2017 IL App (5th) 140201-U

NO. 5-14-0201 & NO. 5-14-0299

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | St. Clair County. |
| | ) | |
| v. | ) | No. 13-CF-1263 |
| | ) | |
| GILBERT EVANS, | ) | Honorable |
| | ) | John Baricevic, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Cates and Barberis[*] concurred in the judgment.

**ORDER**

¶ 1 *Held*: Police officer's testimony about conversations that took place during a controlled drug buy was admissible under a hearsay exception covering the statements of co-conspirators. Police officer's testimony that the defendant called the officer and an informant "those white motherfuckers" was not inherently racially charged or prejudicial. Defendant was entitled to a credit of $5 per day against his fines for time spent in custody prior to sentencing. Where defendant labeled his *pro se* pleading a "Petition for Relief from Judgment and or in the Alternative Petition for Post-Conviction

[*]Justice Stewart was originally assigned to participate in this case. Justice Barberis was substituted on the panel subsequent to Justice Stewart's retirement and has read the brief and listened to the recording of oral argument.

Relief," the trial court was not required to advise him that it was treating the petition as a postconviction petition under *People v. Shellstrom* because the court was not "recharacterizing" the petition.

¶ 2 The defendant, Gilbert Evans, was convicted on one count of unlawful delivery of a controlled substance. The court sentenced the defendant to a prison term of five years and imposed a $1,000 drug assessment and a $40 street value fine. The defendant filed both a direct appeal from his conviction and a *pro se* pleading entitled "Petition for Relief from Judgment and or in the Alternative Petition for Post-Conviction Relief." The court treated the pleading as a postconviction petition, which it summarily dismissed after finding it to be frivolous and patently without merit (see 725 ILCS 5/122-2.1 (West 2014)). The defendant appeals his conviction, arguing that (1) the court erred by allowing a police officer to testify to inadmissible hearsay; (2) testimony that he referred to an undercover officer and an informant as "those white motherfuckers" was racially charged and prejudicial and, therefore, should have been excluded; and (3) he was entitled to a credit of $5 per day against his fines for time spent in custody prior to sentencing. The defendant appeals the dismissal of his petition, arguing that the court erred in treating it as a postconviction petition without advising him of its intent to do so. We affirm both the defendant's conviction and the dismissal of his petition. However, we modify the mittimus to reflect a $5-per-day credit against his fines.

¶ 3 The defendant was arrested for selling crack cocaine to Master Sergeant Joe Beliveau during an undercover operation. Beliveau is the director of the Metropolitan Enforcement Group of Southern Illinois (MEGSI), an undercover narcotics unit comprised of state and local police officers. At trial, Beliveau testified that MEGSI

undercover operations typically target areas known for drug activity. On the day the defendant was arrested, Beliveau participated in two drug buys while working in an undercover operation targeting one such area in East St. Louis.

¶ 4 Beliveau testified that he drove to a gas station at the corner of Louisiana Boulevard and North 26th Street with a confidential informant. He stated that when they arrived, they were approached by an individual named Aurphey Campbell. Campbell asked what type of drugs they were looking to buy. Beliveau indicated to Campbell that they wanted to buy crack. Campbell told them to park on the south curb of Louisiana Boulevard just east of North 26th Street behind an SUV that was already parked there. Beliveau testified that when they arrived at that location, he saw Campbell reach his hand into the window of the SUV and receive an object from the driver. Campbell then approached Beliveau's vehicle and handed him crack cocaine.

¶ 5 Beliveau testified that he could not see the occupants of the SUV at first; however, he did have the opportunity to see the driver of the SUV because she later stepped out of the vehicle. The driver was a black female, later identified as Lasha Garner. Before leaving the scene, Beliveau asked Campbell for his telephone number; however, Campbell told him he did not have a phone. Instead, Beliveau gave Campbell his phone number. Beliveau then drove to a different location to meet with other officers involved in the operation. Two other officers involved in the operation later stopped Garner's SUV. They searched the vehicle and found a substance in the vehicle which later tested positive for crack cocaine. However, they did not arrest Garner at the time due to the fact

that there was an ongoing undercover operation and Garner's arrest could potentially alert other drug dealers to the existence of the operation.

¶ 6 Beliveau testified that approximately 30 minutes to an hour after the first drug buy, Campbell called him and offered to sell him crack cocaine again. Beliveau and the confidential informant met Campbell at the same gas station. This time, Campbell instructed them to follow him to a different location. Campbell got into a gray minivan driven by a woman he said was his girlfriend.

¶ 7 Beliveau followed the minivan to a house on North 23rd Street in East St. Louis and parked in front of the house. Several people were sitting outside on the porch of the house. Campbell exited the van and used a phone from someone on the porch to make a phone call. Beliveau was not able to hear any of Campbell's phone conversation. However, as Campbell walked back toward the vehicles, Beliveau heard him refer to someone named Gil while talking to the occupants of the house. The prosecutor asked, "So you heard−you heard the word 'Gil'?" Beliveau answered in the affirmative. He testified that Campbell then approached and told him the crack was "on its way."

