2012 IL App (1st) 110235-U

FOURTH DIVISION
November 8, 2012

No. 1-11-0235

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 13771
	)	
JANET YURUS,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not denied her right to a fair trial where she testified on direct examination by her own attorney that she refused to take a polygraph examination. Defendant's confrontation rights were not violated by State witness's unsolicited statement regarding the confession of a non-testifying witness where it was not elicited for the truth of the matter asserted and error, if any, was cured. The recanting witnesses' handwritten statements and grand jury testimony were both properly admitted as prior inconsistent statements. The trial court's judgment is affirmed.

¶ 2 After a jury trial, defendant, Janet Yurus was convicted of first degree murder and sentenced to 32 years in prison. She now appeals her conviction. We affirm.

¶ 3 BACKGROUND

¶ 4 On May 2, 2001, Henry Wrobel, defendant's 78-year old uncle, was shot and killed in his home at 5136 South Wolcott. His body was found the next day by defendant and her son, Richard Kupferschmidt. Defendant was eventually indicted for the crime, along with Richard Kupferschmidt, Ricardo Pabon, Israel Munoz-Gallardo and Isaac Sierra. (We note the record refers to Mr. Sierra as both "Isaac" and "Issac.") Defendant and Ricardo Pabon were tried in simultaneous but severed jury trials.

¶ 5 The following evidence was adduced at defendant's trial. When the police arrived at the murder scene, they found signs of a forced entry but no physical evidence. The initial investigation produced no solid leads and the case remained unsolved for several years. Officer Patrick Johnson, one of the officers who had arrived at the scene, wanted the murder solved. He therefore kept the reports and continued to actively investigate the case whenever he had an opportunity. Officer Johnson would ask about the murder whenever he and his partner made narcotics arrests or conducted minor investigations in their role as tactical officers. Johnson spoke to approximately 30 people between 2001 and 2004. He did not generate any leads until September 2004.

¶ 6 On September 13, 2004, Johnson arrested Carlos Roman on an unrelated weapons charge. Roman said he had information about the murder. Johnson did a follow-up investigation by looking for Issac Sierra ("Big Boy"), Ricardo Pabon, Robert Cardenas, Gregorio Cortez and Richard Kupferschmidt through police department records and photographs. Johnson printed photos of the men.

¶ 7 On May 8, 2005, Johnson went to the area of 47th and Ashland to assist two other officers who had pulled over a vehicle matching the description of a van involved in an earlier unrelated shooting. When Johnson arrived he saw Ricardo Pabon, Robert Cardenas, and Gregorio Cortez outside of the van. Johnson subsequently contacted Detective Thomas Cepeda who worked in the cold case unit.

¶ 8 Detective Thomas Cepeda testified that he spoke to Robert Cardenas at the Homan Square police facility on May 8, 2005. Cardenas was a City Knights gang member who worked with Richard Kupferschmidt at Harlem Furniture. After reading Cardenas his rights, Cepeda told him he was investigating the murder of a 78-year-old man that occurred in May 2001 in the 5100 block of South Wolcott. Cardenas immediately bowed his head and stared at the floor. After a few moments, Cardenas started shaking his head and said "it ain't right what happened to that old man." He told Cepeda that "Big Boy" had shot the man in the head and that Rick Pabon and Saul Ayala were present. Cardenas said that the man's niece and her son wanted him dead for the insurance money and inheritance. He told Cepeda that they had met at defendant's house a couple of times to discuss the killing and robbing of her uncle.

¶ 9 Assistant State's Attorney (ASA) Margaret Firnstein spoke to Cardenas on May 8, 2005, and he agreed to give a handwritten statement. Cardenas was then taken to 26th Street where he was interviewed by two more ASA's. He then testified before the grand jury. In his grand jury testimony, Cardenas stated that he was at defendant's house in early 2001 when she discussed with her son, Richard and Big Boy, a plan to rob and kill Henry Wrobel.

¶ 10 Detective Cepeda and Sergeant Anthony Wojcik also interviewed Gregorio Cortez. He

told them he was afraid of Big Boy, the individual involved in the murder, because Big Boy was a Satan Disciple. The detectives told Cortez that Big Boy was in a federal penitentiary in Pennsylvania and that he would be there for awhile. At that point, Cortez agreed to speak to the detectives. Cortez subsequently agreed to talk to the State's Attorney.

