2016 IL App (1st) 102274-UB

THIRD DIVISION
May 25, 2016

No. 1-10-2274

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 13128
	)	
KEITH PIKES,	)	The Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

HELD: While admission of hearsay statement made by nontestifying codefendant did not fall under coconspirator exception to hearsay rule, it did comprise a tacit admission and, thus, was properly admitted and did not violate defendant's rights to confrontation or a fair trial. Additionally, witnesses' prior inconsistent statements were properly admitted as substantive evidence and were not cumulative or prejudicial.

¶ 1 Following simultaneous but separate jury trials with codefendant Lamont Donegan (Donegan), defendant Keith Pikes (defendant) was convicted of the first degree murder of Lorne Mosley via a drive-by shooting and sentenced to 27 years in prison. Defendant brought an appeal to our court presenting three issues for review, one of which challenged the propriety of the trial court's admission against him of evidence of a prior crime committed by Donegan in which defendant was not involved. Referred to as the scooter shooting, this evidence consisted of a prior incident between Donegan, a member of the Four Corner Hustlers street gang (as was defendant), and members of the rival Gangster Disciples. During this incident, which occurred a day or so prior to Mosley's murder, Quentez Robinson, a member of the Gangster Disciples, rode a scooter through Four Corner Hustlers' territory followed by other Gangster Disciples in a car. Donegan shot at Robinson, who rode off unharmed. The driver of the car then struck Donegan, who later, according to the State's theory of the case, allegedly recruited defendant to assist him in exacting revenge for the incident. In moving for the admission of this evidence at trial, the State insisted that the scooter shooting was related to Mosley's drive-by murder, providing an explanation for it as well as demonstrating Donegan's and defendant's joint motive and intent. The trial court agreed and admitted the evidence.

¶ 2 On appeal, our court concluded that the scooter shooting, as presented by the State, amounted to other-crimes evidence and, because the State admitted it had no evidence that defendant was even present at the scooter shooting, let alone a participant, it failed to meet the threshold requirement for admission of other-crimes evidence, namely, defendant's involvement beyond a mere suspicion. See *People v. Pikes*, 2012 IL App (1st) 102274, ¶¶ 27, 41-41.

Therefore, our court held that the evidence was inadmissible and we reversed defendant's conviction and remanded for a new trial, finding it unnecessary to consider the other two issues raised by defendant on appeal. See *Pikes*, 2012 IL App (1st) 102274, ¶ 45.

¶ 3 Our state supreme court granted the State's petition for leave to appeal (Ill. S.Ct. R. 315 (eff. Feb. 26, 2010)), and issued a decision reversing ours and remanding the matter to our court. See *People v. Pikes*, 2013 IL 115171. In its decision, the supreme court held that the admissibility of evidence regarding a collateral crime in which a defendant was not involved should be judged under ordinary relevancy principles rather than traditional other-crimes analysis. See *Pikes*, 2013 IL 115171, ¶ 20 ("[b]ecause defendant was not involved in the scooter shooting incident, it was not an 'other crime' for purposes of evaluating its admissibility under" the other-crimes doctrine). The court further reasoned that, because other evidence at defendant's trial demonstrated he was "motivated to assist" Donegan in Donegan's retaliation for the scooter shooting, evidence of that incident was relevant to show the motive for the drive-by shooting which resulted in Mosley's murder. See *Pikes*, 2013 IL 115171, ¶ 22. In concluding that the trial court did not err in admitting this evidence, the supreme court remanded the cause to our court for consideration of the other issues defendant raised on appeal.

¶ 4 Accordingly, it is upon the supreme court's reversal and remand that we again review the instant cause, this time focusing on the remaining two issues defendant raised in his initial appeal.[1] First, defendant contends that the trial court denied his rights to confrontation and a fair trial when it admitted a hearsay statement made by Donegan, a nontestifying codefendant, under

[1]The parties rebriefed these issues for our court following the supreme court's remand.

the coconspirator exception to the hearsay rule where the statement was not made in furtherance of any conspiracy. Second, he contends that he was denied a fair trial where the State introduced prior inconsistent statements of its recanting witnesses which were inadmissible as substantive evidence and, when coupled with these witnesses' prior grand jury testimony, were redundant and exploited the jury's tendency to believe that which is repeated most often. Defendant again asks that we reverse his conviction and remand for a new trial. For the following reasons, this time we affirm.

¶ 5 BACKGROUND

¶ 6 Because we presented the facts of this cause in detail in our prior decision (see *Pikes*, 2012 IL App (1st) 102274, ¶¶ 2-16), we discuss them again here in a more limited version. However, we note that, because our prior decision dealt only with the trial court's admission of the scooter shooting incident, we now highlight certain additional facts from the record that are relevant to our consideration of the new issues of hearsay and prior inconsistent statements, upon which we focus herein.

¶ 7 In the summer of 2006, a feud erupted between the Gangster Disciples and the Four Corner Hustlers following the shooting by a Gangster Disciple member of Victor Parsons, a member of the Four Corner Hustlers. Referencing the scooter shooting incident, the State's theory on the instant case, again, was that the drive-by shooting that killed Mosley was part of this ongoing war and, in particular, was retaliation sought by Donegan, defendant and a third man named Golden Richardson for, in part, that incident. Prior to defendant and Donegan's separate simultaneous jury trials, the State filed several motions *in limine*. In addition to one seeking to

introduce evidence of the scooter shooting, the State also sought to introduce certain coconspirator statements made by Donegan prior to and immediately following Mosley's murder. Specific to the instant cause, as the only statement defendant now challenges on appeal, the State sought to introduce Donegan's statement, made after Mosley's murder and in the presence of defendant and Deangelo Coleman (a fellow member of the Four Corner Hustlers), that "we got one last night" and "it's about time they got one," along with Donegan's description to this group of how he and defendant performed the drive-by shooting, namely, that defendant drove himself and Donegan slowly on Corliss Avenue near some Gangster Disciples; that Donegan shot outside his window from the car; that Donegan had wanted to shoot at the Gangster Disciples on foot but that his foot had been injured; and that Donegan wanted revenge for his injury. The trial court granted the State's motions allowing Donegan's statement and evidence of the scooter shooting, finding that these were relevant, more probative than prejudicial, and necessary to allow the jury to understand the context surrounding Mosley's murder.

¶ 8 Briefly, at trial, Robinson testified that the two street gangs were in a feud and that their territories ran along Corliss Avenue. He testified at length regarding the scooter shooting. He also testified that he was present during the drive-by shooting and saw a silver box-type car driving toward him with the back window down. He saw a hand stick out the window and start shooting. He heard 12 to 15 shots from two different guns. Robinson jumped to the ground and did not see who was shooting, but saw that Mosley had been shot.

