2016 IL App (1st) 132736-U
No. 1-13-2736
March 1, 2016
Modified Upon Denial of Rehearing May 17, 2016

SECOND DIVISION

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

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CR 20466
	)	
KEITH PEARSON,	)	The Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Objections to minor misstatements in the prosecutor's closing argument would not have changed the result of the trial. Defense counsel did not provide ineffective assistance by failing to preserve for review the issue of whether the trial court erred by allowing a witness's out of court statements into evidence, because the evidence likely had no effect on the result of the trial.

¶ 2 A jury found Keith Pearson guilty of first degree murder. Keith contends that the prosecutor's factual misstatements in closing argument deprived him of a fair trial, the trial

court erred when it admitted out of court statements into evidence, and defense counsel provided ineffective assistance. We affirm.

¶ 3 BACKGROUND

¶ 4 On July 6, 2009, Kelly Pearson drove a car owned by his girlfriend, Veronica Estudillo, accompanied by Kelly's twin brother, Keith Pearson, and their friend Terrence Binion. Near the intersection of Jackson Boulevard and St. Louis Avenue, a car pulled up next to Estudillo's car, and a gun from the passing car discharged nine or ten bullets into Estudillo's car, killing Binion and injuring Kelly.

¶ 5 On October 7, 2009, around 8 p.m., Kelly drove Estudillo's car, with Keith as his passenger, through the intersection of Madison Street and Homan Avenue. At a bus stop near that intersection stood four persons: Terrance Burdine, Michael Morris, Natasha Howliet, and another man Burdine and Morris did not know. Kelly turned to head north on Homan, and Keith fired several shots out of the passenger side window towards the bus stop. One bullet hit and killed Howliet.

¶ 6 Police officers obtained statements about the shooting from Burdine, Morris, and Keith's cousin, Curtis Pearson. An assistant State's Attorney wrote out statements that Burdine, Morris and Curtis signed. Keith made a videorecorded statement at the police station admitting that he shot towards the bus stop. Keith and Kelly both admitted that they belonged to the Vice Lords street gang. A grand jury indicted Keith and Kelly for murder. The trial court severed the cases and conducted separate simultaneous trials before two separate juries on the charges against Keith and Kelly.

¶ 7 Keith testified at his trial, and he admitted that he fired the shot that killed Howliet. He claimed that he fired the shot in self-defense. Thus, the jury for Keith's case needed to decide only whether the evidence showed beyond a reasonable doubt that Keith did not act in self-defense when he fired the shots in the direction of the bus stop.

¶ 8 Burdine testified that on October 7, 2009, he walked with his friend Morris on Madison. When they reached Homan, Morris went to talk to Howliet, who was standing at the bus stop. Burdine saw Estudillo's car turn left to head north on Homan. He heard shots, but he did not see the shooter. Morris took off running after the shooting stopped. Burdine did not see what happened to the other man at the bus stop, a man he did not recognize.

¶ 9 Burdine admitted that he looked at a photo array at the police station after the shooting. He admitted that he signed a statement at the police station, but he testified that he did not make several of the statements attributed to him in the written statement presented at trial.

¶ 10 Morris testified that he associated with members of the New Breed gang. Morris said that the New Breeds had no dispute with the Vice Lords. Morris's testimony otherwise accorded with Burdine's. Like Burdine, Morris saw Estudillo's car turn slowly, and then he heard gunshots. Morris heard Howliet say a bullet hit her. When the shooting stopped, Morris ran for help. He did not see the shooter or anyone who rode in Estudillo's car. Morris testified that he had seen Estudillo's car "driving past Homan" around 3 p.m. the same day, several hours before the shooting.

¶ 11 Morris admitted that he signed a statement at the police station, but he denied that the written statement accurately recorded what he said. Morris also admitted that he testified

before the grand jury that indicted Keith and Kelly, but he said that the transcript of grand jury proceedings did not accurately record his testimony.

¶ 12 The court permitted a witness for the prosecution to read into evidence the handwritten statements Burdine and Morris signed, along with Morris's grand jury testimony.

¶ 13 According to Burdine's statement, Estudillo's car almost stopped as it went through the intersection at Madison and Homan. Burdine said he saw two men who looked alike in the car, looking toward the bus stop. He then saw the gun in the car's window, and he saw the shots fired in the direction of the bus stop.

¶ 14 According to Morris's statement, Estudillo's car slowed down in the intersection at Madison and Homan. Morris saw the twins in the car, and then he saw the gun discharge. A police officer also testified that Morris told him that he saw Estudillo's car slow down in the intersection, and he saw the twins looking in his direction and towards Burdine right before the shooting started.

