2014 IL App (1st) 121541-U
No. 1-12-1541
June 16, 2015

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 04 CR 3557
	)	
WILLIAM DUKES,	)	The Honorable
	)	Thomas M. Tucker,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Supreme Court Rule 402(f) forbids the introduction into evidence of a statement the defendant made in the course of negotiations to have the State promise not to seek the death penalty, where the negotiations did not end in a plea of guilty. The trial court should exclude evidence of the defendant's unsavory conduct where that conduct has only marginal probative value. The trial court must exclude a witness's prior consistent statement where the witness made the prior statement after his motive to lie had already arisen. Statements of a co-defendant who participated in the crime will not usually qualify as statements of identification within the meaning of Supreme Court Rule of Evidence 801(d)(1)(B).

¶ 2 A jury found William Dukes guilty of two murders. In this appeal, Dukes argued that the trial court erred when it permitted the State to present evidence of statements Dukes made in

his effort to negotiate sentencing concessions from the State. We agreed with Dukes, finding the improperly admitted statements prejudicial in this case with closely balanced evidence, so we reversed the convictions and remanded for a new trial. Our supreme court instructed us to vacate our order and reconsider the judgment in light of *People v. Rivera*, 2013 IL 112467, which we did not cite in our original order. Accordingly, we vacate our original order and enter this order in its stead.

¶ 3 BACKGROUND

¶ 4 Marilyn Williams owned a house in Cicero. In the summer of 1993, she lived upstairs in the house with her daughter Lucy and Lucy's two children, Dustin, then 2 years old, and Bridget, who was 8. Marilyn rented part of the first floor to Marko Tomazovich. Sometime that summer Marilyn met Dukes. She leased a second unit on the first floor to Dukes for about two months. Lucy briefly engaged in a sexual relationship with Dukes that summer. On July 23, 1993, Lucy told Dukes that she was going to marry her longtime boyfriend, Kevin Rhynes, the next day. Dukes wished her good luck. Lucy had sex with Dukes that night and married Kevin at the courthouse the next day. Lucy and her children moved into Kevin's home, and Dukes moved out of Marilyn's house soon thereafter.

¶ 5 Tomazovich had a severe problem with substance abuse and addiction. Tomazovich's father helped him pay the rent, but by the summer of 1993, Tomazovich's father decided to stop giving Tomazovich money, and Tomazovich stopped paying rent. Lucy handed Tomazovich an eviction notice for failure to pay the rent. Marilyn and Lucy told Tomazovich they just wanted him to move out. He said, "Fuck you, bitches; I ain't paying."

Later, Tomazovich said to Marilyn, "One day, I'm going to get you when you're alone. You better watch your back. I'm going to kill you."

¶ 6 On August 28, 1993, Lucy left Bridget and Dustin with Marilyn while Lucy went to work her shift as a cocktail waitress from 5 p.m. until closing. She went to Marilyn's home the next morning. She found the front door ajar, and then she saw Dustin sleeping on a couch. Lucy found Marilyn and Bridget in the bathtub, dead. She picked up the telephone but heard no dial tone. She went down to Tomazovich's unit and banged on the door. When he answered, she told him to call 911. Tomazovich came upstairs with her and then went to a neighbor's home to call police.

¶ 7 The medical examiner found that Bridget died when someone tied a ligature around her neck and cut off her air. Tears on her vagina indicated that she had been raped shortly before her death. Marilyn died from suffocation. Her head bore marks showing the result of blunt force trauma shortly before death.

¶ 8 Police recovered a blood-soaked comforter from Marilyn's home. The police laboratory's tests showed that the blood matched Bridget's blood. Police also found several hairs on the comforter. From Tomazovich's unit, police obtained a bloody t-shirt and bloody jeans. Laboratory tests indicated that the blood matched Tomazovich and not Bridget or Marilyn.

¶ 9 In an initial interview on August 29, 1993, Tomazovich told Detective Darlene Sobczak that he knew nothing about the murders. He told Sobczak that he bled on his shirt and jeans in a fight at a bar. He also said he bled on the clothes during a fight in the woods.

¶ 10 In October 1994, police arrested Tomazovich for two robberies. Tomazovich pled guilty and the court sentenced him to six years in prison. In March 1995, Sobczak again

interviewed Tomazovich about the murders of Marilyn and Bridget because he remained a suspect in the case. Tomazovich again said he knew nothing about the murders. But he changed his story when Sobczak interviewed him in August 1995. Tomazovich then said that he watched while Dukes murdered Marilyn and raped and murdered Bridget.

¶ 11 Police arrested Dukes in August 1995. Officers found part of Lucy's drivers license in Dukes's wallet. Dukes told Sobczak he knew nothing about the murders, and he had not gone to Marilyn's house on the night of the murders. Police released Dukes without charging him.

