2014 IL APP (1st) 120639-U

FIFTH DIVISION
March 14, 2014

No. 1-12-0639

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois
v.	)	
FREDERICK SMITH,	)	No. 07 CR 17924
Defendant-Appellant	)	Honorable
	)	Steven J. Goebel,
	)	Judge Presiding

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

ORDER

HELD: Defendant was convicted of first degree murder and appealed, alleging ineffective assistance of counsel. This court affirmed, finding that: (1) defense counsel was not ineffective for failing to object to the introduction of other-crimes evidence where some of it was properly admitted for nonpropensity purposes and the remainder was not prejudicial in context; (2) no prejudice resulted from defense counsel's failure to request a jury instruction on other-crimes evidence where the evidence of defendant's guilt was overwhelming; and (3) defense counsel acted reasonably in failing to impeach a prosecution witness where the witness's credibility was already severely undermined on direct examination.

¶ 1 Defendant Frederick Smith was charged with first degree murder in the shooting death of Carlton Hamilton. His first jury trial resulted in a hung jury; however, in a subsequent jury trial, he was found guilty of that offense. The trial court sentenced defendant to a term of 75 years, which included a 25-year enhancement for personally discharging a firearm that proximately

caused Hamilton's death. On appeal, defendant contends that he received ineffective assistance of trial counsel. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On August 9, 2006, Carlton Hamilton and Maurice Barbee were having a conversation in the street near 81st Street and Cornell Avenue, in Chicago, when they were fired upon by either defendant or Georgio Gaines, both of whom were in a green minivan approaching on Cornell. Barbee fled to a nearby gangway. Hamilton, however, fell to the ground, prompting someone inside the vehicle to yell "finish him." Defendant exited the vehicle with Georgio Gaines and fired additional shots at Hamilton as he lay on the ground and died of gunshot wounds. He and Gaines then returned to the minivan and drove off. Later that evening, defendant had the green minivan destroyed by two companions.

¶ 4 Defendant and Gaines were charged with Hamilton's murder. Prior to defendant's first trial, the State filed a motio*n in limine* to admit evidence of other crimes. The State sought to introduce evidence of the destruction of the van used during the shooting and of defendant's alleged participation in the murder of George Fletcher, who had lent the van in exchange for narcotics. The State claimed that this evidence was relevant to show defendant's identity, intent, knowledge, motive, and consciousness of guilt.

¶ 5 At a hearing on the State's motion, the State asserted that defendant and Gaines were identified as participating in the murder of Carlton Hamilton on the afternoon of August 9, 2006, at 8130 South Cornell Avenue. According to the State, they were driving a green minivan at the time, which was owned by Kathy Ross, Fletcher's girlfriend. Fletcher, however, "was for all intents and purposes the owner and user of that van." Shortly after Hamilton's murder, defendant and Gaines met up with Fletcher at an apartment and an argument ensued over the use of the

van. Defendant then told Gaines and Winston Gibbons to "take care of [Fletcher] or look after him or something along those lines" and sent them outside. Moments later, at about 1:44 a.m. on August 10, 2006, Fletcher was shot and killed at 8249 South Drexel Avenue. The green minivan was also burned by one of the individual's present at the apartment. The State identified three witnesses it could call who were present during the conversation that preceded Fletcher's murder: Anthony Williams, Pierre Macon, and Ralph Jones. The State also noted that Macon gave a handwritten statement and grand jury testimony stating that defendant told him to "get rid of the van" and "burn the van down the street."

¶ 6 Defense counsel argued that the State was seeking to admit prejudicial evidence of a murder for which defendant was not charged. Defense counsel further argued that there was no direct evidence that defendant was involved in the destruction of the van.

¶ 7 The trial court ultimately granted the State's motion in part and denied it in part. The court found that the probative value of the evidence regarding Fletcher's murder did not outweigh its prejudicial effect. However, the court ruled: "What you will be allowed to do is put in the facts, whatever you have, to show in the statement that the van was destroyed and that [defendant] ordered the van destroyed." The State requested permission to introduce evidence that defendant stated "go ahead and take care of him," with the details of Fletcher's murder redacted. However, the court refused, stating that "[t]he part of the statement take care of him will not be [admissible]."

¶ 8 Several months later, on the eve of trial, the State revisited the court's ruling on the motion *in limine* and asked whether it could introduce three statements made by defendant in response to Fletcher's inquiry about the whereabouts of his van; namely, (1) "why are you worried about that ragedy ass van"; (2) "you worried about that old gray man's van when you

know we just got jacked from my drugs and money"; and (3) "what you worried about, fuck your van; I lost all my money and dope." The court ruled that the State could not introduce the above statements, but that it could "say witnesses were present at a certain date, time and location, [and] saw whatever it was that they saw."

