2014 IL App (1st) 113779-U

FOURTH DIVISION
June 12, 2014

No. 1-11-3779

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. 09 CR 9224
	)	
KOREY GREEN,	)	Honorable
	)	Stanley J. Sacks
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by admitting (1) the videotaped deposition of an unavailable witness under Supreme Court Rule 414 (eff. Oct. 1, 1971); (2) an officer's testimony regarding the actions he took after hearing out-of-court statements; (3) a witness's prior inconsistent statements; or (4) a witness's prior consistent identification statements. In addition, trial counsel was not ineffective for declining a limiting instruction that would direct the jurors' attention to objectionable evidence. The mittimus would be corrected to reflect one conviction for first-degree murder.

¶ 2 Following a jury trial, defendant Korey Green was found guilty of first-degree murder and sentenced to 60 years in prison. On appeal, defendant asserts that (1) the trial

court erred in allowing the State to present the testimony of Essie Whittaker *via* a videotaped deposition after the trial court found him to be unavailable under Illinois Supreme Court Rule 414 (eff. Oct. 1, 1971); (2) the trial court erroneously allowed the admission of alleged hearsay statements made by Robert Acklin, who was deceased at the time of trial; (3) the trial court erred by allowing the introduction of Marvin Green's prior statements; (4) the trial court erred in admitting Whittaker's prior consistent statements; (5) defense counsel was ineffective for failing to advance a remedy when it had been determined that defendant's videotape interview played for the jury contained improper comments; and (6) the mittimus should be corrected to reflect a single murder conviction where there was only one victim. For the following reasons, we correct the mittimus to reflect one conviction and affirm the judgment in all other respects.

¶ 3 I. BACKGROUND

¶ 4 On the morning of July 23, 2008, Julian Bell was fatally shot in the back while driving by the Guggenheim Elementary School near 72nd and Green Streets in Chicago. Defendant was subsequently charged with several counts of first-degree murder, including an enhancement based upon his personal discharge of a firearm. On the day the case was set for trial, the State was not ready to proceed and sought a rule to show cause why Essie Whittaker, a witness for the State, should not be held in contempt for refusing to come to court, even though the State had offered to provide transportation. The trial court was reluctant to issue a warrant for a 79-year-old man, but did so and entered a rule to show cause. At the next date, the State represented that Whittaker was under the care of a physician and that the State would file a motion to take a video deposition of Whittaker pursuant to Rule 414.

¶ 5 In its written request, the State explained that Whittaker had at least six significant medical conditions that limited his mobility, endurance, comfort and ability to travel, thereby preventing him from appearing. Attached to the motion was the statement of Dr. Mamie Long, Whittaker's attending physician. While failing to include how many years she had treated Whittaker, Dr. Long stated that these medical conditions prevented Whittaker from testifying in court. Neither the motion nor the attached statement, however, definitively delineated the specific medical conditions. The trial court initially granted the State's motion for a videotaped deposition based on Dr. Long's statement but subsequently held additional proceedings pursuant to defendant's motion to reconsider the ruling and ordered that Dr. Long be questioned.

¶ 6 During the parties' examination of Dr. Long *via* telephone conference in the judge's chambers, Dr. Long stated she had begun treating Whittaker at some point before 2008, and identified Whittaker's medical conditions as (1) hypertension; (2) type-two diabetes; (3) high cholesterol; (4) peripheral vascular disease; (5) breast (sic) cancer, in remission; and (6) incontinence. In addition, Dr. Long stated that Whittaker recently told her another doctor had just diagnosed him with some form of recurrent cancer, though she had yet to receive those files and did not know whether he was terminally ill. Whittaker had also told Dr. Long that he was starting chemotherapy and radiation, which the doctor explained could lead to extreme fatigue. Dr. Long further stated that Whittaker would very easily become tired and short of breath. She stated that whatever walking would be required in the parking lot or building would strain him, although he did still drive a car. As a result, Whittaker should be deposed in a location that did not require extensive walking. Dr. Long added that even if Whittaker was brought to the

building and pushed in a wheelchair, it would not alleviate the stress involved, which would be detrimental to his health. In contrast, being at home would reduce stress. She also acknowledged that illness aside, Whittaker was generally reluctant to testify. Having reconsidered the State's motion for a video deposition after hearing from Dr. Long, the trial court again granted that motion and ordered Whittaker's deposition to be taken at his home in the presence of the judge, the assistant State's Attorney (ASA), defendant and defense counsel. In reaching its decision, the court stated that while Dr. Long did not know if Whittaker's death was imminent, "I don't think anyone here wants to increase that possibility."

