

NOTICE
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2015 IL App (5th) 130287-U

NO. 5-13-0287

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Massac County.
)	
v.)	No. 08-CF-161
)	
DOMINICK N. STEPPAN,)	Honorable
)	Joseph Jackson,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant failed to prove that his attorney's decision to forgo asking the court to admit prior witness statements was objectively unreasonable and where the defendant failed to establish that he was prejudiced, he did not receive ineffective assistance of counsel and we affirm the trial court's order denying his postconviction petition.

¶ 2 The defendant, Dominick N. Steppan, was found guilty of attempted murder and aggravated discharge of a firearm, and was sentenced to 50 years in prison on the attempted murder conviction. On direct appeal, we affirmed the defendant's conviction and sentence. *People v. Steppan*, 2012 IL App (5th) 090481-U. While his direct appeal was pending, the defendant filed a *pro se* postconviction petition. The trial court

appointed an attorney to represent the defendant, and the attorney amended the petition. After the trial court held an evidentiary hearing, the court denied his amended petition. The defendant appeals and seeks a new trial on the attempted murder charge on the basis that he did not receive his constitutional right to the effective assistance of counsel. The defendant claims that his attorney did not use exculpatory evidence—two prior statements by the victim's wife that the defendant claims were inconsistent with her trial testimony. At trial, the victim's wife testified that the defendant threatened to kill her husband. The defendant claims that his attorney was ineffective for not impeaching this witness with other statements she made to the police in which she stated that the defendant only threatened to physically assault her husband. We affirm.

¶ 3

FACTS

¶ 4 At the time the incidents at issue took place, the defendant lived with Mary Jo Mason. Mary Jo Mason was the sister of Connie Hambrick. Connie was married to Kevin Hambrick. Before the incident, Kevin told Mary Jo's daughter that the defendant might be abusing her mother. Kevin also directly asked Mary Jo if the defendant was abusing her. Mary Jo denied any abuse. The defendant learned that Kevin had spoken to Mary Jo and to her daughter.

¶ 5 The testimony of Connie Hambrick is central to the defendant's postconviction argument of ineffective assistance of counsel, and so we restate the substance of her testimony as included in our earlier unpublished order on the defendant's direct appeal.

¶ 6 At the criminal trial, Connie Hambrick testified that she lived in a two-story home in Metropolis. The home has large windows. The bedroom she shares with Kevin is in

the front of the house, and the headboard of their bed is in front of two windows in her bedroom.

¶ 7 On October 17, 2008, Connie's husband had an argumentative telephone conversation with the defendant. Connie testified that she had known the defendant for about a year, and that he was involved with and living with her sister, Mary Jo Mason. The defendant knew where Connie and Kevin lived because he had been to their home about four or five times. Later that evening, the defendant called again, and Connie answered the phone. She knew that the defendant was calling because his phone number was displayed on the caller identification system. Connie answered the call in order to keep her husband from answering, as he was still upset from the first call. Connie testified that during this conversation, the defendant told her that he planned to kill Kevin. She testified that he told her numerous reasons for wanting to kill Kevin. He told Connie that he loved her and the children, and that his dispute was only with Kevin. Connie assumed that the defendant had been drinking alcohol, because during the conversation, he slurred some of his words. She told her husband about the conversation.

¶ 8 At about 11:30 p.m., Connie had just finished taking a shower in the bathroom near her upstairs bedroom. Her husband was in bed watching television. By the time her shower was over, Connie testified that her husband had fallen asleep. Connie got into bed in a seated position and saw a flash in her peripheral vision, and then heard a gunshot. Connie screamed and pushed Kevin from the bed. She called a 9-1-1 operator. An officer responded to the 9-1-1 call. On cross-examination, Connie admitted that she made multiple statements to Officer Jim Corry of the Metropolis police department

immediately after the incident. When asked if she told Officer Corry that the defendant threatened to kill Kevin, Connie testified, "I don't know if I told Officer Corry that."

¶ 9 Officers investigating the scene determined that seven bullets went through the wall behind the headboard of the Hambricks' bed. One of these bullets passed through the headboard and lodged in the center of a pillow on the bed.