¶ 9 Defendant's first jury trial subsequently resulted in a hung jury and was declared a mistrial. For his retrial, Defendant hired a new attorney, and co-defendant Gaines was joined. Gaines would be tried for the murders of Hamilton and Fletcher in a severed jury trial.

¶ 10 Prior to defendant's retrial, the State filed another motion *in limine* to admit evidence of other crimes. The State again sought to introduce evidence relating to the destruction of the minivan and the murder of Fletcher to show identity, intent, knowledge, motive, and consciousness of guilt. The trial court, after a hearing, stated that it would abide by its previous ruling.

¶ 11 At defendant's second jury trial, Spencer Williams testified that he was incarcerated on an armed habitual criminal conviction and had been previously convicted of burglary. Williams could not recall most of the events surrounding Hamilton's murder on August 9, 2006, or any of the testimony he gave before the grand jury. Williams also could not recall any of his testimony from defendant's previous trial. The State questioned Williams regarding a number of letters he wrote to the Cook County State's Attorney's office seeking deals and indicating that he would not testify, or would testify untruthfully, unless he received one. Finally, Williams testified that he was still serving his sentence for armed habitual criminal and that his sentence was never reduced.

¶ 12 On cross-examination, Williams stated that he did not recognize defendant or Gaines and that he cannot remember having seen them commit a shooting in August 2006. He also stated that he cannot recall ever telling anyone that defendant shot a gun at someone.

¶ 13 Chicago police detective Kathleen Chigaros testified that about 6:30 p.m. on August 9, 2006, she assisted with a homicide investigation near 8130 South Cornell Avenue. While canvassing the area, she encountered Williams and spoke with him. Williams told her that he had been walking northbound on Cornell Avenue from 82nd Street when he saw a green minivan approach from the direction of 81st Street. The minivan slowed down, then he saw defendant and Gaines start shooting from the van. Williams stated that defendant and Gaines subsequently exited the van and approached the victim. Someone then yelled "finish him, finish him," as defendant pointed his gun and fired additional shots. Williams stated that after the shooting, defendant and Gaines returned to the van and drove south to 83rd Street before heading westbound. He also stated that an individual named "Winston" was in the van and that he knew the assailants to be from the area of 82nd Street and Ingleside Avenue. Following this conversation, Detective Chigaros brought Williams to the lead detectives. She testified that she asked Williams if he would go to Area 2 to assist in the investigation, and that Williams responded that he would as soon as possible.

¶ 14 Assistant State's Attorney (ASA) Donna Norton testified that on the evening of September 5, 2006, she went to Area 2 headquarters and met with Detectives Braun and Resa regarding the homicide at 8130 South Cornell Avenue. About 11:30 p.m., she also met with Williams at the detective division of Area 2, with Detective Resa present. Williams agreed to speak with her about what he observed on August 9, 2006. After their conversation, he also

agreed to give a handwritten statement. ASA Norton testified that Williams was not promised anything in exchange for his statement.

¶ 15 Williams' handwritten statement was introduced into evidence and then published to the jury. Williams stated that about 6:30 p.m. on August 9, 2006, he was walking northbound on Cornell Avenue from 82nd Street. He then saw Hamilton and Maurice Barbee, both of whom he has known for about 15 years, standing at 8130 South Cornell Avenue, and a green Mercury minivan with gray trim at the bottom approaching southbound on Cornell Avenue. He was about two houses away from Hamilton and Barbee, when a young black male, whom he identified as Gaines, reached out of the front passenger window with a semi-automatic handgun, either a nine-millimeter or a .40-caliber, and fired several shots at Hamilton, who fell to the ground. Williams stated that he stood behind a white picket fence at 8152 South Cornell Avenue when the shots were being fired and that Barbee ran westbound into a gangway.

¶ 16 Williams stated that as Gaines was firing from the front passenger window, the side-door of the minivan slid open and shots were fired from there as well. Williams then saw a black male, whom he identified as defendant, stand over Hamilton holding what appeared to be a Tech 9 handgun with a long clip. Williams stated that someone in the minivan was yelling "finish him" and that defendant fired about three shots at Hamilton. Defendant then reentered the minivan through the sliding door, and the vehicle drove southbound on Cornell Avenue before heading westbound on 82nd Street. Williams stated that he was able to get a "better look" at Gaines as the minivan passed him and that he was also able to get another look at defendant because the sliding door was not completely closed. He stated that the driver of the minivan was a black male.

