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2017 IL App (3d) 140218-U

Order filed April 5, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0218
v.	)	Circuit No. 13-CF-318
	)	
MARQUIS D. COSTIC,	)	Honorable
	)	David A. Brown,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Holdridge and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The evidence presented at trial was sufficient to prove that defendant was guilty of felony murder beyond a reasonable doubt. (2) The evidence presented at trial was sufficient to prove that defendant was guilty of aggravated battery with a firearm beyond a reasonable doubt. (3) Defendant forfeited review of the prosecutor's erroneous mischaracterization of trial testimony in closing arguments and the evidence at trial was not so closely balanced to warrant a plain error review of the issue. (4) Defendant waived the issue of previously subpoenaed defense witnesses failing to testify at trial and failed to make a clear *pro se* posttrial claim of ineffective assistance of counsel regarding the issue. (5) The trial court did not abuse its discretion in sentencing defendant.

¶ 2 Following a jury trial, defendant, Marquis D. Costic, was found guilty of first degree felony murder (720 ILCS 5/9-1(a)(2) (West 2012)), aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)), and two counts of mob action (720 ILCS 5/25-1(a)(1) (West 2012)). He was sentenced to consecutive terms of 34 years of imprisonment and 17 years of imprisonment for murder and aggravated battery, respectively. No sentence was entered on the findings of guilty on the mob action charges. Defendant appeals, arguing: (1) the State failed to prove he was guilty of felony murder beyond a reasonable doubt; (2) the State failed to prove he was guilty of aggravated battery with a firearm beyond a reasonable doubt; (3) he was denied a fair trial due to prosecutorial misconduct in closing arguments; (4) this court should remand this cause for further proceedings based on defendant's *pro se* posttrial allegations of ineffective assistance of trial counsel where counsel proceeded to trial in the absence of two previously subpoenaed defense witnesses; and (5) his sentence was excessive. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with first degree murder, aggravated battery with a firearm, and two counts of mob action. The indictment alleged that on April 7, 2013, defendant committed first degree murder when he shot and killed Treyshawn Blakely with a firearm while committing a forcible felony being mob action (Count I); committed aggravated battery when he knowingly discharged a firearm in the direction of Gerald Embrey, thereby causing an injury to Embrey (Count II); committed mob action when he, while acting with another person, knowingly disturbed the public peace by the use of force or violence and caused injury to Blakely by the discharge of a firearm (Count III); and committed mob action when he, while acting with another person, knowingly disturbed the public peace by the use of force or violence and caused injury to Embrey by the discharge of a firearm (Count IV).

¶ 5 On January 7, 2014, defendant's attorney answered ready for trial and proceeded to trial without two previously subpoenaed witnesses. The witnesses had been subpoenaed for trial for the previous day but the courthouse had been closed due to bad weather. Defendant indicated he wanted to proceed with the trial without those witnesses. The following conversation took place between the trial court and defendant:

> "THE COURT: All right. You understand that if we start the trial and the out-of-custody witnesses don't appear or aren't at the courthouse to be called by your attorney, you wouldn't have the benefit of them being there. Do you understand?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. And that sounds like there is at least some possibility that they wouldn't be available to be called as witnesses and that could affect your ability to or your attorney's ability to put on a defense on your behalf. Do you understand?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Knowing that, do you still want to go forward with the trial, start the trial today?
>
> THE DEFENDANT: Yes."

¶ 6 At trial, in a hearing outside the presence of the jury, the defense called defendant's brother to the witness stand. Defendant's brother was sworn-in to testify. Defense counsel asked defendant's brother if he understood that he was going to be called to testify about the events that occurred on April 7, 2013, at the intersection of Warren Street and Butler Street. Defendant's brother responded, "on the advice of counsel and pursuant to the rights granted

under the Constitution of the United States and of the state of Illinois [he was respectfully declining to answer] any questions related to this matter." Based on defendant's brother invoking his fifth amendment rights and him having been charged with "clearly related" charges, the trial court found that defendant's brother would not be able to give any relevant testimony and ruled that he would not be allowed to be called as a witness.

¶ 7 Officer David Logan testified that on April 7, 2013, he responded to a call regarding a shooting at Butler Street and Warren Street in Peoria, Illinois. Logan observed a male lying in the street with what appeared to be a gunshot wound to the head. Logan also observed another male with blood around his face, who identified himself as Allen Fitzpatrick, sitting on the curb on the south side of Butler Street. Fitzpatrick had not been shot.

¶ 8 Initially, Logan was unable to get control of the scene due to the "number of people on scene, coming to the scene, rushing up, [and] ignoring what officers were telling them to do." As more officers arrived, they were able to get the crime scene under control, cordon off the area with yellow crime scene tape, and maintain the integrity of the crime scene. Logan observed "numerous spent shell casings from a rifle laying on the even side of Butler Street." He did not observe any weapons. Logan attempted to locate witnesses but "nobody was really cooperative." He estimated between 50 to 75 people were at the scene and "running around the area." He spoke with as many people as he could, with very few people being cooperative or having any information about the incident.

