2014 IL App (2d) 120104
No. 2-12-0104
Order filed March 31, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-198
JUAN F. BLANCO,	)	Honorable Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

Held: (1) The jury could have concluded beyond a reasonable doubt that the defendant was guilty of first degree murder; (2) the trial court properly sustained the State's objection to part of defense counsel's closing argument; (3) the trial court did not improperly curtail defense counsel's cross-examination of a certain witness; (4) the trial court did not err in failing to give a certain jury instruction; and (5) the trial court's decision that defense counsel failed to make a *prima facie* case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), was not against the manifest weight of the evidence.

¶ 1 Following a jury trial, the defendant, Juan F. Blanco, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2008)). He was sentenced to a total of 47 years' imprisonment. On appeal, the

defendant argues that: (1) he was not convicted beyond a reasonable doubt; (2) the trial court improperly sustained the State's objection to defense counsel's closing argument; (3) the trial court improperly curtailed defense counsel's cross-examination of a certain witness; (4) the trial court erred in not giving a certain jury instruction; and (5) the trial court erred when it held that defense counsel failed to make a *prima facie* case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), where the State used two peremptory challenges to excuse the only eligible African-American venire persons from the jury. We affirm.

¶ 2 BACKGROUND

¶ 3 On February 11, 2009, the defendant was charged by indictment with the first degree murder of the victim (720 ILCS 5/9-1(a)(1) (West 2008)). The charges alleged that the defendant had shot the victim to death. The charges further alleged that the defendant had concealed the victim's homicide (720 ILCS 5/9-3.1(a) (West 2008)).

¶ 4 Between May 23 and June 2, 2011, the trial court conducted a jury trial. The State's evidence established that the victim was the defendant's brother-in-law. The victim's sister, Victoria Rojas, was married to the defendant at the time of the murder. Victoria had three children. The defendant was the father of the two youngest children. The defendant moved out of the marital residence in October 2008. Victoria and the defendant's relationship was "bad." Shortly after the defendant moved out, the victim moved in with Victoria. Victoria last saw the victim on Wednesday January 14, 2009, around 7 pm, when he left to go to his girlfriend's house.

¶ 5 The victim worked at Haldex Hydraulics Corporation. On January 15, 2009, he worked from 5:49 a.m. to 2:37 p.m.

¶ 6 Ramona Simmons testified that she was the victim's girlfriend. The victim would normally get off work and go to his sister's house, have dinner with her and her family, and come to Ramona's place. He would normally call her every morning on his break, at lunch, and when he got off work. On January 15, 2009, she last spoke to him around 2:50 p.m. During this last conversation, "the phone just went silent."

¶ 7 The victim owned a white Intrepid. Ramona testified that the victim regularly parked his Intrepid outside of her residence. In either December 2008 or in January 2009, she gave him a tarp to put over the windshield to protect it from ice and snow.

¶ 8 On January 16, 2009, the victim's body was discovered in the back seat of his car around 8 am, at Gem Suburban Trailer Park in Rockford. The police subsequently began to investigate. When the police found the victim's body, it appeared to be frozen. It had been extremely cold that morning, around 15 to 20 degrees below zero. The doors on the passenger side were locked and the doors on the driver's side were unlocked. Deputy Tim Speer, a forensic technician, arrived around 9:40 a.m., and processed the scene for evidence.

¶ 9 Speer took photographs of the scene and of the tread patterns on all of the shoes of those who had been near the car while the victim's death was being investigated. There was a large amount of coagulated blood in the interior of the Intrepid. Speer took photographs of footwear impressions he found in the snow by the driver's door and the rear door on the driver's side of the Intrepid.

¶ 10 An expert in the field of footwear examinations determined that the victim's shoes were not capable of making those impressions. The shoe impressions were consistent with Nike Air shoes, size 10. However, no positive identifications could be made. The expert acknowledged that the Nike Air shoes were a very popular and common shoe.

¶ 11 The Intrepid was towed to the Justice Center to be examined because of the weather conditions. Speer spent four days processing the vehicle. The tarp was folded on the passenger seat. A latent fingerprint of the defendant's was found on the tarp. (Victoria had testified that she never knew the victim to allow the defendant to drive his car.).

¶ 12 Speer found a deformed projectile behind the driver's seat on the rear floorboard. This projectile and one later recovered during the autopsy was determined by a firearm expert to have been fired from the same gun, either a 9mm or a .38 caliber gun.

