2012 IL App (5th) 100542-U

NO. 5-10-0542

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jefferson County.
	)	
v.	)	No. 06-CF-429
	)	
DEMETRIUS COLE,	)	Honorable
	)	Terry H. Gamber,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by refusing to instruct the jury that the testimony of an accomplice should be viewed with suspicion and when it allowed a witness to testify concerning incriminating statements made by a coconspirator. Additionally, the defendant did not receive ineffective assistance of counsel when his trial counsel did not request a limiting instruction with regard to testimony of the investigating officer's findings during the course of his investigation and when counsel did not tender an instruction explaining the manner in which the jury should consider alleged incriminating statements made by the defendant. Therefore, the defendant's convictions for first-degree murder and robbery are affirmed.

¶ 2 The defendant, Demetrius Cole, appeals from his convictions for three counts of first-degree murder and one count of robbery after a jury found him guilty in the circuit court of Jefferson County. On appeal, the defendant argues (1) the trial court erred by refusing to instruct the jury, pursuant to Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.17), that the testimony of an accomplice should be viewed with suspicion; (2) the court erred when it allowed Lindsay McIntosh to testify

concerning incriminating statements made by a coconspirator because the statements were made several days after the conclusion of the conspiracy and were not sufficiently proximate in time to the conspiracy to be considered a coconspirator statement; (3) trial counsel was ineffective for his failure to offer a jury instruction limiting the use of certain information obtained during the investigation that implicated the defendant in the robbery and murder; and (4) trial counsel was ineffective for his failure to offer a jury instruction explaining the manner in which the jury should consider the alleged incriminating statements made by the defendant to the members of the conspiracy and to Ratasha Turner, a person outside the conspiracy. For the reasons that follow, we affirm.

¶ 3 The following evidence was adduced at the defendant's jury trial. We will set forth only those facts pertinent to our disposition of the specific issues on appeal.

¶ 4 On July 5, 2006, Mike Walker, while employed as a patrol officer for the Jefferson County sheriff's department, was dispatched to Randy Farrar's residence following the report of an unresponsive male. Kelly Tinsley, an employee of Farrar whose office was located in Farrar's residence, had called 9-1-1 because she found Farrar's body lying at the bottom of the basement steps while she was working. When Walker arrived at the residence, Tinsley showed him where she had found the body. After observing the body lying facedown in the doorway of a room in the basement, Walker determined that Farrar was deceased. He then requested dispatch to send detectives and a crime scene technician to the residence.

¶ 5 Detective John Kemp, a detective captain with the Jefferson County sheriff's department, was involved in the investigation of Farrar's death. Detective Kemp was dispatched to Farrar's residence on July 5 and had an opportunity to inspect the home. He observed droplets of blood on the foyer floor leading down the basement stairs, a blood splatter on the wall leading down to the basement, broken glass in the kitchen, and a small dent in the drywall of the living room. He found gray hair inside the dent, and it was later

revealed that this hair belonged to Farrar. Farrar was lying on his right side inside the doorway to the game room located in the basement and was wearing a plaid shirt and green underwear. Two shell casings from a .380-caliber firearm were recovered a short distance from Farrar's body. Detective Kemp also observed lead fragments and jacket fragments around the pool table and in the ceiling tiles, and it appeared that at least two rounds had been fired in the basement. He also observed a defect in the carpet, which indicated that a round had hit the floor and had torn up the carpeting. He also noticed that the master bedroom was in disarray and that a drawer under the bed frame was pulled out and was lying on the floor. The evidence indicated that Farrar had hidden money in a drawer hidden under his bed and also had hidden money in his bedroom closet and bathroom. Detective Kemp observed an empty pistol case for a Walther PPK .380 pistol in a dresser drawer lying on the floor. The purchase receipt for the gun was also in the case and indicated that Farrar was the owner of the pistol. Detective Kemp further observed that the wiring for the telephone had been ripped from the wall.