¶ 7 At trial, Detective Nicole Price testified that after the shooting, she canvassed the surrounding area and spoke to Whittaker in his garage at 7212 South Green Street. During their conversation, Whittaker stated that he had observed a man named Korey, who grew up next door, shooting a gun. Whittaker subsequently identified defendant from a photo array. In addition, ASA Eric Sauceda testified that on January 23, 2008, Whittaker, then 76 years old, signed a statement. Upon seeing a photograph of defendant, Whittaker identified him as the person shooting at 72nd and Green. ASA Michael O'Malley further testified that when Whittaker appeared before a grand jury, he again identified a photograph of defendant as the person who fired a gun on the day in question.

¶ 8 The State also presented the jury with Whittaker's videotaped deposition. Whittaker testified that he was outside on his porch on the morning of the shooting when he heard gunshots fired from the direction of 72nd Street and Green Street. From his porch, Whittaker could see a man shooting a gun but could not see the man's face clearly.

While Whittaker was still on his porch, the shooter walked by and Whittaker recognized the man as defendant, his former neighbor. Additionally, Whittaker saw defendant in the area almost every day. Whittaker subsequently identified defendant's photograph and identified him from a lineup. When asked to identify defendant during the video deposition, at which defendant was present, Whittaker testified that he looked like defendant but it had been a while since Whittaker had seen him.

¶ 9 Officer Thomas Gorman testified that he spoke with Robert Acklin at the scene and subsequently transported him to the police station. In addition, Detective Michael Rose testified that following a 45-minute interview with Acklin, Detective Rose was looking for a male black subject named Korey. Acklin died, however, on November 26, 2010. Before trial, defendant had filed a motion *in limine* to prohibit the State from introducing or referring to Acklin's alleged hearsay statements. Defendant argued that testimony indicating Acklin spoke to the police was unnecessary to explain the officer's subsequent actions and that testimony regarding Acklin would cause the jury to infer that Acklin identified defendant as the shooter. Following argument by the parties, the trial court found the State could elicit testimony that the police spoke to Acklin so long as the substance of his statements was not revealed. Pursuant to the trial court's ruling, Detective Rose did not testify to the substance of Acklin's statements.

¶ 10 Officer Scott Reiff testified that on December 23, 2008, defendant was taken into custody and participated in a videotaped interview by Officer Reiff and Detective Stanek. Officer Reiff testified regarding the details of his interview with defendant, who denied involvement with the shooting and alleged that he was with his brother Marvin on that day. Before defendant's interview was played for the jury, defense counsel, outside the

jury's presence, stated that he had asked the State to redact from defendant's videotaped statement all references to "rims." The State, despite its disagreement with counsel on this matter, had prepared an alternative copy redacting the challenged references. The State noted that references to rims pertained to motive but made no representation that it had removed all references to motive and defense counsel did not expand upon his request. Instead, counsel objected on the basis that references to rims would be proof of other crimes, would be irrelevant to defendant's alibi defense, and would involve information from the now deceased Acklin. Following discussion, the court granted defendant's request but defense counsel did not ask to view the newly redacted tape before it was presented to the jury.

¶ 11 In defendant's video statement, he said he heard gunshots fired while on his way to the laundromat, where he then smoked marijuana with his brother Marvin. Defendant denied any involvement in the shooting. During this video, however, the police stated that defendant's motive for the shooting was that he had been ripped off for $1,200. Defense counsel then moved for a mistrial because the State had failed to redact any reference to the motive, although the State argued that counsel had only requested the redaction of references to rims. The trial court denied the motion. Initially, the court stated that it would tell the jurors to disregard the improper statements, and that a properly redacted video would be given to the jury during deliberations. Defense counsel objected that a limiting instruction would draw attention to the improper references. The court subsequently proposed only that another videotaped statement, free from all references to motive, would be created and presented to the jury to resolve the matter. Counsel for both parties expressly assented to this solution. After the new tape was

created, defense counsel informed the court that this satisfied defendant's original request and requested that the jury be informed that it represented the proper version. In furtherance thereof, the trial court instructed the jury to "disregard in total the video you saw yesterday" and to consider the latest version as "evidence in this case."