¶ 9 Gerald Embrey testified that he was 17 years old on the day of the incident. On that day, Embrey was on Butler Street walking toward Warren Street. When he was one or two blocks away from the intersection, he noticed "a big crowd just going everywhere" at the intersection. Embrey ran toward the intersection to see what was going on. Embrey saw his friend,

Treyshawn Blakely, who was also 17 years old, running toward the intersection from Warren Street. At the same time, Embrey also saw defendant and defendant's brother running toward the intersection, in the same direction as Embrey was running. Embrey passed defendant and his brother. Embrey did not see either defendant or defendant's brother with a weapon. Embrey believed that defendant and defendant's brother wore their hair in dreadlocks.

¶ 10 As Embrey approached the intersection, he saw Allen Fitzpatrick was "knocked out"—unconscious. There were fights still taking place among other people in the crowd. Embrey testified that there were "[a] lot" of people fighting. He did not see defendant or defendant's brother fighting. About a minute after he arrived at the intersection, Embrey heard a lot of rapid-fire gunshots. He saw Blakely get shot in the back of the head. Embrey got shot in the left leg, causing him to fall. He could not get back up. Somebody drove up next to Embrey, put him in their car, and drove him home. Eventually, Embrey went to the hospital and then to the police station.

¶ 11 Christeia Bonner testified that on the day of the incident she was driving around with her friend, Kimberly Brock, in Kimberly's new car. Christeia was driving the vehicle up Butler Street toward Warren Street. She was unable to reach the intersection because the car directly in front of her car was blocking the roadway. Christeia saw two African American males run past her vehicle toward the intersection of Butler Street and Warren Street. The shorter of the two men had dreadlocks. The other man was taller and "dark-skinned."

¶ 12 According to Christeia, there were over 50 people gathered around the intersection of Butler Street and Warren Street. The driver of the car in front of her had the driver's side door open and was looking at "something." When Christeia approached the man, she saw that he was looking at somebody on the ground. At that point, Christeia heard a gunshot. People started

running. Christeia looked in the direction of the gunshot, toward the right side of the street. Christeia saw the two men that had run in front of her car "tuggling [sic] back and forth with each other." They possibly could have been fighting. She then heard gunfire. It was "gunshot after gunshot like pop, pop, pop, pop." Christeia got back into Kimberly's car and put the car in reverse to get out of the area. Christeia did not see the gunshots being fired and never saw the weapon.

¶ 13 Kimberly Brock testified that she was in the car with Christeia on April 7, 2013. They drove up Butler Street but could not move any further because "a whole bunch of people" were in the middle of the street and a red car was in front of their car. She saw some people arguing. Kimberly saw two people coming from behind on her right side, with one person trailing the other person. Kimberly heard "a lot" of gunshots coming "from whoever was running around that [sic] behind us." When asked if she saw a gun, Kimberly answered that she saw "something" and she knew what "it" was, and that is where shots were coming from. Kimberly indicated that she was not close enough to see "it," she but knew what "it" was. Kimberly saw sparks fly from the gun when it was being fired. According to Kimberly, of the two men, "the one in front had longer hair and that's where the gunshots came from." The shots were fired into the crowd of 20 or 30 people. She saw the head of a child "fly back" and then he hit the ground.

¶ 14 The next day, Kimberly reported her observations of the incident to police. Police showed her a 12-person photo lineup. Kimberly identified defendant from those photographs as being the person who "shot those people." Kimberly also identified defendant's brother from a six-person photo lineup as the person she saw "running with the shooter." Kimberly made an in-court identification of defendant as the shooter.

¶ 15 Officer John Williams testified that he responded to the scene at 1600 Butler Street on the day of the incident. He saw a lifeless body in the middle of the street and immediately started taking photographs but stopped because the amount of people in the area who had become unruly and unsafe. Once order was restored, Williams continued photographing the scene. The evidence found at the scene included 21 shell casings, a black hat, a watch, and a cell phone. Williams also went to the odd numbered houses on Butler Street because the occupants had reported bullet strikes in their homes. Projectiles were dug out of homes at 1541 and 1535 Butler Street.

¶ 16 The day after the incident, Williams and other officers executed a search warrant at 1614 Butler Street, where defendant and his brother resided. Police located a safe located in an upstairs bedroom, which contained an empty 50 round box of .223 Remington ammunition—the type of ammunition used during the shooting. Two live .223 cartridges and several guns were also found in the home. The guns that had been found did not fire .223 ammunition.

