2016 IL App (3d) 150274-U

Order filed November 3, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0274
v.	)	Circuit No. 13-CF-909
	)	
MICHAEL B. WILLIAMS,	)	Honorable Kevin Lyons
Defendant-Appellant.	)	Judge, Presiding

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions affirmed where the evidence was sufficient to prove him guilty beyond a reasonable doubt. The trial court did not err when it refused to admit certain evidence, including a witness affidavit and testimony of defense expert witness. Defendant was not deprived of effective assistance of counsel. The trial court did not commit plain errors during the trial.

¶ 2 Following a jury trial, defendant Michael Williams was found guilty of aggravated battery with a firearm and unlawful possession of a weapon by a felon. He was sentenced to 18

years' imprisonment for the aggravated battery and 6 years' for unlawful possession, to be served consecutively. His posttrial motion for a new trial was denied and he appealed.

¶ 3 FACTS

¶ 4 Defendant Michael Williams was charged by indictment with aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) for his role in a shooting that occurred on September 27, 2013. The shooting happened in a parking lot of an apartment complex where Williams, Eric Brownlee, Scott Lang, Gregory Williams, Ray Anderson, Chayla McNeal and several other people were gathered. McNeal, who was the mother of Brownlee's children, lived in an apartment in the complex. Brownlee went to McNeal's apartment to clean up. After rejoining the parking lot party, Brownlee was shot in the leg. Williams was arrested later that night.

¶ 5 Prior to trial, the State filed a *motion in limine* to exclude the testimony of Williams's expert witness, Steven Howard, a purported gunshot residue (GSR) expert. The State argued Howard lacked scientific qualifications and had no basis in literature for his opinion. The trial court questioned Howard's qualification as a GSR expert, informed Williams that it was inclined to bar the expert from testifying, but invited Williams to submit Howard for an offer of proof.

¶ 6 Williams was tried before a jury. After the jury was empaneled but before the presentation of evidence began, Williams tendered to the State an affidavit signed by witness Lang in which he recanted his identification of Williams as the shooter. A sidebar took place at which defense counsel acknowledged the late tender but said he had just been provided the document from Williams's wife. The trial court determined that the affidavit could not be used and the parties could not refer to it due to its untimely disclosure. The trial court indicated that

Lang could testify that he changed his story and admitted the affidavit into evidence on Williams's motion.

¶ 7 McNeal testified that when Brownlee left after showering at her apartment, she heard a gunshot and looked out the window to see Brownlee shot and bleeding on the ground. She saw "like 10 guys running" from the area. McNeal also saw a man with braided hair and a striped shirt standing over Brownlee. She heard the man say, "I will kill you right now." She then saw both a blue truck and a silver car drive away. She called 911 and reported that it was too dark to see the shooter and she did not know his identity. She was able to describe the shooter as "a light-skinned black man with a burned face." McNeal picked Williams out of a photographic array at the police station later that night. She also identified Williams in the courtroom.

¶ 8 On cross-examination, McNeal estimated it was 50 feet from her apartment window to the spot of the shooting. She described the parking lot as "really dark," without lights. She identified Williams at the time of the shooting because he was the only person that Brownlee knew there and she "wouldn't think anyone could do it but him." She did not see a weapon. McNeal was unsure whether the man standing over Brownlee was Williams and said she made a mistake identifying him as the shooter.

¶ 9 Morris Franklin, a Peoria police officer, testified that he spoke to McNeal after the shooting. McNeal described that the shooter had braids and "burnt" skin, was wearing a red and white striped shirt, and left the area in a blue Blazer. David Smith, a Peoria police officer assigned to the Federal Bureau of Investigations (FBI), testified that he arrested Williams after Williams arrived home in a gold car at approximately 11:30 p.m. Williams was wearing a black and red striped shirt.

¶ 10 Lang testified. He was friends with both Brownlee and Williams. He and Brownlee went to welding school together. After class on September 27, 2013, he went to hang out with Brownlee and Williams in the parking lot. Brownlee was making fun of Williams, who just looked at Brownlee in response. Brownlee left to shower. When he returned, Brownlee began arguing with Williams. They were yelling at each other. Lang saw Williams "rack a gun and shoot Eric." Williams was a couple of feet from Brownlee and Lang was about 10-20 feet from them. After the shooting, Lang went behind the buildings and then left. He did not talk to the police at the scene but later that night went to his county sheriff's department and told them what he had seen. He was told that Peoria was not the department's concern. He talked to a Peoria detective on October 1, 2013, and identified Williams as the shooter from a photograph. On cross-examination, he denied that his story had not always been consistent. He acknowledged it was dark the night of the shooting but said the darkness did not affect his ability to see the shooting. He had been drinking but he was not impaired. Lang testified it was clear in his mind that Williams was the shooter, stating he saw Williams shoot Brownlee.