¶ 9 Herbert Lemon, a member of the Gangster Disciples, testified that he was in the car that was following Robinson on the scooter when Donegan shot at Robinson, and that the car then

struck Donegan and drove away. Lemon was also present during the Mosley murder the next night. Lemon testified that he saw a gray box-type car coming toward him and heard shots coming from it. Lemon looked inside the car and saw defendant driving and Donegan in the passenger seat; he saw them both shooting as the car drove past. Lemon later picked defendant out of a photo lineup and identified him to police as the driver and one of the shooters; Lemon similarly picked Donegan out of a separate photo lineup and identified him to police as the passenger and the other shooter.

¶ 10 Brandon Merkson testified that he is a member of the Gangster Disciples, that there was an ongoing feud between his gang and the Four Corner Hustlers, and that he was present at both the scooter shooting and the Mosley murder. With respect to the latter, he stated that he saw a gray box-type car approaching him and, as it slowed down, its occupants began shooting. Merkson could not see the driver, but did see Donegan inside the car shooting.

¶ 11 Two additional witnesses, Vernard Crowder and Deangelo Coleman, also testified at trial, but did so in direct contradiction to prior statements they made to both police and the grand jury in this cause. At trial, Crowder denied that he, defendant and Donegan were gang members and that he saw defendant on the day of Mosley's murder or heard any gunshots. He acknowledged testifying before the grand jury, but asserted he had done so only because the prosecutor agreed to drop a domestic battery charge against him; he denied his entire grand jury testimony. Accordingly, the State presented the testimony of two assistant State's Attorneys concerning Crowder's grand jury testimony and the handwritten statement he made to police. In these, which were consistent with each other, Crowder stated that on the day of Mosley's murder, he saw

defendant standing near an older model, greyish black Toyota car, with Donegan inside it, cleaning it. Defendant asked Crowder if he wanted to "go do business" on Corliss, which Crowder knew meant harming a member of the Gangster Disciples. Crowder declined as he was on probation. Defendant did not like his answer, reminding him that members of that gang had killed Parsons. Soon thereafter, Crowder heard gunshots coming from Corliss. Crowder also described that, after the Mosley murder, he next saw defendant in the fall of 2007, at which time defendant told him he was angry about being shot at during another subsequent incident and complained, " 'Why ain't nobody keeping going over there, finishing what he had left off with,' " which Crowder knew referred to Mosley's murder.

¶ 12 Coleman similarly denied being a gang member, as well as having any knowledge of the scooter shooting or the Mosley murder, when he testified at trial. However, an assistant State's Attorney published Coleman's statements to police, in which Coleman described these events. With respect to the Mosley murder, Coleman stated that on the day it happened, he was with defendant and Donegan when, during their conversation, Donegan said that someone had to pay for the scooter shooting and that he was going to kill a member of the Gangster Disciples. Coleman recounted that Donegan told them he would steal a car to use for the planned shooting on Corliss and that he had a "jiggler" key that fit older model Toyotas. He also described that defendant and Donegan talked about getting "pay back" all day. Later that day, Coleman saw defendant driving an older gray Toyota and then saw him and Donegan cleaning out that car; Donegan put some guns in the car and defendant got in the driver's seat, Donegan got in the passenger seat, and Richardson, who had arrived to join them, got in the back seat as defendant

drove away. In addition, Coleman's statement to police and grand jury testimony detailed that, on the day after the Mosley murder, he again saw defendant and Donegan. At this time, both defendant and Donegan described to Coleman how the murder took place. Defendant explained how he and Donegan had driven around before going onto Corliss, that there were a lot of people outside, that they drove slowly down the block and that they were "blasting," or shooting at the people. Donegan described the same to Coleman and told him that they "got one last night. About time we got one." Donegan further discussed that he had wanted to do the shooting on foot, but could not because his foot had been injured in the scooter shooting incident, for which he had been seeking revenge.

¶ 13 Ultimately, the jury found defendant guilty of the first degree murder of Mosley, but found that the State had not proven that he personally discharged a firearm.

¶ 14 ANALYSIS

¶ 15 As noted, this appeal now comprises two issues for our review. We address each separately.

¶ 16 I. Admission of Hearsay Statement

¶ 17 The first issue defendant presents deals with the trial court's admission of a hearsay statement made by Donegan, his nontestifying codefendant. Citing *Bruton v. United States*, 391 U.S. 123 (1968), defendant contends that his rights to confrontation and a fair trial were violated with the admission of this statement, as it did not fit the conconspirator exception to the hearsay rule because, in his view, the particular statement was not made in furtherance of any conspiracy. However, based upon our review of the record, we ultimately disagree.

¶ 18 To be clear, the statement at issue–the only hearsay statement defendant now challenges on appeal–was made *by Donegan* to Coleman *in the presence of defendant* when the three men met *the day after* Mosley's murder, whereupon Donegan recounted that they "got one last night. About time we got one." Again, although Coleman denied any knowledge of the events during his trial testimony, an assistant State's Attorney published the statement he made to police and his grand jury testimony at defendant's trial. In these, Coleman stated that, the day after the murder, both defendant and Donegan described to him how the murder took place, with defendant explaining that he and Donegan drove around before going onto Corliss, that there were a lot of people outside, that they drove slowly down the block and that they shot at the people. Donegan, meanwhile, described the same, discussed that he had wanted to do the shooting on foot but could not because his foot had been injured during the scooter shooting incident for which he was seeking revenge, and then stated to Coleman during this conversation between the three men that they "got one last night. About time we got one." The trial court allowed this statement into evidence as against defendant pursuant to the coconspirator exception to the hearsay rule.

¶ 19 Before addressing the propriety of the admission of Donegan's hearsay statement, the State presents a threshold matter regarding waiver of this issue.[2] The State adamantly insists that

[2]The parties also dispute the applicable standard of review, with defendant insisting it is *de novo* because it involves solely a question of law (namely, whether his constitutional right to a fair trial was violated via its admission), and the State noting that the question of whether evidence is admissible pursuant to a hearsay exception is reviewed under an abuse of discretion standard. At its core, the primary issue here, as presented by defendant, calls us to examine whether the trial court properly admitted certain evidence--Donegan's statement. The admission of evidence, including within the context of hearsay, is in the sound discretion of the trial and will not be reversed absent abuse of that discretion. See *People v. Stechly*, 225 Ill. 2d 246, 312-13 (2007); accord *People v. Cookson*, 215 Ill. 2d 194, 204 (2005); see also *People v. Caffey*, 205

defendant cannot now challenge the admission of Donegan's statement because he requested that his jury hear it and, with this affirmative acquiescence to its presentation, this goes beyond mere waiver and not even plain error can be applied to save his contention on appeal. The State cites to portions of the record wherein defendant initially sought severance of his trial from Donegan's to which the trial court agreed, and states that the trial court then changed its mind; the State also points to moments before the presentation of both Crowder's and Coleman's testimonies wherein it characterizes defendant's colloquy with the court as acquiescence to the testimony of Donegan's statement. For his part, defendant, too, discusses these sections of the record and insists he has not waived the issue but, rather, made only a qualified waiver with respect to the statement's admission at his trial, as the trial court had already declared that the statement would be admitted, regardless of how it would be presented.