¶ 15 Morris's grand jury testimony effectively repeated his written statement. In addition to the repeated statements, Morris also told the grand jury that he noticed standing at the bus stop a man he did not recognize. The grand jury transcript included no question about where that man went at the time of the shooting.

¶ 16 Detective Donald Hill testified that, based on a recording of a call to 911, he concluded that Eric Lockheart had been at the bus stop at Madison and Homan at the time of the shooting. Hill testified that he interviewed Lockheart, but Lockheart provided no useful information about the shooting. Lockheart did not testify.

¶ 17 The prosecution called Curtis as a witness. Curtis told the court that he would not testify against his cousins. To each of a long series of questions, Curtis answered, "I refuse." When asked whether, at the police station, he had identified an exhibit as a photograph of Kelly, Curtis answered, "I refuse. No, I didn't." To a similar question concerning a photograph of Keith, Curtis answered, "I refuse. I don't know what you're talking about."

¶ 18 The prosecutor asked Curtis if he had appeared before a grand jury on October 15, 2009. Curtis answered, "I don't know what you [are] talking about." The prosecutor purported to read part of a transcript of statements ascribed to Curtis, then asked whether Curtis had made that statement. Curtis said, "I refuse. I don't know what you [are] talking about." The prosecutor then asked similar questions about what Curtis allegedly said to police officers, eliciting the same response. To all other questions, Curtis curtly answered, "I refuse." Keith's counsel objected that in the questions asked of Curtis, the prosecutor was prejudicially reading extensive portions of the grand jury transcript. Keith argued that the prosecution could not use the out of court statements as substantive evidence. The trial court overruled the objection.

¶ 19 At the conclusion of Curtis's testimony, the prosecutor moved for leave to publish to the jury the entire statement Curtis signed at the police station and the official transcript of Curtis's testimony to the grand jury. The court granted the prosecution leave to publish both the signed statement and the grand jury transcript.

¶ 20 According to the transcript of grand jury proceedings, Curtis testified that, on October 7, 2009, Keith called him and asked to meet him at a gas station. Keith and Kelly came to the

station in Estudillo's car. Keith told Curtis that he "was the one doing the shooting on Madison and Homan." Curtis told Keith and Kelly they needed to get rid of the car and the gun. The next day Curtis heard a televised report about the shooting. Curtis called Keith. Keith said, "man, I f***ed up." Curtis then called Kelly, who said, "that's f***ed up."

¶ 21 According to the handwritten statement, Curtis told the assistant State's Attorney that on October 7 Keith called Curtis and arranged to meet Curtis at a gas station. Keith and Kelly came to the station in Estudillo's car. Keith told Curtis that he "did the shooting that happened at Madison and Homan," and Keith said, "man, I think I really f***ed up." Curtis told Keith and Kelly they needed to get rid of the car and the gun. The next day Curtis heard a televised report about the shooting. Curtis called Keith. Keith said, "I know I f***ed up real bad." Curtis then called Kelly, who said, "it's f***ed up."

¶ 22 John Harris testified that on October 13, 2009, police locked him in a jail cell next to a cell holding Keith. Keith told Harris that while Keith was in a car at Madison and Homan, he saw at a bus stop "these guys [who] shot at their car recently, and [Keith] was going to retaliate on the guys." Keith said he shot at the guys but a bullet hit and killed Howliet.

¶ 23 The prosecution then played an excerpt from the videorecording of Keith's statement to police at the police station. Keith told an officer that he saw Mitch, the man who killed Binion, at the bus stop, and Mitch started to approach Estudillo's car. The officer asked whether Mitch had a gun. Keith answered, "I don't know." Keith added that because Mitch had shot at Keith and Kelly on several occasions between July 6, 2009, and October 7, 2009, Keith feared for his life. He admitted that he fired his gun in the direction of the bus stop.

¶ 24 Keith's testimony at trial echoed the videorecorded statement. Keith testified that on July 6, 2009, he saw Mitch, who lived in the Martin Luther King homes, shooting at Estudillo's car, and the bullets Mitch fired killed Binion. Some time after the July attack, Mitch again shot at Keith when Keith was near the intersection of Madison and Homan. Later, Mitch shot at Keith near the intersection of Central Park and Van Buren. Keith reported the shooting incidents to Detective Marco Garcia, who was collecting evidence related to the murder of Binion.

