2011 IL App (1st) 1090738-U

SECOND DIVISION
November 15, 2011

No. 1-09-0738

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellant,	)	of Cook County
	)	
v.	)	No. 02 CR 16057
	)	
DESHANTA YOUNG,	)	Honorable
	)	James B. Linn,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶*1* *Held:* Defendant's jury trial convictions are affirmed over defendant's contentions that the State violated his right to a fair trial in myriad ways and that he had received ineffective assistance of counsel.

¶2 On September 10, 2004, a jury found Young guilty of one count each of first degree murder, aggravated battery with a firearm and home invasion. Young appeals those jury verdicts, asking

this court to reverse outright his convictions, or in the alternative, to secure a new trial by raising the following issues:

1) the ear-witness line-up was conducted in an unorthodox manner which produced an untrustworthy result;

2) the trial court erred in denying Young a new trial when one of the two eye witnesses recanted his testimony identifying Young as the armed intruder;

3) the prosecutor's alleged violation of the trial court's ruling on admissibility of Young's other crimes despite no objection from Young's counsel;

4) the prosecutor's closing argument which referenced Young's refusal to cooperate in a line-up and inferred Young's guilt amounted to prosecutorial misconduct;

5) Young's trial counsel's ineffective assistance for failing to object to the prosecutor's closing argument; and

6) any voice identification evidence that was obtained during the line-up was in criminal violation of Illinois' eavesdropping statute.

¶3 I. BACKGROUND

¶4 On April 4, 2002, Willie Egeston, Kenyatta Martin and James Perkins were visiting Deondre Egeston in his second-floor apartment in Chicago. They were playing video games and smoked some marijuana. As Willie Egeston and Kenyatta Martin were leaving to pick up snacks, two armed men in ski masks and dressed in black burst through the kitchen door. Kenyatta Martin complied with the masked gunmen's order to lie on the kitchen floor. Willie Egeston ran to the bedroom occupied by James Perkins and Deondre Egeston while being chased by one gunman. Both Deondre

and Willie described the gunman as a muscular, masked black man with braids hanging down out of the mask, about 6' - 6'1", 200-210 pounds, wearing a three-quarter length black leather jacket with black pants and holding a black gun. Deondre almost immediately jumped out of the second floor bedroom window. James grabbed Deondre's loaded gun that Deondre kept in his bedroom and shoved Willie behind him. James fired at the armed intruder. The intruder returned gunfire, hitting James. Kenyatta, while still on the kitchen floor, heard the gunshots. He then heard the intruder say, "Drop the gun." Willie heard the intruder say, "Drop the heat, cuz." James, injured from the gunshots, complied with the armed intruder's verbal command and threw Deondre's gun into the hallway toward the armed intruder. Kenyatta then heard the intruder say, "You dead." Willie heard the intruder say, "Now you're dead." More shots were fired by the armed intruder hitting both James and Willie. Willie picked up James, who was unable to move on his own due to gunshot wounds, and pushed him out of the window. Willie then jumped out of the window to try to escape the gunfire. Kenyatta, still lying on the kitchen floor, heard the follow-up gunfire and then heard footsteps running past him and out the kitchen door. Kenyatta got off the kitchen floor and ran into the bedroom. He heard more gunshots and jumped out of the same second floor window James , Willie and Deondre exited.

¶5 James Perkins and Willie Egeston, both shot several times, were taken by ambulance to the hospital. James died from his eleven gunshot wounds before police were able to adequately question him. Officers interviewed Kenyatta Martin and Deondre Egeston at the scene. Both men provided a brief description of the armed gunmen. Willie Egeston was shot four times, including once in the neck. Officers attempted to interview Willie in the emergency room but the interview was cut short

by medical staff who needed to intubate Willie to assist him with his difficulty breathing caused by the gunshot to his neck. At trial, Willie had no memory of being interviewed that night. Police officers stated Willie described his shooter as a black masked male, between 6"- 6'1" tall, approximately 200 - 210 pounds, wearing all black with a black leather coat. Willie was treated for five days as an in-patient due to the gunshot wounds he received. Willie's brief description given to officers just before he was intubated in the hospital emergency room on the night of the murder was consistent with both Kenyatta's and Deondre's description.

¶6 The day after the murder/aggravated battery and home invasion, a black Toyota SUV stopped in front of Bobby Egeston's home while Bobby was sitting on the front steps, Bobby was Deondre and Willie's relative who lived nearby. A black man with braids exited the driver's side of the black Toyota SUV and approached Bobby inquiring about Willie 's condition from the night before. The driver identified himself as "Sean" and gave Bobby his phone number with a request that he pass it along to Deondre and to tell Deondre that he wanted to talk to him.

