

No. 1-10-1734

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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. 08 CR 9555
)	
REYMUNDO MELGOZA,)	Honorable
)	Thomas V. Gainer,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶1 *Held:* Defense counsel's representation at trial was not ineffective; the plain error doctrine does not apply to reach the forfeited issue on appeal of whether the trial court erred in excluding certain testimony by one of the defense witnesses; the trial court did not improperly admit prior bad acts evidence at trial.

¶2 Following a bench trial in the circuit court of Cook County, defendant Reymundo Melgoza was convicted of two counts of aggravated discharge of a firearm and sentenced to six years of imprisonment. On direct appeal, the defendant argues that: (1) defense counsel rendered ineffective assistance at trial; (2) the trial court erred in prohibiting the introduction of evidence by the defense

to impeach the State's primary witness; and (3) the trial court improperly admitted evidence of prior bad acts and failed to limit the amount of such evidence at trial. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶3

BACKGROUND

¶4 On April 26, 2008, the defendant, while riding as a passenger in a black vehicle in Chicago, Illinois, fired several gunshots at another vehicle carrying two individuals, Salvador Catalan (Catalan) and Matthew Lopez (Lopez). Neither of the two victims was physically injured as a result of the defendant's actions. In May 2008, the defendant was charged with two counts of attempted murder and four counts of aggravated discharge of a firearm.

¶5 On November 12, 2008, the State filed a motion to introduce other crimes evidence (motion for other crimes evidence), requesting that evidence of a prior traffic altercation involving the defendant and Catalan be admitted at trial to show the defendant's "motive, identity, intent, and absence of mistake." On September 3, 2009, at the hearing on the motion for other crimes evidence, the State argued that on March 14, 2008, Catalan was driving his car with his girlfriend as a passenger in the 4200 block of 79th Street in Chicago, Illinois, when a vehicle driven by the defendant approached them from the opposite direction of travel (the traffic incident). The defendant, while "throwing gang slogan[s]" and "calling out gang slogan names," swerved his car into Catalan's vehicle, causing it to hit a pole. The traffic incident was reported to the police but no charges were brought against the defendant. The State argued that the traffic incident was not an accident and that it was sufficiently similar to the events leading up to the April 2008 shooting to make it admissible. Over defense counsel's objection, the trial court allowed the State to introduce

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evidence of the traffic incident at trial for the purpose of showing the defendant's intent, motive and "common scheme that some sort of animus existed between [the defendant] and [Catalan]." However, the trial court specifically cautioned that it would strike and disregard any evidence of the traffic incident if the evidence at trial were to show that it was only an accident, rather than a deliberate act designed by the defendant to inflict harm upon Catalan.

¶6 On January 6, 2010, a bench trial commenced during which the State presented the testimony of two witnesses. Catalan testified that on April 26, 2008, at approximately 1a.m., he drove his car with his nephew, Lopez, to a McDonald's restaurant at 84th Street and Pulaski Road in Chicago, Illinois. The restaurant parking lot was brightly lit and, while in line at the drive-thru lane, a black car pulled up next to Catalan's car. Catalan did not recognize the two men in the driver and passenger seats of the black car, but noticed the defendant, whom he had known from high school, sitting behind the driver in the back of the vehicle. The defendant's window was open and he began yelling gang slogans such as "S.D." and "everything killer" at Catalan and Lopez, after which Catalan drove toward a police station to report the incident. However, the black car followed them and Catalan observed the defendant in the rearview mirror leaning out of the black car's window and firing five or six shots at them with the gun in his left hand. The unidentified man sitting in the passenger seat of the black car also extended his arm out of the passenger side window. The black car then made a U-turn and drove away. Although Catalan's car was struck with several bullets and suffered two flat tires, he managed to drive to a police station where he reported the crime. On May 4, 2008, Catalan returned to the police station where he identified the defendant as the shooter from a police lineup. Catalan then made an in-court identification of a group of photographs depicting

multiple bullet holes in the rear of his car, which was later admitted into evidence. At trial, Catalan also testified about the traffic incident that occurred a month prior to the shooting. He testified that on the afternoon of March 14, 2008, he was driving his girlfriend home when a truck driven by the defendant blocked his path and prevented Catalan's car from turning left at the intersection of 81st Street and Tripp Avenue. The defendant then shouted "S.D." at Catalan and hit Catalan's car with the truck as Catalan tried to drive away, causing Catalan's car to hit a pole. Thereafter, Catalan was en route to a police station to report the traffic incident when he saw the defendant's truck coming at him at a high rate of speed near 79th Place and Kirkland Avenue. Catalan then immediately reversed his car's direction, saw a police officer near the intersection, and notified the police officer that the defendant was chasing him. The police officer then stopped the defendant's truck, which also carried one female and four or five other male passengers, and recovered bats and crowbars from the vehicle. The defendant was subsequently charged with a traffic violation.

