2012 IL App (1st) 092906-U

FOURTH DIVISION
August 23, 2012

No. 1-09-2906

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04CR10613
	)	
DWAYNE DAVIS,	)	The Honorable
	)	Timothy Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concur in the judgment.

Held: Trial court affirmed; trial court did not err where it allowed evidence in at trial that defendant possessed marijuana at the time he was arrested with the murder weapon; the State properly proved defendant guilty beyond a reasonable doubt where there was a credible eye witness to the shooting, ballistics evidence linking defendant to the murder weapon, and defendant was arrested in possession of the murder weapon; and defendant was not denied the effective assistance of counsel.

¶ 1 ORDER

¶ 2 After a jury trial, defendant Dwayne Davis was convicted of first degree murder for the shooting death of Levon Ward. Defendant, who was subject to a 20-year sentencing

enhancement after the jury concluded that he personally discharged a firearm during the commission of the murder, was sentenced to a total of 52 years' imprisonment. On appeal, defendant contends: (1) the trial court erred where it allowed evidence of other crimes to be presented at trial; (2) he was denied the effective assistance of trial counsel because trial counsel failed to properly investigate the location where the murder weapon was recovered; (3) he was denied the effective assistance of trial counsel where counsel "opened the door" to allow allegedly prejudicial other crimes evidence regarding defendant's possession of marijuana to be heard by the jury; and (4) the State failed to prove defendant guilty beyond a reasonable doubt. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Prior to trial, the State filed a motion to allow proof of other crimes. In its motion, the State alleged that defendant committed several crimes during a three-day period, and that each of these crimes involved the discharge or possession of a .45 caliber semi-automatic weapon. This weapon was ultimately determined to be the weapon used in Ward's murder. Specifically, the murder at issue in this case took place on the night of October 29, 2003. In its motion, the State alleged that on that night, defendant was driving a grey Cavalier from which he fired seven shots from a .45 caliber semi-automatic handgun at the victim, who was standing on the sidewalk at 2800 W. Polk in Chicago. The victim died as a result of a gunshot wound to the back.

¶ 5 The State alleged in its motion that, earlier the same day, defendant was driving a grey Cavalier and fired a .45 semi-automatic handgun at three victims standing on the sidewalk, David Finches, Calvin Henry, and Jessie Mayfield. Two victims were struck in the leg. The State

further alleged in its motion that the next day, October 30, 2003, in the area of 1400 S. Central Park, defendant fired eight shots from a .45 caliber semi-automatic handgun at Derrick Williams and four other individuals while they sat in a parked car. Finally, on November 1, 2003, defendant was arrested while in possession of a .45 caliber semi-automatic handgun at 1339 S. Central Park (the Central Park apartment). Ballistic tests on the cartridge casings recovered from both of the shootings on October 29, 2003, and the shooting on October 30, 2003, showed that all of the recovered cartridge cases were fired from the handgun defendant was arrested with on November 1, 2003. The State argued in its motion:

> "The prejudicial effect of the other crimes evidence here does not substantially outweigh its probative value. The facts of the other crimes are neither remote in time nor speculative. The aforementioned other crimes all happen within two days of the murder. The other crimes all occurred in the evening hours in the same area of Chicago. There is no speculation about the defendant's involvement since he was identified in each incident. In each case defendant used the same .45 caliber semi-automatic handgun. Clearly, this other crimes evidence shows the defendant's identity in the murder case before the court."

¶ 6 Although not included in the State's pleadings, it was later revealed that narcotics were also recovered on November 1, 2003, at the Central Park apartment when defendant was arrested with the murder weapon. The trial court asked the State if they were seeking to offer the

narcotics-related information into evidence, and the State responded that they did not intend to offer that evidence. The trial court ruled that the State could introduce evidence of the October 30 shooting of Williams and his companions because the shell casings recovered in that case were linked to the murder weapon recovered from defendant on November 1, 2001. Evidence of the October 29, 2003, shootings of Henry and Mayfield would not be admitted. At trial, however, the State did not admit evidence of the October 30 shooting of Williams. The State advised the court that Williams was served with a subpoena, but did not present himself in court. The State requested a continuance so they could locate Williams, but the request was denied. At trial, the State attempted to admit the other crimes evidence of Williams' shooting through the testimony of the police officer who collected shell casings from the scene of that crime and from the Illinois State Police forensic scientist who compared those shell casings to the .45 caliber semi-automatic handgun recovered from defendant. Defense counsel objected and the trial court, after hearing arguments from both parties, concluded that the other crimes evidence could not be admitted without Williams, who was the only witness able to link that shooting to defendant.

¶ 7 At trial, Tanya Huff testified that she was in the vicinity of 2800 West Polk Street on October 29, 2003, at approximately 11:00 p.m. At that time, she observed victim Ward, whom she knew from the neighborhood, walking on her side of the street, as well as three men standing against a wall directly across the street. One man stepped forward and fired a gun, and then a second man stepped forward and fired another gun. Huff heard screaming and saw the victim lying on the ground, shot in the head. The three men fled after the shooting. Huff testified that she recognized one of the men who was shooting because she had seen him around the

neighborhood. She did not know him personally, or know his name, but was told that his name was Dwayne Davis. Huff stated that she was unable to identify the shooter in court because, while she knew what the shooter looked like at the time of the shooting, she did not know how he looked after the passage of time:

> "Q. [ASSISTANT STATE'S ATTORNEY:] Do you see the person by the name Dwayne Davis that you identified - - do you see the person who shot at Levon Ward in court today?
>
> A. [WITNESS TANYA HUFF:] I can't answer that honestly. I really can't because I don't know what he looks like now. I don't.
>
> Q. Did you know what he looked like back then?
>
> A. Yeah."