¶ 12 Police arrested Tomazovich again in 1998. Again police asked him about the murders. This time, Tomazovich said that he held Marilyn's legs while Dukes choked her. Prosecutors charged Tomazovich with the murders of Marilyn and Bridget.

¶ 13 Five years later, in October 2003, Tomazovich agreed to plead guilty to home invasion and to testify against Dukes in exchange for the dismissal of charges against him for the murders of Marilyn and Bridget. Also in October 2003, a police officer acting under cover tried to induce Dukes to confess to the murders. The officer did not succeed. Instead, officers arrested Dukes on drug charges in January 2004.

¶ 14 On January 10, 2004, Sergeant James Washburn of the Chicago Police Department questioned Dukes. Washburn asked what type of sentence Dukes thought he could get for a double homicide. Dukes said, "the needle." Dukes then said he wanted to tell Washburn about his participation in the murders of Marilyn and Bridget. First, Dukes wanted to make some phone calls. After the calls, Dukes said he would make a statement about his participation in the murders if the State promised not to seek the death penalty. Washburn

said he needed to speak to his supervisor. When he returned, Washburn said, "State's Attorney's office wants to know exactly what you're going to say in your statement regarding the murders." Dukes said, "[W]ell, I'm going to tell them about my participation in the murders of Marilyn and Bridget." Washburn asked, "What are you going to say? That you killed Marilyn and Bridget?" Dukes answered, "[Y]es, yes, I am."

¶ 15 Assistant State's Attorney Jim Papa joined the subsequent discussion. Dukes said he would make a statement about the murders if the State would agree to a sentence of 20 years with day-for-day good time credit. Papa said the State would not do that. Dukes then asked for 40 years, and Papa again refused. Dukes said he would make a statement if the State promised not to seek the death penalty. Papa said he would confer with his supervisor about the offer, and asked Dukes if he felt remorse about the murders. Dukes said yes.

¶ 16 When Papa returned to the interview room, he said the State would agree not to seek the death penalty in exchange for a truthful statement about the murders. Dukes asked Papa to put the promise in writing. Papa's supervisor came to the interview room and told Dukes the State would not seek the death penalty but only if Dukes made a truthful statement within a day. Dukes agreed and the police started videorecording. But then Dukes decided not to talk.

¶ 17 A grand jury indicted Dukes for the murders of Marilyn and Bridget. Before trial, Dukes filed a motion to suppress the discussions he had with Washburn and Papa as plea negotiations. The trial court denied the motion, except that the court decided the State could not elicit testimony that Dukes asked for a sentence of 20 years, then a sentence of 40 years, in exchange for a statement about the murders.

¶ 18 At the jury trial, the State presented an expert on hair comparison, who testified that two hairs found on the blood-soaked comforter appeared to be pubic hairs. Those hairs matched Dukes's hair, and they did not match Tomazovich's hair or the other hair samples police took, including hairs of Marilyn and Bridget. The expert also looked at other hairs from the comforter, and found the hairs did not match Dukes, Tomazovich, Marilyn, Bridget, or any other hair samples prosecutors asked the expert to compare to the hairs from the comforter. The expert admitted that nothing about the hairs indicated when or how the hair arrived at the comforter, and she did not conclude from the unidentified hairs that other persons participated in the crimes. The expert admitted that Bridget or Marilyn or anyone else who came to their home could have picked up the unidentified hairs anywhere outside the home and carried them to the comforter. The expert also admitted that Dukes's hair could have gotten on the comforter when he lived in the house and sometimes visited Lucy.

¶ 19 An expert on DNA comparisons compared the DNA from the two hairs from the comforter to Dukes's DNA. He found that the DNA matched at two loci, and he estimated that about one Caucasian person in 1300 would match the hair's DNA at those two loci.

¶ 20 Washburn testified about the January 10, 2004, interview with Dukes. After the prosecution elicited all of the statements the trial court permitted, defense counsel, on cross-examination, elicited Washburn's testimony that Dukes sought a sentence of 20 years, and a sentence of 40 years, in exchange for his statement.

¶ 21 Sobczak testified that when she questioned Dukes in 1995, she asked him about his relationship with Lucy. According to Sobczak, Dukes "kept on and on about how she liked rough sex, and that they wanted each other and he would have sex with her and she wanted

him and little detail like about roughness and stuff of sex." When defense counsel objected, the prosecutor promised to show the relevance of the testimony to motive. The judge overruled the objection. Sobczak testified that she asked Dukes why he had Lucy's picture from her drivers license in his wallet. Dukes said Marilyn asked him to stop Lucy from marrying Kevin. After Dukes had sex with Lucy the night before her wedding, Dukes took all of Lucy's identification cards, thinking that she could not complete the civil ceremony without any identification. Dukes told Sobczak that on August 28, 1993, he spent the afternoon with a friend, then he went to another friend's home, then he stayed at a crack house for the night. Sobczak testified that she found the crack house where Dukes said he stayed, and she verified that he did not spend the night there on August 28, 1993. Neither party asked Sobczak what she did, in 2004, to verify that Dukes had not spent a specific night at the crack house in 1993.

