2015 IL App (2d) 130246-U
No. 2-13-0246
Order filed February 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT A. SMITH, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 11-CF-2826 Honorable Mark L. Levitt, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's convictions for first-degree murder and aggravated battery with a firearm.

¶ 2 After a jury trial, defendant, Robert A. Smith, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2010)). The trial court denied defendant's posttrial motion and sentenced him to consecutive terms of 35 years and 10 years of imprisonment. The court denied defendant's motion to reconsider the sentence.

¶ 3 On appeal, defendant raises five issues. Specifically, defendant asks us to consider whether: (1) the court erroneously admitted other-crimes evidence for the purpose of establishing motive; (2) the court erred in refusing to admit a prior inconsistent statement as substantive evidence; (3) a police officer improperly identified defendant in a photograph derived from a surveillance video; (4) he was denied a fair trial where, despite felony murder not being charged, the jury received an accountability felony-murder instruction; and (5) the cumulative effect of the trial errors deprived him of a fair trial. For the following reasons, we reject defendant's arguments and affirm.

¶ 4 I. BACKGROUND

¶ 5 On August 5, 2011, at around 3 p.m. in North Chicago, Phillip Taylor was driving a vehicle with Larry Bone and Geno Adams as his passengers. A vehicle pulled up next to the passenger's side of Taylor's car, and gunshots were fired. Taylor was shot in the head and killed, and Bone, who was sitting in the back seat, was shot in his wrists. Defendant was ultimately charged with first-degree murder and aggravated battery with a firearm.[1]

¶ 6 For context, we briefly note that the State's theory was that, a few days before the murder, defendant was present at a gas station, driving his white Grand Prix. Bone and Adams were also at the gas station, gunshots were fired, and defendant's girlfriend's brother was shot

[1] Specifically, as to Taylor, defendant was charged with four counts of first-degree murder. As to Bone, defendant was charged with aggravated battery and aggravated discharge of a firearm. As to Adams, defendant was charged with aggravated discharge of a firearm. Defendant was also charged generally with aggravated unlawful use of a weapon. The State ultimately nol-prossed all but one count each of first-degree murder and aggravated battery (as to Bone). No felony-murder charges were filed.

and injured. Therefore, the State argued that defendant, seeking revenge, intended to kill Bone or Adams on August 5, 2011, but Taylor was killed. According to the State, defendant then took the murder weapon, which he also used at the gas station, to his mother's house and gave it to her boyfriend, James Charleston, to hide.

¶ 7 Defendant claimed that he was innocent. In addition to denying his involvement, defendant offered his own theory of the August 5, 2011, shooting, noting that another person, Roderick Golden, had been charged with and convicted of trying to solicit Adams's murder. He implied that Golden or another person acting on Golden's behalf committed the shooting, and that Adams was the target. Defendant further implied that Charleston and Golden, both around the same age and career criminals, could have connections. Defendant argued that the police never investigated that lead. Defendant noted that Charleston had, at one point, stated that the gun was his and, specifically, that he bought it in March 2011, and hid it prior to the August shooting. Also, defendant presented evidence that Charleston had occasionally driven the white Grand Prix. Finally, defendant argued that the gunshots came from a black car, not a white Grand Prix.

¶ 8 A. Other-Crimes Evidence

¶ 9 Prior to trial, the State moved *in limine* to admit evidence of a shooting that occurred around 2 a.m. on July 30, 2011, at a Speedway gas station in Waukegan. According to the State, the other-crimes evidence was relevant to defendant's motive for and identity in the August 5, 2011, shooting. As to motive, the State asserted that Bone and Adams had provided statements that, on July 30, 2011, they were at Speedway when gunshots were fired. Defendant's girlfriend's brother, Chris Huley, was shot in the arm. Defendant, wearing "a very unique shirt," specifically, a white tank top t-shirt, took Huley to Lake Forest Hospital. The State's theory was

that, on August 5, 2011, defendant shot at Bone or Adams in retaliation for Huley's injuries. According to the State, defendant believed that Bone's brother shot Huley. The State argued that, during his police interrogation, defendant cried when relating the devastating impact the shooting had on Huley, who had a promising college football career.

¶ 10 As to identity, the State asserted that, at the hospital on July 30, 2011, Detective Larry Holman spoke with defendant, who denied being at Speedway when Huley was shot. According to the State, however, a Speedway surveillance video depicted defendant there, wearing the same clothing as in the hospital surveillance video, driving a white Grand Prix, and holding a handgun in the firing position. According to the State, it appeared on the video that defendant ducked behind the car, stood up, pointed the gun, and, in the assistant State's Attorney's view, "I think it jammed." The State noted that the surveillance video from Speedway was "very--very grainy," and it acknowledged that defendant would likely argue that it was not him on the video.

¶ 11 The State further asserted that, at the July 30, 2011, shooting, an unspent cartridge bullet was ejected from a gun and was found at the base of a gas pump. The unspent cartridge was identified as a .380-caliber casing that had been fired from a .380 Tanfoglio weapon. The State noted that five .380-caliber cartridge casings and four .380-caliber bullets were recovered from the August 5, 2011, shooting, and that the casings and bullets were also fired from a .380 Tanfoglio weapon. The State informed the court that a .380 Tanfoglio model EA 380 was recovered in defendant's mother's (Cynthia Mendez's) boyfriend's (James Charleston's) grandmother's (Gertrude Brown's) house. According to the State, Charleston told police that, on August 5, 2011, defendant gave him the weapon to hide.

¶ 12 The State asserted that "defendant admits to all of the above except for shooting (he is not asked during the interview if he shot)." Further, at oral argument, the State explained to the trial

court its theory that "the same person who had that gun on the 30th of July, had that same gun on August 5th, and we were able to put it through James Charleston in this defendant's hands, so for identity." The State repeatedly asserted that, as to the July 30th shooting, defendant admitted to being at the scene. The State acknowledged, however, that, at the scenes of both the July 30, and August 5, 2011, shootings, numerous casings from other handguns were found, including .40- and .45-caliber casings.

¶ 13 The State's written motion summarized its requests as follows:

> "11. The State seeks to admit the July 3[0], 2011[ ] shooting of Chris Huley as motive evidence and for identification. First, with respect to the motive evidence, Chris Huley is the defendant's girlfriend's brother. The defendant was the sole person at Lake Forest Hospital waiting for Chris Huley on July 3[0th]. After being released[,] Chris Huley[] made his recovery at the defendant's residence. The defendant, when speaking on September 2, 2011, with North Chicago police, began to cry when relating the devastating, likely permanent, impact the July 3[0th] shooting had on the life of Chris Huley.
>
> 12. The State seeks to admit the July 3[0th] shooting to identify the defendant. Correlating the shell casing recovered on July 3[0th] at the Speedway Gas Stations [*sic*] with casings and bullets recovered at the August 5th murder scene[,] and showing that all were fired from a recovered .380 Tanfoglio model EA 380, is essential to proving the identity of the defendant. Absent this information, the only identification of the defendant comes from Larry Bone, a convicted felon currently on parole, who delayed two weeks before picking the defendant from a photographic line-up. There is also some circumstantial identification evidence relating to the defendant's white Grand Prix."

¶ 14 Defendant objected that the evidence was more prejudicial than probative, particularly since: (1) no one identified defendant as being a shooter at the Speedway incident; (2) there was nothing particularly unique about wearing a white tank top on a hot August night; and (3) Huley was able to play football after his injury, so the State's alleged motive did not exist.[2] In contrast to the State's alleged motive for the shooting, which was, in defendant's view, "very slim," defendant argued that the motive for the August 5, 2011, shooting was more likely related to the fact that a man named Roderick Golden, who defendant alleged had connections with Charleston, had been charged with soliciting Adams's murder. Defendant noted that the police had not investigated the fact that Golden was indicted for soliciting Adams's murder, and Adams was riding in the front passenger seat of Taylor's car at the time of the shooting.

