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2016 IL App (5th) 140158-U

NOTICE  
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NO. 5-14-0158

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 11-CF-1887
	)	
RAMOS SANDERS,	)	Honorable
	)	Robert B. Haida,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.  
Justices Welch and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The defendant's conviction affirmed because: (1) his claims with regard to problems related to home invasion as a predicate felony for his murder conviction are without merit; (2) he was not denied a fair trial by the trial judge's ruling that he could not cross-examine a witness about the sentencing range the witness would have faced if the witness had been charged with murder in this case, or by alleged prosecutorial misconduct; and (3) he has not demonstrated that he received ineffective assistance of counsel as a result of the fact that his trial counsel did not request two jury instructions that the defendant now claims should have been requested.

¶ 2 The defendant, Ramos Sanders, appeals his conviction, following a trial by jury, of the offense of first-degree murder. He does not challenge his sentence. For the following reasons, we affirm his conviction and sentence.

¶ 3

## FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On January 20, 2012, the defendant was charged in a one-count criminal indictment with first-degree murder. The charge resulted from the defendant's alleged involvement in the shooting death, on or about December 24, 2011, of Edward Austin.

¶ 5 On November 4, 2013, the defendant's jury trial began, before the Honorable Robert B. Haida, with the selection of the jury. The following morning, after the jury had been sworn, but before either party had delivered opening statements, the trial judge gave the jury a number of instructions. The judge instructed the jury, *inter alia*, that the members of the jury were "the only judges of the credibility of the witnesses," and that it was the duty of the jury to "decide the weight to be given to the testimony of each" witness. He instructed the jury that when evaluating the credibility of each witness, the jury was to "consider the witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience and any previous inconsistent statement or act by the witness concerning an issue important to the case." After the trial judge gave his instructions, and each party gave an opening statement, live witness testimony began.

¶ 6 The first witness to testify was Special Agent Jamie Brunnworth, with the Illinois State Police. She testified that she was called to the scene of a homicide in Washington Park, where she learned that two houses were involved in the incident. She first went to the house located at 2124 North 49th Street, where she observed, on the front porch, a broken window that led into the house's living room. She also observed that the front door leading into the living room "had numerous footwear impressions on it." Inside the

living room, Brunsworth observed a large amount of blood, leading into a bedroom off the living room. In the bedroom, Brunsworth observed Austin's body. Brunsworth testified that she next went to the other house, which was located across the street at 2225 North 49th Street, and that in the living room of that house she observed "a large amount of blood" as well as "an overturned refrigerator and several broken beer bottles."

¶ 7 After visiting the two crime scenes, Brunsworth interviewed neighbor Allen Williams, who had placed the 9-1-1 call to police. She also learned, from other officers, that the defendant was in custody at the Washington Park police station. Brunsworth testified that she and Special Agent Brian Ewing went to the station to interview the defendant. She authenticated the shoes that were recovered from the defendant at the station, which were then admitted into evidence. She testified that Ewing administered a gunshot residue test to the defendant. Brunsworth testified that in addition to the white Adidas tennis shoes that had been admitted into evidence, other clothing she observed at the station that had been recovered from or worn by the defendant included "white socks, blue jeans, a white t-shirt," and a black and white baseball cap.

¶ 8 Brunsworth next testified about Austin's autopsy, which she attended, noting that Austin had four gunshot wounds, numerous cuts and abrasions to his face, and also swollen areas of the face. She also testified about the scope of her investigation and other individuals she interviewed. She testified that in late 2011, she received an anonymous phone call, tipping her off that someone else—Terrell McCaleb—might have been present at the scene. She later learned that the caller was McCaleb's sister. She attempted, to no avail, to contact McCaleb, but eventually convinced McCaleb's mother to bring him in

for an interview, which took place on January 25, 2012. During the interview, McCaleb told Brunnworth that in addition to the defendant, Austin, and himself, three other individuals were present when the murder took place: Michael Williams, Markevious Jones, and Scott Cole. She testified that officers later located a vehicle registered to Jones, which matched the description given to police by witness Allen Williams, who had observed the vehicle near the scene. Brunnworth testified that later in 2012, the gun used to kill Austin was recovered in Madison, Illinois, in what the parties stipulated was a totally unrelated criminal investigation, with no links to the defendant. Brunnworth authenticated numerous crime scene photos of both the interiors and the exteriors of the two houses involved.

¶ 9 On cross-examination, Brunnworth agreed that there were discrepancies in the stories put forth by the various people she interviewed. She also agreed that when she finally was able to interview McCaleb on January 25, 2012, she did not photograph or collect his shoes. On redirect examination, Brunnworth testified that she read McCaleb his *Miranda* rights before interviewing him, because she considered him a suspect; however, she testified that McCaleb was cooperative, unlike Jones and Cole.

