2018 IL App (1st) 152644

No. 1-15-2644

Order filed August 31, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 17000
	)	
DAMIEN HYDE,	)	Honorable
	)	Frank Zelezinski,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

O R D E R

¶ 1 *HELD*: The improper submission of a prior inconsistent statement to the jury during deliberations when the statement was admitted for impeachment purposes only was harmless error. The trial court did not err in responding to a jury inquiry. Following a preliminary *Krankel* inquiry, defendant was not entitled to the appointment of new counsel.

¶ 2 Following a jury trial, defendant, Damien Hyde, was convicted of first degree murder during which he personally discharged a firearm that proximately caused the victim's death and two counts of attempted first degree murder during which he personally discharged a firearm that proximately caused great bodily harm to two additional victims. Defendant was sentenced to an aggregate of 130 years' imprisonment. On appeal, defendant contends his right to a fair trial was violated where the trial court admitted a prior inconsistent hearsay statement as substantive evidence when the witness lacked personal knowledge about the events described in the statement. Defendant additionally contends the trial court improperly responded to a jury inquiry. Defendant finally contends the trial court erred in failing to appoint new counsel following a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). Based on the following, we affirm the judgment of the trial court.[1]

¶ 3 FACTS

¶ 4 On April 9, 2009, Tierra Huff and Cardell Alexander were at a friend's apartment located on Claude Court in Chicago Heights. Huff and Alexander were in a relationship at the time and continued to be at the time of trial. The pair planned to meet their friend Tommy Pointer at the Claude Court apartment. While waiting for Pointer, between six and ten people were in the ground floor apartment in addition to people continuously entering and exiting. Around 11:45 p.m., Alexander heard commotion outside the apartment and heard a gunshot. He went outside while Huff remained inside. Once outside, Alexander observed defendant and Calvin Griffin engaged in an argument. Alexander also observed a black Grand Am with tinted windows parked in the middle of the street. Griffin was holding a handgun. According to

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

Alexander, defendant, who was unarmed, walked toward the Grand Am while telling Griffin that he "will be right back." Defendant entered the passenger seat and the car left the area. Griffin then joined Huff and Alexander in the friend's apartment and remained for five or ten minutes before leaving.

¶ 5 Shortly thereafter, Huff and Alexander heard yelling and multiple gunshots from outside the Claude Court apartment. The apartment door flew open and a number of people, including Pointer, attempted to run inside. Pointer collapsed at the apartment door. Huff and Alexander observed defendant, with one foot in the doorway and his arms extended into the apartment, use both hands to repeatedly fire a "long," "AK47-like" gun. Alexander approximated that defendant fired between 15 and 30 gunshots. Huff was shot in the upper portion of her thigh and in her foot. Alexander was shot six times, including in his stomach and legs. Pointer suffered multiple gunshot wounds and was unresponsive and motionless. Huff called 911. When the paramedics arrived, Huff and Alexander were transported to the hospital where they each underwent multiple surgeries as a result of their injuries. Pointer also was transported to the hospital; however, he died from his gunshot injuries.

¶ 6 Huff testified at trial that she arrived at the Claude Court apartment around 10:30 p.m. on April 9, 2009. While at the apartment, approximately 10 people were in and out of the space. At approximately 11:45 p.m., Huff heard a gunshot. Griffin then entered the apartment appearing "very anxious, jittery." He did not have any weapons on him. Griffin left the apartment about 10 minutes later and Huff remained. According to Huff, she heard yelling from outside the apartment after midnight and began hearing gunshots. While she was seated on the couch with Alexander, the door to the apartment flew open and Huff observed Pointer fall at the door. Huff

testified that she moved from the couch to the floor and, as she did, her foot was struck by a bullet. Huff observed defendant shooting from the doorway of the apartment. He was standing next to Pointer's body with one foot inside the doorway and his arms extended inside the doorway. He had both hands on the firearm. Huff, who was four or five feet from the doorway, testified that she had an unobstructed view of defendant as he "sprayed" the apartment with bullets. Defendant shot "[a] lot. He wouldn't stop. [She] couldn't keep counting. It was a lot. It was bullets flying everywhere, stuff was hitting floors, stuff was hitting us. It was blood everywhere, skin, flesh, everywhere." Huff did not observe anyone else with a firearm.

¶ 7 Huff knew defendant by his nickname, "Flame." She had seen defendant one time in the neighborhood a couple of days before the shooting. Huff said Alexander was not friends with defendant. On the date of the shooting, defendant had braids that lay below his ears. According to Huff, she viewed a photographic array on April 11, 2009, and positively identified defendant. She told the police that "Flame" shot her. Huff added that, on May 11, 2009, she viewed a physical lineup and positively identified defendant as the shooter. At trial, Huff viewed a picture depicting the May 11, 2009, lineup. Huff testified that defendant had changed his appearance between the date of the shooting and the May 11, 2009, lineup. Specifically, on the date of the shooting, defendant wore braids "with click-clacker beads at the end," but he "cut his hair off" by the time of the lineup.

¶ 8 On cross-examination, Huff stated that she did not identify defendant to the 911 operator when she initially reported the shooting nor did she identify defendant to the police that responded to the scene. Huff testified that the 911 operator did not ask for the shooter's identity. Huff first identified defendant as the shooter on April 11, 2009, after her release from the

hospital. Huff stated that she spoke to the police while at the hospital, but she denied having stated that "she heard" defendant was the shooter. Huff admitted that, when testifying before a grand jury on April 15, 2009, she described defendant's hair as distinctive. During the grand jury, Huff testified that defendant "got dreads. They was [*sic*] like pop-up instead of lying down." Huff testified at trial that she did not mention the beads in defendant's hair during her grand jury testimony because she was not asked about them. Huff stated that she knew the difference between braids and dreads, but that "[a]fter a while they look like dreads." Huff testified that, during the shooting, she "heard a lot of stuff flying, breaking." Huff, however, acknowledged that bullets had not struck a number of areas in the Claude Court apartment, including a wall opposite from where defendant stood while shooting, a mirror, a lamp, a television, and a computer screen. Huff additionally acknowledged telling the police that Pointer wore his hair in braids with black beads that were "standing up *** like popping."

¶ 9 Alexander testified at trial that he, too, only knew defendant from the neighborhood. They were not friends. Alexander described the scene after defendant fired the gunshots as "chaos." On April 11, 2009, Alexander spoke to the police while he remained in the hospital. Alexander described what occurred during the shooting and identified the assailant by his nickname, "Flame." Alexander viewed a photographic array on the same date and positively identified defendant as the shooter. Then, on May 9, 2009, Alexander went to the police station to view a physical lineup. Alexander again positively identified defendant as the shooter. He also provided a handwritten statement on that date identifying defendant as the shooter. Alexander added that he testified before the grand jury on March 23, 2010, during which time he yet again identified defendant as the shooter.

¶ 10 On cross-examination, Alexander admitted that, in his grand jury testimony, he said he was already outside the Claude Court apartment at 10 p.m. when defendant approached and began a "nice altercation" with Griffin. According to Alexander's grand jury testimony, defendant arrived near the apartment in a black Grand Am, exited the vehicle, and began approaching Griffin. Griffin then pulled out a firearm and shot it in the air.

¶ 11 Brandi Spayer testified that, in April 2009, she and defendant lived together in Chicago Heights with Spayer's two daughters. Defendant was the father of Spayer's youngest daughter. According to Spayer, on April 9, 2009, she made dinner for herself and her daughters. Defendant, who had been out, returned home between 8 p.m. and 9 p.m. He reported having been with his sister. Later that evening, defendant left again without saying where he was going. At 2 a.m. the next day, Spayer left for her job as a newspaper delivery person. Defendant was not at home at the time.

¶ 12 Spayer testified that she arrived back home on April 10, 2009, around 7 a.m. after completing her newspaper deliveries. Defendant returned home approximately 15 to 30 minutes later. Spayer testified that, when defendant arrived, he told her that they needed to leave because threats were being made against them and they were in danger. In response, Spayer called her mother, who lived in Iowa, and stated that they were having trouble with their apartment and feared being evicted. Spayer then packed up and retrieved her vehicle from the repair shop. Defendant and Spayer subsequently drove to Spayer's mother's house in Des Moines. They arrived on the same day. According to Spayer, defendant wore his hair in chin-length dreadlocks on April 10, 2009, but he "got it all cut off" sometime thereafter.