¶ 17 Jared Hanneman testified that he and defendant had been jail cellmates for two months, during which time they spoke with each other about their cases. Hanneman was being held on several charges, which included a burglary, possession of a controlled substance, and aggravated battery. Defendant told Hanneman that on the night Blakely was killed, defendant, defendant's brother, and some of their friends had left a party and ran into a group of people with whom they "ha[d] some animosity with." A fight broke out between the two groups. Both defendant and defendant's brother were a part of the fight. Defendant told Hanneman that his brother "had grabbed a gun and started taking shots into the group of people" and then they left the scene and went to hide out. Defendant indicated that his brother had shot Blakely. Hanneman did not request to speak with a detective about the information defendant had disclosed until a week

before defendant's trial. Hanneman testified he had learned all of the information in "bits and pieces" over the course of two months and that he believed testifying was the right thing to do. Hanneman did not expect any negative repercussions or beneficial treatment regarding his pending charges as a result of his decision to testify.

¶ 18 The crime weapon was never located. Dr. John Scott Denton performed the autopsy of Blakely. Denton opined that the cause of Blakely's death was a gunshot wound to the back of the head fired by a high-velocity rifle from two feet away or greater than two feet away.

¶ 19 Forensic Scientist Dustin Johnson examined the 21 fired .223 caliber Remington cartridge casings that were recovered at the scene. Johnson testified that type of ammunition was typically fired by a high-velocity rifle and, in his opinion, all 21 cartridges were fired by the same unknown firearm. A bullet fragment recovered from Blakely's body was identified as a .22 caliber bullet. A .22 caliber bullet was fired by using a .223 cartridge case (the .223 designation was the diameter around the .22 caliber bullet). A bullet fragment recovered from a house at 1535 Butler Street and the fragment recovered from the autopsy of Blakely were fired from the same unknown firearm.

¶ 20 At the close of the State's evidence, defendant's counsel motioned for a directed verdict. The trial court denied the motion.

¶ 21 For the defense, Twila Williams testified that she was at her mother's house on the 1600 block of Butler Street on the day of the incident. Williams's mother said that some guys were fighting and she was going to call the police. When Williams went outside, she saw 40 or 50 people in the street and saw that Allen Fitzpatrick had been "jumped on, mouth bleeding, different things like that." Fitzpatrick was staggering and then he sat on the curb. Williams did not witness any fighting. Williams heard gunshots and observed that the shooter was defendant's

brother, who was wearing "sagging" jeans and a T-shirt. She testified that he was "kind of like holding onto his pants and the gun at the same time" and was pulling up his pants while he was shooting. Williams also testified that defendant's brother was with "another guy," but she could not remember that other person and did not get a good look at him. Williams knew defendant's family from "on the block" and was familiar with defendant, but she did not remember seeing defendant at all that day.

¶ 22 At the time of her testimony, Williams was in jail for violating her probation and for retail theft. She had been convicted of theft numerous times, including multiple times for felony theft. Williams told police of her observations regarding the incident after she was arrested on the probation violation four months after the incident. Williams did not go to police after the incident because she had a warrant out for her arrest. She "was on the run" and was not ready to get arrested at that time. Williams testified that when she was eventually arrested, police questioned her about the incident and she told the truth.

¶ 23 Outside the presence of the jury, defendant confirmed that he was electing not to testify.

¶ 24 In closing arguments, the prosecutor argued that Blakely was "gunned down by two cowards, [defendant and defendant's brother], two cowards that brought a gun to a fistfight." The prosecutor described the gun as a high-powered, high-velocity weapon and argued that defendant and defendant's brother were responsible for the damage that resulted from the gunfire because they had turned the street fight into a gunfight. The prosecutor argued that under a theory of accountability both defendant and defendant's brother were equally responsible for the consequences of the gunshots where the evidence showed they ran toward the fight together, fired 21-shots, fled the scene together, and "hid[] out because they kn[e]w they killed the boy."

¶ 25 As part of his closing argument, defendant's attorney argued that Kimberly Brock appeared traumatized on the witness stand and had testified that the scene was chaotic. He questioned whether Brock accurately described the events she witnessed given the chaos at the scene. Defendant's counsel further argued that Twila Williams had testified that she knew defendant and defendant's brother, she did not see anyone fighting, she saw defendant's brother shoot the weapon, she saw someone other than defendant with defendant's brother, and she did not see defendant anywhere at any point that day.

¶ 26 As part of his rebuttal closing argument, the prosecutor argued:

> "Twila Williams. Twila, Twila, Twila. Now, if I had all the power in the world, I guess she should be scared of me, but, you know, I don't sentence her. A judge does. The judge will be the final arbiter of what happens to Twila, not me.
>
> And let's talk about Twila. I mean, apparently, according to her, *** she would be behind this occurrence. So she, apparently from behind, can tell who is doing the shooting and how this is happening. And, apparently, according to her, this is all just a big accident. Oh. He's reaching for his pants and he's holding up the gun and, oh, the gun just happens to go off 21 times. So, accident, accident, accident, accident, accident. Twenty-one times an accident."