¶ 6 In the course of his investigation, Detective Kemp learned that Farrar had been at the Frosty Mug, a restaurant and bar located in Mt. Vernon, around 5 p.m. on Saturday, July 1. He also learned that Farrar had received several private telephone calls between 6 and 8 p.m. on July 1, and he had not attended church on Sunday morning. The evidence indicated that Farrar regularly attended church and would usually tell Shannon Green, another church member, in advance if he was not attending. Green testified that Farrar did not contact her about missing church that Sunday. A Post-it note was found in Farrar's bedroom, which had the name "Susan" and a phone number written on it. The phone number was traced to a Gwendolyn Jones and was listed in the phone records of Farrar's home phone and cell phone that were obtained in the investigation. The records of Farrar's phones revealed that 29 phone calls were made between the number found on the Post-it note and Farrar between

June 24, 2006, and July 1, 2006. The phone records indicated that after July 1, the phone calls from Gwendolyn's residence ceased, and the last outgoing phone call from Farrar's home and cell phones was made on July 1.

¶ 7 Gwendolyn was the mother of the defendant and Christopher Watkins. Detective Kemp received a telephone call from Gwendolyn, and he interviewed her and her son, Watkins. Watkins admitted to being present when Farrar was killed. The investigation also led the detectives to Chandra Jones, who was heard saying that she was present at the Farrar residence when Farrar was killed. Detective Kemp talked to Chandra, and she confirmed that she was present the night Farrar was killed. Walker and Chandra implicated the defendant and his girlfriend, Krysta Donoho, as being involved in the killing. The investigators believed that Donoho had engaged in an act of prostitution with Farrar, and the investigators learned that she might have been living in Gwendolyn Jones's home at the time of the incident. Ultimately, the defendant, Donoho, and Watkins were arrested for the murder of Farrar. Detective Kemp admitted that the defendant's DNA was never found at the crime scene.

¶ 8 Chandra Jones testified that she initially met the defendant, Watkins, and Donoho just before July 4, 2006, but she could not remember the exact day. She was 16 years old at the time. According to Chandra, the defendant, Watkins, and Donoho were sitting outside a house on 17th Street in Mt. Vernon. As she walked by the house, Donoho called her over. At some point, she decided to leave with them in a white Ford Expedition. They first stopped at Casey's General Store, and Donoho used the pay phone. The phone records obtained during the investigation indicated that a phone call was made to Farrar from the pay phone located at Casey's at 8:23 p.m. Surveillance videos obtained from Casey's showed that Donoho was placing a phone call from the Casey's pay phone on July 1.

¶ 9 After leaving Casey's, the group went to Farrar's house. Chandra and Donoho walked

to the front door of the house, and Farrar answered the door. Donoho went into the house, but Chandra immediately returned to the vehicle because Farrar told her that she was not welcome in his house. She knew that Donoho was going to get money from Farrar, but was unsure what Donoho was going to do for the money. She testified that she was going into Farrar's residence with Donoho because she did not want Donoho to go in alone.

¶ 10 The defendant and Watkins were in the vehicle when she returned. They had initially parked in the driveway, but once Chandra returned to the vehicle, they moved it to a private drive across the street. Watkins and the defendant then crawled out of the vehicle's windows and had a conversation. Chandra could not hear their conversation. After a few minutes, they got back into the vehicle and proceeded to move the car again. They backed the vehicle into Farrar's driveway, and the defendant and Watkins exited the car and walked around the house. She did not observe them enter the house, but was able to see them inside the house through the front windows.

¶ 11 Through the window, Chandra observed the defendant and Watkins crawling behind the couch while Farrar and Donoho simultaneously walked past the window on the other side of the couch. She then observed the defendant and Watkins beating Farrar. From their body language, it appeared that they were "kicking and stomping" him. She was unable to observe everything that occurred in the house because they went into another room, which was out of her eyesight. She believed that she observed blood on Farrar's shirt. She testified that she did not leave the vehicle and observed everything from inside the car. The light in the house was eventually turned off, and she could no longer see inside. After the light was turned off, she heard two gunshots. She testified that it was dark outside when this incident occurred. She further testified that she stayed in the vehicle because she was not going to run off into the middle of the woods, she did not know where she was, and she had nowhere to go.