¶ 13 Spayer said she returned to Illinois on April 21, 2009, to appear in court for a traffic ticket in Steger. After court, she was met by Chicago Heights police officers and transported to the police station. Spayer said she spoke to the officers about the circumstances surrounding her and defendant's exit to Iowa. Spayer testified that she also met with an Assistant State's Attorney [ASA], but she denied that he asked her about the events that transpired on April 10, 2009. Spayer said she was with the ASA for approximately 15 minutes while he wrote out a statement. Spayer denied speaking to the ASA. Spayer, however, admitted to signing every page of the statement.

¶ 14 Spayer also admitted to various portions of the handwritten statement read by the State. In particular, when asked whether she told the ASA that she recently had been staying in Des Moines, Iowa with her mother, Spayer said, "yes." Then, when asked whether she told the ASA that she was home on April 9, 2009, with defendant and her daughters, defense counsel objected based on hearsay. The objection was overruled. Defense counsel objected again, arguing the statement was not impeaching. The trial court overruled the objection and instructed the State to "get to the meat of what we have to get to." The State inquired whether Spayer told the ASA "[w]hen [defendant] returned in the morning, he seemed agitated and woke up. ***. [Defendant] said we all had to get out of Chicago Heights." Spayer said, "Yes." The State then inquired whether Spayer told the ASA that "[defendant] said he was with his sister, Jamie, earlier in the night, and some guy had shot at him." Spayer said, "Yes." The State further inquired whether she told the ASA that "[defendant] said he was mad, and that he went back to the same spot later in the night and got into it with the same guys, and he fired some shots at them." Spayer said, "Yes." The State additionally inquired whether she told the ASA "[defendant] said

we had to get out of Chicago Heights because he was afraid that the guys were going to come over to the apartment and shoot it up while I and the girls were inside." Spayer said, "Yes." The State finally inquired whether she told the ASA "[defendant] told me to tell the police that he was with me all night Thursday, April 9th, and all day Friday, April 10th, if I was ever questioned by the police." Spayer said, "Yes." Spayer added that she and defendant were no longer in a relationship.

¶ 15 On cross-examination, Spayer testified that she was detained by police officers at the Steger courthouse following her traffic court appearance. The officers took her purse and searched her. According to Spayer, she was not free to leave. Shortly thereafter, Chicago Heights police officers arrived and transported her to the police station. Spayer was placed in an interrogation room and was not free to leave. She was treated like "crap." The officers were "very mean. They were very rude. They were yelling, screaming in [her] face, [she] had no personal space when they were talking to [her] at the time. They were threatening [her.]" According to Spayer, the officers threatened to charge her as an accomplice and threatened to remove her kids from her care. Spayer recalled the officers stating that she and defendant were "pieces of sh***" and that they had known defendant since he was a little boy and he was "going to go down for this." Spayer testified that she was scared. According to Spayer, her requests to make a phone call were denied. At one point, after leaving the bathroom, a police officer was waiting for her and took her down a "pitch-black stairwell." He held up a plastic bag and told Spayer to remove her jewelry because she was going to have to sit in a cell until she agreed to what they said.

¶ 16 Spayer testified that she was never given an opportunity to provide her version of the events in question; instead, the officers told her what information her statement would contain. Spayer said the officers "informed [her] of the whole situation." Spayer acknowledged that she testified on direct that she made the statements read to her by the State. Spayer, however, testified that she was not given an opportunity to read the handwritten statement completed by the ASA before she signed it, and she was not given the opportunity to make any corrections to the statement. With regard to the correction appearing on the statement, Spayer denied that she made the modification or that her initials were affixed to the document indicating as much. Spayer added that, while the ASA was writing out the statement, "[h]e corrected me a few times on what I supposedly said." Spayer testified that her statement was not voluntary. According to Spayer, one of the detectives that threatened her was in the room with the ASA when the statement was taken.

¶ 17 Spayer denied telling anyone that defendant reported shooting somebody in retaliation for having been shot at. Spayer recalled that she woke up around 1 a.m. or 1:30 a.m. on April 10, 2009, to feed her baby before leaving for her paper route. She thought defendant likely left shortly before she woke up because she heard him say "bye" before leaving. Spayer explained that defendant cut his dreadlocks off because he was trying to gain employment in Iowa.

¶ 18 On redirect examination, Spayer acknowledged that she agreed to have the ASA write her statement. Spayer denied that she read the first paragraph of her statement aloud and denied that the ASA read the remainder of her statement aloud to her. Spayer again denied making any corrections to the statement, but acknowledged her initials appeared on the page in addition to her signature. Spayer acknowledged that she never told the ASA that the police threatened her.

¶ 19 ASA Terry Reilly testified that he was called to the Chicago Heights police station on April 21, 2009, in connection with the underlying case. When he arrived, he spoke to Detectives Art Robles and Johnson[2] in reference to Spayer. ASA Reilly then interviewed Spayer alone, outside the presence of any police officers. During the interview, Spayer was not handcuffed. ASA Reilly described Spayer's demeanor as "normal." She was cooperative and answered all of ASA Reilly's questions. He approximated that they spoke for 45 minutes about the incidents that occurred on April 9 and April 10, 2009, before memorializing her statement in writing. Spayer told ASA Reilly that she was comfortable having him write down what she had said. For the next 30 minutes, ASA Reilly wrote out Spayer's statement, asking questions at various points when he was not sure what they had discussed or when he wanted more information. Once ASA Reilly completed the statement, he called Detective Johnson into the interview room to witness him review the statement with Spayer. ASA Reilly had Spayer read the first paragraph of the statement aloud to prove she could read the English language. ASA Reilly then read the rest of the statement aloud to Spayer. ASA Reilly informed Spayer that she could make corrections to the statement, which she did one time and initialed the correction. After having read the statement aloud, ASA Reilly asked Spayer if the statement was accurate. Spayer said yes and signed each page of the statement. ASA Reilly also signed every page of the statement, as did Detective Johnson.

¶ 20 ASA Reilly testified that, during the time he was alone with Spayer, she never reported that the police had threatened her. As part of the interview and statement, ASA Reilly inquired whether Spayer had been threatened by the police and she answered in the negative. Spayer

[2] Detective Johnson's first name does not appear in the record.

never mentioned that the police threatened to take her kids away or to charge her with a crime. ASA Reilly testified that he and Spayer had a normal conversation; they never argued. According to ASA Reilly, Spayer did not request to use the telephone while in ASA Reilly's presence.

¶ 21 The State moved to publish Spayer's statement to the jury. Defense counsel objected. The following exchange ensued:

> "DEFENSE COUNSEL: Your Honor, at this time I would have an objection as Ms. Spayer did already testify that she told the State everything that is on the statement. So now him reading it, it is just hearsay, because she said, 'I did tell him everything that is in here.'
>
> THE COURT: Well, there is impeachment as to what occurred, and it would be impeaching at this time.
>
> DEFENSE COUNSEL: Well, I mean, my objection is that it is—the statement itself is not impeaching. The circumstances may be impeaching, but not the statement itself."

The parties then engaged in a sidebar outside the presence of the jurors.

> "ASA: ***. So, Judge the reason why we need the entirety is that she is denying that any of this statement was read. It is six pages, and she is denying that any of this portion [*sic*] was either read by herself or read to her and that she was allowed to make corrections in this statement.
>
> Particular things for impeachment have to do with the voluntariness which are included in the statement, but the reason that I am asking that the whole statement go in,

Judge, is because she denied him—her reading it or him *** reading it and that it was just thrown in front of her and she signed it.

***

DEFENSE COUNSEL: I believe Ms. Spayer's testimony was the State specifically read off certain things in the statement and said, 'Did you tell the State that?' Her response was, 'Yes, I did.' 'Did you tell the State this?' 'Yes, I did.' Everything they asked her did you tell the State, she admitted she told the State. So I don't understand how it is impeaching.

What I understand the State is doing is as far as the voluntariness, because on cross is what we challenged, and I understand Mr. Reilly being able to testify that he was in there by ourselves [*sic*] and this and that and that she never told any threats. But as far as reading the statement [to the jury], it is not impeaching because she admitted that she said everything that the State asked her, everything that was on here that the State asked.

And he, the State, has already covered the fact that in the statement it says this was voluntary. The State—Mr. Reilly has already testified that he told—that this was a voluntary statement, and it is in the last paragraph, nobody forced or coerced her. And to actually read the statement, it is not impeaching at all because she admitted that she told the State everything.