¶ 8 As Beliveau continued waiting, a yellow Cadillac pulled up next to his vehicle. Beliveau told the driver that "the line for crack" was behind his car. The driver told Beliveau that he did not want to wait and indicated that he would drive around the block instead. Before the yellow Cadillac drove off, however, Campbell approached and talked to the driver. Beliveau heard Campbell tell the driver that there was another individual looking to buy crack. He also heard the driver ask Campbell for "Gil's cell phone number," but did not hear Campbell's reply. Campbell then yelled to the occupants of the

house, " 'Call Gil, the yellow Cadillac is also looking for a package.' " The yellow Cadillac then drove away.

¶ 9 A few minutes later, a white Cadillac arrived. Campbell approached Beliveau's vehicle to ask for the money to make the buy. Pursuant to MEGSI policy, however, Beliveau refused to provide the money for the buy without first seeing the crack. Campbell went to talk to the driver of the white Cadillac, which was parked approximately 50 feet from Beliveau's vehicle. Beliveau testified that he could see the driver's leg sticking out from the open door of the Cadillac. He described the driver's shoe as a "unique 'old school' blue Adidas sneaker," and he noted that the driver was wearing gray sweat pants. The driver was later identified as the defendant.

¶ 10 According to Beliveau, he could see that Campbell was having a conversation with the driver of the white Cadillac. The prosecutor asked if he could overhear the conversation, at which point defense counsel objected. She argued, "All of this has been hearsay. It's been offered for the truth of the matter. It has nothing to do with what steps he took next." The prosecutor responded, "I think overhearing the conversation is what led Agent Beliveau to continue waiting." She did not wait for a ruling, however, telling the court, "Okay, I'll move on." She then asked Sergeant Beliveau how long the conversation between the driver and Campbell lasted. Beliveau testified that the conversation lasted only a few minutes, after which Campbell again approached his car and asked for the money to make the buy.

¶ 11 At this point, the prosecutor again asked Beliveau if he could clearly hear the conversation between the driver and Campbell. Beliveau said, "Yes." The prosecutor

then asked, "And what did the driver say?" The defendant objected again on the basis of hearsay, but then acknowledged that the statement was admissible as a statement against interest by the defendant. Beliveau testified that he heard the driver (the defendant) say to Campbell, " 'Tell the white motherfuckers to go home and take their money if they're not going to give up their money.' "

¶ 12 Beliveau testified that Campbell returned to his vehicle to ask him for money to make the buy. This time, Beliveau gave him $40 to make the purchase. He explained that he "realized that this transaction wasn't going to occur" otherwise. Campbell then walked back to the white Cadillac. Beliveau could see Campbell hand the money to the driver, but was not able to see the driver hand Campbell the crack because Campbell changed his position and blocked the view. When Campbell returned to Beliveau's vehicle, he handed him approximately one-tenth of a gram of crack cocaine.

¶ 13 After receiving the crack, Beliveau drove away. The white Cadillac remained parked in front of the house. Beliveau testified that at one point during the exchange, the driver leaned far enough out the open door that Beliveau was briefly able to get a good look at his face. Beliveau gave a description of the white Cadillac and the driver to Agent Scott Booth and Agent Nicholas Arnold. They stopped the vehicle and took photographs of the driver and a passenger. Beliveau later met with Booth and Arnold. He was able to identify the defendant as the driver of the white Cadillac based on those photographs.

¶ 14 Beliveau testified about the type of surveillance used during controlled drug buys like the two that took place in this case. He explained that there was a microphone in his

car to allow other officers to overhear a transaction as it is happening. The reason for this is officer safety. Beliveau further testified that the equipment allows him either to record the transactions or to transmit them by radio to other officers, but he cannot do both at the same time. In the operations involving Campbell, Garner, and the defendant, the equipment was used to transmit the audio to Agents Booth and Arnold. Beliveau testified that the microphone can only pick up conversations that occur within the vehicle or right next to an open window. Booth testified that the audio was spotty during the overhear in this case.

¶ 15 The defendant was charged with one count each of unlawful delivery of a controlled substance (less than one gram of crack cocaine) within 1,000 feet of a place of religious worship (720 ILCS 570/407(b)(2) (West 2012)) and criminal drug conspiracy (720 ILCS 570/405.1 (West 2012)). During the trial, the State requested that jurors also be instructed on the lesser included offense of unlawful delivery of a controlled substance (less than one gram of crack cocaine) (720 ILCS 570/401(d) (West 2012)).

