

No. 1-11-0373

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellant,	)	Cook County.
	)	
v.	)	94 CR 5146
	)	
RODELL SANDERS,	)	Honorable
	)	John D. Turner, Jr.,
Petitioner-Appellee.	)	Judge Presiding.

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JUSTICE SALONE delivered the judgment of the court.  
Justice Neville concurred in the judgment.  
Justice Murphy dissented in the judgment.

ORDER

*Held:* Where a witness's out-of-court statement could have significantly added to the impeachment of that witness's testimony and provided some substantive evidence that the defendant did not participate in the offense, the trial court did not commit manifest error when it held that defense counsel's conduct, that led to the exclusion of the evidence of the out-of-court statement, prejudiced the defendant.

¶ 1 Following a third-stage evidentiary hearing under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)), the trial court granted the request of the defendant, Rodell Sanders, for a new trial because he had ineffective assistance of counsel at trial. The State appeals,

contending that defense counsel's errors did not prejudice Sanders. Because we find that the trial court did not commit manifest error, we affirm.

¶ 2

## BACKGROUND

¶ 3 On December 15, 1993, Stacy Armstrong fell asleep while her friend, Phillip Atkins, was driving her home from a party. Around 2 a.m., Atkins woke Armstrong in Chicago Heights to show her that a man was pointing a gun at them and ordering them to get out of the car. Four men directed Atkins and Armstrong to walk down an alley to a garage. The men searched both Atkins and Armstrong and took Atkins's wallet. One man asked Atkins if he belonged to the Mickey Cobras gang. Atkins said yes. The questioner then told one of the other men to kill Atkins. That man shot Atkins repeatedly. The questioner then directed the shooter to shoot Armstrong. Two bullets hit her face and one went through her shoulder. She lost consciousness. About 20 minutes later, she regained awareness and went to a house nearby, where a man called 911. An ambulance took Armstrong to a hospital. Police found Atkins's corpse on the floor of the garage.

¶ 4 Armstrong told police the man who questioned Atkins and ordered the other man to shoot him was about 30 years old, 6 feet tall with a slender build and with a mustache and medium complexion for a black man. On December 31, 1993, police showed Armstrong an array of photographs of six black men. Armstrong identified a photograph of Sanders as a photograph of the man who ordered the shooting. Sanders, who was 29 years old and wore a mustache, stood five foot eight and weighed 180 pounds.

¶ 5 Police arrested Sanders on January 14, 1994. They arrested Germaine Haslett, a slender black man almost 6 feet tall, at the same time. Haslett told police Sanders directed the murder while

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Haslett stood guard. A grand jury charged Sanders and Haslett with the robbery and murder of Atkins and the attempted murder and aggravated battery of Armstrong.

¶ 6 Sanders hired Marty Mroz, a private investigator, to interview Haslett. Sanders gave Mroz a list of questions to ask Haslett, and Sanders gave Mroz a code to use so that Haslett would know that Mroz truly worked for Sanders and not the police. Mroz provided the following answers that Haslett gave to Sanders' questions:

"Q: Is it true that you lied about Rodell Sanders being at that murder in Chicago Heights on December 15, 1993?

A: Yes.

Q: Did you lie because you were scared?

A: Yes.

Q: Did you ever hear Rodell Sanders order you or anyone else to kill somebody?

A: No.

Q: Did you lie about Rodell Sanders and two other subjects picking you up \*\*\* the night of the murder of Phillip Atkins and attempted murder of Stacy Armstrong?

A: Yes.

Q: Did you lie about acting as a lookout while all of this was going on?

A: Yes.

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Q: How many people really committed the crime?

A: Three.

Q: What were their names?

A: (Afraid to give \*\*\* any names because he thought he might implicate himself).

Q: Isn't it true that you were really the one that forced Ms. Armstrong out of her car on December 15, 1993 about 2:26 a.m. and forced her to walk down an alley?

A: (Would not answer).

Q: Isn't it true the police told you Ms. Armstrong said it was you who did this because she knew you?

A: Yes.

Q: Who really took Ms. Armstrong out of the car?

A: I don't know.

Q: Who took the 'man' victim out of the car?

A: (At first he blurted out Rob Frazier and then recanted and said he didn't know).