THE COURT: She has denied many portions of the statement while, in fact, it was read to her by the State and the very portions that they did.

I am not sure specifically if all of it was read by the State or certain portions. She may—she gave various answers throughout this period of time. The circumstances under

how it was made differ certainly from what Mr. Reilly has testified to here, specifically the making of any corrections, which she adamantly denied that she had anything to do [*sic*] here.

There is enough impeachment to read the statement based upon her denial. If she had said, 'I read the statement and none of it is true' or something of that nature, it would be a different circumstance. But she was adamant to the circumstances to the testimony that I have had. And based upon that, I feel that it is necessary to read the entire statement and spell things out specifically such as corrections and things of that nature because she has denied those matters here.

So there is impeachment throughout the entire statement as her testimony goes, and it differs from what Mr. Reilly has testified. He may publish it and explain things."

¶ 22 The jurors returned to the courtroom and ASA Reilly published Spayer's statement to them. In relevant part, the statement provided that, on April 9, 2009, between 8 p.m. and 9 p.m., defendant received a phone call from his sister, Jamie. After the call, defendant told Spayer that he was going out with Jamie, who drove a black, four-door Grand Am. Defendant left and returned sometime later with a bottle of wine. He appeared upset. He ate dinner alone because Spayer had already eaten with her daughters. Spayer and her daughters then went to bed. According to the statement, defendant said goodbye to Spayer and walked out of the apartment wearing blue jeans, a black t-shirt, and black and white Nike gym shoes. Defendant did not return home until between 6 a.m. and 7 a.m. At the time, defendant appeared agitated. He told Spayer that they needed to leave because, when he was with Jamie earlier in the night, he had been shot at. Defendant added that he returned to the location where he had been shot at and "got

into it with the same guys and fired some shots at them." He did not mention anything about "actually hitting any of the guys he was shooting at." Defendant informed Spayer that they needed to leave because he feared retaliation. Spayer then called her mother in Des Moines and reported that they were being evicted by their landlord and needed a place to stay. Spayer, her daughters, and defendant proceeded to Des Moines. Defendant instructed Spayer that, if asked by the police, she should report having been with defendant on the night of April 9 and the morning of April 10. Defendant further instructed Spayer to tell police that they went to Iowa because defendant was in an altercation with someone earlier in the week and wanted to leave town in case the police were looking for him.

¶ 23 The statement concluded by indicating that Spayer provided it voluntarily with nobody forcing her or threatening her in any way. In addition, the statement provided that she read the first paragraph and ASA Reilly read the rest of the statement aloud to her while she followed along. The statement also provided that Spayer was able to make corrections therein. The statement contained a correction initialed by Spayer and ASA Reilly.

¶ 24 Chicago Heights Police Sergeant Salinas[3] testified that, on April 11, 2009, he interviewed Huff in connection with the shooting. According to Salinas, officers from the major crimes task force had spoken to Huff during the early morning hours of April 10, while she was in the hospital. However, the first time a photographic array was administered to her was at the police station with Salinas. Salinas testified that Huff positively identified defendant, who she knew as "Flame," as the individual that shot her.

[3] The record does not contain Sergeant Salinas' first name.

¶ 25 Chicago Heights Detective William Henderson testified that, on April 11, 2009, he and his partner, Detective Robles, interviewed Alexander at the hospital. According to Detective Henderson, Alexander described the events that occurred shortly after midnight on April 10. Detective Henderson then compiled a photographic array that he showed to Alexander. Alexander identified defendant, who he knew as "Flame," as the shooter of Pointer, Huff, and himself. Detective Henderson testified that, in the days following the shooting, he and other officers unsuccessfully attempted to locate defendant by going to his known hangouts. The officers then received information that, on April 21, 2009, defendant was traveling by bus from Iowa to Chicago. At the designated time, Henderson was at the bus station, but defendant did not exit any buses. Instead, Detective Henderson learned that defendant had switched bus tickets. Detective Henderson alerted officers in Mankato, Minnesota, that he was expected to arrive there on April 22, 2009. Defendant was apprehended by the Mankato police and, on May 9, 2009, he was transported back to Chicago Heights. On that date, Detective Henderson conducted a lineup for Alexander during which Alexander positively identified defendant as the shooter. On May 10, 2009, Detective Henderson conducted another lineup for Huff. She too positively identified defendant as the assailant.

¶ 26 Detective Henderson testified that defendant was not formally charged with a crime after the lineups. Detective Henderson explained that the police needed to continue their investigation and wait for lab results. Defendant remained in police custody on separate charges while the investigation continued, but he was eventually released on probation on those unrelated charges. Detective Henderson further testified that he returned to the crime scene as part of his investigation. While there, he observed a company called Innophos located near the Claude

Court apartments. Innophos had a surveillance camera. Detective Henderson obtained the surveillance video from the date in question; however, the quality of the video was low. He attempted to enhance the quality by sending the video to a company to do so, but the video could not be enhanced. The video showed the Innophos parking lot. After the time of the shooting, it showed a car leaving and "several" individuals walking toward the Claude Court apartments. The low video quality prevented Detective Henderson from being able to identify the type of car or the individuals in the video. Detective Henderson testified that he and his fellow officers attempted to locate the weapon used in the shooting, which, based on the recovered cartridge casings, was known to be a long rifle. The attempts to locate the weapon were unsuccessful. Detective Henderson also was unsuccessful in locating additional witnesses to provide information about the shooting. Defendant eventually was arrested in the underlying case on August 31, 2010. He was at his home in Illinois when he was arrested.

¶ 27 On cross-examination, Detective Henderson testified that, on April 22, 2009, he secured an arrest warrant for defendant. The warrant described defendant as a black male with a light complexion that was 5 feet 11 inches and weighed 190 pounds. Detective Henderson admitted that he viewed the picture of defendant used in the photographic arrays administered to Alexander and Huff. Defendant had a dark complexion. Detective Henderson further testified that he was unable to obtain additional evidence in the case after May 2009. During his investigation, Detective Henderson did learn that defendant might have been in a liquor store at the time of the shooting. Detective Henderson viewed the surveillance tapes of several liquor stores because no one was able to identify defendant in those stores. The videos did not show defendant in any of the stores at the time in question. In relation to the Innophos surveillance

video, Detective Henderson admitted that an individual in the group appeared to be holding a long firearm in the footage. That individual, however, did not match defendant's "build and height." Detective Henderson testified that the individual holding the long rifle was not defendant. Detective Henderson added that the group appearing in the footage walked toward the scene of the shooting approximately four or five minutes after the shooting occurred.

¶ 28 Andre Smith testified that, on the date of the shooting, he worked as a security officer at Innophos in Chicago Heights. The company had security cameras which operated automatically, but which had a manual function as well. Around midnight on April 10, 2009, Smith was in the "command center" viewing the surveillance cameras when he heard gunshots. Smith then "took control of the camera and started zooming into the apartment complex across the street from [the] facility." Smith did not hear any additional gunshots once he took manual control and began focusing the camera. Smith, however, observed a car speeding away and a group of four people, one of which was carrying a long gun or rifle, walking toward the Innophos complex. Smith did not see where the car came from, who was driving the car, or the make/model of the car. Smith testified that he never observed the individual that was carrying the firearm exit the car.

¶ 29 Officer Sean McClinton testified that he was employed by the Mankato, Minnesota police department. On April 22, 2009, he received an assignment regarding a Chicago Heights homicide suspect that was traveling by bus from Des Moines to Mankato. Officer McClinton arrested defendant at the Mankato bus depot and transported him to the police station. While in route, defendant asked Officer McClinton how the officer found him, adding that he had traded bus tickets with someone. Following a custodial search, two bus tickets were recovered from

defendant. The bus tickets contained the name Keith Woodruff. One ticket was for services from Des Moines to Minneapolis and the second ticket was for services from Minneapolis to Mankato. No weapons were found on or with defendant. Defendant also insisted that the "charges were bullsh***" and that "he did not do anything."