¶ 15 The trial court found that the other-crimes evidence was relevant to the issues of motive and identity. The court further found that the theory advanced by the State, that the same weapon was used in an incident six days prior to the charged incident, "that the individuals involved on both occasions [were] the same[,]" that ballistic evidence would show the presence of both defendant and the .380 weapon at both locations was "more than ample" to show the evidence was necessary to prove motive and identity. Finally, the court acknowledged the prejudicial nature of the evidence, and, while it determined that the probative value of the evidence outweighed its prejudicial effect, it stated that there were significant areas open to defendant for cross-examination and that it would entertain requests for limiting instructions.

¶ 16 B. Trial

¶ 17 1. Opening Statements

[2] Defendant also filed a motion *in limine*, seeking, in part, to bar any other-crimes evidence at trial. In light of its ruling on the State's motion, the court denied defendant's motion.

¶ 18 Trial commenced on October 16, 2012. The State's opening statement began as follows:

> "Revenge, ladies and gentleman. That's what motivated this defendant, Robert Smith, to pull his white Grand Prix on the passenger side of a vehicle carrying two passengers, Larry Bone and Geno Adams, at 3:17 p.m. on August 5th of 2011[ ] and fire five rounds from his .380-caliber handgun into that car, which struck and killed the driver of that car, Phillip Taylor. Ladies and gentlemen, Phillip Taylor is dead, and we are all here today because this defendant sought to exact revenge on August 5th, 2011."

The State's opening continued with its summary that the video surveillance and ballistic evidence would put defendant at both the gas station and murder scene. According to the State, Adams and Bone would testify at trial that they were at the gas station on July 30, 2011.

¶ 19 Defendant's opening statement included argument challenging the credibility of the State's witnesses and its motive theory. Further, defendant noted that, even though Roderick Golden was arrested for attempting to hire someone to murder Adams, he was never investigated as possibly being responsible for the August 5, 2011, shooting. In addition, defendant argued to the jury that Charleston, who informed the police that defendant gave him the gun to hide, had recanted that story in a sworn, written statement. Counsel explained that Charleston was a drug addict and, over four written pages, admitted to having lied to police to avoid spending the rest of his life in jail. Defendant further noted that he had turned himself in to the police, he had agreed to talk with them, and that his statement was videotaped. Defendant explained that the video would show him saying he was not involved in the murder. Moreover, in the video, "You're going to hear the police yell at him. You're going to hear him keep his cool and say that he did not do this."

¶ 20 2. Evidence Pertaining to July 30, 2011, Shooting

¶ 21 The parties stipulated to foundation and accuracy for the hospital and Speedway surveillance videos. Further, Deputy Craig Leask testified that he worked as a photographic specialist for the sheriff's office. Leask testified that he made an enhanced video from the original Speedway surveillance video. The video was played for the jury. Leask explained that he had created a side-by-side comparison of the two videos and created an enhanced version by simply changing the contrast to brighten the images. He did not manipulate the content.

¶ 22 Detective Larry Holman testified that, on July 30, 2011, at around 3:05 a.m., he responded to a report of a shooting at the Speedway gas station. The shooting happened around 2:45 a.m. When he arrived, his supervisor told him to go to the hospital. Holman proceeded to Lake Forest Hospital's emergency room to interview Huley, whom Holman described as "not cooperative." Holman went to the lobby and spoke with defendant, whom he identified in court. Holman testified that, at the hospital, defendant was wearing a sleeveless white shirt and jeans. Defendant told Holman that he was with Huley and others at Legends Pool Hall and Bar, down the street from Speedway, and they left shortly before it closed. Defendant said he left on his own and drove away. While on his way home, defendant received a call on his cell phone and was told that Huley had been shot. Defendant immediately drove to the hospital. Defendant denied being present at Speedway when shooting occurred. Holman asked defendant the make and model of the car he was driving, and defendant replied that he drove a white Pontiac Grand Prix. Holman testified that he had previously viewed the hospital surveillance video, which was apparently published to the jury. Holman identified in the video the hospital reception area that leads to the emergency room, Huley coming in on a wheelchair, and defendant, wearing a white sleeveless shirt. Holman then testified that he had previously viewed the Speedway surveillance

video. The State showed Holman a series of three, time-lapsed photographs from the surveillance video, time stamped 2:47:13 to 2:47:14, and asked:

"STATE: This one, do you see the individual you had spoken to at the Lake Forest Hospital, *the defendant*, in this view?

HOLMAN: Yes.

***

STATE: Do you see the same individual, *the defendant*? Could you, please, put an 'X' on him on this second picture? [Holman did so].

***

STATE: And, finally, do you see *the defendant* in this view?

HOLMAN: Yes." (Emphasis added.)

Defendant did not object to the aforementioned questions.

¶ 23 Adams testified at trial, but he was not asked any questions about the July 30, 2011, Speedway shooting. In other words, no motive evidence was introduced through Adams.

¶ 24 Larry Bone testified that he only knew defendant from the week prior to the murder when "he was shooting at us at Speedway." Specifically, Bone testified that, around 2:45 a.m., he went to Speedway to buy gas and snacks. Defendant was there with a white Pontiac and "all his homies." Bone testified that someone hit or punched him from the side, shots were fired, and he ran away. He later heard that Huley was shot.

¶ 25 Officer Donald Szostak testified that he investigated the scene at Speedway. He recovered an intact .380-caliber bullet ("intact" meaning that it was not fired) at the lower right corner of the base of pump three. (In addition, he found a .45-caliber round and six .40-caliber shell casings at the scene). Szostak was shown the time-stamped photographs. Based on the

photographs, Szostak testified that the location where he found the intact .380-caliber bullet was near the driver's side front tire of the white car parked in front of pump three. In addition, he agreed that one photograph showed an individual standing in front of the car and facing the direction where the six .40-caliber shell casings were found.

¶ 26 3. Evidence Pertaining to August 5, 2011, Shooting

¶ 27 Adams testified that he is 27 years old, and Taylor was his cousin. On August 5, 2011, Adams was riding in the front passenger seat of Taylor's car. Taylor was driving, and Bone was seated in back. After buying gas, Taylor drove east on 14th Street. When they stopped at the intersection at Lincoln Avenue, a white vehicle pulled up next to the passenger side of Taylor's car and at least two people in the white car started shooting into Taylor's car. Adams could not see the driver, but he saw an arm hanging out of the back window. Shooting was coming from both the front and back windows of the white car. The passenger window shattered and glass hit Adams in the face. He turned and looked at Taylor, who had been hit in the head and appeared to have died instantly. Taylor "locked up," and his foot was "stuck on the gas," so Adams took control of the wheel. The car traveled approximately two blocks before it hit a pole and stopped in a parking lot. Adams saw the white car turn north onto Sheridan Avenue.

¶ 28 Adams was previously twice convicted for unlawful delivery of a controlled substance (cocaine). On cross-examination, he agreed that he did not see who was in the white car. He did not see anyone shooting from a black car. Adams testified that he had heard of Roderick Golden, and, while he did not know much about the situation, he was generally aware that Golden was charged with trying to hire someone to kill him and his son's mother. No police officer spoke to him about that case.