¶ 27 On January 9, 2014, the jury found defendant guilty on all four charges—first-degree felony murder (count I), aggravated battery with a firearm (count II), mob action as alleged in count III, and mob action as alleged in count IV. In response to a special interrogatory, the jury indicated, "We, the jury, find the allegation that during the commission of the offense of first-degree murder the defendant was armed with a firearm was not proven." The same day, defense counsel filed a motion for new trial, which included arguments that the State failed to prove

defendant guilty beyond a reasonable doubt and the prosecutor made "prejudicial, inflammatory, and erroneous statements in closing argument designed to arouse the prejudice and passions of the jury and to thereby prejudice [defendant's] right to a fair trial."

¶ 28 On February 3, 2014, the trial court received an *ex parte* communication from defendant in the form of a letter dated January 27, 2014. In the letter, defendant indicated his defense counsel had submitted a witness list to the court prior to trial and that it was illogical for him to agree with his attorney to proceed without those witnesses with little or no consideration of how that "that one decision may [a]ffect the overall outcome of [his] trial." Defendant indicated that he and his defense attorney had prepared the best possible defense for nine months, which included the testimony of the originally subpoenaed witnesses. Defendant argued that it was "inappropriate to abandon or disreguard [sic] any portion of the defensive plan" that he and his attorney had put together for nine months. He requested that his witnesses be granted the opportunity to attest to their knowledge of the incident and requested that the trial court grant his pending motion for new trial. The trial court gave notice to the parties of the letter and made it a part of the trial court record.

¶ 29 On February 26, 2014, a hearing on defendant's motion for new trial took place. Defense counsel was asked if he was adopting the allegations contained in defendant's letter to the trial court. Defense counsel responded, "I am not." Defendant's *pro se* letter was not discussed any further. The trial court denied defendant's motion for new trial, finding there was sufficient evidence to support the guilty verdict under the theory of accountability.

¶ 30 A presentence investigation report (PSI report) indicated that defendant was 22 years old at the time of the offense. At that time, defendant lived with his grandmother at 1614 Butler Street in Peoria, where he had been residing for 22 years. Defendant was raised by his maternal

grandmother due to his mother's instability, but he had a good relationship with both of his parents. Defendant had been employed for almost two years prior to the incident with the same employer. Defendant had been a heavy, daily user of cannabis since the age of 10, and he last used cannabis on the day of the incident. According to the Peoria County Jail, defendant was known to be affiliated with a street gang. Defendant had a prior conviction in 2008 for unlawful possession of cannabis, for which had been given six months of supervision after he pled guilty. (It appears from the PSI that he did not successfully complete the terms of his supervision). There were also 16 letters written to the court on defendant's behalf describing him as a caring, hardworking, and responsible person and indicating that defendant had been employed since he first started high school. Defendant also wrote a letter on his own behalf regarding his childhood, work history, values, and character, and also claiming his innocence.

¶ 31 At the sentencing hearing, five mitigation witnesses testified on defendant's behalf. Defendant's aunt testified that defendant had always taken responsibility seriously. She also indicated that defendant graduated from high school. Defendant's aunt did not think it was possible that defendant would be involved with anything "like this" and believed it was "very impossible" for him to be "part of this whole scenario." She also testified that defendant "ha[d] a lot of integrity." On cross-examination, defendant's aunt indicated that she was not aware that defendant had been convicted of the class C misdemeanor of unlawful possession of cannabis and had received court supervision or that he had been ordered to complete 80 public service hours and pay fines but had not done either. She also did not know that defendant had been smoking cannabis daily since he was 10 years old or that he had not graduated from high school.

¶ 32 Tim Farquer, defendant's former teacher, who was currently a school superintendent, described defendant as an "easy going, loving, kind of peacemaker." Farquer believed that there

was no way defendant was a danger to society. He also testified that defendant had walked for graduation and had a graduation party. Farquer would trust defendant with his kids and trust defendant working at his school. Farquer had not seen or spoken with defendant in six years.

¶ 33 Kiara Walker, who grew up with defendant, described him as quiet, shy, outgoing, loving, respectful, kind, caring, gentle, and loving. She testified that she had known defendant for 10 years and "this right here is just something that's just not him." Walker did not believe defendant committed any of the underlying offenses.

¶ 34 Defendant's grandmother testified that defendant was a very responsible, mature, and respectful person and a person of integrity. She indicated defendant "could be a very, very, productive citizen, given the opportunity." She further testified that she believed that defendant had been betrayed by his brother regarding this matter.

¶ 35 Blakely's mother read the victim impact statement that she had written regarding the detrimental impact her son's death had on her.