¶7 On cross-examination, defense counsel asked Catalan whether he had provoked anyone in the black car prior to the April 2008 shooting, whether he had spoken with anyone in the black car, whether he had displayed any gang signs in the McDonald's parking lot, and whether he was a member of the LOC street gang. Catalan answered "no" to each of these questions and stated that the defendant fired gunshots at him without any provocation on Catalan's part.

¶8 Lopez's testimony at trial regarding the April 2008 shooting closely paralleled Catalan's testimony. Lopez testified that he was Catalan's 16-year-old nephew and that he was a passenger in Catalan's vehicle when the black car pulled up alongside it in the McDonald's parking lot. Lopez then made an in-court identification of the defendant as the person sitting behind the driver in the

black car and "throwing up gang signs and [saying] S D Love, everything K." As Catalan and Lopez left the restaurant parking lot and drove toward a police station to report the gang intimidation, the black car followed them. Lopez then heard gunfire, "duck[ed]" down in his seat, and saw in the car's side mirror that the defendant and the front passenger of the black car were firing gunshots at them. Lopez estimated that the defendant fired six shots in the direction of Catalan's car. After the shooting stopped, the black car made a U-turn and drove away, while Catalan and Lopez went to the police station to report the crime. On May 4, 2008, Lopez and his mother returned to the police station where he identified the defendant as one of the shooters in a police lineup. Lopez denied that Catalan was a member of the LOC street gang.

¶9 The State then rested and defense counsel moved for a directed finding on the attempted murder charges, which the trial court initially denied. However, after reviewing the indictment against the defendant, the trial court reversed its ruling and granted defense counsel's motion for a directed finding on the two counts of attempted murder, on the basis that the State had not proven beyond a reasonable doubt that Catalan and Lopez had been shot.

¶10 The defense then presented the testimony of five witnesses. The defendant's sister, Brenda Melgoza (Brenda), and ex-girlfriend, Rosa Delgado (Rosa), testified as alibi witnesses. Brenda and Rosa both testified that on April 25, 2008, at approximately 8 p.m., Brenda drove Rosa and the defendant to a shopping mall near their home. After they arrived at the mall, Brenda visited a shoe store while Rosa and the defendant purchased some ice cream. At approximately 9 p.m., they left the mall and returned home at 79th Place and Tripp Avenue, where the three individuals watched television until Brenda retreated to her bedroom on the first floor of the house at 10:30 p.m. Rosa

and the defendant then went to the basement of the home, where they then lived together, and talked until they fell asleep. Rosa testified that neither she nor the defendant ever left the basement all night. Brenda similarly testified that the basement room, where the defendant and Rosa resided, was located directed beneath her bedroom on the first floor, and that the stairs leading out of the basement adjoined the outside wall of her bedroom. Brenda testified that she never heard either Rosa or the defendant leave the basement on the night of the shooting.

¶11 Eugenia Santacruz (Eugenia) testified on behalf of the defense that she was employed at a McDonald's restaurant located at 67th Street and Pulaski Road during all relevant times. Eugenia stated that she knew both Catalan and the defendant from high school. On April 26, 2008, at approximately 1 a.m., Eugenia, at the direction of her manager, traveled to a second McDonald's restaurant location at 83rd Street and Pulaski Road¹ in order to acquire certain items from there to replenish the inventory at the McDonald's location where she worked. While she was inside the restaurant, she observed three men in the black car in the drive-thru lane. She testified that the defendant was not in the black car and that she ignored the three men who tried to talk to her through the drive-thru window. She then noticed a red car, driven by Catalan, approach the black car. Defense counsel then asked Eugenia whether Catalan did or said anything, at which point the State raised a hearsay objection. Defense counsel then argued that the testimony was admissible as impeachment testimony against Catalan. However, the trial court sustained the State's hearsay

¹Eugenia testified that the McDonald's restaurant at issue was located at 83rd Street and Pulaski Road, while Catalan's testimony shows that it was located at 84th Street and Pulaski Road. Despite this minor discrepancy, we note that they refer to the same restaurant location at issue in the instant case.

objection as to what Catalan said, noting that the court "[did not] have anything in [its] notes that [said] [defense counsel] asked [Catalan] a question about what, if anything, he said to [the occupants in the black car]." The trial court, though, allowed Eugenia to describe what she saw. Thereafter, Eugenia testified that she saw Catalan "throwing up gang signs and saying gang [slogans] to [the defendant]." In light of its ruling, the trial court struck the portion of Eugenia's testimony concerning what Catalan said, but let stand in the record Eugenia's description of Catalan "throwing up gang signs." Eugenia further testified that Catalan then drove away from the restaurant's parking lot and the black car chased after Catalan's vehicle.