¶ 13 Speer took several swabs of blood from the interior of the Intrepid. A DNA analyst found only the victim's DNA profile from swabs taken from the Intrepid.

¶ 14 Speer found a footwear impression on the driver's side carpet close to the pedals. He photographed it and took a "hinge lift" of it. The same expert in the field of footwear determined that the "hinge lift" was consistent with Nike Air shoes. The victim's shoes were determined to have not made the impression.

¶ 15 Speer found what he believed to be a bloody shoe print, around where the victim's head would have been on the back passenger door of the Intrepid. The shoe print did not match the victim's shoes or Nike Air shoes.

¶ 16 Speer processed the defendant's dark-colored Land Rover on January 21, 2009. He did not find any blood in the Land Rover.

¶ 17 Haldex had eight security cameras for the surveillance of its property. Detective Bob Juarez watched some of the video from these cameras and noticed that, on January 15, 2009, between 1:31 p.m. and 1:35 p.m., a dark-colored Land Rover came from the west into the parking lot. Juarez believed that the vehicle was the defendant's because, just like the

defendant's Land Rover, the Land Rover in the video had a very distinctive paint discoloration on the top of the cab.

¶ 18 The State presented evidence that the defendant frequently worked on his Land Rover at Marvin's Tire Shop in Rockford. He was at Marvin's around 3 p.m. on January 14, 2009. He was also seen cleaning his Land Rover at Marvin's on January 16, 2009.

¶ 19 On January 16, 2009, the defendant was arrested. The police did not find a gun or shells at the residence.

¶ 20 On January 21, 2009, following a search of the defendant's bedroom, the police recovered a pair of green-colored jeans. Speer testified that using a "presumptive test," the jeans testified positive for blood. Later, the jeans were tested by Keia Brown, a forensic biologist. Brown testified that the jeans tested negative for any blood.

¶ 21 Also on January 21, 2009, the police searched the garbage dumpster behind Marvin's. The police discovered a bag that was linked to the defendant due to a US Bank receipt and a Walgreen's receipt that was in the bag. Also in the bag was a pair of black and white Nike shoes (that was also independently linked to the defendant) and a shell casing. No blood was found on the shoes. A firearm expert determined that the shell casing was from a 9mm fired cartridge case.

¶ 22 Bill Chamberlain testified for the defense. In 2009, he worked in Rockford at the AutoZone. He generally worked from noon to 9 p.m., and he likely worked on January 15, 2009, but he was not sure. He acknowledged that he spoke to the police on January 17, 2009, and that he gave them a statement. The police showed Chamberlain a photograph of the defendant. He told the police that he had seen the man several times, including just a few days before January

17, 2009. He described the man as a "regular." He recalled that the defendant wanted to purchase a thermostat for his 1996 Land Rover Discovery.

¶ 23 Officer Jeff Ciacco of the Winnebago County Sheriff's department testified that, on January 17, 2009, he and Detective James Reavis questioned Chamberlain. Chamberlain told them that on January 15, he worked from 2:01 p.m. to 9:19 p.m. The thermostat transaction definitely occurred on January 15, 2009.

¶ 24 Jamie Jett, a forensic scientist, examined the hair found from the victim's right hand with hair standards from the defendant. The hair was a blonde Caucasian head hair, not the defendant's.

¶ 25 At the close of the trial, the jury found the defendant guilty of first degree murder and concealment of a homicidal murder. Following the denial of his posttrial motion, the trial court sentenced the defendant to a total of 47 years' imprisonment. The defendant thereafter filed a timely notice of appeal.

¶ 26 ANALYSIS

¶ 27 The defendant's first contention on appeal is that he was not convicted beyond a reasonable doubt. The defendant argues that the only evidence connecting him to the crime was a fingerprint and some shoe impressions. Such evidence was insufficient to convict him because the fingerprint could have been left at a time other than when the murder occurred and the shoe impressions were from a popular shoe brand that were worn by thousands of other people.