¶ 12 In contrast to defendant's statement, Marvin, a convicted felon, first testified that he had not seen or smoked marijuana with defendant on the morning of the shooting. Marvin subsequently testified, however, that he could have been with his brother smoking marijuana at some point on the day of the shooting but did not remember. In addition, Marvin testified that he did not remember testifying before a grand jury whatsoever or remember testifying in that proceeding that he had not seen defendant on the day of the shooting. Despite Marvin's equivocation, he then identified his written statement, which stated that he had not been with his brother on the day of the shooting. Marvin further testified that upon inquiry from the police in February 2009, he had denied killing the victim himself. Following Marvin's testimony, ASA Sarah Chami published his grand jury testimony, in which Marvin unequivocally stated that he never saw defendant on the day of the shooting.

¶ 13 After deliberating, the jury found defendant guilty of first-degree murder and found that his personal discharge of a firearm caused Bell's death. Defendant was subsequently sentenced to 35 years in prison and an additional 25-year enhancement for personally discharging a firearm. Defendant now appeals.

¶ 14 II. ANALYSIS

¶ 15 A. Whittaker's Video Deposition

¶ 16 On appeal, defendant first asserts the trial court erred in admitting Whittaker's videotaped deposition because he was not unavailable, as required to permit its admission under Rule 414. As a threshold matter, defendant has filed in this court a motion to strike from the State's brief a footnote indicating that Whittaker passed away following trial. The State responds that although it noted the fact of Whittaker's death, the State did not rely on that fact in support of its position. Accordingly, we will not consider that fact in our determination and now deny defendant's motion to strike the aforementioned material.

¶ 17 Face-to-face testimony is the rule in Illinois and any exception to the rule must be narrowly tailored and based on special need. *People v. Johnson*, 118 Ill. 2d 501, 508 (1987). With that said, Rule 414, which governs the taking of video testimony when a witness is unavailable, was intended to balance the "need to obtain and preserve evidence, and a criminal defendant's right to have the witnesses against him appear before the jury, who may observe the witnesses' demeanor and credibility." *Id.* Rule 414 states as follows:

> "(a) If it appears to the court in which a criminal charge is pending that the deposition of any person other than the defendant is necessary for the preservation of relevant testimony because of the substantial possibility it would be unavailable at the time of hearing or trial, the court may, upon motion and notice to both parties and their counsel, order the taking of such person's deposition under oral examination or written questions for use as evidence at a hearing or trial."

Ill. S. Ct. Rule 414(a) (eff. Oct. 1, 1971). Thus, the decision whether to permit the preservation and use of witness testimony by videotape when the witness has been declared unavailable is within the discretion of the court. *Johnson*, 118 Ill. 2d at 507. The exercise of this discretion, however, "presupposes that the Rule 414 standards for the utilization of *any* deposition as evidence have been satisfied." *Id*. at 508. It follows that the party seeking to take a deposition *via* videotape must make a threshold showing of "unavailability." *Id*.

¶ 18 Although Rule 414 does not define availability, Illinois Rule of Evidence 804, modeled off its federal counterpart, states, in pertinent part, that a witness is unavailable where he "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity[.]" Ill. R. Evid. 804(a)(4) (eff. Jan. 1, 2011). Mere unwillingness is insufficient to show a witness is unavailable. *Johnson*, 118 Ill. 2d at 509-10. In addition, Illinois case law addressing whether a witness is unavailable within the meaning of Rule 414, so as to warrant a video deposition, demonstrates that trial court judges are given significant discretion in this regard. See *People v. Tokich*, 314 Ill. App. 3d 1070, 1072, 1074 (2000) (affirming the trial court's decision to allow a video deposition to be taken of a detective who would be out of the country at the time of the trial); *People v. Ramey*, 152 Ill. 2d 41, 70-73 (1992) (finding a witness to be unavailable where he claimed to have a lack of memory); *People v. McClendon*, 197 Ill. App. 3d 472, 478, 481-84 (1990) (allowing a video deposition after a witness suffered a heart attack and could not leave the hospital); *People v. Lobdell*, 172 Ill. App. 3d 26, 28-9 (1988) (finding no abuse of discretion when the trial court allowed a

witness to testify *via* video deposition when the witness would be away fishing during the trial).