¶ 16 Prior to trial, the defendant made an oral motion to exclude Beliveau's testimony concerning statements made by Campbell and the driver of the yellow Cadillac before the second buy occurred, arguing that these statements were hearsay. In response, the State's attorney argued that the testimony was offered to explain Beliveau's actions in waiting in front of the house. She also argued that the specific statements referring to a person named Gil were not offered for the truth of those statements. She elaborated: "So it's not necessarily being offered [to show] that this person was going to call Gil *** but that [Beliveau] overheard a phrase saying 'Call Gil,' and then later Gilbert Evans does show

up." The court denied the defendant's motion, finding that the statements came within the police procedure exception to the hearsay rule.

¶ 17 At trial, Beliveau gave the testimony discussed previously. The prosecutor referred to the testimony challenged in this appeal in both her opening statement and closing arguments. The jury returned a verdict of guilty on the charge of unlawful delivery of a controlled substance and a verdict of not guilty on the conspiracy charge. The court subsequently sentenced the defendant to five years in prison and imposed a drug assessment of $1,000 (720 ILCS 570/411.2(a)(3) (West 2012)) and a street value fine of $40 (730 ILCS 5/5-9-1.1(a) (West 2012)). The mittimus reflects a credit of 153 days against the defendant's sentence for the time he spent in custody prior to sentencing. However, there is no credit against his fines.

¶ 18 Subsequently, the defendant filed a *pro se* pleading entitled "Petition for Relief from Judgment and or in the Alternative Petition for Post-Conviction Relief." The court entered an order summarily dismissing this pleading. The court referred to the pleading as a postconviction petition and found that the petition contained conclusory allegations that were insufficient to "show the gist of a constitutional violation." The defendant filed timely appeals from both his conviction and the order dismissing his *pro se* pleading. This court ordered the two appeals consolidated.

¶ 19 As stated previously, the defendant argues that (1) the court erred in allowing Beliveau to testify about conversations that took place before the second drug buy because his testimony was inadmissible hearsay; (2) the court erred in allowing Beliveau to testify that the defendant referred to Beliveau and the informant as "those white

motherfuckers" because this phrase was racially charged and, therefore, unduly prejudicial; (3) he was entitled to a $5-per-day credit against his fines; and (4) the court erred in treating his *pro se* pleading as a postconviction petition without advising him of its intent to do so. We consider each of these arguments in turn.

¶ 20 We first consider the defendant's challenge to Beliveau's testimony concerning the statements of Campbell and the driver of the yellow Cadillac while Beliveau was waiting to make the second drug buy in front of the house on North 23rd Street. We note that although the defendant argues that all of the statements were impermissible hearsay, his arguments focus on only three of those statements−Beliveau's testimony that Campbell referred to someone named Gil while talking to the occupants of the house, his testimony that the driver of the yellow Cadillac asked for Gil's cell phone number, and his testimony that Campbell told someone to "call Gil" because the yellow Cadillac also wanted to buy "a package." As stated previously, the court found that the statements were admissible under the police procedure exception to the hearsay rule. The defendant argues that the court erred in so holding. He argues that the statements including the name "Gil" were used as substantive evidence to demonstrate that he was the driver of the white Cadillac who arrived at the scene to sell crack cocaine.

¶ 21 The State argues that all of Beliveau's challenged testimony was admissible under a hearsay exception for the statements of co-conspirators. In response, the defendant points out that before trial, defense counsel asked the court to clarify which hearsay exception the statements were being admitted under. She asked if they were being considered as the statements of co-conspirators. The court responded by pointing out that

the State only argued that it was offering the statements for a non-hearsay purpose under the police procedure exception. The defendant argues that, under these circumstances, it is unfair to allow the State to rely on a different exception for the first time on appeal. He contends that trial counsel was deprived of an opportunity to present arguments to the trial court concerning the co-conspirator exception. We note that we may affirm the trial court's ruling on any basis that appears in the record, whether or not it was the basis relied upon by the trial court. *People v. Crowder*, 323 Ill. App. 3d 710, 712 (2001). Thus, we are not precluded from considering the admissibility of the statements under both exceptions. For the reasons that follow, we find that two of the statements were properly admitted under the hearsay exception for the statements of co-conspirators, and admission of the third statement was harmless error.

¶ 22 Hearsay is defined as any out-of-court statement offered to prove the truth of the matter asserted therein. Hearsay evidence is generally not admissible unless it falls within an exception to the hearsay rule. *People v. Temple*, 2014 IL App (1st) 111653, ¶ 58. One such exception is the police procedure exception. Under this exception, out-of-court statements are admissible if they are offered for the limited purpose of explaining the course of the police investigation to jurors. *Id*. Evidence that goes beyond what is necessary to explain police conduct does not fall within this exception; it is therefore inadmissible hearsay. *People v. Shorty*, 408 Ill. App. 3d 504, 511 (2011).