¶ 28 It is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* at 261, quoting

Jackson v. Virginia, 443 U.S. 307, 319 (1979). The sufficiency of the evidence and the relative weight and credibility to be given the testimony of the witnesses are considerations within the exclusive jurisdiction of the fact finder. *People v. Jimerson*, 166 Ill. 2d 211, 214 (1995). The evaluation of the testimony and the resolution of any conflicts or inconsistencies which may appear are also wholly within the province of the finder of fact. *Collins*, 106 Ill. 2d at 261-62. Nonetheless, where the record leaves a reasonable doubt, a reviewing court must reverse the judgment. *People v. Smith*, 185 Ill. 2d 532, 542 (1999). A court of review has a duty to carefully review the evidence and to reverse the conviction of the defendant when the evidence is so unsatisfactory as to raise a serious doubt as to the defendant's guilt. *People v. Estes*, 127 Ill. App. 3d 642, 651 (1984).

¶ 29 In *People v. Rhodes*, 85 Ill. 2d 241, 249 (1981), our supreme court held that to sustain a conviction based "solely on fingerprint evidence," the fingerprints must have been found in the immediate vicinity of the crime and under such circumstances as to establish beyond a reasonable doubt that it was impressed at the time of the crime. In *People v. Gomez*, 215 Ill. App. 3d 208, 216 (1991), this court explained that *Rhodes* only applies where a conviction is based "solely on [] circumstantial evidence." We further explained that where there is other evidence in addition to the fingerprint evidence, then the reviewing court must consider "whether the other circumstantial evidence [] taken together with the fingerprint evidence as a whole could have satisfied the jury of the defendant's guilt beyond a reasonable doubt." *Id.* at 217.

¶ 30 In *People v. Span*, 2011 IL App (1st) 083037, ¶ 35, citing *Gomez*, the court held that where a conviction is "based solely on circumstantial evidence," then the fingerprints must satisfy both the physical and temporal proximity criteria. The defendant argues that in reviewing the evidence in this case we should apply the standards set forth in *Span*. The State contends that

Span improperly expanded the holding in *Gomez* and *Rhodes* and that we should apply the holding in *Gomez* instead. We agree with the State. The holding in *Span* is clearly broader than the holding in *Gomez*. Further, *Span* does not explain why it is expanding this court's holding in *Gomez*. Indeed, its ruling indicates that its holding was based on *Gomez*. As the *Span* court gives no reason why we should depart from *Gomez* and *Rhodes*, we will continue to adhere to those decisions.

¶ 31 Based on the standards set forth in *Rhodes* and *Gomez*, we believe that, considering all of the circumstantial evidence in this case, the jury could have concluded beyond a reasonable doubt that the defendant was guilty of murder. The defendant's fingerprint was found at the scene of the crime on a tarp inside of the victim's car. Shoe prints that were consistent with the defendant's shoes were found both inside the vehicle and near the victim's vehicle. The police found in the trash the defendant's shoes along with a shell casing that was consistent with the bullets that had killed the victim. Further, the defendant was seen driving his vehicle by the victim's work area shortly before the victim was killed. From this evidence, the jury could reasonably infer that the defendant killed the victim.

¶ 32 The defendant points outs that the State's evidence was far from overwhelming. Since the victim kept his tarp on the outside of his car at times, the defendant's fingerprint could have gotten there at a time other than when the murder occurred. But *cf. People v. Campbell*, 142 Ill. 2d 363, 387 (1992) (State was not required to negate every conceivable possibility that print was impressed at some other time). He also contends that his Nike Air shoes were very popular shoes that many other people had. Thus, the presence of Nike Air shoe prints at the scene of the crime could not establish that any particular person committed the crime. Moreover, the fact that he may have been at the Haldex parking lot on the day of the murder shows nothing more than

an innocent activity in common with thousands of other people who lived in Rockford. We agree with defendant that there were different inferences that the jury could have drawn from the evidence. However, as we cannot say that no rational fact-finder would have found the way the jury did in this case, we will not disturb the jury's verdict.

¶ 33 The defendant's second contention on appeal is that the trial court erred in sustaining the State's objection to part of defense counsel's closing argument. Specifically, in closing argument, defense counsel argued:

> "There is no gun recovered. They searched [the defendant's car], the Land Rover; they searched his residence on Corbin and the place over on Cunnigham when he was arrested. Nothing. No gun.
>
> Here's the thing: after two and a half years the government has not been able to come up with anyone who has seen [the defendant] fire a gun. After two and a half years, there is no evidence that the State came up with that he ever purchased a gun."