¶ 20 The answer regarding waiver here is a bit unclear and, in our view, there are pertinent portions of the record that both parties fail to cite. What we do know is this. Before trial began, defendant and Donegan filed motions to sever their trials from each other, and the trial court initially denied their motions. However, during pretrial hearing on motions *in limine*, the trial court revisited severance with the parties multiple times and in different contexts. For example, the parties first discussed with the trial court the admissibility of statements made by both defendant and codefendant the day before the murder. It is to this portion of the record that the

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Ill. 2d 52, 89-90 (2001) (declining to accept the defendant's argument that admission of hearsay statement should be reviewed *de novo* and noting that trial courts do not decide to admit evidence in isolation but, rather, base their rulings on specific circumstances of the case and not strictly upon rules of law).

parties cite on appeal; however, these statements are not at issue on appeal. Yet, with respect to these, the trial court found they were admissible as to defendant as coconspirator statements and it asked defendant why he believed severance was necessary. Defendant responded, along with Donegan, that severance was necessary because each defendant would be accusing the other of the murder. The trial court then stated it was going to "play it safe" and the cases would be "severed," as this "would be a safer way to go."

¶ 21 The discussion continued and moved to statements defendant made to Crowder in Donegan's presence before the murder, also not at issue in the instant appeal. Again, the trial court stated that these statements were admissible as to both defendants and told the parties that they were "going to get a separate jury." At this point, defendant, who reminded the trial court that he objected to the admission of all the cited hearsay statements, raised a foundational question with respect to the admission of statements made *after* the murder by Donegan, as any alleged conspiracy, in his view, would have ended by that time. The trial court heard discussion from all the parties, and then declared that the statements were admissible and that they were "coming in" because they were relevant, probative and provided necessary context for the jury.

¶ 22 After a brief discussion on the credibility of the witnesses and what could be said during opening argument, the record next reveals that Donegan honed in on the admissibility of hearsay statements made by both defendants *after* the murder. Donegan referred to statements both defendant and he made to Coleman "telling Coleman how the shooting occurred"–including the particular statement at issue herein. Immediately, the court informed Donegan that the statements were admissible. Donegan acknowledged this, but asked the trial court to specify how

they would be admitted at trial because he wanted "to have all of their conversations because it's all one, at the same time coming out at trial the same time on both cases." Seemingly in an effort to clear any confusion, the trial court presented what it viewed as "the way this would play out" for "just about every witness": the State would present its direct testimony, including the presentation of the statements at issue, in front of both juries; then defendant's jury would be excused while Donegan conducted his cross-examination; and Donegan's jury would likewise be excused while defendant conducted his cross-examination. With this established, the pretrial discussions as to the hearsay statements ended.

¶ 23 However, the discussions resumed on two more occasions during the trial, once before Crowder took the stand and again before Coleman took the stand. At a sidebar before Crowder was called, the trial court went on record to explain that, even though "the cases obviously have been separate from each other," the State would be eliciting testimony from Crowder that he had separate conversations–one with Donegan wherein Donegan allegedly implicated himself in the murder but did not mention defendant, and one with defendant wherein defendant allegedly implicated himself in the murder but did not mention Donegan. The court further explained that the State "wanted to explore" whether the defendants wanted to have their respective juries recused during those statements and, after "colloquy," the defendants "indicated they will waive any right they have to ask the jurors be excluded" since the defendants "want the jury to hear all of this." The court asked defendant's counsel and Donegan's counsel if this was correct, and they agreed. The court also asked defendant and Donegan themselves, and they, too, agreed.

¶ 24 Similarly, and more directly related to the instant appeal, immediately before Coleman

was called to testify, the issue was raised again, now in a different context. During a discussion, the trial court stated that Coleman's testimony would be admissible and relevant "to both juries" and that the "cross-examinations are going to be separate" in an effort to "honor the severance." The State wanted to make clear for the record, however, that the situation with Coleman's testimony was a bit different, as statements made *after* the murder would be elicited and that, unlike with Crowder's testimony, these statements consisted of defendant and Donegan speaking about each other and not just implicating themselves. The State was only concerned that this difference was put on record and wondered whether defendants would be using each other as alibis for their causes and how this would work with respect to the removal of the separate juries.

¶ 25 The court believed this was not an issue, noting that during their prior discussions on the statements' admissibility, "[b]oth sides agreed they were waiving any issue about that, about having the jury taken out during the direct testimony." The court then addressed defendants' counsels, asking them whether they "need[ed] the juries removed when they hear any of this?" Donegan's counsel stated that she did not like jurors removed "because they think you're hiding something" and, when the trial court asked if she would "rather not have the jury removed?," she responded that she would not and that she was "putting that on the record" as "a strategic point." The court turned to defendant's counsel, who agreed with Donegan's counsel and stated that he was taking "a similar strategic position." The court then conferred directly with Donegan and defendant, explaining to them that their counsels wanted both juries "to hear all the statements," including those where each allegedly referred to the other, and that they wanted both juries to be "present at the same time when that testimony is elicited." The court asked Donegan and

defendant if they agreed with their counsels' "strategy," and both responded "Yes." Both juries were present during the direct examination of Coleman, but then separated during each defendant's cross-examination of him. However, the hearsay statements at issue were not introduced during Coleman's testimony.

¶ 26 It was not until the testimony of an assistant State's Attorney (ASA) who published Coleman's handwritten statement to police that Donegan's hearsay statement at issue made to Coleman in defendant's presence of "We got one last night. About time we got one" was finally introduced at trial. Both juries were present during the State's direct examination of the ASA. Yet, the record then reveals that, at the time Donegan began his cross-examination of the ASA, defendant's jury was removed. Similarly, when defendant began his cross-examination of the ASA, Donegan's jury was removed.

¶ 27 Later, during hearing on defendant's and Donegan's posttrial motions, the State raised, among other things, that any argument by defendants that the admission of hearsay statements was improper was waived because, upon direct questioning by the court at the time the witnesses testified, both defendants and their counsels agreed that neither jury needed to be excused. Donegan's counsel, however, argued that, if the issued was waived at all, it was only a qualified waiver and only with respect to the method by which the hearsay statements would be presented to the juries. She explained that "the [c]ourt had already ruled that the State was going to be allowed to" introduce the hearsay statements, even after defendants had objected to them before trial. Accordingly, she stated that, "[f]or judicial time, rather than take up time, we said fine, Judge, then this shortcut can, in fact, be taken," and the defendants agreed the juries did not need

to be removed. The trial court never made a determination as to waiver.