Huff testified that she spoke to the police after the shooting and told them what she saw, but she did not recall telling them she did not get a good look at the offenders' faces. She testified that she identified the shooter in a line-up at the police station in March 2005, noting that "they told me to pick out the guy, and I did." She then prepared a written statement with an assistant state's attorney (ASA). At trial, Huff identified a photograph of the person whom she had picked out of the lineup. The photograph was an image of defendant.

¶ 8 Huff recalled signing the statement prepared by the ASA when she was at the police station, and testified that she read the statement before signing it. She recalled that she told the ASA the statement was true and accurate, that she was not threatened or forced to make the

statement, and that she made the statement freely and voluntarily. She also testified that she identified defendant in the picture as well as in the lineup because he was the shooter.

¶ 9 Huff also explained that she signed another statement on December 15, 2007, when a defense investigator visited her home. At trial, Huff testified that she signed the statement believing the defense investigator worked for the State's Attorney's office and that he was only making a few changes to the statement she previously signed. She denied having read the statement from the defense investigator before signing it, and testified that she did not discuss the events in question with the investigator because he was only interested in getting her to sign the document. Eventually, that statement, which conflicted with the statement she gave to the ASA, was published to the jury. It read:

> "The statement of Tanya Huff taken 15 December, '07 at 12:30 p.m. at 1516 East 70th Street. Present Tanya Huff and Edward Wayne Bunch. This statement taken regarding the shooting of Levon Ward, which occurred on 29 October, '03 at 2800 West Polk Street at 23:19 hours.
>
> My name is Tanya Huff. My DOB is 29 March, '60. I live at 1516 E. 70th Street. I work part-time at the carpet store at 80th and Exchange. On October 29th, 2003, I was walking to a liquor store at Polk and California when I saw three unknown persons running through a vacant lot towards Polk and California.
>
> The area was dark, and I was not able to a [*sic*] get enough

view of these persons to make a positive identification of any of them. I saw two of the three unknown persons fire guns towards the corner of Polk and California.

After firing several shots, these unknown persons ran back through the vacant lot from which they came from and out of my sight. I was interviewed by the police and told them I did not see the faces of the shooters.

On March 12th, 2005, plain clothes officers came to my house at 910 East 82nd Street, Number 2B, at about noon time. The officers stopped my kids as they were coming home, and took the house keys and attempted to unlock my door.

The officers then told me that if I didn't let them inside, they were taking my kids. Because of the statement I let them inside. Once inside they tried to convince me to go with them to Area 4 to answer a few more questions.

Once at Harrison and Kedzie, the officers wanted me to look at a line-up. I told them over and over, as I had told them on the night that shooting happened, I could not identify anyone. They then put me in a small room and locked me inside.

Several times during the next 12 hours, different officers would unlock the door, enter[] the room and show[] me pictures,

> and [tell] me after I picked out the shooter, I could go home to my kids.
>
> After many hours of being locked in that room, one of the officers showed me pictures and asked if I had ever saw any of these guys. I told them I saw this guy in the neighborhood, but I can't say if he was the shooter. He then had me sign the picture.
>
> The same happened when I looked at a line-up. I told the officers that I had seen the same guy from the neighborhood, but I couldn't say if he was the shooter. I had told the officers I didn't get a good look on the night of the shooting as I didn't see their faces.
>
> I never told any officer that I was afraid then, but now that someone had been arrested I was not afraid. Someone prepared a written statement and I was told I could go home to my kids when I signed it, and I did so so I could get to my kids. Signed Tanya Huff."

¶ 10 At trial, Huff did not recall telling the investigator it was dark on the night of the shooting, nor that she was unable to see the shooters. She agreed with the portion of the statement that averred the police officers stopped her kids, took their house keys, attempted to enter her apartment, and threatened to take her children to the Department of Family Services if she did not cooperate with the police. She also agreed with the portion of the statement

indicating that she remained in a locked room at Area 4 for 12 hours and was told she could not go home until she picked out the shooter.

¶ 11 Huff admitted she was previously convicted of manufacture and delivery of a controlled substance in 2000, and of retail theft in 2003. The record reflects that, at the time Huff testified, she was incarcerated due to a pending contempt of court charge for failure to appear in court under subpoena in the instant case. After Huff's testimony and outside the presence of the jury, the State dropped the pending contempt charges.

¶ 12 Former ASA Catherine Nauheimer testified that she interviewed Huff at Area 4 on March 12, 2005. At that time, she obtained both an oral and written statement from Huff regarding the shooting. After memorializing the statement in writing, Nauheimer read it aloud to Huff, and Huff followed along. Although Nauheimer advised her that she could make changes to the statement, Huff did not do so. Huff never complained about how she was treated by police, and indicated that her statement was made freely and voluntarily. Huff viewed a photograph of defendant and identified defendant as the person who shot the victim.

¶ 13 The parties stipulated that, if called to testify, the medical examiner would opine that the victim died from a single gunshot wound to the left chest and the medical examiner would testify that the manner of death was homicide.

¶ 14 Chicago police forensic investigator Carl Brasic testified that he processed the crime scene where Ward was shot and recovered seven cartridge cases that were fired from a .45 caliber automatic weapon.