¶ 17 ASA Francisco Lamas testified that on September 6, 2006, he met with Williams in his office to verify that no threats or promises had been made to him and that he then presented Williams to the grand jury. Williams' grand jury testimony was published to the jury and largely mirrored the version of events he gave in his handwritten statement.

¶ 18 ASA Patrick Keane testified that on July 11, 2008, he met with Williams to bring him before the grand jury on a separate, unrelated murder case. He testified that Williams had pending cases, but that he did not make any promises to Williams in exchange for testimony.

¶ 19 Etta Jones, a court reporter at defendant's previous trial, published portions of Williams' prior trial testimony, which also largely mirrored the version of events he gave in his handwritten statement. On cross-examination, trial counsel introduced a portion of Williams' prior trial testimony in which he acknowledged writing letters to the State's Attorney's office requesting a sentence reduction.

¶ 20 Maurice Barbee testified that he has prior felony convictions for possession of a stolen motor vehicle and driving under the influence of alcohol. He also has three prior convictions for driving on a suspended license. Barbee testified that at 6:30 p.m. on August 9, 2006, he and Hamilton were having a conversation next to Hamilton's car at 81st Street and Cornell Avenue. Barbee then noticed a green van approaching them and saw defendant, in the front passenger seat, aiming a machine gun with a long clip at them. Barbee ran to the side of a house about 50 feet away and heard 4 or 5 shots fired. When the shooting stopped, he came out and saw Hamilton, who appeared to still be breathing, lying on the ground. Barbee heard someone in the van say "finish him" two or three times, then saw two people exit the van. Barbee was unable to see the face of one of the individuals, but the other was defendant, who exited the front passenger side with a gun. Barbee testified that defendant ran to Hamilton and stood over him.

Barbee, meanwhile, ran toward the backyard of the house he was standing near and heard two or three more gunshots. He stayed in the back yard for a few moments in shock. Then, when he eventually went out to the street, he saw that Hamilton was on the ground and not breathing. Police subsequently arrived, but Barbee did not speak with them because he "[j]ust didn't want to." He spoke with detectives early the next morning at his house, however, and identified defendant in a photographic lineup as the person who shot Hamilton.

¶ 21 William Moore, a forensic investigator for the Chicago police department, testified that about 7:30 p.m. on August 9, 2006, he arrived at 8130 South Cornell Avenue to process the crime scene. Investigator Moore photographed the scene and conducted a general canvass of the area. He and his partner then recovered five .45-caliber cartridge cases and one nine-millimeter cartridge case, indicating that two guns were involved. Investigator Moore additionally recovered a fired bullet.

¶ 22 The State, at this point in the trial, sought additional clarification of the ruling on its motion *in limine* to present evidence of other crimes. The court noted that "[i]t all comes in as to Georgio Gaines" and that, with respect to defendant, "[i]t's the same as we did it last time." The State then asked: "Go take care of him, leave the apartment without saying anything that was said, then he hears gunshots, come back to the apartment without saying anything—." And the court responded, "Correct."

¶ 23 Chicago police detective Kevin Scott testified that on August 10, 2006, he was assigned to investigate the murders of Hamilton and Fletcher. About 9:43 a.m., he went to an alley at 950 East 86th Street and observed an "almost completely burned out" green Mercury Villager minivan. Detective Scott testified that an evidence technician was unable to recover any fingerprints from the van.

¶ 24 Pierre Macon testified that he was currently incarcerated and had previously been convicted of residential burglary and criminal drug conspiracy. He then largely denied all questions concerning the events of August 9 and 10, 2006. Macon acknowledged giving a handwritten statement to an ASA, but claimed that none of it was true and that the police forced him give to give it. He similarly acknowledged giving his grand jury testimony, but stated on cross-examination that his grand jury testimony was untrue and that police forced him to make those statements as well.

¶ 25 ASA Geraldine D'Souza testified that on January 8, 2007, she took a handwritten statement from Macon at Area 2 headquarters. She testified that Macon did not complain of any threats when they were alone together and that he did not appear to be repeating a memorized statement.

¶ 26 A redacted version of Macon's handwritten statement was admitted into evidence and then published to the jury. Macon stated that in August 2006, he occasionally went to an apartment belonging to a man named "Ralph," at 82nd Street and Drexel Avenue, where people would "hang out" and "smoke weed." He stated that Gaines, Gibbons, defendant, and Fletcher all "hung out" at the apartment and that a man named "Ant" stayed there as well. On the afternoon of August 9, 2006, Macon was outside Ralph's apartment on Drexel Avenue when he saw Ant driving Fletcher's van, with defendant in the passenger seat and Gaines in the backseat. Macon then went to "hang out" with some friends at 82nd Street and returned to the area near Ralph's apartment around 8 or 9 p.m.