¶ 28 We outline these portions of the record at length to provide a complete picture of what occurred here. Unfortunately, in this instance, it does not seem to clearly answer the question of waiver, at least not as the State presents it. The State's argument is that defendant waived the entire issue of the propriety of the admission of Donegan's post-murder hearsay statement because he "acquiesced" in its admission when, before Coleman testified, both defendants told the trial court they wanted the juries to hear all of the hearsay statements. But, from our review of the record, we do not believe this is an entirely accurate characterization of what occurred. Rather, the only thing that is clear is that defendant, from the outset of his trial, objected to the admission of the hearsay statements, including the statement at issue. And, he did so repeatedly. However, the court was adamant that all the hearsay statements were admissible. This never changed. What did change–what was discussed at various instances during the trial–was *how* the statements would be introduced into evidence. Before trial, the defendants sought severance, which the trial court denied. But then, the court seemingly changed its mind and thought severing the trials was the safer way to go. Accordingly, the court devised the method that, for virtually every witness, the State's direct examination would be conducted in front of both juries and each defendant's cross-examination would be conducted outside the presence of his codefendant's jury. In fact, this is how the majority of the trial proceeded.

¶ 29 When it came time to present the testimonies of Crowder and Coleman, the question of *how* the hearsay statements would be presented–not *whether* they would be presented, as this had already been solidified by the court–was revisited, as raised by the State. This time, defendants

made the strategic decision to have both juries present, fearing that to sever them might cause them to think they were not receiving all the information at trial. However, as the record shows, having both juries present at each defendant's cross-examination of these witnesses did not come to pass. Rather, their cross-examinations followed the same pattern originally set out by the trial court, with each defendant's jury removed during the other's cross-examination of Crowder and, more pertinently, of Coleman.

¶ 30 Yet, at the same time, the hearsay statements at issue here were not even introduced during Coleman's testimony, upon which the State focuses. They were not presented until published by the ASA who testified regarding Coleman's handwritten statement to police. The record reveals that the presentation of her testimony followed the trial court's pattern as well. Both juries were present during the State's direct examination of the ASA, at which time Donegan's post-murder hearsay statement was presented. But, when Donegan began his cross-examination of the ASA, defendant's jury was removed and, likewise, when defendant began his cross-examination of the ASA, Donegan's jury was removed.

¶ 31 All this, along with the comments made during review of defendants' posttrial motions, leads us to the conclusion that, unlike the State's characterization, defendant did not waive the issue of the propriety of the admission of Donegan's hearsay statement. Again, it was clear from the outset that the trial court found Donegan's hearsay statement admissible under the coconspirator exception to the hearsay rule and repeatedly stated that it (along with other hearsay statements) would be admitted at defendant's trial. The court never wavered from this position–for all intents and purposes, that statement was coming in. If anything was uncertain, it

was only *how* it was going to come in, *i.e.*, separately before the severed juries, or together on direct examination but with the two juries separated on cross-examination, or perhaps even together on direct examination and with the two juries present during both cross-examinations. In the end, however, the record seems to indicate that the pattern set by the court–presented to both juries on direct examination but separately discussed during each defendant's cross-examination outside the presence of the other jury–was followed throughout, even during the ASA's testimony bringing forth the hearsay statement at issue.

¶ 32 Accordingly, we do not join in the State's characterization of complete waiver and acquiescence, as it does not seem to us, based on the record, to be the case. After all, the admissibility of Donegan's post-murder hearsay statement was a major, and critical, issue from the beginning of defendant's cause, and one he knew he lost the moment the trial court ruled (and repeatedly so) that it was admissible, before trial even began. The only thing left was to challenge how the statement would be presented to the juries. As defendant points out, had the State believed that any offer to remove the juries meant that the court was reversing its substantive evidentiary ruling that the statement was admissible as against defendant, it would have vehemently opposed such an offer.

¶ 33 It is for these reasons that we are reluctant to find waiver or acquiescence of this critical issue and, as the State would have us, dismiss it without any substantive discussion. In addition to waiver, the parties also present arguments regarding the availability and applicability of plain error analysis, the concept of "qualified waiver," and whether defendant objected at trial and presented a specific-enough posttrial motion to properly preserve this issue for review. These are

all legally technical matters which, while they do have their important place in our law, in the instant cause, we feel should take a back seat. This is because to call the facts of this cause and its procedural posture atypical would be an understatement. Thus, while we acknowledge and appreciate the parties' references to all these procedural concepts in their briefs, we note, as we have infinite times in our state's jurisprudence, that waiver limits the parties' ability to raise arguments, but not our right to entertain them. See *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). Therefore, just as defendant and the State have both chosen to address the merits of this appeal in their briefs, and because of the weightiness of the issue at hand and the facts presented, we, too, choose to do so now.

¶ 34 With that said, however, and based upon our review of the record, we do not find any error on the part of the trial court in admitting as against defendant Donegan's post-murder hearsay statement made to Coleman in defendant's presence. See, *e.g.*, *People v. Simon*, 2011 IL App (1st) 091197, ¶ 89 (a defendant cannot succeed in his claim of error unless there is a primary determination that such error occurred).

¶ 35 As noted, the trial court admitted Donegan's hearsay statement under the coconspirator exception to the hearsay rule. Pursuant to that exception, even though his statement is an out-of-court one offered to prove the truth of the matter asserted, any declaration by one coconspirator is admissible against all coconspirators where his declaration was made during the course, and in furtherance, of the conspiracy. See *Kliner*, 185 Ill. 2d at 140-41; accord *People v. Denson*, 2013 IL App (2d) 110652, ¶ 11. Statements made in furtherance of a conspiracy include those that advise, encourage, aid or abet its perpetration. See *Kliner*, 185 Ill. 2d at 141. Moreover, the

coconspirator exception is not limited solely to statements made between coconspirators, but includes any statement made by a coconspirator to anyone else. See *People v. Redeaux*, 355 Ill. App. 3d 302, 305 (2005). And, statements that are made after a crime may also fall under this exception. See *Kliner*, 185 Ill. 2d at 142. However, to be admissible, these after-crime statements must have been made in an effort to conceal the conspiracy. See *Kliner*, 185 Ill. 2d at 142. The coconspirator exception does not extend to a statement which only narrates what happened in the past and which does not otherwise promote any objective of the conspiracy. See *Kliner*, 185 Ill. 2d at 141; accord *People v. Coleman*, 399 Ill. App. 3d 1198, 1203 (2010).

¶ 36 The debate ensues, then, as to whether Donegan's statement to Coleman made after the Mosley murder that they "got one last night. About time we got one," accompanied by his description of how the murder occurred, was made in an effort to conceal the conspiracy after the fact, thereby making it admissible under the coconspirator exception to the hearsay rule, or whether it merely provided a narrative of what happened, which would make it inadmissible under this exception. Naturally, the State argues the former, explaining that the statement was made "in furtherance of the larger conspiracy, *i.e.*, the ongoing war" between the rival gangs.[3] The State reasons that Donegan's statement was made during the pendency of the gang war and had the effect of advising and encouraging the perpetration of Mosley's murder and inciting other

[3]We note for the record that, in reviewing the prior decision in this cause, the Illinois Supreme court referenced "a continuing gang war between the Gangster Disciples and the Four Corner Hustlers," as well as "[e]vidence of gang membership," when it concluded that the scooter shooting incident was so closely related to Mosley's murder that it was properly admissible to provide a context and motive for the jury. See *Pikes*, 2013 IL 115171, ¶ 24. This would support the State's assertion here that the conspiracy at issue was not simply Mosley's murder, but the broader context of the gang war.

acts of revenge and retaliation.[4] Defendant, meanwhile, disputes the idea that the concept of a conspiracy here can extend so broadly to include the infinite grievances involved in this, or any, gang war, particularly where the conspiracy, as argued herein, was limited to Mosley's murder itself. Defendant further points out that Donegan's statement at issue, as combined with his description of the events surrounding the commission of Mosley's murder, was only a narrative, merely reciting, and perhaps at most bragging about, what already happened, but did not promote, aid or conceal a conspiracy.