¶ 15 Chicago police detective Brian Ferguson testified that on November 1, 2003, he went to a

large apartment complex located at 1339 S. Central Park with his partner to investigate an unrelated matter. There were other officers on the scene, as well. Detective Ferguson and his partner climbed up the back stairwell. When he did so, he could see through a window into the second-floor apartment. He saw defendant, who had a handgun in his waistband. Defendant saw the detectives, removed the handgun from his waistband, tossed it to the ground, and fled to another room in the apartment. Detective Ferguson testified that he pursued defendant, took him into custody, and recovered a .45 caliber semi-automatic handgun. He identified the handgun in open court.

¶ 16 On cross-examination, Detective Ferguson was asked whether defendant was the only person in the apartment. Detective Ferguson agreed that two other people were present, and agreed that all three people were subsequently arrested. Defense counsel then asked:

> "Q. [DEFENSE COUNSEL:] Nevertheless, two of the individuals, you charged with a weapons charge; is that correct?
>
> A. [DETECTIVE FERGUSON:] Yes.
>
> Q. And one with a drug charge; is that correct?
>
> A. Correct."

¶ 17 After this information was elicited by the defense, the State requested a sidebar and argued that defense counsel's questions regarding the circumstances of defendant's arrest "opened the door" for the State to elicit testimony about all of the activity occurring in the Central Park apartment on November 1, 2003. The State proffered that Detective Ferguson would testify that defendant, Vernon Cummings, and Terry Waits were standing in the kitchen of the Central Park

apartment when the police arrived; that defendant had a .45 caliber semi-automatic handgun in his waistband and was counting bags of marijuana; that officers ordered the men to the ground, but defendant tossed the gun on the floor and ran into a closet; that Cummings pulled a .22 caliber revolver from his waistband and tossed it to the floor before running into a bedroom; that Waits complied and was taken into custody; and that individual bags of cocaine and heroin were recovered from Waits' waistband; that officers pursued defendant and Cummings, took them into custody, and recovered the guns along with 44 bags of marijuana from the top of the washing machine. The State also advised the court that 25.2 grams of marijuana were recovered and that defendant was convicted of unlawful use of a weapon and sentenced to Cook County boot camp.

¶ 18 Defense counsel objected to the introduction of the narcotics-related evidence against defendant, but advised the court that she intended to call Waits, who would testify that the officers planted marijuana on him and guns on defendant and Cummings. Defense counsel also stated that she intended to introduce photographs that would demonstrate police could not look into the back window of the Central Park apartment and see inside. Defense counsel asserted that the presentation of this evidence was necessary because the "jury [is] sitting here picturing my client with a big black gun, walking around with it on his waistband. I think I have a right to try to explain what happened here, Judge. The only way I could do that is lay a foundation for impeachment."

¶ 19 After hearing arguments from both parties on the issue, the trial court concluded that, although evidence of the marijuana in defendant's possession constituted other crimes evidence, the State would be permitted to present it because the evidence was relevant in light of

defendant's claims that guns and drugs were planted on him and his cohorts. It instructed that the State could present evidence Cummings had a gun and defendant was purportedly handling bags of marijuana, but was not permitted to elicit testimony concerning the narcotics found on Waits' person, unless that information became relevant in rebuttal:

> "THE COURT: The claim is that that gun, which was a purported murder weapon, was at some point after the murder in the possession of the police and put by the police on Mr. Davis. The defense has a right to make that claim. The jury has a right to consider whether or not it's true, whether or not it raises a reasonable doubt with respect to Mr. Davis' guilt, the question of Mr. Davis' guilt. Implicit in that claim is they put the marijuana on him, correct, [defense counsel]?
>
> A. [DEFENSE COUNSEL]: That's what Mr. Cummings will testify to.
>
> THE COURT: I understand. It's because of that, because it's more - - it is perhaps more difficult, and a fact finder can conclude it's more difficult, for the police, who purportedly did this, to carry 19 or 25 separate bags of marijuana around with them to put on someone. That's a fact that I believe is germane that the jury, the fact finder, ought to have at their- - in evidence to consider whether or not the claim of putting this purported murder

weapon on Mr. Davis is true.

So despite your well placed, well stated, well analyzed objection, I'm going to permit evidence regarding the marijuana through this witness on redirect. And so your objection in that regard is overruled."

¶ 20 On redirect, Detective Ferguson testified that, before defendant noticed him, he saw defendant counting small bags of marijuana that were sitting on a washing machine. Once defendant noticed him, defendant tossed the gun and fled. Detective Ferguson testified that he also saw Cummings in the apartment, who likewise tossed a .22 caliber revolver to the ground before running into a bedroom. Defendant and Cummings were placed into custody and the handguns were recovered, along with the 44 bags of marijuana defendant was seen counting. Detective Ferguson also testified that Waits was arrested, but did not state the basis for his arrest.

¶ 21 After Detective Ferguson testified, the court gave the jury the following limiting instruction:

"THE COURT: Ladies and gentlemen, the claim that Mr. Davis possessed a substance purporting to be marijuana is to be considered by you only as it relates to the claim that Mr. Davis purportedly possessed the .45-caliber semi-automatic pistol that was testified to."

