FOURTH DIVISION
September 24, 2015

1-11-1468

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 16696-01
	)	
TUYEN NGO,	)	Honorable
	)	Colleen McSweeney-Moore,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's judgment convicting defendant of home invasion and aggravated kidnapping is affirmed. Defendant's ineffective assistance of counsel claim fails where trial counsel's performance did not fall below an objective standard of reasonableness and where the outcome of the proceedings would have been no different absent counsel's alleged errors.

¶ 2 The State charged defendant, Tuyen Ngo, with home invasion, armed violence, aggravated kidnapping, residential burglary, and aggravated discharge of a firearm based on a

crime in Burbank, Illinois where defendant gained entry into the victim's home with a firearm, confined a guest of the victim in a bathroom, discharged a weapon in the direction of the victim, and took the victim's property. At the time of defendant's trial he was charged with four additional separate felonies, the facts of which the State argued were admissible in this case "to prove defendant's intent, *modus operandi*, and absence of mistake, accident or innocent frame of mind." Three of those crimes occurred in Illinois and one in Waukesha, Wisconsin. The trial court allowed the State to admit evidence of the offense that occurred in Waukesha. Following a trial the jury found defendant guilty of home invasion and aggravated kidnapping and the court sentenced defendant to concurrent terms of imprisonment of 40 years.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 Kevin Ton lived in Burbank, Illinois and owned a nail salon. On the day of the offense, at approximately 9:45 a.m., Stephen Baldwin had come to Ton's home to give Ton an estimate on installing a fountain in Ton's backyard. A few minutes later Ton's doorbell rang. Ton saw defendant standing outside. Ton described defendant as wearing a light jacket, black baseball hat, blue striped shirt and jeans. Ton opened the door whereupon defendant pushed the door in. When Ton resisted defendant took a gun from his belt and pressed it into Ton's stomach. Defendant came in and spoke to Ton in Vietnamese. Defendant ordered Ton to the floor and took Ton's cell phone. Ton tried to stand and defendant fired a shot. Ton told defendant no one else was in the house. Defendant then walked Ton around the house with defendant's gun in his back.

¶ 6 When Ton and defendant got to the kitchen they found Baldwin hiding under a table. Defendant forced Ton and Baldwin into a bathroom. Defendant took some items from Ton including a limited edition watch. When Ton resisted giving defendant a personal item with sentimental value defendant fired a second shot. Defendant then took Ton to a home office where defendant obtained a printer cable. Defendant tried to use the printer cable to secure the bathroom door with Baldwin inside. Ton convinced defendant to allow him to let his and Baldwin's dogs out because they were barking. Ton used that opportunity to run to a neighbor and call police. When police arrived, defendant was gone.

¶ 7 Detective Thomas Coakley investigated the crime. Police recovered two fired bullets and two shell casings from Ton's home. Ton told police what was missing, including a large amount of cash Ton said he had on hand to make a purchase for his nail salon. Police attempted to track the offender through Ton's stolen cell phones but Ton had discontinued service. Ton said this was because he was afraid the phones would be used to call Viet Nam. Ton testified he sued the Burbank Police Department for accusing him of being a drug dealer and of having someone rob his house as an insurance scam.

¶ 8 The defense questioned Detective Coakley about entries in his field notes. Detective Coakley wrote the names Mario, a Hispanic male, and Ton Do, an Asian male in his field notes. The trial court prohibited defense counsel from questioning Detective Coakley about statements Ton made about those men. Ton's statements allegedly implied Ton believed those two men were suspects in the crime. Detective Coakley denied Ton said he suspected either man of committing the offense at issue in this case.

¶ 9 After the trial of this case defendant was convicted in the circuit court of Cook County of another felony based on an incident which occurred in Orland Park. In that case, an 11-year-old victim was confined to a bathroom in his home and the offender took cash and property (the Orland Park case). Defendant appealed his conviction in that case and this court affirmed. *People v. Ngo*, 2015 IL App (1st) 123825-U. In the trial of the Orland Park case the trial court admitted evidence of the offense at issue in this appeal and evidence of an offense defendant allegedly committed in Waukesha, Wisconsin for the limited purpose of showing the manner in which police were able to identify and arrest defendant. That is, through the investigation of the Waukesha police with regard to the color of the offender's car, a GPS that was recovered, and by the Waukesha police bringing Burbank police in to the investigation.

¶ 10 Detective Coakley received a telephone call from Detective Ed Bergin of the Waukesha, Wisconsin Police Department. Defendant was the suspect in a crime in Waukesha where the offender entered the victim's home, locked the victim in a bathroom using a computer cord, and took property (the Waukesha case). Detective Bergin called Detective Coakley because one of the addresses in a GPS unit taken from defendant's vehicle was for an address in Burbank, Illinois.

¶ 11 Detective Bergin contacted the Burbank Police Department to inquire if any crimes similar to the Waukesha case had occurred in Burbank, Illinois. Detective Coakley determined the Burbank address in the GPS seized from defendant's vehicle was three blocks from Ton's home. Detective Bergin also sent Detective Coakley copies of reports and a photograph of a limited edition watch found in defendant's possession when Waukesha police

took him into custody. Detective Coakley put the picture of defendant he received from Detective Bergin in a photo array and showed the array to Ton. Ton identified defendant as the person who was in his home. Ton also identified the watch in the photograph supplied by the Waukesha Police Department as his watch. Burbank police arrested defendant. Ton later identified defendant again in a line up. Police could not locate Baldwin to view a line up.