¶12 Defense counsel also presented two witnesses at trial who testified to the events of the March 2008 traffic incident involving Catalan and the defendant. Dorothy Avelar² (Dorothy) testified that on March 14, 2008, she was Catalan's girlfriend and lived at 79th Place and Kirkland Avenue. She testified that on that day, at approximately 4:30 p.m., Catalan was taking her home in his car when they encountered the defendant's vehicle near a stop sign at 81st Street and Tripp Avenue. The defendant's truck struck the driver's side of Catalan's car, which caused Catalan's vehicle to hit a pole. The side mirrors of Catalan's vehicle detached as a result of the collision. Dorothy recounted that Catalan maneuvered his car through a small space between the defendant's truck and the sidewalk, and that they headed toward a police station to report the traffic incident. However, as she and Catalan approached 79th Street and Tripp Avenue, she observed the defendant's truck coming toward them at a high rate of speed. At that moment, Catalan reversed his direction of travel and

²The record reflects the spelling of this individual's name as both Avilar and Avelar.

Dorothy directed him to a nearby police officer and informed the police officer that the defendant was chasing them. The police officer then instructed Catalan and Dorothy to park behind the police vehicle, stopped the defendant's truck with her service weapon drawn, and waited for police backup. After police backup arrived, the defendant and the occupants of the truck were searched.

¶13 Dorothy further testified that in September 2009, she met with a defense investigator, Carlos Rodriguez (Investigator Carlos), who showed her two separate police reports which purportedly pertained to the traffic incident. Dorothy stated that only one of the two police reports accurately reflected the events of the traffic incident as she had described at trial, but that the other police report pertained to an unrelated incident involving parties unrelated to the instant case. She testified that she had signed and dated the police report that accurately reflected the events of the traffic incident as she had witnessed them. Dorothy then made an in-court identification of the two police reports that Investigator Carlos had shown her. The police report which Dorothy had signed and dated specifically stated that the collision occurred at 4274 West 79th Street, which was contrary to the location described by Catalan's trial testimony. However, Dorothy stated that she did not look at the address location described on the police report before signing it.

¶14 Maribel Villasenor (Maribel) also testified for the defense regarding her observations of the March 2008 traffic incident. On March 14, 2008, at approximately 3:30 p.m., she left Bogan High School, where she was a student, and the defendant drove her and two other individuals home. Maribel recounted that the defendant drove his truck onto 81st Street, continued onto Tripp Avenue, and turned left onto 79th Place. However, as the defendant attempted to turn onto Kirkland Avenue, a police officer stopped the defendant's truck, ordered everyone in the defendant's truck to raise their

hands, and told the defendant to exit the truck. When more police officers arrived at the location, Maribel and the other passengers were also ordered out of the truck and searched. Maribel testified that they never came into contact with either Catalan or Dorothy from the time that the defendant picked her up from school until the time that they were stopped by the police officers. Nor did she observe the defendant strike Catalan's car during the drive home. Maribel noted that she knew both Catalan and Dorothy because Dorothy was her neighbor and that Catalan always visited Dorothy's home. Defense counsel then asked Maribel at trial whether she had ever seen, on Catalan's MySpace webpage,³ a picture of Catalan with a group of LOC gang members "throwing down signs." However, defense counsel was unable to produce the picture at trial. The State then raised a hearsay objection, which the trial court sustained. Defense counsel then argued that this information was pertinent to impeach Catalan's testimony, but explained that he was unable to produce the picture in court because Catalan had removed Maribel from his list of friends on MySpace—thus, preventing Maribel from accessing Catalan's MySpace webpage or downloading the picture. The trial court ruled that this was "not a sufficient explanation for failure to produce the picture," and struck all evidence pertaining to the picture.

¶15 Following closing arguments, the trial court found the defendant guilty of two counts of aggravated discharge of a firearm. The trial court found Catalan's and Lopez's testimony regarding the April 2008 shooting to be credible. Specifically, the trial court noted that Catalan's demeanor in court was "consistent with his denial of being in a street gang, *** consistent with a person who

³MySpace.com is a social networking website.

was being victimized by a gang banger, who continued on at least two occasions to harass him." In finding Catalan and Lopez credible, the trial court also noted that photographs, which were admitted into evidence and which showed multiple bullet holes in the rear part of Catalan's car, supported their testimony. On the contrary, the trial court noted that the alibi testimony of Brenda and Rosa was not credible, particularly because they, as the defendant's sister and ex-girlfriend, had a serious interest in assisting the defendant. The trial court also found Eugenia's testimony to be incredible and "too pat," noting that Eugenia "[put] it all on Catalan but *** [admitted] that Catalan [drove] off [from the McDonald's parking lot] and that the black car [chased] Catalan." With regards to the March 2008 traffic incident, the trial court did not find Maribel's testimony to be credible, noting that it did not make sense why Catalan and Dorothy would have signaled the police officer for help if, as Maribel claimed, the defendant's truck had never encountered nor struck Catalan's vehicle. Rather, the trial court found Catalan's testimony believable and that the traffic incident was an altercation and not an accident. The trial court further stated that it was unclear how Dorothy's testimony about the police reports from the traffic incident was "impeaching," noting that Dorothy did not look at the address location on the traffic incident report before signing it.