¶ 30 Robert Deel, an Illinois State Police crime scene investigator, testified that he processed the crime scene. He observed numerous discharged cartridge cases in the street, on the sidewalk in front of the Claude Court apartment, and by the front door area of the subject apartment. There were defects in the exterior storm door and front door, along with the neighbor's front door and an interior bedroom door, all of which were consistent with having been struck by spent projectiles. Deel also testified to having observed damage to the concrete at the front stoop of the apartment consistent with having been struck by spent projectiles. Deel observed a large, red blood-like stained area near the front door. In addition, there were red blood-like stains on the living room floor, on the wall of the apartment, and on the floor of the rear bedroom. Deel photographed the crime scene and collected 37 cartridge casings from the scene, all of which were found outside the Claude Court apartment. Deel did not find any cartridge casings in the living room. He did not recover any bullets or discharged materials within the couch, furnishings, television, or pictures located in the living room. Deel did not observe any bullet holes in the living room walls. Deel added that he did not observe any broken furniture or furnishings within the living room. Deel testified that one projectile was found in the mattress in the bedroom. Deel also obtained projectile fragments recovered from Pointer during his autopsy. Deel opined that, because the cartridge casings were recovered outside, the assailant shot the firearm while outside. Deel testified that the bullets used in the shooting were "very small" and

"travel at a very high velocity." He explained that "the reason you don't find a lot of these fragments is because when they hit objects, they just disintegrate into nothing."

¶ 31 Robert John Hunton, a forensic scientist with the Illinois State Police, testified that he examined 30 cartridge casings recovered from the crime scene. Hunton opined that all 30 cartridge casings were fired from a single firearm. He further opined that the ammunition would have been fired from a semiautomatic rifle. Hunton additionally testified that he examined seven 9-milimeter cartridge casings recovered from the crime scene. Hunton never examined a firearm that matched the 9-milimeter casings.

¶ 32 Doctor Ponni Arunkumar, a Cook County medical examiner, testified that a retired colleague performed an autopsy on Pointer. Dr. Arunkumar reviewed the colleague's autopsy reports and discovered Pointer suffered multiple gunshot injuries, including to the back of his neck, his back, his left leg, and the back side of his right forearm. The wounds demonstrated they were not from close range firing. A number of spent projectile bullet fragments were recovered from Pointer's body. Dr. Arunkumar opined that Pointer's cause of death was multiple gunshot wounds and the manner of death was homicide. Dr. Arunkumar also testified that photographs of Pointer showed that he wore his hair in braids. The braids were "sticking in different directions" and had black beads on the ends.

¶ 33 Chicago Heights Police Officer Keeler[4] testified for the defense that he was on patrol on April 10, 2009, when he received a call regarding a shooting at the Claude Court apartments. Officer Keeler and his partner, Officer Ernest Myslinski, were the first responders to arrive on the scene. Officer Keeler observed dozens of people out on the street. They were shouting that

[4] Officer Keeler's first name does not appear in the record.

people had been shot inside the apartment. When Officer Keeler approached the apartment in question, he observed one black male individual "down on the doorway," a black male and a black female that had been shot in the living room, and another individual that had been shot. The officer did not elaborate on the fourth victim. Officer Keeler said the man located in the living room had been shot several times and was bleeding. Officer Keeler did not observe the offender and did not recover any firearms in the apartment. Officer Keeler did not speak to the victims. Officer Keeler testified that, on April 16, 2009, he arrested an individual named Tino Whitfield in connection with the April 10, 2009, shooting.

¶ 34 Chicago Heights Police Officer Myslinski testified that he responded to a call on April 10, 2009, around 12:15 a.m. regarding multiple gunshots at the Claude Court apartments. When he and Officer Keeler arrived after the shooting, he observed "a lot of people" outside the apartment building. As he approached the apartment in question, Officer Myslinski observed shell casings on the ground and an unresponsive individual lying across the doorway. Officer Myslinski testified that there were several people in the subject apartment. "[T]here was confusion. There was crying, screaming." According to Officer Myslinski, Alexander and Huff were located in the living room of the apartment, which was approximately 11 feet by 11 feet. Myslinski testified that, in addition to the victim at the doorway, the victims in the living room, and unknown victims in the bedroom, the apartment also contained about eight or nine police officers and three or four paramedics throughout the space.

¶ 35 Officer Myslinski testified that he attempted to speak with Alexander and Huff about the shooting. Alexander was being treated by the paramedics at the time or within minutes. Alexander was covered in blood, as he had been shot in the leg and the stomach. Officer

Myslinski testified that he "believed" Alexander told him that he did not see anything, but Myslinski added that Alexander was unresponsive to his questions. Alexander did not even provide his name. Officer Myslinski approximated that he attempted to speak to Alexander for one to two minutes before the paramedics removed Alexander from the apartment. Myslinski described Alexander as "kind of in shock and didn't really want to speak much." Officer Myslinski stated that he wrote in his report that Alexander "said he didn't see anything." Officer Myslinski described Huff as "hysterical." She had been shot as well and was unable to clearly answer Myslinski's questions. He attempted to question her for "a minute maybe" or "[s]econds" while the paramedics were tending to her injuries. Officer Myslinski testified that Huff "didn't give [him] any information other than she didn't see anything."

¶ 36 During closing argument, the State provided, in relevant part:

> "Look at the context of [Spayer's] statement, [*sic*] ask you to read the statement carefully when you go back. And, I mean, the state's attorney is asking personal questions about the defendant, high school, where they live, the daughter. Then you [*sic*] ask questions and she tells him about how she made dinner for her and her kids, but he wasn't there. When he came back he had the dinner was [*sic*] ready.
>
> If this is a big conspiracy, why did [ASA] Terry Reilly care about [Spayer] making dinner for the defendant the night of the shooting, because that's what Brandi is telling [him]. He writes things down here that Brandi told [him] [like] *** when she came back the computer laptop was open, so she thinks that defendant was looking at the computer while she was gone.

> What relevance is that to the case? Again, the state's attorney is only writing down what Brandi tells them in the case. You know, is the state's attorney lying about those [*sic*] statement about her making dinner that night, leaving it out for him ***, about leaving [the] computer and him using the computer. It has nothing to do with the case in regards to it.
>
> But again, I guess the one thing when it comes back to what happened, the state's attorney, asked her what happened when you came back that morning, you know, after she had done her paper route. He said he was with his sister, Jamie, earlier in the night, and some guy had shot at him. He said he was mad, and he then went back to the same spot later in the night, got into it with some guys, and he fired some shots at them. That's the statement.
>
> Well, that's what Brandi told them. I mean, if the state's attorney and the police want to conspire, why not just write down that I came back and fired 30 shots, I killed one guy, I fired, I shot three other guys, because this is what Brandi said."

Defense counsel objected without stating a basis for the objection. The trial court overruled the objection. The State continued:

> "The state's attorney is only writing down what she told them.
>
> And, again, the last point that's been brought up in the statement is that he said he had to get out of Chicago Heights because he was afraid that the guys were going to come over to the apartment and shoot at it while the girls were inside. Again, statements that only [defendant] could have told [Spayer] and [Spayer] told the state's attorney, and that's why he wrote it down.

> And then the last statement he says is that [Spayer] said to the state's attorney is that if the police call, tell the police that *** you were with me all night Thursday, April 9th and all day Friday, April 10th if I was even questioned by the police. Again, trying to set up an alibi. Again, this is what [Spayer] is telling the state's attorney.
>
> If the state's attorney wanted to make something up, make it a big conspiracy in this case. [*Sic*]. The state's attorney is only writing down what [Spayer] is telling them in this case. And there [are] all these big corrections. Again, look through the statement, there is only really one correction on this. On page 3 [Spayer] had told the state's attorney that Jamie drives a black Pontiac Grand Am. 'I have been in the car,' well, he cross[ed] that out because she told him 'I have only seen the car 10 to 50 times, not been in the car' and initialed it when they went over the statement."

¶ 37 The parties participated in a jury instruction conference, during which defense counsel did not object to the inclusion of Illinois Pattern Jury Instructions, Criminal, No. 3.11 (approved July 18, 2014) (hereinafter IPI Criminal No. 3.11), which is the prior inconsistent statement instruction. Then, prior to jury deliberations, the State requested that the exhibits be sent to the jury room. Defense counsel objected to providing the jurors with Spayer's handwritten statement on the basis that it was a prior consistent statement. Defense counsel argued that "the whole issue behind her statement was the voluntariness of it. She never signed what she said in that statement, and we have a standing objection regarding any of her statement going back there to the jury." The trial court ruled that Spayer's statement would not be given to the jurors unless they requested it. The court explained that the statement "was impeaching from the sense it is substantive evidence based upon impeachment, but if they do request it, I will send it back."