¶ 37 We believe defendant makes a credible point. From our view, the cited statement made by Donegan to Coleman after Mosley's murder does not fit the coconspirator exception to the hearsay rule. Looking at the statement itself–"got one last night. About time we got one"–it does not advise, encourage, aid or abet Mosley's murder. Again, it was made after the murder took place. Moreover, the statement does not conceal either the murder or any conspiracy, nor does it promote or incite any further retaliation or action of revenge. Rather, it merely recites what happened–members of the Four Corner Hustlers (Donegan, defendant and Richardson) "got one," or killed a member of the Gangster Disciples the prior evening, with the further commentary that it was about time that this revenge for the scooter shooting incident had finally occurred. In fact, the statement at issue was admitted into evidence in conjunction with a description by Donegan to Coleman about how the murder took place, namely, that he and defendant drove around before going onto Corliss into Gangster Disciple territory, that they drove slowly down the block, that

[4]Evidence was presented during trial that defendant was shot sometime after Mosley's murder, allegedly as retaliation for that event.

they shot at people outside, and that Donegan had wanted to do the shooting on foot but could not due to the injury he sustained days before in the scooter shooting incident for which he was seeking revenge. There is nothing more that can be read into Donegan's statement. Essentially, his statement, made after the crime occurred, was not made in furtherance of a conspiracy and was likewise not made in an effort to conceal the crime; it was only a recitation of the crime itself. As such, we would find that the Donegan's statement at issue here should not have been admitted under the coconspirator exception to the hearsay rule.

¶ 38 However, this is, unfortunately, where our agreement with defendant ends.

¶ 39 It is well established that our court reviews the judgment of the trial court, not its reasoning. See *People v. Rajagopal*, 381 Ill. App. 3d 326, 329 (2008), citing *City of Chicago v. Holland*, 206 Ill. 2d 480, 491-92 (2003); accord *People v. Jones*, 2015 IL App (1st) 133123, ¶ 33. Accordingly, we may affirm the trial court's judgment below on any basis we find supported by the record. See *Jones*, 2015 IL App (1st) 133123, ¶ 33; see also *Rajagopal*, 381 Ill. App. 3d at 329 (this is true even if that basis was explicitly rejected by the trial court).

¶ 40 There is another exception to the hearsay rule which we find very pertinent here: the tacit admission rule. Under this doctrine, otherwise inadmissible hearsay statements may be introduced if they constitute an admission by a defendant, either express or tacit. See *People v. Soto*, 342 Ill. App. 3d 1005, 1013 (2003). A hearsay statement meets this rule's requirements when it is incriminating in nature, it is made in the presence and hearing of an accused, and it is not denied, contradicted or objected to by him. See *Soto*, 342 Ill. App. 3d at 1013, citing *People v. Childrous*, 196 Ill. App. 3d 38, 53 (1990). At this point, both the statement and the fact of the

defendant's failure to deny it are admissible in a criminal trial as evidence of his agreement in its truth. See *Soto*, 342 Ill. App. 3d at 1013, citing *Childrous*, 196 Ill. App. 3d at 53 (the defendant's assent may be manifested by his silence, or by an evasive, equivocal or unresponsive reply). The necessary elements for admissibility under the tacit admission rule are, first, that the defendant heard the incriminating statement, second, that the defendant had an opportunity to reply and remained silent, and third, that the incriminating statement was such that the natural reaction of an innocent person would be to deny it. See *Soto*, 342 Ill. App. 3d at 1013, citing *People v. Goswami*, 237 Ill. App. 3d 532, 536 (1992). The statement need not be accusatory, as long as it is evident that the defendant is " 'being painted or portrayed as a participant in illegal and prohibited activity,' " which an innocent person would otherwise normally and naturally deny. *Soto*, 342 Ill. App. 3d at 1013 (quoting *People v. Miller*, 128 Ill. App. 3d 574, 584 (1984)).

¶ 41 Here, in his handwritten statement to police, Coleman stated that he saw defendant and Donegan together the day after Mosley's murder. This group of three had a conversation at that time, wherein defendant made several statements to Coleman about the murder–statements that are not at issue herein. Yet, it was also during this conversation between the three men when, according to Coleman, Donegan also talked about the murder and made the hearsay statement at issue that they "got one last night. About time we got one." Coleman further stated that Donegan described, also in defendant's presence, the circumstances of the shooting, talking about how he and defendant rode around in the car and saw a large group of Gangster Disciples, that defendant drove slowly down the block as they approached them, and that he shot at the group from the window of the car.

¶ 42 From this, we find that Donegan's statement to Coleman describing defendant's role in Mosley's murder satisfies the requirements of the tacit admission rule. First, defendant was present during the conversation. Coleman made clear in his handwritten statement that he met with defendant and Donegan the day after Mosley's murder and that the three had a conversation together; defendant spoke first about what had happened, and then Donegan chimed in with his own description regarding their preparation for the drive-by shooting and the murder itself, accompanied by his hearsay statement at issue and with an expression of his desire to commit a shooting in retaliation for the scooter shooting incident that had resulted in an injury to his foot. Second, upon hearing Donegan's statement and recount of the events, defendant obviously had an opportunity to reply during the conversation among the three men, but he remained silent. In fact, not only did defendant not deny Donegan's statement at issue, but he actually confirmed it with his own description of the shooting to Coleman during this same conversation, which was an identical recount of Donegan's version.[5] And, third, Donegan's statement that they "got one last night. About time we got one" clearly was such that, had it not been true or had defendant not participated in the Mosley shooting, the natural reaction of an innocent person would be to deny such an accusation. Undoubtedly, Donegan's statement at issue to Coleman describing defendant's role in Mosley's murder satisfied the requirements of the tacit admission exception to the hearsay rule.

[5]Again, defendant does not challenge the admissibility of statements he made to Coleman during this same conversation, wherein he provided a recount of the murder similar to that of Donegan; rather, for purposes of this appeal, and as we have noted throughout, defendant has limited his challenge only to Donegan's statement that they "got one last night. About time we got one."

¶ 43 Therefore, while we find that Donegan's statement at issue here was not properly admitted under the coconspirator exception to the hearsay rule, it does, indeed, comprise a tacit admission. Accordingly, and upon this basis, which we determine is overwhelmingly supported by the record, we hold that, ultimately, there was no error in the admission of Donegan's hearsay statement into evidence as against defendant at his trial. See *Jones*, 2015 IL App (1st) 133123, ¶ 33; *Rajagopal*, 381 Ill. App. 3d at 329.