Q: Who was really standing on the sidewalk with a black hood watching Ms. Armstrong?

A: I don't know.

Q: Isn't it true that the police were trying to get you to say that Rodell

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Sanders ordered this murder and you told them no?

A: Yes.

Q: Isn't it true that [a police officer] told you or advised you to lie on Rodell Sanders and place him at the scene of the crime?

A: Yes.

Q: Is one of the reasons you lied or one of the reasons you lied about the name of the offenders was to try to confuse the police?

A: Yes.

The interrogation ended at approximately 1:00 p.m. \*\*\* Mr. Haslett seemed very paranoid and asked [for] proof of identification even after the code was given."

¶ 7 On July 29, 1994, Haslett wrote a letter addressed to Sanders's girlfriend Wendy. Haslett wrote:

"Hi Wendy[.] I know that you are still mad at me for helping the police to lie on Rodell about that murder. But I was scared. Like I told you before the Police told me to lie on Rodell and put his name in on this bull shit. The Police knew all along that it was me that took Stacy out of her car and into the garage and I told them this \*\*\* was me[.] But they want[ed] Rodell instead of me because they need me to come to court on another case \*\*\* then help them put Rodell away for ever. That's why they didn't put me in that line-up because they didn't want Stacy to ever see my face again they said that they would make her think and say it was Rodell. But the truth is I took Stacy out of that car \*\*\* it was just us 3 the police made up the 4 person to

involve Rodell. Wendy I am asking you to please forgive me for lie on Rodell and understand that I was scared. Rodell didn't have anything to do with that bull shit."

¶ 8 Trial

¶ 9 At, trial Armstrong again identified Sanders as the man who ordered the shooting of Atkins and Armstrong. She described the lighting in the alley as good, and she said she had ample opportunity to see the face of Atkins's questioner. She explained that she could not really see the questioner's build under his coat, but she had a good look at his face.

¶ 10 Haslett testified that he was a regent in the Gangster Disciples street gang and Sanders was an assistant governor for the gang. In December 1993, some members of the Four Corner Hustlers beat up some members of the Gangster Disciples. The Gangster Disciples decided to retaliate. Shortly after midnight on December 15, 1993, three Gangster Disciples, including Sanders, drove to Haslett's home and picked him up. A few blocks away, one of the other men in the car saw Atkins in the car with Armstrong and identified Atkins as a member of the Four Corner Hustlers. Sanders told Haslett to stand at the alley to look out for police. Haslett saw the three others go to Atkins's car and walk with Atkins and Armstrong down the alley towards the garage. When Haslett heard shots, he ran home.

¶ 11 Haslett testified that 15 minutes after he got home, Sanders paged him, and Haslett went to Sanders's home. Sanders said, "[Y]ou know what happen[s] when you run while we tak[e] care of business." Sanders told Haslett to kneel, and then Sanders put a gun in Haslett's mouth. Sanders told Haslett that if he said anything about the murders, Sanders would kill Haslett and Haslett's family, just like he killed Atkins and Armstrong.

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¶ 12 Haslett also testified that Sanders's threats led Haslett to write the letter to Wendy. Haslett explained that on July 29, 1994, Haslett went to court, and on his way back to jail he sat in the holding area in Cook County Jail, waiting for transportation. Sanders and another member of the Gangster Disciples entered the holding area. Sanders gave Haslett a piece of paper on which Sanders had written a letter addressed to Wendy. He told Haslett to copy the letter and sign his own name to it. When Haslett hesitated, the third Gangster Disciple took out a shank and held it against Haslett's neck. Haslett copied the letter and signed it. Sanders took the signed letter from Haslett.

¶ 13 Although defense counsel cross-examined Haslett, counsel did not elicit any evidence about the interview with Mroz.

¶ 14 A police officer testified that the Mickey Cobras were allies of the Four Corner Hustlers and enemies of the Gangster Disciples.

¶ 15 The jury found Sanders guilty of murder, armed robbery, attempted murder and aggravated battery. The trial court sentenced him to 55 years for murder with a concurrent sentence of 20 years for armed robbery and to a consecutive sentence of 25 years for the attempted murder. The court held that the aggravated battery conviction merged with the attempted murder conviction. The appellate court affirmed the convictions and sentences on the direct appeal. *People v. Sanders*, No. 1-95-1962 (1997) (unpublished order under Supreme Court Rule 23).

