2016 IL App (2d) 131009-U
No. 2-13-1009
Order filed August 31, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-2344
JESSE J. HERRERA,	)	Honorable John R. Truitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in determining out-of-court statement was admissible as dying declaration; defendant suffered no prejudice from trial court's ruling barring admission of purportedly impeaching photographs or defense counsel's failure to obtain them in a more diligent manner; trial court did not err in telling jurors it was for them to determine what "reasonable doubt" means; trial court's failure to fully comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) was not plain error; and the fact that trial counsel argued his own ineffectiveness was neither a *per se* nor actual conflict of interest.

¶ 2 I. INTRODUCTION

¶ 3 Following a jury trial in the circuit court of Winnebago county, defendant, Jesse J. Herrera, was convicted of first degree murder and sentenced to 57 years' imprisonment. This

was the third trial in this case. The first ended after a State witness violated a *motion in limine* and made a statement before the jury that implied she had been threatened by defendant. In the second trial, the jury could not come to a verdict. Defendant now appeals, alleging the trial court erred in several respects. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Defendant's conviction arose out of the shooting death of Kerry Davis. Davis made a statement, which the trial court found was a dying declaration, implicating defendant in the crime. A hearing was held on defendant's motion to exclude the statement.

¶ 6 At the motion hearing, the State first called Officer Michael Lange, of the Rockford police department. On July 30, 2009, at about 3:32 p.m., he was dispatched in response to a "possible shooting victim." Lange testified that as he approached, a number of juveniles were pointing toward an alley. As he entered the alley, he observed 10 people standing at the "far south end around a subject who was laying [sic] on the ground." He identified the person on the ground as Kerry Davis. Davis was lying on his back. As Lange approached Davis, he noted "blood on the right side of his T-shirt in the chest area." Davis was conscious and stated that he had been shot in the chest. Lange lifted Davis's shirt and observed an entry wound "just to the left of Davis right nipple." Lange testified that he asked Davis who had shot him. Davis told Lange that "Toon had shot him." Lange then asked whether Toon had shot Davis. Davis replied that "the subject's name was Cartoon." Lange then asked for clarification as to whether it was Toon or Cartoon. Davis stated "Cartoon." Davis did not know Cartoon's real name.

¶ 7 Lange testified that Davis then told him that he had been traveling south in a vehicle and was shot and pushed from the vehicle. Davis stated the vehicle was a Nissan Pathfinder. Another individual, a black male who Davis did not know, was also in the vehicle. While Davis

and Lange spoke, Davis was gagging frequently and having difficulty breathing. Davis "lifted his shoulder off the ground in pain." Paramedics arrived and transported Davis to the hospital. Lange later learned that Davis died that same day.

¶ 8 On cross-examination, Lange testified that he observed Davis "moving his arms around at various times" without the assistance of other people. There were about 10 people in the area, and Davis was "discussing various subjects" with various individuals. Lange agreed that while he observed a spot of blood on Davis's shirt, he would not characterize it as a "blood-drenched shirt." There was no pool of blood surrounding Davis. Davis used a cell phone at one point. Lange did not recall Davis complaining about pain, and he never stated that he thought he was going to die. On redirect-examination, Lange reiterated that Davis was gagging continually while they spoke.

¶ 9 The State next called Luis Valentin. Valentin testified that he was visiting his sister and Jessica Rivas. At one point, he went outside with Rivas. There were people across the street pointing down an alley. Looking down the alley, they saw Davis lying on the ground. Valentin noted Davis had a wound in his chest. He did not ask Davis what had happened, as Davis was unable to talk. Valentin was then confronted with a written statement he made to the police, where he reported that Davis said that Toon shot him. He stated that he was trying to leave the police station, so he signed the statement they gave him. He claimed to have told the police to change his written statement, but he signed it despite the fact that they did not change it.

¶ 10 The State then called Joe Lesner. Lesner was present at a pretrial meeting between the State's Attorney trying the case (Robert Schuman) and Valentin. Lesner testified that Schuman handed Valentin a copy of his written statement, and Valentin appeared to read it. It took Valentin a minute-and-a-half to two minutes to read over the statement. Schuman called

Valentin's attention to the portion of his statement where Valentin stated that Davis told him that it was Toon who had shot him. Valentin never indicated that this was not what he told police when they interviewed him after the shooting, nor did he indicate any portion of the written statement was inaccurate.

¶ 11 Mark Jimenez, a Rockford police officer, then testified for the State. He testified that he interviewed Valentin on the day of the shooting. Valentin was not under arrest, and his presence at the police station was voluntary. Valentin was cooperative. He told Jimenez that Davis stated who had shot him. Jimenez typed a statement reflecting Valentin's oral account of events. Valentin read it over and indicated that it was accurate.

¶ 12 The State next called Detective David Swanson, who was present when Jimenez interviewed Valentin. He corroborated Jimenez's testimony. He further stated that Valentin never stated that any part of the statement was inaccurate and that Valentin signed both pages of the statement in Swanson's presence.

¶ 13 Daniel Stark was the next witness called by the State. He testified that on July 30, 2009, he heard a commotion outside his apartment. A number of children were in front of his building yelling, "He was shot." About five minutes later, he went outside. He looked down the alley, saw a person lying on the ground (Davis), and he walked over to that person. Several other people were in the vicinity. Davis had "a little hole in his shirt, on his chest." He noted "a little" blood around the hole. Davis was first saying it was "Cartoon" who had shot him and later he simply said "Toon." On cross-examination, Stark reported that he saw Davis "[w]aiving both arms up and down over [his] head." It appeared he was trying to gets someone's attention. Davis also attempted to bring up something on his cell phone to show to Davis's sister (Rivas). Stark stated that Davis did not "bleed out" until the ambulance came and they flipped him over.

At that point, "he started bleeding out." Stark never heard Davis say anything about pain or the possibility of dying.

¶ 14 The State then called Ryan Newberry, who was a paramedic for the City of Rockford at the time of the shooting. He responded to the shooting. He performed an initial evaluation of Davis and concluded Davis "met the criteria for level 1 trauma, which is immediate danger to life or limb." Davis was "having difficulty breathing" and "was hemodynamically unstable, meaning that his blood pressure was not adequate." They notified the hospital "before we even left the scene that we had a critical patient." Newberry rode in the back of the ambulance with Davis. As they unloaded Davis from the ambulance at the hospital, he asked Newberry if Newberry thought that he would die. On cross-examination, Newberry stated that they were at the scene of the shooting for about seven minutes and that it took less than three minutes to transport Davis to the hospital. During the time Newberry was with Davis, Davis complained of difficulty breathing. Davis also reported that he could not feel anything below his waist. Newberry authored a written report of the incident. In it, Newberry mentions that Davis complained of difficulty breathing, but it does not indicate that he expressed concern for his well-being.

¶ 15 The State's next witness was Jessica Rivas. Rivas testified that Davis was her brother. She explained that though he was not her biological brother, the two were raised like brother and sister. On July 30, 2009, she was at a friend's apartment on Auburn Street. One of her cousins looked out the window and saw someone by her truck. She looked out and saw that it was Cartoon. She yelled out the window, asking Cartoon what he was doing by her truck, but she did not think much about it, as she knew Cartoon. Her truck was parked in a parking lot off the alley. Cartoon "ran off." A short while later, she left the apartment. She saw a group of

children on the other side of Auburn Street yelling "they shot him." She looked down the alley and saw a person lying on the ground. Rivas called 911. As she approached, she recognized her brother's clothes. Davis "had a desperate look." He was "waiving his hand." Davis "had a hole in his chest, a little hole [that] wasn't squirting out a lot of blood." Davis first told Rivas that Toon shot him, and then clarified that it was Cartoon. He also stated that "a black dude pushed [him] out of the truck." Davis was speaking to some children, including Rivas's son. Davis told Rivas's son that he was going to be okay. Davis asked for a cell phone, and Rivas's cousin, Yahaida Valentin, gave him one. Rivas thought Davis was going to be okay. As Davis was talking to Rivas, he started bleeding from the mouth. Davis told her that he would not leave her, "like he was going to be okay."

