No. 2—09—0815
Order filed June 3, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 07—CF—1707
DARVIN T. HENDERSON,	)	Honorable Grant S. Wegner,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Bowman concurred in the judgment.

ORDER

Held: The evidence was sufficient to prove defendant guilty beyond a reasonable doubt; the trial court did not abuse its discretion by allowing a defense witness to invoke his privilege against self-incrimination; defendant's due process right to a fair trial was not violated by the State's refusal to grant the defense witness immunity; the trial court did not abuse its discretion by admitting the coconspirator's hearsay statements; and defendant was not denied effective assistance of posttrial counsel; affirmed.

Following a bench trial, defendant, Darvin T. Henderson, was found guilty of the first-degree murder (720 ILCS 5/9—1(a)(1), (2) (West 2006)) of Rashod Waldrop and of the attempted first-degree murder (720 ILCS 5/8—4(a) (West 2006)) of Jonathan Phillips. Defendant was sentenced to serve an aggregate of 80 years' imprisonment. On appeal, defendant contends that: (1) the State

failed to prove him guilty of murder and attempted murder beyond a reasonable doubt; (2) the trial court abused its discretion by allowing Jonathan Phillips, a defense witness, to invoke his fifth amendment right against self-incrimination or, alternatively, defendant was denied due process of law when the prosecutor refused to grant Phillips immunity; (3) the trial court abused its discretion by admitting statements made by codefendant, Tuan Fields, pursuant to the coconspirator exception to hearsay; and (4) posttrial counsel provided ineffective assistance. We affirm.

BACKGROUND

On April 29-30, 2007, around midnight, someone discharged a firearm at Waldrop and Phillips as they descended the stairwell at 430 North River Street (River Street Apartments) in Aurora, Illinois. Waldrop ran to a car driven by his girlfriend, Teneka Davis, who was waiting outside. Waldrop flung himself into the back seat and said "they shot me." Waldrop later died at the hospital. Aurora police officer Peter Wullbrandt received a dispatch and was the first on the scene. Inside the lobby of the River Street Apartments, he saw several people crouched over an unconscious male, later identified as Phillips, who had been shot in the head. When officer Donald Flower arrived at the scene, he observed Phillips laying on the lobby floor, bleeding from his head. Phillips did not die. The forensic pathologist who performed an autopsy on Waldrop believed his death was caused by a gunshot wound.

Detective Kevin Jenkins, the lead detective assigned to the case, arrived at the crime scene at 2 a.m. on April 30, 2007. There, he obtained copies of the building's surveillance footage, which he reviewed. The surveillance tapes were taken by video cameras strategically placed throughout the apartment building. While no camera recorded the actual shooting, several video clips admitted into evidence revealed activities prior to and after the shooting.

The State theorized that defendant shot the victims to avenge an earlier altercation between defendant, Waldrop, and Phillips, during which Waldrop and Phillips took defendant's gold chain and refused to return it. They told defendant to get it back "in blood." Fields obtained a gun, gave it to defendant outside the apartment building, and the two men went in to the lobby of the River Street Apartment building. Defendant hid in the stairwell while Fields lured the victims from an apartment and down the stairwell, where they were shot. No gold chain or gun was found at the scene of the crime. A bottle of Hennessy liquor was found underneath the first floor stairwell, but defendant's DNA was not found on the bottle. The police did not find any spent cartridges at the scene but did find bullet fragments. Because only bullet fragments were found, the police surmised defendant used a revolver. The parties stipulated that two bullet jackets found at the scene were fired from the same firearm of a .38, .357, or 9mm class.

FACTS

Robert Moore testified to the following at trial. In April 2007, Moore, defendant, and the two victims were all members of the "Gangster Disciples" street gang. Fields, a/k/a Don Juan, was a member of the "Maniac Latin Disciples" street gang, which was closely affiliated with the Gangster Disciples. The Gangster Disciples had two factions, one known as the "Low Ends" and the other as the "1200s." Waldrop, a/k/a Turtle, and Phillips, a/k/a J-Hood, sided with the Low Ends; defendant, a/k/a Bling, sided with the 1200s.

On April 29, 2007, Moore, defendant, codefendant Fields, and others joined a group of people at Farnsworth Park in Aurora, Illinois. The Low Ends and the 1200s were involved in a physical fight. During the fight, Phillips snatched a gold chain from defendant's neck. The altercation ended when Michael Townes fired a shot into the air from his silver revolver. Later, at

a gas station, Moore heard defendant tell Waldrop and Phillips to return his chain, during which Waldrop told defendant to "get it back in blood." Phillips then ripped the chain to pieces.

