

No. 1-09-2445

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 07 CR 19885
)	
DETRIC ROSS,)	Honorable
)	Diane Cannon,
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

Held: The trial court did not err in excluding the testimony of Dr. Geoffrey Loftus, an expert in eyewitness identification. The court did, however, err in permitting the State to impeach its own witness with prior inconsistent statements where the witness testimony did not affirmatively damage the State's case. But this error was harmless given the sufficient admissible evidence to sustain defendant's conviction.

¶ 1 Defendant Detric Ross was charged with first degree murder in the shooting death of

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Gerardo Badajos. Following a jury trial, defendant was convicted of first degree murder and sentenced to 55 years in prison. On appeal, defendant argues that the trial court abused its discretion in preventing defendant from calling an expert witness in the area of eyewitness identification where the evidence against defendant was based solely on eyewitness testimony. Defendant also contends that the trial court erred in allowing the State to impeach its own witness. For the reasons that follow, we affirm.

¶ 2

BACKGROUND

¶ 3 On August 25, 2006, Gerardo Badajos, also known as Tito, was shot and killed near his house located at 5610 South Maplewood Avenue in Chicago, Illinois. Defendant was identified as the shooter in photo-array and lineup procedures by Giggiola Aguilar, Tito's sister, Daniel Badajos, Tito's brother, and Gerardo Sanchez, all of whom were present when the crime was committed.

¶ 4 Prior to trial, defendant moved to suppress the identification on the basis that the photo-array shown to Aguilar the day following the shooting was improperly suggestive in its composition and construction. After hearing testimony from the officers who administered the array as well as Aguilar, the court denied defendant's motion to suppress.

¶ 5 Subsequently, defendant indicated his intention to call as a witness during trial Dr. Geoffrey Loftus, a purported expert in eyewitness identification. If called, Dr. Loftus was expected to testify to the scientific evidence regarding: (1) the effect of low lighting on perception and subsequent memory; (2) the phenomenon of change blindness; (3) the problems inherent in cross racial identification; (4) the effects of stress on eyewitness identification; (5) the

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role lineup procedures play on the accuracy of identifications; (6) the effects of suggestive post-event information, such as court proceedings; and (7) witness confidence as a poor indicator of accuracy. The State made a motion *in limine* to exclude Dr. Loftus' testimony. After hearing argument and taking the motion under advisement, the trial court granted the State's motion to exclude the testimony of Dr. Loftus, noting specifically that because one witness recanted his identification, Dr. Loftus's testimony would confuse the jury.

¶ 6 At trial, Giggiola Aguilar testified on behalf of the State. Aguilar was at her mother's house at 5610 South Maplewood Avenue on the evening of August 25, 2007 to attend a party thrown by her mother's landlord. After she arrived at the party at approximately 9:00 p.m., she learned that the windows to her car had been smashed. Earlier that day, the windows of her mother's car had also been smashed. Aguilar and Tito went outside to assess the damage, and Tito stopped a passing police car in order to make an officer aware of the situation and provide him with the names of those he believed to be responsible. Approximately 15 minutes later, Aguilar walked to the corner of 56th Street and Maplewood Avenue to make a phone call. Her brother Daniel accompanied her. They were approached by a person identifying himself as "Psycho G," who told them he did not appreciate them shooting a block away. Neither Aguilar nor Daniel responded. Tito, also on the phone, then joined the group at the corner.

¶ 7 At that point, Aguilar handed her phone to Psycho G, as the friend with whom she had been speaking had asked to talk to him. As Psycho G was on the phone, a person whom Aguilar did not recognize came up to the group and shook Tito's hand, walking right in front of her. Aguilar heard Tito say "What's up, Shine." The unidentified individual stepped back, which

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allowed her to look at him. Aguilar attempted to introduce herself, but the individual looked away, turned around, and then shot Tito. In total, Aguilar was able to observe him for approximately one to two minutes. The individual, whom Aguilar identified at trial as defendant, then ran away.

¶ 8 When police arrived at the scene, Aguilar described the shooter as a light complexioned African-American male, who was 5'11" tall weighing between 150 to 170 pounds. She further stated that the shooter was wearing a baseball cap, a long-sleeved shirt, jeans and white Nikes.