¶ 29 Bone testified that he is 25 years old and that Taylor and Adams are his cousins. On August 5, 2011, around 3 p.m., he was with Taylor and Adams, driving eastbound on 14th Street. Bone was sitting in the back seat behind Taylor. They stopped at a stop sign at Lincoln Avenue, and Bone saw a white, four-door Grand Prix pull up next to them. Bone testified that defendant was driving the Grand Prix. As soon as he looked up, he saw defendant with a gun pointed at them and shots were fired. Bone testified there was also a shooter in the Grand Prix's back seat, but he could not identify him or her. Bone did not see anyone shooting from a black car. However, he testified that he saw a black car speed up behind them at 14th Avenue and Green Bay Road. "That's the last time I seen the black car."

¶ 30 Bone testified that Taylor was hit in the head and that he was shot in both arms. A bullet passed through Bone's right arm, but another bullet remained lodged in his left wrist. Bone testified that Taylor "went still," but the car continued moving until it finally stopped in a parking lot. Bone had heroin in the car. He testified, "And I realized Taylor was struck. I got out [of] the car. I ran and hid the drugs." Then, Bone dialed 911.

¶ 31 Bone has prior convictions, including: in 2006 for reckless discharge of a firearm; in 2007, and again in 2008, for unlawful use of a weapon by a felon; and various convictions in Wisconsin. In fact, Bone was released from the Wisconsin Department of Corrections (WDOC) 10 days prior to the shooting (and apparent heroin possession). Bone testified that he planned to sell the heroin, and he agreed that, even though he saw that his cousin had been shot in the head, he first hid the heroin in the bushes before calling the police. Bone was never charged with heroin possession, but "because of that," he served another period in the WDOC for violating his parole.

¶ 32 Bone agreed that he did not immediately, at the scene, tell police that defendant was the shooter. Instead, he told them that he could not identify the shooter. Further, at the hospital, a different detective interviewed Bone and he also told that detective that he could not identify the shooter. At trial, Bone explained that, at the hospital, he was in pain and did not want to talk. On August 16, 2011 (*i.e.*, 11 days after the shooting), Bone went to the police department and identified defendant by name as the shooter. He was then shown a photographic lineup, and he again identified defendant as the shooter. Bone testified that he initially told police that he could not identify the shooter because he was on parole and was confused. After being discharged from the hospital, he spoke to his attorney and asked what he should do. Thereafter, Bone went to the police department and identified defendant.

¶ 33 Cynthia Mendez testified that she is defendant's mother and she owns a white Grand Prix. She agreed that, prior to August 5, 2011, she and defendant both drove the vehicle. Mendez also testified that Charleston had driven the vehicle. At the time of trial, she and Charleston were in the process of divorcing. On August 5, 2011, however, in the afternoon, she and Charleston were not married and Charleston was at her home. They were both feeling ill and sleeping and, at some point, Mendez woke up gasping for air. At trial, she testified that, when she woke up, she did not see a gun under the mattress, but she did see Charleston standing over her head with a gun in his hand. Mendez testified that Charleston did not look like himself. She grabbed the gun and wrapped it in a towel and gave it to Charleston. They then went to his grandmother's, Gertrude Brown's house, and Mendez sat in the living room while Charleston went to the back of the house. Mendez denied that, on August 5, 2011: (1) defendant came to the house and gave Charleston the gun; (2) after coming to the house, defendant left the white Grand Prix outside of her garage; (3) she then put the car in the garage; and (4) she cleaned the car.

Mendez recalled speaking to Detective Louis Rivera on August 29, 2011. The interview was recorded. Mendez denied telling Rivera that she saw a gun under her mattress. Mendez was present with defendant when he turned himself in to the Lake County police department.

¶ 34 Detective Rivera testified that Mendez told him that, on August 5, 2011, defendant came to her house and handed Charleston a gun. She told him that she first observed the gun underneath the mattress. She took the gun, wrapped it in a towel, placed it in a plastic bag, and put it in her purse until it was relocated. The jury was shown a portion of Rivera's videotaped interview with Mendez.[3] This court has reviewed that video. In it, Mendez testified that she wrapped the gun in a towel, placed it in a bag, and put it in her purse until it was relocated the next day. She does not, in the redacted video, state that defendant gave Charleston the gun.

¶ 35 James Charleston testified that, on August 5, 2011, he was living with Mendez. Around 3 p.m., Charleston was sleeping on the couch, and Mendez was sleeping in the bedroom. Defendant knocked on the door, Charleston opened it, and defendant came inside. Defendant put a silver pistol in Charleston's hand and told him to "put it up." Charleston put the pistol under the bedroom mattress where Mendez was sleeping. He then woke Mendez and told her defendant was in the house. Mendez got out of bed and went to speak with defendant. Defendant showered, changed his clothes, and left the house. Charleston did not know if defendant was driving the white Grand Prix. Mendez took the gun from under the mattress.

[3] On appeal, the parties have stipulated that the redacted video is approximately two minutes in length and is the only video of Mendez's interview viewed by the jury. Further, the parties agree that, although an unredacted version of the video was also given to the jury during deliberations, it did not, due to an absence of equipment, view the unredacted video.

That night, Charleston and Mendez took the gun (in Mendez's purse) to his grandmother's, Gertrude Brown's, house. Charleston hid the gun in the basement rafters.

¶ 36 Police officers inspected the white car and pointed out to Charleston that there appeared to be bullet holes near the window on the driver's door. Charleston also found a shell casing in the compartment on the inside of the door, and he threw it into the sewer. Around August 24, 2011, Charleston was arrested on an outstanding warrant. At that time, he told police where the gun was located.

¶ 37 Charleston's criminal history included: a 1978 conviction and three-year sentence for burglary; a 1980 burglary conviction; two convictions in 1983 for residential burglary; a 1992 enhanced theft conviction; a 1995 conviction for possession of a controlled substance; a 1996 conviction for burglary; a 1999 conviction for misuse of a credit card; and a 2003 theft conviction. At the time of trial, Charleston was in jail facing a burglary charge. Due to his prior history, if convicted, Charleston (age 51) would likely serve close to 30 years in prison. In exchange for Charleston's testimony, the State dismissed the burglary charge. When asked whether he was testifying to get the charges dismissed or in order to tell the truth, Charleston explained that he wanted to tell the truth.

¶ 38 Charleston agreed that, in November 2011, he visited defendant's attorney's office and completed a sworn statement attesting that everything he told the police (*i.e.*, the story to which he testified at trial) was untrue. Specifically, on November 7, 2011, Charleston arrived at defense counsel's office. He had no appointment, and he said he wished to make a statement. Counsel did not threaten him or tell him what to say; rather, Charleston sat in a conference room with a pad of paper and wrote a four-page statement. He then swore to a notary that everything he wrote was true and accurate.

¶ 39 At trial, however, Charleston testified that the written statement was untrue. Charleston explained that he felt torn between both sides of the situation and felt like the event was thrown into his lap. On the one hand, he felt bad that Taylor was killed, and he noted that his own 16-year-old son had been killed. On the other hand, he was living with defendant's mother. "So I didn't know which way to go. I just know that I didn't want to be in the middle of it. I didn't want to be involved in it. I didn't want to be here today." Charleston testified that his trial testimony, not the written statement, was true.

¶ 40 On cross-examination, Charleston agreed that he is a career criminal, he lies, and he was a heroin and cocaine addict for more than 20 years. Charleston agreed that, when he was arrested in August 2011 and made his first statement, he was high on heroin and he knew he was about to go through withdrawal while in the jail. He was arrested on an outstanding warrant, but was released on bond and eventually those charges were nol-prossed.