Later that evening, Moore attended a party on the fourth floor of the River Street Apartments. Fields and Townes also attended the gathering. Another party was held simultaneously on the third floor. During the party, Moore saw Fields walk into a bedroom while he was on a cell phone. Townes was in the bedroom with Fields. As Fields left the bedroom, he remarked to Moore: "Watch what me and Bling (defendant) about to do." At some point a little later, Moore saw Townes give Fields what looked like the silver revolver Townes had fired in the park. Fields placed the gun under his shirt and into the left side of his shorts and walked out the apartment door into the apartment building hallway. Moore described a video clip, after it was played, as showing Fields walking out of the apartment and down a hall. Moore described that Fields appeared to have his hands on or near his waistband on the left side, in the same area where he had seen Fields place the gun.

During cross-examination, Moore acknowledged that he had been drinking Hennessy all day and that he had smoked marijuana when he was at the park and at the party. Moore talked to Jenkins about the incident, but he did not tell the complete story during his first meeting because he was "with the Gds, with Mike Townes, so I'm not fixing to tell [the lead investigator, Kevin Jenkins] everything that goes on." During a later police interview, he was no longer a Gangster Disciple and was facing Class X felony charges. In exchange for his agreement to testify against defendant, Moore was released from jail on bond and was expected to "walk on [his] charges with probation."

Nakia Hosey testified that, on April 29, 2007, she and two friends, Ashley (defendant's girlfriend) and Jessica, attended the party at the River Street Apartments. Waldrop and Phillips arrived at the party around 11 p.m. Around 11:30, Hosey and her friends left the party to buy cigarettes. Hosey drove Jessica's car. As Hosey drove down River Street, she pulled up to defendant and Fields, who were standing near a parked car. Fields told her to go back into the building because "they was on some bullshit." Hosey then saw defendant put on a pair of white gloves. He was wearing a white hoodie and white pants. Hosey and the two girls drove back to where defendant and Fields stood so Ashley could talk to defendant. When Hosey returned to the party on the third floor about 20 minutes later, she told Waldrop and Phillips to be careful because she had seen defendant outside.

Hosey stated that the party broke up and, as the group left the apartment and were walking down the hallway, Fields directed them to follow him. He led the group, including Waldrop and Phillips, into the stairwell. As Hosey walked down the stairwell with the others, she saw Fields come back up the stairs. She then heard gunshots and everyone ran.

During cross-examination, Hosey acknowledged that she was intoxicated that night. According to Jenkins' report, she told the detective that Phillips had broken defendant's chain in Ashley's face and threw it out the window. She explained that some of her statements to Jenkins were based on a combination of her personal knowledge and what she had heard from others. Hosey denied she was convicted of forgery and denied she made a deal for her testimony.

Codefendant Fields testified that, on the night of April 29, 2007, he ended up at the River Street Apartments. The State presented a series of the video surveillance clips taken the night of the incident. The first two depicted Fields walking out of an apartment, down a hallway, and some

females walking behind him. The next clip showed Fields walking down a stairwell outside of the River Street Apartments and out toward a driveway. The next showed Fields walking on the driveway towards River Street, outside of the apartment building, crossing the street, and walking to a parked car. Fields testified that he could not recall who was in the car. The next clip revealed a car that had pulled up next to the parked car. Fields remembered that Hosey, Ashley, Lexus, and another girl were in that car.

Fields recalled being interviewed by Jenkins and another detective, Nancy Rodarte. He did not remember telling them that it was defendant who was "at the parked car." He remembered that Jenkins wanted him to make up a story about it because "there's too many unsolved mysteries in Aurora."

The State then showed the next video clip depicting Fields walking into the lobby at the River Street Apartments and another person wearing a hoody on his head also walking into the lobby. Near the end of the clip, Fields walked into the elevator lobby area and the person wearing the hoody turned left into the stairwell. Fields testified that he did not know who that person was. Fields remembered that he was supposed to make up a story and say it was defendant who walked into the lobby, but he was not sure that he told the police that. Fields then stated that the police wanted him to say that it was defendant who was in the lobby with him. But Fields then stated that he could not recall what he told the police during the interview.

Another clip revealed Fields walking in a hallway at the River Street Apartments, two other persons identified by Fields as Waldrop and Phillips, walking behind Fields, and a group of others. The next clip, apparently of a view of the hallway from an elevator, showed Fields walking by the elevator door and Phillips and Waldrop near the elevator door also.