¶16 On March 5, 2010, the defendant filed a motion for a new trial. On March 22, 2010, the trial court denied the motion for a new trial and sentenced the defendant to two concurrent 6-year terms of imprisonment. On July 8, 2010, this court allowed the defendant leave to file a late notice of appeal.

¶17

ANALYSIS

¶18 We determine the following issues: (1) whether the defendant received ineffective assistance

of counsel at trial; (2) whether the trial court erred in prohibiting the introduction of evidence by the defense to impeach the State's primary witness; and (3) whether the trial court improperly admitted evidence of the March 2008 traffic incident and failed to limit the amount of such evidence at trial.

¶19 We first determine whether the defendant received ineffective assistance of counsel at trial.

¶20 The defendant argues that defense counsel was ineffective at trial on two basis—by failing to produce and lay a foundation for the MySpace photograph which was allegedly impeachment evidence regarding Catalan's gang activities, and by presenting the testimony of Dorothy at trial. The defendant contends that defense counsel's failure to produce, and thus lay a foundation for, the MySpace photograph at trial was objectively unreasonable and that this failure prejudiced him. Likewise, the defendant maintains that calling Dorothy to testify as a defense witness was not a reasonable trial strategy by defense counsel where her testimony corroborated that of the State's witnesses and damaged the defense's case.

¶21 The State counters that defense counsel's conduct was proper trial strategy and that the defendant was not prejudiced in any way where he had not shown how the outcome of the trial would have been different absent the alleged errors.

¶22 To prevail on a claim of ineffective assistance of counsel, the defendant: (1) must prove that the attorney's performance fell below an objective standard of reasonableness so as to deprive the defendant of the right to counsel under the sixth amendment (performance prong); and (2) that this substandard performance resulted in prejudice to the defendant (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S. Ct. 2052, 2064-68 (1984). Under the performance prong, there is a strong presumption that counsel acted adequately and great deference must be shown to

the attorney's decisions. *People v. Moore*, 2012 IL App (1st) 100857, ¶ 43. There is a strong presumption that the challenged action or inaction might have been the product of sound trial strategy, and every effort must be made to eliminate the effects of hindsight and to evaluate the conduct from counsel's perspective at the time. *Id.* "Because effective assistance refers to competent and not perfect representation, mistakes in trial strategy or judgment will not, of themselves, render the representation incompetent." *Id.* To prove prejudice, the 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." *People v. King*, 316 Ill. App. 3d 901, 913, 738 N.E.2d 556, 566 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.*, 738 N.E.2d at 566. These are stringent standards which the defendant must meet. The defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel. However, a reviewing court may initially analyze the facts of the case under either prong, and, if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *Moore*, 2012 IL App (1st) 100857, ¶ 44; *People v. Irvine*, 379 Ill. App. 3d 116, 129-30, 882 N.E.2d 1124, 1136-37 (2008).

¶23 In the case at bar, defense witness Maribel testified to her observations of the March 2008 traffic incident, which primarily denied the occurrence of an encounter or a collision between the defendant's truck and Catalan's vehicle. Defense counsel then attempted to introduce Maribel's testimony regarding a photograph on Catalan's MySpace webpage which purportedly showed Catalan with a group of LOC gang members "throwing down signs." However, defense counsel explained that he was unable to produce the photograph at trial because Catalan had removed Maribel from his list of friends on MySpace—thus, preventing Maribel from accessing Catalan's MySpace webpage

or downloading the photograph. The State raised a hearsay objection, which the trial court sustained and struck all evidence pertaining to the photograph on the basis that defense counsel's explanation for failing to produce it was insufficient.

¶24 Even assuming, *arguendo*, that defense counsel's conduct was objectively unreasonable, we find that the defendant cannot demonstrate a reasonable probability that the outcome of the trial would have been different but for defense counsel's failure to produce, and thus lay a foundation for, the MySpace photograph at issue. During Maribel's testimony at trial, defense counsel attempted to introduce evidence of the MySpace photograph in order to impeach Catalan's testimony that he was not a member of a street gang. The MySpace photograph purportedly depicted Catalan with a group of LOC gang members "throwing down signs." The defendant argues that evidence of Catalan's participation in a street gang was crucial to expose his bias and motive to testify falsely. He contends that because the trial court's credibility determination of the witnesses was based upon its belief that Catalan did not participate in a street gang, evidence to impeach Catalan's testimony would have changed the trial court's credibility ruling. We disagree.