¶ 11 On July 27, 2005, Cortez spoke to ASA Theresa Smith-Conyers about Wrobel's murder. Cortez told her he was willing to testify in front of the grand jury. At trial, ASA Smith-Conyers published the grand jury transcript. In that transcript, Cortez testified that he knew "Big Boy" who used a lot of different names, including Isaac. Big Boy lived at a nation house for the Satan Disciples on 52nd and Damen. Cortez testified that he was in the City Knights gang and Big Boy was a Satan Disciple, but the two gangs got along. He stated the City Knights gang was small and was run under the Satan Disciples. If City Knight gang members were to go to jail, the Satan Disciples would protect them in there. Cortez testified that after the murder he saw Big Boy with some new clothes and a couple hundred dollars. Cortez said that Big Boy was supplying his friends with money and buying them things. Cortez testified that, on May 8, 2005, he spoke to the police about what happened in 2001. He also testified that, despite being treated well by the police, he did not feel comfortable telling the police what he knew because he was afraid of what Big Boy's friends could do to him or his kids. Also on May 8, 2005, Detective Cepeda and Sergeant Wojcik interviewed Ricardo Pabon.

¶ 12 In May 2005, the police also interviewed defendant's two children, Kerry and Lindsay Kupferschmidt, as well as Lindsay's boyfriend, Saul Ayala, with whom she had three children. The police wanted to interview defendant's son, Michael, but could not locate him.

¶ 13 Kerry Kupferschmidt told Detective Cepeda that defendant had asked her and a friend "seven or eight" times to kill Wrobel because defendant needed the money to pay the mortgage. Kerry's written statement and grand jury testimony were published to the jury at trial.

¶ 14 Lindsay Kupferschmidt told the police that she heard a conversation between her brother, Richard, and Big Boy in 2001 during which Big Boy threatened her brother that "if anything happens, that his fucking body would come up stinking." A portion of Lindsay's written statement and grand jury testimony were published to the jury.

¶ 15 Saul Ayala's written statement and grand jury testimony were also published to the jury. Ayala stated that he was at defendant's house on May 2, 2001 when she asked him to go to Wrobel's house with her son, Richard, to check on him. He and Richard picked up Big Boy and Ricardo Pabon on the way. Ayala testified that Ricardo Pabon was his best friend. Ayala stayed in the car while the other three went towards the house. Ayala stated that ten minutes later, after the three were back in the car, Big Boy yelled at Richard that there was no money. Ayala believed that the three were trying to rob Wrobel.

¶ 16 Defendant was arrested on July 13, 2005, while at a gas station. She was taken to the Homan Square police facility where she was questioned by Detective Cepeda and Sergeant Wojcik. Defendant denied any involvement in, or knowledge of, the murder. The police told defendant that they had interviewed Richard, Saul Ayala, and Ricardo Pabon. Defendant asked if she could see the handwritten statements and transcripts. Detective Cepeda went and got the statements. After defendant looked at them, she asked the detectives what would happen if she only knew that something was going to be stolen from her uncle. She also compared herself to

Ayala, noting that he had admitted he was there, but he was not charged.

¶ 17 After the detectives further discussed their investigation with defendant, she stated that it was Big Boy who had killed her uncle and that he had gone too far with it. She admitted she was involved, but stated that she was not present during the murder and had only wanted her uncle robbed. She told the detectives that, at the time of the murder, she and her family were having financial difficulties. They had fallen behind on their mortgage and did not have money to pay for other expenses. Defendant's mother had told her that her uncle had a large amount of money hidden in his home and defendant thought the money would help her and her family. She came up with various plans to get the money which included her or her son, Richard, stealing the money. Richard tried but could not find the money. Her financial situation worsened so she came up with the plan to have her uncle robbed by Ricardo Pabon.

¶ 18 Defendant also told the detectives that she sent her son, Richard, and Saul Ayala over to her uncle's house on May 2, 2001. When Richard returned, he told her it had been taken care of and she did not have to worry about their bills anymore. That was when she realized the plan to rob her uncle had been carried out.