¶7 On April 16, 2002, approximately six days after Willie Egeston was discharged from his five-day hospitalization, Willie's aunt telephoned police to inform them that Willie had information about the identity of the armed intruder who shot him and murdered James Perkins on April 4, 2002. Officers unfamiliar with the April 4th incident interviewed Willie Egeston who stated that he recognized the voice of the gunman to be "Sean" who he knew from the streets and routinely saw driving a black Toyota SUV. Willie also stated that he heard that "Sean" had just been arrested by Harvey police officers. The police officer confirmed "Sean's" arrest in Harvey, obtained four arrest photos consisting of defendant and three other black men, and showed the photos to Willie Egeston.

From viewing the four photos, Willie identified the defendant, whom he knew as "Sean", as the armed intruder whose voice he heard on the night he was shot and James Perkins was murdered

¶8 Next, Chicago police officers requested that the Harvey police submit the guns recovered during defendant's Harvey arrest to their Chicago crime lab for testing. The forensics department determined that of the bullet casings recovered from Deondre Egeston's apartment from the shootings on April 4, 2002, some matched one of the guns recovered from the black Toyota SUV defendant was in at the time of his Harvey arrest. Deondre's gun that James Perkins slid into the hallway after receiving the verbal command to drop his gun was taken by the armed intruder the night of the murder. At trial, Deondre identified the gun recovered from the car defendant was arrested in as his gun taken from his apartment on the night of the murder.

¶9 On June 4, 2002, police officers attempted to conduct a line-up containing defendant. Their plans were to attempt both eye and ear witness identification by two witnesses, Kenyatta Martin and Willie Egeston. Defendant, not yet charged with crimes stemming from the April 4, 2002 crime but in state custody for unrelated crimes, refused to participate in any eye or ear witness line-up. He called his attorney who represented him in charges stemming from the Harvey arrest. He was asked by his attorney not to cooperate with any line-up procedures unless the attorney was present. Defendant complied with the request and refused to change from his prison garb into street clothes for an eye witness line-up and refused to speak any words for an ear line-up/voice identification.

¶10 Defendant and five others were placed in the line-up room under armed police guard with the goal to wait until the participants began talking to allow the witnesses to hear and possibly

identify the shooter's voice from casual conversation between the line-up participants. The group began to casually converse and the ear witness segment of the line-up proceeded.

¶11 Willie Egeston went first into the witness room. The curtain to the viewing window for the line-up room was drawn closed. By now, the selected line-up participants were freely engaged in conversation. The intercom from the line-up room was on and Willie could hear their voices in the witness room. Willie was instructed to raise his hand every time he recognized the voice he heard the night of the murder. ASA Garcia and police officer Evans were able to view the line-up participants from behind the drawn curtain as they spoke. They were also able to see Willie when he raised his hand. ASA Garcia and Officer Evans then witnessed that whenever Willie raised his hand, it was defendant Young, a/k/a "Sean" who was speaking. After the completion of Willie's voice identification where he repeatedly raised his hand when heard the voice from the intruder, the curtain was opened for the eye witness line-up segment. Willie identified Young by sight as the man he previously reported to police as the man he knew as "Sean" from the neighborhood whose voice he heard on the night of April 4, 2002. This was the same individual he previously identified and picked out of a photo spread shown to him back in April.

¶12 The same procedure was repeated for Kenyatta Martin. Every time Kenyatta raised his hand, ASA Garcia saw that it was defendant who was speaking. Kenyatta said he recognized the voice as both the armed intruder he heard on April 4, 2002 and the man he previously knew from the neighborhood as "Sean". Both Kenyatta Martin and Willie Egeston identified the defendant in the eye witness portion of the line-up procedure.

¶13 Both Willie Egeston and Kenyatta Martin testified at trial that they recognized the armed intruder's voice when he spoke to be "Sean" from the neighborhood whom they had seen and heard 10 to 20 times before the night of the murder. Both witnesses identified defendant Young in court as "Sean" from the neighborhood whose voice they heard the night of the murder. A jury found Young guilty on September 10, 2004.

¶14 Shortly after defendant's jury trial conviction, defendant's trial counsel died, causing the case to be continued for a lengthy period of time until permanent, new defense counsel could be secured to represent defendant and all necessary records could be secured and evaluated.

¶15 Three years after Young's trial, a motion for a new trial was filed alleging Young's trial counsel was ineffective in three ways:

1) for failing to move to exclude the voice identification evidence from the line-up conducted on June 4, 2002;

2) for failing to object to the admission of some of Young's other criminal offenses; and

3) for failing to object when the prosecutor mentioned during closing argument Young's refusal to participate in any line-up before he was charged and told the jury they could infer Young's guilt from his refusal.