¶ 16 The trial court concluded that Davis's statement that Cartoon shot him was admissible under the dying declaration exception to the hearsay rule. It focused its analysis on the question of whether Davis believed he was dying at the time he made the statement. The court noted that Lange testified that Davis was gagging frequently and having trouble breathing. Davis was in pain when he would try to raise his shoulder off the ground, and he remained lying on the ground the entire time. Stark stated Davis had a little hole in his chest with a little blood around it. Newberry, a trained medical professional, recognized Davis's condition as a level-one-trauma situation. Further, Davis told Newberry he could not feel anything below his waist. The trial court further noted that Davis asked Newberry whether Newberry though he would die. The trial court observed that the trip to the hospital took less than three minutes and that there was no evidence that Davis's condition had changed in the interim. This allowed an inference that Davis's state of mind was the same prior to being transported to the hospital as it was when he

asked Newberry whether Newberry thought he would die. The trial court then found that Davis's statement was admissible as a dying declaration.

¶ 17 Defendant subsequently moved the court to reconsider its decision to admit the statement. In denying this motion, the trial court found that statements Davis made to Rivas indicating he was going to be okay were made to comfort Rivas. The trial court further found that such statements did not indicate that Davis actually believed he was not going to die.

¶ 18 A jury trial began on October 22, 2012. Following her testimony, Rivas stated, before the jury, "[I]s he going to stop threatening me now?" Five jurors heard the statement. The trial court declared a mistrial. In January 2013, a second trial was held. After deliberating three days, the jury indicated that it was deadlocked, and the trial court declared another mistrial.

¶ 19 Defendant's third trial began on June 10, 2013. During *voir dire*, the court instructed prospective jurors regarding the State's burden of proof:

> "All right. To the five of you: Do you understand that the burden is on the State to prove the defendant guilty beyond a reasonable doubt; not beyond any doubt, beyond a shred of doubt, beyond any possible doubt? It's beyond a reasonable doubt. You're not going to be given a definition of what that means. It's for you to determine what that means."

Defendant contends that the trial court did not fully comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) when it conducted *voir dire*.

¶ 20 On June 11, 2013, the State moved to bar defendant from using photographs taken by an investigator from an apartment window from which witnesses—including Rivas—allegedly observed events material to the crime. The photographs were tendered to the State on June 11, and purportedly taken the day before. The State contended that it was unfairly surprised by the

late disclosure. Defense counsel represented that they had attempted to get the photographs earlier but were unable to gain access to the apartment from where they were taken. The trial court found that defense counsel had not been diligent in procuring the photographs and therefore barred this evidence. The trial court subsequently denied a motion to reconsider.

¶ 21 Arnette Horton was the State's first witness at defendant's third trial. She testified that, on July 30, 2009, she was in a relationship with Davis. She rented a car—a white Malibu with Florida license plates—from Hertz at the Rockford airport at about 3 p.m. Davis went with her. Davis left Hertz driving Horton's car; however, they then met at a gas station and traded vehicles. On cross-examination, Horton testified that Davis bought, fixed, and sold cars for a living. At the time they rented the car, Davis was carrying about $1,500. Questioned by the State, Horton testified that Davis "flipped" possibly two cars in the 11 months she knew him.

¶ 22 The State then called Jessica Holland. In 2009, Holland was employed at the Hertz location where Horton rented the car. She rented the vehicle to Horton. She identified a picture of the car. On cross-examination, Holland testified that the receipt indicated that the rental transaction was completed at 2:57 p.m., and Horton would have been "walking out the door" at that time.

¶ 23 Delora Davis next testified for the State. Kerry Davis was her son. His nickname was Goldie. She identified a picture of her son.

¶ 24 The State next called Luis Valentin, who was incarcerated at the time of the trial. He acknowledged that he had been convicted of possession of a stolen vehicle, aggravated fleeing, escape, aggravated battery, manufacturing and delivering cocaine, armed robbery, and attempted armed robbery. On July 30, 2009, he was visiting his sister, Yahaida Valentin, at 1904 Auburn Street. Her apartment was on the second floor. Jessica Rivas and Wilfredo Valentin (Luis's

brother) were also present as were several children. Around the middle of the afternoon, Jessica yelled out the window. Luis looked out the window. He saw a Hispanic man trying to get into Jessica's truck by opening the passenger door (Luis later identified defendant as the man). The man stated that "Goldie was out there." Luis waited in the apartment for Goldie, but he never showed up.

¶ 25 A short time later, Jessica and Luis left to buy a car battery. Luis stated that he saw a child pointing down the alley. Luis looked down the alley and saw a man lying in the middle of the alley. Luis ran over to the individual lying on the ground, whom he recognized as Davis. He noticed that "he was moving his eyes, shaking, and saying 'Cartoon, Toon.' " Luis did not see any blood and lifted Davis's shirt. He then observed a hole on the left side of his chest. It was bleeding. Davis kept saying, "Cartoon," and "he was like choking off his blood." Jessica called the police. Jessica was "going crazy, yelling into the phone and screaming and crying." After the police arrived, Luis pointed out the white Malibu to them, which was parked by his sister's apartment. An ambulance came a while later. Police officers asked Luis to accompany them to the police station. He identified defendant from a photographic line up as the man he saw trying to get into Jessica's vehicle.

¶ 26 On cross-examination, Luis estimated that about five minutes elapsed between the time when Jessica yelled at defendant to when he and Jessica started to leave to purchase the battery. He denied that he told an officer at the scene of the shooting that he and Jessica had gotten into her vehicle at some point before seeing Davis lying in the alley. Luis was impeached with several prior statements regarding various details of the events. Luis admitted that he did not know whether Davis used the name "Cartoon" to refer to defendant. On redirect-examination, Luis stated he knew defendant through his sister.

¶ 27 Prior to the State calling its next witness, defendant made a proffer of testimony that Edward Light would give. Light is an attorney in the public defender's office. On June 8, 2013, he assisted defense counsel (Green) in preparing for the trial. Light stated that he asked whether any pictures had been taken from the apartment showing what witnesses could have seen. Light then suggested they attempt to get such photographs. Green stated that he had attempted to previously, but was not successful. Defendant then requested the trial court to reconsider its decision to bar the photographs, and the trial court denied defendant's request.

¶ 28 The State then called Jessica Rivas. Rivas testified that she considered Davis to be her brother. On July 30, 2009, around lunch time, Rivas went to her cousin Yahaida Valentin's home at 1904 Auburn Street in Rockford. Rivas saw defendant near her truck. She knew him as "Cartoon." She knew defendant through a cousin, and defendant had previously been to Rivas's house. Rivas yelled, "What are you doing by my truck?" Defendant "got startled and ran away." He "ran back towards the alley." Rivas added that she could not remember whether defendant ran or walked away. Yahaida's apartment was on the second floor and adjacent to an alley that is next to the building. Rivas was driving a mint green Ford Explorer at the time. It appeared as if defendant was trying to get into her vehicle through the passenger-side door. She did not see defendant again that day. She stated she thought "nothing of it." She also saw the back of a black truck in the alley, which she heard accelerate a few seconds after she yelled at defendant.

¶ 29 After seeing defendant by her truck, Rivas finished a cup of coffee and left Yahaida's apartment. Luis accompanied her. She looked down the alley and saw someone lying on the ground. Rivas called 911. The body was almost a block down the alley. She and Luis ran to the body. As she approached, she realized it was Davis. Davis was lying on the ground, "trying to wave his hand like he wanted help." She lifted Davis's shirt and saw a small hole in his chest.

Davis had a worried expression on his face. She asked Davis who shot him, and he replied, "Toon, Cartoon." At first, it did not appear difficult for Davis to speak, but it appeared to get harder over time. Blood started coming out of his mouth.

¶ 30 An ambulance and the police arrived. A police officer spoke to Rivas. They took her to the police station. This upset her, as she wanted to go to the hospital. She identified defendant in a photographic line up.

¶ 31 On cross-examination, Rivas testified that she was looking out of the back kitchen window when she saw defendant by her truck. The window was on the west side of the apartment building. Defendant left immediately when she yelled at him. Rivas acknowledged that her written statement to the police did not mention that defendant was trying to get into her vehicle via the passenger-side door. Rivas was impeached with other prior statements as well. Rivas agreed that she never saw defendant in possession of a gun, and she did not hear a gunshot. She did not see defendant get into the black truck she observed in the area, and she never saw defendant and Davis together.