¶ 9 Early in the morning of August 26th, Aguilar went to the Area One police station where Detective Daniel Gorman asked her to look through 39 black and white photographs of African-American men. Aguilar testified that she told Detective Gorman that an individual in the photo-array, who was later identified as Walter Thomas, looked like the man who shot her brother. Specifically, she stated that the two had similar complexions and eyes. However, she did not tell the detective that the individual in the photo was the man who shot her brother.

¶ 10 Two days after Tito was shot, Detective William Brogan came to Aguilar's mother's house and presented Aguilar with five color photographs. Walter Thomas's photo was not included in this array. Defendant's picture, however, was in this second group of photos and Aguilar identified him as Tito's murderer.

¶ 11 Later that evening, Aguilar returned to Area One to view a physical lineup. Again, Walter Thomas was not part of this lineup, but defendant was. Although none of the individuals in the lineup were wearing baseball caps, Aguilar was able to identify defendant as the shooter. Before leaving the station, she asked Detective Gorman for the name of the person she identified

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and learned his nickname was "Shine." For the first time, she informed the detective that her brother had referred to the person who shot him as Shine.

¶ 12 Since making the identification on August 27th, Aguilar had attended at least 10 of the court proceedings at which defendant was present.

¶ 13 Daniel Badajos, Tito's brother, echoed his sister's testimony regarding the events that occurred on the night of August 25th before Tito's shooting. Specifically, he testified that he was standing on the corner as Aguilar made her phone call when Psycho G approached them and said "I don't appreciate you all shooting, I'll kill a nigger over that." Daniel also saw the man who approached Tito and shot him. He testified that the man, who he identified in court as defendant, was wearing dark pants, a long-sleeved shirt, a baseball cap, and tennis shoes. Daniel explained that initially he was scared when defendant approached their group, but once defendant shook Tito's hand, he assumed they were friends. The entire encounter lasted approximately two minutes before defendant took out his gun and began shooting "over and over again."

¶ 14 When police arrived, Daniel gave them nearly the same description as Aguilar, though the two were questioned separately. Daniel testified that he told the officer the offender was a light-skinned African-American male approximately six feet tall weighing 150 to 160 pounds. Daniel was unable to recall whether the offender had facial hair. He described the weapon used to shoot Tito as a blue steel semi-automatic handgun. When Daniel went to the police station early in the morning of August 26th, he was separately shown the same photographs his sister had seen, but did not make an identification of the shooter.

¶ 15 On August 27th, he received a call from his sister who told him to come to the police

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station to view a physical lineup. There, he viewed the lineup after his sister, but without speaking to her first. Prior to viewing the lineup, Detective Gorman told him not to be scared and that he was under no pressure to make an identification. Daniel testified that although he recognized an individual in the lineup as the one who shot Tito, he told the officers otherwise, because the person who shot Tito had been wearing a hat. Thus, he requested the detectives to ask the individuals in the lineup to put hats on. After seeing the lineup wearing hats, Daniel was able to identify defendant as the man who shot his brother.

¶ 16 Gerardo Sanchez, also known as Psycho G, also testified for the State. On August 25th he was attending a block party at 56th Street and Campbell Avenue when he heard gunshots. He walked over to the next block, which was 56th Street and Maplewood Avenue, and saw three people standing on the corner. As he was somewhat intoxicated, he approached them angrily and told them to stop shooting. Among the group of three was a female, who handed him her cell phone so that he could speak to the person on the other end. As Sanchez was on the phone with his head down, he heard a gunshot next to his ear. He kept his head down as he heard two more shots, and when he looked up, the only person he saw was the woman whose phone he had. Sanchez returned her phone and went back to the block party. Sanchez testified that he did not hear or see anyone join the group before the shots were fired.

¶ 17 Fifteen minutes later, Sanchez returned to the area of 56th Street and Maplewood Avenue looking for his own phone. By this point, the police had arrived in response to the shooting, and, according to Sanchez, an officer "grabbed" him and took him to the station. At the station, Sanchez told police he did not see who did the shooting, nor did he see anyone flee the scene, but

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the police persisted in their questioning and insisted that Sanchez knew the identity of the shooter. When Sanchez was presented with mugshots, he pointed at random to an individual, later identified only as "Kent," in order to satisfy the officers. Sanchez was then released from the station to go to work.