¶ 10 The next witness to testify was Sergeant Abigail Keller, an Illinois State Police officer assigned to the Division of Forensic Services. She testified that she processed the crime scene at the house at 2124 North 49th Street, and assisted another officer with the scene at the house at 2225. She testified in detail about the scenes, with much of her testimony reiterating that presented by Brunnworth.

¶ 11 Officer James Boyd of the Washington Park Police Department was the next witness to testify. He responded to the 9-1-1 call placed by Allen Williams, and received from Williams a description of some of the individuals Williams had observed. As Boyd searched for the individuals, he observed "two subjects running down the middle of 51st Street." He testified that one subject "was wearing a white t-shirt and blue jeans," while the other was wearing "dark clothing." Boyd was called back to the scene of the crime, but later observed the defendant in custody at the police station. Boyd testified that he believed the defendant was the person he had seen running in a white t-shirt and blue jeans. When asked if he recognized, in the courtroom, the person he chased then later saw at the police station, Boyd identified the defendant.

¶ 12 Following adjournment for lunch, witness testimony resumed. Terrell McCaleb was the next witness to testify. He testified that he was drinking with Austin, Jones, and Cole on the night in question. He denied that the defendant was present. He testified that he fell asleep in one of the houses. He denied that he was awakened by someone kicking on the door, and denied that he saw Austin bloodied and beaten. He answered "no" to each additional question asked of him pertaining to details of the evening, until he was asked if he saw a diagram of the house. He subsequently conceded that he gave police a statement on January 25, 2012, and conceded that a videotape showed him making that statement. He was then asked a series of questions about what he said on the videotape. McCaleb agreed that, as reflected on the videotape of his statement, he told police that: (1) the defendant was also present and drinking on the night in question; (2) McCaleb passed out and woke up to someone kicking on the door; (3) he saw Michael Williams

use a bag of concrete to break the living room window; and (4) he saw "Ramos" shoot through the broken window, into the house. He denied, however, that the "Ramos" he referenced on the videotape was the defendant.

¶ 13 Returning to the content of the videotape, McCaleb agreed that he told police that after "Ramos" shot through the window, McCaleb and the others got into Jones's car, and that eventually, the men returned to the house, and Williams and "Ramos" exited the car. He agreed that as of October 2012, he had maintained to officers that everything in his January 25, 2012, statement was true. He denied that anyone had ever told him that he "better not testify" against the defendant. He conceded that he was currently serving a 10-year sentence for aggravated robbery. He authenticated an affidavit that he believed he had executed around March 28, 2013, in which he stated that he "lied on Ramos Sanders saying that he was there on December 24, 2011." In the affidavit, McCaleb claimed that he did not see "Ramos Sanders" at the scene of the crime, that he "was told by someone to say" what he said, and that his statements to the authorities were "a lie." He claimed that the affidavit was not the result of threats, but that he "just decided to come out with the truth." He testified that the affidavit was true.

¶ 14 Counsel for the State then asked McCaleb how long he had known Austin, to which McCaleb responded, "Probably like two years." He was then asked if he knew any of Austin's family. He testified he did not. The State asked if he knew that Austin "had a momma," to which he responded, "Yeah." He was then asked if he knew that Austin had sisters, to which he responded, "No," and if he knew that Austin had a brother, to which he also responded, "No." The State then asked McCaleb if he knew that Austin's family

was present in the courtroom. Counsel for the defendant objected on the basis of relevance. When asked by the trial judge about the relevance of the question, counsel for the State said, "I'll withdraw the question." The trial judge responded, "Okay," then subsequently stated, "The objection will be—the question will be withdrawn." Counsel for the State then asked McCaleb if his story would change "at all" if McCaleb knew that Austin's family was in the courtroom, to which McCaleb responded, "No."

¶ 15 On cross-examination, McCaleb testified that in October 2012, he told authorities that he had not been completely honest in his first statement, and had left out the fact that he was in possession of a gun while asleep in the house on the night in question. On redirect examination, McCaleb was asked if he shot Austin, to which he responded, "No." He also responded "No" when asked if his testimony would change if he were accused of shooting Austin.

¶ 16 The next witness to testify was Allen Williams. He testified that he previously worked on and managed houses, including the two involved in this case, one of which he lived next to. He worked with Austin on renovating the houses. Counsel for the State subsequently asked Williams to describe Austin's personality. Williams testified that Austin "was cool, friendly, easy to get along with, didn't bother nobody." Counsel then asked Williams how long he had known Austin, to which Williams responded, "About six, seven years." Counsel asked if Austin was generous, to which Williams responded, "Yes, very." Counsel then asked if Austin had a lot of friends. Counsel for the defendant objected, stating "[w]e seem to be going into character evidence and reputation evidence when it's not the heart of the matter." The trial judge overruled the objection, but stated,

"But having—yeah. I think you've gone about as far as you need to go with that." Before moving on to questions about the home renovation, counsel for the State asked Williams what sort of things he had observed Austin doing with his friends, to which Williams responded, "Just normal things, basically having fun and working together."