¶ 22 Lucy testified that when she arrived at the courthouse for her wedding on July 24, 1993, she found that she had no identification cards. However, she had her birth certificate, and the court accepted that as sufficient identification for the ceremony. Lucy saw Dukes a few times after the wedding. He gave her back her identification cards. Another time he came into the place where she worked as a cocktail waitress. She told Dukes their relationship was over. Dukes remained calm, and he "never seemed like he was angry or any emotions actually, none." Lucy testified that she did not like rough sex, and she never said to Dukes that she liked rough sex. Dukes's attorney moved to strike as irrelevant all references to rough sex. The trial court denied the motion.

¶ 23 Tomazovich testified that he had a "love/hate" relationship with Marilyn. He explained, "We always argued and ten minutes later she would bring me down a pot of food." When they argued, he said things he did not mean. The parties stipulated that Tomazovich threatened to kill Marilyn after she and Lucy served him with an eviction notice in the summer of 1993.

¶ 24 Tomazovich extensively recounted the events of August 28, 1993. Around 10 p.m. that evening, Dukes came by Tomazovich's home with some beer. After they drank some, Dukes asked Tomazovich for money. Tomazovich said he had none. Dukes suggested that they could ask Marilyn for money. Tomazovich and other persons often borrowed money from Marilyn. Tomazovich and Dukes went upstairs and Tomazovich knocked on Marilyn's door. Marilyn let him in, and agreed to give him $5. When Marilyn saw Dukes behind Tomazovich, she started yelling at Dukes and Dukes yelled back. Dukes knocked Marilyn down and started choking her. Tomazovich tried to pull Dukes off Marilyn, but Dukes swung a fist and hit Tomazovich in the head. Marilyn tried to get up, but Dukes got back on top of her and choked her. He told Tomazovich to hold Marilyn's legs. Tomazovich did so. He let go quickly, but Marilyn was quiet and not moving. Dukes rummaged through the home, apparently looking for cash.

¶ 25 Tomazovich testified that he saw Dukes carry Bridget into the bedroom. Tomazovich followed and saw that Dukes had taken Bridget's pants off. Tomazovich said, "[W]hat the fuck." Dukes hit Tomazovich in the chest. Tomazovich watched Dukes rape Bridget. Tomazovich tried to grab Bridget, and Dukes hit Tomazovich repeatedly and pushed him out of the bedroom. When Dukes came out of the quiet bedroom, he told Tomazovich to help

him carry Marilyn into the bathroom. Dukes then carried Bridget into the bathroom. Dukes threatened to do the same to Tomazovich's children if Tomazovich said anything. Tomazovich went downstairs to his home and took off his soiled clothes. He testified that he did not remember how he got blood on his clothes, but he thought his nose might have bled.

¶ 26 To persuade the jury that Tomazovich had not concocted his account of the murder in response to police questioning, years after the crimes took place, the prosecutor asked Tomazovich about a conversation between Tomazovich and his friend, Arlene Kwil, a few days after the murders. The jury heard the following:

"Q. What did you say to Arlene Kwil?

A. I started venting about how I couldn't help the kids out.

Q. Did you say words to the effect that you couldn't stop him?

A. Yes.

Q. Who were you referring to?

A. Dukes.

Q. A few days after that *** were you then spoken to again by the police?

A. Yes.

Q. Did they confront you with what *** you had told Arlene Kwiil?

A. Right.

Q. What did you say?

A. I believe I told them I didn't know nothing."

¶ 27 In closing argument, the prosecutor emphasized Dukes's confession, and said that the lack of Bridget's blood on Tomazovich's clothing showed that Tomazovich told the truth.

¶ 28 The jury found Dukes guilty of the first degree murders of Marilyn and Bridget. The trial court denied Dukes's motion for a new trial and sentenced him to natural life in prison. Dukes now appeals.

¶ 29 ANALYSIS

¶ 30 Dukes argues that the trial court committed reversible error (1) when it denied Dukes's motion to suppress the statements he made in negotiations with the State; (2) when it denied Dukes's motion to strike all references to rough sex; and (3) when it permitted Tomazovich to testify about his conversation with Kwil. Dukes also contends that the prosecutor's closing argument deprived him of a fair trial.