¶ 32 The State's next witness was Elijah Smith. On July 30, 2009, he was riding his bike to his friend's house. As he approached the alley where Davis was found lying on the ground, he saw a truck sitting there. He also heard a male voice saying "hurry, hurry." He looked down the alley and saw a dark-colored SUV. The driver was a "[d]ark skinned man [wearing a] white shirt." He added the driver was African-American. A light-skinned, African-American man wearing a red hat sat in the passenger seat, and he then moved to the back seat. He did not get a good enough look at these men that he would be able to identify them. He never saw either man outside the SUV. Smith left and came back five minutes later. Police cars and people had

gathered in the alley. Smith approached and saw Davis, whom he recognized, lying on the ground. He could hear Davis talking, but he could not remember what Davis said.

¶ 33 The State next read into evidence a transcript of the testimony of Ryan Newberry, which was given at an earlier hearing (defendant stipulated to the veracity of the transcript only). Newberry testified that he was a paramedic working for the Rockford fire department in the summer of 2009. At about 3:30 p.m. on July 30, 2009, he was dispatched to the alley where Davis was found lying on the ground. Newberry believed Davis to be seriously injured. Davis was having difficulty breathing. Davis could answer Newberry only by "speaking very softly" and "using very short sentences." Davis's vital signs were not stable. Within a minute of assessing Davis, Newberry requested a "trauma alert" of the hospital, meaning that "a trauma surgeon, trauma services, trauma nursing, anesthesia, [and] other ancillary services [would be] waiting for us when we arrive[d]." As they were unloading Davis at the hospital, he asked Newberry whether Newberry thought he was going to die. While they were transporting Davis to the hospital, he was unable to respond to questions Newberry posed to him. On cross-examination, Newberry agreed that Davis never identified the person who shot him to Newberry.

¶ 34 The State then read the testimony of Daniel Stark, which was given at an earlier hearing as well. Stark testified that on July 30, 2009, he was drawn outside his apartment by a group of children yelling "he was shot, he was shot." Stark went outside about five minutes after hearing this. He looked down the alley and saw a person lying on the ground. He walked over. Other people were standing around the person on the ground, one of whom he knew to be the person's sister. The person on the ground (Davis) "had a little hole in his shirt, on his chest." Stark only saw a little blood. Davis first said "Cartoon" had shot him; he later simply said "Toon." Stark sat down against a nearby wall. The police arrived about 10 minutes later. On cross-

examination, Stark stated he was about seven feet from Davis. Davis was waving his arms in the air. It appeared he was trying to get someone's attention. Davis was trying to show his sister something on a cell phone. He first said "Toon" shot him, then "Cartoon," and then "Toon" again. Davis "didn't bleed out until the ambulance came, *** then he started bleeding out."

¶ 35 Mary Ogden, a detective with the Rockford police department was the State's next witness. Though she was assigned to the domestic violence unit, she was dispatched to the Davis shooting. She interviewed witnesses in the area of the shooting. She spoke with Elijah Smith, who identified the race of the driver of the SUV observed in the alley.

¶ 36 The State next called Michael Lange of the Rockford police department. He also responded to the Davis shooting. He saw a number of children pointing down an alley, and he drove that way. Ten individuals had gathered near the south end of the alley; one individual was lying on the ground. The person on the ground was lying on his back. Lange exited his car and approached, noting a small amount of blood on Davis's shirt. Davis was talking with two females. Davis stated he had been shot in the chest, and Lange lifted his T-shirt and observed an entry wound—"a small hole just to the left of his right nipple." Lange asked Davis who had shot him, and Davis replied, "Toon." Lange then asked if Toon had shot him, and Davis stated, "Cartoon." Lange then asked Davis to clarify whether it was Toon or Cartoon. Davis stated, "Cartoon." Davis further stated that Cartoon had driven away in a silver Nissan Pathfinder. Davis explained that he was inside that vehicle, driving down the alley, when he was shot and pushed out. Davis stated that there was also a black male inside the Pathfinder, but he did not know his name. Davis did not know Cartoon's real name.

¶ 37 Lange testified that the ambulance arrived after a "couple minutes." While Lange spoke with Davis, Davis was "constantly gagging." Davis had trouble breathing as well. Davis was

"taking a lot of long deep breaths, and he was lifting his right shoulder off of the ground and grimacing in pain." After the paramedics arrived, Davis did not want to answer any more questions from Lange.

¶ 38 On cross-examination, Lange testified that by the time he got to the alley, there were already a lot of people standing around Davis. A little bit of blood had seeped through Davis's shirt. However, by the time Lange saw the actual wound, it was no longer bleeding. When Lange first arrived, Davis was not yet having trouble breathing. He did not appear to be in pain at that time. As they spoke, Davis began having difficulty breathing and started choking on his own blood. Lange acknowledged that his report written on the day of the incident stated that Davis told him that "they" shot him. Lange agreed that Davis described being in a silver Nissan Pathfinder rather than a dark-colored Dodge Durango. They were traveling in a southbound direction. Davis did not tell Lange whether Cartoon or the black male was driving the vehicle.

¶ 39 Andrew Harper was the State's next witness. He testified that he is employed as a police officer for the city of Rockford. On July 30, 2009, at about 3:30 p.m., he responded to the Davis shooting. He went to a residence on the north side of Auburn Street (the alley is on the south side) and knocked on various doors in apartment buildings in the vicinity. Daniel Stark answered one such door. Stark related what he had observed. On cross-examination, Harper stated he arrived at the scene "very quickly," and he spoke to Stark near the north end of the alley. However, on recross-examination, he clarified that he had been at the scene for "a good amount of time" before speaking to Stark.

¶ 40 The State then called William Donato, another Rockford police officer. On July 30, 2009, at about 4:25 p.m., Donato was assigned to secure the crime scene. At about 4:50 p.m., Donato was sent to check out a white 2009 Chevrolet Malibu. It was parked adjacent to the

apartment building where Yahaida Valentin lived. The car was backed into a parking spot. A sergeant informed Donato that the vehicle was going to be impounded and that Donato should perform a pre-tow inventory search. In the course of so doing, Donato pushed a button on the dash board. A compartment opened, and there was a large sum of money inside. Donato estimated that it was approximately $1,000. He reported what he found to the sergeant. Donato identified several photographs of the Malibu. On cross-examination, Donato testified that the vehicle was unlocked when he approached it.

¶ 41 The State next called Eric Harris, a detective with the Rockford police department. On July 30, 2009, at 3:31 p.m., he was sent to the scene where Davis had been shot. After arriving at the scene, he was sent to the hospital to check on Davis. After that, he returned to the Public Safety Building to help interview witnesses. He compiled a photographic line up, which included defendant. He also included five other individuals "with similar facial characteristics of" defendant. At about 5 p.m., he met with Rivas. Detective Joyes was also present. When he presented the line up array to Rivas, she immediately identified defendant as being the person known as "Cartoon." On cross-examination, Harris explained that he put defendant's photo in the lineup because he knew his nickname to be "Cartoon." At the time, Harris did not know of anyone else being called "Cartoon," though he subsequently became aware that there were others with the nickname "Toon" or "Cartoon."

¶ 42 Lacreacia Simmons was next called by the State. In July 2009, she was living with her three children and their father, Cordella Lee. Defendant was also staying with them. At the time, Simmons owned a 2000 Dodge Durango. It was "gray or silverish." On July 30, 2009, Lee dropped Simmons off at work. Lee was supposed to pick her up later. When he did so, he was with Simmons' cousin, using her cousin's van. She did not ask why they were not using her

SUV. Subsequently, she saw it parked in her cousin's driveway. She picked up her vehicle and went home. Her vehicle was in the same condition as it had been when she saw it earlier that same day. On cross-examination, Simmons testified that a Nissan Pathfinder is much smaller than a Dodge Durango. A few days earlier, they had returned from a long trip and cleaned the vehicle.

¶ 43 Detective Marc Posley of the Rockford police department then testified for the State. On July 30, 2009, he was assigned to investigate the Davis shooting. He was informed of a possible suspect with the nickname of "Cartoon." He knew that defendant went by that name. He related this to other officers involved in the investigation. On cross-examination, Posley acknowledged that there were other people in Rockford with the same nickname, and there were also people with the nickname "Toon." He did not relate this to Harris when Harris was putting together the lineup.