¶ 12 Watkins was the first to return to the vehicle, and Chandra observed that he had

money in his hand. She did not know how much money he was holding, but believed there was "a lot." Thereafter, the defendant and Donoho returned to the vehicle, and they left Farrar's home and drove toward Mt. Vernon. During the ride, the defendant threatened to kill anyone in the vehicle who talked about what happened that night. He threatened that he would kill anyone who talked just "like he did the man."

¶ 13 After arriving in Mt. Vernon, they stopped at the Circle K gas station to get gas. Surveillance video obtained from the gas station revealed that Chandra and Watkins entered the gas station on the evening of July 1. Then, the group went to McDonald's, which was next door to the gas station. Chandra testified that she sat in the vehicle while the defendant and Watkins went inside. Surveillance video obtained from McDonald's showed that Watkins and the defendant were in the restaurant on July 1.

¶ 14 Ratasha Turner, a former employee of the Mt. Vernon McDonald's, testified that the defendant and Watkins were inside the McDonald's at approximately 10 p.m. on July 1, 2006, while she was working. She observed that the defendant was holding "hundreds" of dollars when he flipped through his money to find a smaller bill to pay for his order. Turner asked him where he obtained all the money, and he responded that they "hit a lick." She testified that this meant he had robbed someone. Turner also observed that the defendant was wearing a white shirt, and it appeared that he had spilled something darkly colored on the bottom of it.

¶ 15 Once the group left McDonald's, they went to Sonic and Watkins went inside to talk to his girlfriend. Chandra sat inside the vehicle, and Donoho threw something away in the dumpster. Then, the group went to Wal-Mart where the defendant asked Chandra for her purse. Chandra emptied her purse and gave it to the defendant. He put clothes that he obtained from Farrar's house in the purse, and Donoho threw the purse into the trash.

¶ 16 According to Chandra, the group returned to Farrar's residence later that same night

to retrieve a change bowl that contained their fingerprints. Both Donoho and Watkins went into the house to find the change bowl. They left Farrar's house the second time, went to "some girl's house," and then went to Gwendolyn Jones's residence. Chandra went to Watkins's room while Donoho, the defendant, and Watkins went into another room to talk. She could not hear their conversation, but Watkins subsequently told her that they were going "back to the house" to get a key to the safe. Chandra did not go with them and instead stayed in Watkins's room. When the three returned, they gave her $200.

¶ 17 Tanya Melton testified that she was Watkins's friend during the time the incident occurred. On the night of July 1, she was at McDonald's with her roommate when she observed Watkins's vehicle drive past the restaurant. She followed Watkins's vehicle because she had been trying to find him earlier that night. She eventually met Watkins at his mother's house. She observed that Donoho, the defendant, and Chandra were in Watkins's vehicle. Melton and her roommate were sitting in Melton's minivan when the defendant asked her for a ride somewhere. She initially agreed to give him a ride. Donoho and Chandra got into Melton's vehicle while the defendant and Watkins went into the house. A few minutes later Watkins got into the vehicle, and he sat in the backseat with Chandra. This upset Melton, and she made the group get out of her car. Melton and her roommate immediately left and went back to their apartment.

¶ 18 The next day, July 2, the defendant, Watkins, and Donoho went to Melton's apartment at approximately 11 a.m. and asked for a ride. Melton agreed to give them a ride, and the defendant told her where to go. They stopped at Casey's General Store, and Donoho went inside. The video surveillance obtained from Casey's showed Melton's vehicle in the Casey's parking lot around that time. The surveillance video also showed that Donoho used the pay phone when she was inside Casey's. Farrar's phone records revealed that he received a phone call from the Casey's pay phone at 11:31 a.m. on July 2.

¶ 19 When Donoho returned to the vehicle, they left Casey's and the defendant directed Melton to drive to Farrar's house. The defendant told her to back into the driveway, and the defendant, Donoho, and Watkins got out of the vehicle. The group walked around to the back of the residence, and approximately five minutes later, they returned to the vehicle. Donoho was holding something in her hands, but Melton did not see what she was holding. Melton drove them back to her apartment, and she was given $40 for driving them.