Fields testified that the group then headed down the stairwell, that Waldrop and Phillips passed Fields on the stairs, and that, as they neared the bottom of the stairs, Fields heard gunshots. Fields stated that he saw a hooded person with a gun. Fields believed it was the same hooded person who had entered the lobby with him earlier. Fields identified a video clip, time-stamped 23:39:48, showing Waldrop coming through the stairwell door and hitting the ground. The next clip showed the hooded man running past Waldrop and Dale Johnson running after him. At 23:40:06, the video clip showed Fields in the lobby. At 23:44:14, it showed Phillips laying on the floor wearing a white tank top. Fields verified that the next video clip, recorded from another angle, showed himself walking through the stairwell door to the lobby and then going back to the stairwell.

Fields denied knowing who shot Waldrop and Phillips. He stated that he probably did tell Jenkins that defendant was the shooter. But Fields maintained that Jenkins told him to fabricate that claim. Although Fields was offered deals, he stated that he had declined them.

During cross-examination, Fields testified that he was first interviewed by detectives Sherwood and Rowely after he was arrested. Jenkins was not present during the interview, and Fields denied knowing who the gunman was. Fields claimed that Jenkins spoke with him in his cell after the first interview and brought him a meal from McDonald's. Fields explained that Jenkins was his uncle by marriage. According to Fields, Jenkins told him that the police believed defendant was the shooter and that the surveillance videos showed Fields was involved in the crimes. Jenkins told Fields that, if Fields cooperated, Jenkins would help him with his drug case. Fields maintained that Jenkins wanted Fields to create a story to pin the crime on defendant.

Waldrop's former girlfriend, Teneka Davis, testified that, on the night of the incident, Waldrop telephoned her and asked her to pick him up at the River Street Apartments. Tiffany Knox

drove Davis' car and parked near the entrance to the building. Davis called Waldrop to tell him that they had arrived. Waldrop asked her if she saw anyone outside and she told him no. Fifteen to twenty minutes later, Davis heard screams from the third or fourth floor of the building. She then saw a man wearing a dark blue or black hoodie with the hood up, blue jeans, white gloves, and a black mask with the eyes cut out, carrying a gun in one hand running to the back of the building. The man headed towards the dead end. She recognized him as defendant from his build and his height.

Davis next saw Dale Johnson run out of the building and head in the same direction as defendant. Waldrop then ran from the building and flung himself into the back seat of Davis' car saying his last words, "they shot me, they shot me." As Knox drove to the hospital, Davis heard more gunshots behind them. Waldrop died on the operating table. Davis identified a video clip that showed her car arriving at the building, people running out of the front door, and her car departing for the hospital.

On cross-examination, Davis stated that it was "pitch dark" outside of the building. She could only see the first man's eyes. Davis admitted that she told Jenkins that she was not sure that the man she saw was defendant or his brother.

Cedric Merriweather testified that defendant called him at approximately 10 p.m. on April 29, 2007. Defendant asked Merriweather for a "banger," the street name for a gun. Merriweather responded that he did not have a gun. Sometime before 11 p.m., Merriweather called back defendant and asked if he got what he was looking for. Defendant told him that he "was straight." Defendant also told him that "they want me to get it in blood, we get it in blood."

Merriweather acknowledged that he first told the State about his communications with defendant in March 2008, when Merriweather was in jail charged with two Class X offenses, one of which had been committed while he was released on bond for the other. In addition to facing a 6- to 30-year prison term, Merriweather also faced mandatory consecutive sentences if convicted of both offenses. See 730 ILCS 5/5—8—1(a)(3), 5—8—4(h) (West 2006). In exchange for his testimony against defendant, the State agreed to a nine-year prison term for one of the offenses and to dismiss the other charge.

At trial, the State offered Baron McClung immunity pursuant to section 106.2.5(b) and (c) of the Code of Criminal Procedure (725 ILCS 5/106.2.5(b)(c) (West 2008)), which the trial court granted. The State then asked McClung questions regarding statements he had made to Jenkins on May 9, 2007, and May 16, 2008, in which McClung had described his interactions with defendant and Fields on the night that the shooting took place. McClung revealed that Fields spoke with defendant at the car. Fields stated that he thought the Low Ends were in the building. McClung saw defendant wearing a black hoodie and white gloves. After Fields gave defendant a silver "cowboy" revolver, defendant put it in the pocket of his hoodie and followed Fields toward the apartment. Fields and defendant told McClung to wait behind the building. McClung drove to where they directed but eventually drove off. McClung testified that he either did not remember the information he gave Jenkins or maintained that his statements to Jenkins were false.