¶ 44 The State then called Detective Jeff Schroder. Schroder testified that he was involved in the investigation of the shooting death of Davis. At about 3:30 a.m. on July 31, 2009 (the day after the shooting), Schroder, accompanied by other officers, went to locate Cordella Lee at a residence. They knocked, and Lacreacia Simmons answered. Lee was present. In the course of speaking with Lee and Simmons, Schroder learned they owned a Dodge Durango. Simmons turned over the keys to the police. The Durango was impounded.

¶ 45 Defendant was then allowed to call Schroder out of order and conduct direct examination. Schroder testified that Davis first told him "Cartoon and a black guy" had shot him and he later said "they shot me." Rivas told Schroder about a person she saw near her truck, but she did not say "that the person by her truck was messing with the truck." Schroder further testified that when he went to the home of Simmons and Lee, Simmons directed him to a bedroom where

defendant had been staying. They found a blue duffel bag in the room. There were a number of black and blue baseball caps in the bag, but no red ones. The hats were not tested for gunshot residue. Schroder seized the caps. On redirect-examination, Schroder testified that a number of the caps still had tags on them.

¶ 46 Grace Kohn next testified for the State. Kohn stated that she and defendant had a child together. Defendant's nickname was "Cartoon." She also heard defendant called "JJ" and "Toon." During the morning of July 30, 2009, Kohn was at home. She spoke with defendant on the telephone and then he came over. He left subsequently, and he called Kohn later in the afternoon. Kohn did not remember speaking to defendant. When asked whether she told detectives that defendant had called an hour later, Kohn replied she "might have," and added, "Whatever it says in that statement—I had a more clear memory back then" and "[i]t's been four years." She agreed that her statement was accurate where it stated defendant returned to her house between 4:30 and 5 p.m., though she did not actually recall the time. She also agreed that her statement was accurate that defendant was wearing blue jeans, a red shirt, and black tennis shoes—though, again, she did not have an actual recollection of this. She drove defendant to one of his friend's houses (named Bud) about 5 p.m. She picked defendant up a few hours later. He was wearing a blue shirt. About 10:30 p.m., Kohn and defendant were at her home. The police came and arrested him. On cross-examination, Kohn testified that defendant neither resisted the police when they came to arrest him, nor did he attempt to flee.

¶ 47 The State next called Cordella Lee. Lee testified that he and Simmons had children together. In July 2009, he was living with Simmons at 4224 Auburn Manor. Defendant was staying here as well. Simmons owned a Dodge Durango, which he drove "all the time." On July 30, 2009, he dropped Simmons off at her place of employment. He was going to help Simmons'

sister and brother-in-law move. At about noon, defendant borrowed the Durango, saying he wanted to go and retrieve some personal items. Lee did not go with him. Lee testified that defendant knew Lee had to pick up Simmons at 5:30. However, he did not return the vehicle by this time, and Lee got a ride from Simmons' cousin to pick her up. When they returned to the cousin's house, the Durango was there. Lee and Simmons took it and went to pick up their children.

¶ 48 A few days before July 30, 2009, Simmons, Lee, and their children had returned from a trip to Tennessee. After returning, they cleaned the vehicle (he later explained that this included shampooing the interior). At about 4 a.m. on July 31, 2009, the police impounded the Durango. They also asked Lee to accompany them to the police station, where he spoke to a detective. He did not recall telling the detective that the vehicle had not been cleaned. Lee further testified that he knew an individual nicknamed "Bud"—who was his cousin. Bud lived in the area where Kohn had driven defendant on the day of the shooting. When he loaned the Durango to defendant, it was "[v]ery clean," and when defendant returned it, it was in the same condition.

¶ 49 The State next called Samika Coulter. On July 30, 2009, around the middle of the afternoon, she received a call from a friend she knew as "Chaz." She then drove to a location where she encountered Chaz and "another dude" walking down the street. She then identified defendant as the person with Chaz. She "agreed to drop him off behind Chuck E. Cheese." While they were driving, defendant made a telephone call. Coulter heard defendant say, "Make sure there [aren't] no shells in the truck; clean the blood out of the truck, report it in as stolen." He also stated, "[G]et rid of the truck." Coulter did not know to whom defendant was speaking. Coulter drove defendant to a "pinkish-reddish" house behind Chuck E. Cheese, where they parted ways. On cross-examination, Coulter acknowledged that she had consumed a half pint of

Remy Martin during the morning of July 30, 2009, between 8:30 and 9 a.m. and that she later went to a liquor store to buy more to drink. She also had smoked some marijuana. Coulter was impeached with various prior inconsistent statements. Coulter did not know defendant, outside of seeing him a few times. On redirect-examination, she stated she did know defendant as "Cartoon."

¶ 50 The State then called Maurice Pruitt, a detective with the Rockford police department. He interviewed Grace Kohn on August 3, 2009, regarding the Davis homicide. Pruitt took a written statement from Kohn. He then identified a copy of the statement, including one correction made by Kohn.

¶ 51 The State next read the prior testimony of Daniel Basile into the record. Basile, a city of Rockford police officer, testified that he was working during the early-morning hours of July 31, 2009. He accompanied other officers to 4224 Auburn Street (where Simmons and Lee lived). He was assigned to impound Simmons' Dodge Durango. The vehicle was towed to the impound garage and placed in a secure area.

¶ 52 Bruce Voyles was the State's next witness. He testified that he is a Rockford police officer and is assigned to the identification and crime scene unit. Voyles had received training regarding fingerprinting and testified as an expert on the subject approximately 10 times prior to this trial. On July 30, 2009, at about 4 p.m., Voyles was dispatched to the area of the Davis shooting. Other officers were already present. Voyles was assigned to photograph and collect evidence. By the time Voyles began processing the crime scene, Davis had already been taken to the hospital. Voyles recovered a white shoe, which, he was told, had been moved by someone. He also recovered a tube of Carmex cream, a pair of sunglasses, and a "cardboard concert flyer." Voyles accompanied Detective Shimaitis to the hospital, where he recovered the victim's

clothing including a shoe that matched the one found in the alley. He was then sent back to the crime scene to photograph a white Chevrolet Malibu that was parked on the north end of the alley. He also photographed a large sum of money that was inside the car, and he then collected and counted the money. He determined it was $1,000. Voyles also photographed a green Ford Explorer and a gray Dodge Durango. The Durango had a can of a cleaning product in it. He was unable to recover any useful fingerprints from the Durango, and he found no shell casings in it. Voyles also collected samples for gun-shot residue testing and sent them to the State Police crime lab. On cross-examination, Voyles testified that nobody directed him to do anything at the north end of the alley (by Yahaida Valentin's home) other than photograph the Malibu. He also denied recovering "smudges" of fingerprints from inside the Durango.

¶ 53 The State next called Dr. Mark Peters, whom the trial court recognized as an expert in the field of forensic pathology. Peters conducted an autopsy of Davis. Peters described how he conducted the autopsy. He then opined that the cause of Davis's death was a gunshot wound to the chest. The nature of this particular wound would result primarily in internal bleeding, and a person suffering such an injury could continue to speak and breathe for a period of time. On cross-examination, he acknowledged that a person with this sort of injury might not be able to speak as well. The trial court allowed defendant to conduct direct examination of Peters following his testimony for the State. Peters explained that close-range firing refers to firing from distances of 2 to 24 inches. Typically, this would leave certain evidence on the skin, such as soot and stippling. Peters saw no evidence of close-range firing when he examined Davis. On cross-examination, Peters agreed that if a victim were clothed, the evidence of close-range firing might remain on the clothing rather than the skin.

¶ 54 Detective Brian Shimaitis next testified for the State. He testified that he is employed by the Rockford police department. On July 31, 2009, at about 1:20 p.m., he attended the autopsy of Davis. He took photographs of the autopsy and collected a spent projectile that was recovered from Davis's upper torso. On cross-examination, Shimaitis reiterated that the bullet had not exited Davis's torso.

¶ 55 The State then called David Welte of the Illinois State Police Crime Laboratory. He is a firearm and toolmark examiner. He examined the bullet recovered from Davis. Welte stated, "It was a .40 caliber, fired bullet with seven lands and groves with a left-hand twist." He further testified that this is a "pretty rare class of characteristics." The only manufacturer he was aware of that produced a weapon with such characteristics was Hi-Point, and this was confirmed when he ran this data through an FBI database. On cross-examination, Welte agreed that a .40 caliber bullet was bigger than several other common bullets; however, "there are also several caliber bullets that are larger than a .40 caliber" bullet. On redirect-examination, Welte stated that multiple variables affect how much damage a bullet will do.