¶ 12 The victims in the Waukesha case testified in detail as to that offense in defendant's trial of this case. Before they testified the trial court instructed the jury in this case as follows:

> "Ladies and gentlemen, at this time evidence will be received that the defendant has been involved in an offense other than that charged in the indictment. This evidence will be received on the issue of the defendant's identification and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that offense; and, if so, what weight should be given to this evidence on the defendant's identification."

¶ 13 The victims in the Waukesha case described how defendant had come to their nail salon with a woman and children two days before the crime. Defendant appeared at the door to their residence with a gun two days later while the victim's wife was out. During the course of the Waukesha case defendant ordered the victim to the ground and fired two shots in the residence: once when the victim tried to stand after being ordered to lie down and again as the victim attempted to retreat into the kitchen. Based on defendant's earlier visit to the Waukesha victims' nail salon, police were able to view surveillance video from a nearby

business. After viewing the surveillance video Waukesha police had defendant as a suspect. When police found him at a casino, defendant voluntarily spoke to the Waukesha police. As a result, Waukesha police recovered a GPS from defendant's vehicle and the data it stored, and obtained a photograph of a watch found in defendant's possession that was the same brand of limited edition watch taken in Burbank.

¶ 14 Police caused bullets and shell casings recovered from the crime scene in Burbank to be compared to bullets and shell casings recovered from the scene in the Waukesha case. The evidence at the trial of this cause included testimony to a reasonable degree of scientific certainty that the shell casings recovered from the scene in Burbank were fired from the same gun that fired the shell casings recovered from the scene in Waukesha. Police also recovered various bullets and shell casings from defendant's home. The evidence included testimony that three bullets seized from defendant's home had at one time been chambered in the same weapon that fired two shell casings recovered in Waukesha.

¶ 15 In this case the jury found defendant guilty of home invasion and aggravated kidnapping. Defendant filed a motion for a new trial arguing, in part, the State committed a *Brady* violation by failing to provide defendant with Baldwin's criminal history. The trial court denied defendant's motion for a new trial. Defendant filed a motion to reconsider and a supplemental motion for a new trial arguing defendant received ineffective assistance of counsel based on trial counsel's failure to investigate and call Baldwin as a witness. Defendant supported the motion to reconsider and supplemental motion for a new trial with Baldwin's affidavit. The court denied the motion to reconsider and did not reach the merits of the supplemental motion for a new trial.

¶ 16 This appeal followed.

¶ 17 ANALYSIS

¶ 18 Defendant's sole contention on appeal is that he received ineffective assistance of counsel at trial and he raises several claimed deficiencies in counsel's performance in support of that contention.

> "To establish a claim of ineffective assistance of trial counsel, defendant must show that his attorney's performance was deficient and that he suffered prejudice as a result, *i.e.*, there was a reasonable probability that but for counsel's deficient performance, the result of the proceedings would have been different. [Citation.]" *People v. Smith*, 2014 IL App (1st) 103436, ¶ 63 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

¶ 19 For purposes of a claim of ineffective assistance of counsel, deficient representation means that counsel's performance fell below an objective standard of reasonableness, and prejudice means that there is a reasonable probability that but for counsel's deficient representation, the result of the proceeding would have been different. *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 100. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" *Id.* The alleged act of incompetency "must be of the type that probably changed the outcome of the trial." *People v. Nelson*, 106 Ill. App. 3d 838, 845 (1982). The court will consider the strength of the evidence of the defendant's guilt in determining whether trial counsel's allegedly deficient performance prejudiced the defendant. See *People v. Barnwell*, 285 Ill. App. 3d 981, 992 (1996).

¶ 20 If the court finds a lack of sufficient prejudice, it need not consider the quality of the attorney's performance. *Nelson*, 106 Ill. App. 3d at 845. Where the defendant claims trial counsel was ineffective in allowing certain evidence to be admitted, if the evidence of the defendant's guilt is overwhelming even absent evidence trial counsel erroneously allowed to be admitted, the defendant cannot demonstrate that the outcome of the trial would have been different if counsel had not made the alleged error. *People v. Gordon*, 378 Ill. App. 3d 626, 640 (2007) (finding no ineffective assistance of counsel for not objecting to admission of HGN test results in DUI prosecution where "the State had produced enough evidence even without the HGN test results to convict [the] defendant of driving under the influence").

¶ 21 Defendant argues he received ineffective assistance of counsel based on trial counsel's alleged failure to enforce the trial court's ruling regarding other-crimes evidence. Defendant argues this failure allowed the State to improperly use other-crimes evidence as substantive evidence of defendant's guilt in this case. Defendant also argues he received ineffective assistance of counsel in this case based on trial counsel's alleged failure to (1) conduct a reasonable investigation into Stephen Baldwin and call him as a witness, (2) impeach Ton's identification of defendant with statements he made to police regarding persons Ton believed to be suspects, and (3) object to the admission of the GPS data or, alternatively, to ask for a limiting instruction as to the use of that evidence. Defendant argues these errors individually denied him the effective assistance of counsel and that cumulatively, counsel's errors denied him a fair trial. Errors, when considered together, may have a cumulative effect to deprive a defendant of a fair trial. *People v. Killian*, 42 Ill. App. 3d 596, 601 (1976). However, "[t]he whole can be no greater than the sum of its parts." *People v. Albanese*, 102 Ill. 2d 54, 82-83

(1984), abrogated on other grounds, *People v. Gacho*, 122 Ill. 2d 221, 262 (1988). "A new trial is not warranted where a defendant presents a myriad of arguments but fails to demonstrate any single reversible error ***." *People v. Sullivan*, 366 Ill. App. 3d 770, 786 (2006).