¶ 31 Negotiations

¶ 32 Dukes argues first that the trial court violated Supreme Court Rule 402(f) (Ill. Sup. Ct. R. 402(f) (eff. July 1, 2012)) when it denied his motion to suppress the statements he made in the course of plea negotiations. In determining whether a trial court has properly ruled on a motion to suppress, findings of fact and credibility determinations made by the trial court will be reversed only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). Our supreme court adopted Supreme Court Rule 402(f) "to encourage the negotiated disposition of criminal cases by eliminating the risk that juries will hear statements or admissions made by defendants during plea negotiations." *People v. Hart*, 214 Ill. 2d 490, 502 (2005). Rule 402(f) provides, "If a plea discussion does not result in a plea of guilty, *** neither the plea discussion nor any resulting agreement, plea, or

judgment shall be admissible against the defendant in any criminal proceeding." Ill. Sup. Ct. R. 402(f) (eff. July 1, 2012). To determine whether the rule requires exclusion of a statement, "courts must consider, first, whether the accused exhibited a subjective expectation to negotiate a plea, and, second, whether that expectation was reasonable under the totality of the objective circumstances." *Hart*, 214 Ill. 2d at 503.

¶ 33 The *Hart* court distinguished offers to cooperate from plea negotiations, and cited with approval *People v. Beler*, 327 Ill. App. 3d 829 (2002), and *People v. Rolih*, 233 Ill. App. 3d 484 (1992). The defendant in *Beler* offered to cooperate with a drug investigation, but he "did not express an interest in confessing, pleading guilty, or seeking concessions from the State in exchange for a plea." *Beler*, 327 Ill. App. 3d at 834, quoted in *Hart*, 214 Ill. 2d at 508. Similarly, the defendant in *Rolih* "wished to cooperate" (*Rolih*, 233 Ill. App. 3d at 486, quoted in *Hart*, 214 Ill. 2d at 508), but he did not "manifest that [he] was willing to plead guilty to the charges against him. He did not indicate what the terms were under which he would be willing to bargain." *Rolih*, 233 Ill. App. 3d at 489, quoted in *Hart*, 214 Ill. 2d at 508-09.

¶ 34 The *Hart* court found the circumstances in *Hart* similar to the circumstances in *Beler* and *Rolih*. Hart offered to cooperate in a police investigation and asked the detective what he could offer. Hart did not ask what sentence or other concession the prosecutor might offer, and he did not admit guilt or offer to plead guilty. The *Hart* court found the statements admissible because Hart did not show that he expected to negotiate a plea.

¶ 35 The *Hart* court contrasted the circumstances in *Hart*, *Beler*, and *Rolih* with the circumstances in *People v. Friedman*, 79 Ill. 2d 341 (1980). See *Hart*, 214 Ill. 2d at 507-08.

Friedman, in jail on charges of theft by deception, called the office of the Attorney General, and an investigator called back. In the course of the call, Friedman said, "If I'm convicted, I would rather go to a Federal prison as opposed to a State prison." *Friedman*, 79 Ill. 2d at 350. The trial court permitted the prosecutor to introduce the statement into evidence.

¶ 36 On appeal, the *Friedman* court held:

> "In the present case, defendant's unsolicited statement was an offer to enter negotiation, stating generally the terms upon which defendant would be willing to bargain. We cannot agree with the State that an essential element of a plea discussion is the requirement that the statement sought to be excluded be made 'as an integral part of a bona fide negotiation' with the appropriate parties in attendance. The fact that the party to whom this statement was made did not have the actual authority to enter negotiation is not, standing by itself, sufficient to render the statement admissible. [Citation.] Defendant could have reasonably assumed that Kaiser was an appropriate party to whom he could convey his offer to bargain. [Citation.]
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> Nor can we agree that the parties must be seated at the negotiating table before our rule applies. A statement made as an offer to enter negotiation is indistinguishable from a statement made at an advanced stage of the negotiation process in terms of its impact upon a jury. Statements related to either stage of this process are equally devastating in the trial of the accused. In determining whether a statement is plea related, we do not require 'a preamble explicitly demarcating the beginning of plea discussions' [citation]. But where a preamble

> is delivered, such as defendant's inquiry related to 'making a deal' in the present case, it cannot be ignored. [Citation.] This is a clear indication of defendant's intent to pursue plea negotiations. We find that defendant's unsolicited statement was a plea-related discussion and therefore inadmissible under Rule 402(f).
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> While we do not question defendant's subjective expectation to enter a plea-related discussion at the time the statement was made, nor the reasonableness of defendant's expectations under the circumstances, we do agree with the State that there is a distinction between a statement made in the furtherance of a plea discussion and an otherwise independent admission which is not excluded by our rule. [Citation.] Where a defendant's subjective expectations are not explicit, the objective circumstances surrounding defendant's statement take precedence in evaluating defendant's subsequent claim that the statement was plea related. Before a discussion can be characterized as plea related, it must contain the rudiments of the negotiation process, i.e., a willingness by defendant to enter a plea of guilty in return for concessions by the State." *Friedman*, 79 Ill. 2d at 352-53, quoting *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977).