¶16 Affidavits from Kenyatta Martin (trial witness), Attorney John Lykes (Young's attorney in the other criminal charges) and defendant Young were submitted in support of the motion for a new trial. Kenyatta Martin recanted his ear and eye witness trial testimony claiming he was coerced by police to testify in the manner he did. He also stated his new-found religious beliefs with the Fireball Faith In Christ Church motivated him to come forward. Attorney Lykes, who represented

Young in the criminal case for which he was arrested in Harvey, stated he advised Young not to participate in any line-up unless Lykes was available to be present even though Young was not charged with any offense stemming from the April 4 incident. Lykes was never hired to be Young's attorney for the criminal charges that eventually were filed in this case. Young averred that he was told by his lawyer not to cooperate in any line-up procedures.

¶17 A hearing was held on the post-trial motion where Kenyatta Martin testified about his recantation. The trial court denied the motion, finding that any ineffective assistance provided by Young's trial attorney did not provide a basis for granting a new trial and that there was sufficient corroborating evidence at trial for the jury to convict Young beyond a reasonable doubt.

¶18 2. ANALYSIS

¶19 Defendant first argues that the evidence presented at trial was insufficient for the jury to find the defendant guilty beyond a reasonable doubt. Generally, defendants-appellants in criminal cases argue issues relating to the admissibility of evidence before raising the issue of reasonable doubt. However, as defendant relies primarily on the plain error doctrine, which in large part depends upon whether the evidence was closely balanced, we will address the issues in the manner chosen by the defendant.

¶20 A. The Voice Identification Segment of the June 2, 2002 Line-up

¶21 When a defendant challenges the sufficiency of a finding of guilty, the relevant inquiry for this court is whether, when viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278-79 (2004). This court must examine any challenged piece of

evidence to determine its sufficiency, but still looks to the evidence, as a whole, to see if defendant's guilt was established beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532 (1999); *People v. Ortiz*, 196 Ill.2d 236 (2001).

¶22 On June 2, 2002 Kenyatta Martin and Willie Egeston were asked to participate in a line-up composed of two distinct segments: 1) a voice identification/ear witness segment, and 2) an eye witness line-up. The defendant raises challenges only to part one - the voice identification/ear witness segment of the June 2, 2002 line-up procedure.

¶23 First, it is noted that throughout Young's opening brief, he represents that aside from the evidence from the June 2, 2002 line-up, the only other evidence linking Young to the crime was Deondre's gun recovered from the black Toyota SUV in which Young was a passenger during Young's arrest for an unrelated offense. Young argues that aside from the voice identifications on June 2, 2002, nothing else connected Young directly to the crimes and was the only evidence implicating Young. This representation ignores the strong identification testimony of one of the victims, Willie Egeston, who reported to police that he recognized the voice of the masked gunman as that of a man he knew as "Sean" from the neighborhood who was recently arrested by Harvey police. Questions relating to whether pretrial identifications are suggestive and conducive to irreparable mistaken identity do not arise where the person identified was known to the trial witness prior to the crime, because the identification is independent of and uninfluenced by any pretrial confrontation. *People v. Robinson*, 42 Ill. 2d 371, 376 (1969). He subsequently identified the man he knew as "Sean" from a photo spread he was shown by police. This ear and eye witness

identification of defendant was given to police on April 16, 2002, not long after both the crime on April 4, 2002 and Willie Egeston's discharge from the hospital on April 9, 2002.

¶24 Long before the voice identification of June 2, 2002, Willie identified the defendant , the one he knew as "Sean" from the neighborhood as the armed intruder. Reliability is the key in determining the admissibility of identification testimony. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). The United States Supreme Court lists five factors to consider in identification testimony, as follows:

> "1) The witness's opportunity to see/hear the criminal during the crime,
>
> 2) The witness's degree of attention,
>
> 3) The accuracy of any prior descriptions of the criminal,
>
> 4) The witness's level of demonstrated certainty,
>
> 5) The time elapsed between the observation and the identification." *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), *see also In re M.W.*, 232 Ill. 2d 408, 434 (2009).

¶25 We find that, in the instant case, Willie Egeston's first ear and eye identification of the intruder in April, 2002 did not involve any violation of Young's constitutional rights and that it occurred under reliable circumstances. In fact, defendant raises no issue regarding this trial testimony. Willie, a mere twelve days after he was shot, and only six days after being discharged from the hospital, contacted police to provide a detailed description of the defendant and explained how he recognized defendant's voice as a man he knew as "Sean" having heard his voice in the neighborhood ten to twenty times before the night of the occurrence. The description supplied by

Willie Egeston closely matched the defendant. The defendant had been apprehended in an unrelated criminal offense, so police readily obtained an arrest photo of "Sean" and brought Willie a spread of four photos of four different black men. Willie immediately identified the defendant as the man he knew as "Sean" as the intruder whose voice he heard on the night of the murder. This whole identification process, which was set in motion by Willie Egeston coming forward about the identity of the intruder, was timely and strongly supports its accuracy. This identification was neither initiated by police nor was any aspect prompted by them. *People v. Beals*, 165 Ill. App. 3d 955, 963-64 (1988).