¶ 19 In October 2005, the police located Michael Kupferschmidt in the area of 48th and Cicero near his home. He agreed to go to the police station to talk about his great uncle's death. He spoke to Detective Cepeda and Detective Saul Del Rivero. Michael's written statement and grand jury testimony were published to the jury at trial. Michael, who was in the City Knights gang, told the detectives that he heard defendant say that she wanted her uncle murdered. Michael stated that about four months before the murder, he was in defendant's minivan with her,

Richard and Ricardo Pabon. Defendant asked them if they were ready to rob Uncle Henry. Pabon said he was ready. A month later they were in the van, discussing robbing and murdering Wrobel with a gun. Pabon said he "had another guy" who had a gun and defendant told Richard and Pabon that she wanted them to murder Wrobel.

¶ 20 At trial, defendant's children (Michael, Kerry, and Lindsay), as well as Saul Ayala and Robert Cardenas, recanted their statements. Defendant also denied that she had admitted to Sergeant Wojcik that she wanted to rob her uncle. She denied that she was having financial problems at the time of the murder. She stated that the police had treated her "like crap." She also stated that she passed out in the room because it was 105 degrees with no air conditioning. She testified that Detective Cepeda kicked her in the back and shoulders to wake her up, he refused to give her water, and she urinated on herself. On direct examination, defendant stated that the detectives asked her to take a lie detector test and she told them "bring me my lawyer and I'll take a lie detector test." During cross-examination, the State asked defendant about her request for a lawyer and her refusal to take a lie detector test.

¶ 21 The jury found defendant guilty of first-degree murder. She was convicted and sentenced to 32 years in prison. She now appeals her conviction.

¶ 22 ANALYSIS

¶ 23 *Polygraph Examination*

¶ 24 Defendant first argues that her right to a fair trial was violated because the State questioned her regarding the polygraph examination and argued that she was guilty because she refused to take a polygraph examination and asked for an attorney. The State contends that it

was defendant herself who brought up the claim and introduced the evidence on direct examination by her own attorney.

¶ 25 We review the trial court's decision to admit evidence for an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). "An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable [citation] or where no reasonable person would agree with the position adopted by the trial court [citations]." *Id.*

¶ 26 During its case-in-chief, the State adduced testimony concerning defendant's interview with the police and the contents of her oral statement. The State did not attempt to introduce any evidence regarding a polygraph examination or defendant's request for an attorney. However, defendant later took the stand and denied any involvement in the murder and testified that the police treated her "like crap." Under direct examination by her own attorney, she described the circumstances regarding her arrest and stated: "Then they're like, well, take a lie detector test. I says, bring me my lawyer and I'll take a lie detector test. I says, I have nothing to hide." She stated that she never made the inculpatory oral statement that the State introduced and relied upon. During cross-examination, defendant was questioned as follows:

> "ASSISTANT STATE'S ATTORNEY: You told us a little while ago when your lawyer was asking questions, that when you were at the police station, you said, you know what, I don't want to talk to you, I want my lawyer, that's what you told these folks, right?
>
> DEFENDANT: After they asked me to take a lie detector test."

Later, the State rhetorically asked defendant "if you didn't do anything to anybody or you didn't

have anything to do with this murder, you don't have to worry about taking the old lie detector test, do you?"

¶ 27 In general, evidence relating to polygraphs is inadmissible. *People v. Baynes*, 88 Ill. 2d 225 (1981). The reason for this is twofold. "On the one hand, the results of polygraph examinations are not sufficiently reliable to be used to prove guilt or innocence." *People v. Taylor* 101 Ill. 2d 377, 391 (1984). "On the other hand, because of their quasi-scientific appearance, the results of polygraph examinations are likely to be given undue weight in the minds of jurors." *Id.* at 391-92. However, the Supreme Court has directed that the facts of individual cases may allow for exceptions. *People v. Melock*, 149 Ill. 2d 423, 466 (1992) ("We *** reserve the opportunity to revisit our position on the general inadmissibility of [polygraph] evidence as particular issues are presented in future cases."). This appears to us to be just such a case.

¶ 28 The general rule is that evidence that a defendant refused to take a polygraph examination is inadmissible. *People v. Eickhoff*, 129 Ill. App. 3d 99, 103 (1984). However, polygraph evidence may be admitted for the limited purpose of rebutting a defendant's claim that his confession was coerced. *People v. Jefferson*, 184 Ill. 2d 486, 493 (1998). Here, defendant did not testify that her oral admission to Sergeant Wojcik was coerced. She denied making any statements. Although *Jefferson* is not precisely on point, the State correctly notes that defendant claimed to have refused a lie detector test and asked for a lawyer as part of her claim that the police abused her because she refused to make any inculpatory statements.