¶ 27 Upon returning to the area, Macon saw Gibbons, Gaines, Ant, and defendant "hanging out" in the alley. Defendant said, "Come here man, I need you to do something for me," then told him that he would give him some money to burn Fletcher's van. Macon stated that he

agreed to burn the van because he wanted the money and was scared of defendant. Defendant told him that Ant would give him instructions and that he should follow Ant.

¶ 28 Macon and Ant drove Fletcher's green minivan to 85th Street and Ingleside Avenue. Macon then poured gasoline inside of the vehicle and lit it on fire, burning his face and right hand in the process. Macon and Ant subsequently ran back to Ralph's apartment where they found Fletcher upset because his van had been gone for so long. Fletcher asked Macon if he knew the whereabouts of defendant and Gaines, and Macon responded that he did not. Macon then lay down awhile, stating that he was in pain from his burns.

¶ 29 When Macon awoke about three hours later, defendant, Gaines, Fletcher, Ralph, Gibbons, and Ant were in the apartment, and Macon heard Fletcher ask defendant about his van. Defendant told him that the van was stopped on Western, and Fletcher then left the apartment. Macon stated that Gaines and Gibbons came back in the apartment at some point, that each had a gun in his hand, and that they went into a room and closed the door. Macon stated that he stood up to leave and asked defendant for the money he was promised for burning the van, but defendant told him, "No, you ain't getting nothing. Get out of 82nd or I'll do something to your bitch ass and your bitch ass family." At that point, Macon left the apartment and went home.

¶ 30 ASA Sanju Oommen testified that on January 10, 2007, she spoke with Macon in her office about the homicide in question, then asked him to go into the grand jury. ASA Oommen testified that during the grand jury hearing, Macon was asked, "What could you hear [defendant] and [Fletcher] talking about?" And he responded, "[Fletcher] was asking [defendant]—[defendant] was telling him the car stopped on 78th and Western."

¶ 31 Ralph Jones testified that he has a prior felony conviction for retail theft. About 7:30 p.m. on August 9, 2006, Jones returned to his apartment after visiting his mother and found

Fletcher standing in his living room. He repeatedly had to ask Fletcher to sit down because he was peering through the window blinds and kept standing up. Jones testified that he eventually went to the kitchen to get something to eat and passed Ant and Macon on the way. Ant and Macon were having a conversation, and they left the apartment around 8 p.m. Jones testified that Ant returned about 15 minutes later, and that Macon returned after another 15 minutes with red and blistered hands. He testified that Macon was breathing as if he had just been burned and was shaking his hands and blowing on them. Jones filled a pot with ice and instructed Macon to put his hands in it. He then brought his plate to the front of the apartment where he could watch Fletcher, who "was bouncing up and down like a Jack-in-the-Box." Jones testified that when he subsequently returned to the kitchen with his plate, Macon was asleep at the table.

¶ 32 About 1 a.m. the next morning, Gaines, defendant, and Gibbons entered Jones' apartment through the back door, and Jones met them in the hallway. They then went to the front of the apartment, and defendant and Fletcher had "a little argument." Jones heard defendant say, "You worried about that raggedy ass van? I just got jacked for my dope and my money." Defendant then told Fletcher, "We gonna take care of you, man. We got you, man. Don't worry. We got you, man. We're gonna take care of you." At that time, Gibbons was sitting behind Jones on the corner of a table with "his hand up under a hoody and there was a big bulge up under the hoody." Gaines was on a loveseat to Jones' right holding a Glock nine-millimeter on the side of his leg. After defendant told Gaines and Gibbons, "Take care of this guy, man," Gaines stood up and was followed by Fletcher, then Gibbons out the front door. Sometime later, Gaines and Gibbons returned to the apartment. Defendant and Gaines then had a conversation and went towards the back. Jones remained seated for a moment. He then noticed it was very quiet, and when he checked the back of the apartment, he discovered that he was the only one still in the residence.

¶ 33 On cross-examination, Jones stated that he saw Fletcher smoke crack-cocaine on the day in question, and he admitted that he may have smoked some as well. Jones acknowledged using drugs in the past.

¶ 34 The parties stipulated to the medical examiner's testimony regarding Hamilton's autopsy. The medical examiner recovered two bullets from Hamilton's body. She concluded that the cause of Hamilton's death was multiple gunshot wounds and that the manner of his death was homicide.