¶ 11 Wallace Jordan, a security officer at the apartment complex where Brownlee was shot, heard the gunshot around 10 p.m. and arrived at the scene of the shooting a minute later. Jordan testified that his car lights were shining onto the parking lot and he saw Williams standing over Brownlee, saying, "I'll kill you, motherfucker. You don't know who you're messing with." Jordan identified Williams in court as the man standing over the victim. Jordan estimated he was 50 feet away from the two men. Jordan was familiar with Williams, knew his voice, and recognized him when he turned toward Jordan after threatening Brownlee. He was 100% certain that Williams was the man standing over Brownlee. He did not see Williams with a weapon.

Williams then took off in a blue Blazer. Jordan backed out of the lot and called the police. He later picked Williams out of a photo array.

¶ 12 Before the trial resumed the next day, the trial court heard additional arguments regarding the Lang affidavit. The trial court found that Williams committed "a serious discovery violation" and could not benefit from it. The trial court stated, "I find the production of it to be deliberate, purposeful, ill-positioned, untimely, and without the support of law." The parties also discussed and agreed to stipulate that Williams had been previously convicted of a felony, with no additional details to be provided.

¶ 13 The trial continued before the jury. Jason Leigh, a Peoria detective who investigated the shooting, testified. He spoke with Brownlee a third time in the hospital on October 26, 2013. Brownlee was in a good state of mind, responsive and not confused. Brownlee told him that Williams was the shooter. Brownlee told him that he had taken the tequila bottle Williams was holding, which angered Williams. The bottle was then knocked to the ground, which caused it to break, further angering Williams. In the course of his investigation, Leigh also offered a photo array to O'Neal, who identified Williams as the man she saw standing over Brownlee, and to Lang, who identified Williams as the person who shot Brownlee.

¶ 14 A stipulation was entered into evidence which provided that the results of the GSR test from Williams's hands indicated that he "may not have discharged a firearm with either hand. If he did discharge a firearm, then the particles were removed by activity, were not deposited, or were not detected by the procedure" and that there were no fingerprints found on the shell casings found at the scene. The stipulation that Williams had a prior felony conviction was also entered into evidence. The trial court instructed the jury that Williams's conviction could only be considered for the fact that he had a prior felony conviction. The State rested.

¶ 15 Williams moved for a directed verdict, which the trial court denied. The trial court heard further argument on the GSR expert witness proffered by the defense, which submitted that Howard would testify that because there would be a reasonable degree of professional certainty that there would be some residue on a person's hand after shooting a weapon, and Williams had no GSR on his hand, he was therefore not the shooter. The expert, Howard, testified as an offer of proof. He was a gun owner, attorney and an expert in weapons, ballistics, gunshot residue, and shooting reconstruction. He provided his educational and professional qualifications. In his opinion, there was a more than 20,000-to-1 chance that Williams was not the shooter. His conclusion was based on a Czechoslovakian study about how gunshot spray goes forward when a weapon is discharged.

¶ 16 The trial court weighed the probative value of Howard's testimony against its prejudicial effect and stated that it could not conclude what the witness intended to say, which clouded the court's ability to measure whether Howard's testimony was relevant or probative. The court also found that Howard's conclusion, that the shooter would have gunshot residue on his hand and since Williams did not, he was not the shooter, would not be a conclusion requiring an expert to reach. After noting that it read the article on which Howard relied in forming his opinion, the trial court stated it did not see how the article allowed Howard to compute a likelihood or lack of likelihood that Williams was or was not the shooter. The trial court concluded the testimony would not assist the jury. The court further found the testimony might confuse the jury. The trial court granted the State's motion *in limine* and barred Howard from testifying.

¶ 17 The defense presented its case. Witnesses Ariel Ivory, Ray Anderson, Gregory Williams, Leonard Schmidt, and Tiffany Issac all told a similar story, that a mysterious man in a hoodie or a hat shot Brownlee. They did not provide these statements to the police until four months after

the shooting. Ivory testified she was at her apartment the night of the shooting and that Williams showed up at her door around 10 p.m. He used her phone to call his wife for a ride. Williams was not wearing gloves and she did not notice any blood on him. He did not use the bathroom while he was in her apartment. He was "a little frantic." She told the police this information in January 2014.