¶ 56 The State next called Scott Rochowicz, who is employed by the Illinois State Police and is assigned to the Forensic Science Center in Chicago. He is the supervisor of the microscopy and trace chemistry section. Rochowicz explained that gunshot residue (GSR) consists of "all the particulate materials, vapors and heat, that are emitted from a firearm when it is discharged." "Primer gunshot residue," he continued, "refers specifically to the primer that is emitted into the environment when a firearm is discharged." Generally, gunshot residue kits should be administered within six hours (Rochowicz also referred to a two-hour window to perform testing). However, if an item—such as clothing—can be secured in a sealed container, "that would retain the GSR." Rochowicz examined the GSR kits collected by Voyles from the

Durango. Vials collected from the front and rear passenger headliner contained gunshot residue. He opined, "My conclusion is that those two specific areas were either in the environment of a discharged firearm or contacted a [primer gunshot residue] related item."

¶ 57 On cross-examination, Rochowicz acknowledged that he could not say how or when the GSR was deposited on an item. He cannot tell what caliber of weapon might have left the deposit. He was not asked to test any clothing worn by defendant. He received no GSR collection kit taken from defendant's hands, hats, or clothing. Gunshot residue "will not evaporate." It would remain on the headliner of a vehicle indefinitely if it is not disturbed. The relevant consideration is not the passage of time; rather, it is "the activity that's important about the retention of gunshot residue parts." Defendant was allowed to conduct direct examination of Rochowicz following the conclusion of his testimony for the State. He acknowledged that six hats related to this case were also submitted to the crime laboratory. The State never asked that they be tested. Rochowicz did not find gunshot residue on any of the hats. During cross-examination by the State, Rochowicz testified that the crime laboratory does not test every single item that is recovered by a police department. Further, even if the hats had gunshot residue on them at one time, it could have been "removed by activity" or simply "not detected by the procedure." Some of the hats had stickers on them and appeared to be new.

¶ 58 The State next called Darren Foulker, a detective with the Rockford police department. Foulker identified a picture of defendant taken at about 11 p.m. on July 30, 2009. Defendant was wearing a dark blue shirt.

¶ 59 The State's next witness was Jordan Stedman of the Rockford police department. He responded to the Davis shooting and met with Jessica Rivas. She told Stedman defendant was wearing a red shirt.

¶ 60 David Huff of the Winnebago County Sheriff's Office testified next. He works in the corrections bureau. Inmates are assigned a PIN number to use in making telephone calls (which they are required to pay for). All calls are recorded. Nothing would prevent one inmate from placing a call and handing the telephone to another inmate. On September 23, 2012, a call was placed using the PIN number of inmate Mark Rook. Huff listened to a recording of that call, and it appeared that three people were speaking. Huff identified a CD recording of the call.

¶ 61 The State's next witness was Mark Rook. Outside of the presence of the jury, Rook testified that he had entered into an agreement with the State's Attorney's office. As part of that arrangement, the State paid for a hotel room for Rook and his family for seven days, paid him a $20 statutory witness fee, gave him food cards for local restaurants, provided him transportation between his hotel and the courthouse, and agreed to provide bus tickets for him and his family to a destination of his choosing within the continental United States after the trial. After he reaches that destination, the State will further pay for a hotel for one week. The State also agreed to reduce a pending charge of residential burglary to burglary.

¶ 62 The jury was then recalled. Rook testified that in September 2009, he was arrested for residential burglary and placed in the Winnebago County jail. While there, he met defendant. On September 23, 2009, he had a conversation with defendant. Defendant asked Rook if Rook could contact an acquaintance of theirs named Sam. Defendant wanted to keep Rivas from testifying. Rook's brother worked with Sam. Rook called his brother and asked if Sam was present. He told his brother Cartoon wanted to talk to Sam. Sam was not present at the time, so defendant asked to speak to Rook's brother. Rook remained near defendant while defendant spoke to Rook's brother. Rook identified a recording of the telephone conversation, including the participants in the call. The recording was played for the jury.

¶ 63 Sometime after September 23, Rook heard defendant talking to two other people about his homicide case while they were working in the laundry room. Rook asked defendant if he did it. Defendant looked at Rook and stated, "Pssh, what's you think." While stating this, defendant "nodded his head from a regular position down and then back to a normal position." He told a guard about his conversations with defendant. Detectives came to speak with him.

¶ 64 On cross-examination, Rook admitted that he was hoping that his testimony in this case would help the disposition of his burglary case. He clarified that the motion defendant made with his head when Rook asked him if he had committed the homicide was "not just straight up and down." Rook admitted he initially told detectives that he heard defendant say he "smoked a dude," and he signed a written statement to that effect. However, he now admitted that defendant never used those words. Rook agreed that he never looked at any pictures to try and identify the others who were present when defendant purportedly said, "Pssh, what's you think." On redirect-examination, Rook stated that detectives wrote his statement and "smoked" was the word they chose to write. On recross-examination, he acknowledged that he read and signed the statement.

¶ 65 Detective Mark Jimenez was the final witness called by the State. On July 31, 2009, Jimenez met with Cordella Lee. Detective Swanson was also present. He interviewed Lee in an interview room at the police station. The interview was taped. Jimenez reviewed the recording the day before his testimony. He testified that the recording was a true and accurate copy of the interview. Lee told Jimenez that he had lent an SUV to defendant. A portion of the recording was then played. On cross-examination, Jimenez acknowledged that Lee was wearing a red shirt during the interview. Following Jimenez's testimony, the State rested.

¶ 66 The defense began its case by reading a stipulation into evidence. Specifically, the parties stipulated that if called to testify, Detective Dulgar, a Rockford police officer, would state that he recovered a blue duffel bag from 4224 Auburn Street (where Lee and Simons lived). The bag contained six baseball caps.

¶ 67 Defendant then called Julio Saenz. Saenz testified that he was living in Rockford in 2009. Saenz's nickname is "Cartoon." On cross-examination, Saenz testified that he did not know defendant and was not aware of anyone else who went by the nickname "Cartoon." He did not know Davis, Valentin, or Rivas. He denied being in the alley where Davis was shot on July 30, 2009. He testified that he did not shoot Davis.

¶ 68 Matthew Weber next testified for defendant. Weber testified that he is employed as an "investigator for Winnebago County." Weber determined that it was 7.2 miles from the Rockford Airport to 1904 Auburn Street (where Yahaida Valentin lived). It took Weber 16 minutes and 27 seconds to drive the route via what he determined would be the most direct route. He also investigated a second route using Kishwaukee Street, which was 8.3 miles long and took him 17 minutes and 15 seconds to travel. On cross-examination, Weber acknowledged that his investigation occurred three years and ten months after Davis's murder. Moreover, he drove the first route at 7:30 a.m. and the second route at 10:15 a.m., while Davis picked up the Malibu from the airport at about 3 p.m. Weber did not know what traffic conditions Davis encountered. He also did not know what route Davis actually used or how fast he was driving. On redirect-examination, Weber stated there was some road construction that might have slowed him down "a little bit" on the first route, but it would not have changed the mileage. The same was true for the second route.

¶ 69 Defendant next called Brandon Dillard, a police officer employed by the city of Rockford. On July 30, 2009, he was dispatched to the area of a shooting. At that location, he spoke to Luis Valentin. Dillard testified that Valentin told him that Jessica got in the driver's seat of her vehicle, he got in the passenger's seat, and they backed out of the parking stall when they looked down the alley and saw someone lying on the ground.

¶ 70 Defendant then called Jordan Stedman, a Rockford police officer. On July 30, 2009, he spoke with Rivas at the scene of the shooting. Rivas told him she saw defendant standing near her truck, but never said defendant was "messing" with her truck or trying to get into it. She also told Stedman that she went outside to check on her truck rather than to go to Wal-Mart.