¶ 35 Illinois State Police Sergeant Wayne Ladd testified that on September 22, 2006, he recovered a Masterpiece Arms Mach 10 .45-caliber pistol, with an extended clip, from Eric President on the 7500 block of South Evans Avenue, about a mile and a half away from where the shooting of Hamilton occurred. He inventoried the gun, and it was submitted for testing.

¶ 36 Kurt Zielinski, a forensic scientist with the Illinois State Police, testified as an expert in the field of firearms identification. Zielinski analyzed the bullets recovered from the scene of the homicide and Hamilton's body, and he concluded that all three were .45-caliber and fired from the same firearm. He also analyzed the cartridge cases recovered from the scene and concluded that one was a nine-millimeter Luger and that the other five were .45 auto caliber casings fired from the same firearm. Zielinski finally testified that the nine-millimeter cartridge case was fired from the gun recovered from Gaines.

¶ 37 William Demuth, a forensic scientist for the Illinois State Police, testified as an expert in the field of firearms and toolmark identification as well as firearms operation. Demuth opined that the five .45-caliber cartridge casings recovered from the scene of Hamilton's homicide and all three bullets were fired from the gun recovered by Sergeant Ladd.

¶ 38 The State subsequently established that on September 4, 2006, Gibbons was arrested at 836 East 81st Street, and Gaines was arrested at 7934 South Escanaba Avenue. During the arrest of Gaines, Gaines directed police to a garbage can containing a nine-millimeter semi-automatic handgun with 11 live rounds. On September 5, 2006, Spencer Williams identified Gaines in a lineup as one of the individuals he had observed shooting. Thereafter, on July 30, 2007, police learned that defendant had been located in Indiana and arranged for him to be arrested and transported for a lineup. The next day, Spencer Williams also identified defendant in a lineup as one of the individuals he had observed shooting.

¶ 39 After the State rested, defendant's motion for a directed verdict was denied, and the defense rested without presenting any evidence. Following closing arguments, the jury found defendant guilty of first degree murder, and also that during the commission of the offense, he personally discharged a firearm that proximately caused the death of another person.

¶ 40 Defendant hired a new attorney to handle his posttrial proceedings. Posttrial counsel filed a motion for a new trial alleging multiple instances of ineffective assistance of trial counsel. Among the claims were that trial counsel "failed to object to anything" and "failed to challenge any witness." Posttrial counsel particularly took issue with trial counsel's "complete*** fail[ure] to properly object to or cross-examine Spencer Williams."

¶ 41 The trial court ultimately found that trial counsel was not ineffective and denied defendant's motion for a new trial. The court then sentenced defendant to 50 years' imprisonment for first degree murder, with a 25-year enhancement for personally discharging a firearm that proximately caused Hamilton's death.

¶ 42 ANALYSIS

¶ 43 In this appeal, defendant raises multiple contentions of ineffective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 44 Defendant first contends that trial counsel was ineffective for failing to object to evidence of his dispute with Fletcher over the minivan and of Fletcher's subsequent departure from Jones' apartment. He claims that this evidence "strongly suggest[ed]" that he ordered Fletcher's murder and was introduced by the State in violation of the court's ruling on the motion *in limine.*

¶ 45 The State responds that this evidence did not violate the court's ruling on the motion *in limine* and that any objection by defense counsel would not have been granted as a result. The State thus argues that trial counsel did not provide deficient performance, noting that "[d]efense counsel is not required to make losing motions or objections in order to provide effective legal assistance." *People v. Mercado*, 397 Ill. App. 3d 622, 634 (2009).

¶ 46 The record shows that the trial court ruled before defendant's second trial that it would abide by the ruling it made on the State's motion *in limine* prior to defendant's first trial. That

ruling allowed the State to introduce evidence that defendant ordered the green minivan used in Hamilton's murder destroyed, but barred evidence related to Fletcher's murder, including: (1) the instruction given by defendant to Gaines and Gibbons to "take care" of Fletcher; and (2) the responses defendant gave to Fletcher when he asked about the whereabouts of his minivan.

¶ 47 Here, defendant claims that the State violated the above ruling with the testimony of three witnesses: Ralph Jones, ASA D'Souza, and Pierre Macon. Ralph Jones testified at trial that in the early morning hours of August 10, 2006, defendant and Fletcher became embroiled in an argument concerning Fletcher's minivan. Jones testified that he heard defendant say, "You worried about that raggedy ass van? I just got jacked for my dope and my money." He then heard defendant tell Fletcher, "We gonna take care of you, man. We got you, man. Don't worry. We got you, man. We're gonna take care of you." Jones testified that Winston Gibbons was in the room when defendant made this statement and that he had his hand under a "hoody," which contained a large bulge; Georgio Gaines was also in the room holding a Glock nine-millimeter on the side of his leg. Defendant told Gaines and Gibbons, "Take care of this guy, man," at which point Gaines stood up and walked out the front door followed by Fletcher, then Gibbons. Jones testified that Gaines and Gibbons returned to the apartment sometime later.