¶ 36 In sentencing defendant, the trial court noted that defendant was found guilty on all charges but was also found not to have been the shooter in this case. The trial court additionally noted defendant's lack of a criminal record and the great deal of support from his family and friends. The trial court also indicated 21 shell casings had been found at the scene from a high-powered rifle in close range with a large crowd of people and noted that "it's amazing that there weren't more victims, more tragic deaths, [and] more people taken to the hospital." The trial court indicated that the community should not be torn apart by acts of violence and the community deserved better. The trial court stated that it was taking into consideration the statutory factors in aggravation and mitigation and sentenced defendant to 34 years of imprisonment for murder and to a consecutive sentence of 17 years of imprisonment for

aggravated battery with a firearm. The trial court found that the mob action charges merged into the felony murder and aggravated battery convictions and did not sentence defendant on the mob action guilty findings.

¶ 37 Defendant filed a motion to reconsider the sentence, which the trial court denied. Defendant appealed.

¶ 38 ANALYSIS

¶ 39 On appeal, defendant argues: (1) the State failed to prove he was guilty of felony murder beyond a reasonable doubt; (2) the State failed to prove he was guilty of aggravated battery with a firearm beyond a reasonable doubt; (3) he was denied a fair trial due to prosecutorial misconduct in closing arguments; (4) this cause should be remanded for further proceedings based on his *pro se* post-trial allegations of ineffective assistance of trial counsel; and (5) his sentence was excessive.

¶ 40 I. Felony Murder

¶ 41 Defendant argues that the State failed to prove he was guilty of felony murder beyond a reasonable doubt. He argues that the evidence against him was insufficient and that mob action could not form the basis of the underlying felony to support his felony murder conviction.

¶ 42 A. Sufficiency of the Evidence

¶ 43 In support of his insufficiency of the evidence claim, defendant argues that the State failed to prove an element of the underlying mob action offense—that he had "acted without the authority of law." The State argues that the evidence of defendant, defendant's brother, and a group of their friends engaging in a fist fight that broke out with a group of individuals with whom defendant's group had animosity was sufficient proof that defendant was guilty of mob action. When addressing a defendant's challenge to the sufficiency of the evidence, a reviewing

court will decide whether, when viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the State proved the elements of the offense beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 44 A person commits the offense of first degree felony murder when he kills a person without lawful justification in the course of attempting or committing a forcible felony other than second degree murder. 720 ILCS 5/9-1(a)(3) (West 2012). A second-degree murder takes place when a person commits a first-degree murder with the intent to kill or do great bodily harm to the victim, or knows that such acts will cause death or knows that such acts create a strong probability of death or great bodily harm (720 ILCS 5/9-1(a)(1), (a)(2) (West 2012)) and one of two mitigating factors is present: (1) defendant acted under a sudden and intense passion resulting from serious provocation by the victim or (2) the defendant subjectively believed that he was acting in self-defense, but his belief was unreasonable. 720 ILCS 5/9-2(a)(1), (a)(2) (West 2012)). The defense of second degree murder is not available for those charged with felony murder. *People v. Morgan,* 197 Ill. 2d 404, 452 (2001)).

¶ 45 The purpose of the felony murder statute is to limit violence caused by the commission of a forcible felony by subjecting an offender to a first degree murder charge if another person is killed during the felony. *People v. Davison*, 236 Ill. 2d 232, 239 (2010)). The felony murder statute does not require the State to prove the intent to kill but, rather, was enacted to deter the commission of the predicate felony offense by holding the wrongdoer liable for any foreseeable death that results from the commission of that forcible felony. *People v. O'Neal*, 2016 IL App (1st) 132284, ¶ 25 (citing *People v. Belk*, 203 Ill. 2d 187, 192 (2003) and *Davison*, 236 Ill. 2d at 239).

¶ 46 In this case, defendant was convicted of felony murder with the predicate felony offense being mob action. The specific subsection of the mob action statute as charged in this case is subsection 25-1(a)(1) of the Criminal Code of 2012, which provides that a person commits mob action when he or she engages in "the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law." 720 ILCS 5/25-1(a)(1) (2012). In proving a defendant is guilty of mob action, it is not necessary to prove that defendant struck the victim or performed the act that caused the killing. *People v. Davis*, 213 Ill. 2d 459, 474 (2004). While mob action is not a classified as a forcible felony (720 ILCS 5/2-8 (West 2012)), there is no dispute that mob action may be the basis for felony murder because it is a felony that involves the use or threat of physical force or violence. 720 ILCS 5/2-8 (West 2012); *Davison,* 236 Ill. 2d at 242; *Davis*, 213 Ill. 2d at 471 (mob action qualifies as a forcible felony because it involves the use of force or violence against the victim).

¶ 47 In this case, the evidence showed, largely by way of the jailhouse informant, that defendant, his brother, and their friends engaged in a fight with a group of others with whom they had some underlying animosity. From this testimony, the jury could reasonably infer that defendant was not a mere bystander to the fight but was an active participant and, thus, guilty of mob action. Defendant argues that because there was no evidence to indicate which group started the fight it was unknown whether one group was acting in self-defense and, thus, the State failed to establish that defendant acted "without authority of law." Defendant argues that "[f]or all the jury knew, [his] involvement might have been limited to defending himself from blows struck by members of the opposing group," and, thus, he could not have been guilty of mob action or felony murder.