¶ 19 Here, Dr. Long explained that in her medical opinion, Whittaker should not be required to appear at any court hearing or trial because of his several medical conditions. Dr. Long also stated Whittaker had been informed that he had experienced a recurrence of cancer. All of these conditions contributed to Whittaker fatiguing very easily and quickly becoming short breath quickly. Dr. Long acknowledged that Whittaker was reluctant to come to court, but stated the situation has caused him a great deal of stress, and that taking his testimony at his home would be less stressful. Furthermore, Whittaker's reluctance was not mutually exclusive of his doctor's opinion that requiring him to come to court could jeopardize his health. Given the testimony of Dr. Long, Whittaker's several medical conditions, and the potential impact that the stress of testifying could impose on his health, the trial court did not abuse its discretion by determining that Whittaker was unavailable to testify in court due to his infirmities and thus, a videotaped testimony would be appropriate, even if another judge may have ruled differently.

¶ 20 B. Detective Rose's Testimony Regarding Acklin

¶ 21 Next, defendant asserts the trial court erred in permitting Detective Rose to testify that he began looking for a black man named Korey after speaking to Acklin, as Acklin's statement was inadmissible hearsay. A defendant is guaranteed the right to confront the witnesses against him. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §8. In addition, "Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and it is generally inadmissible *** unless it falls within an exception to

the hearsay rule." *People v. Tenney*, 205 Ill. 2d 411, 433 (2002). It follows, however, that absent an out-court-statement, no hearsay is present. See *Id*. at 432-33. In addition, testimony that details what police did is not hearsay because it is not offered for the truth of the matter asserted. *People v. Peoples*, 377 Ill. App. 3d 978, 984 (2007). The trial court's ruling on the admissibility of evidence, including alleged hearsay, will not be reversed absent an abuse of discretion. *People v. Williams*, 181 Ill. 2d 297, 313 (1998).

¶ 22 Our supreme court has had numerous opportunities to consider the propriety of an officer's testimony regarding a witness's statements. In *People v. Gacho*, 122 Ill. 2d 221, 247 (1988), our supreme court found it was permissible for a police officer to testify that after speaking to the victim, the officer went to find the defendant. The court found that the officer did not testify to the specific statements made in that conversation but to the officer's resulting investigatory procedure. *Id.* In addition, although the court stated that the officer's testimony "would have been objectionable as hearsay" had he testified to the substance of the conversation, we note that the court did not find such an objection would always be sustained or that such testimony would constitute inadmissible hearsay under any circumstances. *Id*. at 248. Shortly thereafter, in *People v. Jones*, 153 Ill. 2d 155, 160-61 (1992), our supreme court stated, "It is undisputed that an officer may testify to his investigatory procedures, including the existence of conversations, without violating the hearsay rule. This is true even if a logical inference may be drawn that the officer took subsequent steps as a result of the substance of that conversation." Furthermore, the supreme court has in several instances found that an officer's testimony as to the substance of an out-of-court statement was not inadmissible hearsay. See *People v. Banks*, 237 Ill. 2d 154, 180-81 (2010) (holding that the admission of an out-of-court

statement, including its substance, to explain investigatory procedure was proper); *People v. Pulliam*, 176 Ill. 2d 261, 273-74 (1997) (holding that the substance of bystanders' out-of-court statements was properly admitted to show the officer's investigative steps leading to the defendant's arrest, rather than for the truth of the matter asserted); *People v. Simms*, 143 Ill. 2d 154, 173-74 (1991) (an officer's testimony regarding out-of-court statement by the defendant's brother that the defendant said he killed the victim was admissible to show the officer's investigative steps); but see *People v. Boling*, 2014 IL App (4th) 120634, ¶ 18 (stating that testimony regarding investigative steps cannot include the substance of a nontestifying witness's statement); *People v. Sample*, 326 Ill. App. 3d 914, 920-21 (2001) (same).

¶ 23 Here, the challenged testimony presents no hearsay. Simply put, the record contains no out-of-court statement. Detective Rose testified that after speaking to Acklin, for 45 minutes, the detective was looking for a black man named Korey. The substance of Acklin's statement, however, was not testified to. *Cf. People v. Armstead*, 322 Ill. App. 3d 1, 7-8 (2001) (where the assistant State's Attorney repeatedly asked the testifying officer who the out-of-court witness identified as the perpetrator, and ultimately elicited a response that the officer was looking for the defendant after speaking to that witness, it was clear that the witness had identified defendant). Acklin may have merely told Detective Rose that someone named Korey was at the crime scene or was known to be knowledgeable regarding neighborhood affairs. In addition, Acklin may have simply filled in details without stating that defendant was the shooter. While Acklin may have told Detective Rose that defendant was the shooter, other possibilities exist and we cannot speculate that the jurors made any given assumption in this regard. As a result,

Detective Rose's testimony did not contain an out-of-court statement as required to constitute hearsay.