¶ 22 Chicago police detective Frank Szwedo testified that on March 12, 2005, he conducted a sequential lineup which included defendant. Detective Szwedo explained that sequential lineups

are conducted using a "blind administration" format, which means that the detective who administers the lineup has no other involvement in the case, does not know who the suspect is, and does not play a role in choosing the lineup participants. Before Huff viewed the lineup, Detective Szwedo explained to her that the suspect was not necessarily in the lineup, that she was not required to make an identification, and that she should not assume she was being forced to identify anyone. He also explained to her that, in this type of lineup, she should not assume that he knew who the suspect was. The lineup proceeded, with each participant entering the viewing room alone, facing the two-way glass, turning right and left, and then leaving the room. Detective Ferguson testified that, after viewing the lineup, Huff told him the shooter was "in there," but that she was scared to identify him because she knew the individual and the individual knew her. Detective Ferguson testified that "[s]he had general apprehension of making an identification for fearing for her life or her safety." After reassuring Huff that the lineup participants could not see the witness who was identifying them, Huff identified defendant as the shooter.

¶ 23 Illinois State Police forensic scientist Kurt Murray testified as an expert in the field of firearms identification that he received seven cartridge cases recovered from the scene of the murder, as well as the recovered .45 caliber handgun and magazine. After test firing the gun and comparing the discharged cases to the seven recovered cases, Murray concluded within a reasonable degree of scientific certainty that the seven discharged cartridge cases recovered from the murder scene were fired from the .45 caliber handgun.

¶ 24 Over defendant's objection, ASA Andreana Turano testified that she was present in court

on June 1, 2004, when defendant pled guilty to the offense of unlawful use of a weapon and was sentenced to Cook County boot camp. This conviction resulted from defendant's arrest on November 1, 2003, in the Central Park apartment, where the gun was seen in his waistband and recovered by police.

¶ 25 Chicago police detective Gregory Jones testified that he was the primary detective assigned to investigate Ward's murder. During the course of the investigation, Detective Jones learned there was a match between the cartridge casings recovered at the murder scene and the gun recovered from defendant. On March 10, 2005, Detective Jones learned that defendant had been arrested on an unrelated offense. Detective Jones interviewed defendant. Then, Detective Jones arranged for Huff to come to Area 4 on March 12, 2005, to view a lineup. When she arrived, Detective Jones interviewed her in a large open room with doors that do not lock. He denied having shown Huff a photo array with defendant's picture. Detective Jones testified that he never told Huff she could not go home until she identified the shooter in the lineup, and never threatened to take her children away if she did not identify the shooter. Huff arrived at the police station around 7:30 p.m. and the lineup was conducted at approximately 9:15 p.m. After the lineup, Huff was interviewed by an ASA, and then left the station around 12:00 a.m.

¶ 26 The State rested. Defendant presented a motion for a directed verdict, which the court denied.

¶ 27 Private investigator Edward Bunch testified for the defense that, on December 15, 2007, he went to Huff's apartment to interview her and get a statement from her regarding Ward's murder. He stayed at her apartment for about an hour. Bunch testified that he introduced himself

to her, told her his profession, and gave her his business card. They then sat down and Huff "relayed what she saw" the night of the murder, while he wrote it down. Afterwards, Bunch asked her to read and sign the statement if she believed it to be true and accurate, and to make any corrections if needed. He did not read the statement aloud to her. Huff signed it without making any corrections and without Bunch's encouragement. He took notes while obtaining the statement, but later destroyed them. The statement, quoted above, was published to the jury.

¶ 28 Defendant's friend Terry Waits testified that he was at the Central Park apartment on November 1, 2003, when police "raided" it. He and defendant were sitting on the couch talking when the police came through the back window. Waits testified that the police raised the window up, stuck one arm through the window to unlock the door, came in, and ordered the occupants not to move. He testified that other officers came in through the front door, for a total of at least 12 police officers in the apartment. Waits denied having seen a gun on defendant's hip. He did not see defendant toss a gun. Waits testified that, when the officers raised the window up, they could have seen inside the apartment but, when the window was lowered, "I think it got some kind of tint on there or something on that window."

¶ 29 Waits further testified that, after the officers searched the apartment, they placed two guns and some marijuana on the kitchen table. He testified that the first time he saw the guns and the marijuana was when the police put them on the kitchen table. After "huddling up" for a conference in the kitchen, the police officers "came and said we giving you a gun, we giving you a gun. I know you just came in here, but you got to go too, and they gave me marijuana." Waits denied having cocaine and heroin in his possession while in the apartment. He also denied

seeing defendant with a gun and denied that defendant was handling marijuana when the police arrived.

¶ 30 Waits admitted that he was convicted of possession of a controlled substance after being arrested at the Central Park apartment, but thought it was for marijuana, stating "[t]hey never mentioned cocaine or heroin." Waits also admitted that he had 10 drug-related convictions, including five felony convictions since 1998, for possession of a controlled substance and delivery of cannabis. Waits denied that he was a drug dealer, explaining that he was a drug user who sold drugs so he could make money to get more drugs.

¶ 31 Private investigator John Dugan then testified that he worked as a private investigator for the defense in this case. In April 2009, after interviewing Waits, Dugan went to the apartment building located at 1343 and 1345 S. Central Park. While there, he photographed the stairwells on the back of the building, the second floor apartment windows, the front of the building, and the surrounding area. He testified that police officers could not have looked through the second floor window and observed defendant and his cohorts in the apartment because "you couldn't see through" the window from the back porch." On cross-examination, however, Dugan admitted that, while he investigated the building located at 1343 and 1345 S. Central Park, he was "never at" 1339 S. Central Park, which was the location at issue, and did not photograph that building. He acknowledged that he did not know what the 1339 S. Central Park apartment looked like either in 2003 or in April 2009. The defense rested.