¶ 44 As a final matter for the record with respect to this issue, we noted at the outset that defendant couched this contention on appeal in the constitutional context of his right to confrontation, due process and a fair trial. In support, he alleged a *Bruton* violation, which prohibits the introduction of testimony that a nontestifying codefendant implicated the defendant in a crime. See 391 U.S. 123. Defendant is correct in his citation to *Bruton*, as well as his recitation of the legal principles it espouses. And, we have no problem with *Bruton*'s holding, nor with its viability or applicability within our current legal system.

¶ 45 However, pursuant to our discussion above, we find, contrary to defendant's assertion, that *Bruton* and any constitutional concerns are simply inapplicable to the instant cause. Our courts have specifically held that, if a hearsay statement at issue meets the requirements of the tacit admission rule, its admission, along with evidence of the defendant's lack of denial, are not a violation of the defendant's right to confrontation. See *Soto*, 342 Ill. App. 3d at 1013; accord *Goswami*, 237 Ill. App. 3d at 536. Rather, and as we noted above, "[w]hen a statement that is incriminating in nature is made in the presence and hearing of an accused and such statement is not denied, contradicted, or objected to by him, both the statement and the fact of his failure to

deny it are admissible in a criminal trial as evidence of the defendant's agreement in its truth." *Soto*, 342 Ill. App. 3d at 1013 (quoting *Childrous*, 196 Ill. App. 3d at 53). Therefore, having found that Donegan's statement met the requirements of the tacit admission rule, its admission does not comprise a violation of defendant's constitutional rights here. See *Soto*, 342 Ill. App. 3d at 1013; accord *Goswami*, 237 Ill. App. 3d at 536. Accordingly, we need not address his *Bruton* allegation and, thus, our discussion of this issue is complete.

¶ 46 II. Admission of Handwritten Statements

¶ 47 Defendant's second, and last, contention on appeal is that the trial court denied him a fair trial by allowing the State to introduce "prior inconsistent statements" made by Crowder and Coleman, namely, their handwritten statements to police and their grand jury testimony, both of which they recanted at trial. First, defendant asserts that these were inadmissible, and improperly admitted, as substantive evidence in violation of section 115-10.1 of the Illinois Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 2006)). Next, defendant insists that the admission of these statements violated common law principles concerning prior consistent statements. Finally, defendant claims that the statements were, above all, cumulative in nature and should have been excluded because they merely repeated that which was already in evidence. He contends that, because of all of this, the prejudicial effect of the statements' admission substantially outweighed any probative value they might have had, thereby requiring reversal of his conviction and remand for a new trial. We disagree.

¶ 48 Again, as a threshold matter, there is a waiver argument here. This time, defendant concedes that he has forfeited this issue for our review because he "failed to preserve this

objection to the improper introduction of Crowder's and Coleman's prior statements." However, he urges us to consider this issue as one of plain error (arguing that the evidence against him was close and that this error affected the integrity of his trial), or of ineffective assistance of counsel (arguing is was no conceivable strategy for agreeing to evidence that is improperly admitted). Briefly, with respect to plain error, we note that the burden under both prongs of that analysis is squarely upon defendant. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005), and *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (under first prong, he must prove there was plain error and the evidence was so closely balanced that this error alone severely threatened to tip the scales of justice against him; under second prong, he must prove there was plain error and the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process). However, before a plain error analysis may be undertaken, the defendant must show that an error occurred, for, absent error, there can be no plain error. See *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010), citing *Herron*, 215 Ill. 2d at 187; see also *Piatkowski*, 225 Ill. 2d 551, 565 (2007) ("the first step is to determine whether error occurred"). Similarly, with respect to ineffective assistance of counsel, the defendant again faces a two-prong burden, as he is required to establish both that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *People v. Edwards*, 195 Ill. 2d 142, 162 (2001), and *People v. Simmons*, 342 Ill. App. 3d 185, 191 (2003) (the defendant must overcome the presumption that counsel's action was sound trial strategy and show probability sufficient to undermine confidence in the outcome of his trial). However, just as with plain error, if it is

determined the defendant did not suffer prejudice, whether trial counsel's performance was constitutionally deficient need not be decided and our discussion ends there. See *People v. Brooks*, 187 Ill. 2d 91, 137 (1999) (in such instance, examination of performance prong is not warranted).

¶ 49 Because, as we explain below, there was no error in the instant cause in the trial court's admission of the prior statements at issue, we find no plain error here. Moreover, as the situation at hand does not amount to ineffective counsel resulting in prejudice to defendant, we likewise find no merit in preserving this issue for review under an ineffective assistance of counsel claim.

¶ 50 To clarify, defendant challenges the admission of Crowder's and Coleman's handwritten statements to police, as published to the jury via ASAs at defendant's trial. He does not, however, challenge the admission of Crowder's and Coleman's grand jury testimony. As noted, Crowder and Coleman testified at trial, but did so in direct contradiction to their prior handwritten statements, denying any gang membership or knowledge of the Mosley murder and stating that they made their statements to police under duress or in response to promises of leniency regarding other crimes. However, Crowder's prior statement to police and his grand jury testimony, which were consistent with each other, described that he saw defendant on the day of Mosley's murder, that defendant asked him if he wanted to "go do business" on Corliss, that he soon after heard gunshots coming from there, and that he next saw defendant in the fall of 2007 whereupon defendant complained, " 'Why ain't nobody keeping going over there, finishing what he had left off with,' " which Crowder knew referred to Mosley's murder. Similarly, Coleman's prior statement to police and his grand jury testimony, which were also consistent with each

other, described that he saw defendant on the day of Mosley's murder, that defendant was talking about getting "pay back" all day, and that defendant drove himself, Donegan and Richardson away in an older Toyota. Coleman also described in his handwritten statement and grand jury testimony that he later saw defendant on the day after the Mosley murder, whereupon defendant explained how he and Donegan had driven around before going onto Corliss, that there were a lot of people outside, that they drove slowly down the block and that they were "blasting," or shooting at these people.

¶ 51 Defendant's first assertion is that Crowder's and Coleman's prior handwritten statements to police, which were consistent with each other but inconsistent with their trial testimony, were inadmissible and improperly admitted as substantive evidence in violation of section 115-10.1. Prior inconsistent statements from a testifying witness may be admitted to impeach the witness' credibility. However, section 115-10.1 also allows prior inconsistent statements not just for impeachment purposes but as substantive evidence as long as the witness is subject to cross-examination and the prior statements were either made under oath at another proceeding or narrate, describe or explain an event or condition of which the witness had personal knowledge and which are proved to have been written or signed by him. See 725 ILCS 5/115-10.1 (West 2006). The witness must actually have seen the events which are the subject of the statements, and statements related to the witness by a third party do not satisfy the personal knowledge requirement. See *People v. McCarter*, 385 Ill. App. 3d 919, 930 (2008); accord *People v. Morgason*, 311 Ill. App. 3d 1005, 1011 (2000) (testifying witness must have observed the events being spoken of rather than hearing about them afterwards).