¶26 It is well-settled in Illinois that voice identification to determine guilt is permissible and may be used by itself to establish defendant's guilt beyond a reasonable doubt, *People v. Nunn*, 101 Ill. App. 3d 983 (1981). The manner of identifying the accused only goes to the weight of the identification evidence which falls within the province of the trier of fact to evaluate. *People v. Nunn*, 101 Ill. App. 3d at 989.

¶27 We find that the voice identification by Willie Egeston that he reported to police on April 16, 2002, was reliable as that term is defined for ear witness testimony by the United States Supreme Court and supports defendant's conviction. *Neil v. Biggers*, 409 U.S. at 199-200. Although Willie Egeston never saw the masked intruder's face, he recognized his voice independent of any suggestion from anyone. Willie had known the intruder as someone from the neighborhood and had heard him speak on numerous occasions prior to the night of April 4. Willie admitted that he smoked some marijuana on the night of the crime, and this information was provided to the trier of fact in determining his credibility and the weight the jurors should give to his testimony.

¶28 We refuse to substitute our judgment for that of the jury, who were able to observe the demeanor of the witnesses. Willie Egeston's voice identification of the defendant was reliable due to the past relationship between the two. No matter how casual, it was at least sufficient to provide Willie Egeston with enough familiarity with defendant's voice. The defendant does not complain about the voice recognition of defendant by Willie Egeston in April, 2002. Instead, defendant complains only about the voice recognition procedure that was conducted for both Willie Egeston and Kenyatta Martin on June 2, 2002 that was without defendant's cooperation or knowledge.

¶29 Against the backdrop of Willie Egeston's identification information given to police on April 16, 2002, the state subsequently arranged to conduct an ear and eye line-up involving defendant, Young, a/k/a "Sean" for two witnesses, Willie Egeston and Kenyatta Martin. Defendant was in state custody on unrelated criminal charges, so any complained-of delay in arranging the line-up for a prisoner for whom transportation and security must be arranged is understandable. On June 2, 2002, defendant was transported from jail to participate in the line-up, but upon arriving he refused to either change into street clothes from his jail uniform or speak the words the witnesses reported hearing from the intruder the night of April 4, 2002.

¶30 Investigative voice or eye witness identification procedures for law enforcement officials are not set in stone. The sole requirement is that the procedure implemented should not be unduly suggestive so as to result in a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U. S. 377 (1968). We evaluate the facts surrounding the voice recognition procedures implemented on June 2, 2002 against that required standard.

¶31 Young argues that the procedures used for the voice identification in his case were unorthodox. He submits that once he refused to cooperate and read aloud the phrases the witnesses reported hearing that night, the attempt at ear identification should have come to an end.

¶32 Typically, voice identifications are conducted in one of two common ways: 1) by taping a series of individuals while they speak prepared text - usually words heard spoken by the perpetrator that a witness reported hearing and then played for a witness to determine if identification can be made, or 2) by having a witness observe a line-up of individuals speak prepared text. Both of these "conventional" methods have their critics. See 29A Am. Jur. 2d Evidence § 1403, Voice Identification (updated through Aug. 2011)

¶33 Young submits a Massachusetts state court case from 1978 for the proposition that "words used in a line-up should not be those heard at the scene". See *Commonwealth v. Martini*, 375 Mass. 510 (1978). We could find no Illinois case that has adopted this mandate for voice identification procedures. More importantly, in *Wade v. United States*, 388 U.S. 218, 222-23; 87 S. Ct. 1926, 1930; 18 L. Ed. 2d 1149 (1967), the United States Supreme Court held that compelling a defendant to participate in a line-up and to speak the words purportedly uttered by the criminal did not violate the defendant's Fifth Amendment privilege against self-incrimination. *See also Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); *People v. Costillo*, 240 Ill. App. 3d 72, 80 (1992). In any event, due to defendant's refusal to cooperate, the words/phrases used by the intruder as reported by the witnesses were not used during this voice identification procedure. The law enforcement officials came up with a creative solution to defendant's refusal to participate in an voice recognition line-up where he would have read the words witnesses reported were spoken at

the scene. Instead, the procedure implemented replicated how each witness heard "Sean's" voice in the past in a natural conversational tone and meter.