¶ 23 Another exception is the co-conspirator exception. Under this exception, any out-of-court statement by one conspirator is admissible against all co-conspirators if the statement is made during the course of a conspiracy and in furtherance of the objectives

of the conspiracy. *People v. Kliner*, 185 Ill. 2d 81, 141 (1998). Statements in furtherance of a conspiracy include statements "that have the effect of advising, encouraging, aiding or abetting its perpetration," as well as statements relating to efforts to conceal the conspiracy or avoid prosecution. *Id.* This exception applies to the statements of a conspirator even if they are made to a police officer rather than a co-conspirator. *People v. Redeaux*, 355 Ill. App. 3d 302, 305 (2005). The exception is also applicable even in the absence of a conspiracy charge. *People v. Goodman*, 81 Ill. 2d 278, 283 (1980).

¶ 24 In order for the co-conspirator exception to apply, however, there must be independent evidence of a conspiracy. *Id.* Although such independent evidence should ideally be introduced prior to the co-conspirator's statements, this is not a requirement. *Id*. at 284. On appeal, we will reverse the trial court's evidentiary rulings only if they are an abuse of the court's discretion. *Temple*, 2014 IL App (1st) 111653, ¶ 58.

¶ 25 We agree with the defendant that none of the three statements that include references to the name Gil were admissible under the police procedure exception. In the first statement, Beliveau testified that he heard Campbell refer to an individual named Gil while talking to the people on the porch of the house. He did not hear the substance of what was said about Gil, and he did not know the defendant's name until later. It is therefore difficult to imagine what this testimony could possibly explain to jurors about Beliveau's course of conduct. In the second statement, Beliveau testified that the driver of the yellow Cadillac asked Campbell for Gil's cell phone number. This testimony, likewise, does nothing to explain any of Beliveau's conduct.

¶ 26 In the third statement, Campbell yelled to the people sitting outside the house, asking them to "Call Gil" because the driver of the yellow Cadillac also wanted to buy "a package." At trial, the State argued that this statement was admissible to show why Beliveau continued to wait. We are not persuaded. We acknowledge that the statement could lead to an inference that Beliveau remained in front of the house because he could gather from this statement that someone named Gil was going to arrive to provide drugs for the driver of the yellow Cadillac to purchase. However, the State presented far more direct evidence to explain this conduct in the form of Campbell's statement to Beliveau that the crack was on its way.

¶ 27 Moreover, statements identifying the defendant by name go beyond what is necessary to fully explain the course of Beliveau's conduct. See *Temple*, 2014 IL App (1st) 111653, ¶ 59. Hearsay evidence that identifies the defendant as the person who committed the crime "cannot be explained away as 'police procedure.' " *People v. Rivera*, 277 Ill. App. 3d 811, 820 (1996). Although many of Campbell's statements were properly admitted to explain the course of Beliveau's conduct, the three statements mentioning the defendant's name were not properly admitted under this exception.

¶ 28 We turn now to the co-conspirator exception. The defendant argues that the exception does not apply to any of the statements because (1) there was insufficient evidence of the existence of a conspiracy and (2) the statements were made before any conspiracy could form.

¶ 29 In support of his first claim, he points out that the jury acquitted the defendant on the drug conspiracy charge. He acknowledges that this may have been because jurors

were not convinced that the transactions took place within 1,000 feet of a place of worship, which was a part of the conspiracy as charged, but he argues that it could also be because the jurors found insufficient evidence of a conspiracy. We are not persuaded. Statements are admissible under this exception if the State makes a *prima facie* showing of the existence of a conspiracy, and the exception is applicable even if conspiracy is not charged. *Goodman*, 81 Ill. 2d at 283. To make this *prima facie* showing, the State must show that two or more individuals intended to commit a crime, that they had a common design or plan to do so, and that at least one individual acted in furtherance of the plan. *People v. Batrez*, 334 Ill. App. 3d 772, 283 (2002). The existence of an agreement or common plan ordinarily must be shown through circumstantial evidence. *Id.* at 283-84. We believe the evidence in this case clearly showed a common plan between Campbell and the defendant to sell crack cocaine. Without considering any of Campbell's statements, the evidence showed that the defendant and Campbell arrived at the same location where the sale was to occur and that Campbell acted as the intermediary in conducting the sale. This is sufficient to make the required *prima facie* showing.

¶ 30 In support of his claim that the conspiracy could not have formed before the statements at issue were made, the defendant points out that Campbell sold crack to Beliveau earlier in the day without the help of the defendant. He argues that the evidence showed that Campbell called Beliveau to sell him crack as he had earlier in the day, and that Campbell only formed a conspiracy to sell the crack through the defendant after they arrived at the house on 23rd Street and he called Gil. We disagree. The more rational inference to be drawn from the evidence was that Campbell waited until he knew that he

could obtain crack from the defendant before contacting Beliveau to arrange the second buy. It is also worth noting that Beliveau testified that Campbell placed a call before any of the challenged statements were made. Thus, even accepting the defendant's contention that a conspiracy only formed after Campbell arrived at the 23rd Street house and called the defendant, the statements were made during the course of the conspiracy.