¶ 25 Keith testified that on October 7, 2009, he received a call from a customer seeking drugs. The customer asked to meet Keith at Madison and Homan. Kelly agreed to drive Keith there in Estudillo's car. Kelly took eastbound Madison to reach Homan. Keith saw a man approach the car from the bus stop. At first, Keith thought the man was the customer who had called, but then he saw "it was Mitch, and he was pulling a gun from his waistband running towards the vehicle." Keith, in fear for his life, fired at Mitch, who ran east on Madison, while Kelly turned to head north on Homan. Kelly cursed Keith because Kelly had not seen Mitch and did not know why Keith started shooting.

¶ 26 On cross-examination, Keith admitted that Mitch belonged to the New Breeds street gang. But Keith testified that he had no problem with New Breeds. Keith qualified his testimony somewhat, saying that Mitch "was pulling what [Keith] believed to be a gun from his waistband." Keith admitted that his gun held six or seven bullets, and he told police that he shot all of the six or seven rounds. But when the prosecutor asked how many shots he fired, Keith answered, "I said on the video maybe seven, but I'm not sure. It could have been

three or four. It happened so fast, I really don't remember. I was afraid for my life that night." Keith testified that he still frequented the area near Madison and Homan because he still lived in the neighborhood.

¶ 27 Detective Garcia testified in rebuttal that Keith did not tell him who shot at Estudillo's car on July 6, 2009. Garcia repeatedly tried to contact Keith after July 6 to see if Keith could remember any useful facts about the shooting on July 6. Police finally located Keith and brought him to the police station for a further interview on September 28, 2009. Keith then told Garcia that someone had shot at Keith on September 20, 2009. Keith said he heard on the street that a man called Black did that shooting, but Keith said he would not be able to identify the shooter. Garcia said that Keith did not inform him about the other time Mitch shot at Keith. Garcia tracked down a man called Blackie, but no one identified that person as Mitch, and he found no evidence connecting Blackie to the shootings at Keith or the murder of Binion.

¶ 28 Keith testified in surrebuttal that he spoke with Garcia two or three times between July 6 and September 20. Garcia showed Keith photo arrays. Keith told Garcia that Mitch, sometimes called Black, shot at the car and killed Binion, and Mitch shot at Keith on two occasions after July 6 and before October 7.

¶ 29 The prosecutor argued in rebuttal closing argument:

> "The defendant claims that he was so scared yesterday and that 'Mitch' is riding up on him and he's got a gun, he is about to pull a gun out. But I hope you were listening to his testimony because what he actually said on direct

> was that 'Mitch' ran from the bus stop towards the Martin Luther King buildings. And then when I asked him on cross, he says[,] 'Mitch ran off the bus stop towards me, towards my car,' where he is in the middle of the street, ladies and gentlemen, he is in the middle of the street about to make a turn to go north. If 'Mitch' is running up on him, how is he shooting all the way at the bus stop?
>
> Then he tells you on direct, he said that he shot about nine, ten times. Then I asked him on cross how many times did he shoot; he said six or seven. Then he said, 'Well, no, think it was about three to five times.' [D]o you think the defendant is minimizing what he did that day? Absolutely. Absolutely."

¶ 30 Defense counsel did not object to the argument.

¶ 31 The jury found Keith guilty of first degree murder by personally shooting a gun. Keith filed a motion for a new trial in which he argued that the trial court "improperly permitted the jury to consider prior inconsistent statements from certain witnesses, grand jury testimonies and written statements as substantive evidence *** where recanting witnesses acknowledged making most of prior inconsistent statements." At the oral argument on the motion, defense counsel specifically drew the court's attention to the use of Morris's out of court statements. Counsel did not mention Curtis. The trial court denied the motion and sentenced Keith to 65 years in prison. Keith now appeals.

¶ 32 ANALYSIS

¶ 33 Keith argues on appeal that (1) prosecutorial misconduct in closing argument deprived him of a fair trial, and (2) the trial court erred by allowing the jury to hear evidence of out of court statements by Morris and Curtis. Keith also argues that, to the extent that his trial counsel failed to preserve the first two issues for appellate review, his counsel provided ineffective assistance. We address first the question of whether counsel preserved the first two issues for review.

¶ 34 Forfeiture

¶ 35 Defense counsel failed to object to the remarks in closing argument which Keith specifically addresses in this appeal. We find that counsel forfeited review of the remarks. See *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 78. We will consider the failures to object to the remarks as possible instances of attorney error.