¶ 18 On the morning of August 27th, several officers from the Chicago Police Department arrived at Sanchez's workplace, handcuffed him, and brought him back to the police station. According to Sanchez, an officer told him that they had already identified the shooter and only needed Sanchez's confirmation. Sanchez continued to maintain that he had not seen the shooter. At trial, the State asked whether he then told the officers that he saw defendant, whom he knew as Shine, shoot Tito. Sanchez denied making that statement, and further denied telling the officer questioning him that the reason he did not implicate defendant earlier was because he was afraid. He testified instead that detectives presented him with photographs and asked him to identify the person he knew as Shine, which he did. He indicated that Shine and defendant were the same individual.

¶ 19 Later in the evening of the 27th, Sanchez viewed a physical lineup, and again identified Shine pursuant to the detectives' request. Sanchez further testified that he was then led into a room with a detective and a state's attorney, and he told them again he had not seen who shot Tito; specifically, he denied seeing Shine shoot Tito. As he was speaking to the detective and the assistant state's attorney, the assistant state's attorney began preparing a statement. Before Sanchez left the room, he was asked to sign the statement. However, Sanchez testified that because the attorney did not permit him to read the statement first, he declined to sign it. At trial,

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he denied telling the state's attorney that his reason for declining to sign the statement was because he was afraid for himself and his family if he positively identified defendant. The statement remained unsigned.

¶ 20 In response to Sanchez's testimony, the State sought to call Assistant State's Attorney Robert Robertson, who had written the statement Sanchez was asked to sign, as an impeachment witness. Defendant moved to bar Robertson's testimony, which the court denied on the basis that Sanchez's testimony at trial that was inconsistent with his statements to Robertson and affirmatively damaged the State's case.

¶ 21 ASA Robertson testified that on August 27th he was an assistant state's attorney in the felony review unit. At 9:15 p.m., he spoke with Aguilar, Daniel and Sanchez. After speaking with Sanchez, he asked if he could memorialize Sanchez's statement, and Sanchez agreed. Detective Gorman was present when Robertson began taking down Sanchez's statement. According to Robertson, Sanchez told him that he knew a person who went by the name "Shine," though the two were not friends. Sanchez saw Shine loitering on the corner of 56th Street and Campbell Avenue three or four times per week over the past several years. With regard to the shooting, Robertson testified that Sanchez told him he saw Shine fire the gun at Tito and flee immediately afterward. Over defendant's objection, Robertson testified that Sanchez explained to Robertson that originally he did not tell the police that Shine was the shooter because he was afraid for himself and his family. Therefore, while Sanchez wanted to help, he did not want anyone to discover that he had made the identification. For that reason, he refused to sign the statement after Robertson had him read it aloud.

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¶ 22 The State also called Detective Gorman of the Chicago Police Department as a witness. Detective Gorman was called to the scene of the shooting on August 25th at 9:30 p.m. At the scene, he interviewed Daniel while his partner interviewed Aguilar. During the interview with Daniel, a man approached the scene. Daniel pointed at the man and identified him to Detective Gorman as Psycho G (Sanchez), who had witnessed the shooting. When Detective Gorman spoke to Sanchez, he admitted he was present during the shooting. Detective Gorman then arranged for Sanchez, Aguilar and Daniel to proceed to Area One. At Area One, Detective Gorman elicited more detail from Sanchez regarding the shooting. Sanchez stated that he heard a gunshot and saw a hand with a gun next to his face, but gave no information about the person who had fired the gun.

¶ 23 Later that night into the next morning, Detective Gorman pulled photos from central booking based on the description Aguilar and Daniel gave of the offender. Ultimately, he compiled a photo-array of 39 African-American men and presented the array first to Aguilar and then to Daniel. Prior to presenting the array, Detective Gorman had both Aguilar and Daniel sign an advisory form which instructed them not to assume he knew who the suspect was, and advised them that the suspect may not be in the array. The form also stated that they were not required to make an identification. Based on Aguilar's statement that a man in the array, later identified as Walter Thomas, looked like the shooter, an investigative alert was broadcast for that individual.