¶ 41 Defense counsel informed the court that he wanted Charleston to read the written statement, and the State objected. Outside of the jury's presence, counsel argued that the statement should be admitted substantively as a prior inconsistent statement pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/115-10.1 (West 2010). The State objected, arguing that the statement did not narrate, describe, or explain an event but, rather, it simply recanted Charleston's prior position. The State argued that it should be used only for impeachment and should not be read to the jury in its entirety, but it noted that "if there are individual portions of it, maybe like a couple lines at the most, that would–need[] to be redacted, but to have *** the witness read the entire thing, it only goes to impeachment. And he could impeach [Charleston], but it doesn't come in as substantive evidence pursuant to 115/10.1." The State also argued that defendant had not sufficiently laid foundation to admit it

substantively, and would need to go through the statement line by line with Charleston to have him either adopt or negate the information. The court ultimately agreed with the State, finding that the statement "doesn't describe what he knows about an event. It mostly describes his denying that he knows anything about an event." Nevertheless, the court informed counsel that he could "certainly impeach [Charleston] at great length from this document" and that it would allow counsel to pursue that impeachment.

¶ 42 In the jury's presence, counsel then reviewed the statement with Charleston, virtually line by line. After each sentence, he asked Charleston whether he wrote the sentence and which portions were true or false. In part, the written statement attested that: "I told [police] I had a gun someone had thrown to me, but I had already had a .38 gun hidden in my granny['s] basement that I bought in March from someone on the streets. I hid it in my granny['s] basement a week prior to the accident on the 5th of August. How it got out of the basement is beyond me." Charleston later wrote (three times) that *no one gave him the gun* and that he did not see defendant in possession of a firearm on August 5, 2011, or any other day. He wrote that he had not seen defendant "since the incident on the 30[th] of July" and that he "lied about someone giving me a gun when I had it all the time." The statement included Charleston's account that he was high from smoking crack and heroin with Detective Wade's brother, Steve, and that, in order to get out of jail, he told police information that he learned from Steve and that he overheard Detective Rivera saying to Mendez.[4] The statement included Charleston's account that police took his DNA sample and told him they would charge him with murder for tampering with evidence, showed him pictures and told him that Mendez's car was seen at the Speedway on July

[4] Detective Wade testified that his brother, Steve, has a drug problem. Wade testified that he did not discuss this case with Steve.

30, 2011, and promised him that his cases would disappear and he would get money from the State to start a new life. Charleston wrote that he was a daily crack and heroin user who "change[d] things" to work for him. Charleston wrote that, when he was released from bond court after being arrested on the warrant, police took him home and waited outside so that he could get methadone pills and not be sick from withdrawal. He smoked crack while the police were outside waiting for him to get his pills.

¶ 43 Defense counsel confirmed with Charleston that, even though it was a sworn statement, he was now testifying that almost everything he wrote was a lie. Counsel confirmed with Charleston that he was divorcing Mendez and that he was now testifying against his estranged wife's son. Finally, he confirmed with Charleston that, although he entered the courtroom in handcuffs and was likely to receive, based on his history of more than 20 felony convictions, 30 years if convicted on the burglary charge, due to his trial testimony, that charge was to be dismissed and he would be released from jail later that day.

¶ 44 The remaining evidence in the State's case included testimony that, after Charleston was picked up on a warrant on August 14, 2011, he told the police where the firearm was located. The arresting officer testified that he assumed that the only reason Charleston mentioned the gun was to obtain a deal on the burglary charge. Thereafter, the firearm was recovered from the rafters of Brown's basement; it was inside a plastic grocery bag and wrapped in two wet towels.

¶ 45 Investigation of Mendez's white Grand Prix revealed a dent protruding from the inside to the outside of the car on the driver's door frame. The defect was painted black, and there were apparent scratch marks below and over it. Further, on the driver's side door, weatherstripping had been perforated by an object. The hole in the weatherstripping was immediately behind the bulging perforation in the exterior of the vehicle and was consistent with the passage of a bullet

being fired from the interior of the vehicle. As there was no perforation completely through the driver's pillar frame, it was assumed that the projectile would still be present in the driver's door. However, when police removed the interior door panel of the driver's door, it was easy to remove, indicating that it had previously been removed. No debris, dirt, or fired projectiles were found inside the door panel, and it appeared as though the interior of the door had been cleaned. There were no apparent bullet holes *entering* the vehicle.

¶ 46 Several shell casings were found in the eastbound lanes at the intersection of 14th Street and Lincoln Avenue; five were .380 caliber, and four were .45 caliber. Discharged projectiles were found in Taylor's car. The damage to Taylor's car evidenced that one shot was fired into the rear passenger window, one shot was fired into the rear passenger door, and two shots were fired into the front passenger window. The trajectory of the bullet that killed Taylor went from the passenger side window to the driver's seat. A firearm expert, Gary Lind, testified that he compared the shell casings found at Speedway and the August crime scene with the Tanfoglio Model EA .380-caliber gun retrieved from Brown's home. Lind concluded that the .380-caliber casings at both locations were fired from the recovered gun. The bullet cores retrieved from Taylor's head and the driver's seat back cushion could not be compared to the gun, but they were consistent in size with being fired from a .380-caliber gun.

¶ 47 Detective Donald Florance recalled that Golden was convicted of trying to hire an undercover officer to murder Adams. There was no investigation into whether Golden had anything to do with the August 2011, shooting in this case, nor was there any investigation into possible connections between Charleston and Golden.

¶ 48 An August 5, 2011, surveillance video from the Midwest Bank on 14th Street showed the drive-through area of the bank on the east side of the building facing 14th Street. On the video

and photographs taken from it time-stamped 3:11:54 p.m., Detective Cesar Flores identified a maroon vehicle as Taylor's car. In another photograph time-stamped 3:11:57 p.m., Flores identified a white Grand Prix traveling immediately behind Taylor's car. Finally, he identified a photograph time-stamped 3:12:04 p.m., of a black car following the white car, and testified that they were unable to determine the make and model of the black car. Flores agreed that there were pedestrians who gave police information that they saw someone in the black car shooting and then speeding away from the scene.

¶ 49 At the close of the State's case, the court denied defendant's motion for a directed verdict. Defendant called Thomas Wood to the stand, who testified that he lived on Lincoln Street facing west. Around 3 p.m. on August 5, 2011, he was sleeping and awoke to the sound of gunshots. He went to the window and saw a dark minivan driving at a high rate of speed and "trying to get away from something." The minivan was driving south, and there were kids running across the street away from the intersection.

¶ 50 Nicole Lentz testified that around 3 p.m. on August 5, 2011, she was walking on 13th Street towards 14th Street. She saw someone point a gun out of a black car and heard two gunshots. She was about one block away from the black car and did not see a white car. The first time she saw the black car, it was behind the maroon vehicle. Lentz never saw the black car pull up next to the maroon vehicle. Rather, the driver of the black vehicle was shooting forwards toward the maroon vehicle.

¶ 51 Sheila Tannin testified that she was walking with Lentz on August 5, 2011, when she heard gunshots. She looked up and saw an arm sticking out of a four-door black car with a gun. She saw the gun shoot at least four or five gunshots. A maroon or red car was in front of the

black car. Tannin did not see a white car. The black car quickly went through the stop sign without stopping, and the red car was moving fast.

¶ 52 Per defendant's request, the trial court took judicial notice of an indictment and conviction for Golden, wherein he was charged with and convicted of the offense of solicitation of murder of Adams and Adams's girlfriend.[5] Counsel argued it was relevant to show that there was motive for another person to be shooting at Adams and that the police did not properly investigate that lead. The court informed counsel that he could inform the jury that, between April 25, 2010, and May 10, 2010, Golden committed the offense of solicitation of murder with the intended victim being Adams. Defense counsel informed the jury of those convictions and then rested.