¶ 48 Pierre Macon's handwritten statement, published at trial by ASA D'Souza, similarly recounted a dispute between defendant and Fletcher over his minivan. Macon stated that he returned to Jones' apartment after burning Fletcher's van and found Fletcher upset because his van had been gone for so long. He then later heard a conversation in which Fletcher asked defendant about the van. Macon stated that defendant told him the van was stopped on Western, and that Fletcher left the apartment. He also stated that Gaines and Gibbons returned to the apartment at some point and that each had a gun in his hand.

¶ 49 Macon finally acknowledged in his testimony that he gave the handwritten statement published by ASA D'Souza. He further acknowledged testifying before the grand jury that defendant and Fletcher had a conversation, that Fletcher then left the apartment, and that Gaines and Gibbons returned to the apartment at some point holding guns. He testified at trial, however, that his statements were all untrue.

¶ 50 Contrary to the State's claim, we cannot say that an objection to the testimony concerning defendant's dispute with Fletcher and Fletcher's subsequent departure from Jones' apartment would have been overruled by the trial court. The court was quite clear in ruling on the State's motion *in limine* that the State was precluded from introducing any evidence of the events around the time of Fletcher's murder, except for evidence that defendant ordered the destruction of Fletcher's minivan. The court also specifically precluded the State from introducing defendant's statement to Gaines and Gibbons that they should "take care" of Fletcher, as well as his remarks to Fletcher about his "raggedy ass van," both of which were introduced through the testimony of Jones.

¶ 51 The State cites a single exchange with the trial court to suggest that it did not violate the court's ruling on the motion *in limine*. At one point during trial, when the State requested clarification of the court's ruling on its motion *in limine*, the court stated, "[i]t's the same as we did it last time." The State then asked: "Go take care of him, leave the apartment without saying anything that was said, then he hears gunshots, come back to the apartment without saying anything—." And the court responded, "Correct." This exchange admittedly seems to suggest that the court allowed evidence of the events around the time of Fletcher's murder after all. However, it is entirely unclear why the court would reverse its prior ruling without any discussion. For this reason, we find that trial counsel should have objected to the evidence in

question because it would have allowed the court to explain its reasons for suddenly allowing evidence previously off limits to the State, or to clarify that its statements had been misunderstood. In light of the court's prior contradictory ruling on the motion *in limine*, we believe that trial counsel's failure to object was unreasonable. *Strickland*, 466 U.S. at 687-88.

¶ 52 We nonetheless find that defendant did not suffer any prejudice. The record shows that the State did not present any evidence that Fletcher was murdered. Moreover, the evidence that the State did present hardly suggests that defendant ordered his murder, as defendant now claims. Defendant's instruction to Gaines and Gibbons to "take care" of Fletcher is innocuous absent knowledge of Fletcher's death. Rather than appearing to order Fletcher's murder, the statement suggests that defendant was asking Gaines and Gibbons to simply remunerate Fletcher for the loss of his van. The fact that Gaines and Gibbons were armed does not change that perception either. There was no evidence that Fletcher was concerned about Gaines and Gibbons being armed, nor was there evidence of any threatening behavior by Gaines and Gibbons towards Fletcher. Gaines and Gibbons merely walked out the front door with Fletcher and returned to the apartment at some point without him. We further note that the reference to defendant's "dope" was unlikely to have much impact on the jury given the grislier facts of this case. In sum, we find it highly unlikely that the result of the proceedings would have been different if trial counsel had objected to this testimony. *Strickland*, 466 U.S. at 687, 694. Accordingly, we reject this claim of ineffective assistance. *Flores*, 153 Ill. 2d at 283-84 (noting that "[w]here the ineffectiveness claim can be disposed of on the ground that the defendant did not suffer sufficient prejudice, the court need not determine whether counsel's performance constituted less than reasonably effective assistance.").

¶ 53 Defendant next contends that trial counsel was ineffective for failing to object to certain "other crimes" evidence; namely, (1) Macon's statement that he agreed to burn Fletcher's van because he was afraid of defendant; (2) Macon's statement that defendant threatened him, "No, you ain't getting nothing. Get out of 82nd or I'll do something to your bitch ass and your bitch ass family"; (3) Macon's statement that Jones' apartment was a place where people would hang out and smoke weed and that defendant hung out there; and (4) Jones' testimony that defendant told Fletcher, " I just got jacked for my dope and my money." Defendant claims that "[n]one of this information should have been admitted at trial, because it was irrelevant to any issues in the case, and strongly suggest that [he] is both a frightening person and a criminal." We address all but the last of these statements, which we have already found was barred by the trial court and should have been objected to by trial counsel.