¶ 24 On August 26th, Detective Gorman requested that Sanchez be brought in for another round of questioning, as he believed Sanchez had not been truthful the night before. At this time, Sanchez stated that earlier on the day of the shooting, he saw a man he knew as Kent. Sanchez

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described Kent as violent and capable of killing, but still maintained he had not seen the shooting. Upon receiving this new information, Detective Gorman conducted a search for Kent and learned that he lived across the street from Tito but was in jail on the day the murder occurred.

¶ 25 When Detective Gorman arrived at work the next day, he learned that defendant was in custody. That night, he conducted a physical lineup in which defendant was included.

According to Detective Gorman, Aguilar, Daniel and Sanchez all identified defendant as the shooter after viewing the line up. Specifically, Detective Gorman testified that Sanchez pointed to defendant, said "that's Shine," and stated that Shine shot the man on 56th Street and Maplewood Avenue.

¶ 26 Detective Brogan, also of the Chicago Police Department, testified in conformity with Detective Gorman. He was called to investigate the murder of Tito on August 27th. In connection with that investigation, he had Sanchez brought into the station and asked him why he had identified Kent in the murder when Kent was in jail at the time. Over defendant's objection, Detective Brogan testified that Sanchez told him he wanted to be truthful, but he was afraid for his family. Sanchez then proceeded to inform Detective Brogan that he saw a man he knew as "Shine" from the area of 58th Street and Campbell Avenue shoot Tito. A photo array was generated of people who lived in that area and presented to Sanchez. Sanchez pointed to a photo of defendant and said "That's Shine and that's the guy that shot him."

¶ 27 Based on Sanchez's identification, Detective Brogan took an 8x10 picture of defendant and generated four other pictures of people with like physical characteristics to show to Aguilar

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at her home that afternoon. When Aguilar also identified defendant as the man who shot her brother, Detective Brogan arrested defendant.

¶ 28 At the conclusion of the State's evidence, both sides stipulated that if called to testify, forensic investigator Shader would state that he did not recover shell casings at the scene of the crime. Further, he would testify that shell casings would be recovered if the weapon used was a semi-automatic handgun, but not if the weapon was a revolver.

¶ 29 After hearing closing arguments, the jury found defendant guilty of first degree murder and further found that defendant personally discharged the weapon that was used to commit the murder. Following a sentencing hearing, the trial court sentenced defendant to a total of 55 years in the Illinois Department of Corrections. The motion to reconsider sentence was denied and defendant timely filed this appeal.

¶ 30 ANALYSIS

¶ 31 Defendant first contends that the trial court erred in preventing him from presenting the testimony of Dr. Geoffrey Loftus, an expert in eyewitness identification.

¶ 32 As a general rule, an expert witness may testify if he possesses experience and qualifications which provide him with knowledge that is not common to lay persons and where his testimony will aid the jury in reaching its conclusion. *People v. Enis*, 139 Ill. 2d 264, 288 (1990). The decision of whether to allow an expert witness to testify is within the broad discretion of the trial court, and when considering the testimony's reliability, the court should balance its probative value against its prejudicial effect. *Id.* at 290. Stated differently, the trial judge should "carefully scrutinize" the necessity and relevance of the expert testimony and

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determine whether there is a logical connection between the testimony and the facts of the case.

People v. Tisdell, 338 Ill. App. 3d 465, 468 (2003).

¶ 33 Initially, defendant argues that the trial court failed to undertake the careful scrutiny required in determining the relevance of Dr. Loftus's testimony to the facts of the instant case. We disagree. The trial court ordered briefing and heard extensive arguments on the motion to exclude the expert testimony of Dr. Loftus after which the court took the motion under advisement before returning with a ruling. In its oral ruling, the court stated it had considered the motions filed by both parties and the proposed testimony of Dr. Loftus,¹ and balanced the probative value with the prejudicial effect, in accordance with the mandate of *Enis*, *People v. Allen*, 376 Ill. App. 3d 511 (2007), and *In re Keith C.*, 378 Ill. App. 3d 252 (2007). Ultimately, the court concluded that "the particular circumstances, that being the identification, naming of the defendant by a nickname, the time of the identification with regards to the incident, the earlier description does not warrant testimony of an expert in this case." The court went on to highlight the confusion that would result if the jury were to consider Dr. Loftus's testimony in connection with Sanchez's identification in particular, given that Sanchez's identification had been retracted.