¶ 20 Lindsay McIntosh testified that Donoho contacted her a few days after McIntosh had a birthday party for her son on July 1. Donoho was invited to the party, but did not attend. Donoho asked McIntosh to tell the police that she had attended the birthday party. McIntosh refused her request. Approximately one week later, McIntosh received another telephone call from Donoho in which Donoho admitted that she had set someone up and they had gotten killed. She told McIntosh that the defendant was present during the murder.

¶ 21 Dr. Mark LeVaughn, a former medical examiner for multiple counties in southern Illinois and southern Indiana, performed an autopsy on Farrar's body in the afternoon of July 6, 2006. Dr. LeVaughn explained that Farrar died as a result of a gunshot wound to the head and his manner of death was determined to be a homicide. He noted that Farrar suffered two gunshot wounds to the forehead, one that entered the skull and the second was a grazing wound. He also suffered nonlethal wounds in the form of bruising on the back of his head behind each ear, bruising on the back of his left forearm, small superficial abrasions on both knees, and two rib fractures. He concluded that these nonlethal wounds occurred at or near the same time as the gunshot wounds. He explained that the nonlethal wounds were blunt injuries and were consistent with someone being hit and kicked by another person.

¶ 22 He concluded that Farrar had been deceased within a time frame of 36 hours. He explained that Farrar was last known to be alive on July 1, 2006, and he was found on July 5, 2006. He described his postmortem findings as indicating that the body developed rigor

mortis, which is the temporary stiffening of the muscles after a person dies, and lividity, which is the gravitational pooling of the blood in the body. He stated that the rigidity of the muscles goes away over two to four days. He explained that rigor mortis sets in within the first several hours of a person's death, and it fully develops after approximately 12 hours. He noted that although rigor mortis lasts for another 12 hours, it diminishes over those last 12 hours. He concluded that Farrar's body had developed rigidity of the muscles, but his rigidity was diminishing.

¶ 23 He explained that the time it takes for lividity to develop is dependent on the position of the body, but after approximately six hours, the blood no longer flows because blood clots form. He observed that Farrar's body had some discoloration of the skin of the abdomen, which is a common occurrence when a body is decomposing. The discoloration of the skin indicated that Farrar had been dead for at least a day and a half.

¶ 24 Dr. LeVaughn opined that it was impossible for someone to have seen Farrar alive on the evening of July 4, 2006, based on his autopsy results. He concluded that the postmortem findings indicated that it was possible that Farrar died on the evening of July 1. However, the defendant presented the testimony of witnesses who believed they saw Farrar driving his vehicle on July 2 and standing outside his home on July 4.

¶ 25 Michael Cooper, an expert in the field of firearms identifications, testified that the shell casings found in Farrar's basement were fired from the same firearm. He further testified that the two shell casings could have been fired from a .380-automatic-caliber pistol. However, he was unable to determine whether the shell casings were fired from the Walther PPK .380 pistol without having the actual firearm to test.

¶ 26 After hearing all the evidence, the jury found the defendant not guilty of intentional first-degree murder. The jury found him guilty on four counts: first-degree murder in that he knew his actions would result in murder; first-degree murder in that he knew his actions

would result in the strong probability of death; felony first-degree murder in that he committed murder during the commission of a robbery; and robbery.

¶ 27 On June 10, 2010, the trial court sentenced the defendant to 45 years' imprisonment for the knowing-first-degree-murder conviction and 7 years' imprisonment on the robbery conviction. The robbery conviction was to run consecutively to the first-degree-murder conviction. The defendant appeals.

¶ 28 The defendant first argues that the trial court erred by refusing to tender IPI Criminal 4th No. 3.17, which instructs the jury to view the testimony of a witness involved in the commission of the offense with suspicion. Specifically, the defendant notes the trial court erred by refusing to tender this instruction because the State's case hinged on the testimony of Chandra Jones, and sufficient probable cause existed for the State to have charged her as a coconspirator.