¶34 Defendant also argues that he was the only person who said the word "cuz" during the line-up, one of the words spoken by the intruder. No recording of what was said by the voices during the line-up was made to definitively determine whether that statement is correct. What we do know is that the witnesses raised their hands when they heard defendant speaking and one of them remembered that one of the words used during that raised-hand event was "cuz." The witnesses also raised their hands when Young spoke at other times during the voice identification. Therefore, the representation that the identification of Young was based on the single word "cuz" uttered by Young is incorrect.

¶35 The defendant makes an argument that while each witness was listening to the conversations of the line-up participants, there was no way for the witness to directly point to the person who was speaking when he raised his hand. It was the Assistant State's Attorney who determined that defendant was speaking each time each witness raised his hand. The jury heard about this procedure. The method described is not shown to be tainted or suggestive. In any event, the identification of defendant as the voice they recognized and heard was confirmed by the second part of the identification procedure where the curtain was pulled back and each witness independently identified defendant as the person whose voice they heard on the night of the murder. This is a simple issue of reliability of the identification. The jury heard about the procedure and gave the weight they felt it deserved. The jury had ample evidence to find defendant guilty beyond a reasonable doubt.

¶36 B. Motion for a New Trial

¶37 Defendant contends that the circuit court erred in denying him a new trial based on newly discovered evidence. The denial of a motion for a new trial based on newly discovered evidence will not be disturbed on appeal absent an abuse of discretion. *People v. Gabriel*, 398 Ill App. 3d 332, 350 (2010). In Illinois, newly discovered evidence warrants a new trial when four factors are met**:** 1) it has been discovered since the conclusion of the trial; 2) it could not have been discovered prior to trial by the exercise of due diligence; 3) it is material to an issue and not merely cumulative evidence already available; and 4) it is of such a conclusive nature that it will probably change the result of the trial. *People v. Gabriel*, 398 Ill. App. 3d 332, 350 (2010).

¶38 1. Kenyatta Martin's Recantation

¶39 In an affidavit, followed by post trial hearing testimony, Kenyatta Martin recanted his testimony implicating the defendant in the home invasion which resulted in the shooting of Willie Eggeston and the murder of James Perkins. He alleges that he was coerced into giving false testimony because he was nudged once or twice during the voice identification procedure of June 2, 2002 by someone he believed to be police personnel sitting next to him while he was listening to the voices in the line-up room. He asserts he interpreted the nudge as a signal to raise his hand for a voice that he heard at the time he was nudged. At the hearing on the motion for a new trial, Kenyatta Martin specifically testified he was never instructed by anyone to do anything if he received a nudge. He testified that this is what he meant by the "force" that he mentioned in his affidavit concerning the ear witness identification procedure. Prior to his recantation, he never told anyone he had been nudged. He testified at the post-trial hearing that the only instruction he was

given was to raise his hand if he heard the voice of the armed intruder. He affirmed that no one told him what to say at the trial. He also testified that no one threatened him if he did not testify at trial in a certain way. Similarly, he was not promised anything in exchange for testifying in a certain way at trial.

¶40 This recantation is, at best, extremely weak. There does not appear to have been the least bit of physical or mental pressure imposed on Martin to, in any way, influence him to testify at trial the way he did. There was no indication that he was forced to come to the station to participate in the identification process. There is no evidence that anyone said anything to him about what to do when he was nudged. There was no screaming or intimidation by any officers. There were no accusations that he was lying and there were no harsh words used with him, or any other comments that would indicate anything remotely resembling coercion. Other than the alleged nudge, there were no other facts presented that would indicate a suggestive identification procedure. Certainly, there were no alleged nudges for the other times he raised his hand. There was also no nudging when the curtain was opened for the eye witness line-up when he pointed to the defendant as the intruder he heard on the night of the murder. His October 2007 affidavit also attempts to explain that his new Christian faith has caused him to come forward. In other words, Kenyatta admits that he not only lied during the June 2, 2002 identification procedure, but also lied during his testimony two years later at trial. He now wishes the court to believe he is telling the truth at the post-trial hearing. However, Martin's testimony at the post trial hearing held to evaluate his recantation is completely insufficient to demonstrate that anyone exerted power over his free will to testify

truthfully at trial. We note that when Martin testified at trial, he was not a convicted felon, but at the post-trial hearing he testified that he subsequently was convicted of felony offenses.

¶41 In the instant case, Kenyatta Martin's recantation met several of the factors supporting the granting of a new trial: 1) it was discovered after the trial; 2) it could not have been discovered prior to trial by the exercise of due diligence; and 3) it is arguably material to the issue and not merely cumulative. *People v. Williams*, 295 Ill. App. 3d 456, 462 (1998). However, we cannot say that the circuit court abused its discretion in denying defendant's motion for a new trial where Martin's testimony was not of such a conclusive character that it would probably have changed the result of the trial. The circuit court considered Martin's impeached testimony and determined that a new trial based on the newly discovered evidence was not warranted.