¶ 24 Assuming *arguendo* that the jurors inferred Acklin told Detective Rose that defendant was the shooter, this would not likely alter our determination that no hearsay was present, as Acklin's alleged statement was clearly offered to show the investigative steps taken by the police, not to demonstrate the truth of Acklin's purported statement that defendant was the shooter. *Cf. People v. Jura*, 352 Ill. App. 3d 1080, 1085-89 (2004) (an officer's testimony regarding the content of an out-of-court statement was inadmissible hearsay used as substantive evidence of the defendant's guilt); *People v. Armstead*, 322 Ill. App. 3d 1, 7-8 (2001) (where an officer testified that another witness told him the defendant was the perpetrator, the reviewing court apparently presumed that the jury would consider the out-of-court statement for its truth and that as a result, the testimony contained hearsay); *Sample*, 326 Ill. App. 3d at 921-24 (finding a confrontation error occurred where the State create a strong inference as to the content of the out-of-court statement and the statement was used as substantive evidence). In any event, we need not address that inquiry in any detail given that Detective Rose did not relay Acklin's out-of-court statement, as required to constitute hearsay. We find no abuse of discretion.

¶ 25 C. Marvin's Inconsistent Statements

¶ 26 Defendant next asserts that the trial court erred in admitting hearsay evidence by defendant's brother Marvin. Specifically, defendant asserts that Marvin's prior written statement and grand jury testimony were neither admissible substantively pursuant to section 115-10.1 of the Code of Criminal Procedure (the Code) (725 ILCS 5/115-10.1 (West 2010)), nor proper statements with which to impeach Marvin's trial testimony,

because Marvin's prior statements were not sufficiently inconsistent with his trial testimony. We review the trial court's decision to admit evidence pursuant to section 115-10.1 for an abuse of discretion. *People v. Salazar*, 126 Ill. 2d 424, 456 (1989).

¶ 27 Section 115-10.1, which governs the admissibility of prior inconsistent statements as substantive evidence (*People v. Lawrence*, 268 Ill. App. 3d 327, 332 (1994)), states as follows:

> "In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement--
>
> (1) was made under oath at a trial, hearing, or other proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> (A) the statement is proved to have been written or signed by the witness, or
>
> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

> (C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.
>
> Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein." 725 ILCS 5/115-10.1 (West 2010).

Accordingly, to be admissible under this statute, the witness's prior statements must be, among other things, inconsistent with his prior testimony. *Lawrence*, 268 Ill. App. 3d at 333.

¶ 28 With that said, a witness's prior statement does not have to directly contradict his trial testimony in order to be inconsistent within the meaning of section 115-10.1; rather, a prior statement may be inconsistent where it tends to contradict the witness's trial testimony. *People v. Billups*, 318 Ill. App. 3d 948, 957 (2001). As a result, inconsistencies may be found where a witness is evasive or silent, or changes his position. *People v. Zurita*, 295 Ill. App. 3d 1072, 1077 (1998). Similarly, professed memory loss may be deemed inconsistent with a prior statement. *People v. Vannote*, 2012 IL App (4th) 100798, ¶ 25 (citing *People v. Flores*, 128 Ill. 2d 66, 87-88 (1989)). In addition, a prior statement is inconsistent where it omits a matter of significance that one would reasonably be expected to mention if true. *Billups*, 318 Ill. App. 3d at 957. While only inconsistent portions of a witness's prior inconsistent statement are admissible, admissibility does not require the trial court to make a quantitative analysis of whether the witness's entire statement is inconsistent. *People v. Govea*, 299 Ill. App. 3d

76, 87 (1998); compare *People v. Morales*, 281 Ill. App. 3d 695, 702 (1996) (while some of the prior statements' content was not relevant to the court's inquiry, the trial court did not abuse its discretion by admitting the entire statement), with *People v. Bush*, 227 Ill. App. 3d 81, 90-91 (1992) (after determining that retrial was warranted due to improper jury instructions, the reviewing court found that on retrial, only the inconsistent portions of the witness's out-of-court statement should be presented to the jury). Furthermore, our supreme court has held that section 115-10.1 "does not require a certain minimal amount of inconsistencies." *Salazar*, 126 Ill. 2d at 457.