¶ 29 The other cases cited are also not on point. Defendant cites *People v. Lewis*, 269 Ill. App.

3d 523 (1995), a case in which a detective was asked about his interview of the victim. He testified that she agreed to take a polygraph examination. *Lewis*, 269 Ill. App. 3d at 526. The defendant moved for a mistrial which the court denied. *Id.* The appellate court reversed after noting that it was "confronted with the gratuitous, volunteered testimony of an *experienced* police officer, who flag[ged] to the jury's attention the fact that the State's key witness 'agreed to take a polygraph exam.' " (Emphasis in original.) *Lewis*, 269 Ill. App. 3d at 527. As the court explained: "the prosecutor retains the duty to admonish the State's witnesses never to mention polygraph examinations during their testimony." *Id*. Here, as the centerpiece of her claim that she never gave the oral confession claimed by the State, defendant during direct examination by her own attorney volunteered testimony that she told the detectives that if they allowed her to speak to her attorney, she would agree to take a lie detector test because she had "nothing to hide." She claimed that when the police would not let her speak to her attorney, she decided "not to help [them] out with anything," and therefore made no statement to them. Thus, *Lewis* is distinguishable because it did not involve the situation where a *defendant* introduced the polygraph evidence.

¶ 30 Similarly, *People v. Eaton*, 307 Ill. App. 3d 397 (1999), another case relied on by defendant, is inapposite because there the prosecutor informed the jury that defendant had not taken a polygraph examination. In the instant case, it was the State's position that defendant was lying when she testified that she offered to take a polygraph test if allowed to speak to her lawyer and that she never refused to take a polygraph examination. The State never took the position that defendant did refuse the test.

¶ 31 In response to defendant's claim that she would have taken a polygraph test after speaking to her lawyer because she "had nothing to hide," the State challenged her by suggesting that if she had nothing to hide she would have taken a polygraph test regardless. That was the State's attempt, albeit in a rather inartful way, of suggesting that no polygraph test was ever offered by the police or refused by the defendant, and that defendant's claim at trial that she never gave an oral confession was also a lie.

¶ 32 The State contends that defendant's claim is analogous to a *Doyle* issue. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). In *Doyle*, the United States Supreme Court held that the prosecution's use of a defendant's post-*Miranda* silence, for impeachment purposes, violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, by suggesting that the refusal to answer questions is indicative of guilt. However, we agree with the State that no *Doyle* violation occurred here because it was the State's position that defendant never exercised her right to remain silent and never refused to take a polygraph test. As the State notes, it did not ask the jury to draw an inference from defendant's silence. Instead, the State argued that defendant was *not* silent and did, in fact, confess. The State's argument was that defendant's claims to have refused a lie detector test and asked for a lawyer were lies. Thus, the State's comments regarding the polygraph examination, of which defendant now complains, were made for the purpose of challenging defendant's credibility on the issue of her denial of making her confession.

¶ 33 That said, we do not condone the State's wording in cross-examination or rebuttal argument. It was susceptible to being misinterpreted as a criticism of her for *actually* refusing a

polygraph test and *actually* exercising her right to remain silent as defendant claims the State intended. Nonetheless, under the unique facts of this case, we find that defendant has failed to show that the trial court's decision to allow the evidence to be admitted was "arbitrary, fanciful or unreasonable" or that "no reasonable person would agree with the [trial court's] position." *Becker*, 239 Ill. 2d at 234. Moreover, any error was harmless. As the State notes, the evidence against defendant in this case was overwhelming.

¶ 34 "The improper admission of evidence is harmless error if no reasonable probability exists that the verdict would have been different if the evidence at issue had been excluded [citation], such as where the evidence of guilt is overwhelming [citation]." *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 63; see also *People v. Graves*, 2012 IL App (4th) 110536, ¶ 32 (Internal quotation marks omitted.) ("Error will be deemed harmless and a new trial unnecessary when the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result."). The evidence against defendant was overwhelming and the admission of the polygraph evidence by the State during its cross-examination of defendant was harmless.

¶ 35 Defendant further argues on appeal that the State's comments during closing argument regarding the polygraph examination compounded the trial court's error in allowing the State to cross examine her on the issue. As the State correctly notes, defendant failed to raise this argument in her motion for a new trial. Thus, the issue is forfeited.