¶ 34 This diligent inquiry stands in contrast to that which we held insufficient in *Allen*. In that case, there was no indication that the trial court seriously considered the relevance of the expert's proposed testimony in connection with the facts of the case. *Allen*, 376 Ill. App. 3d at 526. Instead, the trial court merely stated it did not believe the expert would assist the jury and would

¹ Defendant also provided the court with a report prepared by Dr. Loftus, but this was not made part of the record on appeal.

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in fact confuse them more. *Id.* at 525. We determined that there was "no considered basis" for this conclusion. *Id.* at 526. In contrast, here, the court gave several reasons why it believed Dr. Loftus's testimony would not be relevant or probative, citing, for example, the timing of the identification and the consistent early descriptions of the shooter by the eyewitnesses. Further, the court gave a concrete example of how Dr. Loftus's testimony would confuse the jury. Merely because the court referred specifically to the confusion that would result due to Sanchez's recantation of his identification, it does not follow, as defendant contends, that the court failed to consider the relevance of Dr. Loftus's testimony to the identifications made by Aguilar and Daniel, neither of which were recanted. When read as a whole, the court's ruling does not turn solely on its findings regarding potential juror confusion, but takes into account the other circumstances of the case bearing on the relevance of the expert's testimony. Therefore, we conclude that the court sufficiently inquired into Dr. Loftus's proposed testimony so as to support its exercise of discretion.

¶ 35 We turn next to whether this exercise of discretion was proper where it resulted in the preclusion of the expert testimony. As a starting proposition, we note that our supreme court has cautioned against the overuse of expert testimony, stating:

"Such testimony, in this case concerning the unreliability of eyewitness testimony, could well lead to the use of expert testimony concerning the unreliability of other types of testimony, and eventually, to the use of experts to testify as to the unreliability of expert testimony. So-called experts can usually be obtained to support most any position. The determination of a lawsuit should not

depend upon which side can present the most or the most convincing expert witnesses. We are concerned with the reliability of eyewitness expert testimony [citations], whether and to what degree it can aid the jury, and if it is necessary in light of defendant's ability to cross-examine witnesses." *Enis*, 139 Ill. 2d at 289.

Nevertheless, in the years since *Enis*, courts in Illinois as well as other jurisdictions have recognized the value experts may have in dispelling common myths and misconceptions surrounding identifications and their accuracy. See, e.g., *People v. Tisdell*, 316 Ill. App. 3d 1143, 1157 (2000), *rev'd on other grounds*, 201 Ill. 2d 210 (2002) (numerous studies describing the high potential for eyewitness error, coupled with juror misconceptions about identifications, may make expert testimony helpful); *Allen*, 376 Ill. App. 3d at 525-26; accord *U.S. v. Brownlee*, 454 F.3d 131, 142 (3rd Cir. 2006); *People v. Campbell*, 847 P.2d 228, 233 (Colo. App. 1992). The value of the testimony, though, must be measured by the specific facts of the case at bar. Where the topics the expert will testify to do not correspond to the issues of identification in the case, we have routinely affirmed the trial court's exclusion of the testimony. See, e.g., *People v. Aguilar*, 396 Ill. App. 3d 43, 54-55 (2009); *In re Keith C.*, 378 Ill. App. 3d at 264; *Enis*, 139 Ill. 2d at 288.

¶ 36 Here, defendant sought to introduce testimony relating to seven different issues in eyewitness identification, but few of these are relevant to the identifications made by Aguilar and Daniel. For instance, according to defendant, Dr. Loftus would testify to the problem low lighting plays in making accurate identifications. But while the crime did occur at night, Daniel explicitly testified that the street was illuminated both by a streetlight and by the lights from a

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nearby elementary school. Also irrelevant is expert testimony regarding the effects of post-event information on identification, due to the fact that Aguilar's identification of defendant occurred well before she saw him at the 10 pre-trial court dates. Dr. Loftus was further expected to testify regarding the phenomenon of change blindness, or a witnesses's inability to recall an individual's appearance moments after speaking with them. However, this was not a factor in the instant case where both Aguilar and Daniel were able to describe in detail the shooter's appearance immediately following the shooting.