¶ 37 We find this case more like *Friedman*, and not like *Hart*, *Beler*, and *Rohli*. Dukes asked for specific sentencing concessions, in anticipation of a conviction, much like Friedman. Dukes asked to speak with an Assistant State's Attorney. Most glaringly, Washburn elicited the critical confession by representing to Dukes that Washburn needed to tell the Assistant State's Attorney what Dukes intended to admit so that the Assistant State's Attorney could decide whether the State would make the sentencing concessions in exchange for the

proposed admissions. Therefore, we find that under Supreme Court Rule 402(f), as explained in *Friedman* and *Hart*, the trial court violated Rule 402(f) when it permitted Washburn to testify that he said to Dukes, "What are you going to say? That you killed Marilyn and Bridget?" and that Dukes answered, "[Y]es, yes, I am." Accordingly, the trial court's finding that Washburn and Duke were not engaged in plea negotiations was against the manifest weight of the evidence.

¶ 38 The prosecutor introduced other statements from the conversation with Dukes on January 10, 2004, and Dukes contends that the court should have excluded those statements because they also took place in the course of plea negotiations. First, after Dukes told Washburn he thought someone guilty of a double murder could receive the death penalty, Dukes said he wanted to tell Washburn "about his participation in the murder of Marilyn and Bridget." Dukes said he wished "to get this off [his] chest." He had not mentioned any possible plea or sentencing concession. Dukes did not then ask to speak to an Assistant State's Attorney. After a break in the questioning, Dukes decided to seek sentencing concessions in exchange for his statement. We find that under all of the circumstances of this case, the trial court did not violate Rule 402(f) when it permitted Washburn to testify that Dukes said he wanted "to get this off [his] chest" and he would tell Washburn about his participation in the murders of Marilyn and Bridget. See *Hart*, 214 Ill. 2d at 511. Therefore, the trial court's finding that the parties were not engaged in plea negotiations was not against the manifest weight of the evidence.

¶ 39 The prosecution also presented evidence that Papa told Dukes Papa needed to confer with his supervisors about taking the death penalty off the table, and Papa then asked Dukes

whether he was remorseful for committing the murders. According to Washburn, Dukes "indicated to ASA Papa that he was remorseful for the murders." In the context of his discussion with Papa and Washburn, Papa asked the question as a request for part of the information he needed for conferring with his supervisor about whether to agree to make the requested sentencing concession in exchange for Dukes's statement admitting that he committed the murders. A reasonable person in Dukes's position would have understood Papa's question to mean that the State would not take the death penalty off the table unless Dukes showed remorse. We find that the manifest weight of the evidence shows that Dukes made the admission as part of a plea negotiation. See *Friedman*, 79 Ill. 2d at 351. The trial court erred when it allowed the State to present evidence that Dukes indicated that he felt remorseful for the murders of Marilyn and Bridget.

¶ 40 The State also presented evidence that in exchange for the promise to take the death penalty off the table, Dukes agreed to make a videorecorded statement about "his involvement with Marilyn and Bridget." Dukes began the recorded statement by talking about his relationship with Marilyn, but then he said, "I can't go on. I can't do it." These statements also occurred in the course of his attempt to negotiate with the Assistant State's Attorneys for assurance that he would not receive the death penalty if he admitted that he murdered Marilyn and Bridget. Again, we find that the request for the State's Attorneys' assurance that the State would not seek the death penalty parallels the request in *Friedman* that the State accommodate Friedman's preference for federal rather than state prison. In view of all the circumstances of the statement, we find that Rule 402(f) required the court to

suppress evidence of the statements Dukes made shortly before and at the beginning of the videorecorded statement. See *Friedman*, 79 Ill. 2d at 351-52.

¶ 41 The State suggests that defense counsel invited the error of admitting the plea negotiations into evidence, because after the court denied defense counsel's motion to suppress the statements, and after the State presented to the jury evidence of the confessions, defense counsel tried to put the confessions into context by eliciting Washburn's testimony that Dukes asked for a sentence of 20 years, and then for a sentence of 40 years, in exchange for the statement he proposed to make. The State cites no authority that holds that defense counsel's acts after the court denied counsel's motion to suppress and permits inadmissible testimony into evidence can retroactively invite the error of admitting the evidence. Defense counsel consistently objected to the inadmissible confessions. We find that Dukes did not invite the error. See *People v. Cortes*, 181 Ill. 2d 249, 283 (1998).

¶ 42 Thus, we find that the court properly admitted only Dukes's statement that he wanted "to get this off [his] chest" and that he wanted to tell Washburn "about his participation in the murder of Marilyn and Bridget." The court erred when it allowed into evidence further testimony about the discussions involving Dukes, Washburn and Papa.