¶25 Although the trial court prohibited Maribel from testifying about the photograph because defense counsel's explanation for its absence was insufficient, we find that the complained-of evidence—that is, an occurrence of Catalan displaying gang signs—had already been established by another defense witness, Eugenia, who testified that she observed Catalan "throwing up gang signs" on the night of the shooting. Thus, we find that evidence impeaching Catalan's denial of any participation in a street gang had already been properly presented to the trial court, which the trial court was free to consider in determining the credibility of the witnesses. Moreover, the trial court

was presented with evidence from eyewitnesses Catalan and Lopez who, after observing the occupants of the black car at close range in the McDonald's drive-thru lane, testified that the defendant was one of two individuals who shot at them from the black car. In a subsequent police lineup, Catalan and Lopez each identified the defendant as one of the shooters. Further, we find that even disregarding Catalan's testimony, Lopez's unimpeached testimony, which the trial court found to be credible along with corroborating evidence that the bullet holes were found only in the rear part of Catalan's vehicle, was sufficient to support the defendant's conviction. See *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 13 (positive identification of a single eyewitness is sufficient to sustain a conviction). Based on the evidence presented at trial, we cannot say that there was a reasonable probability that the defendant would not have been convicted of aggravated discharge of a firearm but for defense counsel's failure to produce the MySpace photograph during Maribel's testimony. Therefore, the defendant's ineffective assistance of counsel claim under this theory must fail.

¶26 The defendant also claims that defense counsel was ineffective by presenting Dorothy's testimony at trial, which he argues corroborated the testimony of the State's witnesses and damaged the defense's case. Specifically, he asserts that Dorothy's account of the March 2008 traffic incident corroborated Catalan's version of what happened and thus, directly contradicted Maribel's testimony that no traffic collision involving the defendant's truck and Catalan's vehicle had occurred. He maintains that defense counsel's failed attempt to impeach Dorothy's testimony with a signed copy of the police report and his unsound decision to call her as a witness prejudiced him.

¶27 We find that the defendant has failed to overcome the strong presumption that defense counsel's decision to present Dorothy's testimony was anything but sound trial strategy. Defense

counsel elicited testimony from Dorothy at trial that she had met with Investigator Carlos in September 2009, who showed her two separate police reports which purportedly pertained to the traffic incident. Dorothy testified that only one of those two police reports accurately reflected the events of the traffic incident as she had described at trial, and that she had signed and dated the police report which corresponded with what she had observed. Defense counsel, in an attempt to impeach Catalan's and Dorothy's testimony regarding the traffic incident, presented the two police reports at trial. The police report which was signed and dated by Dorothy specified a location for the traffic collision different than that described by Catalan and Dorothy. When defense counsel questioned Dorothy about the discrepancy regarding the collision location, she explained that she had failed to verify the written address on the police report before signing it. Although defense counsel's attempt to impeach Dorothy's and Catalan's testimony with the police report was ultimately unsuccessful, we find defense counsel's action to be a matter of trial strategy where he had to call Dorothy because it was her signature on the police report. Although defense counsel's action did not yield the desired outcome, that did not render him ineffective, and we refrain from using the benefit of hindsight in evaluating defense counsel's trial strategy. See *People v. Skillom*, 361 Ill. App. 3d 901, 914, 838 N.E.2d 117, 128 (2005) (the fact that counsel's strategy was ultimately unsuccessful was not a sufficient reason to deem his representation ineffective); *Moore*, 2012 IL App (1st) 100857, ¶ 43 (every effort must be made to eliminate the effects of hindsight and to evaluate counsel's conduct from his perspective at the time). Thus, we find that defense counsel's decision to call Dorothy as a witness and his attempt to impeach her testimony was a matter of sound trial strategy. Moreover, we find that even if defense counsel's conduct were objectively unreasonable,

the defendant had failed to show how such error prejudiced him where Dorothy's testimony concerned only the March 2008 traffic incident, rather than the crime charged, and we cannot say that there was a reasonable probability that the outcome of the trial would have been different but for her testimony about the traffic incident. Therefore, the defendant did not receive ineffective assistance of counsel.

¶28 We next determine whether the trial court erred in prohibiting the introduction of evidence by the defense to impeach the State's primary witness.

¶29 The defendant argues that he should be granted a new trial because he was denied the right to present a defense when the trial court prohibited defense witness Eugenia from testifying that she had heard Catalan call out gang slogans on the night of the shooting. He contends that this evidence was crucial to impeach Catalan's testimony that he was not a gang member, and that the trial court erred in sustaining the State's hearsay objection. Although he concedes that he failed to preserve this issue for review on appeal, the defendant urges this court to review this issue as plain error.

¶30 The State counters that even if the trial court committed error in barring Eugenia's testimony about what she had heard Catalan call out on the night of the shooting, the defendant has failed to establish that any error prejudiced him. Specifically, the State maintains that the excluded testimony was merely cumulative to Eugenia's testimony that she had seen Catalan flash gang signs that night. Evidence that Catalan lied about not being in a gang, the State contends, would not establish that Catalan had a bias or a motive to testify falsely in this case. Further, the State argues that the defendant's guilt in this case was overwhelming and whether or not Catalan was impeached on his denial of gang membership would not have altered the outcome of the trial.