¶ 36 *Right of Confrontation*

¶ 37 Defendant next argues that her confrontation rights were violated where the State elicited evidence of the confession of a non-testifying codefendant, Richard Kupferschmidt. Kupferschmidt, defendant's son, was tried in a separate jury trial. However, the jury in defendant's trial learned of Kupferschmidt's confession to the offense. First, Sergeant Wojcik (who at the time of trial was a lieutenant) testified regarding his interview with Lindsay Kupferschmidt and her denial of any knowledge of the murder. The following colloquy occurred:

> "ASSISTANT STATE'S ATTORNEY: Lieutenant, did you give any information to Ms. Kupferschmidt at that time?
>
> WOJCIK: Yes.
>
> ASSISTANT STATE'S ATTORNEY: What did you tell her?
>
> WOJCIK: We told her your brother's in custody. Your brother already admitted to what he did –
>
> DEFENSE ATTORNEY: Objection.
>
> ASSISTANT STATE'S ATTORNEY: Judge, if I could rephrase.
>
> THE COURT: Sure. First off, I will sustain the objection. Ladies and gentleman, please strike the last answer. You should not consider it at all. Go ahead.
>
> ASSISTANT STATE'S ATTORNEY: Lieutenant, without telling us exactly who said what, did you indicate to Lindsay Kupferschmidt that Richard Kupferschmidt was there at Homan Square?
>
> WOJCIK: Yes."

Thereafter, the State elicited testimony from Wojcik that Lindsay Kupferschmidt was allowed to meet with her brother and that, after their conversation, Ms. Kupferschmidt was willing to discuss the facts and circumstances surrounding her uncle's death.

The second reference to Richard Kupferschmidt's admission occurred when Wojcik was testifying about defendant's denial of any knowledge of the murder when she was first in custody. The following colloquy occurred:

> "ASSISTANT STATE'S ATTORNEY: Did she indicate to you at that time anything about Richard Kupferschmidt and Saul Ayala and their involvement or non-involvement?
>
> WOJCIK: She stated because I told her they had – well, anyway getting back, I said he had given a statement. Your son already admitted this -
>
> ASSISTANT STATE'S ATTORNEY: Lieutenant –
>
> DEFENSE COUNSEL: Objection."
>
> THE COURT: Objection sustained. Please strike the last answer, ladies and gentlemen."

¶ 38 Citing *Crawford v. Washington*, 541 U.S. 36, 53 (2004), defendant now asserts that the admission of this evidence violated her confrontation rights because Kupferschmidt was not subjected to cross-examination. As the Illinois Supreme Court has explained:

> "The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const., amend. VI. This part of the sixth amendment is called the confrontation clause and applies to the states through the fourteenth amendment.

> [Citation.]. In *Crawford*, * * * the United States Supreme Court held that the sixth amendment's "primary object" is with "testimonial hearsay." [Citation.] Accordingly, [t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. [Citation.]." *People v. Williams*, 238 Ill. 2d 125, 142 (2010).

¶ 39 The State contends that no *Crawford* violation occurred here because Lieutenant Wojcik's unsolicited statement was not elicited for the truth of the matter asserted. The State notes that in a later sidebar dealing with defendant's motion for a mistrial on this issue, the prosecutor stated "That was not the answer that I was intending to get from him. I was trying to sort of lead him around those areas, Judge." The State further notes that defense counsel conceded that the statement was unsolicited: "I know the witness just spit it out twice."

¶ 40 The State also contends that, *even if* Wojcik's testimony had not been stricken, it "would have been admissible to show the resultant effects on the hearer of the statement." Thus, the State argues that the statement was not a *Crawford* violation because, had it been admitted, it would not be "introduced for the truth of the matter asserted, *i.e.* that Richard had admitted his part in this case, but to show why Lindsay and then defendant changed their stories. They went from denials of any knowledge to eventual detailed statements about what they knew."