¶ 10 In both his *pro se* postconviction petition and his amended postconviction petition, the defendant alleged that his trial attorney did not impeach Connie Hambrick with her inconsistent statements to the police. In his amended petition, he explains that the inconsistent statements could have been used to impeach Connie, and also could have been introduced as substantive evidence that the defendant did not intend to kill Kevin Hambrick.

¶ 11 At the evidentiary hearing on the defendant's amended postconviction petition, his trial attorney, Marilou Shaner, testified. She testified that Connie Hambrick made three written statements to the police before trial, and that she did not state in any of them that the defendant explicitly threatened to kill Kevin Hambrick. However, Shaner testified that she still was not surprised when Connie testified that the defendant threatened to kill Kevin. Shaner explained that she interviewed Connie before trial, and that the prosecutor told her that Connie would testify at trial about the defendant's explicit threat to kill Kevin. Shaner testified that at trial, she cross-examined Connie about the differences between her written statements and her trial testimony. Shaner testified about her reason for not impeaching Connie with her statements to police. She testified that Connie had already testified about the statements, and that impeaching her with those statements

would not have been beneficial. Shaner testified that she did not believe introduction of the prior statements would have mitigated the case against the defendant, which she described as strong and "overwhelming." Shaner also testified to her witness examination technique in this type of cross-examination. She testified that she used a specific tone of speech in order to prevent the jury members from feeling sympathy for the witness.

¶ 12 The trial court denied the defendant's postconviction petition on May 23, 2013. The order addressed four claims. The defendant raised three of the claims in the postconviction petition. The fourth claim involved whether Shaner should have sought a mental fitness examination before trial. The defendant did not include this claim in his postconviction petition, but included the claim in his direct appeal. While the trial court specifically addressed three of the defendant's postconviction issues, the court did not reference his ineffective assistance claim in its order denying the petition.

¶ 13 The defendant timely filed his appeal. This court has jurisdiction pursuant to Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 14 LAW AND ANALYSIS

¶ 15 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-stage process for adjudicating postconviction petitions. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). The trial court advanced the defendant's claim to the third stage as the court found that he had made a substantial showing of a constitutional violation. *People v. Tate*, 2012 IL 112214, ¶¶ 8-10, 980 N.E.2d 1100. At the third stage, the trial court conducts an evidentiary hearing. *Id.* On

appeal from a postconviction order after the court holds an evidentiary hearing where fact-finding and credibility determinations are involved, we will not reverse the court's decision unless that decision is manifestly erroneous. *People v. English*, 2013 IL 112890 ¶ 23, 987 N.E.2d 371; *Beaman*, 229 Ill. 2d at 72, 890 N.E.2d at 509. A ruling is manifestly erroneous if it contains an error that is "clearly evident, plain, and indisputable." *People v. Hughes*, 329 Ill. App. 3d 322, 325, 767 N.E.2d 958, 960 (2002) (citing *People v. Ruiz*, 177 Ill. 2d 368, 384-85, 686 N.E.2d 574, 582 (1997)).

¶ 16 Court's Failure to Specifically Rule on Defendant's Ineffective Assistance Claim

¶ 17 First, we review the trial court's order to assess the defendant's claim that the court neglected to rule upon the issue raised in this appeal—the attorney's alleged failure to impeach the victim's wife with inconsistent statements. The trial court's order contains specific rulings on some issues and concludes with the broad statement: "The Defendant's Petition for Post-Conviction Relief is denied." The court's order denied the defendant's petition in its entirety. However, even if the court's broad denial was somehow deficient, we note that the State "is not limited to the trial court's rationale but may argue for affirmance on any basis in the record." *People v. Calhoun*, 382 Ill. App. 3d 1140, 1146, 889 N.E.2d 795, 800 (2008) (citing *People v. Reed*, 298 Ill. App. 3d 285, 295, 698 N.E.2d 620, 628 (1998)). Therefore, we will consider the State's argument that the testimony of the victim's wife was not inconsistent with her prior statements.

¶ 18 Inconsistent Prior Statements

¶ 19 The defendant characterizes Connie's prior statements to police as inconsistent with her trial testimony. He argues that his attorney should have used these prior

statements as exculpatory evidence—evidence that he did not plan or threaten to kill Kevin Hambrick. In contrast, the State argues that Connie Hambrick's prior statements, although different from her trial testimony, were consistent with her testimony. The State argues that her testimony represented a more detailed version of her original statements.