¶ 52 Defendant insists that, while a good portion of Crowder's and Coleman's handwritten statements to police were substantively admissible under section 115-10.1, certain parts were not, specifically, those wherein Crowder and Coleman recount defendant's description of the Mosley shooting and his participation in it, for which they were not present. The State concedes this point; it notes that most of the content of their statements was properly admitted under section 115-10.1 as substantive evidence because it concerned events which they personally witnessed (*i.e.*, defendant's statements of intent to retaliate, his actions with the car, and soon after hearing shots from Corliss), but admits that the portion concerning the description of the shooting defendant provided after it occurred was inadmissible as substantive evidence.

¶ 53 However, as the State points out, the jury was clearly instructed by the trial court regarding prior inconsistent statements and their admission as substantive evidence versus impeachment evidence. In fact, the record reveals that the court gave a jury instruction that directly and explicitly tracked the language of section 115-10.1 and informed the jury that, while a witness' prior statement, inconsistent with his trial testimony, "ordinarily may be considered *** only for the limited purpose of deciding the weight to be given his testimony," they "may consider a witness' earlier inconsistent statement as evidence without this limitation" if section 115-10.1's factors were met. The court provided the jury with these factors and cautioned them that, in making this determination, they "should consider all the circumstances under which [the witness' prior statements were] made." It is well established that a jury is presumed to follow the instructions that the trial court gives it. See *People v. Glasper*, 234 Ill. 2d 173, 201 (2009), citing *People v. Taylor*, 166 Ill. 2d 414, 438 (1995); accord *People v. McGee*, 2015 IL App (1st)

130367, ¶ 72. Defendant cites to nothing in the record to prove that the jury in his cause considered all of Crowder's and Coleman's handwritten statements substantively. To the contrary, it is just as conceivable, and, in fact, legally presumptive, that the jury properly considered the different portions of the statements appropriately–those based on Crowder's and Coleman's personal knowledge substantively under section 115-10.1 and those not based on their personal knowledge only as impeachment evidence. Without more than mere speculation from defendant, and in light of the clear fact that the jury was properly and explicitly instructed with respect to their consideration of this very evidence, we cannot say that any error occurred here. See *McGee*, 2015 IL App (1st) 130367, ¶ 72, citing *People v. Garcia*, 231 Ill. App. 3d 460, 469 (1992) (jury instructions specific to cited issue tend to cure any potential error resultant from that issue).

¶ 54 Even if we were to assume that the jury erroneously considered the entirety of Crowder's and Coleman's handwritten statements substantively, which we do not believe occurred, we find that no prejudice resulted from such consideration. This is for two reasons. First, and again, defendant attacks only the admission of Crowder's and Coleman's prior handwritten statements to police. He does not attack the admission at trial of their grand jury testimony. Having chosen not to do so, defendant concedes that the admission of their grand jury testimony was proper. Upon examination, Crowder's and Coleman's handwritten statements to police were virtually identical to their grand jury testimony. In both arenas, Crowder and Coleman described the same occurrences with respect to defendant, his actions surrounding Mosley's murder and his statements about his participation in, and retaliatory basis for, that crime. Crowder’s and

Coleman's grand jury testimony was admitted substantively at trial. Thus, there can be no prejudice here–in challenging the admission of Crowder's and Coleman's handwritten statements to police, he is attempting to challenge evidence that had already been properly admitted through grand jury testimony. See *People v. Wilson*, 302 Ill. App. 3d 499, 511-12 (1998) (where same evidence was otherwise admissible through grand jury testimony, error in admission of cited evidence, if any, would only be harmless).

¶ 55 Second, and more significant, defendant is raising an argument that our courts have consistently rejected. That is, the essence of his claim here is that it was improper for the trial court to admit Crowder's and Coleman's handwritten statements to police and their grand jury testimony because the admission of both of these resulted in the admission of prior consistent statements which improperly bolstered those witnesses' credibility. Such an assertion, however, has no legal basis. See *People v. White*, 2011 IL App (1st) 092852, ¶¶ 49-54; *People v. Johnson*, 385 Ill. App. 3d 585, 607-08 (2008); see also *People v. Santiago*, 409 Ill. App. 3d 927 (2011); *People v. Perry*, 2011 IL App (1st) 081228; *People v. Maldonado*, 398 Ill. App. 3d 401 (2010). Simply put, the rules and concerns that apply to prior statements that are consistent with a witness' trial testimony are not raised when a court is dealing with prior statements that are inconsistent with a witness' trial testimony. See *Johnson*, 385 Ill. App. 3d at 608 (discussing that defendants often confuse the two); accord *White*, 2011 IL App (1st) 092852, ¶¶ 51-53. Our courts have reiterated that these two types of statements "stand on very different evidentiary ground," with the former serving "no purpose other than to bolster trial testimony," but with the latter being "a vital tool to challenge witness credibility by contradicting and discrediting trial

testimony." *White*, 2011 IL App (1st) 092852, ¶¶ 51-53. Thus, whereas prior consistent statements should be limited in their repetition, the admission of prior inconsistent statements are critical because they prevent turncoat witnesses from merely denying an earlier statement when it was made under circumstances indicating it was likely true. See *White*, 2011 IL App (1st) 092852, ¶¶ 51-53.

¶ 56 The trial court here was presented with this classic situation. Crowder and Coleman were turncoat witnesses, taking the stand and denying their earlier handwritten statements to police and their grand jury testimony in their entirety. Notably, while these prior statements were consistent with each other, they were inconsistent with their trial testimony–the true measure at play here. Thus, in determining whether to admit this evidence, the trial court was not confronted with the admission of prior consistent statements which should be limited, but, rather, with prior *inconsistent* statements which do not evoke the same concerns. As such, and particularly in the instant cause, Crowder's and Coleman's prior inconsistent statements were vital. Crowder spoke to defendant immediately before Mosley's murder, with defendant asking him if he wanted to "go do business" on Corliss, which Crowder knew meant shoot at rival gang members; soon after defendant left him, Crowder heard gunshots coming from Corliss. In addition, Crowder saw defendant months later, whereupon defendant complained that no one had capitalized on "what he had left off with," namely, Mosley's murder. Likewise, Coleman also saw defendant on the day of the crime and defendant expressed to him his desire to get "pay back" for prior events. Coleman then saw him drive away with Donegan and Richardson in a car that matched the one used in Mosley's murder. And, Coleman saw defendant the next day,

whereupon defendant described the shooting and his participation in it. Moreover, Crowder's and Coleman's credibility was crucial; again, they rejected everything they had said before and told the jury at trial that they had been harassed by authorities to tell lies. Accordingly, their prior inconsistent statements were a vital tool in the challenge of their credibility by contradicting and discrediting their trial testimony. Ultimately, this cause mirrors *Johnson, White*, *Santiago*, *Perry* and *Maldonado*, and merits the same result. The trial court's decision to admit both Crowder's and Coleman's handwritten statements to police and their grand jury testimony, which comprised prior statements inconsistent with their trial testimony, was well within its discretion and in no way erroneous.