¶ 38 While deliberating, the jury sent the trial court a series of notes. In the first note, the jurors requested a copy of Spayer's handwritten statement. Over defense counsel's objection, the jury was provided the statement. Later, after deliberating for nearly four hours, the jury sent a note indicating it was deadlocked. The trial court responded, "Jurors: When you became jurors you took an oath to work together and work toward obtaining a verdict. Please honor your oaths and work towards obtaining verdicts in this case. Continue your deliberations." Then, after deliberating for over three additional hours, the jury requested a definition of reasonable doubt. With both parties' consent, the trial court responded, "Jurors: In the State of Illinois 'Reasonable Doubt' cannot be defined. It is what you find it to be." The jury was sequestered for the night shortly thereafter.

¶ 39 The jurors resumed deliberations the next morning and, after approximately 20 minutes, sent a note indicating they were deadlocked with one juror voting not guilty and "no prospect" of changing the vote. The court instructed the jurors to continue deliberating. Approximately one hour later, the jury sent another note asking, "With the lack of physical evidence connecting the defendant to the crime or crime scene, is eyewitness testimony from one person legally sufficient to prove guilt beyond a reasonable doubt?" The State requested the court respond in the positive. Defense counsel argued that answering as such expressly would advise the jury that eyewitness testimony is sufficient to convict as opposed to responding that the jury continue to deliberate. The trial court responded, "Jurors: The *credible* testimony of one witness is sufficient to convict in a criminal case. Please continue your deliberation considering all the evidence in the case." (Emphasis in original.)

¶ 40 Less than 30 minutes later, the jury returned its verdict. Prior to announcing the verdict, defendant requested a mistrial, arguing, *inter alia*, the court's response to the jury's last inquiry was improper. The trial court denied the mistrial request. The jury's verdict was announced, finding defendant guilty of first degree murder and two counts of attempted first degree murder. The jury also found defendant personally discharged a firearm and in doing so proximately caused Pointer's death and great bodily injury to both Alexander and Huff. The trial court entered judgment on the jury's findings.

¶ 41 Defense counsel subsequently filed a posttrial motion for judgment notwithstanding the verdict or, in the alternative, a new trial, claiming, *inter alia*: (1) the jury's verdict was against the manifest weight of the evidence; (2) the State failed to demonstrate defendant was guilty beyond a reasonable doubt; (3) the trial court erred in admitting Spayer's prior consistent statement as substantive evidence where it was hearsay; (4) the trial court erred in allowing the jury to have Spayer's handwritten hearsay statement during deliberations; and (5) the trial court erred in responding to the jury's note regarding eyewitness testimony. Notwithstanding, defendant then filed a "Motion to Proceed Pro Se In the Alternative Means Of Ineffective Assistance of Counsel." The trial court granted defendant's request to appear *pro se*. In his *pro se* motion, defendant argued, *inter alia*, that his trial counsel was ineffective for failing to call as witnesses Griffin, Officer Robles, and Kurt Hudspeth, the plant safety manager at Innophos. Defendant additionally argued that his trial counsel was ineffective for failing to introduce the 911 recording to impeach Huff's testimony. The trial court conducted a preliminary *Krankel* hearing, after which it determined that defendant's allegations against trial counsel were matters of trial strategy and, therefore, the motion was denied.

¶ 42 The court then granted defendant's request to reappoint defense counsel to represent him in his posttrial motion. In an amended memorandum in support of defendant's motion for judgment notwithstanding the verdict or, in the alternative, a new trial, defense counsel argued, *inter alia*, that the trial court erred in admitting Spayer's handwritten statement because it constituted a prior consistent statement and, alternatively, it did not meet the requirements for admission as a prior inconsistent statement because Spayer did not have personal knowledge of the subject event. Defense counsel additionally argued the trial court erred in allowing the jurors to have Spayer's handwritten statement during deliberations because it constituted a prior consistent statement. The posttrial motion was denied. In so doing, the trial court stated, in relevant part: "It's the Court's position that what was done was appropriate here. [Spayer's statement] was appropriate impeachment and it was the forum to allow it as substantive evidence and the law was satisfied by this Court's opinion here."

¶ 43 Defendant subsequently was sentenced to 60 years' imprisonment for first degree murder and personally discharging the firearm that caused Pointer's death and consecutive terms of 35 years' imprisonment for each count of attempted first degree murder and personally discharging a weapon that caused great bodily harm to Alexander and Huff. This appeal followed.

¶ 44 ANALYSIS

¶ 45 I. Prior Inconsistent Statements

¶ 46 Defendant first contends the trial court erred in admitting Spayer's handwritten statement as substantive evidence where the statement contained unreliable hearsay. Defendant argues the statement initially was admitted for purposes of impeachment; however, the trial court subsequently erroneously admitted the statement as substantive evidence where Spayer did not

have personal knowledge of the events allegedly described to her by defendant. The State responds that defendant has forfeited review of his contention because his trial counsel did not object to the admission of Spayer's statements on the basis set forth on appeal.

¶ 47 To preserve an issue for appellate review, a defendant must both object at trial and present the issue in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). "A specific objection at trial forfeits all grounds not specified. An issue raised by a litigant on appeal does not have to be identical to the objection raised at trial, and we will not find that a claim has been forfeited when it is clear that the trial court had the opportunity to review the same essential claim." (Internal citations omitted.) *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009).

¶ 48 In this case, defense counsel objected to the admission of Spayer's statement, arguing it was a consistent statement that did not qualify as impeachment. Defendant additionally objected, albeit without stating a basis, to the State's closing argument regarding Spayer's statement. Defendant again objected to providing the statement to the jury during deliberations on the basis that it was a prior consistent statement. In defendant's initial posttrial motion, defense counsel also argued that Spayer's statement was a consistent statement that did not qualify as impeachment. Then, once defense counsel was reappointed following defendant's *pro se* motion for ineffective assistance of counsel, counsel included a claim that Spayer's statement was inadmissible as a prior inconsistent statement because she lacked personal knowledge of the events contained therein. In support, defense counsel cited the supreme court's recent decision in *People v. Simpson*, 2015 IL 116512, ¶ 32, which clarified that a witness must have personal knowledge of the event at issue, not just of the defendant's admission, in order for a statement to qualify as substantive evidence.

¶ 49 Although the vast majority of the trial court's considerations of Spayer's statement were whether it was admissible for purposes of impeachment, we do not find the claim raised by defense counsel in the final posttrial motion and raised on appeal is so significantly different from the claim repeatedly raised during trial and in the initial posttrial motion that it should be considered forfeited. *Cf. Lovejoy*, 235 Ill. 2d at 148 (forfeiture applied on the basis that the claims raised at trial and on appeal were significantly different where, at trial, the defendant asserted that a separate hearing on the issue of brutal or heinous conduct was required because the jurors might return a compromise verdict and, on appeal, asserted that a separate hearing was necessary because the Criminal Code required a bifurcated hearing). There is no dispute Spayer lacked personal knowledge regarding the alleged events that took place at the Claude Court apartments. As such, there is no risk that defendant's failure to object due to Spayer's lack of knowledge deprived the State the opportunity to present rebuttal evidence on that theory. See *People v. Hughes*, 2015 IL 117242, ¶ 38 (citing *People v. Caballero*, 102 Ill. 2d 23, 31 (1984)). In fact, the State has consistently argued, and continues to on appeal, that Spayer's statement was admissible for purposes of impeachment. Moreover, the record shows that the trial court eventually did have the opportunity to consider the same argument advanced on appeal. Furthermore, forfeiture is a limitation on the parties and not on the court. *People v. Sangster*, 2014 IL App (1st) 113457, ¶ 66. We, therefore, consider the substance of defendant's claim on appeal.