¶ 29 IPI Criminal 4th No. 3.17 provides as follows:

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

A defendant is entitled to have this instruction tendered to the jury if the witness was an accomplice to the crime. *People v. Winston*, 160 Ill. App. 3d 623, 630 (1987). The witness-accomplice instruction should be tendered to the jury when probable cause exists to believe the witness was guilty of the offense either as a principal or as an accessory. *People v. Kirchner*, 194 Ill. 2d 502, 541 (2000). To be considered an accomplice, the totality of the evidence and the reasonable inferences drawn therefrom must establish probable cause to believe not merely that the person was present and failed to disapprove of the offense, but that the person participated in the planning or the commission of the offense. *People v.*

Henderson, 142 Ill. 2d 258, 315 (1990). A person who provides aid following the completion of the offense is not considered an accomplice. *People v. Allen*, 119 Ill. App. 3d 186, 193 (1983).

¶ 30 Further, mere presence at the scene of the crime when the offense is committed is insufficient to establish probable cause under an accountability theory. *People v. Iniguez*, 361 Ill. App. 3d 807, 816 (2005). "An accomplice must knowingly, voluntarily, and with common interest unite with the principal offender in the commission of the crime." *People v. Travis*, 94 Ill. App. 3d 983, 991 (1981). "If this test is met, the defendant is entitled to the instruction notwithstanding the witness'[s] denial of involvement." *Winston*, 160 Ill. App. 3d at 630.

¶ 31 "The task of a reviewing court is to determine whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense." *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). The reviewing court will not disturb a trial court's refusal to give the accomplice-witness instruction absent an abuse of discretion. *Kirchner*, 194 Ill. 2d at 541.

¶ 32 The defendant argues that the accomplice-witness instruction should have been tendered to the jury because Chandra could have been indicted for the robbery and murder of Farrar under an accountability theory. The defendant relies on the following evidence to support his argument: Chandra fully intended to go inside Farrar's residence, but was denied admittance; she then returned to the vehicle and observed the defendant and Watkins beating Farrar through the residence's front windows; she heard two gunshots; she was left alone in the vehicle, but did not leave; she observed Watkins with money in his hand; she accompanied the group back to Mt. Vernon; she gave her purse to the defendant as requested and watched him put clothing that he obtained from Farrar's residence in it; she watched Donoho dispose of the purse; she accompanied the group back to Farrar's residence to find

a change bowl that had fingerprints on it; she waited in Watkins's bedroom while the defendant, Watkins, and Donoho returned to Farrar's residence to get into the safe; she accepted $200 from the group when they returned from Farrar's residence; and she failed to disclose to the police her knowledge of the crimes until the police contacted her. Further, the defendant notes that statements made during the State's closing argument support his argument that an accomplice-witness instruction should have been tendered to the jury. Specifically, the defendant points out that the State argued as follows during closing arguments:

> "Now, the defense is going to talk to you probably at great length, and a couple of points that they're going to hit, primarily, one of them is going to be Chandra Jones and the question of whether Chandra Jones was involved to a greater degree than what she told you. Probably. Don't really expect her to get up here on the witness stand and say, 'yeah, I was part of killing Randy Farrar, but here's the truth and the simple truth.' They want to put this crime off on Chandra Jones. They want you to go back in that room and say, 'well, we think Chandra Jones had a part in this.'
>
> Chandra Jones is not on trial here. Even if you believe that Chandra Jones was involved to a greater degree than she admitted to you, that doesn't mean he's innocent. That doesn't mean he didn't participate. That does not mean that you should find him not guilty, even if you think that she's involved to a greater degree."

¶ 33 After carefully reviewing the record in this case, we find that the trial court properly denied the defendant's request for an accomplice-witness instruction because the evidence does not establish probable cause that Chandra participated in the planning or commission of Farrar's murder. Chandra was 16 years old on the day that Farrar was murdered. The defendant, Watkins, and Donoho asked her to go somewhere with them on that day, and she agreed. She was aware that they were going to someone's residence and she might go inside

with Donoho, but the evidence did not reveal that she knew what would happen once she got inside. Nothing in the record indicated that Chandra was present during any conversation between the defendant, Donoho, and Watkins regarding their plans for that day. Once Chandra was refused admittance into Farrar's residence, she waited in the vehicle while the offense was committed. Although the defendant notes that Chandra was left alone in the vehicle while the crime was being committed, the record shows that Farrar's house was in a rural area, Chandra did not know where she was, and it was night. She witnessed the defendant and Watkins beating Farrar and heard two gunshots. As the group was returning to Mt. Vernon, the defendant threatened everyone in the vehicle. After he made his threats, he asked Chandra for her purse. Chandra gave the defendant her purse and watched him put clothes that he had taken from Farrar's residence in it. She then accompanied the group back to Farrar's residence to find a change bowl, but waited outside in the vehicle. She later accepted $200 from the group. The evidence indicated that no conversation was held in Chandra's presence with regard to the reason for going to Farrar's residence, the plan for the commission of the offense, and the plans for concealment of the offense.