During cross-examination, McClung stated that he was 17 years' old on April 29, 2007. He said that Jenkins told him that Jenkins knew defendant was the shooter and just wanted McClung to confirm that fact. McClung maintained that all of the statements that he made to Jenkins were

false and he cooperated with Jenkins because he believed that it was the only way he would be allowed to go home from the police station.

McClung also testified that, in November 2007, he went to the office of defendant's trial counsel and wrote a statement in which he wrote the following: he did not know where defendant was at the time of the shooting; defendant had tried to break up the fight in the park; someone threw a brick through the back window of defendant's car; an hour later defendant told McClung that he was going to spend the evening at his girlfriend's apartment; and McClung did not see him again until the next day.

McClung testified that, on the evening of April 29, 2007, he drove a friend's car to the east side of Aurora, where he picked up defendant. He did not notice defendant's demeanor or recall anything defendant had said. However, a DVD recording of portions of Jenkins' interview of McClung revealed that he had told Jenkins that defendant appeared to be "mad" and kept saying, "I'm gonna get my chain back through blood." After he was confronted with the transcript of his statement to Jenkins, McClung acknowledged that he had said those things but they were lies.

McClung further testified that he did not remember having told Jenkins that he drove defendant to the River Street Apartment building. He also could not recall having told Jenkins about a car occupied by women pulling up while he was outside the apartment building. However, the recordings revealed that McClung did tell Jenkins that he drove defendant to the River Street Apartments and did describe the incident about the car occupied by women.

McClung admitted to telling Jenkins that, while they were parked near the apartment building, Fields arrived and spoke to defendant. Fields and defendant discussed how people had jumped defendant in the park. Fields told defendant that the attackers were inside the apartment

building. Defendant asked Fields if he "got one" and Fields handed him a revolver. McClung testified that those claims were lies invented by Jenkins.

McClung also did not recall having told Jenkins that defendant wore a black hoodie and white gloves, and that, before Fields and defendant walked to the apartment building, they told him to wait for them nearby. Contrary to McClung's testimony, the recording he made with Jenkins revealed otherwise.

Jenkins testified that he was the lead detective assigned to the case. He denied talking to Fields in a holding cell before conducting the recorded interview and denied telling Fields to lie. Jenkins asserted that Fields told him that defendant was the shooter during his interview. A recording of Fields' interview with Jenkins conducted on May 1, 2007, was admitted into evidence at the end of the trial. Jenkins also denied telling McClung to concoct a story about the shooting.

Earl James testified that he was present at the River Street Apartments on April 29, 2007, but left before the shooting. In February 2008, he was taken into custody on felony charges. Originally placed in cell block 300, James requested a move to cell block 500 to be close to Fields, who was his friend and former roommate. While in cell block 500, he met defendant. James started working out and conversing with defendant. Defendant showed James a police report with some statements Fields had made in April or May 2008. Defendant also told James about the events of April 29, 2007. Defendant told James that he and Fields pulled up to the River Street Apartments, Fields handed defendant a revolver, and defendant followed Fields into the building. Defendant waited in the stairwell while Fields went up the elevator. Defendant told James that both he and Fields were going to shoot the victims, but Fields froze while defendant fired the shots.

James admitted that he was testifying as part of an agreement he had made with the State to plead guilty to two Class 2 felonies and in exchange he had received two consecutive 24-month terms of probation for those convictions. James' bond was modified in October 2008 to allow him to travel out of state to visit his sick grandmother, but James denied that this modification was made as part of a deal for his testimony.

Defendant's friend, Shauntel Andrews, testified for defendant that he was with defendant on the night of April 29-30, 2007, from about 10 p.m. until after 2 a.m., playing video games at Maurice Culpepper's home. Andrews stated that he waited until the last minute possible to come forward with this information because he did not want to be threatened by anyone.

Culpepper testified that he knew Andrews but did not know defendant. Culpepper stated that he, Andrews, and defendant played video games on the night of April 29-30 from around 10:30 p.m. to 2:00 a.m. Culpepper spoke to Andrews before meeting with defense counsel. Culpepper and Andrews were codefendants in armed robbery cases. Also, Andrews had been convicted of delivery of a controlled substance and vehicular hijacking.

Ashley, defendant's former girlfriend, testified that, on April 29, 2007, she, Hosey, and some other women left a party at the River Street Apartments. She saw a car filled with men pull outside around 10 p.m., but defendant was not there.