¶42 Contrary to the argument presented by defendant, Kenyatta Martin's recantation, even if taken as true, would probably not have changed the result of the trial. There was sufficient evidence adduced at trial from Willie Egeston to convict defendant beyond a reasonable doubt. If Kenyatta Martin had merely testified at trial that he did not know who the intruder was the testimony would still have corroborated the testimony of Willie and Deondre Egeston as to the events of April 4, 2002. In any event, the circuit court held an evidentiary hearing to judge the credibility of the recantation. The judge who heard the testimony relating to the recantation was the same judge who heard Martin's testimony at trial. This court's review is much more deferential when the trial court holds an evidentiary hearing based upon the recanted testimony at issue, even though there is a general presumption that recantation evidence may be unreliable. *People v. Gabriel*, 398 Ill. App. 3d at 352; *People v. Steidl*, 177 Ill. 2d at 261 (1997).

¶43 Taken as true, Kenyatta Martin's recantation testimony would not likely change the outcome on retrial. On its own, it could not possibly cause any significant shift in the strength of the State's case such that it would probably create a reasonable doubt of defendant's guilt at trial.

¶44 Defendant's new evidence in the form of Kenyatta Martin's recantation would not fatally undermine the State's case or even significantly weaken it. First, Willie Egeston was the State's main witness and the only witness who was standing next to the deceased victim, James Perkins, when the intruder yelled to James, "Drop the heat, cuz" and "Now you're dead." Because Egeston knew the defendant from the neighborhood, he recognized his voice - facts brought out in trial testimony. Egeston's positive identification testimony remains intact and untainted. It would not in any way be weakened by Martin's inability to identify the armed intruder. Martin was lying on the kitchen floor while the shootings were taking place in the bedroom. If Martin was never able to positively identify defendant, the result at trial could easily have been the same solely with Egeston's positive identification testimony. Not only does Martin's recantation not significantly weaken the State's case, it does nothing for defendant's case, as he did not present any defense to be strengthened or weakened. Therefore, even in light of Martin's recantation, we agree with the trial court's determination following the post-trial hearing where Martin testified, that a jury would likely not change its finding of defendant's guilt beyond a reasonable doubt. Identification by a single witness is sufficient to support a conviction. *People v. Rincon*, 387 Ill. App. 3d 708, 723 (2008).

¶45 2. Prosecutor's Alleged Violation of Trial Court's Order on Admissibility of Defendant's Other Crimes

¶46 The trial court ruled on the State's motion *in limine* to allow proof of other crimes prior to trial. Defendant raises two issues on appeal regarding the admission of defendant's possible involvement in other crimes which defendant now argues violated the trial court's ruling, as follows:

1) ineffective assistance of counsel for failing to object when the prosecutor allegedly violated the court order, and

2) prosecutorial misconduct by the prosecutor for violating the trial court's order on proof of other crimes.

¶47 The admissibility of evidence is a matter within the sound discretion of the trial court and that determination may not be overturned on appeal absent a clear abuse of discretion. *People v. Adkins*, 239 Ill. 2d 1, 23 (2010).

¶48 The trial court considered the State's motion at various times in the pre-trial stage of this case. At one stage, the admissibility of evidence concerning the circumstances of the recovery of Deondre Egeston's gun that the armed intruder took from the murder victim, James Perkins, during the home invasion was discussed. The court ruled that the kidnaping offense defendant was charged with prior to his arrest in this case was not similar enough to the instant home invasion/aggravated battery/murder charges to be admitted as proof of other crimes but instructed the State that the court would allow the jury to learn how the gun was recovered because it was "part of the investigation, but not hear the exact details of the kidnaping case."

¶49 Subsequently, a dispute arose between defense counsel and the State regarding the court's ruling. The parties sought clarification from the court. The court stated that the State could relate

how the gun was found but not the details of other crimes in the recovery of the gun. The parties acknowledged, on the record, the trial court's clarification. Not only did defense counsel state on the record, "I understand" after the trial court ruled, but defense counsel appropriately did not object at trial when the circumstances of the retrieval of the gun were covered during trial testimony. His actions in not objecting when the trial testimony was elicited that briefly covered the investigative actions leading to the gun retrieval were consistent with the court's ruling on the motion.

