



¶ 3 In the early morning hours on July 19, 2008, a drive-by shooting occurred outside of Club Phoenix, a nightclub located near Sixth Street and Missouri Avenue in East St. Louis, Illinois. Fernando Lusk, a member of the club's security, and Regina Davis, a patron of the club, were seriously injured in the shooting. The defendant was charged with three counts of aggravated battery with a firearm. Following a jury trial, the defendant was found guilty on all counts. The identification of the shooter was the core issue at trial, and the sufficiency of the identification evidence is the threshold issue in this appeal.

¶ 4 Fernando Lusk was working security at Club Phoenix during the early morning on July 19, 2008. He was stationed at the front door, collecting the \$5 cover charge and checking for identification. Lusk testified that the defendant entered the club, refused to pay the cover charge, and then "got in his face." Lusk noted that the defendant got so close that the two "could have kissed." Lusk testified that he pushed the defendant outside with one hand and that the defendant came right back in. Lusk thought the defendant was seeking a confrontation. Lusk got off his stool, and this time used both hands to push the defendant out the door of the club. Lusk was later told that the defendant had returned to look for a pendant that had been lost when he was initially pushed out the door. Lusk testified that he was not bothered by the defendant's conduct. He explained that he had worked as a bouncer for more than 18 years and that he often dealt with people who tried to avoid paying a cover charge.

¶ 5 Lusk further testified that at closing time, a female patron requested an escort to her car. As Lusk walked the woman to her car, he observed a white, four-door pickup truck, with a king cab, drive slowly past them. Lusk recalled that he looked at the driver and remarked, "That's the guy we kicked out of the club." Lusk testified that the driver fired a black gun through the truck's open window. Lusk pushed the woman to the ground to shield her from the gunfire. When the gunfire stopped, Lusk got to his feet. He saw the white truck

drive away.

¶ 6 Lusk testified that he went to the hospital and was treated for gunshot wounds to his leg and his arm. After he was released, he went to the police station. He identified the defendant's picture in a photo array. Lusk testified that he was certain that the defendant was the driver of the white truck. He stated that he saw the driver clearly before the shooting began, and that he recognized the driver as the same man who had refused to pay the cover charge earlier that night. Lusk testified that he did not drink alcohol while he was on duty that night, and that he did not recall drinking after his shift ended. He acknowledged that it was possible that he drank a small amount of alcohol after his shift that night, but he was not intoxicated.

¶ 7 Celondra Lewis was also an eyewitness to the shooting. She was, however, reluctant to testify at trial and was declared an adverse witness at the State's request. Lewis acknowledged that she had witnessed a drive-by shooting during the early morning hours on July 19, 2008. She was talking with someone outside Club Phoenix when she noticed a white truck on Missouri Avenue near the railroad tracks about a block from her location. The white truck traveled down Missouri Avenue and passed in front of Club Phoenix. She then heard gunshots and ducked down.

¶ 8 Lewis acknowledged that she gave a statement to the police in the morning hours after the shooting, and that three days later, she went to the police station and identified the defendant's picture in a photo array. Lewis testified that she did not actually see the shooter inside the white truck. She assumed that the defendant was the shooter because she recognized the white truck as the same one he had been in earlier that evening. Lewis explained that she had seen the defendant get into that truck shortly after he was ejected from Club Phoenix. Lewis acknowledged that she was under the influence of alcohol at the time of the shooting, and that she may have been under the influence a few hours later when she

gave her statement to the police.

¶ 9 Corey Walker was employed as a security guard at Club Phoenix. He was working at the club during the early morning hours on July 19, 2008. Walker testified that the club closed about 4:30 a.m. that morning. As he was standing outside the club after closing, he saw Fernando Lusk, another member of the club's security team, escort a female patron to her car. The woman's car was parked in a parking lot across the street from the club. Walker testified that he noticed a white truck moving slowly down the street. The truck was either a Chevrolet or a GMC. He watched the truck as it turned the corner and came to a stop. Walker observed a black gun appear through the open window on the driver's side of the truck. He could not see the person who was inside the truck, but he noticed the person's arm was of light complexion. Walker saw Lusk dive behind a car as gunshots rang out.