¶ 18 Anderson testified he was in the parking lot with about a dozen people the night of the shooting, laughing and drinking. Upon arriving, Brownlee shook Williams's hand and "they kind of hugged, whatever." Williams was wearing an orange and white striped shirt and was drinking tequila. Brownlee headed inside the apartment building for a few minutes and when he came back outside, a man with a dark-colored hoodie appeared from between the apartment buildings. The man and Brownlee exchanged words and the man in the hoodie shot Brownlee. Anderson stated that after the gunshot, Williams walked up and tried unsuccessfully to tussle the gun away from the shooter. He then stood over Brownlee and said, "What was that, man? You could have got us all killed. What the fuck was that?" Anderson ran because he saw a car coming and did not know what would happen next. On cross-examination, Anderson stated that he and Williams were related and they were close. He did not come forth with a statement until January 2014, when he wrote a letter to Williams. Anderson felt there was no need to call the police.

¶ 19 Gregory Williams stated he was present in the parking lot on the night in question. He saw a man in a dark-colored hoodie "reach off his hip." After he saw this man draw a handgun, Gregory started running. He then heard a gunshot. He did not see Brownlee get shot but he returned to the scene when he heard sirens and noticed then that Brownlee was shot. He said Williams tried to reach for the gun from the shooter's hands to prevent him from shooting again.

He heard Williams say to Brownlee, "Man, you almost got us killed." On cross-examination, Gregory stated he did not give a statement to the police even though he returned to the scene when the police were still there. He did not give a statement until January 2014, when he wrote a statement for Williams's attorney. He admitted he had prior convictions for attempt robbery, residential burglary and a juvenile burglary conviction.

¶ 20 Schmitt testified he was at the parking lot where the shooting took place to have a drink with a friend with whom he worked. The atmosphere was pleasant and friendly. He was in his car a few feet from Williams and saw a man in a hood walk up and have words with Brownlee. He saw Brownlee put his hands in the air and then saw the man in the hood shoot Brownlee. Williams tried to get the shooter off Brownlee, and then stood over Brownlee and said, "you almost got me killed. Just screaming. Like, I'm trying to help you or whatever." Williams was wearing a red or orange striped shirt and left the scene in a blue Navigator. When a red Impala pulled into the parking lot, everyone scattered, and Schmitt drove away. On cross-examination, Schmitt admitted that in his statement he provided Williams in January 2014, he wrote the mysterious man dressed in black had on a hat, not a hood. He was aware the night of the shooting that Williams had been arrested for it.

¶ 21 Issac testified before the court. She stated she was in the parking lot with Brownlee and Williams the night in question. She saw a man in black come from behind the apartment complex with his arm out moving quickly. When she heard a gunshot, she ran. Williams did not have a gun and did not shoot Brownlee. On cross-examination, Issac said stated she wrote a letter for Williams. She did not write the letter until January 2014. She was aware days after the shooting that Williams was arrested and never gave a statement to the police.

¶ 22 Brownlee testified. He stated that after his welding class let out early on September 27, he and Lang went to the apartment complex. He was taking Xanax and Lang was snorting Ritalin. Lang remained in the car to do more drugs when they arrived at the parking lot. Brownlee was not having a problem with Williams on the night of the shooting and had never had a problem with him. He heard a scuffling and saw some people come from between the cars. He heard a pop and realized he had been shot in the leg. He looked up and saw Williams and the gunman wrestling for the gun. When he was asked if he could identify the shooter, he stated, "Not in here. Not in here." He said Williams did not shoot him.

¶ 23 On cross-examination, Brownlee said he told the detectives on October 26, 2013, when he was in the hospital, that Williams shot him. He said he took Williams's tequila and drank some, which made Williams angry. Williams then pulled a gun and shot him in the leg. He said Williams stood over him and threatened that he could kill him. In May 2014, he went to the State's Attorney's Office and said Williams did not shoot him and he wanted to drop the charges. He said, "I didn't want to send an innocent man to jail for something that he didn't do." He denied that he said the man who shot him had a greenish complexion. He admitted he had prior convictions for unlawful possession of a controlled substance and for shoplifting. In rebuttal, Brownlee said he was medicated when he identified Williams as the shooter and did not fully appreciate the questions. He further stated that he made up the identification because his feelings were hurt due to the fact that Williams did not "step up." He thought Williams would know and identify the shooter.

¶ 24 Leigh testified in rebuttal. He said that visited Brownlee three times in the hospital, the third time on October 26 at Brownlee's request. Even if Brownlee was on medication, he was in a good state of mind and responsive to his questions on October 26. At that visit, Brownlee

identified Williams. Brownlee said he and Williams were arguing over tequila, and after shooting him, Williams threatened that he could kill him. The first two times Brownlee said he did not know who shot him. Brownlee identified Williams from a photograph.