¶ 57 Defendant acknowledges that his argument has been repeatedly rejected by our courts. However, he insists that no one has ever considered the admissibility of prior inconsistent statements under section 115-10.1 in light of *People v. Dabbs*, 239 Ill. 2d 277 (2010), a case he argues defeats *Johnson*, *White* and its progeny. Defendant is wholly incorrect. *Dabbs* merely stands for the proposition that common law principles concerning the admission of evidence must still be considered even when evidence is admitted via a codified statutory provision, subjecting evidentiary issues to more than one "rule." See *Dabbs*, 239 Ill. 2d at 289. The defendant in *Dabbs* argued that a statute that allowed for the admission of his other acts of domestic violence did so without regard to common law evidence considerations including relevance, prejudice and probative value. See *Dabbs*, 239 Ill. 2d at 288. The *Dabbs* court disagreed, concluding that neither the statute nor the common law abrogated the other; instead, it noted a "unified scheme of rules of evidence," wherein all these principles work together in

determining admissibility. See *Dabbs*, 239 Ill. 2d at 290-91.

¶ 58 Defendant reads *Dabbs* as support for his assertion that, because a prior statement that has been substantively admitted under section 115-10.1 becomes the functional equivalent of trial testimony, the admission of more than one nearly identical prior statement violates the common law prohibition against prior consistent statements. Defendant, however, completely misses the mark. As we discussed above, our courts have made a critical distinction between prior consistent statements and prior inconsistent statements, and have discussed the usefulness, dangers and admissibility of each. His reading of *Dabbs* wholly ignores this. Moreover, while *Dabbs* was decided before *Johnson*, *Johnson*'s progeny, which was decided after *Dabbs*, has had a long and critical impact on our jurisprudence, one that has been consistently and repeatedly reaffirmed. See, *e.g.*, *White*, 2011 IL App (1st) 092852; *Santiago*, 409 Ill. App. 3d 927 (2011); *Perry*, 2011 IL App (1st) 081228; *Maldonado*, 398 Ill. App. 3d 401 (2010). This is particularly true of *White*, which specifically recognized the "inherent tension" between the admission of multiple prior inconsistent statements as substantive evidence under section 115-10.1 and the rule barring prior consistent statements that bolster trial testimony, but rejected the argument that this common law rule or its " 'underlying rationale' " can easily be "grafted" onto the rules allowing for the admission of prior consistent statements. *White*, 2011 IL App (1st) 092852, ¶ 51 (the former does not justify obstructing the operation of section 115-10.1). Contrary to his insistence, *Dabbs* does not provide a new context in which to consider this issue, as the admission of multiple section 115-10.1 statements, each inconsistent with a witness' trial testimony, does not nullify the common law rule against the admission of prior consistent

statements nor does it violate the principles announced in *Dabbs*.

¶ 59 In a final attempt to argue their inadmissibility, defendant contends that, regardless of and apart from all of this, Crowder's and Coleman's handwritten statements to police should have been excluded as cumulative evidence since they were merely repetitive of their grand jury testimony and, thus, the prejudicial effect of their admission substantially outweighed their probative value. However, defendant's argument is, again, not new; the defendants in *White* argued the exact same point as a last-ditch effort in the exact same context before this very court. See *White*, 2011 IL App (1st) 092852, ¶ 43. There, we acknowledged that parties should refrain from introducing needlessly repetitive statements from a witness. See *White*, 2011 IL App (1st) 092852, ¶ 44. However, we were quick to point out that the prior inconsistent statements at issue were not " merely cumulative" or needlessly repetitive; rather, they bore upon the witness' credibility regarding the events at issue. *White*, 2011 IL App (1st) 092852, ¶ 44. And, we further noted that, even if the second inconsistent statement could be considered unnecessarily repetitive, the defendants failed to cite to any case where a court found that the prejudicial effect of a substantively admitted prior inconsistent statement substantially outweighed its probative value merely because it was repetitive of a previously admitted prior statement. See *White*, 2011 IL App (1st) 092852, ¶ 44. In fact, we pointed out that our court "has found that even when the State presented a prior inconsistent statement that was 'unnecessarily repetitive' of another, the repetition did not rise to the level of prejudice." *White*, 2011 IL App (1st) 092852, ¶ 44, citing *People v. Fields*, 285 Ill. App. 3d 1020, 1028 (1996).

¶ 60 The same is true here. The presentation of Crowder's and Coleman's handwritten

statements to police were not, contrary to defendant's assertion, merely cumulative of what was already before the jury. True, their grand jury testimony, which was similar to their handwritten statements, was also admitted into evidence. However, it was these handwritten statements to police that initiated the entire investigation of Mosley's murder and defendant's involvement therein. The jury in defendant's trial was tasked with the duty of assessing not only Crowder's and Coleman's credibility as the only witnesses who spoke with defendant immediately before and after the murder, but also Crowder's and Coleman's assertions on the stand that they had been harassed and/or promised leniency by authorities, allegedly causing them not to tell the truth but only what these authorities wanted to hear. Crowder's and Coleman's claims of what happened near Corliss that day were critical, and the jury had to assess what happened via their recounting of the events. Accordingly, we do not agree with defendant that Crowder's and Coleman's handwritten statements to police added nothing to what was already before the jury at trial. And, even if we did agree, defendant, just as the defendants in *White*, points to no precedent holding that the prejudicial effect of a substantively admitted prior inconsistent statement substantially outweighs its probative value simply because it is repetitive of a previously admitted prior statement. Just as we held in *White*, the very opposite is true and there is no such prejudice. See also *People v. Harvey*, 366 Ill. App. 3d 910, 913-15 (2006) (evidence was not "cumulative" when trial court admitted as prior inconsistent statements both grand jury testimony and prior written statements for each witness).

¶ 61 Ultimately, not only does defendant not raise any new argument here, he cannot demonstrate any prohibition against the admission of more than one prior inconsistent statement.

To the contrary, our courts have specifically held that there is none. Rather, it is for the trial court to determine in its sound discretion how many such statements should be admitted into evidence. Based upon our review of the instant cause, we find that the trial court here did not err in admitting, as substantive evidence, both Crowder's and Coleman's handwritten statements to police and their grand jury testimony, which properly constituted prior inconsistent, not prior consistent, statements and which were in no way cumulative. Accordingly, without any such error, we find, in turn, no plain error here nor any ineffective assistance of counsel in failing to object to their admission, and defendant's claims regarding Crowder's and Coleman's statements have no merit.

¶ 62 CONCLUSION

¶ 63 Accordingly, for all the foregoing reasons, and based upon remand by our state supreme court, we now affirm the judgment of the trial court.

¶ 64 Affirmed.