¶50 Evidence of a defendant's other crimes are generally not admissible unless those crimes are shown to be relevant or in some way connect the defendant to the crime for which he is being tried. *People v. Maldonado*, 402 Ill. App 3d 411, 426 (2010). Evidence that the gun taken in the home invasion was recovered in an investigation unrelated to the home invasion certainly connected the defendant to the crime for which he was being tried. Further, the trial court allowed the State to only present the evidence that was meaningful as the consequential steps in the course of the criminal investigation for the instant case. The court's ruling was consistent with the Illinois Supreme Court's repeated rulings that the consequential steps in a criminal investigation are relevant and admissible. *People v. Jackson*, 232 Ill. 2d 246, 266-67 (2009); *People v. Smith*, 177 Ill. 2d 53, 80-81 (1997); *People v. Henderson*, 142 Ill. 2d 258, 303-04 (1990); *People v. Gacho*, 122 Ill. 2d 221, 247-48 (1988).

¶51 There was other trial testimony concerning the police investigation in the instant case which alluded to other crimes by the defendant. One was the line-up procedure where defendant was already in the custody of the Department of Corrections and upon arrival to the police station,

refused to change from his prison uniform into street clothes. This information was necessary to explain why the line-up procedure proceeded the way it did.

¶52 Next, trial testimony was presented that defendant was a passenger in a stolen black Toyota SUV and two guns were recovered, one involved in the instant case and one not connected to the instant case. It was the prosecutor who through questioning on re-direct examination confirmed that defendant was not charged with unlawful possession of a weapon or with stealing the black Toyota SUV. No one mentioned that the defendant was arrested for kidnaping or that he was charged with other crimes. Consistent with the trial court's ruling, the jury merely heard a general explanation of the investigation that led to the recovery of Deondre Egeston's gun which was taken during the invasion of Deondre's home.

¶53 Next, Officer Trlak's trial testimony covered the steps he took after Willie Egeston identified the person who shot him and murdered James Perkins as "Sean" from the neighborhood and that he heard that "Sean" was just arrested by Harvey police. Officer Trlak testified how he followed up on Willie Egeston's information by contacting the Harvey police department to confirm "Sean's" arrest and obtain the mug shots of defendant and three others who were arrested with the defendant to show to Willie Egeston. This testimony explained investigative steps. *People v. Jackson*, 232 Ill. 2d at 266-67. Neither this testimony nor the other trial testimony were in violation of the court's ruling. In fact, they appear to be in strict conformance with the court's ruling which allowed the State to provide to the jury an explanation of the investigative steps taken to solve the crimes for which defendant was being tried. Having found no error, there can be no plain error and defendant was not deprived of a fair trial. *People v. Bannister*, 232 Ill. 2d 52, 71 (2008). There is no evidence of

ineffective assistance of counsel. Defense counsel, through his advocacy, severely limited the State's motion to present evidence of defendant's other crimes. The trial testimony comported with the order without the need for defense counsel to object. There certainly is no evidence whatsoever for the charge of prosecutorial misconduct.

¶54 3. Defendant's Claim That The Prosecutor's Reference to Defendant's Refusal To Participate in a Line-Up and Argument that Such Refusal Infers Guilt , Coupled With Trial Counsel's Failure To Object Requires a New Trial

¶55 Defendant next argues that he is entitled to a new trial based on the jury hearing evidence that defendant refused to participate in a line-up and the State's argument that the jury could infer the defendant's guilt from the refusal. Defendant concedes that his trial counsel did not raise this issue during trial. While new counsel raised the issue in defendant's motion for a new trial, it is well-settled that by failing to object at trial, the issue is forfeited. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). Defendant attempts to avoid application of the forfeiture rule by invoking the closely-balanced-evidence prong of the plain error doctrine and arguing that, in the alternative, trial counsel provided ineffective assistance by failing to object to the evidence and argument.

¶56 Our supreme court recently addressed the plain error doctrine in *People v. White*, 2011 109689 (Aug. 4, 2011). "Plain error review under the closely-balanced evidence prong of plain error is similar to an analysis for ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced: that the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him, *i.e.*, that the verdict 'may have resulted from the error and not the evidence' properly adduced at trial (*see People v. Herron*, 215 Ill. 2d 167, 178 (2005) (plain error)); or that there was a 'reasonable probability' of a different result had

the evidence in question been excluded (*see Strickland*, 466 U.S. at 694)." *People v. White* , 2011 IL 109,689, 2011 WL 3359706 (Aug. 4, 2011).

¶57 As previously discussed in this order, the evidence in this case was not closely balanced. Consequently, defendant cannot show that he was prejudiced so the plain error doctrine doe not apply.

Our supreme court followed guidance in the federal court's analysis to the extent that when a party has failed to establish all of the required elements of plain error, the court need not consider whether there was error. *People v. White*, 2011 IL 109,689, 2011 WL 3359706 (Aug. 4, 2011).