¶ 10 Walker noted that there had been only one altercation at the club during the early morning hours on July 19, 2008, and so he thought the shooter was the man who had been involved in the altercation. Walker recalled that he had been working in the back of the club that night and that by the time he reached the front door the altercation was over. When Walker stepped outside, he observed a man who seemed to be upset and agitated. He went over to talk with the man. The man indicated that he lost an expensive pendant when a bouncer pushed him down inside the club. Walker went back inside to look for the pendant. He found it and returned it to the man. He then directed the man to leave the premises. Walker identified the defendant as the man who had been involved in the altercation. He had not met the defendant prior to that night.

¶ 11 Regina Davis went to Club Phoenix on July 19, 2008. She testified that she arrived at the club between 2 a.m. and 3 a.m. She met her sister there. Davis testified that she drank alcoholic beverages while at the club, but she did not become intoxicated. When she was ready to leave, she asked security for an escort. Fernando Lusk walked her to her car. The

car was parked in a lot across the street from the club. As Davis approached her car, she noticed a dark pickup truck driving down Missouri Avenue. She saw it turn a corner and slow its speed. Davis testified that she began to search her purse for her car keys. As she was looking in her purse, she heard Lusk say, "That's the dude we kicked out the club." Davis looked up. She saw the driver of the truck through the driver's side window. Davis noted that the driver was a light-skinned man with a big afro. She could not see his facial features. Then she heard gunshots, and Lusk pushed her to the ground. Davis stated that she heard gunshots coming from the truck, but she did not see a gun.

¶ 12 Davis was shot in the left knee. She was transported to the hospital and was admitted for several days. Davis recalled that a police officer came to the hospital to take her statement, and that at the time, she was not thinking clearly because of the medication she was taking. Davis acknowledged that she told the officer she could not recall whether the shooter drove an SUV or a truck. Davis testified that her mind cleared a few days after she was discharged, and that she then remembered that the shooter drove a dark-colored pickup truck. Davis acknowledged that she initially reported that the shooter had braided hair, but then clearly remembered that he had an afro. Davis testified that she had not seen the shooter prior to the night of the shooting. At trial, she was unable to identify the defendant as the shooter.

¶ 13 The defendant called three witnesses and testified in his own defense. Victoria Toney testified that on July 19, 2008, she was tending bar in a nightclub in East St. Louis called Club Paradise. Toney stated that the defendant came into Club Paradise during the early morning hours on July 19, 2008. She recalled that the defendant appeared dazed and "red and bruised up," and that he asked to see William Moore. Moore owned Club Paradise, and he and the defendant were friends. Toney testified that the defendant left the club sometime before 5 a.m. She stated that shortly after the defendant left, a man came in and reported that

someone had been shot outside Club Phoenix. Toney testified that Club Phoenix is approximately two blocks from Club Paradise.

¶ 14 William Moore, the owner of Club Paradise, testified that he met with the defendant on the night of the shooting. Moore stated that the defendant had stopped by Club Paradise earlier that night, that he left to attend a party, and that he returned to Club Paradise around 3:30 a.m. Moore recalled that he and the defendant talked for 30 to 45 minutes. During the conversation, the defendant mentioned he had been "jumped on" at Club Phoenix earlier that same night. Moore testified that the defendant left Club Paradise around 4:30 or 4:45 a.m., and that within a few minutes after the defendant's departure, a man came into the club and said there had been a shooting at Club Phoenix. Moore stated that Club Phoenix was two or three blocks from his club.

¶ 15 Fernando Lusk was called as an adverse witness by the defense. Lusk acknowledged that he was treated in the emergency room at Kenneth Hall Regional Hospital on July 19, 2008. Lusk testified that he told the emergency room staff that he had been shot outside a nightclub. He denied reporting that he had been shot by an unknown person. During cross-examination, Lusk identified the defendant in the courtroom. He testified that he was "100% certain" that the defendant was the man who shot him outside Club Phoenix on July 19, 2008.