¶ 71 Cordella Lee next testified for defendant. He stated the he and Simmons cleaned Simmons's Dodge Durango after returning from a trip. They cleaned the carpet, which needed cleaning after the trip because, Lee explained, they have four children. The children made "a pretty big mess in the car." They did not, however, clean the headliner of the vehicle, as it was not needed. On cross-examination, Lee stated that they cleaned the carpet by vacuuming and using a shampooer. When defendant returned the SUV to him on July 30, 2009, it appeared to be in the same condition as it was when Lee lent it to defendant.

¶ 72 Defendant then read another stipulation into the record consisting of earlier testimony of Detective Voyles. Voyles, if called, would testify that there were smudges inside the Dodge Durango and that it had not been wiped completely clean.

¶ 73 Also by stipulation, defendant presented earlier testimony of Luis Valentin. Valentin had testified that he observed no blood coming from the bullet hole in Davis. Further, he acknowledged that he told detectives that Davis kept stating "Toon shot me," though, in fact, Davis could not speak as he was coughing up blood. Defendant then rested.

¶ 74 The State called Jimenez in rebuttal. On July 30, 2009, he met with Luis Valentin. Jimenez identified a written statement that Valentin gave to him and Detective Swanson. Valentin never asked to make any changes to the statement.

¶ 75 The State next called Joseph Lesner, who was an assistant State's Attorney on April 15, 2011. On that date, he met with Valentin. Valentin read over the written statement that he had given on July 30, 2009. Valentin never indicated that the statement was not accurate.

¶ 76 The jury found defendant guilty of first-degree murder. It further found that he used a firearm, which he personally discharged, in the commission of the offense. The trial court imposed a sentence of 32 years' imprisonment, with a 25 year enhancement due to defendant personally discharging a firearm during the offense. This appeal followed.

¶ 77 III. ANALYSIS

¶ 78 On appeal, defendant raises five issues. First, he contends that the trial court erred in allowing the admission of Davis's hearsay statements that "Cartoon" or "Toon" shot him. Second, he argues that he should have been allowed to use certain photographs, taken on the eve of trial, that defendant states would impeach the testimony of Rivas and Luis Valentin. In the alternative, defendant contends it was ineffective assistance of counsel to not procure these photographs earlier. Third, he complains that the trial court should not have instructed the jury that it was for them to determine what "reasonable doubt" means. Fourth, he alleges error in the trial court's failure to conduct *voir dire* in compliance with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Fifth, he asserts that the trial court should have appointed new counsel to address the issue of trial counsel's effectiveness in a posttrial motion rather than requiring trial counsel to argue his own ineffectiveness. For the reasons that follow, we affirm**.**

¶ 79 A. Hearsay

¶ 80 The trial court determined that Davis's statements that "Cartoon" and "Toon" shot him were admissible as dying declarations. Undoubtedly, as they were out-of-court statements "offered to prove the truth of the matter asserted," they were hearsay. *People v. Olinger*, 176 Ill. 2d 326, 357 (1997); Ill. R. Evid. 801(c) (eff. October 15, 2015). Hearsay is typically inadmissible. *Id.*; Ill. R. Evid. 802 (eff. January 1, 2011). One exception to the hearsay rule is the dying-declaration exception. *People v. Georgakapoulos*, 303 Ill. App. 3d 1001, 1008 (1999); Ill. R. Evid. 804(b)(2) (eff. January 1, 2011). Pursuant to this exception, a hearsay statement is admissible if: "(1) the declaration pertains to the cause or circumstances of the homicide; (2) the declarant has the fixed belief and moral conviction that death is imminent and nearly certain to follow almost immediately; and (3) the declarant possesses sufficient mental abilities to give an accurate account of the cause or circumstances of the homicide." *People v. Gilmore*, 356 Ill. App. 3d 1023, 1033 (2005). A declarant's belief that death is imminent may be shown by circumstantial evidence. *Id.* The proponent of the statement must prove these elements beyond a reasonable doubt. *Id.* We will overturn such a determination by a trial court concerning whether a statement falls within this exception only if the trial court's decision is contrary to the manifest weight of the evidence. *People v. Graham*, 392 Ill. App. 3d 1001, 1005 (2009); *Georgakapoulos*, 303 Ill. App. 3d at 1009. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *DeLong v. Cabinet Wholesalers, Inc.*, 196 Ill. App. 3d 974, 978 (1990).

¶ 81 In ruling Davis's statements admissible, the trial court found that Lange testified that Davis was "gagging often and having trouble breathing." When Davis attempted to lift his shoulder off the ground, he appeared to be in pain. The trial court noted that Davis "was always lying down" and "never up walking around." Stark testified that he observed a little hole in

Davis's shirt, with a little blood present. Newberry (the paramedic) immediately recognized that this was a "level 1 trauma situation," which corroborates witnesses who testified Davis was having difficulty breathing prior to Newberry's arrival. After being transported to the hospital, which took less than three minutes, Davis asked Newberry if Newberry thought he was going to die. The trial court noted that there was no testimony that Davis took a dramatic turn for the worse just prior to posing this question and thus was in the condition that he had been in since the time of the shooting. The trial court held that the totality of this evidence proved, circumstantially, that Davis believed he was dying when he made the statements at issue here. Given the state of the record, we cannot say that an opposite conclusion to this finding is clearly apparent.

¶ 82 Defendant argues, nevertheless, that the statements were made 10 minutes before Davis asked Newberry if Newberry thought he was going to die. Accepting defendant's timeline as accurate, there is no evidence that Davis's condition changed significantly during this period. Hence, the trial court could have inferred that Davis's state of mind at the time he uttered those statements was the same as it was at the time he posed the question to Newberry. Defendant attempts to undermine this inference by pointing to Rivas's testimony that Davis was having increasing difficulties speaking as his condition progressed. We note that Lange testified that Davis was gagging continually while they spoke. Defendant contends Davis had only a small hole in his chest and was no longer bleeding (at least externally). While this observation is supported by the record, it is also undisputed that Davis was shot in the chest at fairly close range (inside a vehicle). Regardless of the size of the hole (which, we note, there is no evidence Davis could see from his supine position), the fact of the shooting itself provides a strong basis to conclude Davis believed he was dying.

¶ 83 Furthermore, while it is true that Davis told both Rivas and her son that he was going to be okay, the trial court concluded that this was merely an attempt to comfort them. This is a reasonable inference, as Davis and Rivas had been raised together like siblings. Defendant attempts to undermine the trial court's inference by pointing out that there was no testimony that defendant's son was distraught or in need of comforting. Rivas testified that her son, who was four years' old at the time, "kept on asking [Davis], 'are you okay.' " From this testimony, the trial court could infer that Davis would want to comfort Rivas' son, a child of tender years, who was persistently inquiring about Davis's condition. Defendant's argument does not persuade us that an opposite conclusion is clearly apparent.

¶ 84 In other words, defendant has not carried his burden on appeal of establishing that the trial court's determination is contrary to the manifest weight of the evidence. As such, we cannot conclude that the trial court erred on this point. Given our resolution of this issue, we need not address the State's argument in the alternative that the statements constituted excited utterances.

¶ 85 B. The Photographs

¶ 86 Defendant next argues that the trial court erred in barring certain photographs he wished to introduce to impeach the testimony of Rivas and Valentin, as the photographs were taken and tendered to the State on the eve of the trial. He also argues, in the alternative, that if the trial court properly barred the photographs, his attorney was ineffective for not procuring them in a timely manner. The photographs at issue were taken on June 10, 2013, while jury selection was proceeding for the third trial, which resulted in this appeal. The photographs were taken by Matt Weber, an investigator working for the defense. They were taken from Yahaida Valentin's apartment, and they purportedly showed the view Rivas and Valentin would have had of the area where they testified that they observed defendant near Rivas's truck. Defendant contends that

the photographs show that "Rivas and Valentin could not have seen the alley in which Rivas's truck was parked or defendant standing by Rivas's truck from the kitchen window."