¶ 32 The jury returned a verdict of guilty against defendant. The trial court denied defendant's motion for a new trial. Defendant was sentenced to 52 years' imprisonment, inclusive of a 20-

year sentencing enhancement because he personally discharged a firearm during the commission of the murder. Defendant appeals.

¶ 33 ANALYSIS

¶ 34 I. The Admission of Other Crimes Evidence

¶ 35 Defendant first contends that the trial court erred in allowing the State to present evidence demonstrating he was handling bags of marijuana when he was arrested on November 1, 2003, in the Central Park apartment and subsequently discovered the murder weapon. Specifically, defendant argues that this evidence was admitted for the improper purpose of bolstering the credibility of the State's witness, was irrelevant, and was more prejudicial than probative. The State responds that the evidence was admissible for a number of reasons, including that it was admissible to give the jury relevant and import information regarding the course of the investigation whereby the murder weapon was discovered, as well as through the doctrine of curative admissibility, under which "a party may present inadmissible evidence where necessary to cure undue prejudice resulting from an opponent's introduction of similar evidence." See *People v. Duff*, 374 Ill. App. 3d 599, 606 (2007). For the following reasons, we find no error in the trial court's decision to admit this other crimes evidence.

¶ 36 Evidence of a defendant's other crimes is admissible if relevant for any purpose other than to show a defendant's propensity to commit crimes. *People v. Wilson*, 214 Ill. 2d 127, 135-36 (2005). Our supreme court has explained that other crimes evidence is admissible to show motive, intent, identity, absence of mistake, and the existence of a common plan or design. *Id.*;

People v. Dabbs, 239 Ill. 2d 277, 283 (2010). Further, evidence of other crimes may be admitted where it is part of a continuing narrative of the events in question, is intertwined with the event charged, or explains an aspect of the crime charged that would otherwise be implausible. *People v. Thompson*, 359 Ill. App. 3d 947, 951 (2005). Evidence is relevant if it tends to make the existence of a fact of consequence more or less probable. *People v. Munoz*, 398 Ill. App. 3d 455, 481 (2010). It is also relevant to show the circumstances or context leading up to the defendant's arrest for the crime and the identification of the weapon used in the crime. *People v. Kimbrough*, 138 Ill. App. 3d 481, 484-85 (1985).

¶ 37 Even when such evidence is offered for a permissible purpose, the evidence will not be admitted unless its probative value outweighs its prejudicial impact. *People v. Moss*, 205 Ill. 2d 139, 156 (2001). It is within the sound discretion of the trial court to determine the admissibility of other crimes evidence, and its decision will not be disturbed absent a clear abuse of discretion. *Wilson*, 214 Ill. 2d at 136. As a court of review, we will find an abuse of discretion "only where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court." *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 38 The doctrine of curative admissibility provides that " 'an opponent may reply [to the admission of inadmissible evidence] with similar evidence if it is needed to eradicate an unfair prejudice which might ensue from the original evidence [citations.].' " *People v. Chambers*, 179 Ill. App. 3d 565, 580-81 (1989), quoting *People v. Wilbert*, 15 Ill. App. 3d 974, 984-85 (1973). "[W]here the door to a particular subject is opened by defense counsel on cross-examination, the State may, on redirect, question the witness to clarify or explain the matters brought out during,

or to remove or correct unfavorable inferences left by the previous cross-examination." *People v. Manning*, 182 Ill. 2d 193, 216 (1998). While cautioning that this doctrine is not a "panacea," our supreme court explained that it can be used where: "[i]f A opens up an issue and B will be prejudiced unless B can introduce contradictory or explanatory evidence, then B will be permitted to introduce such evidence, even though it might otherwise be improper." *Manning*, 182 Ill. 2d at 216. The doctrine of curative admissibility is intended to be protective and goes only so far as to shield a party from adverse inferences. *Manning*, 182 Ill. 2d at 216-17. It is limited in scope (*People v. Liner*, 356 Ill. App. 3d 284 (2005)) and should be used cautiously (*People v. Stanbridge*, 348 Ill. App. 3d 351 (2004)).

¶ 39 Here, we agree with the State that the admission of the narcotics evidence was proper under the doctrine of curative admissibility to rebut defendant's assertion that the murder weapon was planted on him by police officers. Our review of the record shows that the State did not mention the narcotics during the direct examination of Detective Ferguson. Rather, in compliance with the trial court's pretrial ruling regarding proof of other crimes, the State limited questioning to the recovery of the murder weapon. Specifically, Detective Ferguson testified on direct examination that he and his partner climbed up the back stairs of the Central Park apartment building and looked into the back window of an apartment on the second floor. From that vantage point, Detective Ferguson observed defendant with a gun in his waistband. When defendant saw the detectives, he "took the handgun from his waistband, tossed it to the ground and fled." The remainder of Detective Ferguson's direct examination focused on apprehending defendant and recovering the handgun. Detective Ferguson then identified the handgun he had

recovered from defendant at the Central Park apartment, and affirmed that he took the handgun back to the police department for inventory.

¶ 40 On cross-examination, defense counsel again led Detective Ferguson through the events of the night of the arrest, having him describe his ascent up the back staircase of the Central Park building. Then, defense counsel brought out the fact that there were others arrested along with defendant:

"Q. [DEFENSE COUNSEL:] But you say - - you testified that you observed through the window; is that right?