¶ 53 In rebuttal, the State called Detective Gianni Giamberduca to testify that Golden's solicitation of murder for Adams was simply ancillary to the girlfriend, who was the primary target. On cross-examination, Giamberduca agreed that, on the solicitation tapes, Golden said he wanted Adams to "be killed messy."

¶ 54 4. Jury Instructions Conference

¶ 55 Before closing arguments, the court held a jury instruction conference. There, the State offered an accountability instruction, and the following colloquy ensued:

"COURT: Accountability, No. 13, proposed instruction. Defense?

[5] The State asserted that Adams's girlfriend was the primary target of Golden's solicitation and that Golden only intended for Adams to be a target if he happened to be present with his girlfriend at the time. Nevertheless, the State apparently separately charged Golden with solicitation with Adams as the target and Golden was convicted of that charge.

DEFENSE COUNSEL: I would object, Judge. There is no codefendant here. I – I don't know who the State is trying to have – have him held accountable for.

COURT: I don't want to speak for the State, but there is evidence that there was more than one weapon being fired out of the white car.

STATE: And, Judge, if I may also, the defense case is there was a black car shooting, too.

COURT: But you're – or you're objecting?

DEFENSE COUNSEL: I would, I would object for the record.

COURT: Okay. That will be given over objection, No. 13, accountability.

And No. 14, you're also objecting to first-degree murder with the accountability language?

DEFENSE COUNSEL: *Yes.*

COURT: Given over objection.

***

COURT: *And I should have said [No.] 14 was [jury pattern instruction number] 5.03A [felony murder].*" (Emphasis added.)

¶ 56 5. Closing Arguments

¶ 57 As with its opening statements, the State's closing argument began:

"Revenge. That was the defendant's motive when he and his accomplices shot at Phil Taylor on August 5, 2011, revenge for the July 30th shooting at the Speedway Gas Station that left the defendant's soon to be brother-in-law with a shot to the elbow."

The State then explained to the jury that the court would instruct it on the relevant law, summarizing that law for the jury in the following order: (1) defendant is responsible for the

conduct of another person if he aids or abets the offense (accountability); (2) to sustain the charge of first-degree murder, it is not necessary for the State to show that it was defendant or an accomplice's original intent to kill Taylor if the jury finds that defendant or an accomplice combined to do an unlawful act, such as commit first-degree murder, and the deceased was killed (felony murder); and (3) to sustain the charge of first-degree murder, the State must show that defendant intended to kill or commit great bodily harm to Taylor. Finally, before completing its argument, the State reiterated that defendant's motive was to avenge the Speedway shooting of Huley.

¶ 58 Defense counsel promptly disputed that the State had established its purported motive:

> "You heard about revenge. What evidence do we have that the defendant was angry at these people who were shot or what evidence do we have he even knew that they were responsible for shooting and injuring his brother-in-law? Nothing. Nothing. There's nothing there. It's pure conjecture that there's any connection between these individuals in that maroon car and the shooting that happened earlier, earlier that week at the gas station. So that's ridiculous. There is no evidence of revenge."

Further, counsel emphasized that the police never followed up on the possibility that the August 5, 2011, shooting might have been Golden trying to kill Adams. Moreover, counsel attacked Charleston's credibility (for example, "[Charleston] could have been the most uncredible [*sic*] witness in the history of trials here in Lake County. It was almost laughable. He's a career criminal, a career liar, an admitted liar, a drug addict.") and reviewed for the jury Charleston's written statement, his recanting of that statement, and that he was walking out of jail for testifying against defendant ("Walked in this courtroom in shackles, testified and walked out a free man."). Counsel argued that, given their criminal histories, drug addictions, age, and locale,

Charleston and Golden were likely connected. Finally, counsel attacked Bone's credibility and his late identification of defendant as the driver.

¶ 59 In rebuttal, the State argued to the jury that it could completely ignore Charleston and Bone and find defendant guilty based on the surveillance videos and ballistics evidence. "Look at the surveillance videos. Look at the ballistics. Look at the tool marks. This defendant based upon that alone is guilty." The State again noted that what happened on August 5, 2011, was revenge.

¶ 60 6. Jury Instructions, Verdict Forms, and Verdict

¶ 61 The jury was instructed that the other-crimes evidence could be considered by it only as it related to defendant's motive and identity.

¶ 62 Further, before receiving the first-degree murder instruction specifying that a person commits first-degree murder when he or she kills someone and intended to kill or do great bodily harm to that person, the jury was instructed on accountability and, pursuant to pattern jury instruction No. 5.03A (Illinois Pattern Jury Instructions, Criminal, No. 5.03A (4th ed. 2000) (hereinafter instruction No. 5.03A)) that:

> "To sustain the charge of first degree murder it is not necessary for the State to show that it was or may have been the original intent of the defendant or one for whose conduct he is legally responsible to kill the deceased Phillip Taylor. It is sufficient if the jury believes from the evidence beyond a reasonable doubt that the defendant and one for whose conduct he is legally responsible combined to do an unlawful [act,] such as to commit first degree murder and that the deceased was killed by one of the parties committing that unlawful act."

¶ 63 The jury was provided general verdict forms (*i.e.*, guilty and not guilty forms for first-degree murder and aggravated battery, without specifying whether guilt was premised on accountability, felony murder, etc.).

¶ 64 During deliberations, the jury asked the court three questions, namely regarding ballistics, a list of the State's evidence, and whether it could be provided with equipment to view the videos. As to ballistics, the jury inquired whether there were any .380-caliber bullets found in the maroon car that had intact casings to directly link to the .380-caliber gun. It was instructed that it had all of the evidence and should continue deliberations. Ultimately, the jury found defendant guilty of first-degree murder and aggravated battery.

¶ 65 C. Posttrial Motions and Sentencing

¶ 66 In his motion for a new trial, defendant argued that the State was erroneously allowed to argue a revenge motive without proving up those allegations. Further, he argued that the court erred in not admitting as substantive evidence Charleston's written statement. Finally, defendant argued that the court erred in giving various jury instructions, including instruction No. 5.03A.

¶ 67 The court denied defendant's motion for a new trial. In his statement at sentencing, defendant expressed that he was sorry for Taylor's family's loss, but stated that he was not responsible and was innocent. The court sentenced defendant to 35 years' imprisonment on the first-degree murder conviction and a consecutive 10-year term for the aggravated-battery-with-a-firearm conviction. The court denied defendant's motion to reconsider the sentence. This appeal followed.

¶ 68 II. ANALYSIS

¶ 69 Defendant argues on appeal that: (1) the court erroneously admitted other-crimes evidence for the purpose of establishing motive; (2) the court erred in refusing to admit

Charleston's prior inconsistent statement as substantive evidence; (3) the court erred in allowing Holman to identify defendant in a photograph derived from a surveillance video; (4) he was denied a fair trial where, despite felony murder not being charged, the jury received an accountability felony-murder instruction; and (5) the cumulative effect of the trial errors deprived him of a fair trial. We address each argument in turn.

¶ 70 A. Other-Crimes Evidence

¶ 71 Defendant argues first that the court erred in allowing evidence of the Speedway shooting for purposes of establishing motive. He notes that the State relied heavily on the shooting of Huley as evidence of his alleged motive to shoot at Taylor, Bone, and Adams. However, absent any evidence that those individuals shot at Huley or that defendant believed that they did, there was no evidence to support the State's motive theory.