¶ 54 Under Illinois law, " '[a]ll relevant evidence is admissible, except as otherwise provided by law.' " *People v. Dabbs*, 239 Ill. 2d 277, 289 (2010), quoting Ill. R. Evid. 402 (eff. Jan. 1, 2011). Relevant evidence is that which has any tendency to make the existence of any fact of consequence to the determination more or less probable than it would be without such evidence. *People v. Illgen*, 145 Ill. 2d 353, 365-66 (1991).

¶ 55 The supreme court has long recognized that evidence of other crimes is inadmissible to show defendant's disposition or propensity to commit crime. *Illgen*, 145 Ill. 2d at 364. However, such evidence is admissible if relevant for any other purpose, so long as its prejudicial effect does not substantially outweigh its probative value. *Dabbs*, 239 Ill. 2d at 283-84.

¶ 56 We initially find that trial counsel was not deficient in failing to object to Macon's statement that he burned Fletcher's van because he was afraid of defendant, or in failing to object to the threat defendant made to Macon. Here, Macon's fear of defendant and defendant's threat

to him were relevant to explain why Macon's trial testimony differed from what he initially told ASA D'Souza and the grand jury. *People v. Williams*, 262 Ill. App. 3d 734, 743 (1994) (noting that "[e]vidence of witnesses' fears are also relevant and admissible where it tends to prove a material fact in issue and its probative value outweighs its prejudicial effect"). Macon's statement that he burned Fletcher's van at defendant's request because he was afraid of him was also part of the continuing narrative of events given that the van had been used during Hamilton's murder. *People v. Pikes*, 2013 IL 115171, ¶ 20 (noting that "evidence of other crimes may be admitted if it is part of the 'continuing narrative' of the charged crime"). We disagree that this testimony was highly prejudicial, as defendant claims, because it made him seem to be "a frightening person and a criminal." If anything made defendant seem a frightening person and a criminal in this case, it was the fact that he was accused of committing a murder and of asking Macon to burn the van used to commit the crime; it was not Macon's expressed fear of defendant.

¶ 57 Defendant's reliance on *People v. Robinson*, 189 Ill. App. 3d 323 (1989), is misplaced. In *Robinson*, defendant was tried for the murder of his girlfriend, who was killed during an altercation between the hours of 4:30-5 p.m. *Robinson*, 189 Ill. App. 3d at 326, 329. At trial, the State introduced evidence through a third party that, on the morning of the murder, defendant had an argument with a maintenance man "about the defendant throwing trash off the back porch," and he threatened to kill the maintenance man. *Robinson*, 189 Ill. App. 3d at 329-30. This court found that "[t]here was no proper purpose for introducing this prejudicial evidence," the sole purpose of which was to show defendant's propensity for violence. *Robinson*, 189 Ill. App. 3d at 335.

¶ 58 *Robinson* is clearly distinguishable from the instant case. Here, unlike *Robinson*, Macon's fear of defendant did not merely show defendant's propensity for violence. It also helped explain why his testimony at trial differed from his grand jury testimony and handwritten statement, and established the circumstances surrounding the burning of the van used during Hamilton's murder. Given these alternate bases of relevance, we conclude that trial counsel was not ineffective for failing to objecting to Macon's statements that he was afraid of defendant and that defendant threatened him and his family. *Mercado*, 397 Ill. App. 3d at 634.

¶ 59 Defendant further claims that trial counsel should have objected to the portion of Macon's handwritten statement in which he stated that defendant "hung out" at Jones' apartment, where people would "hang out" and "smoke weed." We agree. Macon's statement that defendant would "hang out" at Jones' apartment was clearly relevant to establishing Macon's familiarity with defendant. However, it was irrelevant and prejudicial to include facts that the house was a place where people would "smoke weed." See *People v. Agee*, 307 Ill. App. 3d 904 (1999) (finding that the trial court erred in admitting an officer's testimony that defendant was arrested in a "high narcotic activity area" where it was irrelevant to the charge of unlawful use of a weapon and "implied that defendant had engaged in an uncharged offense, narcotics trafficking").