¶ 17 With regard to the events on the night in question, Williams described being awakened by loud music and people talking. He also heard dogs barking. He subsequently saw a car parked in front of his house, which drove away when Williams approached it. He saw that the door to the house at 2225 was open. When he investigated, he saw the bloody, overturned refrigerator and the bloody walls. When he went to the house at 2124, he saw the broken window and called police. While he waited for officers to arrive, the car returned, and he was able to see that it was a "brown, tannish, gold looking Impala." He also saw two men coming down the stairs from the house. Subsequently, he returned to the house at 2124 and found Austin lying on the floor.

¶ 18 Special Agent Brian Ewing, with the Illinois State Police, was the next witness to testify. He testified that he administered the gunshot residue test to the defendant, who he identified in the courtroom. Trooper Denis Janis, also with the Illinois State Police, testified that he attended Austin's autopsy, and administered a gunshot residue test to Austin. Mary Wong, a forensic scientist with the Illinois State Police Forensic Sciences Division, was qualified as an expert witness in the area of gunshot residue analysis. She testified that she analyzed the gunshot residue test administered to the defendant, and concluded that the defendant "either discharged a firearm, came in contact with a primer

gunshot residue related item with his right hand[,] or was in the environment of a discharged firearm." She could not conclusively say which of the three possible options had happened, but agreed that her results were consistent with, *inter alia*, the defendant firing a gun. Her conclusion with regard to the test administered to Austin was that "he may not have discharged a firearm with either hand," and that if Austin did discharge a firearm, "the particles were either removed by activity, not deposited[,] or not detected by the procedure."

¶ 19 When live witness testimony resumed the following day, Thomas Gamboe, a forensic scientist with the Illinois State Police, was qualified as an expert witness in the area of firearms, tool mark, and footwear impressions. He testified that discharged cartridge casings and projectiles collected in this case had all been fired from the same weapon, which was the weapon Brunnworth recovered in Madison in 2012. He testified that he is the author of the Illinois State Police training manual, and the Illinois State Police procedures manual, for footwear examination. In this case, the front door to the house at 2124 had at least nine footwear impressions, and Gamboe testified that two impressions could have been made by the defendant's right shoe, as could have 20 other patterned impressions from the living room floor and pieces of glass found at the scene. On cross-examination, Gamboe reiterated that any other Adidas shoe of the same model could also have made the marks on the door. With regard to the impressions not found on the door, he testified that he was able to make "five points of identification, mostly in the ball area of the shoe," which he agreed referred to the way the shoe was worn down, breached, cut, or nicked. He testified that he was "absolutely certain" the defendant's

right shoe made the impression, although he agreed that he could not determine when the impression was made. He also agreed that at least three pairs of shoes kicked the front door.

¶ 20 Dr. Raj Nanduri testified that she is a forensic pathologist and that she performed the autopsy on Austin's body. She was qualified as an expert witness in the area of medicine and forensic pathology. She testified that the cause of Austin's death was a gunshot wound to the head, and that the manner of death was homicide. According to Dr. Nanduri, Austin also had a number of other injuries, including gunshot wounds on the left hip, the right upper arm, the left wrist, and the abdomen, as well as various lacerations, contusions, and scratches.

¶ 21 The next witness to testify was forensic biologist Brian Hapack, with the Illinois State Police. He testified that he tested the shoes that were recovered from the defendant for the presence of blood. He found blood on the stitching of one of the shoes. Jay Winters, another forensic biologist with the Illinois State Police, testified that he compared a known blood standard taken from Austin to the blood found on the stitching of the defendant's shoe, using a DNA analysis procedure. The result of his analysis of the stitching was that the DNA profile obtained from the blood on the stitching of the defendant's shoe matched Austin's DNA profile.

¶ 22 During a break in testimony, the trial judge and the parties held an initial jury instructions conference. When testimony resumed, McCaleb was recalled to the witness stand by the State. Prior to detailed questioning of McCaleb, the State played for the jury the videotape of McCaleb's January 25, 2012, statement to the police, in which McCaleb

stated, *inter alia*, that he gave the gun he had to Ramos Sanders and that Sanders shot through the window at Austin. The State then asked McCaleb if he continued to maintain, as he had during his testimony the previous day, that everything he said on the videotape was "a lie." McCaleb responded, "Yeah." The State then asked McCaleb to authenticate two photographs of the bedroom that he allegedly fell asleep in on the night in question. McCaleb did so. On cross-examination, McCaleb testified in more detail about the contents and layout of the bedroom and the rest of the house.