¶ 25 Michael Bornsheuer, an investigator with the Peoria County State's Attorney's Office, was the last witness to testify. He stated that on May 2014, he was present when Brownlee came into the office and told the prosecutor that Williams was not the shooter. Bornsheuer testified that Brownlee said the subject that shot him was a little taller than he was, had a scar on his nose and a greenish complexion.

¶ 26 The defense rested and moved for a directed verdict. The court denied this motion and closing arguments were presented. During the State's closing, it challenged the credibility of the defense witnesses, characterizing their testimony as inconsistent, stating that the witnesses "all come to court in a rehearsed kind of way, but not really sure about what they're supposed to say." In response to the State's objection regarding the defense's characterization of the evidence, the trial court gave the jury a limiting instruction that closing arguments were not evidence and that the jurors should rely on their own recollection of the evidence.

¶ 27 The jury found Williams guilty of both counts. He moved for a new trial. At a posttrial hearing, Williams asked the court to take judicial notice of the manufacturer's description of Ritalin and argued that trial counsel was ineffective for failing to challenge Lang's use of Ritalin. He also challenged as ineffective assistance the exclusion of any blacks from the jury. He argued the Lang affidavit and his expert witness were improperly excluded. The trial court denied the motion for a new trial, finding, in part, that it excluded Howard because the article on which the expert relied was not applicable. A sentencing hearing took place and the trial court

sentenced Williams to 18 years' for aggravated battery with a firearm and 6 years' for unlawful possession of a weapon by a felon, to be served consecutively. Williams appealed.

¶ 28 ANALYSIS

¶ 29 Williams raises five issues on appeal: whether the State failed to prove him guilty beyond a reasonable doubt; whether the trial court erred when it refused to admit the Lang affidavit and when it rejected Williams's firearm expert; whether he was deprived of effective assistance of counsel; and whether the trial court committed plain errors during the trial.

¶ 30 First, Williams challenges the evidence as insufficient to convict him. He points to the inconsistency of the State's evidence and its conflict with the evidence of the defense. Williams claims the defense presented viable and consistent evidence that an unidentified man in black shot Brownlee and the State failed to offer any physical evidence connecting him to the shooting, raising a reasonable doubt as to his guilt.

¶ 31 It is not the function of the reviewing court to retry a defendant on a challenge to the sufficiency of the evidence. *People v. Steidl*, 142 Ill. 2d 204, 226 (1991) (quoting *People v. Jimerson*, 127 Ill. 2d 12, 43 (1989)). The jury is to determine the weight to be given to witness testimony, to assess witness credibility, and to make reasonable inferences from the evidence presented. *Id*. Only where the evidence is so improbable or unsatisfactory that there remains a serious doubt about the defendant's guilt should a criminal conviction be set aside. *Id*. The testimony of a single witness, if credible, is sufficient to sustain a conviction. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The lack of physical evidence does not negate the eyewitness testimony. *People v. Rouse*, 2014 IL App (1st) 121462, ¶ 58. In reviewing a challenge to the sufficiency of the evidence, we consider whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 32 The jury heard the testimony of many witnesses, including eyewitnesses and detectives, as well as the victim. McNeal testified for the State that she observed Williams standing over Brownlee, who had been shot and was laying on the ground, and heard Williams threaten Brownlee. McNeal later recanted her identification, saying she had been mistaken about the shooter's identity. Jordan, the security guard, saw Williams standing over Brownlee and heard Williams threaten Brownlee. Jordan knew Williams and was familiar with his voice. Lang testified that he saw Williams "rack a gun and shoot Eric" and heard the threat. The testimony from Lang, McNeal, and Jordan all placed Williams standing over the victim threatening him immediately following the shooting. All three of these witnesses picked Williams out of a photo lineup; McNeal and Jordan on the night of the shooting, and Lang a few days later. Brownlee also told the detectives that Williams was the shooter, which statement he later recanted under oath. The defense put forth witnesses that testified Brownlee was shot by a mysterious man in a hood. They all stated that Williams wrestled the hooded man trying to get the gun from him, and then stood over Brownlee.