¶ 31 We do not believe the first two of the challenged statements were admissible. As noted, Beliveau testified in the first statement that Campbell said something about someone named Gil. Because we do not know the contents of the statement, there is no way to discern whether the statement was made in furtherance of the conspiracy. The second statement was made by the driver of the yellow Cadillac. Although he went to the location with the intent to purchase crack, the evidence did not support an inference that he had a common plan with the defendant. Indeed, the fact that Campbell asked someone to call Gil because the driver of the yellow Cadillac also wanted to buy from him indicates that he was likely not part of a conspiracy. Thus, we find that both of these statements were admitted in error. However, we find the errors to be harmless. We recognize that the use of the defendant's name provided the jury with strong evidence that the defendant was in fact the driver of the white Cadillac. However, because we will conclude that the remaining statement was properly admitted under the co-conspirator exception, the use of his name was merely cumulative, and neither statement contained any additional information that could harm the defendant.

¶ 32 The remaining statement−Campbell's instruction to the occupants of the house to "call Gil" because more crack cocaine was needed−was properly admitted as the

statement of a co-conspirator. As we have already explained, there was at least *prima facie* evidence that Campbell was involved in a conspiracy with the defendant. The statement directly furthered the conspiracy because it led to the defendant being informed that more crack was needed so he and Campbell could make an additional sale. We thus conclude that this statement was properly admitted.

¶ 33 We next consider the defendant's claim that the court erred and denied him a fair trial by allowing the State to elicit testimony that he called Beliveau and the confidential informant "those white motherfuckers" and by allowing the prosecutor to refer to the testimony in her closing argument. We note at the outset that the defendant has forfeited this claim. Although he objected to the testimony on the basis of the hearsay rule both in his pretrial motion and during Sergeant Beliveau's testimony, he did not at any point raise the issue he raises here about the "racially charged" nature of the statement. An objection on specific grounds results in forfeiture of all other grounds. *People v. Barrios*, 114 Ill. 2d 265, 275 (1986). In addition, the defendant did not object to the prosecutor's remarks referring to the statement during her opening statement or closing argument.

¶ 34 Nevertheless, we may consider claims that have been forfeited under the plain error doctrine. Under that doctrine, we may consider the claims if (1) the evidence in the case is so closely balanced that it is possible that the verdict may have been the result of the error or (2) the claimed error was a fundamental error of such a magnitude that it undermined the integrity of the judicial process and affected the fairness of the defendant's trial regardless of how close the evidence was. *People v. Herron*, 215 Ill. 2d 167, 175-79 (2005). The first step in determining whether plain error has occurred is

determining whether there has been an error at all. *People v. Marshall*, 2013 IL App (5th) 110430, ¶ 13. Here, we conclude there has been no error.

¶ 35 As the defendant correctly states, Illinois courts "have consistently condemned the introduction of race" into a case. *Id.*; see also *People v. Brown*, 170 Ill. App. 3d 273, 284 (1988). In support of his contention that his comment to Beliveau was "racially charged" and prejudicial enough to warrant reversal under the plain error doctrine, the defendant calls our attention to three cases−this court's decision in *People v. Marshall*, the Second District's decision in *People v. Brown*, and the federal appellate case of *United States v. Bowman*, 302 F.3d 1228 (11th Cir. 2002). We find no support for the defendant's position in any of these cases. In fact, we find that the contrast between the case before us and all three cases illustrates the flaw in the defendant's claim that the statement at issue here was prejudicial and racially charged.

¶ 36 In *Marshall*, the defendant was charged with murder in the shooting death of a man outside a house party in Marion, Illinois. *Marshall*, 2013 IL App (5th) 110430, ¶¶ 3-4. Two witnesses gave statements to police, and later retracted those statements. Both witnesses gave trial testimony that was consistent with the statements they gave to police. *Id*. ¶¶ 5-6.

¶ 37 The prosecuting attorney attempted to explain the witnesses' actions during his opening statement and closing argument. In his opening statement, he told jurors, " 'you will see that there are a few in the black community who refuse to cooperate with the police even when a murder happens right under their nose, and those people have a habit

of intimidating, harassing, sometimes threatening anybody who they think is cooperating with the police.' " *Id.* ¶ 7.