¶ 43 The State argues that the errors had no prejudicial effect because it presented overwhelming evidence of Dukes's guilt. Apart from Tomazovich's testimony and the inadmissible confessions, the State had little evidence to present. Two pubic hairs, very likely from Dukes, appeared on the blood-soaked comforter – along with several other hairs from unidentified sources, almost certainly unrelated to the crime. The State's expert admitted she could not determine when Dukes's hair reached the comforter, and it may have

gotten there when he lived in the house and had a sexual relationship with Lucy. Lucy described her relationship with Dukes, but nothing in her description leads to the conclusion that he murdered her family. Dukes admitted that he had some role in the murders, but apart from the inadmissible statements, he never admitted guilt.

¶ 44 The prosecution relied primarily on the testimony of Tomazovich. Tomazovich admitted that he had severe financial problems and problems with substance abuse around the time of the murders. The prosecutors knew Tomazovich had threatened to kill Marilyn, and the State charged Tomazovich with both murders. By testifying against Dukes, Tomazovich induced prosecutors to reduce the charges against him from two murders to a single charge for home invasion. To ensure that Tomazovich gave the State the testimony the State sought, the State delayed sentencing Tomazovich on the home invasion charge until after the conclusion of Dukes's trial. The concessions to Tomazovich could lead a reasonable trier of fact to find that Tomazovich had such a strong motive to say what the State wanted that his testimony lacked credibility. See *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

¶ 45 We find the evidence in this case closely balanced. Confessions introduced into evidence usually have powerful effect. *People v. R.C.*, 108 Ill. 2d 349, 356 (1985). Because the trial court improperly admitted into evidence the confessions Dukes made in plea negotiations, in this closely balanced case, we must reverse the conviction. See *R.C.*, 108 Ill. 2d at 355-56. Because the State presented sufficient evidence to sustain the convictions, a retrial will not violate Dukes's right not to be subjected to double jeopardy. See *People v. Taylor*, 76 Ill. 2d 289, 309 (1979). Accordingly, we remand the case for a retrial.

¶ 46 Rough Sex

¶ 47 We address Dukes's remaining arguments only insofar as the issues may arise again on remand. The trial court permitted Detective Sobczak to testify that Dukes told her that Lucy liked rough sex. The State then elicited Lucy's testimony that she did not like rough sex and she never said she did. The court denied defense counsel's motion to strike the testimony as irrelevant, as the court held that the evidence related to Dukes's motive for killing Marilyn and Bridget.

¶ 48 Our supreme court stated the relevant principles in *People v. Hendricks*, 137 Ill. 2d 31 (1990):

> "It is well established that a defendant's prior misconduct is not admissible for the purpose of establishing his bad character or propensity to commit illegal or immoral acts, because the prejudicial impact of such evidence outstrips its negligible probative value. [Citation.] 'The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.' [Citations.] Evidence of uncharged misconduct by the defendant undermines the presumption of innocence. [Citations.]
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> Equally as well established as the general rule of inadmissibility, however, is the exception that prosecutors may present evidence probative of motive, intent, identity, absence of mistake or other material facts in issue even though such evidence discloses prior instances of uncharged misconduct by the defendant.

> [Citations.] Motive, although not an element of murder, may be a material factor at issue in establishing guilt, particularly when the only evidence is circumstantial. [Citations.] Thus, in some circumstances it is possible for the State to offer evidence tending to establish a defendant's motivation even though it involves the potential of disclosing a defendant's prior immoral or improper conduct.
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> The pursuit of justice has not permitted, and must not now permit, a man to be convicted based on an image created of him in the courtroom based on the idiosyncrasies of his past life." *Hendricks*, 137 Ill. 2d at 52-53, *quoting Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

¶ 49 According to Illinois Supreme Court Rule of Evidence 403, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Ill. Sup. Ct. R. Evid. 403 (eff. Jan. 1, 2011).

¶ 50 The State argued that Dukes's statement to Sobczak showed that his sexual relationship with Lucy motivated him to kill Lucy's mother and Lucy's daughter. The State adduced ample evidence of the sexual relationship without adding in evidence that Dukes said Lucy liked rough sex. The statements concerning rough sex have at best marginal relevance and considerable potential for prejudicial effect. See *People v. Lampkin*, 98 Ill. 2d 418, 428-29 (1983). Therefore, we hold that on remand the court should exclude all references to rough sex.

¶ 51 Prior Consistent Statement

¶ 52 The trial court also overruled defense counsel's objection to Tomazovich's testimony that a few days after the murders, he told Arlene Kwil that he "couldn't help the kids out," and he "couldn't stop him." Tomazovich testified that when he spoke to Kwil, his statements referred to Dukes. The prosecution used the testimony to bolster Tomazovich's trial testimony by showing that he did not recently concoct his account of the murders.