¶ 36 Keith's counsel objected at trial to evidence of the out of court statements of both Morris and Curtis. Keith's posttrial motion challenged the court's rulings allowing out of court statements into evidence "where recanting witnesses acknowledged making most of prior inconsistent statements." Curtis did not acknowledge making any of the prior statements ascribed to him. Counsel in the argument on the motion did not make any reference to Curtis's statements or testimony. We find that counsel failed to preserve for review any issue concerning the admissibility of Curtis's out of court statements. See *People v. Campbell*, 2015 IL App (1st) 131196, ¶ 24. We will address the failure to preserve for review the objection to Curtis's out of court statements as another possible instance of attorney error.

¶ 37 Morris acknowledged most of the out of court statements ascribed to him, and defense counsel at the oral argument on the posttrial motion clarified that he intended to challenge the rulings concerning Morris's out of court statements. We find the issue concerning Morris's statements preserved for review. See *People v. Denson*, 2014 IL 116231, ¶ 11.

¶ 38 Morris's Statements

¶ 39 We review the rulings admitting Morris's multiple out of court statements into evidence for abuse of discretion. *People v. White*, 2011 IL App (1st) 092852, ¶ 42. Keith admits that section 115-10.1 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-10.1 (West 2012)) permitted the jury to consider the transcript of Morris's grand jury testimony as substantive evidence. However, Keith argues that once the court allowed the prosecutor to read that transcript into evidence, repetition of the testimony through the presentation of the handwritten statement, and through an officer's testimony about what Morris said in an interview that led to the handwritten statement, had substantial prejudicial effect and no significant probative value. See *People v. Dabbs*, 239 Ill. 2d 277, 289-90 (2010). Keith acknowledges that several panels of the appellate court have permitted the use of multiple out of court statements in circumstances effectively indistinguishable from the circumstances here. See *White*, 2011 IL App (1st) 092852; *People v. Perry*, 2011 IL App (1st) 081228, ¶¶ 79-87. The courts in those cases specifically rejected the argument that the repetition of effectively identical out of court statements had considerable prejudicial effect and no significant probative value. The *White* court said:

"[W]hile courts have found little value in a prior consistent statement apart from the impermissible bolstering of trial testimony, the legislature has recognized that a prior inconsistent statement not only serves to discredit trial testimony, but may serve as substantive evidence if it meets the requirements of section 115-10.1. While a blanket prohibition (with limited exceptions) makes sense for prior consistent statements, applying that same general bar to inconsistent statements that are consistent with each other would frustrate the legislature's goal of discouraging recanting witnesses. [Citation.] A witness could be questioned as to prior inconsistent statements, but after one is admitted as substantive evidence, the witness would be free to deny other prior statements without a risk that those statements would be admitted as substantive evidence. We conclude that the underlying rationale for the rule against prior consistent statements does not justify obstructing the operation of section 115-10.1. [Citation.] We decline to create a new evidentiary rule limiting the number of inconsistent statements admitted under section 115-10.1.

Finally, we note that just because a jury can consider a witness's prior inconsistent statements as substantive evidence under section 115-10.1, this does not mean that the door is flung open to admit prior inconsistent statements []without limit,[] as defendants suggest. The trial judge may []exercise

discretion to limit the number of such statements that may be introduced.[]" *White*, 2011 IL App (1st) 092852, ¶¶ 53-54.

¶ 40 Keith raises significant due process and fair trial issues. The trial court could address the *White* court's concerns by permitting the prosecutor to read one source – here, say, Morris's grand jury testimony – and then permitting the prosecutor to adduce summary testimony that a statement to a police officer and a handwritten statement Morris signed repeated all the essential assertions found in the grand jury testimony. Such a procedure would avoid the prejudicial and non-probative repetition of the out of court statements while still impeaching the witness's trial testimony with evidence that several of his out of court statements disagreed with that testimony. However, in light of this court's consistent precedent, we will not here say that the trial court abused its discretion when it allowed the jury to hear the multiple out of court statements Morris made, all of which repeated the same basic assertions, and conflicted with his trial testimony. Therefore, we hold that the multiple repetitions of Morris's out of court statements do not require reversal of the conviction.

¶ 41 Ineffective Assistance of Counsel

¶ 42 To show ineffective assistance of counsel, Keith bears the burden of showing that "his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Patterson*, 192 Ill. 2d 93, 107 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Keith argues that his counsel's representation fell below an objective standard of reasonableness in two ways: (i) counsel failed to preserve for

review the issue of whether the trial court erred by admitting Curtis's out of court statements into evidence, and (ii) he failed to object to the prosecutor's misrepresentations in closing argument about the evidence presented at trial.