¶ 38 He returned to this theme repeatedly during closing argument. Among other things, he argued, " 'I think what is most crucial in deciding this case, in deciding the credibility of [the two witnesses], and in deciding most of the other issues in this case, is to understand the culture of the black community here in Marion." *Id.* ¶ 8. He urged jurors to " 'keep in the back of [their] mind[s] how many people in that community feel about law enforcement.' " *Id.* He went on to tell them that most black people in Marion " 'were raised to believe that the police and prosecutors are their enemy,' " and that " '[t]he biggest sin that you could−that you can commit is to be a snitch in the community' " or " 'to ever cooperate with the police on anything.' " *Id.*

¶ 39 Finally, the prosecutor told jurors:

> " 'Now, in our white world, ladies and gentlemen, *** if somebody gives a statement to the police and then later on changes their story, the automatic response would be that that person is not truthful and that there is a problem with their credibility.
>
> But again, please look at their testimony and what they did *** through the eyes of people who were raised, again, to feel that the police are always against them and that they cannot trust the police.' " *Id.* ¶ 9.

The defendant did not object to the comments at trial or in a posttrial motion. *Id.* ¶ 10.

¶ 40 On appeal from his conviction, this court agreed with the defendant that the prosecutor's statements "constituted a fundamental violation that affected the fairness of

the trial under the second prong of the test" for application of the plain error doctrine. *Id*. ¶ 14. We found the statements problematic for three reasons. First, we found that the prosecutor's injection of race into the case "was arbitrary." *Id*. We explained that the witnesses' race had no bearing on their credibility. We further explained that despite the lack of relevance, the prosecutor explicitly told jurors that an understanding of the "culture of the black community" would help them decide most of the issues in the case. *Id*. For this reason, we concluded that it was possible that jurors in fact considered the "improper and inflammatory remarks" in reaching their verdict. *Id*.

¶ 41 Second, we noted that prosecutors may only argue facts that are based on evidence in the record. *Id*. ¶ 15 (citing *People v. Johnson*, 208 Ill. 2d 53, 115 (2003)). Because the record in *Marshall* contained no evidence concerning the makeup of the community of Marion or the "culture" of that community, the prosecutor's argument ran afoul of this rule. *Id.*

¶ 42 Third, we found that the prosecutor "improperly aligned himself with the jury" by comparing the black community in Marion with what he described as "our white world." *Id*. ¶ 16. Finally, we emphasized that the prosecutor's inflammatory use of race as an issue "was an egregious and consistent theme throughout the trial." *Id*. ¶ 17. We noted, however, that courts have previously found even isolated racially charged remarks to constitute plain error. *Id*.

¶ 43 The stark difference between the testimony and argument at issue in this case and the numerous prosecutorial remarks at issue in *Marshall* is immediately apparent. There, as just discussed, the prosecutor made unsupported arguments about the culture of the

community in which the two witnesses lived and explicitly argued that an understanding of this culture was crucial to deciding most of the issues in the case. Here, by contrast, the prosecutor elicited testimony that the defendant made one statement in which he called an undercover officer and an informant "white motherfuckers," a phrase that is not inherently racially charged, unlike the prosecutor's arguments in *Marshall*. The defendant made the statement when he was apparently angry that Beliveau refused to put up the money for the crack before seeing the crack. The term "motherfucker" is the type of profanity one might expect a drug dealer to use under the circumstances; it is not a racial epithet. The mere fact that he referred to Beliveau and the informant as "white" does not automatically transform the comment into a racial slur. It could easily have been used as a physical description.

¶ 44 More significantly, the prosecutor did not argue that the defendant's comment was racially motivated, nor did she urge jurors to consider any perceived racial animus in reaching their verdict. Rather, she argued that the comment was part of a discussion between Campbell and the defendant which demonstrated that they had a common design or plan to sell the crack cocaine, an element she had to prove to support the conspiracy charge. Thus, we find *Marshall* distinguishable.

¶ 45 We likewise find *Brown* distinguishable from the facts before us. That case involved a charge of aggravated criminal sexual assault. *Brown*, 170 Ill. App. 3d at 275. A crucial question for jurors in that case was whether the victim or the defendant was more credible. *Id*. at 282. In his closing argument, the prosecutor argued as follows:

" 'Who cares about this little black woman running around Aurora, mad at her husband, parking out on the street at 1:00 in the morning. *** Who cares about this person who is looking for cocaine [and] took a stranger in their car. *** Every single person in this society is entitled to the same protection of law, whether they're white or black, whether you like them or don't like them, even though they might have done things that you and I wouldn't do.' " *Id*. at 283-84.

On appeal from his conviction, the defendant argued that these comments improperly "introduced a racial element into the trial." *Id*. at 283. The appellate court agreed, noting that there was no reason to mention the victim's race. *Id*. at 284.

¶ 46 The *Brown* court did not provide any rationale for its conclusion other than its statement that the victim's race was irrelevant. It is worth noting that two other issues required reversal as well; therefore, the court did not need to determine whether the improper remarks were sufficiently prejudicial to require reversal standing alone. See *id*. at 275. Nevertheless, we also believe the remarks at issue in *Brown* had a far greater potential for unfair prejudice than the testimony and arguments at issue here. Although not discussed by the *Brown* court, the implication of the challenged argument there was the notion that the victim was unlikely to get justice because she was black. Neither the testimony nor prosecutorial comments involved in this case carry the same type of message. We find no support for the defendant's position in *Brown*.