¶ 22 1. Failure to Call Baldwin as a Witness

¶ 23 Defendant argues trial counsel was ineffective in failing to investigate, locate, and call as a witness Stephen Baldwin because Baldwin's testimony would have cast doubt on Ton's identification of defendant and Baldwin would have testified that defendant was not the perpetrator of the Burbank crime. "The failure to interview witnesses may indicate actual incompetence [citation], particularly when the witnesses are known to trial counsel and their testimony may be exonerating." *People v. Greer*, 79 Ill. 2d 103, 123 (1980). If the evidence is closely balanced, there may be little question of the prejudicial impact of trial counsel's failure to present certain evidence or to impeach the State's evidence; but there may be no prejudicial impact from failing to impeach the complaining witness with "relatively minor inconsistencies" where the State presents overwhelming evidence against the defendant. *Barnwell*, 285 Ill. App. 3d at 992 (distinguishing *People v. Garza*, 180 Ill. App. 3d 263 (1989)).

¶ 24 Defendant argues trial counsel was deficient in failing to investigate Baldwin as a witness because Baldwin's description of the offender's clothing differed from Ton's and defense counsel knew that Baldwin was unable to identify defendant from a photo array as the offender when Ton identified defendant from the same photo array, both of which would have buttressed the defense argument that Ton's identification was suspect. Defendant concedes the value of Baldwin's impeachment of Ton's identification in this way is low, but argues that investigating that impeachment evidence would have led to the allegedly

exculpatory evidence. Defendant also argues Baldwin was the "prover in [Ton's] insurance scam" and trial counsel failed to offer evidence (Baldwin's testimony) that would have supported that argument. Defendant argues there is a reasonable probability Baldwin's testimony would have resulted in a different outcome at trial when combined with evidence Ton described two different suspects to police. Baldwin would have corroborated defendant's theory of the case that defendant was not present at the crime and Ton falsely identified defendant to hide his insurance scam.

¶ 25 Defendant raised this argument for the first time in a supplemental motion for a new trial filed with his motion to reconsider the trial court's denial of his original motion for a new trial. The reason asserted for the delay was that trial counsel's investigator "clearly had not found Baldwin when counsel filed his original motion for a new trial." Defendant argues the trial court erroneously failed to rule on the supplemental motion for a new trial. The State argues the court did rule on the motion and denied it. Our review of the hearing on defendant's motions reveals the trial court did not rule on the supplemental motion for a new trial, which is the motion that contained defendant's ineffective assistance of counsel argument. Defendant had filed a (1) supplemental motion for new trial or judgment *n.o.v.*, (2) amended memorandum in support of supplemental posttrial motions, (3) statement of Stephen Baldwin, (4) motion to reconsider denial of motion for new trial, (5) motion to reconsider sentence, and (6) defendant's motion for extension of time for filing of additional memorandum for supplemental posttrial motions. The State took the position defendant timely filed the motion to reconsider the denial of the motion for a new trial and the motion

to reconsider sentence but argued that defendant's supplemental motion for a new trial was untimely.

¶ 26 The trial court ruled as follows:

> "It's the court's position that I will proceed on the motion. The motions are entitled Motions to Reconsider Sentence and Denial of Motion for New Trial. I will not permit the filing of any supplemental motions, memorandum, nor am I granting any extension of time. There needs to be finality to these cases. And as I have indicated, this case was continued for months for that purpose and we are going to finalize this case today."

¶ 27 Defendant asserts that if this court finds the trial court properly refused to rule on the supplemental motion for a new trial, then posttrial counsel was ineffective for not properly presenting and arguing the posttrial motion. However, at the hearing, posttrial counsel admitted he "didn't know where Mr. Baldwin was when [he] filed the original petition."

¶ 28 The jury found defendant guilty on June 10, 2010. Defendant filed the supplemental motion for new trial or for judgment *n.o.v.* on March 11, 2011. The supplemental motion was untimely. 725 ILCS 5/116-1(b) (West 2012). ("A written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict."). "The trial court certainly has the discretion to deny leave to file a posttrial motion beyond the prescribed 30-day period." *People v. Gilmore*, 356 Ill. App. 3d 1023, 1035-36 (2005). Although the limitation as to time is mandatory, and motions not timely filed are

properly denied, the time limitation applies to the defendant. *Id.* "The trial court still retains jurisdiction after 30 days from the entry of the verdict because the final judgment in a criminal case is the pronouncement of sentence." *Gilmore*, 356 Ill. App. 3d at 1036.

¶ 29 The court sentenced defendant on February 10, 2011. Nonetheless, the trial court had the discretion to rule on defendant's untimely supplemental posttrial motion because the motion to reconsider the denial of the (timely) motion for a new trial and the motion to reconsider the sentence were pending before the trial court without objection from the State. See *Gilmore*, 356 Ill. App. 3d at 1036 (distinguishing *People v. Barry*, 202 Ill. App. 3d 212, 215-16 (1990), wherein "there apparently was no pending postsentencing motion that preserved the trial court's jurisdiction to rule on an untimely posttrial motion filed after sentencing"). "A trial court abuses its discretion where its ruling is arbitrary, fanciful or where no reasonable person would take the view adopted by the court." *People v. Taylor*, 383 Ill. App. 3d 591, 594 (2008).

¶ 30 The State argued at the hearing on the supplemental motion that defendant could have raised the ineffective assistance counsel claim sooner because that claim was "readily apparent" when defendant filed the timely posttrial motion. Defendant's initial posttrial motion focused on the failure of the State to turn over Baldwin's criminal history information. Defendant's supplemental motion for a new trial repeated those same claims. In fact, the relevant portions of the two motions, except for the legal basis of the argument (one being the failure to disclose evidence and the other being ineffective assistance of counsel for failing to obtain it), are nearly identical. We hold the trial court did not abuse its discretion in refusing to allow defendant to file the supplemental motion for a new trial.