¶ 16 Sanders filed a postconviction petition and the trial court dismissed the petition without holding an evidentiary hearing. The appellate court reversed the judgment and remanded the case for an evidentiary hearing on the petition. *People v. Sanders*, No. 1-98-2453 (2000) (unpublished order under Supreme Court Rule 23). Sanders amended his postconviction petition in 2003, and the

trial court heard evidence on the amended petition in 2006. Sanders sought to show that his trial counsel provided ineffective assistance, especially because counsel never introduced evidence of the statement Haslett made to Mroz in May 1994.

¶ 17 The trial court granted the petition and set the case for a new trial. The prosecution appealed. The appellate court held that the trial court erred by granting a new trial without finding that trial counsel's errors prejudiced Sanders. *People v. Sanders*, No. 1-07-1312 (2008) (unpublished order under Supreme Court Rule 23). The appellate court upheld the trial court's finding that trial counsel committed unprofessional errors, and remanded for a further evidentiary hearing limited to the issue of whether trial counsel's errors prejudiced Sanders. *Sanders*, No. 1-07-1312.

¶ 18 The trial court held the mandated evidentiary hearing in October 2010. Only Sanders testified. Sanders said that during the murder trial he consulted with his attorney about whether to testify. Sanders decided not to testify because his counsel failed to introduce into evidence Haslett's May 1994 statement to Mroz. Sanders explained that if he failed to present the May 1994 statement, jurors would disregard his testimony about all issues as uncorroborated and self-serving. If counsel had introduced Haslett's statements to Mroz, Sanders intended to refute much of Haslett's testimony. Sanders planned to testify that due to the strip searches before prisoners reached the holding area at Cook County Jail, and the constant presence of 40 or 50 guards walking around the area, he had no opportunity to use a shank to threaten Haslett in the holding area. Sanders also planned to testify that in July 1994, he had no need for a further admission from Haslett, and that Haslett lied about Sanders's involvement in the murder because Sanders already had the May 1994 statement. Sanders planned to directly contradict Haslett's testimony about meeting up after the murder and the threats

Haslett said Sanders made at that meeting. Sanders would have testified that he was at a party at a friend's house at the time of the murder. He supported the alibi with affidavits from others who attended the party. Finally, Sanders testified at the hearing on prejudice that he hoped Haslett's assertions in the May 1994 statement about police coercion would persuade the jurors that police could have subtly pushed Armstrong to point to Sanders as the man who directed the shootings in December 1993.

¶ 19 The trial court found that Armstrong's initial description of the man who ordered the shootings differed somewhat from Sanders's appearance, and the difference cast some doubt on her identification of Sanders. The court added, "Eyewitness testimony alone has a notorious record of misidentification and is often unreliable." The trial court accepted Sanders's explanation that without the corroborating evidence of Haslett's statement to Mroz, Sanders's testimony would amount to little more than a denial of the charges not likely to persuade the jury. The court concluded with a finding of a reasonable probability that Sanders would have achieved a better result if his trial counsel had not committed unprofessional errors that kept the jury from learning of the statement Haslett made to Mroz in May 1994. Therefore, the court found that Sanders was prejudiced, granted Sanders's postconviction petition, and ordered a new trial. The State again appeals.

¶ 20

#### ANALYSIS

¶ 21

#### Standard of Review

¶ 22 The State argues that we should review the trial court's ruling *de novo* because the judge at the postconviction hearing did not preside at trial and, according to the State, the issue of whether trial counsel's errors prejudiced Sanders is a pure question of law. We disagree. When the trial court

hears evidence concerning the question of whether to grant a postconviction petition, we apply a manifest error standard of review. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 23 Prejudice

¶ 24 To establish prejudice due to trial counsel's errors, a defendant must show a reasonable probability that he would have achieved a better result if counsel had not committed the errors. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶ 25 The prosecution presented no physical evidence tying Sanders to the crime or the crime scene. The conviction depended on the testimony of Armstrong and Haslett. Armstrong's testimony faced the uncertainty of all eyewitness identifications, and the difference between her initial description of the man who ordered the shooting and Sanders's appearance added somewhat to that uncertainty. Our supreme court held that a discrepancy between a witness's initial description of an offender and the defendant's appearance affects the weight the trier of fact should accord to the witness's identification of the defendant as the offender. *People v. Slim*, 127 Ill. 2d 302, 308 (1989).