¶ 72 We note that, in their initial briefs, the parties presumed that this issue was forfeited and that we should consider the issue only for plain error. Specifically, the parties noted that, although defendant: (1) objected to the State's motion *in limine* to introduce the other-crimes evidence; (2) filed his own motion *in limine* to exclude other-crimes evidence; and (3) argued in his motion for a new trial that the State argued the revenge motive without substantiating those claims, he did not object at trial when the other-crimes evidence was introduced. However, our supreme court has recently confirmed that, in criminal cases, even absent a trial objection, an issue may be preserved where a defendant raises the issue either in a motion *in limine* or in response to a motion *in limine* and then again raises the issue in a posttrial motion. See *People v. Denson*, 2014 IL 116231, ¶¶ 14, 18. Accordingly, defendant here has not forfeited this issue for our review.

¶ 73 Generally, because it is strongly prejudicial, other-crimes evidence is inadmissible if relevant only to establish the defendant's propensity to commit crimes. See *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). However, if the probative value outweighs the prejudicial effect, other-crimes evidence may be admissible for other purposes, including those proffered by the State here, namely motive and identity. *Id*. We review for an abuse of discretion a trial court's decision to admit evidence of other crimes. *Id.* at 182.

¶ 74 Here, as to motive, the State moved to admit evidence of the July 30, 2011, Speedway shooting to establish that defendant was present at the shooting, where Huley was injured, and that he was so upset by it that, on August 5, 2011, he sought revenge against Taylor, Adams, and Bone. In its motion, the State informed the court that, in his videotaped interrogation, defendant was distraught and cried about Huley's injury, and the State argued that defendant thought that Bone's brother was responsible for shooting Huley. The State represented that Bone and Adams would testify that they were present at Speedway when there was a fight and shots were fired.

¶ 75 Defendant is correct that the State failed to prove up its alleged motive theory. Although it relied heavily on its theory of revenge in both opening and closing statements, the State never introduced any portion of defendant's videotaped statement or even called the interrogating officer to testify. As such, it offered only argument, not evidence, that defendant was upset over Huley's injury and that defendant thought Bone's brother, Bone, Taylor, or Adams had anything to do with Huley's injury. Although the State argued that defendant wanted revenge against those persons responsible for Huley's injury, there was no evidence that anyone other than defendant and his acquaintances fired shots at Speedway. Specifically, Bone testified that defendant and his friends fired shots, but he did not testify that he or anyone else fired any weapons. Adams, although called to the stand, was not asked a single question about the

Speedway shooting. There was never any testimony or evidence that Bone's brother was at Speedway. As such, there was no evidence either connecting the occupants of Taylor's car with Huley's shooting or reflecting that defendant believed they were responsible for Huley's injury. In sum, given the trial evidence, the jury should not have been permitted to consider the other-crimes evidence for purposes of establishing motive.

¶ 76 This does not, however, end our inquiry. The improper admission of other-crimes evidence for one purpose does not necessarily render it inadmissible for another purpose. See *e.g.*, *People v. Johnson*, 2014 IL App (2d) 121004, ¶ 51; see also *People v. Boyd*, 366 Ill. App. 3d 84, 95 (2006). As defendant acknowledges, identity was the central issue in this case. Defendant does not challenge on appeal the court's admission of evidence from the Speedway shooting for purposes of establishing the identity of the August 5, 2011, shooter. Any such challenge would fail, as the surveillance video and ballistics evidence recovered from the July 30, 2011, shooting were relevant to whether defendant could be linked to the car and weapon responsible for the August 5, 2011, shooting. Moreover, although defendant argues that the State's reliance on the evidence for purposes of motive was prejudicial, we note that his counsel impressed upon the jury that the State failed in its proof in that regard. In sum, even if it was improper for the jury to consider the other-crimes evidence for motive, the evidence was properly admitted for purposes of establishing identity.

¶ 77 B. Admission of Inconsistent Statement

¶ 78 Defendant argues next that the trial court erred by allowing Charleston's written statement to be introduced only for impeachment purposes. Defendant argues that the statement satisfied the requirements of section 115-10.1 to be admitted substantively because: (1) it was inconsistent with Charleston's trial testimony; (2) Charleston was subject to cross-examination at

trial; (3) the statement was undisputedly written and signed by Charleston; (4) Charleston admitted under oath at trial that he made the statement; and (5) it described Charleston's first-hand knowledge of his ownership and possession of the gun involved in the August 5, 2011, shooting, the fact that the gun was his and that no one gave it to him, and the conditions that gave rise to his initial statements to police that defendant gave him the gun. Accordingly, defendant contends that the court erred in concluding that the statement merely denied knowledge of the incident and failed to satisfy section 115-10.1's requirement that the statement narrate, describe, or explain an event or condition of which the witness has personal knowledge. Defendant argues that the error was prejudicial and denied him a fair trial because the jury was prevented from considering Charleston's written statement on equal footing with his trial testimony to determine which was true, and Charleston's trial testimony was critical to linking him to the murder weapon.

¶ 79 We review for an abuse of discretion the court's determination as to whether a witness's testimony is admissible under section 115-10.1 of the Code. *People v. Harvey*, 366 Ill. App. 3d 910, 920 (2006). A court abuses its discretion only where no reasonable person would take the view adopted by it. *People v. Rojas*, 359 Ill. App. 3d 392, 401 (2005).

¶ 80 Section 115-10.1 of the Code provides that:

> "[E]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if:
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement—
>
> (1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording." 725 ILCS 5/115-10.1 (West 2010).

¶ 81 Here, of the foregoing requirements, the sole dispute at trial was whether Charleston's written statement satisfied section 115-10.1(c)(2).[6] The court excluded the statement as substantive evidence because it found that the statement did not describe or narrate an event of which Charleston had knowledge; rather, the court found the statement "*mostly* describes his denying that he knows anything about an event." (Emphasis added.) In so holding, the trial court apparently focused on the portions of Charleston's statement wherein he explained that he was not present at the shooting, that the information that he gave to police he learned from other people (*i.e.*, Rivera and Wade), and that he did not know how the gun got out of Brown's basement on August 5, 2011. We do not disagree with the trial court that, where a witness only

[6] We reject the State's argument that we may affirm because the statement also failed to satisfy section 115-10.1(c)(1), in that it was not made under oath at a trial or other proceeding. The clear language of the statute reflects that its requirements are satisfied if either section 115-10.1(c)(1) *or* section 115-10.1(c)(2) are met.

recants a prior statement or where he or she denies knowledge of an event, the statement is properly used for impeachment, not substantive evidence. As defendant notes, however, Charleston's statement *also* described conditions of which Charleston had personal knowledge and which directly contradicted his trial testimony, most critically that he *bought* the gun in March 2011, and that he hid it in Brown's basement *prior* to the August 5, 2011, incident. That statement describes the event or condition of coming into possession of the weapon and hiding it at a time and in a manner inconsistent with Charleston's trial testimony. Indeed, the primary relevance to the State of Charleston's trial testimony was that he directly linked defendant to the murder weapon: defendant gave him the gun on August 5, 2011, and told him to "put it up." In that vein, Charleston's written statement was inconsistent concerning that event: Charleston purchased the gun in March and hid it prior to August 5, 2011. Accordingly, the trial court should not have excluded the statement in its entirety. We agree with defendant that, here, a portion of the four-page written statement should have been admitted substantively under section 115-10.1.

¶ 82 Nevertheless, our finding of error does not end the inquiry, for a section 115-10.1 error can be deemed harmless. See, *e.g.*, *People v. Wilson*, 2012 IL App (1st) 101038, ¶¶ 37, 55. To determine whether the evidentiary error was harmless, we consider whether there is a reasonable probability that, absent the error, the jury would have acquitted defendant. *Id.*; see also *In re E.H.*, 224 Ill. 2d 172, 180 (2006) (quoting *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990)). Put another way, the error is harmless where there remains overwhelming evidence of guilt. See *People v. Miles*, 176 Ill. App. 3d 758, 764 (1988). We conclude that there is no reasonable probability that the jury would have acquitted defendant if the court had admitted substantively a portion of Charleston's inconsistent statement.