¶ 41 Defendant notes that the State has not cited a post-*Crawford* case that supports its argument. Nonetheless, as the Illinois Supreme Court later acknowledged, the *Crawford* court "added an explicit logical corollary" to its prohibition of the admission of testimonial hearsay

statements by unavailable witnesses. *Williams*, 238 Ill. 2d at142. In a footnote, the *Crawford* court pointed out that "the confrontation clause does not bar the admission of testimonial statements that are admitted for purposes other than proving the truth of the matter asserted. [Citations.]. Stated another way, *we need only consider whether a statement was testimonial if the statements at issue were, in fact, hearsay statements offered to prove the truth of the matter asserted*. [Citations]." (Emphasis added.) *Id*.; see also *Tennessee v. Street*, 471 U.S. 409 (1985).

¶ 42 As the State additionally notes, any error was cured where the trial court sustained defense counsel's objections and instructed the jury to disregard the statements. Defendant, without citation to authority, asserts that a *Crawford* violation cannot be cured by a trial judge's admonitions to the jury. We disagree. See *Tennessee v. Street*, 471 U.S. at 415, n. 6 ("The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue.").

¶ 43 In sum, defendant's confrontation rights were not violated where the detective's unsolicited statements that he told a witness and defendant that Richard had admitted his part in the murder were not elicited for the truth of the matter asserted, and the trial court cured any error by sustaining defendant's objection and instructing the jury to disregard the statements.

¶ 44 *Prior Inconsistent Statements*

¶ 45 Defendant next argues that she was denied a fair trial when the State introduced the prior inconsistent statements of five witnesses. She contends that the statements were "unnecessarily duplicative" of each other and that "[t]he admission of the additional out-of-court statements violated the common-law rule against corroboration of substantive evidence through prior

consistent statements[.]" She contends that in each instance where a witness recanted, only one prior inconsistent statement should have been admitted since the admission of the second statement transformed the first into an improper prior "consistent" statement.

¶ 46 Defendant's argument has been soundly rejected several times by this court. See *People v. Johnson*, 385 Ill. App. 3d 585 (2008) (holding that the admission of multiple inconsistent statements, even though the prior statements were consistent with each other, was not subject to the rule against the admission of prior consistent statements); accord *People v. White*, 2011 IL App (1st) 092852, *People v. Perry*, 2011 IL App (1st) 081228; *People v. Maldonado*, 398 Ill. App. 3d 401, 423 (2010); *People v. Santiago*, 409 Ill. App. 3d 927 (2011). In *White*, we specifically rejected the defendants' argument that the court's prior decisions "denigrate[d] the reasoning behind the rule against prior consistent statements." *White*, 2011 IL App (1st) 092852, ¶ 49; see also *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 50 ("contention that admission of multiple prior inconsistent statements from the same witness violates the rule against prior consistent statements has been addressed at length, and rejected, by this court").

¶ 47 Defendant acknowledges that this court has previously rejected her argument, but notes that none of these prior decisions has considered section 115-10.1 of the Code of Criminal Procedure of 1963 in light of the principles enunciated in *People v. Dabbs*, 239 Ill. 2d 277 (2010). The parties disagree as to whether this particular argument was preserved for appeal. The State asserts that defendant failed to object to the alleged errors at trial or include them in a posttrial motion. The State notes that *Dabbs* was issued on November 18, 2010 and claims that "defendant failed to raise this issue in [her] exhaustive 55 issue post-trial motion filed on

December 29, 2010." Although defendant asserts that she included the issue in her motion, she merely references seven pages in general (of the twelve page motion) and cites no specific paragraph. The motion does not raise the case of *Dabbs*. However, in paragraph 13, defendant argues that "[t]he court erred by allowing the State to read the handwritten statement of Michael Kupferschmidt, regarding prior consistent statement[s] in both his handwritten statement and grand jury testimony." We believe this argument sufficiently preserved the issue for review.

¶ 48 In *Dabbs*, the defendant was convicted of domestic battery against his girlfriend after a jury trial during which his ex-wife testified that defendant had abused her. The testimony was allowed pursuant to section 115-7.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4 (West 2008)), which permits the admission of evidence of a defendant's other acts of domestic violence in a domestic violence case. On appeal, the court rejected the defendant's argument that section 115-7.4 was unconstitutional. *Id*. at 291. We note that defendant here has not argued that section 115-10.1 is unconstitutional.