¶ 48 While defendant argues that there was no evidence of who started the fighting, it was for the jury to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the evidence presented. *People ex rel. City of Chicago v. Le Mirage*, Inc., 2013 IL 113482, ¶ 64. Additionally, defendant did not raise or prove the affirmative defense that he was acting in self-defense. See 720 ILCS 5/7-14 (West 2012) (a defense of the justifiable use of force is an affirmative defense). Thus, in viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant engaged in "the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law" when he engaged in the fighting with other group of people with whom his friends had animosity. See *Collins*, 106 Ill. 2d 237 at 261.

¶ 49 B. Mob Action as the Underlying Felony for the Felony Murder Conviction

¶ 50 Defendant also argues that the offense of mob action could not form the basis for the felony murder charge under the facts of this case. In support of his argument, defendant notes that count III of the indictment charging him with mob action alleged that he, "without authority of law and while acting together with another person, knowingly disturbed the public peace by the use of force or violence and caused injury to Treyshawn Blakely by the discharge of a firearm." Defendant contends that the only injury inflicted on Blakely was the fatal gunshot wound, which formed part of the mob action charge so that the same act that constituted the predicate felony of mob action arose from and was inherent in the murder and, thus, could not be prosecuted as felony murder.

¶ 51 Where the defendant's acts that constitute a forcible felony arise from and are inherent in the act of murder itself, those acts cannot serve as a predicate felony in a charge for felony murder. *Davison,* 236 Ill. 2d at 240. In determining whether mob action may properly serve as a

predicate felony for felony murder, the court must consider whether the conduct underlying the felony involves an "independent felonious purpose" other than the killing. *Id.* at 244; *Davis*, 213 Ill. 2d at 474. Whether mob action improperly served as the predicate forcible felony of a first-degree felony murder conviction is reviewed *de novo. Davison,* 236 Ill. 2d at 239.

¶ 52 Here, the mob action charge indicated that defendant, acting together with another person, knowingly disturbed the peace by the use of force or violence and caused injury to Blakley by the discharge of a firearm. The jury was instructed that "[a] person commits the offense of Mob Action, as alleged in Count 3, when he acting together with one or more persons and without authority of law knowingly disturbs the public peace by the use of force or violence; and one of the participants in the Mob Action violently inflicts injury to Treyshawn Blakely." However, injury to Blakely was not an element of mob action as charged under section 25-1(a)(1) of the Code. See 720 ILCS 5/25-1(a)(1) (2012) (a person commits mob action by engaging in the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law).

¶ 53 At trial in this case, there was ample of evidence of mob action on the day of Blakely's murder where the evidence showed police were unable to get control of the crime scene due to the estimated 50 to 75 people at the intersection of Warren Street and Butler Street, fights were breaking out among people in the crowd at the time of the shooting, and there were a lot of people that were arguing and fighting. The evidence also showed that defendant and his brother were involved in the fighting and, at some point, two people were shot, one of whom was fatally shot. Defendant's participation in the mob action involved different acts and consisted of a different felonious purpose than that of the shooting into the crowd of people. The acts of mob action were not inherent in the murder of Blakely and did not arise from the murder of Blakely.

The specific identity of Blakely as a victim of the mob action was not an essential element of the mob action charge where the mob action statute did not require there be a victim of the knowing or reckless use of force or violence that disturbed the public peace by two or more people acting together and without authority of law. See 720 ILCS 5/25-1(a)(1) (2012). Thus, the allegation in the indictment of injury to Blakely by way of a discharged firearm was immaterial to the mob action charge and may be disregarded as surplusage. See *People v. Collins*, 214 Ill. 2d 206, 220 (2005) (where an indictment alleges all essential elements of an offense, other matters unnecessarily added to the indictment may be regarded as surplusage).

¶ 54 II. Aggravated Battery

¶ 55 Defendant also argues that the State failed to present evidence sufficient to sustain his conviction for aggravated battery with a firearm. He argues that the jury found that he was not the shooter and the evidence was insufficient to support that he was accountable for the shooter's actions.

¶ 56 A person is legally responsible for another's conduct if, before or during the commission of the offense, and with the intent to promote or facilitate the commission of the offense, he solicits, aids, abets, agrees or attempts to aid another in planning or committing the offense. 720 ILCS 5/5-2(c) (West 2012). To prove accountability, the State must establish that the defendant shared the principal's criminal intent or that a common design existed between the defendant and the principal. *People v. Fernandez*, 2014 IL 115527, ¶ 13. One may be accountable for a crime other than the crime that he intended to commit, as long as it occurred in furtherance of the crime the offender did plan or intend. *Id.* ¶ 19. A common design may be inferred from the circumstances, and a court will consider the following factors to determine whether a defendant is guilty under an accountability theory: whether the defendant was present when the crime was

committed; whether he maintained a close affiliation with his companions when the crime took place; whether he failed to report the crime; and whether he fled from the scene. *People v. Taylor*, 164 Ill. 2d 131, 141 (1995).