¶ 23 On redirect examination, he testified that he had known Michael Williams for "[p]robably like six, seven years." With regard to how he came to possess a gun on the night in question, he testified that he could not remember who left it at the house, but that someone did, and that he picked it up. He testified that after he fell asleep, he was awakened because "[s]omebody was kicking on the door." He then got up and walked through the house, and saw Austin in the shower, "trying to get the blood off his face." McCaleb testified that he asked Austin what happened to him, and Austin responded, "'your boys beat me up.'" He testified that he then "walked to the front door to try to see who was kicking" it. He looked out the window through a set of blinds and saw the car leaving, then called Jones's phone. He testified that Jones said he would return for McCaleb, so McCaleb went outside and waited on the porch, carrying the gun with him. When the car returned, Williams demanded that McCaleb "[g]ive them their gun," so McCaleb handed the gun to Ramos. Because the door was again locked, "they got to trying to kick the door in." Williams eventually threw a bag of concrete through the window. Austin then "came running," at which point Ramos shot at him through the

window. McCaleb testified that he and the others then left in the car. They returned to the house a few minutes later, and both Williams and Ramos got out, this time Williams with the gun. McCaleb testified that he and Jones then drove away.

¶ 24 When questioned by counsel for the State, McCaleb conceded that in his testimony the previous day, he had answered some of the same questions "the exact opposite way." When asked why, McCaleb testified that "people have been—when I was in the county, they had been threatening me," and that he believed that if he testified, "something might happen to me." He testified that he filled out his recantation affidavit because while he was in the St. Clair County jail, "these three dudes came to me" and told him that "you got to write this affidavit for Ramos." On re-cross-examination, McCaleb testified that his videotaped statement to the police was "the truth," and reiterated that Ramos shot through the window at Austin. On re-redirect examination, McCaleb was asked to explain to the jury why his "story changed overnight." McCaleb testified that while on his way back to prison the previous day, he "felt bad for lying and like just letting—like lying for the person who killed somebody who I was cool with."

¶ 25 Following McCaleb's testimony, the State rested. The defendant made a motion for a directed verdict, which was denied. The defendant presented one witness, Susan Bolen, who testified that she was a forensic scientist, specializing in latent fingerprint examination, employed at the Metro East Forensic Science Lab in Fairview Heights. Bolen testified that she examined fingerprint impressions from the door knob at 2124, as well as a number of broken beer bottles and a bottle of vodka found at the crime scenes. She testified that "no print conclusively returned to" the defendant.

¶ 26 Closing arguments followed. The State argued its theory of the case, but made very few direct references to McCaleb's testimony, and did not address the fact that McCaleb had completely changed his testimony during the course of the trial. The defendant, on the other hand, contended that "[t]he story that the State is arguing is premised completely on Terrell McCaleb's version of events," and continued: "You saw him on the stand. He is incredible. Can we believe anything he said? Likely not. Not yesterday, not today, not at any point." Throughout the remainder of his argument, the defendant called into question McCaleb's credibility. During its rebuttal closing argument, the State focused on the physical evidence implicating the defendant, and the apprehension of the defendant by the police after the murder. The State also contended that McCaleb was credible because he never would have admitted to possessing the gun if he were the one who killed Austin. With regard to McCaleb's flip-flopping, the State stated, "thank God he had a moment to think about what he was doing, that he took this stand and lied in front of Edward Austin's family." The defendant objected and moved to strike the statement, and the trial judge stated, "[m]aking mention of the victim's survivors here in court is not appropriate." He then stated, "I grant the motion and direct the jury to disregard that comment."

¶ 27 Following closing arguments, the jury was instructed. The trial judge told the jury, *inter alia*, that only the jury members were "the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them." As he had done before any witness testimony was taken, he again instructed the jury with regard to evaluating the credibility of each witness, telling the jury members that they could "take

into account his ability and opportunity to observe, his age, his memory, his manner while testifying, any interest, bias or prejudice he may have[,] and the reasonableness of his testimony considered in the light of all the evidence in the case."

¶ 28 The jury received general verdict forms for the offense of first-degree murder, and was also instructed that if the jury found the defendant guilty of first-degree murder, the jury was to then determine whether the State had proved the allegation that, during the commission of the offense of first-degree murder, the defendant was armed with a firearm. Following deliberations, the jury found the defendant guilty of first-degree murder, and also found that he was armed with a firearm during the commission of the murder. The defendant filed a posttrial motion, which was denied. Following a sentencing hearing, the defendant was sentenced to a term of imprisonment of 50 years: 35 years for first-degree murder, and a 15-year enhancement for committing the offense while armed with a firearm. His motion to reduce or modify sentence was also denied. This timely appeal followed.