Phillips, the victim who had survived the shooting, was the final witness called by the defense. When defendant called Phillips to testify and asked whether he remembered April 29, 2007, Phillips invoked his fifth amendment right against self-incrimination. The trial court asked whether there were any charges involving Phillips in this case. The State informed the court that Phillips had not been charged in connection with the incident, and defense counsel indicated that he knew of no

facts to suggest the fifth amendment applied to Phillips. However, the prosecutor stated that, from the altercation in the park, charges were "possible." Recognizing that there was a question as to whether or not there was a potential for the applicability of the fifth amendment, the court appointed a public defender to represent Phillips.

The following day, David Kliment appeared on behalf of Phillips and informed the court that he had discussed the issue with Phillips and Phillips wished to invoke his right against self-incrimination. Kliment stated: "Based on my conversations with [Phillips], I understand what defense counsel wishes to do with him, but that would open him up to cross-examination and I believe his Fifth Amendment rights would be impacted *** ." Thereafter, the trial court asked if defendant had anything else for the record. Defense counsel asked the prosecutor to grant Phillips immunity, but the prosecutor declined, responding that it was not his responsibility to do so.

At the end of the evidentiary portion of the trial, the parties stipulated that Jessica Bickett would testify that Jenkins interviewed her on April 30, 2007. She told Jenkins that, as she descended the stairs with the other party guests, she heard gunshots. When she reached the first floor, she saw Phillips laying on the floor. Someone asked Phillips who had shot him, and Phillips repeated, "Don Juan, Don Juan." Bickett heard that "Bling" also was involved in the shooting. The stipulation included a waiver of any objections to the information based on hearsay.

Following closing arguments, the trial court found defendant guilty as charged. Thereafter, on December 10, 2008, defendant filed a *pro se* posttrial motion challenging the sufficiency and reliability of the State's evidence and the competency of his trial attorney for failing to interview witnesses whose testimonies would have rebutted the State's theory of guilt. Defense counsel then filed a motion for a new trial which included an allegation that the prosecutor's refusal to grant

Phillips immunity violated defendant's right to due process of law. The motion was supported by a transcript of a recording of an interview with Phillips conducted by defense counsel on March 3, 2008, during which Phillips stated that he knew who had shot him and it was not defendant.

Because defendant had alleged his trial counsel was ineffective, the trial court permitted defense counsel to withdraw and appointed Ron Haskell as counsel to investigate defendant's claims and to represent him at his posttrial and sentencing proceedings. On May 18, 2009, Haskell filed an amended motion for a new trial, reiterating the ineffective assistance and due process claims. At the hearing on the motion, the trial court recognized that he may not have made a finding as to whether there was real danger of incrimination, "but it was clear to me that based on the nature of the events that day that there was the potential for incrimination." The trial court also found the State did not have to grant Phillips immunity, and in this case, the State "did absolutely nothing wrong."

Thereafter, the trial court denied the posttrial motion and sentenced defendant to serve an aggregate sentence of 80 years' imprisonment (48 years for first-degree murder and 32 years for attempted first-degree murder). Defendant timely appeals following the denial of his motion to reconsider sentence.

ANALYSIS

A. Motion to Dismiss

We first address the State's motion to dismiss for lack of jurisdiction, which we have taken with the case. Defendant was admonished, after sentencing, pursuant to Supreme Court Rule 605(a) (eff. October 1, 2001) regarding the steps he must take to appeal from his convictions and sentences. After conferring with counsel, who did not serve as trial counsel but was appointed to represent

defendant on his posttrial allegations of ineffective assistance of trial counsel, defendant's counsel indicated that he did not wish to file a motion to reconsider sentence but wanted to proceed directly to appeal and requested appointment of counsel to represent defendant on appeal. The trial court entered an order for the appointment of counsel to represent defendant on appeal and a notice of appeal was filed. Once defendant was imprisoned, he changed his mind and filed a timely *pro se* motion to reconsider his sentence. The trial court permitted defendant to withdraw his notice of appeal and posttrial counsel filed a motion to reconsider sentence that incorporated and modified defendant's *pro se* motion. Following the denial of the motion, defendant filed a new notice of appeal and another order appointing appellate counsel was entered. The State contends that, since defendant was represented by counsel at the time he filed his timely *pro se* motion to reconsider sentence, his *pro se* filing was unauthorized and, since the only authorized posttrial motion was filed beyond the 30-day limit, it was untimely and of no legal effect.

We believe that there are several reasons to deny the State's motion. First, because defendant's posttrial counsel specifically adopted defendant's timely *pro se* motion, the amended motion was timely. Second, defendant was following the trial court's Rule 605 admonishment that he had the right to contest his sentence by filing a motion to reconsider within 30 days, which he did. Finally, it is apparent that the trial court "lulled" defendant into believing that, if he withdrew his notice of appeal to litigate his motion to reconsider, he would be allowed to file a notice of appeal thereafter. See *People v. Easley*, 199 Ill. App. 3d 179, 184 (1990). Accordingly, we deny the State's motion.