¶ 16 The defendant testified that he had planned to attend a birthday party at Club Phoenix on July 19, 2008. The defendant stated that when he entered Club Phoenix, he was pushed to the ground by a bouncer named Fernando Lusk. The defendant stated that when he got to his knees, he noticed that his gold necklace was broken and that his pendant was missing. He thought that Lusk had snatched his pendant and tossed it on the floor. The defendant testified that he spotted the pendant on the floor in a corner, and that when Lusk was distracted by two patrons entering the club, he retrieved his pendant and left the club.

¶ 17 The defendant testified that he had driven his father's Chevrolet pickup truck that

evening. He described it as a white, extended cab pickup truck. It was a two-door model and had tinted windows. The defendant testified that he parked the truck on the street about a half block from Club Phoenix. After the altercation at Club Phoenix, he drove it back to Club Paradise. The defendant testified that he remained at Club Paradise, visiting with his friend, William Moore, until 4:50 or 5 a.m. When he left Club Paradise, he drove directly to his house. He then drove to his parents' house to check on his dad and the pets. The defendant denied any involvement in the shooting.

¶ 18 In his first point, the defendant contends that the trial court committed reversible error when it denied his motions for a judgment of acquittal at the close of the State's case and at the close of all evidence because Lusk's identification testimony was unreliable and insufficient to prove him guilty beyond a reasonable doubt.

¶ 19 In considering a challenge to the sufficiency of the evidence, a reviewing court must decide, after viewing the evidence and reasonable inferences therefrom in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004). In cases where a finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt. *Cunningham*, 212 Ill. 2d at 279, 818 N.E.2d at 308. A reviewing court has a duty to carefully examine the evidence, but it must not substitute its judgment for that of the fact finder regarding the credibility of the witnesses, the weight to be given the evidence, the reasonable inferences to be drawn from the evidence, and the resolution of inconsistencies in the evidence. *People v. Tenney*, 205 Ill. 2d 411, 428, 793 N.E.2d 571, 582 (2002). It is not the function of the reviewing court to retry the defendant. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999).

¶ 20 After carefully considering the evidence in the record, we conclude that a rational trier of fact could have found that all essential elements of the charged offenses were proved beyond a reasonable doubt. Based on the evidence in the record, the jury could have reasonably found that Fernando Lusk, given his training and experience in the field of security, was a more accurate observer than the other witnesses, especially under stressful circumstances. The jury could have reasonably found that Lusk had an adequate opportunity to observe the defendant before any shots were fired; that Lusk identified the defendant through a photo array and at trial, and that he did not waver in his identification of the defendant as the shooter; that Lusk's identification testimony was not impeached in any significant way; that Lusk provided a fairly accurate description of the shooter's vehicle; and that Lusk's errant recollection that the truck was a four-door, rather than a two-door model was not significant.

¶ 21 Additionally, the jury could have reasonably found that Regina Davis and Corey Walker were candid and truthful about what they remembered and what they did not remember, and that these witnesses were credible despite some lapses in their respective memories.

¶ 22 On this record, the jury could have reasonably found that the identification testimony was credible, and that the evidence was sufficient to prove that the defendant was guilty beyond a reasonable doubt of aggravated battery with a firearm. The trial court did not err in denying the defendant's motions for a judgment of acquittal at the close of the State's case and at the close of all the evidence.

¶ 23 The defendant next contends that he was unfairly prejudiced because inadmissible hearsay purporting to identify him as the shooter was erroneously admitted. The alleged hearsay statement was uttered by Regina Davis as she recounted what happened when Fernando Lusk escorted her to her car on the night of the shooting. Davis testified that she

noticed a pickup truck moving slowly down the street, and that she was standing near her car, looking in her purse for the car keys, when she heard Lusk say, "That's the dude we kicked out the club." Davis testified that as soon as Lusk said that, she looked up and heard gunshots.

¶ 24 In order to preserve an alleged error for review, the defendant must have made a contemporaneous objection at trial and raised the alleged error in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). In this case, the defendant raised the hearsay issue in his posttrial motion, but did not make a contemporaneous objection to the statement or move to strike it at trial. The defendant did not properly preserve the issue for review. *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d at 1130; *People v. Trefonas*, 9 Ill. 2d 92, 98-99, 136 N.E.2d 817, 820 (1956). Additionally, the defendant has not established that the admission of the alleged hearsay statement constitutes plain error. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). In this case, the evidence at trial was not closely balanced, and the defendant has not shown that he was denied a substantial right affecting the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467, 475 (2005). As such the point is waived.