¶ 29

#### ANALYSIS

¶ 30 On appeal, the defendant raises three arguments, contending that his conviction must be reversed because: (1) the offense of home invasion did not properly serve as the predicate felony for his murder conviction; (2) he was denied a fair trial by the trial judge's ruling that the defendant could not cross-examine McCaleb about the sentencing range McCaleb would have faced if McCaleb had been charged with murder in this case, and because the State was permitted to "invoke sympathy and inflame the passions of the jury" by eliciting testimony about "the personal character of the deceased and evidence

that the deceased left a surviving family"; and (3) he received ineffective assistance of counsel because his counsel failed to request an accomplice-witness instruction regarding McCaleb's testimony and an independent felonious purpose instruction with respect to the offense of felony murder.

¶ 31 In support of his first argument on appeal, the defendant contends that "the underlying predicate home invasion did not have a felonious purpose independent from the murder." The State responds by pointing out that the defendant was charged in a one-count indictment with first-degree murder and was never charged separately with felony murder, as the defendant alleges. Nor was the defendant charged with home invasion. The State notes that, to the contrary, "felony murder was merely one of the four options (knowing, intentional, strong probability, felony) given to the jury as part of its instruction on first[-]degree murder," and that because the defendant was convicted on a general verdict, there is no basis to reverse the defendant's conviction. We agree with the State. In *People v. Morgan*, the Supreme Court of Illinois ruled that even if a trial court errs with regard to instructions related to felony murder, that error does not constitute reversible error where a general verdict form or forms were used at the defendant's trial. *People v. Morgan*, 197 Ill. 2d 404, 448 (2001). That is the case because "a general verdict finding a defendant guilty of murder, where the defendant was charged with intentional, knowing, and felony murder, raises the presumption that the jury found the defendant committed the most serious crime alleged, intentional murder." *Id.* In this case, as in *Morgan*, we are therefore required to presume that the jury found the defendant guilty of the most serious crime alleged, intentional or knowing murder.

Accordingly, "any error in instructing the jury on felony murder did not deprive [the defendant] of a fair trial." *Id.* In his reply brief, the defendant contends that in this case, the normal presumption is rebutted because the State emphasized the felony murder aspect of the case in its closing argument and in the instructions to the jury. While it is true that the State referenced in argument the felony murder theory of the case, and the jury was instructed on it, we simply do not conclude that this makes it "more likely"—as the defendant terms it—that the jury "chose the felony murder theory," rather than the intentional or knowing murder theory, as the record is of course silent as to which theory the jury chose, and there is therefore no support for the defendant's assertion. Accordingly, we find no error warranting reversal of the defendant's conviction.

¶ 32 In support of his second argument on appeal, the defendant contends that allowing the defendant's counsel to question McCaleb about the sentencing range McCaleb would have faced if McCaleb had been charged with murder in this case "was necessary to determine McCaleb's credibility." He claims his right to confrontation was violated. He acknowledges that the trial court has the discretion to restrict the scope of cross-examination, but claims that in this instance, the trial court abused that discretion, notwithstanding the fact that McCaleb was not charged with any crime in this case. He contends that is so because "McCaleb was a seriously flawed witness, he gave different versions of the events, and he showed a willingness to change his story to accommodate his perceived self-interest." The defendant also points out that McCaleb was the only witness to testify that the defendant shot Austin through the window and then returned "to the house to finish him off." He contends that McCaleb had a motive to frame the

defendant, and that "the possible sentence McCaleb faced on a first[-]degree murder charge was highly relevant" in terms of showing that motive, and bias.

¶ 33 The State responds by pointing to authority from this court that has held that "[t]he confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense desires." *People v. Leak*, 398 Ill. App. 3d 798, 823 (2010). Moreover, this court has ruled that when determining the constitutional sufficiency of cross-examination, a reviewing court "looks not to what the defendant had been prohibited from doing, but to what he had been allowed to do." *People v. Wilson*, 254 Ill. App. 3d 1020, 1045 (1993). If our review of the record demonstrates that the jury was "made aware of adequate factors concerning relevant areas of impeachment of a witness, no constitutional question arises merely because the defendant [was] prohibited on cross-examination from pursuing other areas of inquiry." *Id.*