¶ 20 At trial, the State called Connie Hambrick as a witness. Connie testified that on the night of the incident, the defendant telephoned her husband. She could not hear what was being said, but testified that her husband became very angry. After the call ended, Connie stated that her husband was concerned because he believed something was going to happen between the two men. Later that evening, the defendant called back, and Connie answered the phone in order to prevent the men from having another argument. During this phone conversation, Connie testified that the defendant told her "he would kill my husband."

¶ 21 The defendant's attorney cross-examined Connie, and the following exchange about the threats Kevin made towards Connie's husband occurred:

"Q. All right. You said the call that he made when he talked to you, he told you that, 'This has nothing to do with you or the kids. I love you, and I would never do anything to hurt you'?

A. Yes.

Q. All right. And do you remember—on the first call that was made, do you remember hearing Mr. Steppan say that he was going to kick Kevin's ass?

A. I heard him say that in the conversation, yeah.

Q. Okay. But he didn't say in the conversation to you, 'I'm going to kill Kevin'?

A. Yes, he did.

Q. Did you tell Officer Corry that?

A. I don't know if I told Officer Corry that.

Q. Is it possible that when you talked to Officer Corry, you just said that [Defendant] said, 'I'm going to kick Kevin's ass,' and didn't say a thing—

A. It's a possibility that I told Officer Corry that, yes.

Q. All right. In fact, would it be possible that when you talked to Officer Corry, you never told him at all that Dominick Steppan was going—had threatened to kill Kevin?

A. It's a possibility."

¶ 22 Prior inconsistent statements are admissible in evidence if the prior statement is *inconsistent* with the testimony at trial. 725 ILCS 5/115-10.1 (West 2006). Additionally, the witness must be available for cross-examination. *Id.*; *People v. Govea*, 299 Ill. App. 3d 76, 85, 701 N.E.2d 76, 82 (1998).

¶ 23 We review Connie's statements in order to determine if her prior statements were inconsistent with her testimony at trial.

¶ 24 Connie's written statement dated October 18, 2008, contained the following:

"Then about 5:30 pm [Steppan] called my house and talked to my husband. My husband was quiet for a while then all of a sudden he started yelling at him and telling him not to call back. When he got off of the phone he said that [Steppan]

had said he was mad and that Kevin was a peice [sic] of shit. He had threatened to kick Kevin's ass and come to our house to do it. After that we just went on with the rest of our evening. Then about 8:30 pm [Steppan] called again. This time I answered the phone. He was very drunk and he told me that he didn't have a problem with me and the kids just Kevin and he said that Kevin was going to pay for what he said about him and after I hung up on him."

¶ 25 In addition to Connie's written statement, she spoke with Sergeant Scott Deming of the Metropolis police department on October 17, 2008. Sergeant Deming prepared a narrative description of his interview. Connie told Sergeant Deming that she met the defendant in July 2008, after he was released from prison on parole. Connie's sister, Mary Jo Mason, engaged in a relationship by mail with the defendant while he was incarcerated. When the defendant was up for parole, he told Mary Jo that he had nowhere to go, and so the defendant was paroled to her residence.

¶ 26 On October 13, 2008, the defendant was released from home monitoring and came to Connie's home to celebrate. The defendant became intoxicated. He talked about a gun that he had obtained from his cousin.

¶ 27 Connie told Sergeant Deming that the defendant told her that he beat up his cousin and his cousin's wife, and then fled from their home in Kentucky, wrecking Mary Jo's car in the process. Connie stated that Mary Jo took the blame for the wreck because the defendant was still supposed to be on home monitoring in Illinois.

¶ 28 On October 15, 2008, Connie needed a ride to the hospital and was taken by Mary Jo's daughter, Cindy. While at the hospital, Connie spoke with Cindy about her concern

for Mary Jo's welfare. Cindy then told the defendant about that conversation. On October 17, Connie's mother called and told her that the defendant had just beaten up Mary Jo, and Mary Jo was refusing to go the hospital. A couple of hours later, the defendant began calling Connie's home.