After the State objected, the trial court sustained the objection and instructed the jury to disregard the argument. The defendant argues that the trial court's ruling was erroneous and prejudiced him because the trial court's instruction to the jury to disregard the argument allowed the jury to speculate that the defendant owned or possessed a gun but the defendant had been successful in having that evidence suppressed. The defendant insists that "is the only logical inference that the jury could draw from the circuit court's sustaining of the State's objection and its instruction."

¶ 34 Like a prosecutor, defense counsel may comment on the evidence and draw any reasonable inferences that the evidence will support. *People v. Maldonado*, 402 Ill. App. 3d 411, 428 (2010). Both the prosecutor and defense counsel are entitled to discuss reasonable doubt, to present his or her view of the evidence, and to suggest whether the evidence supports reasonable

doubt. *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 87. Counsel in closing argument may be vigorous and eloquent and make fair comment upon the evidence. Such latitude, however, does not give counsel the right to go beyond the evidence presented and the inferences therefrom, misstate the law, or express personal opinions on the evidence. *People v. Wooley*, 178 Ill. 2d 175, 209 (1997). The regulation of the substance and style of closing argument lies within the trial court's discretion and the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 128 (2001).

¶ 35 Here, the trial court did not abuse its discretion in striking certain remarks that defense counsel made during closing arguments. The trial court allowed defense counsel to inform the jury that no gun was ever found connecting the defendant with the crime. However, the trial court struck defense counsel's comments that the State was not able to find (1) any evidence that the defendant had ever purchased a gun or (2) an eyewitness who had ever observed the defendant fire a gun. Those comments were indeed improper because they sought to impose an additional burden upon the State by requiring it to present more evidence to convict the defendant than was required by statute. There is no requirement in the Criminal Code that, in order to convict the defendant of murder, the State had to prove that the defendant had previously purchased and fired a gun. Thus, the trial court's striking of those comments was not erroneous.

¶ 36 In so ruling, we reject the defendant's argument that the trial court's striking of defense counsel's comments allowed the jury to infer that the defendant possessed a gun but that he was able to have such evidence suppressed. In making this argument, the defendant relies on *People v. Barnes*, 107 Ill. App. 3d 262, 268 (1982). In that case, the defendant was able to have certain

evidence recovered from his apartment barred. Defense counsel stated in his closing argument that no evidence connecting the defendant to the crime had been recovered from the defendant's apartment. In rebuttal, the prosecutor stated:

> "Ladies and gentlemen, Counsel told you that we didn't tell you what happened in the apartment. Counsel knows all the evidence in the apartment. He knows what we had. We would wish we could show it to you."

The trial court sustained the defendant's objection to the State's argument. Nonetheless, the reviewing court reversed, explaining:

> "These comments were highly improper and we find that the prejudice arising from them was not eliminated by the mere sustaining of defendant's objection. In a case where no direct physical evidence linked defendant to the crime the suggestion by the State that such evidence existed but was being withheld from the jury could only have been calculated to prejudice his case in the eyes of the jury." *Id.*

¶ 37 We do not find the instant case and *Barnes* to be analogous. In *Barnes*, the prosecutor made an explicit reference to there being additional evidence against the defendant that it was unable to show the jury because the evidence had been barred. There was no other reasonable way to construe the prosecutor's comments in that case. Here, there was no explicit reference that the State was unable to present evidence that the defendant had purchased a gun or previously fired one because such evidence had been suppressed. Although the defendant insists that jury could nonetheless draw such an inference from the trial court sustaining the State's objection, we believe that the jury could more plausibly infer that the State's objection was sustained because the issue of whether the defendant had previously owned or used a gun was

not relevant or placed a greater burden on the State to present more evidence than was required to convict the defendant of murder.

¶ 38 The defendant's third contention on appeal is that the trial court erred in curtailing defense counsel's cross-examination of Speer. Speer testified that a preliminary test on the defendant's jeans tested positive for blood. Defense counsel then questioned Speer whether he subsequently learned that more complete tests had determined that it was not blood on the defendant's jeans. The trial court sustained the State's objection to that question. The defendant contends that the trial court's ruling was erroneous because it interjected unnecessary confusion into the case as it allowed the State to imply to the jury that there was blood on the defendant's jeans, when in fact there was not.