¶ 34 In this case, as described in detail above, McCaleb was subject to thorough cross-examination on all matters of relevance to this case, including his credibility as a witness in light of his conflicting and self-contradictory testimony, his motive, and his possible bias against the defendant. As the State aptly notes, McCaleb was not charged with any crime related to this case. Nevertheless, the jury was informed, in response to questions asked by the State, that McCaleb was serving a 10-year sentence for aggravated robbery; however, as the State notes on appeal, that sentence "stemmed from an entirely separate set of circumstances than the case at hand." Moreover, the trial judge specifically ruled that the defense could inquire whether McCaleb was charged with any crime related to

this case, and could even refer to any hypothetical sentence as "serious range of punishment, serious punishment, serious charge," but could not talk about specific numbers or refer to it as a lengthy sentence. Given these undisputed facts, we do not conclude the trial judge abused his discretion when he refused to allow the defendant to question McCaleb about the sentencing range McCaleb would have faced if McCaleb had been charged with murder in this case. Additionally, there is no reason to believe that McCaleb would have been able to answer questions about any possible sentencing range for murder, as there is nothing that indicates anyone ever discussed possible sentencing ranges for murder with him, or threatened him with prosecution for murder in this case, or that he would have any independent knowledge of the possible sentencing range for murder in the state of Illinois or anywhere else.

¶ 35 With regard to his contention that he was denied a fair trial because the State was permitted to "invoke sympathy and inflame the passions of the jury" by eliciting testimony about "the personal character of the deceased and evidence that the deceased left a surviving family," the defendant argues that the tactics of the State amounted to prosecutorial misconduct. He claims the State's questioning of witness Williams about Austin's personality and nature, the State's questioning of McCaleb about whether McCaleb knew if Austin had various family members and if McCaleb knew Austin's family was present in the courtroom, and the State's reference, in rebuttal closing argument, to the fact that surviving members of Austin's family were present in the courtroom were all prejudicial error, and taken together, "the cumulative impact of these errors requires reversal for a new trial." The defendant acknowledges that the trial judge

sustained trial counsel's objection to the rebuttal closing argument reference to Austin's family, and directed the jury to disregard the statement. He also acknowledges that when trial counsel objected to the questioning of McCaleb, the State withdrew its final question (whether McCaleb knew Austin's family was present in the courtroom), and the trial judge mentioned before the jury that the question was withdrawn; he notes, however, that the trial judge did not instruct the jury to disregard any of the other questions or answers, and claims that accordingly "the prejudicial error was not cured by the prosecutor's withdrawal of the question."

¶ 36 With regard to the questioning of witness Williams, the State concedes that questions about a victim's character can be used "as a way to inflame the jury," but contends that in this case there was no such intent, and that the questions were "asked in an introductory fashion, along with a line of questioning as to how Williams knew Austin, their work together, etc." The State also points out that even though the trial judge overruled the defendant's objection to the line of questioning, he also placed limits on the State's further questioning, stating, "But having—yeah. I think you've gone about as far as you need to go with that." Moreover, the State notes that this court has held that even when character or reputation evidence has been improperly admitted in the State's case in chief, the admission of the evidence does not always constitute reversible error. See *People v. Goodwin*, 98 Ill. App. 3d 726, 730 (1981). In *Goodwin*, this court concluded that the improperly admitted character evidence "at most, had a marginal impact upon the jury" and therefore did not constitute reversible error. *Id.* at 729. The Supreme Court of Illinois has recognized as well "that not every mention of a victim's

personal traits will automatically vest in a defendant the right to a new trial." *People v. Lewis*, 165 Ill. 2d 305, 330 (1995). To analyze the impact of the evidence, a reviewing court must first consider whether the prejudicial evidence was elicited incidentally. *Id.* at 331. That is important because if "this type of evidence is presented in such a manner as to cause the jury to believe it is material, its admission is highly prejudicial and constitutes reversible error unless an objection thereto is sustained and the jury instructed to disregard such evidence." *Id.*

¶ 37 In this case, we agree with the State that the presentation of evidence about Austin's character was incidental—asked in an introductory fashion, along with a line of questioning as to how Williams knew Austin—and there is nothing in the record to indicate the manner in which it was presented would cause the jury to think it was material. The State did not dwell on Austin's character, and when instructed to move on, the State did so. Moreover, unlike in two cases (see *People v. Bernette*, 30 Ill. 2d 359 (1964) and *People v. Hope*, 116 Ill. 2d 265 (1986)) in which the Supreme Court of Illinois found reversible error, in the case at bar, the testimony was not presented by a member of the victim's family, another fact that might cause the evidence to be inflammatory for a jury. See *People v. Lewis*, 165 Ill. 2d 305, 333 (1995). In fact, no member of the victim's family testified at all in this case. Accordingly, we find no reversible error with regard to Williams' testimony.

¶ 38 With regard to references to Austin's surviving family, the State notes that when trial counsel objected to the questioning of McCaleb, the State withdrew its final question (whether McCaleb knew Austin's family was present in the courtroom), and the trial

court mentioned before the jury that the question was withdrawn. The State takes issue with the defendant's assertion that because the trial court did not instruct the jury to disregard any of the other questions or answers, "the prejudicial error was not cured by the prosecutor's withdrawal of the question." The State contends that because the jury was properly instructed, pursuant to Illinois Pattern Jury Instruction 1.01, to "disregard questions and exhibits which were withdrawn or to which objections were sustained," the jury was effectively told to disregard the entire line of questioning about Austin's family.