¶ 53 Case law makes it clear that "[t]he general rule is that a witness may not be rehabilitated by admitting former statements consistent with his trial testimony. [Citation.] An exception to this rule exists where there is a charge that the witness recently fabricated the testimony or that the witness has a motive to testify falsely. [Citation.] Under these circumstances, a prior consistent statement may be admissible, but only if the witness makes the prior consistent statement before the motive to fabricate arose." *People v. Heard*, 187 Ill. 2d 36, 70 (1999).

¶ 54 Under Tomazovich's own account, police questioned him days before he spoke to Kwil. Tomazovich admitted at trial that in the initial interview he lied to police about the murders, knowing that he could be held criminally responsible for the murders. Thus, after Tomazovich first spoke to police, he had a motive to concoct a story blaming someone else for the murders before he spoke to Kwil. Therefore, the exception for statements made before the motive to lie arose does not apply, and it cannot justify the trial court's decision to permit Tomazovich to testify about the prior consistent statements he made to Kwil. See *Heard*, 187 Ill. 2d at 70.

¶ 55 Though the State did not raise the argument at trial, on this appeal the State contends that the trial court could permit Tomazovich to testify about his statements to Kwil under the rule

permitting the admission into evidence of prior statements of identification. See Ill. Sup. Ct. R. Evid. 801(d)(1)(B); 725 ILCS 5/115-12(c) (West 2012). "A prior identification is admissible because it refutes the possibility that an in court identification is based solely on the suggestiveness of the trial setting." *People v. Jones*, 293 Ill. App. 3d 119, 124 (1997).

¶ 56 The State compares Tomazovich's testimony here to testimony about a crime victim identifying a photograph as a picture of the offender (*People v. Holveck*, 141 Ill. 2d 84, 93, 104-05 (1990)), and to testimony about a crime victim's description of her attacker, where the victim gave police the first name of her attacker. *People v. Shum*, 117 Ill. 2d 317, 342 (1987). The State asks this court to interpret the rule allowing prior statements of identification into evidence to allow the admission into evidence of any statement in which an offender blames someone else for having primary responsibility for the crime. If courts interpret the rule so broadly, the exception for identification statements would almost entirely swallow the rule of the general inadmissibility of prior consistent statements. Tomazovich's prior consistent statement here does not serve the purpose of the rule, as it does not refute the possibility that the suggestiveness of the trial setting led him to name Dukes as the murderer. The defense did not suggest such a possibility, which would make no sense in this setting, where Tomazovich knew Dukes and admitted that he helped Dukes with at least one murder. Tomazovich's statements to Kwil do not qualify as statements of identification, and, therefore, Rule 801 cannot provide grounds for permitting Tomazovich's statements to Kwil into evidence. See *Holveck*, 141 Ill. 2d at 105; *Jones*, 293 Ill. App. 3d at 124-25.

¶ 57 Because the State has presented no adequate justification for permitting Tomazovich to testify about his statements to Kwil, the trial court must exclude that testimony on retrial.

¶ 58 We need not address Dukes's arguments about the prosecutor's closing argument. We presume the prosecutor at the trial on remand will confine her remarks to the evidence and reasonable inferences from the evidence.

¶ 59 CONCLUSION

¶ 60 The trial court committed reversible error when it denied Dukes's pretrial motion to suppress statements he made to Washburn and Papa, telling them that he would admit he murdered Marilyn and Bridget if the State agreed not to seek the death penalty. The court erred when it denied Dukes's motion to strike all references to rough sex, as the prejudicial effect of the testimony outweighed its marginal probative value. The court also should not have permitted Tomazovich to testify about prior consistent statements he made after his motive to shift the blame for the murders to someone else had already arisen. We reverse the convictions and remand for retrial.

¶ 61 The Supreme Court's Supervisory Order

¶ 62 After we rendered our decision, the supreme court issued a supervisory order instructing us to reconsider the decision in light of *Rivera*, 2013 IL 112467. We read and considered *Rivera* before entering our original order in this case. We found that *Rivera* involved unpreserved issues and applied a plain error standard of review not applicable to our review of the issues Dukes properly preserved. The *Rivera* court restated and reapplied the principles stated and applied in *Friedman* and *Hart*, without any elaboration relevant to Dukes's appeal. Therefore, we saw no need to discuss *Rivera*. Our supreme court's order imposes on us an obligation to discuss *Rivera* separately.