¶ 26 Haslett's testimony provided persuasive corroboration for Armstrong's identification of Sanders as one of the murderers. Haslett explained why Sanders and other Gangster Disciples went looking for members of the Four Corner Hustlers. Haslett placed Sanders at the scene of the crime at the time of the crime, and Haslett testified that in the course of threatening Haslett, Sanders admitted that he killed Atkins.

¶ 27 Sanders's trial counsel used several pieces of evidence to undercut Haslett's credibility. Because Haslett testified that he acted as Sanders's accomplice, the trial court instructed the jury to

treat Haslett's testimony with caution and suspicion. See *People v. Newell*, 103 Ill. 2d 465, 470 (1984). Haslett admitted that the State agreed to charge him with only armed robbery and to recommend a sentence of only 12 years for his role in the murder. Haslett also had a prior felony conviction for selling drugs. The letter Haslett addressed to Wendy had little impeachment value, because Haslett testified, without contradiction, that Sanders threatened to slit his throat if he did not write the letter.

¶ 28 If Sanders's trial counsel had succeeded in introducing into evidence the statements Haslett made to Mroz in May 1994, the evidence could have significantly undermined Haslett's credibility. We note that Haslett made the statements directly to Mroz, when Sanders posed no immediate threat to Haslett. We also note that the statements contradict almost all of Haslett's trial testimony.

¶ 29 The State emphasizes the evidence that Sanders orchestrated the statements by handing Mroz a written list of questions to ask Haslett and by giving Mroz a code to use so that Haslett would know Mroz truly worked for Sanders. However, the summary of the interview shows that Haslett refused to answer several of the questions, and some of his answers apparently did not match what Sanders expected him to say. Thus, Haslett's answers in the interview make it clear that Sanders did not entirely control Haslett's responses. Moreover, Sanders apparently used the code to assure Haslett that Mroz did not secretly work for the police. Both in the interview and in the letter Haslett said he feared police, and the police pressured him to name Sanders as the killer. Reasonable jurors could find that Haslett's interview significantly undercut the credibility of Haslett's testimony at trial.

¶ 30 The State argues that Sanders could not use the interview as substantive evidence of his innocence. The trial court should admit a witness's prior statement as substantive evidence if the

prior statement conflicts with the witness's trial testimony, the opposing party could cross-examine the witness about the prior statement, and the statement "describes[] or explains an event or condition of which the witness had personal knowledge, and \*\*\* the witness acknowledged under oath the making of the statement." 725 ILCS 5/115-10.1 (West 2008). The statement here contradicted Haslett's trial testimony and it described events in his personal knowledge. Defense counsel at trial did not elicit an admission from Haslett that he made the statement, but this court has no reason to doubt Mroz's account of the interview or to find that Haslett would deny making the statement. On the state of the record before this court, we find a reasonable probability that Sanders could have used Haslett's statements to Mroz as substantive evidence.

¶ 31 As substantive evidence, the statement supports the conclusion that Sanders did not participate in the murder, and police pressured Haslett into naming Sanders as the murderer. Thus, the statement would have some effect as impeachment of Haslett, whose testimony provides very significant support for the conviction, and some effect as substantive evidence of Sanders's innocence.

¶ 32 Sanders testified at the evidentiary hearing that he would have testified at trial if his counsel had introduced Haslett's statement to Mroz into evidence. The trial court found Sanders's testimony at the evidentiary hearing credible and we see no grounds for disturbing the trial court's finding of credibility. See *People v. Wittenmyer*, 151 Ill. 2d 175, 191-92 (1992). If Sanders had testified, he would have explained to the jurors that he had no need to coerce a letter from Haslett in July 1994, because Haslett had already admitted to Mroz that he lied to police. Sanders would also have described the holding area at Cook County Jail, telling jurors that no prisoner could bring a shank

into that area past the many guards who strip searched the prisoners and closely watched them in the holding area. The testimony could cast some doubt on Haslett's testimony about why he wrote the letter to Wendy, and it could make the letter itself more credible as evidence Haslett knew Sanders did not participate in the crime. Sanders would also have testified to an alibi, and affidavits supporting the postconviction petition indicate that he could produce other witnesses to support the alibi.