¶ 39 The defendant, in his reply brief, counters that because only the final question was withdrawn, the other questions remained, and the jury was never instructed to disregard them. However, we note that in his opening brief, the defendant clearly states the law applicable to this issue, quoting the pronouncement of the Supreme Court of Illinois that "where testimony in a murder case respecting the fact that the deceased left a spouse and family *is not elicited incidentally, but is presented in such a manner as to cause the jury to believe it is material*, its admission is highly prejudicial and constitutes reversible error unless an objection thereto is sustained and the jury is instructed to disregard such evidence." (Emphasis added.) *People v. Bernette*, 30 Ill. 2d 359, 371 (1964). In this case, we conclude, as we did with regard to the testimony elicited about Austin's character, that the questioning of McCaleb about Austin's surviving family was incidental, and there is nothing in the record to indicate the manner in which it was presented would cause the jury to think it was material. Again, unlike in *Bernette* (*id.* at 370), in the case at bar, the testimony was not presented by a member of the victim's family. Moreover, also unlike in *Bernette*, where the State elicited information that the

surviving children and stepchildren of the victim ranged in age from seven months to six years (*id.* at 370-71), no specificity about Austin's alleged surviving family, such as the age of surviving family members or their closeness to Austin, was adduced. Accordingly, we find no reversible error with regard to references to Austin's family. Moreover, we agree with the State that the trial judge dealt correctly with the rebuttal closing argument remark of the State, stating that "[m]aking mention of the victim's survivors here in court is not appropriate," then granting the defendant's motion to strike the remark and directing the jury to disregard it.

¶ 40 In support of his third and final argument on appeal—that he received ineffective assistance of counsel because his counsel failed to request an accomplice-witness instruction regarding McCaleb's testimony and an independent felonious purpose instruction with respect to the offense of felony murder—the defendant contends that the absence of each instruction provides an independent ground for reversal on the basis of ineffective assistance of counsel. It is well established that to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that his or her attorney's assistance was deficient, and that he or she was prejudiced thereby. *People v. Harris*, 225 Ill. 2d 1, 20 (2007). An attorney's assistance is deficient when it is "objectively unreasonable under prevailing professional norms." *Id.* Prejudice is shown when a defendant demonstrates "that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A

defendant must satisfy both prongs of the test, and the failure to do so precludes a finding of ineffective assistance of counsel. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998).

¶ 41 In this case, with regard to the prejudice prong he must satisfy, the defendant argues that he was prejudiced by the alleged errors of his counsel because "the evidence at trial was closely balanced and the outcome of the trial may have been different absent counsel's deficiency." The State, on the other hand, contends that the evidence was not closely balanced, and that there is no reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

¶ 42 With regard to the defendant's claim that counsel was ineffective because counsel did not request an independent felonious purpose instruction, we agree with the State that the jury instructions, when read in their entirety, properly apprised the jury that it must find that the defendant acted with the felonious purpose to commit the act of home invasion that was independent of murder. We also agree with the State that because the parties used general verdict forms, there is no way to know under which theory the jury found the defendant guilty, and that the defendant therefore cannot meet his burden of demonstrating that there is a reasonable probability that but for the alleged error of counsel the result of the proceeding would have been different. As discussed in more detail below, the defendant also cannot demonstrate prejudice because the evidence was not closely balanced.

¶ 43 With regard to the lack of an accomplice-witness instruction, we begin with the text of the instruction the defendant claims should have been requested, which is found in the Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000), and states as

follows: "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." We note that after the jury was sworn, but before either party had delivered opening statements, the trial judge instructed the jury, *inter alia*, that the members of the jury were "the only judges of the credibility of the witnesses," and that it was the duty of the jury to "decide the weight to be given to the testimony of each" witness. He instructed the jury that when evaluating the credibility of each witness, the jury was to "consider the witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience and any previous inconsistent statement or act by the witness concerning an issue important to the case." Moreover, following closing arguments and just before the jury began to deliberate, the trial judge told the jury, *inter alia*, that only the jury members were "the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them." He again instructed the jury with regard to evaluating the credibility of each witness, telling the jury members that they could "take into account his ability and opportunity to observe, his age, his memory, his manner while testifying, any interest, bias or prejudice he may have[,] and the reasonableness of his testimony considered in the light of all the evidence in the case."