¶ 34 The defendant relies on *People v. Cobb*, 97 Ill. 2d 465 (1983), an Illinois Supreme Court case, as support for his argument that the facts of the present case warrant giving the jury the witness-accomplice instruction. In *Cobb*, 97 Ill. 2d at 476-77, the court determined that the instruction was necessary where the witness was with the offenders before the crime, waited in the vehicle with the motor idling, watched the offenders hurriedly flee the scene of the crime, drove the offenders away in the getaway car, heard the offenders discussing their disappointment at having obtained only a small amount of money, and then failed to disclose to the police her knowledge of the crime until three weeks later. Unlike the witness in *Cobb*, Chandra did not wait in the vehicle with the motor idling and then help the offenders escape by driving the getaway vehicle. Instead, she sat in the vehicle while the

offense was committed with no warning that a murder was about to occur, accompanied the offenders back to town instead of leaving the vehicle in the middle of the night in a rural area, and gave the defendant her purse following a threat on her life and following the commission of the offense. The facts in this case are insufficient to show probable cause existed to indicate Chandra was guilty under a theory of accountability. Accordingly, the evidence was insufficient to support giving the accomplice-witness instruction, and the trial court did not abuse its discretion in denying the defendant's request for such an instruction.

¶ 35 The defendant next argues that the trial court erred by allowing into evidence, under the coconspirator exception to the hearsay rule, Lindsay McIntosh's testimony concerning two conversations that she had with Donoho. Specifically, the defendant argues the statements made by Donoho were not sufficiently proximate in time to the conspiracy to be considered a coconspirator statement.

¶ 36 During the trial, McIntosh testified Donoho contacted her a few days after July 1. McIntosh had a birthday party for her son on July 1, and Donoho asked McIntosh to tell police that she had attended the party. McIntosh refused. Approximately one week later, Donoho contacted McIntosh again and admitted that she had set someone up and the person was killed. She further admitted that the defendant was present during the murder. The trial court had concluded that these statements were admissible pursuant to the coconspirator hearsay exception. Specifically, the court concluded that the statements fell within the concealment stage of the alleged crime and that an independent *prima facie* showing of conspiracy had been established.

¶ 37 "Under the coconspirator exception to the hearsay rule, any act or declaration (1) by a coconspirator of a party, (2) committed in furtherance of the conspiracy, and (3) during its pendency is admissible against each and every coconspirator, provided that (4) a foundation for its reception is laid by independent proof of the conspiracy." *People v. Childrous*, 196

Ill. App. 3d 38, 51 (1990). However, the coconspirator hearsay exception does not extend to a statement which is merely a narrative of past events and which does not further any objective of the conspiracy. *People v. Byron*, 164 Ill. 2d 279, 290 (1995). "Statements made after the crime, for the purpose of concealment[,] are admissible so long as the efforts at concealment are proximate in time to the commission of the principal crime." *People v. Connolly*, 186 Ill. App. 3d 429, 435 (1989).

¶ 38 Here, Donoho's statement to McIntosh regarding McIntosh providing her with an alibi on the night of the murder occurred a few days following the murder and, as such, was proximate in time to the commission of the murder. Donoho's statement went beyond a mere recitation of past occurrences. Instead, it was directed toward concealment of the conspiracy. Donoho's statement expressed her desire to conceal the conspiracy by encouraging McIntosh to provide an alibi for her on the night of the robbery and murder. Because Donoho's statement was made in furtherance of an effort at concealment, the statement was also made in furtherance of the conspiracy and was properly admitted pursuant to the coconspirator hearsay exception.