¶ 29 Sergeant Deming reported the following from Connie's interview:

"Hambrick stated she walked into the room to check on [her husband Kevin] when all of a sudden Kevin began yelling into the phone telling the person on the phone not to call back. Kevin handed me that phone and said listen to this. When I picked up the phone I could hear Steppan saying 'FAT FUCK YOU SCREWED UP THIS TIME AND YOU'RE GONNA PAY FOR IT!' Hambrick stated Steppan hung up the phone. Hambrick stated Kevin then told her what Steppan had said.

Hambrick stated around 8:30 pm, Steppan called the house phone again and she answered it. Hambrick stated Steppan told her, 'I love you and your kids and wouldn't do anything to hurt you guys and I know [y]ou love your husband and stand by him BUT THAT'S GONNA CHANGE!' Hambrick stated Steppan made some further threats. Hambrick stated Steppan was screaming for her to shut the people up in the background, but there was no one talking in the background. Hambrick stated when Steppan stated 'KEVIN'S GONNA PAY FOR WHAT HE SAID ABOUT ME!' she hung up the phone."

¶ 30 The State contends that Connie's trial testimony was consistent with her prior statements. In support of this argument, the State cites a case detailing a situation where

the court found that prior statements were inconsistent with trial testimony. Although the context is different, we find this case helpful in our analysis of what amounts to an inconsistency meriting admission.

¶ 31 In *People v. Govea*, a witness's prior statements were admitted after the trial court found that they were inconsistent with her trial testimony. At trial, she testified that she had not seen whether defendant used a stick that he was carrying, whereas before trial she indicated that she saw the defendant beat the victim with the stick he was carrying. *Govea*, 299 Ill. App. 3d at 87, 701 N.E.2d at 84. The same witness also testified at trial that she did not know who owned the vehicle used to leave the scene of the attack, whereas before trial she identified the defendant as the owner of the vehicle. *Id.* "Because these and other discrepancies between [the witness]'s trial testimony and her written statement and grand jury testimony amounted to significant inconsistencies *and not mere omissions*, we hold that the trial court did not abuse its discretion in admitting [the witness]'s prior testimony in its entirety." (Emphasis added.) *Id.* (citing *People v. Salazar*, 126 Ill. 2d 424, 456-58, 535 N.E.2d 766, 779-80 (1988)).

¶ 32 In this case, Connie initially informed the police that the defendant threatened to assault her husband and made other threats against him. The defendant made statements that he knew that Connie loved Kevin, but "that's gonna change." Connie told the officers that the defendant twice claimed that Kevin was "gonna pay" for what he said. Although Connie did not specifically state that the defendant threatened to kill Kevin, she told the officers that he made many threats of harm, some of which could imply the threat of death. In contrast, the witness in *Govea* completely changed her testimony from

witnessing the defendant beat a victim with a stick, to not seeing the defendant do anything but carry a stick—statements that were directly contradictory. We are inclined to agree with the State that Connie's trial testimony elaborated on the threats the defendant made and were more in the nature of an omission rather than an inconsistency. *Govea*, 299 Ill. App. 3d at 87, 701 N.E.2d at 84.

¶ 33 Furthermore, it is important to review the cross-examination of Connie. The defendant's attorney drew out the discrepancy between her trial testimony and her prior statements to the police. Connie confirmed that the defendant threatened to harm Kevin, but stated that he also threatened to kill Kevin. The defendant's attorney then asked Connie if she had told the police that the defendant threatened to kill Kevin. Connie responded that she did not know if she had told the police, and then twice stated that it was a possibility that she never told the police of the defendant's threat to kill Kevin. With these answers, Connie acknowledged that she might have merely omitted telling the police about the death threat.