¶ 29 Here, Marvin testified at trial that he was not smoking marijuana with defendant outside the laundromat on the morning of the shooting but then testified that he could have been smoking marijuana with defendant that morning. This latter equivocal representation had a tendency to contradict his prior unequivocal statements that he had not seen defendant at all that day. Before the grand jury, Marvin was asked whether he saw defendant on the day of the shooting and answered no, notwithstanding Marvin's trial testimony that he did not recall this exchange or recall testifying before the grand jury at all. In addition, after being confronted with his handwritten statement, Marvin acknowledged previously stating that he never saw defendant at any time that day. Assuming *arguendo* defendant correctly argues that the only inconsistency between Marvin's trial testimony and prior statements was whether Marvin could have been with defendant on the day of the shooting, we categorically reject defendant's characterization of the discrepancy as immaterial. While Marvin's prior statements amounted to a complete rebuttal of defendant's claim that he had been with Marvin on the day of the shooting, Marvin's trial testimony did not. Moreover, although the jury also heard certain

consistencies between Marvin's trial testimony and prior statements, the trial court was not required to engage in a quantitative analysis of Marvin's prior statements. We find no abuse of discretion. In light of our determination that Marvin's prior inconsistent statements were admissible for their substance, we need not consider defendant's contention that they would have otherwise been inadmissible to impeach Marvin's testimony. *Cf. People v. McCarter*, 385 Ill. App. 3d 919, 931-33 (2008) (after determining that testimony regarding out-of-court statements was not admissible as substantive evidence pursuant to section 115-10.1, the reviewing court also found those statements could not be used for impeachment by the State because the witness's testimony had not damaged the State's case).

¶ 30 D. Whittaker's Prior Statements

¶ 31 Defendant further contends the State improperly bolstered Whittaker's testimony with prior consistent statements. As a threshold matter, the State asserts that defendant has failed to preserve this issue for review. See *People v. Mullens*, 313 Ill. App. 3d 718, 729 (2000) (a defendant must contemporaneously object and challenge the error in a posttrial motion or face forfeiture). Waiver aside, we find no abuse of discretion. See *People v. McWhite*, 399 Ill. App. 3d 637, 640-41 (2010).

¶ 32 Statements made before trial generally may not be admitted to corroborate trial testimony or rehabilitate a witness. *Id.* at 641. With that said, certain exceptions exist. See *Id*. (statements may be admitted to corroborate a witness's testimony where there is a charge that the witness recently fabricated his testimony or had a motive to present false testimony). Relevant to the prior statements at issue, section 115-12 of the Code provides as follows:

> "A statement is not rendered inadmissible by the hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him." 725 ILCS 5/115-12 (West 2010).

Accordingly, a witness may testify regarding an out-of-court statement in order to corroborate his trial testimony regarding the same subject where the out-of-court-statement is one of identification. *People v. Tisdel*, 201 Ill. 2d 210, 216, 218 (2002). Moreover, evidence of a witness's out-of-court identification and a third person's testimony attesting to the fact of that prior identification, may be used both to corroborate the witness's in-court identification and as substantive evidence. *Id*. at 509.

¶ 33 Here, during his deposition testimony, Whittaker identified defendant, who was then present at Whittaker's home, and added that he had previously identified defendant from a photograph and in a lineup. Detective Price and ASA Sauceda also testified that Whittaker identified defendant's photograph. In addition, ASA O'Malley testified that Whittaker identified a photograph of defendant before the grand jury. Not only did Whittaker, the declarant, testify at trial via his deposition, but Detective Price, ASA Sauceda and ASA O'Malley did as well. Thus, both the declarant and the other witnesses were subject to cross-examination regarding Whittaker's statements. Moreover, these were clearly identification statements made after perceiving defendant.