¶ 63 Rivera moved to suppress statements he made to a detective and an assistant State's Attorney on grounds that police violated Rivera's asserted right to remain silent. Rivera did not argue that the statements took place in the course of plea negotiations. *Rivera*, 2013 IL 112467, ¶¶ 4-5. At the trial, the detective testified that when he confronted Rivera with some of the evidence, Rivera "asked *** if he gave a confession what guarantees would he have." *Rivera*, 2013 IL 112467, ¶ 6. The detective said only that he could not promise Rivera anything. Rivera responded, "I will give you a confession. Just go get me another glass of water." *Rivera*, 2013 IL 112467, ¶ 6. Rivera asked the assistant State's Attorney about "guarantees that he was not going to jail" if he confessed. *Rivera*, 2013 IL 112467, ¶ 7. The assistant State's Attorney, like the detective, refused to make any guarantees. Rivera said he "was scared that he was going to go to jail." *Rivera*, 2013 IL 112467, ¶ 7. When the assistant State's Attorney repeated that he would make no guarantees, Rivera terminated the discussion. The assistant State's Attorney corroborated the detective's testimony about the discussion and added that he explained to Rivera that he could not make any guarantees because the assistant State's Attorney did not "want it to be presented at a trial that he was promised this and that's the only reason he said X, Y, Z." *Rivera*, 2013 IL 112467, ¶ 8.

¶ 64 The *Rivera* court noted that Rivera waived the issue of whether the trial court improperly admitted evidence of plea negotiations, and therefore the *Rivera* court addressed only the question of whether the admission of Rivera's statements into evidence amounted to plain error. *Rivera*, 2013 IL 112467, ¶ 17. Thus, the *Rivera* court applied a standard of review not applicable to the case against Dukes. The *Rivera* court repeated and applied the principles articulated in *Friedman*. *Rivera*, 2013 IL 112467, ¶¶ 18-19. The *Rivera* court found that

before his first statement, Rivera asked for a guarantee, but when the detective offered nothing, Rivera said, "I will give you a confession." Rivera did not clearly show a subjective intention to negotiate a plea, so the *Rivera* court found Rivera's first statement admissible.

¶ 65 We find the circumstances of Dukes's first statement to police similar to the circumstances of Rivera's statement to the detective. When Washburn first provoked Dukes to say that someone guilty of two murders might receive the death penalty, Dukes said he wanted to tell Washburn about his participation in the murders of Marilyn and Bridget. Like Rivera, Dukes did not insist on any prior sentencing concession, and he did not ask to speak to an assistant State's Attorney before making the statement. As we said in our original order in this case, we find that the trial court properly admitted into evidence testimony that Dukes said to Washburn that he wanted to tell Washburn "about his participation in the murder of Marilyn and Bridget."

¶ 66 However, Dukes's later statements all involved requests for specific sentencing concessions, and Dukes consistently asked to speak to an assistant State's Attorney with authority to make the requested concessions. Washburn and Papa elicited the later statements used against Dukes by representing that they needed to tell assistant State's Attorneys with greater authority more about what Dukes would say in exchange for the sentencing concessions he sought. Washburn and Papa did not say that no one would offer the sentencing concessions he requested, or that no one would make any guarantees. Compare *Rivera*, 2013 IL 112467, ¶¶ 25-26; see also *People v. Hill*, 78 Ill. 2d 465, 469-70 (1980).

¶ 67 Unlike Dukes's statements, Rivera's statements showed no intent to enter a plea negotiation. Rivera only said he wanted to "do the right thing" and to "talk about what happened." *Rivera*, 2013 IL 112467, ¶¶ 7-8. Rivera made the statements to an attorney who did not promise to convey his statements to someone with more authority to negotiate. Moreover, Rivera never admitted participating in the crime for which he stood accused.

¶ 68 Dukes, on the other hand, said to Papa that he would admit to Papa's superior that he killed Marilyn and Bridget in exchange for specific sentencing concessions. Under the principles applied in *Friedman*, *Hill*, *Hart*, and *Rivera*, we hold again that the trial court correctly allowed into evidence Dukes's first statement, that he wanted to tell Washburn about his participation in the murders of Marilyn and Bridget. However, all of Dukes's subsequent discussions with Washburn and Papa occurred, like the discussion in *Friedman*, in the course of plea negotiations. Washburn and Papa elicited the further statements from Dukes by acting as conduits who would convey Dukes's negotiation offer to a person with greater authority who might grant Dukes the sentencing concessions he sought. The *Friedman* court clarified that negotiations conducted through a person who promised to convey the offer to another with authority to grant the requested concessions qualify as plea negotiations which the trial court must exclude from evidence under Supreme Court Rule 402(f). *Friedman*, 79 Ill. 2d at 352. Therefore, under *Friedman* and the principles applied in *Rivera*, the trial court violated Supreme Court Rule 402(f) when it admitted Dukes's later statements into evidence. Accordingly, we have reviewed *Dukes* in light of *Rivera* and determined that a different result is not warranted in this case.

¶ 69 Reversed and remanded.