¶ 37 Other portions of Dr. Loftus's proposed testimony, including those related to unconscious transference and suggestive lineup procedures, are premised on speculation. Unconscious transference occurs when an eyewitness identifies an individual in a lineup or photo-array because that person is somehow familiar to them. Defendant posits that because he lived near their mother's house, Aguilar and Daniel may have seen him in the neighborhood prior to August 25th. However, there is no testimony that Aguilar or Daniel recognized defendant from the neighborhood at the time they identified him on August 27th. To the contrary, both Aguilar or Daniel testified at trial that they had never seen defendant before the shooting. Likewise, testimony regarding the importance of double-blind lineup procedures in order to ensure an accurate identification is also based on speculation. Again, there is no testimony that Detective Gorman or Detective Brogan, who conducted the physical lineup and the photo-array, respectively, ever did anything to suggest that they knew the identity of the offender. See *In re Keith C.*, 378 Ill. App. 3d at 263 (without evidence that police engaged in suggestive behaviors in conducting the lineup, there was no abuse of discretion in excluding expert testimony on this

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issue).

¶ 38 Dr. Loftus would also have testified to the effects of stress on identification. The relevance of this presents a somewhat closer question, as the circumstances of the shooting suggest that the witnesses were under some stress, given that Aguilar's car windows had been smashed earlier that evening and Aguilar and Daniel were being accosted by an intoxicated man accusing them of shooting in the neighborhood. However, in recounting his emotional state that evening, Daniel stated that while he was initially afraid when defendant arrived, after he saw Tito and defendant exchange greetings, he relaxed, believing that defendant was a friend. Aguilar, too, was prepared to shake defendant's hand and introduce herself. Thus, while the events of the day may have made the witnesses "uneasy," as the State described in its rebuttal argument, there is nothing to suggest they were particularly afraid of defendant so as prevent them from making an accurate identification.

¶ 39 Finally, Dr. Loftus would have explained that cross racial identifications are less reliable, and that witness confidence does not strongly correlate to accuracy. Although both cross racial identification - the eyewitnesses are Hispanic, while defendant is African-American - and witness confidence were present in this case, these factors alone do not warrant a new trial (*Enis*, 139 Ill. 2d at 289 (witness confidence alone does not warrant reversal and remand)), particularly where the identifications were made within 48 hours after the occurrence. See *Aguilar*, 396 Ill. App. 3d at 55 (witness stress and presence of weapon did not require new trial to include expert testimony where identifications were made within 24 hours after shooting). Accordingly, we agree with the trial court that the expert testimony had limited relevance to the case at bar and conclude that the

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exclusion of this testimony was not an abuse of discretion.

¶ 40 Defendant's second argument on appeal surrounds the admission of testimony from ASA Robertson impeaching Sanchez with Sanchez's prior inconsistent statements. Defendant maintains this was improper impeachment in light of the fact that Sanchez was a witness for the State. The trial court's admission of ASA Robertson's testimony is subject to review for an abuse of discretion. See *People v. Ward*, 101 Ill. 2d 443, 456-57 (1984).

¶ 41 Illinois Supreme Court Rule 238(a) (eff. Apr. 11, 2001), permits both the defendant and the State to impeach their own witnesses. However, impeachment by way of prior inconsistent statements is permitted only where a witness's testimony has damaged the position of the impeaching party. *People v. Weaver*, 92 Ill. 2d 545, 563 (1982). It is not sufficient if a witness merely disappoints the State by failing to incriminate the defendant; rather, the testimony must positively aid the defendant's case. *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 44, citing *People v. Cruz*, 162 Ill. 2d 314, 360 (1994); see also *Weaver*, 92 Ill. 2d at 564 ("[i]t is only when the witness' testimony is more damaging than his complete failure to testify would have been that impeachment is useful").

¶ 42 Our supreme court has explained that in the absence of affirmatively damaging testimony by a witness, the only purpose for introducing a prior inconsistent statement is to have the jury consider otherwise inadmissible hearsay as substantive evidence. *Cruz*, 162 Ill. 2d at 362. Thus, the requirement of affirmative damage to the State's case must be rigorously enforced "in order to foreclose the introduction of oral inconsistent statements under the guise of impeachment." *Id.*

¶ 43 It is undisputed that Sanchez's testimony at trial that he did not see who shot Tito was

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inconsistent with the statements he previously made to ASA Robertson positively identifying defendant as the shooter. Thus, the issue here is whether Sanchez's inconsistent testimony damaged, rather than failed to support, the State's case.

