole story. *People v. DeBeck*, 204 Ill. App. 3d 15, 18, 561 N.E.2d 1081, 1084 (1990). In the instant case, defendant was the first to testify about plea negotiations; therefore, he cannot now complain about such testimony.

¶ 44 Here, the record clearly shows that the State called attorney Hildebrand to rebut the allegations raised by defendant. Mr. Hildebrand testified that he represented defendant on the obstruction-of-justice charge. In order to ensure payment, defendant signed a bond assignment to him. After that, Mr. Hildebrand filed a motion for defendant to be released on his own recognizance. This testimony is consistent with Jody Wesley's testimony that defendant received $1,500 to get out of jail and rebuts defendant's testimony that a check was written directly to him by police as payment for lying to the grand jury. Bond assignments to defense attorneys are a common practice. According to Hildebrand, he signed the check over to defendant with the hope that he would get paid after the case was finished. Hildebrand testified that defendant never complained to him that the police or prosecutors were asking him to lie and further testified that it is his recommendation that a defendant does not lie because it only tends to "screw up a case." Attorney Hildebrand testified that at some point a six-year deal was discussed, but we fail to see how this constitutes reversible error, as defendant testified first about a six-year deal.

¶ 45 Defendant relies on *People v. Benniefield*, 88 Ill. App. 3d 150, 410 N.E.2d 455 (1980), in support of his assertion that the admission of plea negotiation testimony constitutes

reversible error; however, that case is distinguishable from the case at bar. In *Benniefield*, the complained-of testimony was elicited by prosecutors during the defendant's cross-examination, whereas in the instant case defendant brought up plea negotiations during his direct testimony. Under these circumstances, where defendant initiated the testimony on direct examination, defendant has failed to convince us that he was prejudiced by its introduction. The record reflects that the prosecution was merely attempting to give the jury a complete understanding of the story, a difficult task in light of defendant's numerous and differing statements, through attorney Hildebrand's testimony. Considering the totality of the circumstances, we do not find that defendant was prejudiced by Hildebrand's testimony.

¶ 46 III. CREDIT FOR TIME SERVED

¶ 47 Defendant next contends that the trial court failed to award him the proper amount of credit for time served. The State concedes that defendant is entitled to 96 additional days of credit toward his sentence for time spent in custody prior to being sentenced to the Department of Corrections. Therefore, we modify defendant's sentence and order that the mittimus be corrected to reflect 96 additional days of credit for time served.

¶ 48 IV. SENTENCING

¶ 49 Finally, defendant contends the trial court abused its discretion by allowing a factor inherent in the offense to aggravate his sentence. The trial court listed as an aggravating factor at sentencing that defendant's conduct caused or threatened serious harm. Because the offense of first-degree murder requires death, the fact that defendant's actions threatened or caused serious bodily harm cannot be used to aggravate his sentence. Defendant insists that it is unclear how much weight the trial court placed on this improper factor, so the sentence must be vacated and the cause remanded for a new sentencing hearing. We disagree.

¶ 50 We first point out that the sentencing range for first-degree murder is between 20 and 60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 1998). We are aware that in imposing a sentence,

the trial court may not consider any fact implicit in the underlying offense for which he was convicted. *People v. James*, 255 Ill. App. 3d 516, 531, 626 N.E.2d 1337, 1349 (1993). However, a trial court may consider the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant. *James*, 255 Ill. App. 3d at 531, 626 N.E.2d at 1349. Moreover, even if we construe the trial court's comment in the manner defendant suggests, we do not believe it is necessary to remand the case for resentencing. It is only necessary to remand a cause where a reviewing court is unable to determine the weight given to an improperly considered factor. *People v. Beals*, 162 Ill. 2d 497, 509, 643 N.E.2d 789, 795 (1994). Where it can be determined from the record that the weight placed upon the improperly considered aggravating factor was insignificant and did not lead to a greater sentence, it is not necessary to remand. *Beals*, 162 Ill. 2d at 509-10, 643 N.E.2d at 796.

¶ 51 In the instant case, the trial court specifically went through the factors in mitigation and aggravation when sentencing defendant. The trial court found there were no factors in mitigation but noted the following with regard to the factors in aggravation:

> "One applies, Defendant caused or threatened serious harm. Two applies as to compensation as to the evidence. Seven applies, deterrence. Fifteen applies as to the organized gang activity. The history of prior delinquency that's set out applies also, and criminal activity."

The trial court then sentenced defendant to 40 years.

¶ 52 While the trial court noted that defendant's actions threatened serious harm, the record shows that the trial court relied upon other aggravating factors in sentencing defendant, most notably that defendant received compensation for the crime, that it was gang-related and that defendant had a history of criminality and it was necessary to deter him. Defendant relies on *People v. Gonzalez*, 151 Ill. 2d 79, 600 N.E.2d 1189 (1992), in support of his argument,

but that case is distinguishable because it involved an extended-term sentence. Defendant in the instant case did not receive an extended-term sentence, but a sentence well within the range prescribed. Upon our review of the record, we disagree with defendant that we must remand this case for resentencing because we believe that any weight the trial court placed on the fact that defendant's conduct caused serious harm was insignificant and did not result in a greater sentence.

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed in part and modified in part.

¶ 55 Affirmed in part and modified in part.