B. Sufficiency of the Evidence

We next address defendant's contention that the State failed to prove him guilty of murder and attempted murder beyond a reasonable doubt. Where there is a challenge to the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see *People v. Phillips*, 215 Ill. 2d 554, 569-70 (2005) (citing *People v. Collins*, 106 Ill. 2d 237, 261 (1985)). A conviction will not be set aside on grounds of insufficient evidence unless the proof is so unreasonable, improbable, or unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

Defendant maintains that the case against him relied on an aggregate of recanted prior inconsistent statements made by Fields and McClung, testimony made by James, a jailhouse informant, testimony of felons who made deals in exchange for their testimony, and the weak identification evidence of Hosey and Davis.

Defendant's argument is based on the credibility of the witnesses. A conviction can not be reversed merely because the defendant claims witnesses are not credible. *People v. Smith*, 177 Ill. 2d 53, 74 (1997). A reviewing court will not retry a defendant or substitute its judgment for that of the trier of fact on questions involving the credibility of witnesses, the inferences to be drawn, or the weight to be given their testimony. *Siguenza-Brito*, 235 Ill. 2d at 228. It is for the trier of fact to accept or reject as little or as much of a witness's testimony and to judge how flaws in parts of their testimony affect the credibility of the whole. *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004). A reviewing court must allow these reasonable inferences in favor of the State. *Cunningham*, 212 Ill. 2d at 280.

In this case, the trial court knew about the deals Moore, James, and Merriweather received in exchange for their testimony. The court considered their testimony with suspicion, but it found the testimony credible because it was generally consistent with other evidence. The court also viewed Davis' identification testimony with suspicion but found some parts of her identification were consistent with Moore's testimony, as well as the video surveillance tapes. Irvin's testimony, which placed defendant's car at the scene, supported the reasonable inference that defendant was at the River Street Apartments at the time of the shooting. Furthermore, the trial court could reasonably infer that Fields would not permit a hooded, masked, gloved person to enter the lobby without knowing that individual's identity. In addition, Fields' and McClung's pre-trial statements implicating defendant, which were recanted at trial, were properly admitted as substantive evidence of the offense. See *People v. Morrow*, 303 Ill. App. 3d 671, 675 (1999) (citing 725 ILCS 5/115—10.1 (West 2008)).

Where the trier of fact convicted defendant on the basis of a recanted prior inconsistent statement, the question for this court is not whether any evidence existed to corroborate that statement, but whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Zizzo*, 301 Ill. App. 3d 481, 489 (1998). It was within the province of the trier of fact to determine which of the inconsistent statements were truthful. *Zizzo*, 301 Ill. App. 3d at 489. The trial judge, who saw and heard all the witnesses, was in a better position than this court to determine the credibility and the weight to be accorded the testimony.

Defendant acknowledges that there was other evidence corroborating his involvement as the shooter and only argues unreliable statements were insufficient to convict him. We find that the trial court's determinations of credibility were not so improbable, unreasonable, or unsatisfactory to

justify a reasonable doubt as to defendant's guilt, and we will not reweigh the court's determinations or retry defendant, especially given the video evidence which corroborated much of the testimony.

C. Invocation of the Fifth Amendment and Immunity

1. Fifth Amendment

Defendant's next contention involves the trial court's permission to allow the surviving victim, Phillips, to invoke his fifth amendment privilege against self-incrimination. Defendant asserts that the "only imaginable charges for which Phillips might have incriminated himself" were those based on the earlier incident in the park, arising out of his taking defendant's chain and later destroying it. Defendant maintains that the trial court could have limited Phillip's testimony and avoided any questioning regarding what happened before the actual shooting.

The fifth amendment guarantees that no person shall be compelled in any criminal case to be a witness against himself. U.S. Const., Amend. V. The privilege guards against the compulsory disclosure of facts tending to establish criminal liability. *People v. Redd*, 135 Ill. 2d 252, 303 (1990). The protection secured by the fifth amendment is confined to those instances where the witness has reasonable cause to believe he might subject himself to prosecution if he answers questions which tend to incriminate him. *People v. Edgeston*, 157 Ill. 2d 201, 220 (1993). Once a witness asserts the privilege, the trial court must determine if, under the particular facts, there is a real danger of incrimination. *Redd*, 135 Ill. 2d at 304.