¶ 31 We also reject defendant's argument posttrial counsel was ineffective in failing to timely argue ineffective assistance of trial counsel. Defendant's supplemental motion for a new trial did not argue ineffective assistance of trial counsel for failing to investigate and call Baldwin because Baldwin could cast doubt on Ton's identification of defendant as the offender or provide exculpatory testimony. Defendant's ineffective assistance argument in the supplemental motion was confined to the failure to secure Baldwin's criminal history information from which trial counsel could have found evidence with which to impeach Baldwin. Defendant has abandoned that basis for trial counsel's alleged ineffectiveness on appeal.

> "A defendant's failure to include an issue in a posttrial motion results in a waiver of that issue on appeal. [Citation.] We note that, because the attorney who represented defendant at trial did *not* also draft the posttrial motion, posttrial counsel would not have faced a conflict of interest in claiming the ineffectiveness of trial counsel. We therefore apply the waiver rule to posttrial counsel's failure to include the ineffectiveness claim in defendant's posttrial motion." (Emphasis in original.) *People v. Ramos*, 339 Ill. App. 3d 891, 899-900 (2003).

¶ 32 Defendant is raising an argument in support of the posttrial motion he attempted to file--the motion defendant now argues posttrial counsel, who did not represent defendant at trial, failed to properly present and argue--for the first time on appeal. We hold those arguments are waived. Even if we were to construe defendant's argument to be posttrial

counsel was ineffective for failing to properly argue trial counsel's ineffectiveness in failing to investigate and call Baldwin for the reasons stated in this appeal (*i.e.*, Baldwin's value as a witness to the defense) the claim would still fail. We hold defendant cannot show sufficient prejudice from the failure to call Baldwin to cast doubt on Ton's identification or to elicit his testimony that none of the individuals in a photo array police showed Baldwin was the man who forced his way into Ton's home and confined him to a bathroom.

¶ 33 First, defendant acknowledges that the value of Baldwin's testimony to discredit Ton's identification, because they described the offender's clothing differently, is low. "[D]iscrepancies such as these are not uncommon." *People v. Holmes*, 141 Ill. 2d 204, 241 (1990). Further, precise accuracy in describing the clothing of a defendant is not necessary where the identification is otherwise positive." *People v. Barber*, 70 Ill. App. 3d 540, 547-48 (1979). Second, we find that defendant overvalues Baldwin's testimony allegedly exonerating defendant. Any testimony Baldwin could provide is self-impeaching. According to Baldwin's affidavit, he did pick someone from the photo array who Baldwin inferred was not defendant based on the reaction he received from police. Baldwin now avers that the offender is not pictured in the photo array. Even assuming Baldwin viewed a photo array and the first person Baldwin identified was not defendant, Baldwin's testimony is not very credible where he has demonstrated his own uncertainty about the identification. This is especially true where Baldwin initially identified someone as the offender a short time after the offense but subsequently stated he was certain no one pictured was the offender. Just as "[a] vague, doubtful, or uncertain identification will not support a conviction" (*People v. Jefferson*, 183 Ill.

App. 3d 497, 500 (1989)), neither will a doubtful or uncertain nonidentification exonerate a suspect.

¶ 34 We do not have to step into the role of finder of fact to see the inherent weaknesses in Baldwin's proposed testimony. We find the outcome of the proceedings likely would not have been different with his testimony, which likely would have had very little if any impact on Ton's positive identification. "The testimony of a single credible witness with ample opportunity to make a positive identification is sufficient evidence to convict." *Jefferson*, 183 Ill. App. 3d at 501. Accordingly, defendant's ineffective assistance of counsel argument must fail.

¶ 35 2. Failure to Impeach Ton with Alleged Prior Identification of Suspects

¶ 36 Defendant agues trial counsel's performance was objectively unreasonable because trial counsel did not question Ton about suspects he allegedly identified to Detective Coakley. Trial counsel was not permitted to elicit Ton's statements through Detective Coakley because trial counsel had not questioned Ton about them. On appeal, defendant argues that had trial counsel questioned Ton about his statements to police about potential suspects, "the impeaching evidence would have supported counsel's argument that [defendant] was innocent and falsely accused by Ton."

¶ 37 If the court determines that the jury would probably not have reached a different verdict had defense counsel used impeachment evidence it will not find the defendant received ineffective assistance of counsel. *Nelson*, 106 Ill. App. 3d at 845. Such is the case where the impeachment evidence would be "of virtually no value" in light of the evidence. *People v. Scott*, 94 Ill. App. 3d 159, 164 (1981). Based on the record before this court we cannot say

there is a reasonable probability the outcome of the trial would have been different had trial counsel questioned Ton about the two names he gave to Detective Coakley.

¶ 38 During a hearing outside the presence of the jury to determine whether Detective Coakley would be permitted to testify about the names of two men contained in his report, Detective Coakley testified that he had no recollection of writing his notes about those two individuals. He did say the information could have come from no one other than Ton. Detective Coakley testified that he would have asked Ton if anything unusual happened in the few days before the crime and that he was certain that is what the two names in the report was regarding. Detective Coakley's notes reflect that Ton told him that one of the men named in the report had stolen tools from Ton the previous year and the other had wanted to come to Ton's house the day before the offense.