¶31 We find that the defendant has forfeited appellate review of this issue because he failed to raise it in his motion for a new trial. *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472-73 (2005) (a defendant who fails to either make a timely trial objection and include the issue in a posttrial motion forfeits the review of the issue). However, the plain error doctrine allows a reviewing court to consider unpreserved issues when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is so serious, regardless of the closeness of the evidence. *Id.* at 178-79, 830 N.E.2d at 475; *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). In order to obtain reversal and a new trial, the defendant bears the burden of persuasion. See *People v. Hayes*, 409 Ill. App. 3d 612, 628, 949 N.E.2d 182, 195 (2011). The first step in a plain error analysis is to determine whether an error occurred at all. *People v. McLaurin*, 235 Ill. 2d 478, 489, 922 N.E.2d 344, 351-52 (2009); *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964, 971 (2008). " 'Generally, evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court abused that discretion.' " *People v. Perry*, No. 1-08-1228, slip op. at 20 (Ill. App. March 31, 2011) (quoting *People v. Purcell*, 364 Ill. App. 3d 283, 293, 846 N.E.2d 203, 211 (2006)).

¶32 During Eugenia's testimony, defense counsel asked her whether Catalan did or said anything on the night of the shooting. The State objected on hearsay grounds. Defense counsel then argued that the testimony was admissible as impeachment testimony against Catalan. However, the trial court sustained the State's hearsay objection as to what Catalan had *said*, noting that the court had nothing in its notes showing that defense counsel had questioned Catalan on cross-examination about what, if anything, he had said to the occupants of the black car. Nevertheless, the trial court allowed

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Eugenia to describe what she had *observed*. In light of this ruling, the trial court struck the portion of Eugenia's testimony in which she said that she had heard Catalan *call out* gang slogans in the McDonald's parking lot. The court let stand her *observation* that Catalan was "throwing up gang signs."

¶33 Our review of the record reveals that, contrary to the trial court's recollection, defense counsel had inquired of Catalan on cross-examination as to whether he had provoked, spoken with, or displayed any gang signs to, anyone in the black car prior to the shooting. In response, Catalan denied engaging in such conduct and stated that the defendant fired gunshots at him without any provocation on Catalan's part. We find that Eugenia's testimony stating that Catalan had verbally conveyed gang slogans to the occupants of the black car could have been admitted as impeachment evidence to contradict Catalan's cross-examination testimony. See generally *People v. Jenkins*, 2012 IL App (2nd) 091168, ¶¶ 17-19 (testimony of defendant's wife and son regarding what police officer asked the defendant and what the defendant responded, was impeachment evidence, rather than hearsay, to contradict police officer's testimony). Thus, we find that the trial court's exclusion of this portion of Eugenia's testimony on the basis that defense counsel never questioned Catalan on this issue during cross-examination was error.

¶34 Despite the trial court's error, however, we find that the plain error doctrine is inapplicable to reach this forfeited issue because the evidence was neither closely balanced nor was the error so serious as to have affected the fairness of the trial and challenged the integrity of the judicial process. *Herron*, 215 Ill. 2d at 178-79, 830 N.E.2d at 475; *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11. As discussed, the State presented the testimony of Catalan and Lopez, both of whom testified

that the defendant was seated behind the driver in the black car in the McDonald's parking lot. Both testified that the black car followed Catalan's vehicle out of the parking lot, and that they observed the defendant firing gunshots at them. Later, Catalan and Lopez each positively identified the defendant in a police lineup as one of the shooters. The State also presented evidence that the rear portion of Catalan's vehicle suffered several bullet holes, which corroborated Catalan's and Lopez's testimony that they were being followed and shot at from behind. While the defendant presented the testimony of Brenda and Rosa to show that the defendant was not in the black car at the time of the shooting, the credibility of these witnesses was diminished by their biased interest in assisting the defendant. See generally *People v. White*, 407 Ill. App. 3d 224, 236, 941 N.E.2d 1000, 1010 (2011) (while the defendant and the State provided competing versions of the events, the evidence was not closely balanced where the defendant's testimony was impeached). We further note that the basis upon which the trial court found Eugenia's overall testimony to be incredible—mainly, that it was "too pat" and that she "[put] it all on Catalan but *** admitted that Catalan [drove] off and that the black car [chased] Catalan—would be unaffected regardless of whether the barred testimony was admitted or not. Moreover, even if Catalan's testimony were disregarded, Lopez's unimpeached testimony unequivocally identified the defendant as the shooter. Thus, we find that the evidence was not closely balanced.