¶ 44 *People v. McCarter*, 385 Ill. App. 3d 919 (2008), cited by defendant, is instructive on this point. In *McCarter*, prior to trial, witness Lakesha Johnson told assistant state's attorneys that the defendant had made statements to her to the effect that he planned to rob the victim. *McCarter*, 385 Ill. App. 3d at 922. At trial, however, Johnson testified that the defendant never made such statements to her and that she only told the assistant state's attorneys otherwise because a police sergeant had threatened to take her children away and charge her with murder if she did not provide information regarding the crime. *Id.* Under these circumstances, we held that it was improper for the State to impeach Johnson with her pre-trial statements. *Id.* at 933. Specifically, we explained that Johnson's testimony did not offer evidence of defendant's innocence, but merely failed to provide evidence of his guilt. *Id.* As such, we held that Johnson's testimony constituted a "refusal to incriminate defendant" which did not affirmatively harm the State's case. *Id.*

¶ 45 Similarly, in the case *sub judice*, Sanchez also declined to provide evidence of defendant's guilt, but his testimony did not go so far as to establish defendant's innocence. Significantly, Sanchez neither identified anyone else as the shooter, nor did he affirmatively state defendant did not commit the crime. Moreover, contrary to the State's contention, Sanchez's testimony that he did not see or hear anyone come up to the group prior to the shooting did not "remove defendant from the scene of the crime." Rather, Sanchez explained that his inability to register the

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appearance of the shooter was due to the fact that he was on the phone, looking at the ground when he heard the gunshots. While this testimony may have disappointed the State, it in no way affirmatively harmed the State's case. See *People v. Sims*, 285 Ill. App. 3d 598, 610 (1996) (witness's recantation of statement to police detectives that he saw the defendant shoot the victim did not damage the State's case).²

¶ 46 Nor are we persuaded that Sanchez's claim he was bullied by police into making an identification affirmatively damaged the State's case. Again, *McCarter* is instructive. There, witness Johnson also claimed that she was coerced into providing false information by an officer who threatened to remove her children from her custody. *McCarter*, 385 Ill. App. 3d at 922. Nevertheless, we found that no affirmative damage to the State's case occurred due to her testimony. *Id.* at 933. The same is true here. Accordingly, because the State had no legitimate need to impeach Sanchez's credibility, we hold that ASA Robertson's testimony was admitted erroneously.

¶ 47 While this error was not cured by a jury instruction limiting the use of the testimony for the sole purpose of weighing Sanchez's credibility (see *People v. Bailey*, 60 Ill. 2d 37, 43-44 (1975)), we must agree with the State that the error was harmless. See *People v. Chatmon*, 236 Ill. App. 3d 913 (1992) (improper impeachment is subject to harmless error analysis). In evaluating the harmlessness of the admission of ASA Robertson's testimony, we consider whether there was sufficient competent evidence establishing defendant's guilt beyond a

² In fact, far from worsening the State's position, Sanchez's testimony admitting that he identified defendant as Shine was helpful to the State, where Aguilar had testified that her brother referred to the man who shot him by that same nickname.

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reasonable doubt, and whether the error materially contributed to the conviction. *People v. Spence*, 188 Ill. App. 3d 761, 766 (1989).

¶ 48 Defendant maintains that ASA Robertson's testimony, particularly as it related to Sanchez's fear of defendant, was so prejudicial as to materially contribute to his conviction. But this argument is unpersuasive where the properly admitted evidence established defendant's guilt beyond a reasonable doubt. Significantly, the testimony of one credible eyewitness has been held sufficient to sustain a conviction. *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 41; see also *People v. Robertson*, 198 Ill. App. 3d 98, 106-07 (1990). Here, not one but two eyewitnesses, who stood a few feet away from defendant for several minutes before the shooting, identified defendant in an in-person lineup less than 48 hours after the shooting. Both eyewitnesses were also able to provide a detailed description of the shooter to officers immediately following the shooting that was consistent with defendant's appearance. Neither witness's credibility was called into question. In light of this properly admitted evidence supporting defendant's conviction, we conclude that the admission of the impeachment testimony was harmless error.

¶ 49

CONCLUSION

¶ 50 For the reasons stated, we affirm the judgment of the circuit court.

¶ 51 Affirmed.