¶ 87 We disagree with defendant's characterization of what the photographs show. Three photographs taken from the kitchen show the side of a garage that Rivas's truck was parked next to (Rivas testified, "My truck was parked right next to the garage;" Luis Valentin testified it was facing toward the door of the apartment building, which means it was pulled in forwards and the passenger side was on the garage side of the vehicle). In the photograph marked "B," one can see the entire side of the garage, all the way to the alley. If Rivas's truck were parked near the garage, defendant, when standing by the passenger side of the truck, would have been adjacent to the garage. We note that Rivas and Valentin both testified that defendant was trying to open the passenger-side door. Thus, defendant would have been near the middle of the vehicle. People's exhibit 27 (actually a series of exhibits) is an aerial photograph of the area including where Rivas's truck was parked. In People's Exhibit 27, a car is parked in the lot where Rivas's truck had been. This provides a reference point and makes it apparent that the area near the passenger door would have been near the side of the garage shown in the photographs at issue here and some distance from the alley itself. Moreover, People's Exhibits 28 to 31, also photographs, show where the white Malibu driven by Davis was parked, which was next to where Rivas's truck had been parked. These photographs show that there was not much room between the white Malibu and the garage; therefore, it is apparent that the passenger side of Rivas's truck would have had to have been close to the garage. A person standing adjacent to the passenger side of Rivas's truck would have been close to the garage, which is the area shown in the photographs defendant claims impeach Rivas and Valentin. In other words, contrary to defendant's claims, the photographs do not show that it would have been impossible (or even

difficult) for Rivas and Valentin to observe defendant standing next to Rivas's truck. They therefore do not impeach Rivas's and Valentin's testimony.

¶ 88 Accordingly, we would reject defendant's argument even if we were to assume, *arguendo*, that the trial court erred in excluding the photographs due to defendant's attorney's lack of diligence and also that this failure by defendant's attorney constituted representation falling below a level of objective reasonableness (the first prong of *Strickland*, 466 U.S. 668, 687 (1984)). Given that the photographs did not impeach Rivas and Valentin, the trial court's decision was—at most—harmless error. See *People v. Mullins*, 242 Ill. 2d 1, 23 (2011) (noting that error concerning admission of impeachment evidence is subject to a harmless-error analysis); *People v. Williamson*, 44 Ill. App. 3d 208, 215-16 (1976) (same). Moreover, as to defendant's ineffective assistance claim, defendant cannot establish prejudice as required under the second prong of *Strickland*, 466 U.S. at 693. As such, both of these claims necessarily fail.

¶ 89 C. Reasonable Doubt

¶ 90 Defendant next argues that the trial court erred by telling the jury it was for them to "determine what reasonable doubt means." It is axiomatic that neither the court nor counsel should attempt to define reasonable doubt. *E.g.*, *People v. Speight*, 153 Ill. 2d 365, 374 (1992). It has been observed that "[t]here is no better definition of reasonable doubt than the words themselves." *People v. Jenkins*, 89 Ill. App. 3d 395, 398 (1980).

¶ 91 We recently addressed this issue in *People v. Thomas*, 2014 IL App (2d) 121303, and we find it controls here. In *Thomas*, we first noted that "in considering whether a particular jury instruction violated the defendant's due process rights, 'the proper inquiry is not whether the instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it.' " (Emphasis in original.) *Thomas*, 2014 IL

App (2d) 121303, ¶ 20 (quoting *Victor v. Nebraska*, 511 U.S. 1, 6 (1994)). In a case like the present one, the question is whether, taken as a whole, "the instructions to the jury [were] such that there is a reasonable likelihood that the jury understood those instructions as allowing a conviction under a lesser standard than proof beyond a reasonable doubt?" *Thomas*, 2014 IL App (2d) 121303, ¶ 22. The *Thomas* court then noted that the trial court in that case never actually attempted to define reasonable doubt, but it did tell the jury "that the definition was for the jurors to determine." *Id*. 46. Furthermore, "[a] trial court's instruction that the meaning of 'reasonable doubt' is for jurors to determine is a correct statement of Illinois law." *Id*. 47. We then rejected the defendant's argument that this constitutes *per se* error:

> "The defendant argues that a trial court's instruction telling jurors that they must define reasonable doubt inevitably encourages them to apply a standard that is less than proof beyond a reasonable doubt. However, he provides no explanation as to why this should be so, other than citing to *Turman*, 2011 IL App (1st) 091019, and *Franklin*, 2012 IL App (3d) 100618. To the extent that *Turman* and *Franklin* held that simply instructing jurors that they must determine the meaning of 'reasonable doubt' is (1) a violation of the Illinois Supreme Court's proscription against providing a definition or (2) reversible error *per se*, we find them unpersuasive." *Id*. ¶ 48.

We then reiterated that the proper inquiry is to "consider all of the instructions received by the jury and determine whether there is a reasonable likelihood that the jury convicted the defendant under a lesser standard than proof beyond a reasonable doubt." *Id*. ¶ 49. We concluded by holding that simply stating the meaning of "reasonable doubt" is for the jury to determine does not create such a likelihood. *Id*.

¶ 92 *Thomas* is strikingly similar to this case, and we hold that it controls here. The trial court's instructions in this case, in accordance with *Thomas*, did not create a reasonable likelihood that the jury convicted defendant using a standard of less than proof beyond a reasonable doubt.

¶ 93 In his opening brief, defendant called our attention to *People v. Gashi*, 2015 IL App (3d) 130064, a recent case from the Third District. In *Gashi*, the Third District found error "where the trial court told jurors that they could 'decide' or 'determine' for themselves what reasonable doubt means." *Id*. ¶ 25. It explained:

> "A judge's statement to potential jurors that they are free to 'decide what reasonable doubt is' implies 'that there is an extraordinarily broad range of possible meanings' for the concept of "reasonable doubt," some of which may be unconstitutional. See *Wansing v. Hargett*, 341 F.3d 1207, 1214 (10th Cir. 2003). Such a statement makes 'it reasonably likely that the jury would overestimate the amount of latitude it had in defining the reasonable doubt standard.' [*Wansing*, 341 F. 3d at 1215]." *Id*. *Gashi*, 2015 IL App (3d) 130064, ¶ 26.

Defendant asks that we reconsider *Thomas* in light of *Gashi*.

¶ 94 However, as defendant acknowledged in his reply brief, the supreme court vacated *Gashi* and directed the Third District to reconsider its decision in light of its opinion in *People v. Downs*, 2015 IL 117934. In *Down*s the supreme court endorsed our decision in *Thomas*, stating, "We believe that *Thomas* reached the correct conclusion on this point, and hold that here, the circuit court's response to the jury—'We cannot give you a definition [of reasonable doubt;] it is your duty to define [it]'—was unquestionably correct." *Id*. ¶ 24. Accordingly, we adhere to our

decision in *Thomas*. The trial court committed no error by stating that it was for the jury to determine what the term "reasonable doubt" means.

¶ 95 D. *Voir Dire*

¶ 96 Defendant next objects to the conduct of *voir dire*. Specifically, defendant asserts that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). See also *People v. Zehr*, 103 Ill. 2d 472 (1984). Rule 431(b) provides:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects."

Though they disagree with respect to the adequacy of the questioning of one juror, the State and defendant agree that the trial court did not ask all of the questions required by Rule 431(b) of every juror. Defendant further concedes that this error was not preserved and, therefore, he is required to show plain error. Defendant focuses upon the closely-balanced-evidence prong of the plain error test. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Defendant bears the burden of establishing that the evidence is closely balanced. *People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007). Parenthetically, we note that the mere fact that defendant's second trial ended with the jury deadlocked does not compel us to find the evidence closely balanced here. *People v. Davis*, 228 Ill. App. 3d 835, 840 (1992) ("Although defendant's first trial resulted in a hung

jury, that fact alone would not necessarily compel us to view the evidence in the subsequent trial as closely balanced.").

¶ 97 Having reviewed the record and the parties' arguments, we do not believe the evidence is closely balanced in this case. Two witnesses (Rivas and Valentin) testified to seeing defendant in the area shortly before the shooting. The victim stated "Toon" and "Cartoon" shot him. Davis also stated defendant drove away in a silver Nissan Pathfinder. Defendant borrowed a vehicle (a gray Dodge Durango) on the day of the shooting. Gunshot residue was found inside the vehicle. Samika Coulter testified that she met a friend of hers and defendant on the day of the shooting and gave them a ride. While in her vehicle, defendant made a telephone call. Coulter heard defendant say that whoever he was speaking with should make sure there were no shells in the truck, to clean the blood out of the truck, and to get rid of the truck. Defendant made a telephone call from jail. Mark Rook assisted defendant in contacting Rook's brother, who worked with a mutual acquaintance named Sam. Sam was not available, and defendant spoke to Rook's brother. Rook overheard the call and heard defendant say he wanted to make sure Rivas did not come to court. At one point, Rook asked defendant if he had committed the crime. Defendant did not deny having done so, said "Pssh, what's you think," and made a motion with his head that could be interpreted as an affirmative response.