¶35 Nor are we persuaded that the error was so serious as to have affected the fairness of the trial. The barred evidence was that Eugenia had allegedly heard Catalan say gang slogans to the passengers in the black car on the night of the shooting. However, we find that such evidence would have been cumulative to the already admitted portion of Eugenia's testimony that she had seen

Catalan display gang signs, because either could suffice to serve as impeachment evidence to contradict Catalan's testimony that he was not a member of a street gang. Thus, because evidence impeaching Catalan on this point had already been properly presented during the trial, we are not convinced that the trial court's error deprived the defendant of a fair trial. Accordingly, the plain error doctrine does not apply to reach the forfeited issue.

¶36 The defendant alternatively argues that defense counsel was ineffective for failing to apprise the trial court that he had in fact questioned Catalan during cross-examination about what, if anything, he had said to the occupants in the black car prior to the shooting. However, we find that this argument must necessarily fail because the defendant cannot establish a reasonable probability that he would not have been convicted of aggravated discharge of a firearm but for defense counsel's failure to apprise the trial court of its error. See *People v. White*, 2011 IL 109689, ¶ 133 ("[p]lain-error review under the closely-balanced-prong of plain error is similar to an analysis of ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced"). Therefore, the defendant was not entitled to a new trial on this basis.

¶37 We next determine whether the trial court improperly admitted evidence of the March 2008 traffic incident and failed to limited the amount of such evidence at trial.

¶38 The defendant argues that the trial court erred in failing to limit the evidence of the March 2008 traffic incident, which then became the focus of the trial and was overly prejudicial to him. He contends that he is entitled to a new trial because the trial court specifically relied on this improperly admitted evidence in finding him guilty.

¶39 The State argues that the trial court properly exercised its discretion in finding that evidence

of the March 2008 traffic incident was admissible to prove the defendant's motive for the shooting, as well as prove the shooter's identity, especially where the defendant raised an alibi defense. The State contends that the trial court did not improperly rely on evidence of the traffic incident in making its credibility determinations, and that the State did not adduce any unnecessary details of the traffic incident at trial. Rather, the State argues that defense invited the admission of the complained-of evidence by presenting the testimony of two witnesses that concerned only the events of the traffic incident.

¶40 "The term 'other crimes evidence' encompasses misconduct or criminal acts that occurred either before or after the allegedly criminal conduct for which the defendant is standing trial." *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 35 (quoting *People v. Spyres*, 359 Ill. App. 3d 1108, 1112, 835 N.E.2d 974, 977 (2005)). Other crimes evidence may include bad acts which are not considered criminal offenses. *McSwain*, 2012 IL App (4th) 100619, ¶ 35. Generally, evidence showing that a defendant committed prior bad acts is improper where its purpose is to demonstrate the defendant's propensity to commit crimes. *Id.* at ¶ 36. However, evidence of prior bad acts is admissible if the evidence is relevant for any other purpose. *Id.* "Evidence is 'relevant' if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Id.* (quoting *People v. Robertson*, 401 Ill. App. 3d 758, 771-72, 927 N.E.2d 1277, 1289 (2010)). Such evidence, even if offered for a permissible purpose, will not be admitted if its prejudicial effect substantially outweighs its probative value. *Id.* at ¶ 37. The admissibility of prior bad acts evidence is a matter within the trial court's discretion, and a reviewing court will not overturn such a decision absent an abuse of that discretion.

Id. at ¶ 38. A trial court abuses its discretion only when its decision is arbitrary, unreasonable, or fanciful or where no reasonable person would take the trial court's view. *Id.* at ¶ 38.

¶41 At the hearing on the State's motion for other crimes evidence, the trial court allowed the State to introduce evidence of the traffic incident at trial for the purpose of showing the defendant's intent, motive and "common scheme that some sort of animus existed between [the defendant] and [Catalan]." However, the trial court specifically cautioned that it would strike and disregard any evidence of the traffic incident if it is shown at trial that the traffic incident was merely an accident, rather than a deliberate act by the defendant to inflict harm upon Catalan. At trial, State witness Catalan testified to the events of the shooting and the traffic incident. The State's other witness, Lopez, testified only to the details of the shooting. Subsequently, defense counsel presented the testimony of five witnesses. The testimony of two defense witnesses, Dorothy and Maribel, solely centered on the traffic incident. Based on our review of the record, we find that testimony at trial supported a finding that the traffic incident was not merely an accident; thus, the trial court did not abuse its discretion in admitting evidence of the traffic incident to prove motive, intent, and a "common scheme" that an animus existed between the defendant and Catalan prior to the shooting. Further, we are unpersuaded that the focus of the trial was overtaken by evidence of the traffic incident to the detriment of the defendant. Rather, much of the trial evidence centered upon the events leading up to, and the details of, the shooting. Moreover, even assuming that a surplus of evidence concerning the traffic incident had been presented at trial, we find that the defendant cannot now be heard to complain where the majority of the prior bad acts evidence was elicited by the defense. See generally *People v. Carter*, 208 Ill. 2d 309, 319, 802 N.E.2d 1185, 1190 (2003)

("[u]nder the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error").