A witness invoking the privilege against self-incrimination need not prove that the answer to a particular question would necessarily subject him to prosecution. *Redd*, 135 Ill. 2d at 304. Because the privilege must be liberally construed in favor of the witness, any uncertainty as to

whether a question calls for an incriminating answer is to be resolved in favor of the witness. *People v. Brown*, 303 Ill. App. 3d 949, 962-63 (1999).

Evidentiary rulings are within the discretion of the trial court, and the trial court's ruling will not be disturbed absent an abuse of discretion. *People v. Human*, 331 Ill. App. 3d 809, 819 (2002). An abuse of discretion is found only where the trial court's decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court or if it is an error of law. *People v. Lovejoy*, 235 Ill. 2d 97, 125 (2009).

In this case, the trial court knew about Phillips' involvement in at most two altercations with defendant before the shootings took place, which included grabbing defendant's chain and destroying it. Although no charges were pending against Phillips for that activity, there was a possibility that Phillips could be charged and found criminally responsible. Even if Phillips' testimony exposed him to prosecution for a misdemeanor battery or theft, this is activity for which Phillips could have been found criminally responsible. The level of criminal liability does not determine who is protected by the fifth amendment privilege, just facts tending to establish criminal liability. Given the potential exposure to being charged with offenses arising out of taking defendant's chain and later destroying it, we cannot say the trial court abused its discretion by permitting Phillips to invoke his fifth amendment privilege.

Defendant asserts that the trial court could have limited Phillips' testimony to avoid any questions regarding what had happened before the actual shooting took place. Once Phillips testified to the shooting, the trial court would not be able to preclude the State from delving into what had happened before the shooting to explain the context and the motivation behind it. Moreover,

defendant had the opportunity to make an offer of proof as to the substance of Phillips' testimony to establish whether precluding the testimony prejudiced defendant, but did not.

Defendant maintains that the trial court should have conducted a formal hearing as to whether Phillips' fear of incrimination was reasonable, citing *People v. Craig*, 334 Ill. App. 3d 426, 446 (2002), in support. The State observes that, although defendant raised challenges regarding Phillips' right to invoke his privilege against self-incrimination in the posttrial motion and to conduct a formal hearing, defendant acquiesced when the trial court appointed counsel to confer with Phillips and failed to object or comment after Phillips' counsel indicated his belief that Phillips' fifth amendment rights would be impacted. Because defendant failed to raise a contemporaneous objection to the procedure adopted by the trial court, the State contends that defendant has forfeited this issue on appeal. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant asserts that he did not forfeit the issue, but if he did, the issue should be reviewed as plain error. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error).

We find the trial court comported with the requirements of a hearing. When the trial court permitted Phillips to invoke his privilege against self-incrimination, the court first inquired as to whether there were any charges against Phillips. The prosecutor stated that charges were possible and court-appointed counsel for Phillips also represented his client's concerns of self-incrimination. At the hearing on defendant's posttrial motion, the trial court stated that it should have made a finding of incrimination, "but it was clear to [him] that there was the potential for incrimination." The inquiry conducted by the trial court, where the State gave its reasons why Phillips could incriminate himself and where Phillips' counsel also expressed Phillips' concerns and repeated

Phillips' request for the privilege, amounted to a hearing. Unlike the witness in *Craig*, relied upon by defendant, here there is something in the record to indicate that Phillips had reasonable grounds to fear incriminating himself if he answered the questions put to him by defendant or the State. As we noted above, defendant failed to make an offer proof as to the substance of Phillips' testimony to establish whether precluding it would prejudice defendant. Accordingly, we find no abuse of discretion. Because no error occurred, we need not perform a plain-error analysis. See *People v. Walker*, 392 Ill. App. 3d 277, 294 (2009) ("[i]n a plain error analysis, 'the first step' for a reviewing court is to determine whether any error at all occurred").

2. Immunity

In an alternative argument, defendant contends that his due process right to a fair trial was violated when the State refused to grant Phillips immunity to testify. Defendant cites a line of federal cases for the proposition that a prosecutor engages in misconduct when his denial of immunity precludes presentation of relevant evidence and the fact-finding process is distorted. See, *e.g., United States v. Whitehead,* 200 F. 3d 634, 640 (9th Cir. 2000); *United States v. Duran*, 189 F. 3d 1071, 1087 (9th cir. 1999). However, the only case cited by defendant as authority in this State is *People v. Rosenberg*, 341 Ill. App. 3d 893 (2003), which the supreme court reversed because the evidence sought by the defendant could have been obtained by other means. *People v. Rosenberg*, 213 Ill. 2d 69, 81-82 (2004). Thus, Illinois has not adopted the federal line of cases relied on by defendant. In this case, nothing in the record indicates that the State's refusal to grant immunity distorted the fact-finding process, especially when Phillips' identification of Fields as the shooter was stipulated to by the parties through Bickett's testimony. Accordingly, we reject defendant's argument regarding immunity.