¶ 50 "It is a well settled general rule that what a witness states out of court and out of the presence of the defendant is pure hearsay and is incompetent as substantive evidence." *Simpson*, 2015 IL 116512, ¶ 27 (citing *People v. Cruz*, 162 Ill. 2d 314, 359 (1994)). Section 115-10.1 of

the Code of Criminal Procedure of 1963 (Code), however, provides, in relevant part, that a prior statement made by a witness is not rendered inadmissible by the hearsay rule if: (1) the statement is inconsistent with his testimony at the hearing or trial; (2) the witness is subject to cross-examination concerning the statement; (3) the statement narrates, describes, or explains an event or condition of which the witness had personal knowledge; and (4) the statement was written or signed by the witness. 725 ILCS 5/115-10.1(a), (b), (c)(2)(A) (West 2008). When a prior inconsistent statement meets the reliability requirements established by section 115-10.1 of the Code, either party in a criminal case may introduce the statement as substantive evidence. *Sangster*, 2014 IL App (1st) 113457, ¶ 61. Section 115-10.1 of the Code additionally provides that "[n]othing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein." 725 ILCS 5/115-10.1 (West 2008). However, if a prior inconsistent statement is not admissible as substantive evidence, it "can only be used for impeachment when the testimony of that witness does 'affirmative damage' to the party's case." *Sangster*, 2014 IL App (1st) 113457, ¶ 62.

¶ 51 The admission of evidence lies within the discretion of the trial court, and we review the trial court's decision for an abuse of that discretion. *People v. White*, 2011 IL App (1st) 092852, ¶ 42. "Whether a prior statement is inconsistent under section 115-10.1 of the Code and, therefore, admissible as substantive evidence, falls within the sound discretion of the trial court and the decision will be reversed on appeal only if it constitutes an abuse of discretion." *Sangster*, 2014 IL App (1st) 113457, ¶ 59. A reviewing court will find an abuse of discretion

only when the trial court's ruling was arbitrary or fanciful or where no reasonable person would adopt the trial court's view. *Id.*

¶ 52 Defendant argues the trial court erred in admitting Spayer's handwritten statement as substantive evidence in violation of section 115-10.1 of the Code where Spayer lacked personal knowledge of the shooting that defendant allegedly described to her. Defendant maintains the error was compounded where the State treated the statement as substantive evidence during closing argument and where the handwritten statement was given to the jury during deliberations. The State concedes that "a limited portion of [Spayer's] handwritten statement was inadmissible as substantive evidence under the statute insofar as it related to defendant's third-party admission as [Spayer] had no personal knowledge of the underlying events of that admission." The State, however, argues Spayer's entire handwritten statement was admissible for purposes of impeachment.

¶ 53 The parties do not contest that Spayer's handwritten statement contained hearsay. Moreover, as stated, there is no dispute that Spayer lacked personal knowledge of the alleged events reported to her by defendant. Accordingly, Spayer's handwritten statement did not meet the reliability requirements of section 115-10.1 (c)(2)(A) and could not be introduced as substantive evidence. *Id.* ¶ 61. However, pursuant to section 115-10.1 of the Code, Spayer's prior statement could be admitted for purposes of impeachment so long as her trial testimony did "affirmative damage" to the State's case. See *id.* ¶ 62.

¶ 54 Spayer's handwritten statement provided that defendant arrived at home on April 10, 2009, reporting that they needed to leave because, after being shot at earlier when he was with his sister, he returned to the same location and "got into it with the same guys and fired some

shots at them." At trial, however, Spayer testified that, on April 10, 2009, defendant returned home between 7:15 a.m. and 7:30 a.m. reporting only that they needed to leave because threats were being made against them and they were in danger. Spayer said she met with ASA Reilly on April 21, 2009, for 15 minutes, but denied having any conversations regarding the events in question. "Prior testimony need not directly contradict testimony given at trial to be considered 'inconsistent' [citation] and is not limited to direct contradictions, but also includes evasive answers, silence, or changes in position." *People v. Martinez,* 348 Ill. App. 3d 521, 532 (2004). We find that Spayer's trial testimony was a change in position, which caused affirmative harm to the State's case. The harm was exacerbated by Spayer's testimony that she was not able to provide her own version of the events; instead, the police officers dictated her statement. Spayer testified that she signed the statement handwritten by ASA Reilly, but that she was not given the opportunity to read it or correct it. She said the statement was a product of threats and coercion. Accordingly, we conclude the State had a legitimate need to impeach Spayer's credibility and admit her prior inconsistent statement for that purpose. See *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 58.

¶ 55 We recognize Spayer acknowledged at trial that she made the contested statements from her handwritten statement provided to ASA Reilly. However, where Spayer denied the veracity of the statement regarding the motive for her and defendant's flight from Chicago Heights, challenged the voluntariness of the handwritten statement, and claimed the statement regarding the incident was dictated to her by the police, we find the statement was properly admitted impeachment. We also note that, unlike with repetitive prior consistent statements, courts have

uniformly held that there is no prohibition against the repetitive introduction of prior inconsistent statements. See *White*, 2011 IL App (1st) 092852, ¶¶ 49-54 (and cases cited therein).

¶ 56 Defendant argues the State improperly relied upon the substance of the handwritten statement in closing argument. We disagree. Initially, we note that defendant mentioned this argument in passing in his appellant brief without analysis or citation to authority and only included an expanded argument in his reply brief in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016). Rule 341(h)(7) requires that points not argued are forfeited and shall not be raised for the first time in a reply brief. Despite forfeiture, we find the challenged remarks, when considered in context and within the entirety of the State's closing argument, demonstrate the State's attempt to discredit Spayer's trial testimony by contradicting defendant's position that the handwritten statement was dictated by the police and was a product of coercion. See *People v. Wheeler*, 226 Ill. 2d 92, 123 (prosecutors are afforded wide latitude in closing arguments and closing arguments must be viewed in their entirety with the challenged remarks viewed in context).

¶ 57 Defendant additionally posits, again in passing and without argument in violation of Rule 341(h)(7), that the trial court improperly admitted the substance of Spayer's handwritten statement and compounded that error by providing the jury with a copy of the statement during deliberations. Forfeiture aside, " '[t]he decision whether to allow jurors to take exhibits into the jury room is left to the sound discretion of the trial court.' " *White*, 2011 IL App (1st) 092852, ¶ 59 (quoting *People v. McDonald*, 329 Ill. App. 3d 938, 947 (2002)). Here, after the close of evidence and the jury instruction conference, the parties discussed giving Spayer's handwritten statement to the jury for deliberations. The court noted defendant's objection and ruled that the

handwritten statement would be provided to the jury only upon request, explaining that the statement "was impeaching from the sense it is substantive evidence based upon impeachment, but if they do request it, I will send it back." The jury expressly requested the statement during deliberations.

¶ 58 This court has recognized that "[i]n view of the contradictions between [a witness's] statement and his trial testimony, it is understandable that a jury would find it valuable to review the same." *People v. Lee*, 243 Ill. App. 3d 1038, 1044 (1993). However, unlike here, in *White* and *Lee*, the statements at issue were substantively admitted prior inconsistent statements. *White*, 2011 IL App (1st) 092852, ¶ 61; *Lee*, 243 Ill. App. 3d at 1044. As stated, Spayer's handwritten statement was admitted for the limited purpose of impeachment. It did not meet the reliability requirements under section 115-10.1 (c)(2)(A) of the Code, and therefore, could not be introduced as substantive evidence. As a result, we find the trial court abused its discretion in allowing the handwritten statement to go back to the jury. See *People v. Carr*, 53 Ill. App. 3d 492, 497-99 (1977).

¶ 59 Notwithstanding, we find any error in providing the jury with Spayer's handwritten statement was harmless. An error is considered harmless "where there is no *reasonable probability* that the jury would have acquitted the defendant absent the error." (Emphasis in original.) (Internal quotations omitted.) *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 55. It is undisputed that the trial court instructed the jury to weigh all of the evidence and gave IPI Criminal No. 3.11, both orally and in writing, which provided the limitations on the use of the prior inconsistent statement. Moreover, defendant did not tender a more specific instruction or

request to have the jury specifically admonished that Spayer's statement could not be considered as substantive evidence.

¶ 60 Further, the jury's conclusion that defendant shot Pointer, Alexander, and Huff did not depend solely on Spayer's prior inconsistent statement. The jury heard detailed testimony from Alexander and Huff regarding the events that transpired. Alexander observed defendant and Griffin engage in an argument outside the Claude Court apartments. During the initial argument, Griffin fired a gun and, as defendant fled, he said he would "be right back." Then, around 15 minutes later, repeated gunshots were fired. As people poured in from outside the apartment, both Alexander and Huff watched Pointer collapse at the doorway and observed defendant continue shooting a long, AK-47-type rifle into the apartment. Alexander and Huff identified the shooter by his nickname within one day of the offense and consistently identified defendant in photographic arrays and physical lineups despite his change in appearance, *i.e.*, changing his hair from braids or dreads to shaving it off. Spayer testified at trial that defendant was in and out of their home on the night and early morning hours of the dates in question. When he returned between 7:15 a.m. and 7:30 a.m. on April 10, 2009, defendant told Spayer they needed to leave because they were being threatened and their lives were in danger. The jury additionally heard circumstantial evidence of defendant's guilt where he fled to Iowa and then evaded capture by switching bus tickets with an unknown man in an attempt to flee to Mankato, Minnesota.