¶42 Nor do we find persuasive the defendant's contention that the admission of evidence pertaining to the traffic incident created a "mini-trial" which diverted the trial court's attention away from the true issues in the case. In bench trials, unlike jury trials, there is a presumption that the trial court only considers properly admitted evidence and that prior bad acts evidence is only considered for the limited purpose for which it was admitted. *People v. Deenadayalu*, 331 Ill. App. 3d 442, 450, 772 N.E.2d 323, 330 (2002); accord *People v. Robinson*, 368 Ill. App. 3d 963, 976, 859 N.E.2d 232, 246 (2006) (a trial judge is presumed to consider only admissible evidence, and a reviewing court presumes the trial judge in a bench trial knew the law and followed it). As the State correctly notes, the possibility of jury confusion that may be engendered by a "mini-trial" on prior bad acts evidence does not exist in a bench trial. We find that the defendant has not rebutted the presumption that the trial court considered evidence of the traffic incident only for a proper purpose. The record does not support the defendant's contention that the trial court found the defendant guilty of aggravated discharge of a firearm because the traffic incident demonstrated his propensity to commit crimes.

¶43 Nonetheless, the defendant asserts that the prior bad acts evidence of the traffic incident should not have been admitted at trial because its prejudicial effect outweighed its probative value. He maintains that evidence of the traffic incident had little probative value compared to the prejudice to him because it unfairly damaged his credibility and portrayed him as an aggressive person who targeted Catalan. The defendant argues that a new trial is warranted because the trial court specifically relied on this evidence in finding him guilty.

¶44 We reject the defendant's arguments for they are without merit. The trial court, in finding the defendant guilty, stated that Catalan's courtroom demeanor was "consistent with his denial of being in a street gang" and "consistent with a person who was being victimized by a gang banger," and that photographs presented at trial depicting multiple bullet holes in the rear portion of Catalan's vehicle supported Catalan's and Lopez's testimony regarding the shooting. The trial court also found Maribel's testimony regarding the traffic incident to be incredible, noting that Catalan's and Dorothy's conduct in signaling a police officer for help did not make any sense if in fact, as Maribel claimed, the defendant's truck had never encountered or struck Catalan's vehicle. Rather, the trial court concluded that the traffic incident was an altercation and not merely an accident, and found Catalan's testimony to be credible because "it's the only explanation that [made] sense." Based on our review of the record, we find that the trial court, as the fact finder, properly drew inferences from the trial evidence in determining the credibility of the State and defense witnesses. See *People v. Milka*, 211 Ill. 2d 150, 178, 810 N.E.2d 33, 49 (2004) ("the weight to be given witnesses' testimony, the witnesses' credibility, and the reasonable inferences to be drawn from the evidence, are all the responsibility of the fact finder"); *White*, 407 Ill. App. 3d at 234, 941 N.E.2d at 1009 (the defendant's prior theft convictions were properly admitted for the purpose of allowing the jury to evaluate and weigh the defendant's credibility in light of his background). Further, we find that any prejudicial effect in admitting evidence of the traffic incident did not substantially outweigh its probative value of showing that the defendant had shouted gang slogans at Catalan prior to the shooting, where similarities existed between the defendant's encounters with Catalan during the traffic incident and in the McDonald's parking lot. The defendant further points to comments made by the trial court

during the defendant's sentencing hearing to support his contention that the evidence of the traffic incident portrayed him as an "aggressor" and that the trial court viewed this evidence as crucial in determining the credibility of the witnesses. However, just because the trial court's credibility determinations were not resolved in favor of the defendant did not automatically suggest that the trial court relied on the prior bad acts evidence for any improper propensity purposes, particularly where the trial court observed Catalan's courtroom demeanor as consistent with his testimony of the shooting and as someone who was being victimized. *White*, 407 Ill. App. 3d at 234, 941 N.E.2d at 1009 ("[t]hat others may have reached a different result does not render the trial court's decision erroneous"). As discussed, evidence of the traffic incident was relevant to determine, *inter alia*, the motive for the shooting, and any prejudicial effect of the evidence did not substantially outweigh its probative value. Thus, we decline to substitute our judgment for that of the trial court in determining witness credibility or to speculate whether the complained-of evidence unfairly portrayed him as an aggressive person with a history of altercation with Catalan. We find that even if an error had occurred in admitting this evidence, it was harmless error where there is nothing in the record to indicate that the trial court used this evidence for any improper purpose or excessively relied on it in determining the defendant's guilt. Therefore, we find that the trial court did not abuse its discretion in admitting evidence of the traffic incident.

¶45 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶46 Affirmed.