¶ 60 Notwithstanding, we find that defendant did not suffer prejudice as a result of counsel's failure to object to this evidence. Here, Macon never directly stated that defendant, himself, smoked or sold "weed" at Jones' apartment. Macon's statement that defendant hung out at a place where "weed" was smoked was also unremarkable in light of the grislier evidence establishing defendant as Hamilton's shooter. Under the circumstances, we cannot say that there is a reasonable probability of a different outcome in this case had trial counsel objected to one

remark by Macon that defendant hung out at a place where people smoked "weed." *Strickland*, 466 U.S. at 687, 694.

¶ 61 We also reject defendant's claim that trial counsel was ineffective for failing to request that the jury be instructed with Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2013) (hereinafter IPI Criminal 4th No. 3.14), which pertains to evidence of other crimes. In *People v. Jackson*, 357 Ill. App. 3d 313, 321 (2005), this court found that the trial court erred in failing to instruct the jury, pursuant to IPI Criminal 4th No. 3.14, that evidence of defendant's gang membership could only be considered for a limited purpose. We nonetheless found this to be harmless error, noting:

> "[A]n error in a jury instruction is harmless if the result of the trial would not have been different if a proper instruction was given. [Citation.] Generally, the only instructions necessary to ensure a fair trial include the elements of the crime charged, the presumption of innocence, and the question of burden of proof. [Citation.] Here, the proffered instruction did not concern any of these areas and, thus, the error in this case was harmless." (Internal quotation marks omitted.) *Jackson*, 357 Ill. App. 3d at 321.

Similar to *Jackson*, we find that defendant did not suffer any prejudice by the failure of counsel to request IPI Criminal 4th No. 3.14. In the case at bar, defendant's guilt of Hamilton's murder was clearly established. The State presented evidence that two eyewitnesses saw defendant stand over Hamilton with a gun: one heard shots fired, and the other actually saw defendant shoot Hamilton. The State also presented evidence that after the shooting, defendant had an

acquaintance burn the minivan that was used in the shooting, indicating his consciousness of guilt. *People v. Abernathy*, 402 Ill. App. 3d 736, 753 (2010) (noting that evidence of a defendant's attempt to destroy evidence against himself is always admissible to show consciousness of guilt). We find it highly unlikely that a limiting instruction regarding "other crimes" evidence would have changed the result of defendant's trial given this evidence. *Strickland*, 466 U.S. at 687, 694. We therefore conclude that defendant cannot establish that trial counsel was ineffective. *Flores*, 153 Ill. 2d at 283-84.

¶ 62 Defendant next contends that trial counsel was ineffective for failing to impeach Spencer Williams with various letters that he wrote to the State. He claims that these letters established "that Williams was an eager 'snitch' who routinely claimed to have witnessed serious crimes, and who sought to receive money or favors in exchange for his services as a witness or informer." The State responds that trial counsel's decision not to use the letters in cross-examination was a matter of trial strategy.

¶ 63 "Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *Pecoraro*, 175 Ill. 2d at 326-27. "Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable." *Pecoraro*, 175 Ill. 2d at 327.

¶ 64 We cannot say that trial counsel's decision to not impeach Williams with additional letters that he had written to the State was objectively unreasonable. Here, the record shows that Williams' credibility was severely undermined during direct examination by the State. First,

Williams could not recall either his grand jury testimony or the testimony he gave at defendant's previous trial. Then, the State questioned him about a number of letters he wrote to the Cook County State's Attorney's office in which he sought deals and indicated that he would not testify, or would testify untruthfully, unless he received one. Defendant claims that trial counsel should have continued introducing letters that defendant wrote to the State, as if Williams' credibility was not sufficiently in doubt. We find, to the contrary, that the State's direct examination of Williams was devastating to his credibility and that trial counsel pursued a reasonable strategy of letting the State's direct examination stand and merely asking follow up questions so as not to elicit any unwanted testimony from a clearly erratic witness. We therefore reject defendant's claim that trial counsel's cross-examination of Williams was deficient. *Pecoraro*, 175 Ill. 2d at 326-27.

¶ 65 Defendant lastly contends that the cumulative effect of trial counsel's errors in this case resulted in prejudice to him. We disagree. The evidence of defendant's guilt in this case was overwhelming. Two eyewitnesses identified defendant standing over Hamilton with a gun before he was shot to death, and one of those eyewitnesses saw defendant fire the shots. There was also evidence that defendant acted to have the minivan used in the murder destroyed after the shooting. While we do not excuse counsel's errors, we cannot say that any of them would have likely influenced the jury's verdict in this case. *Strickland*, 466 U.S. at 687, 694. We therefore conclude that defendant has failed to establish ineffective assistance of trial counsel. *Flores*, 153 Ill. 2d at 283-84.

¶ 66 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 67 Affirmed.