¶ 43 1. Closing Argument

¶ 44 Prosecutors have wide latitude to make arguments based on the evidence and reasonable inferences from the evidence presented at trial. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). However, "the People are barred from misstating the law or facts of the case ***, or from commenting on factual matters not based on evidence." *People v. Buckley*, 282 Ill. App. 3d 81, 89 (1996). Misstatements of the evidence can provide grounds for reversal if the misstatements substantially prejudice the defendant. *Buckley*, 282 Ill. App. 3d at 90.

¶ 45 Here, the prosecutor twice, without objection, argued that Keith gave internally inconsistent testimony. The prosecutor said,

> "[W]hat [Keith] actually said on direct was that 'Mitch' ran from the bus stop towards the Martin Luther King buildings. And then when I asked him on cross, he says[,] 'Mitch ran off the bus stop towards me, towards my car,' where he is in the middle of the street ***.
>
> Then he tells you on direct, he said that he shot about nine, ten times. Then I asked him on cross how many times did he shoot; he said six or seven. Then he said, 'Well, no, think it was about three to five times.' "

The prosecutor also said that Morris and Burdine told the jury that Keith fired the gun.

¶ 46 Keith testified that Mitch came from the bus stop towards the car, and, when Keith started shooting, Mitch ran towards the Martin Luther King homes. Keith also testified that he told police he fired six or seven bullets, but he may have fired only three or four shots. Keith testified that Mitch fired nine or ten shots at Estudillo's car on July 6, 2009, when he killed Binion. Although Keith admitted at trial that he fired the gun, neither Morris nor Burdine told the jury that Keith fired the gun. Thus, the prosecutor misstated the evidence. However, the minor misstatements probably had little effect on the jury. We find that Keith has not shown a reasonable probability that he would have achieved a better result at trial if his attorney had objected to the prosecutor's two minor misstatements.

¶ 47 2. Curtis's Statements

¶ 48 The trial court, over defense counsel's vigorous objections, admitted Curtis's out of court statements into evidence both to impeach Curtis's trial testimony and as substantive evidence. Keith argues that his attorney provided ineffective assistance by failing to preserve for appellate review the issue of whether the trial court erred by admitting Curtis's out of court statements into evidence. For purposes of this appeal, we presume that the trial court erred when it admitted the statements at issue into evidence. We find that the failure to preserve the issue for review did not amount to ineffective assistance of counsel because Keith would not have achieved a better result on appeal even if his attorney had preserved the issue.

¶ 49 The prosecution presented considerable evidence to discredit Keith's self-serving testimony about his need to defend himself. Harris testified that, in jail, Keith said he shot to

"retaliate" against the person who shot at him. The trier of fact could infer that Keith would not have called the shooting retaliation if he had seen Mitch pulling out a gun.

¶ 50 Morris and Burdine both testified that they saw a third man at the bus stop, but they did not say that they saw that man approach Estudillo's car, and they did not say that the man had a gun. A police officer testified that, from a call to 911, he determined that the third man at the bus stop was Eric Lockheart, not Mitch, and Lockheart had no useful information about the case. The defense presented no evidence, apart from Keith's testimony, to show that the third man at the bus stop was Mitch and not Lockheart.

¶ 51 Curtis's out of court statements added little to the evidence against Keith. According to Curtis's grand jury testimony, Keith admitted to Curtis that he shot toward the bus stop at Madison and Homan. But Keith also admitted to the court that he shot the bullet that killed Howliet. Keith then called Curtis, who met Keith and Kelly at a gas station. Curtis advised them to get rid of the car and the gun, and they did so. When Curtis heard the news report about the shooting, he called Keith, who said, "I f**ked up." While Curtis's grand jury testimony further supports the conclusion that Keith did not act in self-defense, we find that, in light of the State's other evidence, any error in the admission into evidence of Curtis's out of court statements would qualify as harmless error.

¶ 52 Court System Fee

¶ 53 Finally, Keith points out that the trial court improperly assessed a court system fee of $5. The State agrees that we should correct the mittimus to eliminate the improper fee. See

People v. Kornegay, 2104 IL App (1st) 122573, ¶ 52. We correct the mittimus to eliminate the $5 court system fee.

¶ 54 CONCLUSION

¶ 55 The trial court did not err when it admitted into evidence Morris's multiple out of court statements. Defense counsel's failure to object to two minor factual misstatements in the prosecutor's closing argument did not amount to ineffective assistance of counsel. The failure to preserve for review the objections to Curtis's out of court statements made no difference to the result of the appeal, and therefore it did not amount to ineffective assistance of counsel. Because we find no reversible error, we affirm the trial court's judgment. We correct the mittimus to eliminate the $5 court system fee.

¶ 56 Affirmed; mittimus corrected.