¶ 57 In this case, one eyewitness claimed defendant was the shooter while another claimed the shooter was defendant's brother. The testimony of the jailhouse informant indicated that defendant told the informant that it was his brother did the shooting. Defendant participated in the mob action with his brother and was liable for any other criminal act committed in connection with that offense. Under an accountability theory, a common design may have been inferred from the facts of this case, where defendant participated in the street fight with his brother, arrived with his brother, remained with his brother during the shootings, fled from the scene with his brother, hid out with his brother, and failed to report the shootings.

¶ 58 In support of his contention that the State failed to prove him guilty beyond a reasonable doubt of aggravated battery, defendant points to the jury's answer to the special interrogatory that the State did not prove that he personally discharged the gun. No statutory authority exists for the use of a special interrogatory in criminal cases. *People v. Reed*, 396 Ill. App. 3d 636, 645 (2009). The special interrogatory given to the jury should not be used beyond its purpose of determining whether to apply a sentencing enhancement. *Id.* at 646 (quoting *People v. Jackson*, 372 Ill. App. 3d 605, 612 (2007) (refusing to consider the answer to the "special interrogatory" beyond the purpose for which it was asked–whether there could be a sentence enhancement)).

¶ 59 In this case, the jury found defendant guilty of aggravated battery with a firearm but determined that he did not fire the gun. The special interrogatory had no effect on the jury's finding of guilt. The evidence was sufficient to support defendant's conviction of aggravated battery with a firearm under a theory of accountability.

¶ 60 III. Prosecutor's Improper Comments

¶ 61 Defendant argues he was denied a fair trial as the result of the prosecutor's improper comments in rebuttal closing argument that misstated the testimony of Twila Williams as having suggested that the shooting was accidental. Defendant acknowledges that he has not preserved this issue for appellate review because he did not object at trial or raise the issue in a posttrial motion, but he urges this court to consider the issue under the closely balanced prong of a plain error review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Under the closely balanced prong of the plain error doctrine, a court will consider a forfeited issue where the evidence in a case was so closely balanced that the guilty verdict may have resulted from the errors and not from the evidence. *People v. Herron*, 215 Ill. 2d 167, 178 (2005).

¶ 62 Closing arguments are to be based on the evidence and reasonable inferences from the evidence. *People v. Chavez*, 327 Ill. App. 3d 18, 27 (2001). The State must refrain from making improper and prejudicial comments in closing argument. *People v. Porter*, 372 Ill. App. 3d 973, 978-79 (2007). Where the comments are made in rebuttal, they are especially troubling because the defense has no opportunity to respond. *People v. Legore*, 2104 IL App (2d) 111038, ¶ 55.

¶ 63 In this case, Williams, the sole defense witness, testified that defendant's brother was the shooter and defendant was not present at the time of the shooting. The prosecutor improperly argued that Williams had indicated that the shootings were the accidental result of defendant's brother pulling up his pants while holding the weapon. However, Williams never testified that the shootings appeared to be an accident. While the prosecutor erred in his characterization of Williams' testimony, we do not reach a plain error review of the prosecutor's error because the evidence was not closely balanced. Several of the State's witnesses placed defendant at the scene with his brother, and the evidence showed his brother shot the gun 21 times. The evidence

also showed that defendant participated in the mob action with his brother and was with his brother before, during, and after the shooting of Blakely and Embrey. Accordingly, the evidence was not closely balanced and, thus, we do not reach a plain error review of the prosecutor's erroneous comments in rebuttal closing arguments.

¶ 64 IV. *Krankel* Hearing

¶ 65 Defendant further argues that this cause must be remanded for the trial court to consider his claims of ineffective assistance of trial counsel, which he claims that he asserted in his *pro se* posttrial letter to the trial court. See *People v. Krankel*, 102 Ill. 2d 181, 189 (1984) (holding that a defendant is entitled to counsel, other than his originally appointed counsel, to represent him a posttrial hearing in regard to his claims of ineffective assistance of counsel). Specifically, defendant maintains that his trial counsel was ineffective for failing to insure that the subpoenaed defense witnesses appeared at trial. The State argues that defendant waived the issued by agreeing to proceed to trial without the subpoenaed witnesses. Alternatively, the State argues that defendant is not entitled to a *Krankel* hearing where his *pro se* posttrial letter neither alleged ineffective assistance of trial counsel nor requested the appointment of new counsel.