¶ 33 The testimony from witnesses presented by both sides is conflicting. Many of the witnesses gave inconsistent statements in their own accounts. The existence of the conflicting evidence does not by itself require this court to reverse Williams's conviction. It is not unreasonable that the jury, after hearing testimony by the various witnesses and seeing the evidence presented, came to the conclusion that Williams was guilty beyond a reasonable doubt. The jury was in the best position to assess the evidence and determine which witnesses were credible and which ones were not credible. The jury decided which set of facts it found most

believable. All of the evidence, viewed in a light most favorable to the State, is not so improbable or unsatisfactory as to leave a reasonable doubt regarding Williams's guilt. We find the evidence was sufficient to sustain his convictions.

¶ 34 We now address Williams's claim that the trial court erred when it refused to admit the Lang affidavit. Williams submits that the trial court's decision not to admit the affidavit presented by the defense constitutes error. According to Williams, exclusion of the evidence obstructed inquiry into the truth and was an excessive sanction.

¶ 35 "When a party fails to comply with a discovery rule or order, it is within the trial court's discretion to 'order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.' " *People v. Edwards*, 388 Ill. App. 3d 615, 627-28 (2009) (quoting Ill. S. Ct. R. 415(g)(i) (eff. October 1, 1971)). Discovery rules are aimed at preventing surprise and unfair advantage by either party and aiding in the search for the truth. *People v. Turner*, 367 Ill. App. 3d 490, 499 (2006).

¶ 36 Illinois Supreme Court Rule 415(g) gives the trial court the authority to impose various sanctions for a party's violation of discovery rules. Ill. S. Ct. R. 415(g) (eff. Oct. 1, 1971). Possible sanctions include exclusion of the material. *Id*. The exclusion of evidence is a drastic measure and should be applied only to flagrant violations by a party demonstrating disregard of the court's authority. *People v. Whalen*, 238 Ill. App. 3d 994, 998 (1992). Factors which a trial court should consider in determining whether the exclusion of evidence is an appropriate discovery sanction are the (1) effectiveness of less severe sanctions; (2) materiality of the proposed evidence to the outcome of the case; (3) prejudice caused to the party to whom the evidence was not disclosed; and (4) evidence of bad faith in the violation of discovery rules.

People v. White, 257 Ill. App. 3d 405, 414 (1993). This court will not reverse a trial court's decisions on the admission of evidence and the imposition of sanctions unless its determinations were an abuse of discretion. *People v. Randolph*, 2014 IL App (1st) 113624, ¶ 16; *People v. Kladis*, 403 Ill. App. 3d 99, 105 (2010).

¶ 37 When considering the effectiveness of a less severe sanction, the only viable option for the trial court would have been to grant a continuance in order to bring in the notary to verify the affidavit, as well as to give the State time to investigate the affidavit. The State was having difficulties securing its witnesses and any further delay in trial would have contributed to those difficulties. In addition, Williams had been demanding that his trial start immediately due to the continuances already granted because of witnesses failing to appear. While generally a short delay would not be burdensome, here, jury selection had been completed and the trial was set to immediately begin when the affidavit was presented. The instant circumstances indicate that the continuance would have served to benefit Williams to the State's detriment. Lesser sanctions such as a continuance would not be as effective as the exclusion of the affidavit. This factor favors the State.

¶ 38 The second factor is the materiality of the evidence. The affidavit included a statement by Lang recanting his prior identification of Williams as the shooter. Williams maintained that because Lang was the only eyewitness to the shooting, admission of the affidavit was critical to the defense. When the affidavit was first presented immediately before the trial was to begin, the trial court stated that Lang, "can testify and he can also testify, I suppose, that he's gone back and forth like any witness could and say that he now may have changed his story, may change his story between now and the time he takes the stand." The trial court never prevented Williams from questioning Lang about his inconsistent stories; he was prohibited from using the affidavit

to do so. Because Lang had already changed his story to the police regarding the shooter, the fact that he did so again is not as significant or dispositive as Williams argues. The materiality factor favors the State.

¶ 39 The third factor is prejudice to the State. We determine that allowing the affidavit to be used would have severely prejudiced the State. The affidavit was produced minutes before the trial was to begin. It was signed and dated weeks before the trial was to commence. Williams did not offer a reason for the delay in producing the affidavit. After hearing arguments regarding the affidavit, the trial court found that the affidavit was untimely and "deliberately produced and positioned so as to benefit the defense at the – to the detriment of the State" and a "serious discovery violation." The State had no time to prepare its case with the affidavit. As the sole testifying eyewitness to the shooting, Lang's identification of Williams was crucial to the State's case and allowing Williams to use the affidavit would require the State to alter or modify its case. This factor also favors the State.