¶ 39 Detective Coakley's testimony demonstrates that the information in the report about the two men is nothing more than information that may or may not have been pertinent to the investigation. We agree with the trial court that counsel was "trying to leave this impression with the jury that Mr. Ton told the detective about two totally different and random suspects *which they are not*." (Emphasis added.) Detective Coakley positively testified that Ton did not say the two men named in the report committed the crime. He also said that based on everything he gleaned from his investigation or learned from other police officers, Ton always said he did not know the offender who came to his house. Based on the record before us we find that even if trial counsel questioned Ton about his statements to police Ton's identification of defendant would not have been impeached. Thus, we cannot find prejudice to defendant from the failure to so question Ton.

¶ 40 Even if the fact of providing such information to police could conceivably cast some doubt on Ton's veracity or credibility we do not believe, in light of all of the evidence, that had the information been presented to the jury it would have had a reasonable doubt respecting defendant's guilt. Ton positively identified defendant and his stolen watch that was found in defendant's possession, in addition to other corroborating evidence discussed in more detail below. "[T]o demonstrate ineffective assistance of counsel, a defendant must show that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. [Citation.]" (Internal quotation marks omitted.) *People v. Nitz*, 143 Ill. 2d 82, 115-16 (1991). Defendant's ineffective assistance of counsel argument on this basis must fail.

¶ 41 3. Failure to Enforce Trial Court's Order on Other-Crimes Evidence

¶ 42 Next, we address defendant's argument trial counsel was ineffective in failing to enforce the trial court's order limiting the use of other-crimes evidence. The decision whether to object to the admission of evidence is generally a strategic one that may not form the basis of a claim of ineffective assistance of counsel. [Citation.] Counsel may render ineffective assistance, however, where there was no valid reason for failing to object to inadmissible evidence. [Citations.]" *Smith*, 2014 IL App (1st) 103436, ¶ 63.

> "Evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crime. [Citation.] Other-crimes evidence is admissible to show *modus operandi*, intent, motive, identity, or absence of

> mistake with respect to the crime with which the defendant is charged. [Citation.] ***.
>
> The admissibility of evidence rests within the discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. [Citation.]" *People v. Pikes*, 2013 IL 115171, ¶¶ 11-12.

¶ 43 In ruling on the State's motion to admit other-crimes evidence, the trial court relied on *People v. Kimbrough*, 138 Ill. App. 3d 481, 484-85 (1985). The *Kimbrough* court listed several items other-crimes evidence could be admitted to prove if relevant to do so, including the circumstances or context of the defendant's arrest, and stated the list was not exhaustive. *Kimbrough*, 138 Ill. App. 3d at 485-86. In this case, with regard to other-crimes evidence, the trial court ruled as follows:

> "So my ruling is that the State may admit evidence of the Waukesha, Wisconsin, case as evidence of other crimes in the elected Burbank case for purposes of indicating the identity of the defendant, the circumstances surrounding the defendant's arrest, the circumstances surrounding the victim's identity [*sic*] of the defendant from the photo array, the circumstances surrounding the ballistics evidence with regard to the bucket full of bullets found and whether or not they match the spent casings from the Burbank case. And without that evidence, then the jury would be or the fact finder would be left with holes as to

> how did the police find the watch? How did they relate it to this victim? How did the police find the defendant's identity in order to ask the Burbank victim to identify him both in photo arrays and line-ups?
>
> Although the defendant is alleged to have committed four other offenses, I believe that it would be extremely prejudicial to permit the State to admit evidence of all of those offenses despite their striking similarity and I believe that the probative value of the Waukesha case outweighs its prejudicial effect and that's my ruling."

¶ 44 Defendant argues the State violated that order by eliciting "testimony from the other crime to establish *modus operandi*," then in closing argued "that the other-crimes evidence established [defendant's] guilt." Defendant claims the evidence that exceeded the permissible scope of other-crimes evidence in this case that the State elicited without objection was that (1) both victims spoke Vietnamese and were connected to nail salons, (2) the offender forced both into a home during the day, (3) the offender fired bullets at both victims to frighten them, and (4) the shell casings in the Burbank case matched shell casings in the Waukesha case. Defendant argues none of those facts went to the circumstances or context of defendant's arrest, with all but the first going to establish *modus operandi*--a purpose for which the trial court did not admit the other-crimes evidence. Defendant argues the failure to object to enforce the trial court's ruling rendered trial counsel ineffective.

¶ 45 The State argues the trial court allowed it to use other-crimes evidence to establish defendant's identity, and all of the complained-of evidence did exactly that. The State argues the trial court "noted that the offenses had a 'striking similarity' but would not permit the People to admit evidence of all of the offenses." The State asserts on appeal that the evidence was "not admitted to establish *modus operandi*" but was properly admitted to establish defendant's identity because the trial court did not bar the State from establishing identity by reference to the similarities in the two cases. The State asserts it used the evidence "to establish defendant's identity by pointing out the undeniable similarities between the offenses here."

¶ 46 The trial court's order on the State's motion to admit other-crimes evidence, as well as the instructions given to the jury before it heard that evidence and before deliberations, comport with the State's position. At the end of trial the trial court gave the jury the following instruction:

> "Evidence has been received that the defendant has been involved in an offense other than that charged in the indictment.
>
> This evidence has been received on the issue of the defendant's identification and may be considered by you only for that limited purpose.
>
> It is for you to determine whether the defendant was involved in that offense and, if so, what weight should be given to this evidence on the issue of identification."

¶ 47 There is no support for defendant's claim on appeal that the trial court ruled the State could enter evidence from the Waukesha case "only for the limited purpose of explaining how [defendant] was arrested and how it lead to his arrest in the current case." If the trial court had ruled that the evidence was being admitted for that purpose alone the committee comments to this pattern jury instruction told the court to set forth, where the instruction reads "identification," "whatever explanation does fit the evidence." Illinois Pattern Jury Instructions, Criminal, No. 3.14, Committee Note (4th ed. Supp. 2009). The trial court did not instruct the jury to consider the evidence only on the issue of how defendant was arrested in this case.