¶ 34 We also note that this cross-examination made the very point that the defendant seeks by introduction of the prior statements. He wanted the jury to know that Connie did not tell the police that he threatened to kill Kevin. He wanted the jury to know that Connie's trial testimony was different in verbiage from her statements to the police. We also note that the trial court has the ability to admit the entire statement—not just the inconsistent portions—if the remainder of the statement is necessary to keep the jury from being misled. *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 556, 356 N.E.2d 779, 786 (1976); *People v. Caffey*, 205 Ill. 2d 52, 90-91, 792 N.E.2d 1163, 1189 (2001). Here,

probability sufficient to undermine confidence in a trial's outcome." *Id.* at 311-12, 689 N.E.2d at 1214 (citing *Strickland*, 466 U.S. at 687). Legal assistance errors alone do not undermine the outcome of the trial. We analyze whether the defendant received a fair trial in spite of any errors. *Id.* at 312, 689 N.E.2d at 1214. In that context, a fair trial means "a trial resulting in a verdict worthy of confidence." *Id.* (citing *People v. Moore*, 279 Ill. App. 3d 152, 161-62, 663 N.E.2d 490, 498 (1996)).

¶ 39 Earlier in this order, we included the text of counsel's cross-examination of Connie Hambrick. The defendant contends that his attorney "had no valid reason for failing to make the jury aware of Connie's inconsistent statements." As the defendant's attorney cross-examined Connie about the statement and about whether or not she told the police about the death threat, the jury was informed that Connie's statements to police did not contain allegations of death threats and that these statements occurred right after the incident. Connie Hambrick admitted that it was possible that she did not tell the police about the death threat. As we have discussed, this omission was the only aspect of those statements that could have been beneficial to the defense.

¶ 40 An attorney's decision about how to conduct cross-examination of a witness is a matter of trial strategy. *People v. Salgado*, 263 Ill. App. 3d 238, 246-47, 635 N.E.2d 1367, 1373 (1994). Typically, a strategically planned cross-examination does not support a claim of ineffective assistance of counsel. *Id.*; *People v. Leeper*, 317 Ill. App. 3d 475, 482, 740 N.E.2d 32, 38 (2000) (citing *People v. Reid*, 179 Ill. 2d 297, 310, 688 N.E.2d 1156, 1162 (1997)). The defendant's attorney testified at the hearing about this very issue. She testified that she interviewed Connie and spoke with the prosecutor before

trial, and so was aware that Connie's previous statements left out the claim that the defendant threatened to kill Kevin Hambrick. She testified that it is common for witnesses to have additional information beyond what they wrote in their statements. Additionally, Connie's testimony was consistent with Kevin Hambrick's testimony. She testified that she is aware of the danger of cross-examining a victim witness too aggressively as the jury can become sympathetic to the witness. Therefore, she conducted her cross-examination using a calm demeanor without attacking the witness about the differences between her prior statements and her trial testimony.

¶ 41 "Judicial scrutiny of counsel's performance must be highly deferential." (Internal quotation marks omitted.) *People v. Albanese*, 104 Ill. 2d 504, 525-26, 473 N.E.2d 1246, 1255 (1984). We find that defense counsel's decision not to seek admission of Connie's earlier statements was prudent given the additional harmful evidence to her client. By her cross-examination, the jury was made aware of the fact that Connie possibly never told the police officers about the death threat. Seeking admission of those statements would have been counterproductive. Thus we find that the defendant has failed to meet the burden to prove that her performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88.

¶ 42 We also find that the defendant fails to establish prejudice—the second prong of the *Strickland v. Washington* test. This was not a case where the evidence was closely balanced. On direct appeal, we found that the evidence at trial amply supported the defendant's attempted murder conviction beyond a reasonable doubt. *Steppan*, 2012 IL App (5th) 090481-U, ¶¶ 48-54. Someone fired a gun up into the illuminated second-story

bedroom of Connie and Kevin Hambrick, striking the headboard immediately above where Kevin was sleeping. The defendant knew where the Hambricks lived. The defendant made statements to an officer that he would not have shot at the home had he known children were inside. Evidence also established that the defendant had a gun and that the gun matched the caliber of bullets recovered from the scene. In addition, there was testimony about threats the defendant made toward the Hambricks.

¶ 43 We find that the defendant has not established that his trial attorney failed to provide reasonably effective assistance. The defendant also did not establish that he was prejudiced by any alleged legal shortcomings or that he received a verdict not worthy of confidence. Therefore, we find that the trial court's order denying the defendant's postconviction petition was not contrary to the manifest weight of the evidence.

¶ 44 **CONCLUSION**

¶ 45 For the foregoing reasons, we affirm the judgment of the Massac County circuit court.

¶ 46 Affirmed.