¶ 39 A criminal defendant has the right to conduct a reasonable cross-examination. *People v. Davis*, 185 Ill. 2d 317, 337 (1998). While a trial court may not deny a defendant this right, it does have discretion to preclude repetitive or unduly harassing interrogation. *Id.* The latitude to be allowed on cross-examination rests within the sound discretion of the trial court, and a reviewing court should not interfere absent a clear abuse of discretion resulting in manifest prejudice to the defendant. *People v. Hall*, 195 Ill. 2d 1, 23 (2000).

¶ 40 The trial court did not abuse its discretion in not allowing Speer to testify that he subsequently learned that the defendant's jeans did not have blood on them. When Speer was questioned about the jeans, the trial court properly sustained the State's objection on hearsay grounds. Speer had no first-hand knowledge that the jeans later tested negative for blood. The defendant insists that he was prejudiced by his inability to have Speer inform the jury that the preliminary test was wrong as the final test concluded that there was no blood on the jeans. In making this argument, the defendant minimizes the testimony of Brown who testified that more

conclusive tests on the jeans established that there was no blood on the jeans. Brown was the proper person to provide that testimony since she was the one who conducted the conclusive test on the jeans and determined that there was no blood on them. In light of Brown's testimony, the trial court did not err in not allowing Speer to testify to hearsay regarding that evidence instead.

¶ 41 Further, we reject the defendant's argument that the State necessarily acted with nefarious intent when it had Speer testify about the presumptive test on the jeans and when it had the jeans admitted into evidence. In his reply brief, the defendant states:

> "The State now wants to downplay the significance of the evidence that it placed before the jury. The State argues that the tested jeans 'were simply a pair of jeans taken from defendant's bedroom,' nothing more. [Citation omitted.]. However, the State made the effort to place the jeans into evidence before the jury. The question is why. The answer is that the State wanted to leave that subtle implication that the [victim's] blood had been found on clothing of [the defendant], and thereby mislead the jury as to the strength of it case."

¶ 42 The State's decision to have Speer testify about the jeans and to have the jeans admitted into evidence was a matter of trial strategy and reflected an understanding that if it did not have the jeans admitted into evidence, defense counsel probably would. The jeans, without any blood on them, would have supported the defendant's argument that, despite there being a lot of blood as a result of the victim's death, no blood was found on the defendant, in his vehicle, or on his clothes. By not waiting until the defendant had the jeans admitted into evidence, the State could preemptively defeat the inference that it was seeking to conceal evidence. Moreover, Speer's testimony was necessary to lay a foundation for Brown's later testimony as to why she examined the jeans. As such, the State's reasonable trial strategy in this regard is not a basis to disturb the

trial court's decision. See *People v. Swartwout*, 311 Ill. App. 3d 250, 260 (2000) (reviewing court will not second-guess State's trial strategy).

¶ 43 The defendant's fourth contention on appeal is that the trial court erred in finding that Chamberlain's trial testimony failed to acknowledge a prior statement that he made to the police. The defendant insists that because Chamberlain's trial testimony was inconsistent with the statement he gave to the police, the trial court should have instructed the jury that Chamberlain's statement to the police could be considered as substantive evidence.

¶ 44 In criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if it is inconsistent with his testimony at trial and the statement narrates, 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 2010). IPI No. 3.11 instructs the jury that they can consider prior inconsistent statements substantively if the jurors find that the requirements of section 115-10.1 have been met.

¶ 45 On January 17, 2009, two days after the murder, Chamberlain told Officer Ciacco that he had been working at Auto Zone from 2:01 p.m. to 9:19 p.m. on January 15, 2009. During that time, the defendant came into the store and purchased a thermostat. Chamberlain did not sign the statement that he gave to Ciacco.

¶ 46 At trial, Chamberlain testified that he usually worked from noon to 9 pm at Auto Zone. He likely worked on January 15, 2009, but he was not sure. He acknowledged that he spoke to the police on January 17, 2009, and gave a statement. He did not remember the date or time when a man had purchased a thermostat from him. He was not able to identify the defendant in court as the customer from January 15, 2009.

¶ 47 At the close of the evidence, defense counsel requested that the trial court instruct the jury consistent with section 115-10.1(a)(2) that Chamberlain's earlier statement could be considered as substantive evidence. The defense tendered as a proposed jury instruction a version of IPI No. 3.11 that provided:

> "The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.
>
> However, you may consider a witness' earlier inconsistent statement as evidence without this limitation when the statement narrates, describes, or explains an event or condition the witness had personal knowledge of; and the statement was written or signed by the witness. *Or the witness acknowledged under oath that he made the statement.*
>
> It is for you to determine whether the witness made the earlier statement, and, if so what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made. (Emphasis added).