A. [DETECTIVE FERGUSON:] Yes.

Q. You saw - - identified my client as having a gun in his waistband; is that right?

A. Correct.

Q. You said when he saw you, he threw it, right?

A. Correct.

Q. I assume you gained entry into that apartment, right?

A. Yes.

Q. And he wasn't the only person there, right? There were two other people, right?

A. Correct.

Q. All three were arrested, is that correct?

A. Correct.

* * *

Q. [DEFENSE COUNSEL:] One of the individuals was named - - do you recall the names of the individuals that you arrested that day?

A. I would have to look at the police reports to verify their names.

Q. If I told you arrested [*sic*] a man named Vernon Cummings, do you recall that?

A. I would have to look at the report.

Q. Nevertheless, two of the individuals, you charged with a weapons charge, is that correct?

A. Yes.

Q. And one with a drug charge; is that correct?

A. Correct.

[DEFENSE COUNSEL:] Nothing further."

¶ 41 At that point, the State asked for a sidebar, discussed previously, arguing that defense counsel's questioning "opened the door as to what people were charged with, what they were doing" in the apartment. Defense counsel explained that she intended to show, through the testimony of Waits, that police planted a gun and drugs on defendant and the other people present in the Central Park apartment. The trial court concluded:

"THE COURT: I appreciate that the marijuana is a [*sic*]

itself separate offense, essentially evidence of other crimes issue which requires the court to engage in a balancing test with respect to relevance to probative value versus prejudicial effect.

Here is why I'm deeming that it's relevant to talk about these bags of marijuana.

The claim is that that gun, which was a purported murder weapon, was at some point after the murder in the possession of the police and put by the police on Mr. Davis. The defense has a right to make that claim. The jury has a right to consider whether or not it's true, whether or not it raises a reasonable doubt with respect to Mr. Davis' guilt, the question of Mr. Davis' guilt. Implicit in that claim is they put the marijuana on him, correct, [defense counsel]?

* * *

It's because of that, because it's more - - it is perhaps more difficult, and a fact finder can conclude it's more difficult, for the police, who purportedly did this, to carry 19 or 25 separate bags of marijuana around with them to put on someone. That's a fact that I believe is germane that the jury, the fact finder, ought to have at their- - in evidence to consider whether or not the claim of putting this purported murder weapon on Mr. Davis is true.

> So despite your well placed, well stated, well analyzed objection, I'm going to permit evidence regarding the marijuana through this witness on redirect. And so your objection in that regard is overruled."

¶ 42 On redirect examination, the State asked limited questions concerning defendant's marijuana possession, including :

> "Q. [ASSISTANT STATE'S ATTORNEY:] When you first arrived at that window and looked inside that apartment, what did you see the defendant doing?
>
> A. [DETECTIVE FERGUSON:] He was counting small bags of marijuana that were sitting on a washing machine."

Detective Ferguson was asked two additional questions concerning whether the marijuana was recovered and inventoried:

> "Q. [ASSISTANT STATE'S ATTORNEY:] Detective, the bags of marijuana or suspect marijuana that you had observed the defendant counting at that washing machine, were those recovered and inventoried by yourself after the defendant was placed into custody?
>
> A. [DETECTIVE FERGUSON:] Yes, they were inventoried.

* * *

Q. In fact, the 44 bags of suspect cannabis that you saw the defendant counting on top of that washing machine, those were also inventoried by yourself and other officers back at the police station, correct?

A. Yes."

¶ 43 Defendant describes Detective Ferguson's redirect testimony as both an "extensive discussion" and a "prolonged discussion" of defendant's possession of marijuana. We disagree with this characterization and find that the record reflects the narcotics evidence presented was minimal and limited, presented only to rebut the inferences raised by defendant in cross-examination and to present a clear and complete picture of the events leading up to the recovery of the murder weapon. Defense counsel emphasized the circumstances surrounding defendant's arrest and then, during the sidebar, informed the court that she intended to present–and later actually did present through Waits' testimony–the theory that police planted the murder weapon on defendant. The State was entitled to present evidence on redirect to correct these unfavorable inferences. See *Manning*, 182 Ill. 2d at 216 ("[W]here the door to a particular subject is opened by defense counsel on cross-examination, the State may, on redirect, question the witness to clarify or explain the matters brought out during, or to remove or correct unfavorable inferences left by the previous cross-examination.").

¶ 44 Moreover, even aside from the doctrine of curative admissibility, this testimony was admissible as relevant other crimes evidence. Defendant attempted to prove at trial that police raided his apartment for the purpose of planting guns and drugs on defendant and other

occupants, and chose defendant as the recipient of the handgun used in a murder just 3 days earlier. Evidence that police entered the Central Park apartment after observing defendant in possession of marijuana while armed with a handgun was relevant to dispute that defense theory and to fully explain the events leading up to the recovery of the murder weapon. See *Kimbrough*, 138 Ill. App. 3d at 484-85 (evidence is relevant to show the circumstances or context leading up to the defendant's arrest for the crime and the identification of the weapon used in the crime).

¶ 45 Additionally, the court did not err in determining that the probative value of this evidence was not outweighed by its prejudicial effect. As seen from the testimony quoted herein, the challenged testimony about the narcotics was brief and, immediately following this testimony, the court gave the jury a limiting instruction, instructing them to consider the evidence only as it related to the claim that defendant was in possession of the murder weapon. Moreover, we find it highly unlikely that the fact defendant possessed marijuana at the time he was discovered with the murder weapon prejudiced him in any way. We note that defendant does not challenge the admission of this evidence for the purpose of linking him to the murder weapon, but challenges it because he claims it "did nothing more than imply Defendant's propensity for criminality." The jury heard evidence that defendant was seen fatally shooting Ward and was later found with the murder weapon in his possession. It is our opinion that the fact defendant also had marijuana in his possession at that time did not unfairly prejudice defendant. We find no abuse of discretion by the trial court in admitting this other crimes evidence.