¶ 39 The remainder of Donoho's statements, which concerned her admission that she had set someone up and they were killed and that the defendant was present for the murder, occurred one week after the initial statement was made. In *Connolly*, 186 Ill. App. 3d at 435, a police officer testified that he questioned the codefendant six days after the commission of a burglary, and the codefendant indicated that he and the defendant had been in town on the night in question, but he denied their participation in the burglary. The Fourth District Appellate Court concluded that the statement was properly admitted into evidence under the coconspirator hearsay exception because it was made for the purpose of concealment and it was not presumptively unreliable because the codefendant did not attempt to shift the blame to the defendant. *Id*. at 435-36.

¶ 40 In the present case, the second statement made by Donoho is reliable because she implicated herself and did not attempt to shift the blame to the defendant. She claimed that the defendant was present during the murder, but did not reveal whether he actually participated in the offense. The initial statement was made a few days following the commission of the offense, and the subsequent statement was made one week later. Further, we note that an independent *prima facie* showing of conspiracy was established through the testimony of the witnesses and the surveillance videos that were presented and admitted into evidence. Accordingly, these statements were properly admitted under the coconspirator exception to the hearsay rule.

¶ 41 Even assuming *arguendo* that the trial court did err by allowing McIntosh to testify concerning the second statement made by Donoho, we conclude that this error was harmless. See *People v. Patterson*, 217 Ill. 2d 407, 428 (2005) (confrontation-clause violations are subject to harmless-error analysis). As explained above, Donoho admitted that the defendant was present during the murder, but did not reveal whether the defendant participated in the commission of the offense. Because other properly admitted evidence established the defendant's presence when Farrar was murdered, this evidence is merely duplicative. See *People v. Brouder*, 168 Ill. App. 3d 938, 945 (1988) (any error in the admission of evidence is harmless "if the facts are strongly established by other competent evidence").

¶ 42 Last, the defendant argues his trial counsel provided ineffective assistance of counsel. Specifically, the defendant argues his counsel was ineffective because he failed to tender a jury instruction (1) limiting the use of certain information obtained during the investigation that implicated the defendant in the robbery and murder and (2) explaining the manner in which the jury should consider the incriminating statements made by the defendant to the members of the conspiracy and to Ratasha Turner.

¶ 43 To establish that the defendant's trial counsel provided ineffective assistance, the

defendant must show that his counsel's performance was so deficient that his representation fell below an objective standard of reasonableness, and counsel's deficient performance created a reasonable probability that the outcome of the proceeding would have been different absent counsel's deficient performance. *People v. Graham*, 206 Ill. 2d 465, 476 (2003). To prevail on an ineffective-assistance-of-counsel claim, the defendant must satisfy both prongs of this test. *Id.* "[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *Id.*

¶ 44 "Defense counsel's failure to submit a proposed jury instruction does not create a presumption of ineffective assistance of counsel." *People v. Jenkins*, 383 Ill. App. 3d 978, 991 (2008). Instead, the defendant has the burden of proving that the proposed instruction would have been given to the jury and that the outcome of the proceedings would have been different as a result. *Id.* The reviewing court must "evaluate the reasonableness of counsel's conduct from counsel's perspective in light of the totality of the circumstances." *Id.*

¶ 45 Here, the defendant complains that his counsel was ineffective because he failed to request a limiting instruction pertaining to Detective Kemp's testimony regarding his findings during the course of his investigation. Detective Kemp testified that he interviewed Watkins during his investigation, and Watkins admitted that the defendant was present when Farrar was murdered. Defense counsel objected to this testimony as hearsay, but the trial court overruled the objection. The defendant argues that counsel's failure to request a limiting instruction directing the jury that it could not consider Detective Kemp's testimony as proof of his guilt prejudiced him because the entirety of the State's direct evidence was based on the testimony of Chandra Jones, and Detective Kemp's testimony bolstered her credibility.