¶ 49 Instead, defendant's argument is based upon the reasoning in *Dabbs* regarding the "unified scheme of the rules of evidence." *Dabbs*, 239 Ill. 2d at 290. The defendant in *Dabbs* contended that, in enacting section 115-7.4, the legislature made evidence of a defendant's other acts of domestic violence admissible "without regard to its relevance or to the balance of probative value and risk of undue prejudice." *Id*. at 288. The *Dabbs* court rejected this argument. The court noted that section 115-7.4 had abrogated, in part, the Illinois common law evidentiary rule that evidence of other crimes is inadmissible to show a defendant's propensity to commit crimes. *Id.* at 284. However, the court noted that the legislature "specifically provided that the

other-crimes evidence 'may be considered for its bearing on any matter to which it is relevant.' " *Id*. at 290 (quoting 725 ILCS 5/115-7.4(a) (West 2008)). The court further pointed out that "the statute lists three factors to be considered '[i]n weighing the probative value of the evidence against undue prejudice to the defendant' in addition to any other factors the court might ordinarily consider." Thus, the *Dabbs* court held that "the plain meaning of section 115–7.4 of the Code is that evidence of a defendant's commission of other acts of domestic violence may be admitted in a prosecution for one of the offenses enumerated in the statute, so long as the evidence is relevant and its probative value is not substantially outweighed by the risk of undue prejudice." *Id*. at 290-91 (quoting 725 ILCS 5/115-7.4(a) (West 2008)).

¶ 50 However, noting that the rules of evidence function as a unified scheme, rather than individually, the court also explained that "the threshold requirement of relevance would apply to the admission of evidence even if the legislature had not specifically mentioned this requirement." *Id*. Defendant now asserts that "*Dabbs* makes it clear that analysis of a §115-10.1 statement does not begin and end with the statute, but must also consider whether the statement is barred under any other evidentiary rule." Therefore, she contends, the reasoning of *Johnson* and its progeny cannot stand in light of *Dabbs*. She asserts that "[b]ecause a §115-10.1 statement is substantive evidence, this Court should find that attacking or bolstering the credibility of the declarant is governed by the same evidentiary rules as those for a live witness." She states that by failing to address whether the introduction of more than one prior inconsistent statement was prejudicially cumulative, this court has implicitly held that "it is *always* proper to use multiple prior inconsistent statements, regardless of whether those statements were "cumulative or

prejudicial." (Emphasis added.) We disagree.

¶ 51 We have explained that section 115–10.1 does not mean that the trial court can admit prior inconsistent statements "without limit" but, rather, the trial judge may " 'exercise discretion to limit the number of such statements that may be introduced.' " *People v. White*, 2011 IL App (1st) 092852, ¶ 54. As noted earlier, whether it is proper to use multiple prior inconsistent statements is a decision within the trial court's discretion. *Becker*, 239 Ill. 2d at 234. Moreover, we have explained that this court has previously found that "even when the State presented a prior inconsistent statement that was 'unnecessarily repetitive' of another, the repetition did not rise to the level of prejudice. [Citation.]" *White*, 2011 IL App (1st) 092852, ¶ 45. Similar to the defendant in *White*, defendant here has "not cited any case where a court has found that the prejudicial effect of a substantively admitted prior inconsistent statement substantially outweighed its probative value merely because it was repetitive of a previously admitted prior statement." *Id.* Instead, defendant's argument appears to be that it is *never* proper to use multiple prior inconsistent statements. She argues that, in light of *Dabbs* and its reference to "unified scheme" of the rules of evidence that "the language of 725 ILCS 5/115-10.1 is simply irrelevant where these duplicative statements were barred under the common law prohibition of prior consistent statements." We disagree. As the *Dabbs* court stated: "we must construe the statute in a manner that preserves for defendant, as much as is possible *consistent with the legislative purpose*, all of the protections that otherwise exist in our rules of evidence." (Emphasis added.) *Dabbs*, 239 Ill. 2d at 288. We have previously explained that, "[w]hile a blanket prohibition (with limited exceptions) makes sense for prior consistent statements, applying that same general

bar to inconsistent statements that are consistent with each other would frustrate the legislature's goal of discouraging recanting witnesses." *White*, 2011 IL App (1st) 092852, ¶ 53. In sum, defendant has failed to show that the trial court here abused its discretion in admitting more than one prior inconsistent statement of the recanting State witnesses.

¶ 52 CONCLUSION

¶ 53 In accordance with the foregoing, we conclude that defendant has failed to show that she was denied her right to a fair trial. We therefore affirm the judgment of the circuit court of Cook County.

¶ 54 Affirmed.