¶ 48 Nor did the trial court limit how the State could use other-crimes evidence as it pertained to the issue of defendant's identification. Thus, the trial court's order admitting the evidence on the issue of identification encompassed the *modus operandi* exception. See *People v. Quintero*, 394 Ill. App. 3d 716, 726-27 (2009) ("The use of other-crimes evidence to show *modus operandi* and identity are related in that they both serve to identify the defendant as the perpetrator of the offense at issue, but they work in different ways. The *modus operandi* exception has been described as circumstantial evidence of identity on the basis that crimes committed in a similar manner suggest a common author and strengthens the identification of the defendant. [Citations.] The use of other-crimes evidence to show identity, on the other hand, links the defendant to the offense at issue through some evidence, typically an object, from the other offense." (Internal quotation marks omitted.)). We find support for this holding in that, in ruling on the State's motion to admit other-crimes evidence, the trial court found that all of the offenses defendant was alleged to have been involved in had "striking

similarity," and with the Waukesha case, its probative value on the issue of identification outweighed its prejudicial effect. The other-crimes evidence in this case connected defendant to the Burbank case through both some evidence (including the shell casings) as well as the very similar manner in which the crimes were committed. The State did not exceed the scope of the trial court's order.

¶ 49 The State also reminded the jury repeatedly of the limited purpose for which it could consider evidence of defendant's involvement in other crimes consistently with the trial court's order that the evidence was admissible on the issue of defendant's identification. For example, in rebuttal, the State argued the jury had been told "a lot about Waukesha, Wisconsin. And counsel is correct, that is only for the limited purpose of identification in this case. You are not to decide this case based on any crime up there. And the relevance is how that leads to the defendant's *** identification." That defendant's trial counsel also understood the trial court's order to admit other-crimes evidence on the issue of defendant's identification further supports our determination that is the correct interpretation of the trial court's ruling.

¶ 50 Defendant's trial counsel objected to neither any of the testimony or the argument that allegedly exceeded the scope of the admissibility of the other-crimes evidence in this case. The evidence was admissible and the State's arguments were appropriate. Defendant has not established that trial counsel's performance fell below an objective standard of reasonableness.

¶ 51 Even if there had been error in the admission of other-crimes evidence trial counsel's failure to object did not necessarily prejudice defendant. See *Quintero*, 394 Ill. App. 3d at 728 ("The improper admission of other-offenses evidence is harmless error when a defendant is

neither prejudiced nor denied a fair trial because of its admission."). In his case, the victim identified defendant as the person who forced his way into the victim's home with a gun, testified defendant fired two shots in the victim's direction, and testified that property was missing from his home. "The testimony of a single credible witness with ample opportunity to make a positive identification is sufficient evidence to convict." *Jefferson*, 183 Ill. App. 3d at 501. The identification of defendant as the offender is bolstered by the fact that shell casings that had been chambered in the same gun that fired two bullets in Ton's home were found in defendant's home. Ton's identification of defendant is also corroborated by the fact the victim identified a watch found in defendant's possession as the watch taken from his home.

¶ 52 Defendant argues that absent the allegedly inadmissible evidence there is a reasonable probability the outcome of his trial would have been different because the evidence against him was weak. The evidence established that defendant was in possession of the proceeds of the crime, there was a rational connection between defendant's possession of the watch and his commission of the offense because the inference that defendant committed the offense is not unreasonable, and there is physical evidence corroborating defendant's guilt. See generally *People v. Natal*, 368 Ill. App. 3d 262, 269 (2006) (citing *People v. Housby*, 84 Ill. 2d 415, 425-26 (1981) (discussing permissive inference of guilt from possession of recently stolen property when certain conditions are met)). Defendant argues the State's case would have been even more weak "if the jury had heard the testimony of Stephen Baldwin and if the jury had known that Ton identified two other men as the potential perpetrator before the Waukesha police called the Burbank police and gave them [defendant's] name." We disagree.

¶ 53 For the reasons previously discussed, defendant's counsel was not ineffective in failing to call Baldwin as a witness or in failing to impeach Ton with his alleged statement to police about potential suspects. Thus, even without any of the evidence defendant complains his trial counsel should not have permitted the State to elicit, there is no reasonable probability the outcome of the trial would have been different, and the errors complained of are not sufficient to undermine our confidence in the jury's verdict.

¶ 54 Moreover, the challenged evidence demonstrated the strong similarities between the Waukesha offense and the offense in this case, and the trial court properly gave the jury a limiting instruction as to the use of that evidence, curing any prejudice to defendant. *People v. Burgos*, 184 Ill. App. 3d 474, 479 (1989) ("The balance of Bishop's testimony demonstrated the strong similarities between defendant's attack on her and the attack on Campbell and we believe that any prejudice engendered by the testimony was cured by a limiting instruction to the jury."). Defendant's claim of ineffective assistance of counsel for failing to object to other-crimes evidence must fail. *Nelson*, 106 Ill. App. 3d at 845.

¶ 55 4. Failure to Object to Admission of GPS Data or Request Limiting Instruction

¶ 56 Defendant argues the data stored in the GPS unit seized from his vehicle constituted hearsay and should not have been admitted at trial. When defendant objected to the admission of the GPS evidence at trial, the trial court ruled as follows:

> "That evidence is being admitted under proof of other-crimes evidence as it relates to the circumstances surrounding the defendant's arrest and identification in this case. Because at the hearing on the State's motion to admit evidence of other crimes,

> it was adduced that it was the GPS address that was close to Mr. Ton's address in Burbank, Illinois, which prompted the Waukesha police to contact the Burbank Police Department which eventually led to the defendant's identification and arrest in this case. And so for the limited purpose for which that is—the GPS evidence is being admitted goes to those issues [*sic*]."