¶ 40 The fourth factor, bad faith, also favors the State. The affidavit was in the possession of Williams's wife. It was dated September 22, 2014. The trial was ready to begin when the affidavit was presented on November 12, 2014. The defense attorney apparently had no knowledge of the affidavit and was as taken by surprise as the State. Nevertheless, Williams presumably was aware of the affidavit and failed to disclose it to his attorney. The affidavit was signed nearly two months before Williams presented it to counsel the morning of trial. The consequences of that failure should fall on him.

¶ 41 We conclude the *White* factors support the trial court's exclusion of the affidavit and find the trial court did not err when it refused to admit the affidavit as a sanction for Williams's discovery violation. Williams had the opportunity to cross-exam Lang when he testified at trial

and was not prohibited by the trial court from asking whether he changed his story, including the identification.

¶ 42 The third issue is whether the trial court erred when it rejected Williams's firearm expert. Williams maintains that the trial court should not have granted the State's motion *in limine* to exclude expert witness, Howard, his opinion on gunshot residue, and his conclusion that Williams did not shoot Brownlee.

¶ 43 Where scientific, technical or other specialized knowledge will help the jury to understand the evidence or a fact in issue, an expert may testify to his or her opinion. Ill. R. Evid. 702 (eff. Jan. 1, 2011). Expert testimony is generally admissible when the expert's testimony is about matters beyond the common knowledge of ordinary citizens and will help the jury to reach its conclusion. *People v. Gilliam*, 172 Ill. 2d 484, 513 (1996). However, where the testimony is on matters of common knowledge on a subject that is not difficult to understand and explain, the expert testimony is not admissible. *Id*. The trial court's decision to grant a motion *in limine* seeking to exclude a witness is reviewed for an abuse of discretion. *People v. Voit*, 355 Ill. App. 3d 1015, 1023 (2004).

¶ 44 Howard testified in an offer of proof. He was an attorney who owned a gun repair shop, and was hired by Williams to testify regarding gunshot residue (GSR). Howard relied on a Czechoslovakian article in forming an opinion that the absence of GSR on Williams's hands made it "approximately 20,000 to 1" that Williams had fired a gun in the hour prior to his arrest. He based this opinion on the fact that when firing a gun, there are some 20,000 GSR particles that are released, and there should have been some on Williams's hands or body if he had shot Brownlee. According to Howard, because Williams had no GSR on him at the time of his arrest, he could not have been the shooter.

¶ 45 The trial court found the study was not relevant to whether Williams had GSR on his hand, and that Howard could not tie the study to his computation regarding the odds. We agree. Howard admitted the researchers in the article did not sample the subject shooter's hands but maintained the article was authority for his basis to calculate the odds that Williams's hands would contain GSR if he had shot Brownlee. The article is concerned about a different aspect of gunshot dispersion and expressly states that the subject of gunshot residue on hands had been extensively reported and was not discussed in the article. The article further provided the number of gunshot particles would be affected by physical activity of the shooter after the shooting and that shootings outdoors were significantly influenced by "climatic conditions." The article did not account for these factors, further distinguishing the study from the instant circumstances.

¶ 46 We also agree with the court's determination that Howard's testimony would not assist the jury. The knowledge to which Howard would have testified was not outside the experience and qualifications of the average juror. An expert was not necessary to analyze that a person who shot a gun would likely have GSR on his hands after the shooting. The parties stipulated that the results of GSR testing of Williams's hands indicated Williams might not have fired a gun with either hand, or if he did, the GSR was removed, not deposited or not detected. Howard's opinion failed to account for the time lapse between the shooting, Williams's arrest, and the GSR test done by the police one hour and 45 minutes later. During that time period, Williams could have discarded gloves worn during the shooting, or washed his hands or rubbed them on his clothes and removed the GSR. Allowing Howard to testify as an expert would have had a greater prejudicial effect than any probative value. The trial court's decision to preclude Howard from testifying was not an abuse of discretion.

¶ 47 Our next consideration is whether Williams was deprived of effective assistance of counsel. Williams argues that he received ineffective assistance of counsel when his attorney failed to investigate and present evidence regarding the hallucinogenic effects of Ritalin, a drug the defense maintains Lang was using the night of the shooting. Williams also argues that counsel was ineffective for failing to object to the State's strike of the sole black venireperson.

¶ 48 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that his attorney's performance was deficient and that he suffered prejudice as a result of the defective performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). It is an attorney's duty to conduct both factual and legal investigations for the client and he should investigate all potential avenues of evidence to benefit the client. *People v. Morris*, 335 Ill. App. 3d 70, 80 (2002). Matters of trial strategy, such as what evidence to offer and what witnesses to call, do not constitute ineffective assistance. *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002). The standard of review for an ineffective assistance of counsel claim is whether counsel's performance fell below an objective standard of reasonableness and whether the deficient performance prejudiced the defendant. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984).