¶ 61 In light of all of the evidence, we conclude that, even if the jurors did not have Spayer's handwritten statement during deliberations, there is no reasonable probability the jury would have acquitted defendant. The trial testimony of Alexander and Huff that Griffin shot a gun in defendant's presence, that defendant left, and that defendant returned and shot up the apartment,

along with Spayer's trial testimony essentially established the same evidence erroneously provided to the jury during deliberations through Spayer's handwritten statement. See, *e.g.*, *People v. Morales*, 281 Ill. App. 3d 695, 700-01 (where the improper admission of a prior inconsistent statement to the jury was harmless error because it was admissible as impeachment and the jury considered the same evidence through the admission of the speaker's grand jury testimony).

¶ 62 II. Response to Jury Note

¶ 63 Defendant next contends the trial court erred in answering one of the jury's inquiries. On the second day of deliberations, the jury sent a note asking, "With the lack of physical evidence connecting defendant to the crime or crime scene, is eyewitness testimony from one person legally sufficient to prove guilt beyond a reasonable doubt?" The State argued the jury was asking a legal question that should be answered in the affirmative. Defense counsel argued that answering the question in the positive would provide the juror's with the court's opinion as opposed to simply instructing the jury to continue to deliberate. The trial court responded that it needed to "answer this [legal] question head-on" for the jury. The court, however, agreed with defense counsel's suggestion that the jury also be advised that "they are to consider all of the evidence so that it is clear that they are not focusing on whatever this one eyewitness or witness testimony is. So that it is clear they are to consider all the evidence." The trial court responded to the jury by saying, "The *credible* testimony of one witness is sufficient to convict in a criminal case. Please continue your deliberation considering all of the evidence in this case." (Emphasis in original.) Defendant now argues the trial court improperly responded to the jury's inquiry by defining proof beyond a reasonable doubt.

¶ 64 Our supreme court has provided the following guidance on the subject:

> "The general rule when a trial court is faced with a question from the jury is that the court has a duty to provide instruction to the jury when the jury has posed an explicit question or requested clarification on a point of law arising from the facts about which there is doubt or confusion. [Citation.] Nevertheless, a trial court may exercise its discretion to refrain from answering a jury question under appropriate circumstances. [Citation.] Appropriate circumstances include when the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or where the giving of an answer would cause the court to express an opinion that would likely direct a verdict one way or another. [Citation.] Further, the court should not submit new charges or new theories to the jury after the jury commences its deliberations." *People v. Millsap*, 189 Ill. 2d 155, 160-61 (2000).

In addition, when a trial court does answer a jury's question, it must do so correctly and "not misstate the law." *People v. Gray*, 346 Ill. App. 3d 989, 994 (2004).

¶ 65 When assessing the propriety of a trial court's response to a jury question, we employ a two-step analysis. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 16. Initially, we must determine whether the trial court abused its discretion in answering the jury's question. *Id*. Next, we must determine whether the trial court's response to the question was correct. *Id*. The second step of the analysis involves a question of law that we review *de novo*. *Id*.

¶ 66 We first find that the trial court did not abuse its discretion in answering the jury's question. The jury posed an explicit question requesting clarification on a point of law related to

facts about which it had doubt or confusion. *Milsap* provides that, under the circumstances, the trial court had a duty to provide the jury with a correct legal instruction. *Millsap*, 189 Ill. 2d at 160-61. We find that the trial court appropriately complied with that duty. We disagree with defendant's passing insinuation that the trial court's response caused it to express an opinion as to the weight to be given the witness's testimony. In its response, and at the suggestion of defense counsel, the trial court instructed the jury to "continue your deliberation considering all of the evidence in this case." Therefore, not only did the court explain that only *credible* eyewitness testimony could support a conviction, but it also explained that all of the evidence needed to be considered in arriving at a verdict. We conclude there was no abuse of discretion here.

¶ 67 We additionally find the trial court accurately responded to the jury's question. Contrary to defendant's argument, the trial court's response did not impermissibly define reasonable doubt for the jury. As defendant recognized, the trial court responded to an earlier jury note requesting a definition of reasonable doubt by stating "Jurors: In the State of Illinois 'Reasonable Doubt' cannot be defined. It is what you find it to be." This jury inquiry requested clarification about the legal effect of eyewitness testimony under the facts. We are not persuaded by defendant's strained effort to equate the jury's actual question to that of a second attempt for a reasonable doubt definition. Moreover, we find the trial court's response provided an accurate statement of the law. The law is well established that "[t]he testimony of a single witness, if it is positive and the witness credible, is sufficient to convict." *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Defendant insists the trial court should have responded that the credible testimony of a single eyewitness "can be" sufficient to support a conviction as opposed to how it responded, *i.e.*, that

the credible testimony of one witness "is" sufficient to convict. According to defendant, the trial court's response failed to preserve the jury's responsibility to weigh the evidence. We disagree. The response did not instruct the jury that it "must" convict defendant if it found an eyewitness to be credible. Instead, as stated, the trial court's answer provided an accurate statement of the law and reminded the jurors to consider all of the evidence during deliberations.

¶ 68 In sum, we find the trial court did not err in responding to the jury's question. Because we have found no error, defendant cannot support his alternative claim for ineffective assistance of counsel where there was no prejudice suffered. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to support an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced him).

¶ 69 III. *Krankel* Hearing

¶ 70 Defendant finally contends the trial court erred in failing to appoint new counsel following a preliminary *Krankel* hearing. After defense counsel[5] filed her initial posttrial motion, defendant requested, and was granted, leave to file his *pro se* motion for ineffective assistance of counsel. Following a preliminary *Krankel* hearing, during which the trial court interviewed defendant and defense counsel, the court denied the motion finding that all of the claims raised by defendant were "trial strategy matters."

¶ 71 In *Krankel*, the supreme court provided guidance for the handling of posttrial *pro se* motions for ineffective assistance of counsel. *Krankel*, 102 Ill. 2d at 188. Before discussing

[5] Defendant was represented by two assistant public defenders. For purposes of ease, we refer to them collectively as trial or defense counsel.

Krankel, however, we first must provide the relevant law for establishing an ineffective assistance of counsel claim.

¶ 72 Pursuant to *Strickland*, in order to demonstrate ineffective assistance of counsel, a defendant must prove: (1) that his counsel's performance was deficient; and (2) the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. To show deficient representation, a defendant must show his counsel's performance fell below an objective standard of reasonableness. *Id*. at 688. Judicial scrutiny of a counsel's performance is highly deferential, such that a court must indulge in a strong presumption that the counsel's conduct fell within the wide range of professional assistance. *Id*. at 689. To demonstrate prejudice, the defendant must demonstrate there is a reasonable probability that, but for counsel's deficient representation, the result of the proceeding would have been different. *Id*. at 694. The Supreme Court advised that "[a] reasonable probability is a probability sufficient to undermine the confidence in the outcome" of the proceeding. *Id*. Because the defendant must satisfy both parts of the *Strickland* test, if an ineffective assistance claim can be disposed of based on lack of sufficient prejudice, a court need not consider the quality of the attorney's performance. *Id*. at 697.

¶ 73 *Krankel* and its progeny have established that new counsel is not automatically appointed when a *pro se* ineffective assistance of counsel claim is raised. *People v. Jolly*, 2014 IL 117142, ¶ 29. Instead, the supreme court has advised:

> "when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion.

> However, if the allegations show possible neglect of the case, new counsel should be appointed." *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003).

A trial court may base its decision on: (1) the trial counsel's answers and explanations; (2) a "brief discussion between the trial court and the defendant;" and (3) "its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id*. at 78-79. A claim lacks merit if it is "conclusory, misleading, or legally immaterial or [does] not bring to the trial court's attention a colorable claim of ineffective assistance of counsel." (Internal quotations omitted.) *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 22. In this case, because the trial court reached its decision on the merits of defendant's ineffective assistance of counsel claim, we will reverse only if the court's determination was manifestly erroneous. *Id.* ¶ 25. "Manifest error" is clearly plain, evident, and indisputable. *Id*. Even if the reviewing court finds the trial court made an error, the trial court's ruling will not be reversed if the error was harmless. *Moore*, 207 Ill. 2d at 80.