¶ 57 Defendant argues all that was admissible was testimony that police in Waukesha examined the GPS and as a result contacted the Burbank Police Department. Defendant argues trial counsel was ineffective in failing to object on hearsay grounds when the State later used the GPS data "for the truth of the matter asserted, that [defendant] actually went to the addresses listed in the GPS unit," to link defendant to the victims' homes in Burbank and Waukesha. Although the address in the GPS was a location near Ton's home, defendant argues the State used the GPS data for the truth of the matter "asserted"--that defendant actually went to Ton's home.

¶ 58 The State argues the GPS entries are not assertions of fact and therefore fall outside the rule against hearsay. Defendant argues that the GPS entries constitute statements because the act of typing an address into a GPS is an assertion that the entrant wants directions to a particular address. M. Graham, Cleary and Graham's Handbook of Illinois Evidence § 801.2, at 572 (5th ed. 1990) ("Nonverbal conduct may on occasion clearly be the equivalent of an assertive statement, that is, done for the purpose of deliberate communication, and thus classified as hearsay"). Our research leads us to believe that GPS entries of the type at issue here would be considered "computer stored" information rather than "computer generated"

information and, consequently, assertions by the entrant. See *Commonwealth v. Thissell*, 457 Mass. 191, 198 n.13 (2010). But we have no need to decide that issue in this case. First, for the purpose of demonstrating the circumstances of defendant's arrest, the GPS data was not hearsay. *People v. Richardson*, 2011 IL App (5th) 090663, ¶ 23 ("the testimony was not hearsay, and the trial court did not abuse its discretion in admitting it for the limited purpose of describing the course of the investigation that led to the defendant's arrest"). Second, if entering an address into the GPS was an out-of-court assertion by defendant, then it was an admission by a party opponent and, therefore, not hearsay. Ill. R. Evid. 801(d)(2) (eff. Jan. 1, 2011). "An admission is a statement of independent facts which, when taken in connection with proof of other facts, may lead to an inference of guilt, but from which guilt does not necessarily follow." *People v. Davis*, 103 Ill. App. 3d 792, 795 (1981). Courts generally grant wide latitude in construing statements as admissions. *People v. Bryant*, 391 Ill. App. 3d 228, 244 (2009). "There is no requirement that an admission be inculpatory or against interest when made or when offered, because the theory of the admissions exception is based upon the view that the admissibility of a party's own statement is a product of the adversary system." *People v. Aguilar*, 265 Ill. App. 3d 105, 110 (1994).

¶ 59 We find defendant's "statements" inputting addresses into the GPS qualify as admissions. See *Davis*, 103 Ill. App. 3d at 795 (concluding trial court did not err in deciding that defendant's statement of his address was an admission). Defendant argues the State failed to establish evidence to support the inference he made the "statements" entered into the GPS. First, there was sufficient evidence to support an inference defendant made the statements in the GPS. Police recovered the GPS from defendant's vehicle and defendant has not disputed

ownership of that vehicle, nor is there evidence anyone else ever used the vehicle. Defendant actually gave police permission to search the vehicle at the casino. There was also testimony as to how the statements were extracted from the GPS. Second, it is generally held that no predicate or foundation need be laid for the proof of an admission as direct and original evidence. 18 Ill. Law & Practice, § 172, Evidence (citing *Ryan v. McEvoy*, 20 Ill. App. 3d 562, 566 (1974) ("we are unable to conceive of any other reasonable theory that would completely exclude evidence by a disinterested objective witness of voluntary, material admissions of a party against his interest which might tend to support the other side's theory of the case")). We hold that in this case the address entries in the GPS were not hearsay.

¶ 60 Whether hearsay or not, defendant complains of specific instances in which the State allegedly exceeded the scope of the trial court's order admitting the GPS evidence to show the course of the investigation. Defendant argues evidence the GPS contained addresses for a casino where Wisconsin police first located defendant, the Waukesha victim's home, and defendant's home went beyond the limited purpose for which the trial court admitted the GPS evidence. Specifically, defendant argues evidence of his address and the casino were used impermissibly solely to bolster an argument defendant used the GPS to drive to all the other addresses in the GPS, and particularly, "his home address had no relevance to explaining why Waukesha detectives contacted detectives at Burbank regarding [defendant] as a possible suspect."

¶ 61 We disagree. That evidence was admissible to show the circumstances surrounding defendant's arrest. Evidence that one of the addresses in the GPS seized from defendant's vehicle was an address near Ton's home was necessary to show how Ton came to identify

defendant, first from the photo array and subsequently at a line up, and also Ton's identification of the watch found in defendant's possession. Simply informing the jury that Waukesha police found a GPS and contacted Detective Coakley would not explain why Coakley then placed defendant's picture in a photo array and showed it to Ton, leaving the jury to speculate as to the answer. We note that speculation could have resulted in an inference that is worse for defendant. The jury might have speculated Ton's exact address was in defendant's GPS, or the address to Ton's nail salon, or both, or numerous other Burbank addresses. Failing to disclose the discovery of one address near Ton's home may have actually prejudiced defendant more. The fact that the Waukesha victim's address was in the GPS was necessary to show why Waukesha police would have any interest in the addresses stored in defendant's GPS at all. Detective Bergin testified that the purpose of sending the GPS for analysis was to find out "specifically if the Vu Tran address on Oak Crest address [*sic*] in Waukesha had been entered into that unit." Without such testimony the jury would be left to wonder why police extracted the information from the GPS in the first place.