¶ 83 First, defendant argues that the error was not harmless because Charleston's trial testimony implicated his identity by linking him to the gun, and the remaining evidence concerning the shooter's identity was not overwhelming. We disagree. In our view, although Charleston's trial testimony linked defendant to the gun, the error precluding defendant from using substantively Charleston's inconsistent statement on that point was harmless because, even setting aside both Charleston's testimony and statement, the evidence nevertheless overwhelmingly supported defendant's guilt. For example, although not the State's primary theory at trial, the evidence supporting defendant's conviction based on an accountability theory did not at all hinge upon Charleston's testimony. Specifically, even without Charleston's testimony, there is no reasonable probability that the jury would have acquitted defendant, given the following evidence supporting the State's theory that defendant was a participant in the common design to commit the offense: (1) Mendez testified that she owned a white Grand Prix and that defendant drove the vehicle; (2) the Midwest Bank surveillance video from August 5, 2011, depicted a white Grand Prix traveling directly behind Taylor's car; (3) Bone testified that a white, four-door Grand Prix pulled alongside Taylor's car; (4) Bone identified *defendant* as the driver of that white Grand Prix, explaining that he recognized defendant and the vehicle from the Speedway shooting one week earlier; (5) Bone testified that both defendant and *another* person in the back seat of the Grand Prix were holding guns and fired shots; (6) Adams testified that at least two people were present in the white car and that gunshots were fired from both the front and back windows of the vehicle; (7) the bullets recovered were fired from .38-caliber *and* .45-caliber weapons; (8) the bullets recovered from Speedway included an unspent .38-caliber bullet that was fired from the same weapon as the .38-caliber bullets recovered from the August 5, 2011, shooting; and (9) the Speedway surveillance video depicted a person wearing a white tank

top, *i.e.*, the same clothes defendant was wearing a short time later when interviewed by Holman at the hospital. Accordingly, although Charleston's trial testimony was damaging in that it linked defendant to the .38-caliber weapon used in the murder, there remained overwhelming evidence *completely independent from Charleston* to support defendant's guilt as a participant in the crime, regardless of the weapon he used.

¶ 84 Second, we further note that, although defendant is correct that the ability to use a statement for impeachment does not necessarily cure the error of failing to admit it substantively (*People v. Zurita*, 295 Ill. App. 3d 1072, 1079-80 (1998)), here, we simply cannot ignore that defense counsel thoroughly impeached Charleston's credibility by reviewing the statement with him virtually line by line and then by emphasizing those inconsistencies and credibility issues to the jury in closing argument. Further, and consistent with our analysis above, in its rebuttal closing argument (*i.e.*, the last argument the jury heard before retiring to deliberate), the State argued to the jury that it could *ignore* Charleston (and Bone) and still find defendant guilty based on the surveillance videos and ballistics evidence: "Look at the surveillance videos. Look at the ballistics. Look at the tool marks. This defendant based upon that alone is guilty." Accordingly, the State distanced itself from the import of Charleston's testimony. *Cf. People v. Simpson*, 2015 IL 116512, ¶ 39 (considering an ineffective-assistance-of-counsel claim and holding that, despite there being sufficient evidence, even without a statement that was erroneously admitted substantively, to find the defendant guilty beyond a reasonable doubt, the defendant had shown that the statement was a powerful piece of evidence used by the State to its full effect and, therefore, there was a reasonable probability that, absent counsel's errors, the result of the trial would have been different). As Charleston's credibility was essentially eviscerated, we simply do not believe that the jury convicted defendant based on his testimony.

¶ 85 In sum, even setting aside Charleston's testimony and statement, the evidence supporting the verdict was overwhelming. Accordingly, as there is no reasonable probability that, absent the error, the jury would have acquitted defendant, the section 115-10.1 error was harmless.

¶ 86 C. Photograph Identification

¶ 87 Defendant argues next that it was improper for Holman to identify him in the three photographs derived from the Speedway surveillance video. Defendant claims that Holman's testimony violated the "silent-witness" rule because Holman was not present when the video was made and he was no more qualified than the jury to determine who was depicted in it.

¶ 88 Defendant did not object to Holman's testimony either at trial or in his post-trial motion. Accordingly, he asks that we review this issue for plain error. Plain-error review allows us to consider an unpreserved issue where: (1) the evidence is closely-balanced, such that the verdict may have resulted from the error and not the evidence; or (2) regardless of the closeness of the evidence, the error was so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The first step in plain-error review is to determine whether error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 89 Here, we conclude that no error occurred. The silent-witness theory pertains to the admissibility of photographs or surveillance tapes. The theory is that, with proper foundation, photographic or video evidence may be admitted without the testimony of a witness because the evidence acts as a "silent witness" to the event it captured. *People v. Taylor*, 2011 IL 110067, ¶ 32. Given that the evidence speaks for itself, absent certain circumstances, it may be improper and prejudicial for a witness to testify in a manner that interprets the images. Specifically, although "Illinois has long allowed identification testimony by witnesses who did not personally

observe events depicted in a video recording," to do so without invading the province of the jury to determine identity, it must be established that the witness was familiar with the defendant prior to the depicted event *and* that the witness's testimony will aid the fact finder because: (1) the defendant's appearance changed between the date of the recording and trial; *or* (2) the video or photograph was unclear. *People v. Thompson*, 2014 IL App (5th) 120079, ¶ 24; *People v. Starks*, 119 Ill. App. 3d 21 (1983).

¶ 90 Here, defendant does not challenge the admissibility of either the videos or photographs, nor does he challenge, given the hospital interview, Holman's familiarity with defendant and defendant's clothing on July 30, 2011. Rather, defendant asserts that, because the photographic and video evidence speaks for itself, Holman was not in a better position to interpret the images than the jury because: there was no evidence that defendant's appearance had changed, and, given that the jury was provided with an enhanced video, it was in a superior position than Holman to identify who was in the video. Thus, defendant argues that Holman's testimony invaded the province of the jury to determine identification. We disagree.

¶ 91 In *Thompson*, the case upon which defendant primarily relies, the court found identification testimony improper where four witnesses identified the defendant as the person depicted in surveillance footage; however, none of the witnesses testified that the defendant's appearance had changed before trial, that they could identify the defendant's mannerisms, clothing, or body language, or that the surveillance images were unclear. *Thompson*, 2014 IL App (5th) 120079 at ¶¶ 28, 38-40. Here, in contrast, the evidence reflected that the videos and photographs were "grainy" and needed to be enhanced. (This court has reviewed the photographs, which lack clarity). Further, Holman testified that, shortly after the events depicted in the photographs, he interviewed defendant at the hospital and defendant was wearing a white

tank top and jeans. He then testified that the surveillance photographs reflected the person he interviewed that night, *i.e.*, defendant.

¶ 92 Critically, Holman did not *interpret* the photographs or video, in that he did not testify to what defendant appeared to be doing or what happened in them. In *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 39, the court held that an officer invaded the province of the jury where he did not merely identify the defendant as the person depicted on a video but, rather, he testified that, on the video, he saw the defendant remove money from a register and he saw the defendant place his hand that was holding the money into his pocket. The *Sykes* court noted that, in *Starks*, 119 Ill. App. 3d 21 (1983), where the testimony was held admissible, the testifying witness did nothing more than identify the defendant. *Sykes*, 2012 IL App (4th) 111110 at ¶ 40. Here, as Holman did not interpret the video or photographs, the images were unclear, and Holman merely identified defendant based on the clothing, his testimony did not invade the province of the jury.