¶ 33 Haslett's statements to Mroz, together with the testimony Sanders would have brought before the jury if his counsel had introduced those statements into evidence, provide new reasons for jurors to doubt Haslett's credibility and Armstrong's ability to identify the men who took part in the murder. Where only two witnesses provided evidence against Sanders, with no forensic corroboration to show even that Sanders came to the scene of the crime, we cannot say that the trial court committed manifest error when it found a reasonable probability that Sanders would have obtained a better result but for his counsel's errors. Accordingly, we affirm the trial court's judgment and remand this case for a new trial.

¶ 34 **CONCLUSION**

¶ 35 Only two witnesses implicated Sanders in the murder of Atkins, and one of those witnesses, Haslett, testified as an accomplice treated with great leniency because of his testimony against Sanders. Sanders' trial counsel committed errors that precluded the jury from hearing testimony that Haslett gave a statement to a private investigator, and in that statement Haslett largely contradicted his trial testimony and said Sanders did not participate in the murder. Because of the value of the statement to the private investigator, both as impeachment of a key witness and as substantive

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evidence of innocence, and because of the testimony Sanders would have given on his own behalf if his counsel had introduced into evidence Haslett's statement to Mroz, we cannot say that the trial court committed manifest error when it found that trial counsel's errors prejudiced Sanders. Accordingly, we affirm the judgment of the trial court granting the postconviction petition and ordering a new trial for Sanders.

¶ 36 Affirmed.

¶37 JUSTICE MURPHY, dissenting:

¶38 I respectfully dissent. I disagree with the majority's conclusion that the circuit court's determination that there is a reasonable probability that the result of defendant's trial would have been different had he not been barred from using Haslett's May 1994 statement as evidence is not manifestly erroneous. In reaching its conclusion, the majority determines that the May statement would have proved helpful to defendant because it could have significantly undermined Haslett's credibility and been used as substantive evidence of his innocence. The majority also determines that defendant would have testified at trial and explained to the jury that he had no need to coerce Haslett into writing the July letter because he was already in possession of the May statement, that he did not have an opportunity to coerce Haslett into writing the July letter, and that he had an alibi.

¶39 I will initially address defendant's claims that he could have testified that he did not have reason to coerce Haslett into writing the July letter and could have presented evidence of an alibi. Defendant asserts that evidence of the May statement and his accompanying testimony would have established that he had no reason to force Haslett into writing the July letter because he was already in possession of the May statement, which was "damning enough in itself to obviate the need for any further recantation by Haslett." Defendant claims that the May statement "would have knocked out any suggestion that [he] had any reason to coerce Haslett, permitting [him] to rely on both the May 1994 recantation and July 1994 letter for his defense." The State maintains that the May statement does not show that defendant had no reason to coerce Haslett into writing the July letter where the letter contains information that was not included in the May statement.

¶40 The record shows that Haslett related in both his May statement and the July letter that he

lied to the police about defendant's presence at and involvement in the shooting, that the police told him to lie and implicate defendant, and that only three people were involved in the shooting. The record also shows that Haslett failed to answer the question asking for the names of those three individuals and said that he did not know what specific roles they played in the shooting in the May statement, but identified all three offenders and described their roles in the July letter. In addition, Haslett explained why the police wanted to shift responsibility for the shooting from him to defendant and why he was not included in the lineup that was presented to Armstrong in the July letter, but not the May statement.

¶41 The record thus shows that although Haslett asserted in the May statement that defendant was not involved in the shooting and that there were three offenders, he did not identify the three individuals or describe the roles they played in the shooting despite being asked such questions by Mroz. In addition, although Haslett related in the May statement that the police told him to lie and implicate defendant, he did not explain why the police would want to shift responsibility for the shooting from him to defendant or why he was not included in the lineup that was presented to Armstrong. Thus, Haslett did not set forth any specifics regarding the shooting or explain why the police wanted to place the blame on defendant in the May statement, and defendant therefore would have had reason to coerce Haslett into writing the more detailed July letter even if he was already in possession of the May statement. As such, evidence of the May statement would not have helped defendant convince the jury that he had no reason to coerce Haslett into writing the July letter.