¶ 46 II. Sufficiency of the Evidence

¶ 47 Next, defendant contends that the State failed to prove him guilty beyond a reasonable doubt. Specifically, defendant argues that Huff's eyewitness testimony was incredible, inconsistent, and was the product of police coercion. We disagree.

¶ 48 When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Campbell,* 146 Ill. 2d 363, 374 (1992). The trier of fact determines the credibility of witnesses and the weight to be given their testimony, resolves conflicts in the evidence, and draws reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). "A single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *People v. Slim*, 127 Ill. 2d 302, 307 (1989). The reliability of a witness' identification of a defendant is a question for the trier of fact. *People v. Cosme*, 247 Ill. App. 3d 420, 428 (1993). Where the finding of guilt largely rests on eyewitness testimony, a reviewing court must decide whether a fact finder could reasonably accept the testimony as true beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). We will not substitute our judgment for that of the trier of fact. *Ortiz*, 196 Ill. 2d at 259. A reviewing court must construe all reasonable inferences from the evidence in favor of the prosecution. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). We will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Ortiz*, 196 Ill. 2d at 259.

¶ 49 When evaluating an identification, a court may consider the following circumstances: (1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *People v. Pearson*, 324 Ill. App. 3d 622, 626 (2001), citing *Slim*, 127 Ill. 2d at 307-08.

¶ 50 Viewed in the light most favorable to the State, we find the eyewitness testimony in this case satisfies these factors. Huff testified credibly that she was at the scene of the shooting on the night in question when she saw defendant, a person she recognized from the neighborhood, shoot the victim. Huff explained that she was standing directly across the street from defendant when he opened fire on the victim. Huff confirmed that she spoke to police after the shooting and told them she recognized one of the shooters. Later, the police asked her to view a lineup. Huff complied, at which time she identified defendant as the shooter in both a photo array and a sequential lineup. After the lineup, she gave a statement to an ASA confirming that she saw defendant, whose photo was attached to the statement, shoot the victim.

¶ 51 Huff declined to identify defendant as the shooter in court, explaining that she did not know what he looked like at the time of trial because six years had passed. She confirmed that she did know what he looked like at the time of the shooting. We note here that Detective Szwedo testified that Huff was reluctant to identify defendant at the lineup because she was afraid for her safety because "she knew the individual and the individual knew her."

¶ 52 The record also includes two conflicting statements from Huff, one made with the ASA

identifying defendant as the shooter and the other made with the private investigator, denouncing the statement made with the ASA. However, Huff denounced the recantation statement she signed, explaining that she did not read the document before signing it and that she had believed defendant's investigator worked for the State's Attorney's office and only wanted to make a few changes to her original statement. Moreover, the private investigator who made the statement with Huff testified that, although he gave Huff time to read the statement before signing it, he did not read it aloud to her nor have her read it aloud to him. This investigator destroyed the notes he took prior to writing the statement.

¶ 53 In the statement made with the private investigator, Huff alleged that she was coerced by police officers to identify defendant, and she reiterated this at trial. Defendant argues that "Huff's testimony was irrevocably tainted by the coercive tactics of the police detectives, and cannot be relied upon as a truthful identification of anyone." However, Huff reaffirmed at trial that she had no complaints about how she was treated by the police when she was at the police station viewing the lineup, that the statement she gave the ASA was true and accurate, given freely and voluntarily, and that she identified defendant as the shooter because she saw him shoot the victim:

> "Q. [ASSISTANT STATE'S ATTORNEY:] You told [the ASA] that [the statement made with the ASA] was a true and accurate statement of what had happened, correct, after reviewing it?
>
> A. [WITNESS TANYA HUFF:] Yes.

Q. You also told her that no one had threatened you in any way or forced you or promised anything in order for you to make the statement?

A. True.

Q. And that you're making the statement freely and voluntarily?

A. Yes.

Q. And that you had no complaints about how the police or the state's attorney had treated you, correct?

A. Not that day, no.

Q. And you had identified Exhibit No. 1, the picture of the shooter [the photograph attached to the ASA statement] because that's who the shooter was, correct?

A. Yes.

Q. And also you made an identification in a lineup, People's Exhibit No. 6 and 7, because you picked that person out because that's who shot Levon Ward?

A. Yes."

¶ 54 Defendant argues that his conviction should be reversed because Huff's testimony was "coerced, inconsistent, and unreliable." Specifically, defendant argues that:

"[o]ver and over, Huff's testimony was called into question and openly

> impeached. That the State used Huff as its key witness plainly indicates the weakness of its case, as well as the injustice that Defendant suffered."

We disagree, and note that the reliability of a witness' identification of a defendant is a question for the trier of fact. *Cosme*, 247 Ill. App. 3d at 428. The jury considered all of the evidence presented and concluded that defendant participated in the crime, and we see no reason to disturb this determination. See *Ortiz*, 196 Ill. 2d at 259.