¶ 93 As defendant has not established error, we honor the forfeiture.

¶ 94 D. Felony-Murder Instruction

¶ 95 Defendant argues that he was denied a fair trial where the jury was provided an accountability instruction for felony murder that: (1) wrongly advised the jury that the State did not have to prove the essential element of intent to kill for first-degree murder; and (2) where it inserted the uncharged offense of felony murder into the case after the close of evidence.

¶ 96 We first reject the State's contention that defendant forfeited this issue for our review. As noted, at the jury instructions conference, defendant objected generally to the State's introduction of instruction No. 14, which the court clarified was instruction No. 5.03A, felony murder accountability. In his post-trial motion, defendant argued that it was error to give the jury instruction No. 5.03A. Thus, this issue is preserved for our review.

¶ 97 We generally review the court's jury instructions for an abuse of discretion. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 33. The decision to give an instruction rests in the trial court's discretion, but there must be some evidence in the record to justify giving an instruction. *Id.* Where the question is merely whether the instructions accurately explained the applicable law to the jury, however, our review is *de novo*. *Id*. at ¶ 34.

¶ 98 Here, in addition to receiving instructions regarding first-degree murder and accountability, the jury received instruction No. 5.03A, felony-murder accountability. That instruction read:

> "To sustain the charge of first degree murder it is not necessary for the State to show that it was or may have been the original intent of the defendant or one for whose conduct he is legally responsible to kill the deceased Phillip Taylor. It is sufficient if the jury believes from the evidence beyond a reasonable doubt that the defendant and one for whose conduct he is legally responsible combined to do an unlawful [act,] such as to commit first degree murder and that the deceased was killed by one of the parties committing that unlawful act."

¶ 99 Defendant argues that this instruction was improper, noting that felony murder was not charged. He argues that it failed to list a predicate felony other than first-degree murder, which he asserts was not independent from the charged murder. As such, defendant argues that the jury was given contradictory instructions about the intent element for first-degree murder. We disagree.

¶ 100 A defendant may be subject to the felony-murder doctrine if the decedent's death is the direct and proximate cause of the defendant's forcible felony. See *People v. Ruiz*, 32 Ill. App. 3d 750, 755 (2003). However, the predicate offense for felony murder may not arise from or be

inherent in the murder itself; rather, the predicate offense for felony murder must have an independent felonious purpose. *Id.* Here, although the predicate felony described in the instruction is first-degree murder, it relates to an offense independent of the murder of Taylor. In other words, the predicate felony of first-degree murder does not concern Taylor's murder, it concerns the intended first-degree murder of someone *else* in the car, *i.e.* Adams or Bone. First-degree felony murder of Taylor is therefore predicated on the theory that defendant and another combined to kill Adams or Bone and, in doing so, killed Taylor. The factual basis in the record to support the instruction arose in part from defendant's own case, namely his defense that Adams was the intended victim. See *id.* at 756 (no error in instructing the jury on felony murder where the predicate offense involved a victim other than the deceased).

¶ 101 Second, where there is evidence to support the instruction, a felony-murder instruction may be given, even where felony murder has not been charged. *People v. Maxwell*, 148 Ill. 2d 116 (1992); *People v. Jackson*, 233 Ill. App. 3d 1089, 1096 (1992). While consideration must still be given to whether the felony-murder instruction caused unfair surprise and prejudice, given its absence from the charges, defendant here cannot argue surprise or an inability to prepare his defense because, again, the basis for the instruction arose in part from his defense. Specifically, although felony murder was not charged and the instruction was offered after the close of the evidence, the fact that *defendant's* theory that Adams was the intended murder victim minimizes any argument that he was prejudiced by felony murder not being charged. Further, defendant was also well aware that the State's theory was that the intended target of the shooting was Bone or Adams, in retaliation for the Speedway shooting.

¶ 102 Third, and critically, even if giving the instruction was error, reversal would be unwarranted because the jury was provided with only general verdict forms. In *People v.*

Morgan, 197 Ill. 2d 404 (2001), our supreme court held that, under the facts of that case, certain felonies could not serve as the predicate felony for the felony murder and, therefore, felony-murder instructions were erroneously provided to the jury. *Id*. at 447-48. However, the court found that reversal was unwarranted because although the jury was instructed on both first-degree murder (knowing or intentional) and felony-murder, it received only general verdict forms allowing it to find the defendant: (1) not guilty; (2) guilty of first-degree murder; and (3) guilty of second-degree murder. *Id.* at 448. The court held "a general verdict finding a defendant guilty of murder, where the defendant was charged with intentional, knowing, and felony murder, raises the presumption that the jury found the defendant committed the most serious crime alleged, intentional murder." *Id.*; see also *Ruiz*, 342 Ill. App. 3d at 756 (where the defendant was prosecuted under three theories of first-degree murder, but returned a general verdict of guilt on first-degree murder, any error in the felony-murder instruction is rendered harmless), *cf. People v. Shaw*, 186 Ill. 2d 301, 329 (1999) (where the jury was given separate verdict forms for first-degree murder with intent to kill, first-degree murder knowing the acts created a strong probability of death or great bodily harm, and first-degree murder while committing the offense of armed robbery). Thus, even where felony-murder is improperly charged and the jury improperly instructed, the submission of general verdict forms for first-degree murder gives rise to a presumption that the guilty verdict is based on the most culpable offense. Here, felony-murder was not charged and the instruction was not erroneously given, but, even if error occurred, the general verdict forms render reversal unnecessary.

¶ 103 We note that, despite our holding, we do not sanction the manner in which this issue was handled. The reason that the predicate offense for felony murder must have an independent felonious purpose separate from the murder itself is to preclude the State from using felony

murder to avoid proving intentional or knowing killings for first-degree murder, particularly where the same facts are used to establish both the murder and the predicate felony. See *People v. Phillips*, 383 Ill. App. 3d 521, 535 (2008). Here, the facts of the case and defendant's theory that, although someone else committed the crime, Adams was the target, were known well before trial and, if the State wished to proceed on a felony-murder theory, it certainly could have charged defendant accordingly instead of waiting until the close of evidence to submit an instruction thereon. Further, although the felony-murder instruction mirrors the pattern instruction, in a case such as this, where the charged crime is first-degree murder, the predicate felony is also first-degree murder, and the instruction does not specify the name of the target for that predicate felony (*e.g.*, first-degree murder *of Adams*), we think that there was potential for juror confusion. See *Ruiz*, 342 Ill. App. 3d at 756 (noting that the general verdict forms rendered any error harmless, "even if instructing the jury on felony murder was error because the instruction did not specifically list [the name of] the victim in the predicate felony"). Both parties, but particularly the State, could have mitigated against potential confusion by modifying the instruction to specify the target of the predicate felony and by explaining to the jury in closing arguments how felony murder was an applicable theory under the facts of this case.

¶ 104 E. Cumulative Error

¶ 105 Defendant's final argument is that the cumulative effect of the trial errors deprived him of his right to a fair trial. Although individual trial errors may have a cumulative effect of denying a defendant a fair trial, here, we have rejected all but one of defendant's claims of error. *People v. Hall*, 194 Ill. 2d 305, 350-51 (2000). Accordingly, defendant is not entitled to a new trial on the basis of the cumulative effect of multiple errors. *Id.*

¶ 106 III. CONCLUSION

¶ 107 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 108 Affirmed.