¶ 48 The trial court gave the defendant's proposed instruction, but without the italicized language above. The trial court found that Chamberlain's general acknowledgment that he spoke to the police did not support defense counsel's argument that Chamberlain acknowledged all of the other information included in the police report, including telling the police that the defendant was in the Auto Zone on January 15. In a colloquy with the trial court, defense counsel conceded that Chamberlain's acknowledgment regarding the statement about the thermostat did

not convert the entire statement for purposes of section 115-10.1. Specifically, defense counsel and the trial court stated:

> "[DEFENSE COUNSEL]: Well, I didn't say it would do everything, I didn't, but that part of it.
>
> TRIAL COURT: What part?
>
> [DEFENSE COUNSEL]: The part about purchasing the thermostat. *** You're right, it doesn't turn the whole conversation into a substantive statement. That—I think that's probably right."

¶ 49 In considering the defendant's argument, we must determine the appropriate standard of review. The defendant argues that, in reviewing the trial court's decision, our standard of review is *de novo*. Generally, a trial court has discretion when determining whether a witness has made a prior inconsistent statement that may be considered substantively pursuant to section 115-10.1. *People v. Sykes*, 2012 IL App (4th) 100769, ¶39. As the defendant points out, there are exceptions to this rule. See *People v. Drum*, 321 Ill. App. 3d 1005, 1009 (2001) (applying *de novo* standard of review where question was whether a statement was recorded within meaning of section 115-10.1); *People v. Thorne*, 352 Ill. App. 3d 1062, 1074 (2004) (applying *de novo* review regarding the admission of a declarant's prior identification because discretionary factual findings were not involved). Here, as in *Sykes*, the trial court was considering whether the witness acknowledged facts from his prior statement to the police. Thus, we will not disturb the trial court's decision absent an abuse of discretion. *Sykes*, 2012 IL App (4th) 100769, ¶39; see also *Drum*, 321 Ill. App. 3d at 1009 (explaining that the question of whether the out-of-court statement was inconsistent with the witness' in-court testimony depends on the context in which

the statement is offered at trial and therefore trial court's finding resolving that question is reviewed deferentially).

¶ 50 We do not believe that the trial court abused its discretion in determining that Chamberlain had not made a statement under oath in which he had acknowledged giving a prior inconsistent statement. Although he acknowledged that he had given the police a statement, he did not acknowledge that he had told police that he had seen the defendant on January 15. As noted above, defense counsel conceded this point at trial. Accordingly, Chamberlain's earlier statement was not admissible as substantive evidence. See *People v. Redd*, 135 Ill. 2d 252, 314 (1990) (unless a prior inconsistent statement clearly qualifies under section 115-10.1, it is not admissible as substantive evidence). The trial court therefore did not err in refusing to give the specific jury instruction that defense counsel requested.

¶ 51 In so ruling, we find the defendant's reliance on *People v. Flores*, 128 Ill. 2d 66, 86-88 (1989), and *People v. Vannote*, 2012 IL App (4th) 100798, ¶ 25, to be misplaced. In both *Flores* and *Vannote*, the reviewing courts affirmed the trial courts' decisions to admit a witness' prior statement pursuant to section 115-10.1 where the witness's "professed memory loss" on the stand and his prior testimony was inconsistent. *Flores*, 128 Ill. 2d at 87-88 (witness' grand jury testimony was admissible under section 115-10.1 where he testified at trial that he could not remember what he testified to in front of the grand jury); *Vannote*, 2012 IL App (4th) 100798, ¶ 26 (where child witness testified that he could not remember what took place on the day of the alleged touching, his previous statement was thus inconsistent with his trial testimony and thus sufficient to constitute a prior inconsistent statement that was admissible pursuant to section 115-10.1). In so holding, however, the courts in both *Flores* and *Vannote* emphasized that whether a witness' prior testimony was inconsistent with his present testimony was left to the sound

discretion of the trial court. *Flores*, 128 Ill. 2d at 87-88; *Vannote*, 2012 IL App (4th) 100798, ¶ 24. Thus, even though the trial court in this case reached a different decision than the trial courts in *Flores* and *Vannote*, based on the deferential standard of review, we will not disturb the trial court's ruling.