¶ 49 The State is barred from challenging potential jurors solely on the basis of their race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1991). Under *Batson*, the court employs a three-step procedure to decide whether the State used peremptory challenges to exclude venirepersons based on race. *People v. Williams*, 209 Ill. 2d 227, 244 (2004). First, the defendant must make a *prima facie* showing the challenges were based on race; the burden then shifts to the State to provide a race-neutral reason for using a peremptory challenge; and third, the defendant may show the State's reason to be pretextual. *Id*. The trial court then determines whether the defendant has established purposeful discrimination. *Id*.

¶ 50 Williams argues that Lang, one of the main witnesses for the State, was snorting Ritalin on the night of the shooting and was impaired, and that his counsel's failure to seek to admit into evidence the effects this drug has on a person constituted ineffective assistance. Brownlee testified that he obtained some Ritalin for Williams, who was snorting it the night of the shooting. Other than Brownlee's testimony, Williams failed to offer any other evidence to support this claim. Defense counsel impeached Brownlee on a number of statements and questioned him about the group drinking but did not challenge his claim of Lang's drug use. Lang testified that he was not under the influence of any drug other than alcohol and defense counsel failed to question him about his use of Ritalin.

¶ 51 During posttrial arguments on Williams's motion for a new trial, defense counsel stated that Lang had admitted that "at least [he] was intoxicated." and sought judicial notice of the manufacturers' description of Ritalin. Although the trial court did not rule on counsel's request, we consider the information was not relevant under the facts at issue. No other witnesses, for either the State or the defense, testified anyone was doing anything other than drinking alcohol in the parking lot. None of the evidence suggests that Lang was incapacitated, hallucinating or otherwise suffering from adverse effects of Ritalin. We find counsel's decision not to introduce evidence during the trial about the effects of Ritalin could be considered part of the defense strategy and was not ineffective assistance of counsel.

¶ 52 Williams's *Batson* argument is also without merit. The record indicates that the State used a peremptory challenge to dismiss a black venirewoman. *Voir dire* established that the potential juror was a cousin to witness Anderson, and knew witnesses Isaac and Ivory through his relationships with them. Ivory was the mother of Anderson's child. The potential juror was familiar with the apartment complex where the shooting took place. In addition, her daughter

had been the victim of an armed robbery where no arrest was ever made. The State could have reasonably dismissed her for any of the above reasons, none of which were based on race. Because the State had legitimate non-discriminatory reasons to dismiss the juror, there was no reason for trial counsel to raise a *Batson* issue. We find counsel's failure to do so was not ineffective assistance.

¶ 53 Lastly, we look at whether the trial court committed plain errors during the trial. Williams raises a variety of errors he alleged the trial court made which rendered the trial unfair, including: (1) improper admission of his threat against Brownlee; (2) improper admission of his prior 18-year-old drug conviction; (3) the trial court's failure to give a limiting instruction to the jury regarding improper characterizations of evidence in both the State's and the defense's closing arguments; (4) the trial court's allowance of prosecutorial misconduct in the State's closing statement; and (5) its failure to allow Lang's affidavit to be authenticated. Although trial counsel did not object to any of the claimed errors, Williams urges this court to review the issues under plain error, submitting that review is appropriate under both plain error prongs.

¶ 54 An error to which there is no objection at trial and is not raised posttrial is waived. *People v. Johnson*, 218 Ill. 2d 125, 138 (2005). A reviewing court may reach waived errors affecting substantial rights where (1) the evidence is so closely balanced the verdict might have resulted from the error and not the evidence; or (2) the error was so serious that it affected the integrity of the justice system. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). For the plain error doctrine to apply, there must first be plain error. *People v. Wade*, 131 Ill. 2d 370, 375-76 (1989).

¶ 55 There is no requirement that a trial court *sua sponte* refuse to admit evidence. *People v. Driver*, 62 Ill. App. 3d 847, 852 (1978). Where parties stipulate to the evidence to be admitted, a

party cannot later claim its admission constitutes error. *People v. Calvert*, 326 Ill. App. 3d 414, 419 (2001). A stipulation to a prior felony conviction is the least prejudicial means of establishing the conviction where the defendant's status as a felon is an element of the offense. *People v. Allen*, 382 Ill. App. 3d 594, 599 (2008).