¶ 46 Counsel's failure to request a limiting instruction when entitled to one is not a matter of discretion or trial strategy. *People v. Hooker*, 253 Ill. App. 3d 1075, 1085 (1993). "Thus,

such a failure demonstrates that an attorney's performance was deficient, but it does not prove the second *Strickland* prong, that the attorney's poor performance prejudiced the defendant to such an extent that he was denied a fair trial." *Id.*

¶ 47 Detective Kemp's testimony concerning the course of the investigation was properly admitted into evidence. See *Henderson*, 142 Ill. 2d at 304 (testimony from a police officer recounting the steps taken during the course of an investigation is admissible, regardless of whether the jury would conclude that the police began searching for the defendant as a result of the nontestifying witness's statements to police, as long as the testimony does not gratuitously reveal the substance of the statements and inform the jury that the nontestifying witness told police that the defendant was responsible for the crime). The testimony here merely related the course of the investigation, not the substance of Watkins's statements to Detective Kemp. The testimony indicated that during the course of the interview with Watkins, the officers "found that [the defendant] was present" during Farrar's murder. By testifying regarding the course of the investigation, Detective Kemp did not vouch for Chandra's credibility. Evidence of the defendant's presence with the group on the night in question was already presented to the jury. Accordingly, we conclude that the defendant's trial counsel was not ineffective for his failure to request a limiting instruction with regard to Detective Kemp's testimony concerning his investigation.

¶ 48 The defendant next argues that his counsel was ineffective for failing to offer a jury instruction to aid the jury in considering alleged statements made by the defendant that implicated him in the murder and robbery. The defendant points to two statements offered as evidence to the jury. Chandra testified with regard to the first statement. In her testimony, Chandra stated that during the drive back to Mt. Vernon from Farrar's residence following the murder, the defendant threatened to kill anyone who talked about what occurred. She testified that the defendant said he would "kill us like he did the man." The second statement

was contained in Ratasha Turner's testimony where she indicated that the defendant told her that they "hit a lick" in response to her question regarding where the defendant obtained the money he was holding while inside McDonald's.

¶ 49 The defendant argues his trial counsel should have offered Illinois Pattern Jury Instructions, Criminal, No. 3.06-3.07 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.06-3.07), which instructs the jury on how to weigh the evidence that the defendant made a statement relating to the charged offense, because the instruction gives the jury "the tools necessary to properly consider [the] credibility" of the statements. Further, the defendant argues he was prejudiced by his counsel's failure to offer this instruction because the statements were used as admissions in the State's closing argument.

¶ 50 IPI Criminal 4th No. 3.06-3.07 provides the following instruction to the jury:

> "You have before you evidence that [(the) (a)] defendant made [a] statement[s] relating to the offense[s] charged in the [(indictment) (information) (complaint)]. It is for you to determine [whether the defendant made the statement[s], and if so,] what weight should be given to the statement[s]. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made."

Although the IPI Criminal 4th No. 3.06-3.07 was not tendered to the jury, the following instruction was:

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his age, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case."

¶ 51 Further, we note that defense counsel attempted to establish that Chandra's testimony

was recently fabricated. The following colloquy occurred between defense counsel and Chandra:

"Q. [Defense counsel:] *** I believe you had stated that [the defendant] has threatened you, something to the effect of, 'if you say anything, I'm going to kill you just like I killed that man.' Do you remember?

A. [Chandra:] That might not be his exact words but he threatened everybody in the car.

Q. [Defense counsel:] Okay. Buy they–I mean, the point is, this is something new again as far as doing something to you as he did to somebody else. Okay. That's never been stated before in all of the testimony; has it?

A. [Chandra:] I don't know.

Q. [Defense counsel:] Okay. So it may be right? May be something new?

A. [Chandra:] Yeah."

The record indicates that defense counsel also attempted to establish that Ratasha Turner's recollection of the details during the night in question was not clear. The jury heard defense counsel's cross-examination of Chandra Jones and Ratasha Turner and the inferences to be drawn therefrom. The jury was instructed that it was the judge of the believability of the witnesses and of the weight to be given to the testimony of each of them. Therefore, we find no prejudice resulted from defense counsel's failure to offer IPI Criminal 4th No. 3.06-3.07 because the outcome of the proceedings would not have been different had the instruction been given.

¶ 52 For the foregoing reasons, the judgment of the circuit court of Jefferson County is hereby affirmed.

¶ 53 Affirmed.