¶ 66 In this case, the trial court did not err in failing to conduct a *Krankel* hearing because defendant waived the issue regarding the previously subpoenaed witnessed not testifying at trial. Prior to trial, defendant acknowledged that his witnesses were unavailable and decided to proceed with the trial regardless of their absence. See *People v. Blair*, 215 Ill. 2d 427, 444 n. 2 (2005) (waiver is a consensual affirmative act entailing the intentional relinquishment of a known right). The trial court had admonished defendant about his decision to proceed without the previously subpoenaed witnesses and had indicated "there [was] at least some possibility that they wouldn't be available to be called as witnesses and that could affect [defendant's] ability to

or [defendant's] attorney's ability to put on a defense on [defendant's] behalf." Defendant indicated he understood and wanted to proceed with the trial that day. Thus, defendant has waived the issue.

¶ 67 Even if defendant had not waived the issue, there was no basis for the trial court to conduct a *Krankel* hearing because defendant did not raise a clear claim of ineffective assistance of trial counsel. The need to conduct a *Krankel* inquiry is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel. *People v. Ayres*, 2017 IL 120071, ¶ 11. A *pro se* defendant is not required to do anything more than bring his or her ineffective assistance of counsel claim to the trial court's attention. *Id.* (a *pro se* defendant is not required to file a written motion but may raise the ineffective assistance claim orally or through a letter or a note to the trial court). "When a defendant brings a clear claim asserting ineffective assistance of counsel, either orally or in writing, this is sufficient to trigger the trial court's duty to conduct a *Krankel* inquiry." *Id.* ¶ 18.

¶ 68 In defendant's *pro se* posttrial letter, he indicated that it was "illogical" for him to have agreed with his attorney to proceed without those witnesses when those witnesses had been part of the defense's trial strategy. Defendant argued that it was necessary for all his witnesses to testify to "their substantial knowledge" regarding the street fight and the shootings and requested that the pending motion for new trial be granted. The record shows that the witnesses did not testify because the trial court was closed due to severe weather on the original date of trial and the following day defendant indicated that he wished to proceed without those defense witnesses. Defendant's letter appears to request a new trial so that the witnesses could testify about their knowledge of the events of April 7, 2013. While there may have been an insinuation of an ineffective assistance of counsel claim in his letter, defendant did not assert a clear claim that his

trial counsel was ineffective. Without defendant asserting a clear claim of ineffective assistance of counsel, there was no basis for the trial court to conduct a *Krankel* hearing.

¶ 69 V. Excessive Sentence

¶ 70 Finally, defendant argues that the trial court abused its discretion in sentencing him to 51 consecutive years of imprisonment. He claims that the sentences were excessive when considered in light of substantial mitigating factors, which included his law abiding background, employment history, and extensive family and community support. He also argues that the trial court should have considered in mitigation the fact that he was not found to have been the shooter. Defendant further argues that the trial court's remarks at sentencing that he and his brother brought a gun to fist fight were not supported by the evidence.

¶ 71 The imposition of a sentence is a matter of judicial discretion. *People v. Colbert*, 2013 IL App (1st) 112935, ¶ 22. In determining an appropriate sentence, a trial court considers a number of factors, including the facts and circumstances of the crime and the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). A reviewing court has the authority and duty to reduce a sentence where it is arbitrary, oppressive or unjust. *People v. Flambeau*, 134 Ill. App. 3d 932, 936-37 (1985). A sentence within the statutory sentencing range may be an abuse of discretion where it varies greatly with the spirit and purpose of the law. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000).

¶ 72 In this case, the sentencing ranges for defendant's convictions were 20 to 60 years for first degree murder (730 ILCS 5/5-4.5-20(a) (West 2012)) and 6 to 30 years for aggravated battery with a firearm (730 ILCS 5/5-4.5-25(a) (West 2012)). Defendant was sentenced to consecutive terms of 34 years of imprisonment on the murder conviction and 17 years of

imprisonment on the aggravated battery with a firearm conviction—51 years of imprisonment. Defendant was 22 years old at the time he committed the offenses and had a minimal criminal history consisting of a single 2008 conviction for unlawful possession of cannabis. He had worked since he was in high school and there was extensive evidence of his work ethic. Through numerous letters written on his behalf and through testimony of five witnesses at the sentencing hearing, defendant was described as hardworking, kind, respectful, self-supporting, and not one to participate in trouble in the streets. The trial court noted the extensive support defendant received from friends and family. However, the trial court also emphasized the circumstances of the offenses, including that 21 shots were fired into a crowd of people, noting that it was shocking that more people were not injured. The trial court also noted the effect the offenses had on many people, such as the victims' and defendants' families, their friends and the community. The trial court fashioned a mid-range sentence on each charge after considering both mitigating and aggravating factors, namely defendant's rehabilitative potential and the need to deter others from this type of criminal activity. We cannot say the trial court abused its discretion in sentencing defendant.

¶ 73 CONCLUSION

¶ 74 The judgment of the circuit court of Peoria County is affirmed.

¶ 75 Affirmed.

SUPREME COURT OF ILLINOIS

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September 27, 2017

In re: People State of Illinois, respondent, v. Marquis D. Costic, petitioner. Leave to appeal, Appellate Court, Third District. 122248

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 11/01/2017.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

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