¶ 56 A prosecutor's argument is evaluated based on the language used, its relation to the evidence and the argument's effect on the defendant's right to a fair trial. *People v. Simms*, 192 Ill. 2d 348, 396 (2000). Closing arguments are to be considered as a whole when reviewed for improprieties and the State is given wide latitude. *Id.* A limiting instruction to the jury that the arguments are not evidence and must be disregarded if they are not supported by the evidence presented at trial may cure any errors. *Id.* Errors during closing argument do not fall into the category of errors that have been deemed structural. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78.

¶ 57 First, Williams asserts that the testimony by several of the State's witnesses that he threatened Brownlee after the shooting was more prejudicial than probative and the trial court should have prohibited any testimony regarding the threat. The trial court had no responsibility to preclude evidence or even to balance its probative value absent an objection by Williams. There was no error. Similarly, Williams stipulated to admission of the fact that he had a prior felony conviction. When the stipulation regarding Williams's prior conviction was entered into evidence, the trial court instructed the jury that it was only for the fact that Williams had a prior conviction. The specific felony was not mentioned and the jury was never informed of which crime Williams had previously been convicted. Similarly, when the State brought up the prior conviction in closing argument, it did not mention the specifics of the felony. In order to sustain

the charge of unlawful possession of a firearm by a felon, the State had to prove Williams was a felon. The trial court did not err in admitting evidence of Williams's prior felony conviction.

¶ 58 Next, Williams argues that the trial court should have instructed the jury following the alleged mischaracterization of evidence by both defense counsel and the State that two witnesses testified that Williams was the shooter. Regardless of any misstatements in the closings, the witnesses' testimonies were clear that neither saw the shooting. Neither of the witnesses, McNeal or Jordan, testified that they saw who shot Williams. Rather, they each testified that they did not witness the shooting but saw Williams standing over Brownlee after the shooting. While the State did comment that Jordan saw Williams pointing an object, when he actually testified that he saw Williams pointing, the misstatement was not egregious as to amount to prejudice or misconduct. There was no reason for the trial court to instruct the jury regarding the parties' characterization of McNeal's and Jordan's testimonies. The jury was generally instructed that the closing arguments do not constitute evidence and that the jurors were to rely on their notes and recall of the evidence and ignore any remarks or statements not based on the evidence. There was no error.

¶ 59 Williams further challenges the State's comment in closing argument that the testimonies of the defense witnesses were "rehearsed" and the trial court's failure to *sua sponte* correct the misstatements denied him a fair trial. The complained of comments include:

> "But when you look at the believability of the witnesses that were produced by the defendant, they were quite a group. They have this mysterious man in black. Then they contradict each other on a number of points. One, versus a hat versus a hoodie. But they all had one in common. Even though they were kind of all over the place on other issues, they had one thing in common.

> And that thing in common was that not one of them called the police the night of this incident or the next day or the next day or the day after that. They all come to court in a rehearsed kind of way, but not really sure about what they're supposed to say. But what they say is that the defendant was fighting the real gunman, this mysterious man in black. He was fighting him, struggling with him. He's a hero. This guy here, he's [a] hero."

¶ 60 In response, the defense commented that the State never cross-examined the witnesses on the point, stating:

> "Did she ever say: Well, you were well-rehearsed? Or gosh your statements [are] exactly the same as someone else's. We have a difference, a little bit in height. We all know this person was wearing black. Whether it was a hood [*sic*].
>
> "This about this: If it had been rehearsed, wouldn't they all have said the same thing. All hoodie. I think there were two witnesses that said he had a hat. Someone said well they were dressed in black, and the other people said, yes, we saw a hoodie. Is that well-rehearsed?"

¶ 61 The State's comments in closing arguments that the witnesses' testimonies were rehearsed were not so prejudicial as to deny Williams a fair trial. The State did not accuse the witnesses of rehearsing their testimony. These comments were meant to discredit the witnesses rather than accuse them of actually rehearsing the testimony. Moreover, the defense picked up on the theme and used it to discredit the State's argument and bolster the witnesses' credibility. There was no need for the trial court to bar the testimony. As there was no plain error, plain error review is not appropriate.

¶ 62 Lastly, Williams maintains that the trial court erred when it refused to ask Lang whether he signed the affidavit, refused to allow the notary to testify regarding the affidavit, and when it released Lang before he could be recalled for the defense. The affidavit was excluded as a discovery sanction. There was no need to consider or establish the validity of the affidavit or to recall Lang to testify regarding it. There was no error and plain error review is not appropriate. This issue, as well as the other issues in which Williams claims the trial court committed plain error, do not constitute plain error and are thus waived on appeal.

¶ 63 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 64 Affirmed.