¶ 47 We find the third case cited by the defendant−*United States v. Bowman*−equally unavailing. The defendant in that case was the international president of an organization called the Outlaws Motorcycle Club. He was convicted of numerous charges, including

racketeering, conspiracy to commit murder, drug charges, and firearm offenses. *Bowman*, 302 F.3d at 1230-31. Most of the conduct underlying the charges involved conflicts between the Outlaws Motorcycle Club and rival motorcycle gangs. *Id*. at 1231-36. Copies of the constitution of the Outlaws Motorcycle Club were admitted into evidence as proof that the various chapters of the organization had the common design necessary to support the conspiracy charges. *Id*. at 1239. That constitution contained a provision stating that only white males could be members. *Id*.

¶ 48 On appeal from his convictions, the defendant argued that this provision should have been redacted from the copies of the constitution entered into evidence. *Id*. The federal appeals court agreed. The court explained, "Since Bowman was not charged with any racially-motivated crimes, his allegiance to a racist organization is not relevant." *Id*. The court acknowledged that the whites-only policy "was not entirely irrelevant" because its repetition in the copies of the constitution seized from multiple chapters of the organization showed the "uniformity of the Outlaws enterprise." *Id*. at 1239-40. However, the court found that any probative value of this evidence was "outweighed by the danger of unfair prejudice." *Id*. at 1240. The court ultimately concluded that reversal was not warranted because "the whites-only policy comprised but a single phrase in a single sentence" on four documents in a trial that consisted of a month's worth of testimony and a "mountain of documentary evidence." *Id*. The court nevertheless held that the district court erred in failing to redact the reference to the policy. *Id*.

¶ 49 As with *Marshall* and *Brown*, we believe that the contrast between the instant case and *Bowman* could not be more stark. Evidence that a defendant is the head of a large

racist organization is obviously incredibly prejudicial. Evidence that a defendant used the phrase "white motherfuckers" does not have the same potential. We find all of these cases distinguishable. Because we do not believe the defendant's statement had the kind of racial implications involved in *Marshall*, *Brown*, or *Bowman*, we find no error, much less plain error, in allowing either the testimony or the prosecutor's references to it.

¶ 50 The defendant next argues that he is entitled to a credit of $5 per day against his fines for the 153 days he spent in custody prior to sentencing, which amounts to a total credit of $765. The State concedes the defendant is entitled to this credit, and we agree. A defendant is entitled to this $5-per-day credit against all fines by statute. 725 ILCS 5/110-14(a) (West 2012); see also *People v. Jones*, 223 Ill. 2d 569, 588 (2006) (holding that this statute is applicable to drug assessment charges imposed on defendants). This court has the authority to amend the mittimus where the basis for doing so is clear in the record. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008). We therefore amend the mittimus to reflect a credit of $765 against his fines.

¶ 51 Finally, we turn to the defendant's appeal of the court's order summarily dismissing his *pro se* "Petition for Relief from Judgment and or in the Alternative Petition for Post-Conviction Relief." We note that the defendant does not challenge the court's finding that the petition failed to state the gist of a constitutional claim. He argues only that the court erred in failing to advise him of its intent to treat the petition as a postconviction petition as required by our supreme court under *People v. Shellstrom*, 216 Ill. 2d 45 (2005). We disagree.

¶ 52 In *Shellstrom*, the defendant filed a *pro se* pleading entitled "Motion to Reduce Sentence, Alternatively, Petition for Writ of Mandamus to Order Strict Compliance with Terms of Guilty Plea." *Id*. at 47. The trial court treated this pleading as a postconviction petition, and summarily dismissed it on the basis that it was frivolous and patently without merit. *Id*. at 49 (citing 725 ILCS 5/122-2.1(a)(2) (West 2002)). The defendant appealed. He acknowledged that if the pleading was construed as a motion to reduce sentence, it would not be timely filed. He argued, however, that the trial court erred by treating it as a postconviction petition rather than a motion for *mandamus* relief. *Id.* at 49-50. He further argued that, because there is no provision for the summary dismissal of *mandamus* proceedings, the court erred in summarily dismissing the petition. *Id*. at 50. The appellate court reversed the trial court's ruling, and the State appealed to the supreme court. *Id*.

¶ 53 Before the supreme court, the defendant acknowledged that Illinois precedent permitted trial courts to recharacterize unlabeled pleadings as postconviction petitions if they raised claims cognizable under the Post-Conviction Hearing Act. *Id*. at 50. He argued, however, that this rule should not apply to pleadings that are clearly labeled as something else. He argued that this would deprive a *pro se* defendant "of his choice of procedural vehicle." *Id*. The supreme court rejected this contention, and reaffirmed the rule that "where a *pro se* pleading alleges a deprivation of rights cognizable in a postconviction proceeding, a trial court may treat the pleading as a postconviction petition, even where the pleading is labeled differently." *Id*. at 52-53.