¶ 52 We also note that, in his reply brief, the defendant argues that had Chamberlain signed his statement to the police on January 17, 2009, the State would necessarily concede that the statement should have been allowed to be used as substantive evidence under section 115-10.1(c)(2)(A) (West 2008). The defendant contends that Officer Ciacco's failure to have Chamberlain sign the statement that he gave should not be held against the defendant. The defendant expounds:

> "Certainly, the police officer would have had Chamberlain sign the statement, if Chamberlain had provided what the police officer considered to be favorable information for the prosecution. This is all information within the power and control of the State and its use as substantive evidence should not be controlled by the police officer[']s decision at the time of questioning to not have the witness sign the statement."

¶ 53 The defendant's argument as to this point goes more to what the law should be rather than what the law is. Such an argument should be directed at the legislature, not this court. See *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 334-35 (2006) ("[T]he legislature's role is to make the law and the judiciary's role is to interpret the law.").

¶ 54 The defendant's final argument on appeal is that the trial court erred in determining that he had failed to establish a *prima facie* case of purposeful discrimination in the prosecutor's use of a peremptory challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the United States Supreme Court established a three-step process for evaluating a claim that the State has

exercised its peremptory challenges in a racially discriminatory manner. First, the defendant must establish a *prima facie* case of purposeful discrimination in the selection of the jury. Once the defendant establishes a *prima facie* case, the burden shifts to the State to articulate a race-neutral reason for challenging each of the venirepersons in question. Finally, the trial judge must consider those explanations and determine whether the defendant has met his burden of establishing purposeful discrimination. *Id.* at 96-98.

¶ 55 A *prima facie* showing of discrimination under *Batson* requires the defendant to demonstrate that relevant circumstances in the case raise an inference that the prosecutor exercised peremptory challenges to remove venirepersons based upon their race. *Id.* at 96. In determining whether a *prima facie* case of discriminatory jury selection has been established, the following relevant circumstances should be considered: (1) racial identity between the defendant and the excluded venirepersons; (2) a pattern of strikes against African-American venirepersons; (3) a disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during *voir dir*e examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses. *People v. Williams*, 173 Ill. 2d 48, 71 (1996). A trial judge's determination of whether a *prima facie* case has been shown will not be overturned unless it is against the manifest weight of the evidence. *Id.*

¶ 56 Here, the most relevant of the above-delineated circumstances was that neither the victim nor the defendant was African-American. *Cf. People v. Gutierrez*, 402 Ill. App. 3d 866, 892 (2010) (no racial identity between Caucasian-Hispanic defendant and excluded African-

American venirepersons). Further, although the State did not have to articulate race-neutral reason for challenging each of the venirepersons at this point in the proceedings, the State did provide its reasoning. Venireperson Angela Greer was challenged because she was currently on probation for a criminal damage to property conviction. She had been convicted two months earlier and had 22 months of probation remaining. The State noted that it used two other peremptory challenges to remove Justin Fry and Angela Schroeder. Fry was on probation following a guilty plea to driving under the influence. Schroeder had previously been convicted of reckless driving, and she reported serving a day in jail following a domestic violence incident several years earlier. At that time, Schroeder was on court supervision. Both Fry and Schroeder were Caucasian. As the State treated Greer the same way it treated Fry and Schroeder, defense counsel could not establish a *prima facie* case that the State had sought to exclude Greer based on improper reasons.

¶ 57 The State also used a peremptory challenge to remove African-American Jacqueline Alexander. Alexander's son was charged with underage drinking. Alexander's brother had been previously convicted of murder, and Alexander stated she did not believe her brother had been treated professionally and fairly by the police in the case. Her brother was 17 at the time and because it was his first offense, she believed that it was unfair that he had been tried as an adult. She also believed that the prosecution had not treated her brother respectfully. Alexander's hostility towards the police and the prosecution provided the State with a race-neutral reason to exercise a peremptory challenge against her. As such, the trial court's conclusion that the defendant failed to establish a *prima facie* case of a *Batson* violation was not against the manifest weight of the evidence.

¶ 58 CONCLUSION

¶ 59 For the reasons stated, the judgment of the circuit court of Winnebago County is affirmed.

¶ 60 Affirmed.