¶ 62 The evidence about which defendant complains was admissible for a proper purpose. It was not rendered inadmissible because it may have had negative implications for defendant. See *People v. Illgen*, 145 Ill. 2d 353, 375 (1991) ("It is clear that other-crimes evidence often tends to implicate the character of the accused, but if the evidence is properly offered for a purpose which is permissible, then it is not excludable simply because it also implicates the character of the accused."). Even assuming it was improper to do so, we do not believe that soliciting testimony that police found the address to the casino where police found defendant and defendant's home address in the GPS prejudiced defendant. Defendant does not dispute

the GPS was found in his car, his car was parked at the casino when police approached him, and defendant does not challenge the search of his home. "[I]mproper introduction of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based upon its admission. [Citation.]" (Internal quotation marks omitted.) *People v. Johnson*, 406 Ill. App. 3d 805, 818 (2010).

¶ 63 Defendant also claims the State's arguments at trial went beyond the scope of the trial court's order because the State argued in closing that the GPS linked defendant to Ton's home. Defendant also argues the State's closing argument was improper because it argued the GPS data as substantive evidence linking defendant to the scene of the crime. Defendant's argument fails.

¶ 64 Earlier in its closing argument, the State told the jury that defendant was not on trial for what happened in Waukesha, and that "the purpose of this evidence, the purpose of bringing Mr. Tran and all of those other witnesses here from Waukesha to testify before you is on the issue of identification, to aid you in determining that the defendant is the same man who invaded Kevin Ton's home as well as Vu Tran." Then, after noting testimony as to the addresses found in the GPS (defendant's, the casino, the Waukesha victim's, and the Burbank address), the State argued as follows: "Ladies and gentlemen, is it any coincidence that the same man that Kevin Ton and Vu Tran have identified as the offenders [*sic*] in their case was *** in possession of a GPS unit with all of those addresses? No, it's no coincidence because they are one in the same offender."

¶ 65 At the conclusion of the State's closing argument, the State referenced the defense opening statement wherein defendant's trial counsel asserted the only evidence putting defendant at Ton's home was Ton. The State continued as follows:

> "Well, Ladies and gentlemen, you now know that that's not true. You now know about Vu Tran and his encounter with the defendant. You now know about the watch that was stolen and the watch that the Waukesha authorities recovered. You now know about the GPS and its contents. You now know about the bullets and the shell casings. The shell casings found at the scene and the bullets recovered from defendant's home. That they all came from the same weapon or at one time were inside or fired from the same weapon.
>
> So, ladies and gentlemen, the evidence places the defendant Tuyen Ngo at Kevin Ton's home. The evidence is the one that points to the defendant. The evidence is the one that implicates him in this case. And the evidence is what will convict him."

¶ 66 In rebuttal, the State addressed defendant's trial counsel's argument Ton staged the home invasion as an insurance scam. The State attacked the defense's theory arguing that if it were true then Ton should not have identified anyone as the offender. The State continued:

> "And what a coincidence, isn't it, ladies and gentlemen, that when he identifies the defendant, the defendant happens to

> be the one who's in possession of the Magellan GPS. That GPS which you heard from the computer forensics expert has relevant addresses in it. The defendant's home address in Yorkville. It's in his car. The home address of Vu Tran in Waukesha, Wisconsin who also identifies this defendant as the man who came into his home. And a nonexistent address in Burbank, Illinois, just down the street from Kevin Ton's home. How lucky Kevin Ton is that he picked out this guy."

¶ 67 The State made a similar argument with regard to the watch and the ballistics evidence.

¶ 68 We find that the State's arguments comported with the limited purpose for which the circuit court had admitted the evidence. Even if the State implicitly argued that "the GPS and its contents" "places the defendant Tuyen Ngo at Kevin Ton's home," those isolated comments are not enough to undermine confidence in the verdict to warrant a finding of ineffective assistance of counsel. *Sharp*, 2015 IL App (1st) 130438, ¶ 100 ("reasonable probability is a probability sufficient to undermine confidence in the outcome"). The State, on the whole, clearly argued that the evidence helped to identify defendant as the offender in Ton's home in Burbank. More importantly, the State never made any impermissible argument with regard to any evidence. "This court has repeatedly held that evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crimes." *People v. Wilson*, 214 Ill. 2d 127, 135 (2005).

¶ 69 No additional limiting instructions were necessary, and, regardless, defendant was not prejudiced. The State's arguments were properly limited to the identification of defendant.

Finally, an objection to the evidence on hearsay grounds would have been futile. Defendant's argument must fail.

¶ 70 5. Cumulative Error

¶ 71 We have found no error on this record. Defendant did not receive ineffective assistance of counsel. The failure to call Baldwin as a witness did not prejudice defendant because his testimony would have been of insignificant effect in impeaching Ton's identification and based on his statement would not necessarily have exonerated defendant. Ton's alleged statements to police shortly after the crime were not impeaching of Ton's identification of defendant because the record shows Ton never said anyone else committed the crime. The evidence adduced at trial, including the GPS evidence, and the State's arguments, were in compliance with the trial court's order regarding other-crimes evidence. Therefore, trial counsel did not fail to enforce any order, or permit the State to adduce inadmissible evidence or make inappropriate argument. Under the circumstances, "defendant is not entitled to a new trial on the basis of cumulative error." *People v. Hall*, 194 Ill. 2d 305, 351 (2000); *Sullivan*, 366 Ill. App. 3d at 786.

¶ 72 CONCLUSION

¶ 73 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 74 Affirmed.