¶42 To the extent defendant claims that he could have presented evidence of an alibi defense showing that he was at a party at Vicki Ross's house during the shooting, such an assertion is

contradicted by the record where the notice of alibi defense he filed prior to trial indicates that he would present an alibi defense showing that he was with his girlfriend and Kenneth Gulley at the time. Further, while defendant asserts that there were 20 or 30 people at Ross's party and that they were available to testify at trial, such an assertion is unbelievable where he certainly would have testified at trial regardless of whether he could have presented evidence of the May statement if 20 or 30 witnesses were available to corroborate his alibi testimony.

¶43 The majority correctly notes that defendant's conviction was based on the eyewitness testimony of Haslett and Armstrong and that Haslett's credibility was undercut in a number of ways by defense counsel at trial. Thus, to find defendant guilty, the jury must have either relied on the testimony of both Armstrong and Haslett or found that Haslett was not a credible witness and that Armstrong's testimony was alone sufficient to support his conviction. For the reasons that follow, there is no reasonable probability that the result of defendant's trial would have been different had he been allowed to present evidence of the May statement regardless of whether the jury relied on the testimony of both Armstrong and Haslett or just that of Armstrong.

¶44 In order for the jury to have given any weight to Haslett's identification testimony, it must have believed his testimony that he was coerced into writing the July letter and that the matters set forth therein were untrue. If the jury believed Haslett's testimony that he was threatened in the jail bullpen in July 1994, it stands to reason that it also believed his testimony that following the shooting defendant ordered him to his knees, put a gun in his mouth, and told him that if he said anything about what had happened that night, he would kill him and his family "just like he killed them." Thus, the jury likely would have concluded that Haslett was coerced into giving the May

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statement where defendant had previously threatened to kill him and his family, he knew that Mroz was working for defendant, the questions he was asked were written by defendant, and he appeared nervous during the interview. Although defendant would have testified that he did not threaten Haslett on the night of the shooting or in July 1994, such testimony would not have been corroborated by any other evidence and would have constituted self-serving denials unlikely to be believed by the jury. As such, if the jury placed any reliance on Haslett's testimony in finding defendant guilty, the May statement would have been of no value to defendant because the jury would have found that Haslett was coerced into giving the statement and the matters set forth therein were untrue.

¶45 If the jury found that Haslett was not a credible witness and that Armstrong's testimony was alone sufficient to support a finding of defendant's guilt, the May statement would only have had value as substantive evidence to contradict Armstrong's testimony because the jury would have already found that Haslett had been effectively impeached by other means. However, to have found defendant guilty based solely on Armstrong's testimony, the jury must have believed her testimony even though it was contradicted by the July letter. If the jury believed Armstrong's testimony even though it was contradicted by the July letter, then it would have also believed her testimony even if it was contradicted by the May statement because the July letter more strongly contradicts Armstrong's testimony where it provides more complete and detailed information than the May statement. Thus, if the jury found defendant guilty based solely on the testimony of Armstrong, it must have believed her testimony in spite of the July letter, and evidence of the May statement would not have affected the outcome of the trial.

¶46 As such, it is clearly evident that there is no reasonable probability that the result of the trial would have been different had defendant been able to present evidence of the May statement regardless of whether the jury based its finding of guilt on the combined testimony of Armstrong and Haslett or solely on the testimony of Armstrong. If the jury believed Haslett's testimony that he was coerced into writing the July letter, then it would have also believed his testimony that defendant threatened him on the night of the shooting and found that the May statement was the product of coercion and that the matters set forth therein were untrue. If the jury did not believe Haslett's testimony and found defendant guilty on the strength of Armstrong's testimony alone, then it must have believed her testimony even though it was contradicted by the July letter, which more strongly contradicted Armstrong's testimony than the May statement, and evidence of the May statement would not have changed the result of the trial. While defendant's assertions of prejudice may seem convincing in the abstract, they lose force when considered in the context of the specific facts and circumstances of this case, and I therefore respectfully dissent.