¶ 44 This court has noted that the purpose of the accomplice-witness instruction "is to apprise the jury that the testimony of an accomplice is fraught with serious weakness such as the promise of leniency or immunity and malice toward the accused." *People v. Lewis*, 240 Ill. App. 3d 463, 466 (1992). We have held that the failure to request the

accomplice-witness instruction does not support a claim of ineffective assistance of counsel if the jury has been "instructed that in determining the credibility of witnesses, they should consider any interest, bias or prejudice the witness might have." *Id.* at 467. In such a situation, the prejudice necessary to prevail on an ineffective assistance of counsel claim is not present. *Id.*

¶ 45 However, this court has also held that even when a jury has been instructed that in determining a witness's credibility, the jury "should consider 'any interest, bias or prejudice' " the witness may have, the failure to request the accomplice-witness instruction can constitute ineffective assistance of counsel if the evidence is closely balanced and the State's case rests on the credibility of the accomplice-witness as the State's key witness. *People v. Wheeler*, 401 Ill. App. 3d 304, 314 (2010). That is because in such situations, the accomplice-witness instruction compels the jury to examine the testimony of the witness in question "with close scrutiny." *Id.*

¶ 46 We have noted as well, in the context of yet another case involving the question of whether the failure to request the accomplice-witness instruction constitutes ineffective assistance of counsel, that "there is a strong presumption of outcome reliability, so a defendant must show that counsel's conduct 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). When we consider whether a defendant has been prejudiced by the alleged errors of counsel, "we must consider the totality of the evidence before the jury, taking the unaffected findings as a given and taking due account of the effect of the

error on the remaining findings." *Id.* at 796. Prejudice will not be found where we "can be confident in the reliability of the outcome of the challenged proceeding." *Id.* Moreover, in *Davis* we reiterated that "the inclusion of the general credibility instruction factors in favor of finding the lack of prejudice caused by the exclusion of the accomplice[-]witness instruction." *Id.* at 798.

¶ 47 Therefore, we turn to the question of prejudice with regard to both of the defendant's allegations of ineffective assistance of counsel in this case. We agree with the State that the evidence was not closely balanced in this case, and we are confident that there is no reasonable probability that but for the alleged errors of counsel, the outcome of the proceeding would have been different. Although it is certainly true, as the defendant contends, that his mere presence at the scene of the murder is not sufficient to convict him, the evidence before the jury, viewed in its totality, convinces us that no reversible errors occurred.

¶ 48 As described in detail above, a great deal of evidence presented in this case not only places the defendant at the scene of the crime, but also corroborates McCaleb's testimony about what happened on the night in question. The victim's blood was found in the stitching of the defendant's shoes, and the shoes were also linked to impressions left at the scene of the crime. Thomas Gamboe, a forensic scientist with the Illinois State Police, testified that two impressions found on the front door could have been made by the defendant's right shoe, as could have 20 other patterned impressions from the living room floor and pieces of glass found at the scene; he testified that he was "absolutely certain" the defendant's right shoe made one of the impressions on the floor. Mary

Wong, another forensic scientist with the Illinois State Police, testified that she analyzed the gunshot residue test administered to the defendant, and concluded that the defendant "either discharged a firearm, came in contact with a primer gunshot residue related item with his right hand[,] or was in the environment of a discharged firearm." She could not conclusively say which of the three possible options had happened, but agreed that her results were consistent with, *inter alia*, the defendant firing a gun.

¶ 49 The testimony given by witness Allen Williams in many ways matched the testimony of McCaleb. Williams described being awakened by loud music and people talking. He also heard dogs barking. He subsequently saw a car parked in front of his house, which drove away when Williams approached it. He saw that the door to the house at 2225 was open. When he investigated, he saw the bloody, overturned refrigerator and the bloody walls. When he went to the house at 2124, he saw the broken window and called police. While he waited for officers to arrive, the car returned, and he was able to see that it was a "brown, tannish, gold looking Impala." He also saw two men coming down the stairs from the house.

¶ 50 Officer James Boyd of the Washington Park Police Department testified that he responded to the 9-1-1 call placed by Williams, and received from Williams a description of some of the individuals Williams had observed. As Boyd searched for the individuals, he observed "two subjects running down the middle of 51st Street." He testified that one subject "was wearing a white t-shirt and blue jeans," while the other was wearing "dark clothing." Boyd was called back to the scene of the crime, but later observed the defendant in custody at the police station. Boyd testified that he believed the defendant

was the person he had seen running in a white t-shirt and blue jeans. When asked if he recognized, in the courtroom, the person he chased then later saw at the police station, Boyd identified the defendant.

¶ 51 The foregoing evidence, considered in its totality, convinces us that there is no reasonable probability that but for the alleged errors of counsel, the defendant would not have been convicted. Accordingly, the defendant has not met his burden to demonstrate the prejudice necessary to sustain his claims of ineffective assistance of counsel. See, *e.g.*, *People v. Shaw*, 186 Ill. 2d 301, 332 (1998).

¶ 52 CONCLUSION

¶ 53 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 54 Affirmed.