¶ 25 Even if the point had been properly preserved for review, the error, if any, in the admission of the alleged hearsay is harmless. The record shows that Fernando Lusk, the person who uttered the out-of-court statement, testified about that statement and made an in-court identification of the defendant. Moreover, the defendant had the opportunity to cross-examine Lusk in the State's case and in his own case. The defendant has not shown that he was unfairly prejudiced by the alleged hearsay statement. *People v. Hughes*, 259 Ill. App. 3d 172, 178-79, 632 N.E.2d 251, 256 (1994).

¶ 26 The defendant also contends that he received ineffective assistance of counsel because his trial attorney elicited testimony from defense witnesses which, effectively, supplied

evidence necessary for conviction that had not been satisfactorily established in the State's case-in-chief.

¶ 27 Claims based on the ineffective assistance of counsel are analyzed under the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). In order to establish ineffective assistance of counsel, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. 668; *People v. Graham*, 206 Ill. 2d 465, 476, 795 N.E.2d 231, 238 (2003). A reasonable probability means a probability sufficient to undermine confidence in the result of the trial. *Graham*, 206 Ill. 2d at 476, 795 N.E.2d at 238. A defendant must satisfy both prongs of the *Strickland* test in order to establish ineffective assistance of counsel. *Graham*, 206 Ill. 2d at 476, 795 N.E.2d at 238.

¶ 28 The defendant contends that he was unfairly prejudiced when his trial attorney elicited testimony from two alibi witnesses, Victoria Toney and William Moore, which placed the defendant within a few blocks of the shooting near the time of the shooting, and when his attorney elicited testimony from the defendant which showed that he drove a white pickup truck on the night of the shooting. Therefore, the defendant argues that his trial attorney produced inculpatory evidence which the State had failed to elicit in its case-in-chief, and that he could not have been convicted without that evidence. We disagree.

¶ 29 The record shows that the State presented ample evidence in its case-in-chief to establish the defendant's presence at the scene of the crime. The unequivocal testimony of Fernando Lusk placed the defendant at the scene of the crime, and the testimony of other witnesses corroborated Lusk's testimony. There is no reasonable likelihood that the outcome of this proceeding would have been different without the testimony from the alibi witnesses.

Likewise, the record shows that the State presented ample evidence to establish that the shooter drove a white pickup truck during the drive-by shooting. Three of the State's eyewitnesses testified to that fact. The record suggests that the defendant was asked to provide a detailed description of his pickup truck in order to highlight flaws in the descriptions of the truck provided by the State's eyewitnesses and to taint the credibility of those eyewitnesses. There is no reasonable likelihood that the outcome of the proceeding would have been different without the defendant's description of the truck he drove on the night of the shooting. After reviewing the record, we have determined that the defendant has not satisfied the prejudice prong of the *Strickland* test.

¶ 30 We have also determined that the defendant has not shown that his counsel's performance was deficient. The record suggests that defense counsel's decision to elicit testimony from the defendant regarding the model and features of his pickup truck was a matter of trial strategy. The record also suggests that defense counsel's decision to question the alibi witnesses in an attempt to establish that the defendant was in a nightclub a few blocks away around the time of the shooting was a matter of trial strategy and a part of an alibi defense. In addition to pursuing an alibi defense, defense counsel vigorously tested the State's case, challenging the credibility and the memory of the State's witnesses during cross-examination. The defendant has not shown that defense counsel employed unsound strategies or completely failed to conduct meaningful adversarial testing of the State's case.

¶ 31 In this case, the defendant has not shown that his trial counsel's performance was deficient or that he was prejudiced by any of the claimed deficiencies. The defendant has not established that he was deprived of effective assistance of counsel.

¶ 32 Accordingly, the judgment of the circuit court of St. Clair County is affirmed.

¶ 33 Affirmed.