¶58 Even if we were to agree with defendant that the evidence was closely balanced we would still need to find that the admission of the defendant's refusal to participate in the line-up was error. If there was no error, there can be no plain error. *People v. Bannister*, 232 Ill. 2d at 71. Defendant's participation in a lineup does not implicate his Fifth Amendment right not to incriminate himself. He had no right to refuse to participate in a lineup and such refusal allowed fair comment by the prosecutor for the jury to infer guilt. *People v. Shanklin*, 367 Ill. App. 3d 569, 578 (2006); citing *People v. McGee*, 245 Ill. App. 3d 703, 711 (1993).

¶59 4. Allegation That Voice Identification From June 2, 2002 Was Obtained In Violation of Illinois' Eavesdropping Statute

¶60 For the first time on appeal, defendant alleges that his right to a fair trial was violated when law enforcement officials had an intercom turned on in the police department's line-up room without his consent and that this action constitutes a criminal act by law enforcement officials under the Illinois Eavesdropping Statute. His sole claim is that when the witnesses overheard him via the intercom system it was a violation of the eavesdropping provisions of the Illinois Criminal Code. 720

ILCS 5/ 14-1 through 14-9 (1998). Specifically, section 14-2 provides that a person commits eavesdropping when that person: "(a) uses an eavesdropping device to hear or record all or any part of a conversation unless he does so (1) with the consent of all the parties to such conversation." 720 ILCS 5/14-2(a)(1) (1998). This issue has been forfeited as neither trial counsel nor post trial counsel raised the issue below. *People v. McLaurin*, 235 Ill. 2d at 485. Neither the plain error doctrine nor ineffective assistance of counsel claim bypass this forfeiture. However, as the defendant accuses the State of committing a crime, we choose to address this issue to demonstrate how baseless the accusation is.

¶61 Defendant argues that when he refused to speak in any line-up procedure, he did not give any consent to be overheard during any conversation. Consent can be directly given or can be implied by the circumstances. At the time of the line-up, defendant was an inmate with the Illinois State Department of Corrections. Obviously, prisoners do not have all the rights of free citizens The United States Supreme Court has held that prison inmates have no right to privacy. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). Defendant, however, would have us believe that prisoners under armed guard enjoy some significant privacy interest in their casual conversations with others in a line-up room which prevents those who are charged with monitoring their incarceration from eavesdropping on them. He argues that doing so would constitute a criminal violation of the Illinois Eavesdropping Statute. Defendant, an inmate with the Department of Corrections, was being held in the line-up room under the direct supervision of an armed police officer. Neither he nor anyone else in the line-up room could have had any reasonable expectation for a private conversation both due to the nature of the intended use of the line-up room, his awareness of the reason as to why he was

present in that room and the presence of the armed guard assigned to directly monitor him while traveling outside of prison confinement. Although we question whether defendant had any constitutionally protected right to privacy, the fact that he spoke freely with the other line-up participants in a manner that could be overheard by anyone else in the line-up room, including the armed guard, supports the inference that defendant acquiesced in the comments not being private. Such acquiescence constitutes consent for the purposes of the eavesdropping statute. *People v. Ceja*, 204 Ill. 2d 332, 347 (2003), *citing People v. Ardella*, 49 Ill. 2d 517, 522 (1971).

¶62 Reviewing the circumstances of the voice identification line-up without the benefit of any conclusions drawn by the trial court where this issue was never raised, we find that not only was there no criminal violation by law enforcement officials of the Illinois Eavesdropping statute but that both trial counsel and post trial counsel were not ineffective when they did not raise this issue either in a motion to suppress or in a post-trial motion. Utterances made by persons while in the presence of a uniformed, armed police officer who, in this instance, was charged with guarding the defendant as an inmate was a matter of legitimate public interest, as was the investigation of the instant crimes. It stands as a legitimate exception to the Illinois Eavesdropping statute. See 5 Ill. Practice, Criminal Practice and Procedure, Sec. 15:41 (2nd Ed. 2010).

¶63 III. CONCLUSION

¶64 For the foregoing reasons, we decline to substitute our judgment for that of the jury and find no basis to vacate the judgment of the circuit court and remand for a new trial. The issues defendant complains of on appeal were of minimal significance at trial where the defendant was arrested while in possession of the proceeds of the home invasion and where the main witness was so strong in his

identification of defendant, previously knew the defendant, was not shown to have any motive to lie, had the best opportunity to hear the intruder of those left alive, was not impeached in any way, and identified the intruder from voice shortly after his hospital discharge and *via* a photo array well before the line-up.

¶65 The judgment of the circuit court is affirmed.

¶66 Affirmed.