¶ 74 Defendant argues that he presented colorable claims of ineffective assistance of counsel where trial counsel failed to call Griffin, Detective Robles, and Kurt Hudspeth, the plant safety manager at Innophos, as witnesses and failed to introduce Huff's 911 audio recording to impeach her testimony. According to defendant, his allegations and trial counsel's responses show possible neglect of his case and required the appointment of new counsel.

¶ 75 With respect to Griffin, defendant stated that he provided his trial counsel with Griffin's affidavit. Defendant alleged that Griffin's testimony would have contradicted the State's evidence regarding the motive for the shooting. At trial, Alexander testified that Griffin argued with defendant and discharged a firearm shortly before midnight on April 9, 2009. As he left the

area, defendant allegedly told Griffin that he would be right back. When questioned by the trial court during the preliminary *Krankel* inquiry, trial counsel acknowledged receiving Griffin's affidavit. Defense counsel, however, informed the trial court that it was "grateful" Griffin did not testify at defendant's trial because he would have been a State's witness. Defense counsel said she believed Griffin's testimony would have provided support for the State's case. Counsel explained that the State did not call Griffin as a witness because he was in custody pending a different murder charge. Defense counsel further reasoned that, because Griffin was represented by another attorney in the public defender's office, she contacted Griffin's attorney in compliance with the ARDC rules. Griffin's attorney asked that defense counsel not contact Griffin in order to protect him from making an admission. Defendant argues that the trial court erred in finding defense counsel's failure to interview Griffin constituted trial strategy. Defendant insists there is nothing in the "ARDC rules" that prohibited defense counsel from interviewing Griffin where he was represented in an unrelated case and not a party to this case.

¶ 76 We find defendant failed to demonstrate the trial court's preliminary *Krankel* hearing was inadequate. See *id*. ("[t]he operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel"). Decisions about whether to call witnesses are generally considered matters of trial strategy and are reserved to the discretion of trial counsel. *People v. Chapman*, 194 Ill. 2d 186, 231 (2000). " 'A defendant can overcome the strong presumption that defense counsel's choice of strategy was *sound* if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy.' (Emphasis in original.)" *People v. Bryant*, 391 Ill. App. 3d 228, 238 (2009) (quoting

People v. King, 316 Ill. App. 3d 901, 916 (2000)). Defendant did not show that defense counsel's decision not to call Griffin was so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy. See *id*. Defense counsel assessed Griffin's potential for providing inculpatory testimony and his status as a murder suspect in an unrelated case prior to determining that, as a matter of trial strategy, he should not be called as a witness. Even assuming that, in providing her rationale for not interviewing Griffin, defense counsel erroneously cited the ARDC rules, that misstatement does not overcome the strong presumption that defense counsel's decision with regard to Griffin constituted reasonable trial strategy.

¶ 77 With respect to Detective Robles, defendant alleged defense counsel should have called Robles to testify regarding his police report, which provided that, while at the hospital, Alexander and Huff told him they "heard" defendant was the shooter. When the trial court inquired as to the Robles' allegation, defense counsel stated that Robles' partner, Detective Henderson, was questioned about the police report at trial and Detective Robles' testimony would have been cumulative. On appeal, defendant argues Detective Robles' testimony would not have been cumulative where Detective Henderson did not testify that Alexander and Huff told him they only "heard" defendant was the shooter. Although review of Detective Henderson's testimony confirms he and Detective Robles did speak to Alexander at the hospital, but that Detective Henderson was not asked whether Alexander and Huff reported that they "heard" defendant was the shooter, we do not find defendant demonstrated defense counsel's choice of strategy not to call Detective Robles was so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a

strategy. See *id*. Defense witness Officer Myslinski testified at trial that he was one of the first responders on the scene following the shooting, and he attempted to interview both Alexander and Huff while they received medical treatment. Officer Myslinski testified that in his report he provided that Alexander and Huff stated they did not see anything. At trial, Officer Myslinski testified that he believed Alexander said the same and that the only statement Huff made following the shooting was that she did not see anything. Where defense counsel not only zealously cross-examined the eyewitnesses, but also presented Officer Myslinski in an effort to tarnish the credibility of Alexander and Huff's identification testimony, we find defendant failed to overcome the strong presumption that defense counsel's decision not to call Detective Robles was a matter of trial strategy. We additionally find the trial court complied with *Krankel.*

¶ 78 With respect to Kurt Hudspeth, defendant alleged defense counsel should have called Hudspeth to testify that the Innophos video showed the individual holding the rifle-style firearm walking away from the Claude Court apartments instead of walking toward the scene after the shooting. At the preliminary *Krankel* hearing, defense counsel explained that she interviewed Hudspeth. Hudspeth appeared in court multiple times on subpoenas as a potential witness. At that time, defense counsel had been unable to locate Smith, so defense counsel intended to lay the foundation for the introduction of the Innophos surveillance video *vis a vis* Hudspeth. Hudspeth, however, was not present at the time of the shooting; therefore, once Smith was located, defense counsel knew that Smith could lay the foundation for the introduction of the video and be examined regarding the events that transpired. Defense counsel further explained the video clearly demonstrated that the individual holding the rifle-style weapon was not defendant, which Detective Henderson was cross-examined about and confirmed at trial. We find

the record supports the trial court's conclusion following the preliminary *Krankel* hearing. We further find defendant did not show defense counsel's decision was so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy. See *id*.

¶ 79 Finally, with respect to the 911 recording, defendant alleged defense counsel should have introduced the recording to impeach Huff's testimony. In his motion, defendant alleged the dispatcher asked Huff to identify the shooter and she responded that she could not provide an identity because she did not see the assailant. At the preliminary *Krankel* hearing, defense counsel explained that she chose to cross-examine Huff regarding her failure to identify the shooter to the 911 operator instead of playing the actual 911 recording. Defense counsel stated that she was able to reveal numerous inconsistencies in Huff's testimony on cross-examination and consciously decided not to play the recording because the jury would hear Huff "screaming and crying on the 9-1-1 tape to further emphasize the fact she was being shot at the time she made the phone call." We find the trial court complied with the dictates of *Krankel* and defendant failed to show defense counsel's decision was so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy. See *id*. Defendant's allegation that the 911 recording directly would have contradicted Huff's trial testimony that the 911 operator failed to ask her to identify the shooter does not establish a colorable claim sufficient to undermine the trial court's conclusion that defense counsel's decision was a matter of trial strategy. Officer Myslinski's testimony additionally established that Huff stated within minutes of the 911 call that she did not see the shooter.

Keeping in mind the strong presumption that counsel rendered sufficient representation, we find the trial court satisfied *Krankel*.

¶ 80 In sum, we conclude the trial court conducted an adequate preliminary *Krankel* inquiry by permitting defendant the opportunity to present each of the 26 points raised in his *pro se* motion, following up on each of those points with an exchange between the court and defense counsel regarding the complained-of conduct, and adding its own observations of defense counsel's trial performance and the adequacy of defendant's allegations on their face. After performing that inquiry, the trial court found defendant's *pro se* motion failed to present colorable claims of ineffective assistance of counsel. In denying defendant's *pro se* ineffective assistance of counsel claims, the trial court stated:

> "The [c]ourt has heard all the claims of the defendant, and in fact defense counsel has responded regarding all matters. ***. They have explained why things have happened. They had their reasons as to why things occurred, and *** all of the matters were made in trial strategy for the defendant and in avoiding any more serious result regarding the defendant's guilt. I do feel that all matters presented were appropriately done by your trial counsel. They were strategy calls.
>
> Simply because you did lose your case does not necessarily mean that it automatically is in fact ineffectiveness of counsel. Both of your lawyers did a very adequate job in representing you. Their trial strategies were matters which any attorney would have done to protect your rights, and as a result of this, this Court does find that your claim of ineffectiveness of counsel at this juncture is not valid."

We conclude defendant failed to demonstrate the trial court's decision was manifestly erroneous.

¶ 81 CONCLUSION

¶ 82 Based on the foregoing, we affirm the decision of the trial court.

¶ 83 Affirmed.