¶ 98 Defendant contends that the evidence against him was "almost entirely circumstantial." The mere fact that evidence is circumstantial does not mean that it is also closely balanced. *People v. Howery*, 178 Ill. 2d 1, 47 (1997) ("We do not agree with the defendant that this is a close case simply because it was based largely on circumstantial proof of guilt."). Indeed, in *People v. Effinger*, 2016 IL App (3d) 140203, ¶ 26, the court found that the evidence was not closely balanced where it consisted of the victim's testimony, circumstantial evidence, and

evidence indicating defendant's consciousness of guilt, which closely mirrors the evidence in this case.

¶ 99 Defendant also contends that contradictory evidence existed in the record. For example, he points to the testimony of Elijah Smith that a dark-colored SUV had been parked in the alley where Davis was shot. Smith heard someone say, "Hurry, hurry." The SUV was occupied by two African-American men. Defendant is not African-American. Defendant contends that this contradicts Rivas's and Valentin's testimony that they saw defendant in the alley shortly before the shooting; however, we fail to see how. Quite simply, that someone else was in the alley at or about the time Davis was shot in no way makes it impossible for defendant to have been in the alley where Rivas and Valentin testified that they observed him.

¶ 100 It is true that Davis stated he was pushed from a Nissan Pathfinder rather than a Dodge Durango. While this provides some support for defendant's argument, we note that these are both SUV's and that the color described by defendant was consistent with the Durango. Defendant asserts that Davis bought and sold cars for a living and would know the difference between the two particular vehicles. However, while Horton testified that defendant did buy and sell cars, she also testified that in the 11 months she knew him, he "flipped" two cars. That defendant bought and sold a car approximately every five months provides little support for the proposition that defendant would know the difference between any two given vehicles.

¶ 101 Defendant makes much of the fact that Officer Lange wrote in his police report that Davis told him that "they" shot him, while Lange testified that Davis stated "Cartoon" shot him. There was testimony that defendant was acting in concert with another unidentified individual, and the use of the term "they" likely reflected this even if defendant was the only actual shooter.

¶ 102 Simmons, Lee, Rook, and Coulter all have previous felony convictions. While this is impeaching, there is no apparent motive why these individuals would lie to implicate defendant in a murder. It is not even clear that Coulter knew Simmons or Lee, so the notion that they would conspire to all tell stories that implicated defendant is nothing but mere speculation. While Rook also was a felon, he was corroborated by the recording of the call he assisted defendant in placing to Rook's brother. Thus, while the State's case was based partly on the testimony of several felons, their testimony was consistent and corroborated each other's testimony. It was also corroborated by other evidence, such as Davis's dying declaration. Defendant does not explain why these witnesses would conspire in such a matter.

¶ 103 In sum, while some of the State's witnesses were impeached in certain ways and while there were some contradictions in the evidence against defendant, the evidence of record consistently points toward defendant. This is not a situation where the State's case is based on the testimony of one or two questionable witnesses; rather, numerous, independent factors point to defendant's guilt: Davis's statement, defendant's attempt to dissuade a witness from testifying, the testimony of other witnesses placing defendant in the area of the shooting (Rivas and Valentin), and more testimony evincing concern by defendant regarding covering up the crime (Rook and Coulter). Accordingly, we are unable to find that the evidence in this case is closely balanced.

¶ 104 As defendant has failed to show the evidence is closely balanced, the forfeiture of this issue must stand.

¶ 105 E. Conflict of Interest

¶ 106 Defendant's final argument is that his attorney labored under a conflict of interest when he was forced to argue his own ineffectiveness during posttrial proceedings. A conflict of interest can be *per se* or actual. *People v. Perkins*, 408 Ill. App. 3d 752, 761 (2011).

¶ 107 Initially, defendant argues that this was a *per se* conflict of interest. Where a *per se* conflict exists, a defendant need not show prejudice to obtain a reversal. *Id*. However, in *People v. Taylor*, 237 Ill. 2d 356, 374 (2010), our supreme court identified the following three situations that result in a *per se* conflict arising: "(1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved in the prosecution of defendant." None of these situations are present here, so no *per se* conflict exists. See *Perkins*, 408 Ill. App. 3d at 761-62.

¶ 108 Defendant attempts to distinguish *Perkins* by pointing out that in that case, the purportedly conflicted attorney only filed a written motion raising his own ineffectiveness while in this case, defendant's counsel actually argued his ineffectiveness before the court. We fail to see, and defendant does not explain, the significance of this distinction. One factor that the *Perkins* court noted was that the defendant was represented by different counsel on appeal, who could argue the ineffectiveness claim, which had been preserved by counsel raising his own ineffectiveness before the trial court. *Id*. at 762. We note that the ultimate issue of whether counsel was ineffective is reviewed *de novo* (*People v. Stanley*, 397 Ill. App. 3d 598, 612 (2009)), so appellate review, so long as the error is preserved, provides an adequate forum to address the issue. Here, trial counsel's actions, including his oral argument, were adequate to preserve several issues regarding the effectiveness of his representation. Defendant does not

point to any issues that were forfeited. Like the *Perkins* court, we find no *per se* ineffectiveness on trial counsel's behalf.

¶ 109 Defendant cites two cases from this court in support of his argument, *People v. Keener*, 275 Ill. App. 3d 1 (1995), and *People v. Willis*, 134 Ill. App. 3d 123 (1985). *Keener*, 275 Ill. App. 3d at 5, states, "A *per se* conflict of interest arises when attorneys argue motions in which they allege their own ineffectiveness." Similarly, *Willis*, 134 Ill. App. 3d at 133, states "there was a blatant *per se* conflict of interest" where an attorney argued his own ineffectiveness. *Keener* involved the forfeiture of a claim for purposes of appeal, a situation the *Perkins* court persuasively distinguished. See *Perkins*, 408 Ill. App. 3d at 762. *Perkins* also distinguished *Willis* on the basis that in *Willis*, the defendant conducted adversarial examination of his attorney. *Id*. In any event, to the extent *Willis* can be read as stating that a *per se* conflict automatically exists whenever an issue concerning the adequacy of trial counsel's representation arises, it is not a proper statement of the law. See *Perkins*, 408 Ill. App. 3d at 761-62; *cf. People v. Crane*, 145 Ill. 2d 520, 533 (1991) ("*Krankel*, [102 Ill. 2d 181 (1984),] however, did not establish a *per se* rule that all *pro se* motions for a new trial alleging the ineffective assistance of counsel must result in the appointment of new counsel.").

¶ 110 Defendant also argues that an actual conflict of interest existed. If a *per se* conflict does not exist, a defendant may still establish he or she received the ineffective assistance of counsel by showing an actual conflict adversely affected trial counsel's performance. *People v. Hernandez*, 231 Ill. 2d 134, 144 (2008). To do so, the defendant must identify "some specific defect in his counsel's strategy, tactics, or decision making attributable to the conflict." *People v. Spreitzer*, 123 Ill. 2d 1, 18 (1988). Proof of an actual conflict "requires proof of *** 'prejudice' or 'actual prejudice.' " *Id.* However, a defendant is not "required to prove that his

attorney's deficiencies did not constitute harmless error" or that, "in other words, to prove that the conflict contributed to his conviction." *Id*. at 18-19.

¶ 111 Defendant notes that counsel, in arguing his own ineffectiveness, stated that "there were some actions or inactions by defense counsel that I believe constitute[d] ***ineffective assistance of counsel." However, the only defect specifically identified by defendant on appeal concerns counsel's failure to vigorously pursue the claim that he was ineffective with regard to the photographs that the trial court barred for counsel's lack of diligence. Though we recognize that defendant need not prove that there is a reasonable probability that the outcome of the trial would have been different had the photographs been admitted, we fail to see how we could call counsel's conduct a defect given that the photographs do not impeach Rivas or Valentin or have any other meaningful value for defendant. As such, defendant has not provided us with a basis to undo this portion of the proceedings below.

¶ 112 IV. CONCLUSION

¶ 113 In light of the foregoing, the judgment of the circuit court of Winnebago County is affirmed.

¶ 114 Affirmed.

¶ 115