D. Coconspirator Statements

We next address defendant's contention that the trial court erred when it admitted two statements made by Fields under the coconspirator exception to hearsay. Specifically, defendant objects to the admissibility of Hosey's testimony that Fields "told me to go back in because they was on some bullshit" and Moore's testimony that Fields told him "[w]atch what me and Bling about to do." The State contends that, although defendant objected to the admission of the statements at trial, he did not raise the objections in the posttrial motion and defendant's failure to challenge the admission of the hearsay evidence in a posttrial motion forfeits this issue on appeal. See *Enoch*, 122 Ill. 2d at 186. Defendant requests, however, that we review the issue based on ineffective assistance of counsel, plain error, or a relaxation of forfeiture as the issue was fully litigated in the trial court.

Pursuant to the coconspirator exception to the hearsay rule, any declaration by one coconspirator is admissible against all coconspirators where the declaration was made during the course of and in furtherance of the conspiracy. *People v. Kliner*, 185 Ill. 2d 81, 141 (1998). Statements made in furtherance of a conspiracy include those that have the effect of advising, encouraging, aiding, or abetting its perpetration. *Kliner*, 185 Ill. 2d at 141. In order to establish a *prima facie* showing of a conspiracy, the State must prove by a preponderance of the evidence (independent of the coconspirator's hearsay statements) that: (1) two or more persons intended to commit a crime; (2) they engaged in a common plan to accomplish the criminal goal; and (3) an act or acts were done by one or more of them in furtherance of the conspiracy. *People v. Batrez*, 334 Ill. App. 3d 772, 783 (2002). We observe that defendant does not contest a *prima facie* showing of the conspiracy or that the State proved such a conspiracy by a preponderance of the evidence

independent of the statements defendant questions. Rather, he argues that the statements were not made in furtherance of the conspiracy.

Defendant cites *People v. Wilson*, 302 Ill. App. 3d 499, 511 (1998), for the proposition that statements describing the crime are not in furtherance of a conspiracy. In *Wilson* however, the statements were found inadmissible because they were made *after* the accomplishment of the conspiracy and were more akin to bragging. The statements in this case, unlike the statements in *Wilson*, explained events which were occurring during the pendency of the conspiracy; they were not narratives of a past crime. Defendant maintains that the timing of the statements is immaterial. That the statements were made no more than a few hours before the shooting is a distinguishing factor, as it makes them admissible as statements that have the effect of advising and aiding in the conspiracy. Here, Fields told Moore to "watch" what he and defendant were about to do and Hosey to "go" inside because he and defendant "was on some bullshit."

The determination that Fields' statements advised Moore and Hosey of the pending perpetration of the offense was not arbitrary or unreasonable. From the circumstances surrounding the victims' public altercation with defendant in the park, the grabbing of defendant's chain, and defendant's comments about getting it back in blood, it is reasonable to infer defendant and Fields sought to shoot the victims and wanted everyone to know who was responsible for the shooting that was about to take place. Fields' statement to Moore advised of the object of the conspiracy. Fields statement to Hosey aided in the conspiracy by directing her to leave the immediate area prior to the shooting. Accordingly, the trial court did not abuse its discretion by admitting the hearsay statements.

Because the trial court did not err by admitting the statements under the hearsay exception, there can be no plain error. See *Walker*, 392 Ill. App. 3d at 294. Likewise, because the trial court did not err, defendant cannot establish that counsel was ineffective for failing to raise this issue in the posttrial motion.

E. Ineffective Assistance of Counsel

We last address defendant's contention that his posttrial counsel was ineffective for failing to investigate and support defendant's *pro se* claims of ineffective assistance of trial counsel by failing to interview potential witnesses Johnson and Smith. To prove ineffective assistance, defendant must demonstrate that (1) his counsel's performance was deficient and (2) the defense was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). In establishing sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

Defendant argues that "[i]f those witnesses were at the shooting scene *** [Johnson's and Smith's] testimony *could* have shed much-needed light on the only contested issue at this trial: the identity of the shooter." (Emphasis added.) Without more, the argument is mere speculation. Speculation does not satisfy the burden of showing that there is a reasonable probability that, but for

counsel's deficient performance, the outcome of the case would have been different. Accordingly, we reject this argument.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

Affirmed.