¶ 54 The court then went on to consider the defendant's alternative argument that a trial court may not recharacterize a defendant's *pro se* pleading as a postconviction petition "summarily, without giving [the] defendant notice or an opportunity to respond." *Id*. at 53. This time the court agreed. *Id*. at 56-57.

¶ 55 The court first noted that the obstacles to filing a successive postconviction petition−the need to obtain leave of the court to file it and the need to satisfy the cause-and-prejudice test−"are not easy to overcome." *Id*. at 55. The court then explained that a *pro se* defendant could lose the opportunity to present all of his claims if a trial court summarily recharacterized a pleading as a postconviction petition when the pleading was labeled as some other type of pleading. This is because he would not be able to raise any claims later unless he was able to satisfy the cause-and-prejudice test and overcome the obstacles to filing a successive petition. *Id*. at 56.

¶ 56 Recognizing the unfairness of this possibility, the *Shellstrom* court held that before a trial court may recharacterize a *pro se* defendant's pleading as a postconviction petition, the court must (1) provide notice to the defendant that it intends to do so; (2) advise the defendant that, as a result, any subsequent postconviction petition will be subject to the procedural hurdles involved in filing successive petitions; and (3) give the defendant an opportunity to withdraw or amend the pleading if he chooses to do so in light of this information. *Id*. at 57. We review *de novo* the question of whether a trial court has complied with this procedure. *People v. Bland*, 2011 IL App (4th) 100624, ¶ 17.

¶ 57 There is no question that the court in this case did not comply with the requirements of *Shellstrom*. The question before us is whether it was required to do so.

More precisely, the question is whether the *Shellstrom* rule applies to a case such as this, where a petition is expressly labeled as a postconviction petition even though it is also labeled, in the alternative, as some other type of petition. We hold that it does not.

¶ 58 The Fourth District confronted this question in *People v. Shipp*, 375 Ill. App. 3d 829 (2007). We find its decision instructive. There, the defendant filed two different *pro se* pleadings, each of which was titled, "petition for relief from judgment *** pursuant to the Illinois Post-Conviction Act of the Illinois Revised Statutes." *Id*. at 830. Both were dismissed as frivolous and patently without merit. *Id*. at 830-31. Years later, the defendant filed another *pro se* pleading. This time, he labeled it as a petition for relief solely under the Post-Conviction Hearing Act. *Id*. at 831. The trial court dismissed the petition, finding that it was frivolous and patently without merit. The court also found that the petition was a successive petition. *Id*.

¶ 59 On appeal, the defendant argued that the trial court should not have treated his postconviction petition as a successive petition because his earlier pleadings were labeled as petitions for relief from judgment. *Id*. He argued that the trial court recharacterized the earlier pleadings as postconviction petitions without following the procedures required by *Shellstrom*. *Id*. at 832. The Fourth District rejected this contention, explaining that "the trial court did not recharacterize [the] defendant's 1996 petitions as postconviction petitions; [the] defendant himself labeled them as such." *Id*. The Fourth District went on to note that the defendant did not mention section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1996)) "or any other basis for relief other

than the Post-Conviction Hearing Act" in his first two petitions. *Id*. The court therefore found *Shellstrom* to be inapplicable.

¶ 60 Here, as in *Shipp*, the defendant filed a *pro se* pleading labeled as a petition for relief under either the Post-Conviction Hearing Act or, alternatively, under section 2-1401. Here, as in *Shipp*, the defendant invoked the provisions of the Post-Conviction Hearing Act in the body of his pleading. We acknowledge that, unlike the defendant in *Shipp*, the defendant here also invoked section 2-1401. However, this fact does not alter our conclusion. Like the defendant in *Shipp*, the defendant here characterized his petition as a postconviction petition by labeling it as such and by citing to the Post-Conviction Hearing Act in his petition. We thus conclude the trial court did not recharacterize the petition. Because the defendant himself invoked the Post-Conviction Hearing Act in his pleading, he cannot claim to be surprised that the trial court treated it as such. The danger of accidental loss of claims by a *pro se* litigant that animated the supreme court's holding in *Shellstrom* is, therefore, not present here. See *People v. Corredor*, 399 Ill. App. 3d 804, 808 (2010) (focusing on the presence of this danger in determining that *Shellstrom* applied in the circumstances of that case). As such, the trial court was not required to follow the procedures outlined in *Shellstrom*. We find no error in its order summarily dismissing the defendant's petition.

¶ 61 For the foregoing reasons, we affirm both the defendant's conviction and the trial court's order summarily dismissing his *pro se* pleading. However, we modify the mittimus to reflect a credit of $765 against the defendant's fines.

¶ 62 Judgment of conviction affirmed as modified; order dismissing postconviction petition affirmed.