¶ 55 Moreover, Huff's testimony was corroborated by forensic evidence admitted at trial. Specifically, seven cartridge cases were recovered from the murder scene. Ballistics testing performed on these cartridge cases showed that they were fired from a .45 caliber semi-automatic weapon. Three days after the murder, defendant was arrested while in possession of the murder weapon, and subsequently pled guilty to unlawful use of a weapon. Although defendant presented the testimony of his friend, Waits, to support his contention that the weapon was planted by police, it is the purview of the trier of fact to determine the credibility of witnesses. See *Ortiz*, 196 Ill. 2d at 259 (the trier of fact determines the credibility of witnesses and the weight to be given their testimony, resolves conflicts in the evidence, and draws reasonable inferences from the evidence).

¶ 56 The evidence presented in this case was overwhelming and, viewed in the light most favorable to the State, sufficient to sustain a conviction for murder. Defendant was identified by a credible eyewitness and the identification was supported by physical evidence. The jury heard the evidence presented at trial, and observed the witnesses as they testified. The reliability of a witness' identification of a defendant is a question for the trier of fact. *Cosme*, 247 Ill. App. 3d at

428. A rational trier of fact could have found defendant guilty.

¶ 57 III. Ineffective Assistance of Trial Counsel Regarding Defense Photographs

¶ 58 Next, defendant contends that he was denied the effective assistance of trial counsel where counsel failed to properly investigate the location where the murder weapon was discovered. Specifically, defendant argues that, because defense investigator Dugan photographed the wrong apartment, the defense was unable to fully present its theory that the police could not have seen through the Central Park apartment's window to observe defendant in possession of the murder weapon and marijuana, and therefore, it was likely that the police had entered the apartment and planted the murder weapon on defendant. Defendant maintains that trial counsel erred in presenting the wrong photographs and that this error rendered her representation ineffective.

¶ 59 To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984); *People v. Coulter*, 352 Ill. App. 3d 151, 157 (2004). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 342 Ill. App. 3d 849, 859 (2003). To establish prejudice, a defendant must

show there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different. *People v. Easley*, 192 Ill. 2d 307, 317 (2000). Specifically, the defendant must show that counsel's deficient performance rendered the result of the proceeding unreliable or fundamentally unfair. *Easley*, 192 Ill. 2d at 317-18.

¶ 60 Here, even if counsel's representation was deficient, defendant's claim fails because he is unable to show resulting prejudice. See *Easley*, 192 Ill. 2d at 317. Upon careful review of the entire record, we conclude that any error committed by counsel was harmless beyond a reasonable doubt. Specifically, as discussed herein, the evidence against defendant was overwhelming where defendant was identified by Huff, an eyewitness who knew defendant from the neighborhood, as one of the individuals who shot and killed the victim, and ballistics evidence proved that the shell casings recovered from the murder scene matched the .45 caliber semi-automatic handgun officers observed defendant remove from his waistband and throw to the ground at the Central Park apartment just three days after the shooting. Defendant is unable to show the requisite prejudice here where, even if counsel had presented photographs of the correct building, the outcome of defendant's trial would not have been different. See *Easley*, 192 Ill. 2d at 317 (to establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different).

¶ 61 IV. Ineffective Assistance of Counsel Regarding Other Crimes Evidence

¶ 62 Finally, defendant contends that he was denied the effective assistance of trial counsel

where counsel "opened the door" to allegedly prejudicial other crimes evidences regarding defendant's possession of marijuana at the time of his arrest. Specifically, defendant argues that this evidence prejudiced him because it created an inference that he was involved in a larger criminal enterprise and had a propensity for criminal activity. He argues that "t]he jury was able to draw improper inferences that Defendant was regularly engaged in criminal enterprise, and that the shooting was a natural consequence of that enterprise."

¶ 63 Here, even if counsel's representation was deficient, defendant's claim fails because he is unable to show resulting prejudice. See *Easley*, 192 Ill. 2d at 317. In light of the overwhelming evidence presented against defendant, including a credible eyewitness identification of him as the shooter and ballistics evidence establishing that, just three days after the shooting, defendant possessed the firearm used in the victim's murder, defendant cannot establish that the result of the proceeding would have been different had the jury not learned that, along with the murder weapon, defendant also was in possession of marijuana when he was arrested. See *Easley*, 192 Ill. 2d at 317 (to establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different).

¶ 64 We have thoroughly reviewed the record on appeal and find no merit to defendant's argument of ineffective assistance of counsel. There is no merit to defendant's argument that the jury was so prejudiced by information that defendant was in possession of cannabis that it changed the result of the trial. As discussed herein, the other crimes evidence of defendant's possession of marijuana at the Central Park apartment was properly admitted, was limited to

describing the circumstances of defendant's arrest while in possession of the murder weapon, and was not prejudicial to defendant. Moreover, as discussed herein, the evidence of defendant's guilt was strong. Defendant is unable to show resulting prejudice here where, even if counsel had not "opened the door" to this limited evidence of defendant's possession of marijuana, the outcome of defendant's trial would not have been different.

¶ 65 Defendant's reliance on *People v. Fletcher*, 335 Ill. App. 3d 447, 455 (2002), does not persuade us differently, as *Fletcher* is inapposite to the case at bar. In *Fletcher*, defense counsel elicited extensive testimony from the defendant about his lengthy criminal history, including juvenile adjudications which otherwise would have been inadmissible, and opened the door to rigorous cross-examination by the prosecution. *Fletcher*, 335 Ill. App. 3d at 449-53. This is immediately distinguishable from the case at bar, where only limited testimony regarding possession of marijuana possessed by defendant at the same time he was found in possession of the murder weapon was allowed into evidence. Defendant is unable to state a claim for the ineffective assistance of counsel.

¶ 66 CONCLUSION

¶ 67 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 68 Affirmed.