¶ 34 To the extent defendant contends that Whittaker identified defendant for Detective Price before, rather than after, perceiving defendant in a photo array or lineup, defendant ignores that Whittaker had perceived defendant in person, while firing his

weapon. Defendant has also failed to cite any authority supporting his suggestion that duplicate evidence of a witness's prior identification is not permitted by section 115-12, a requirement that appears nowhere in the statute. See *People v. Lewis*, 223 Ill. 2d 393, 402-03 (2006) (because the plain language of section 115-12 did not require the declarant to testify to the out-of-court identification before a third party may do so, the supreme court declined to add that requirement); *People v. Arteman*, 150 Ill. App. 3d 750, 754 (1986) (finding that because section 115-12 did not express "any requirement for any substantial interval between the prior identification and the in-court identification, we conclude that none is required."); see also *Beals*, 162 Ill. 2d at 507 (three witnesses testified that the victim stated she was shot by the " 'fat guy' "). In addition, we categorically reject defendant's suggestion that identifying an offender by name, rather than by a physical description, does not constitute an identification statement pursuant to section 115-12. Moreover, we are not persuaded by defendant's misplaced suggestion that testimony regarding Whittaker's mental state when making prior identification statements amounted to improper witness opinions as to Whittaker's credibility. Accordingly, the trial court properly admitted Whittaker's prior consistent identification statements as substantive evidence and to corroborate his testimony that he saw defendant fire his weapon on the day of the shooting.

¶ 35 E. Defendant's Video Statement

¶ 36 Defendant also contends that after the jury heard defendant's videotaped statement in which the police proposed a motive for the shooting, trial counsel was ineffective for agreeing to submit a newly redacted video to the jury, rather than requesting the jury to

be informed that it should not consider improper remarks concerning motive. We review the assistance of counsel *de novo*. *People v. Williams*, 391 Ill. App. 3d 257, 269 (2009).

¶ 37 To demonstrate that counsel was ineffective, a defendant must prove that (1) counsel's performance was objectively unreasonable and (2) his deficient performance resulted in prejudice. *People v. Pena-Romero*, 2012 (4th) IL App 110780, ¶ 13 (citing *Stickland v. Washington*, 466 U.S. 668 (1984)). In addition, to show that counsel was deficient, the defendant must overcome the strong presumption that counsel's action or inaction resulted from sound trial strategy. *Pena-Romero*, 2012 (4th) IL App 110780, ¶ 14. This strong presumption can be overcome if counsel's decision appears to be so unreasonable and irrational that no reasonable defense attorney, facing similar circumstances, would choose that strategy. *People v. Bryant*, 391 Ill. App. 3d 228, 238 (2009).

¶ 38 Here, defendant cannot show that counsel's performance was deficient. Once the jury heard the officer's suggestion that defendant was motivated to kill Bell after he cheated defendant out of $1,200, defense counsel objected to the issuance of a limiting instruction as a matter of strategy. Specifically, counsel believed that a limiting instruction would draw attention to the improper references. Instead, counsel agreed to the submission of a new video that omitted the objectionable material. We cannot agree that counsel's strategy in this regard was objectively unreasonable or that no other attorney would have chosen it.

¶ 39 Although defendant argues counsel merely assumed that the jury would view the newly created video during deliberations, counsel's assumption was reasonable given that the court instructed the jurors to “disregard in total the video you saw yesterday” and to

consider the latest version as “evidence in this case." The record contains no indication that the jury would disregard the court's instructions. Furthermore, by telling the jury to disregard the first video *in total*, the court effectively instructed the jury not to consider the remarks pertaining to motive. Moreover, given the limited discrepancies between the two versions of the video statement, the attorneys' presentation of closing arguments before the jury viewed the new edition of the statement did not itself render counsel's strategy unsound. Under these circumstances, we cannot say that no reasonably competent counsel would have acted as counsel did here, notwithstanding that other strategies may also have been reasonable. See *People v. Byron*, 164 Ill. 2d 279, 295 (1995) (observing that "[e]qually competent counsel may differ in their approach to each case"); see also *People v. Milton*, 354 Ill. App. 3d 283, 291 (2004) (defense counsel's choice of strategy does not amount to ineffective assistance of counsel merely because the strategy was ultimately unsuccessful).

¶ 40 F. Mittimus

¶ 41 Finally, defendant asserts and the State correctly concedes that the mittimus should be amended to reflect one conviction for first-degree murder. See *People v. Cardona*, 158 Ill. 2d 403, 411 (1994) (finding that "[w]here but one person has been murdered, there can be but one conviction of murder"). Accordingly, we correct the mittimus to reflect one conviction for intentional first-degree murder. See *People v. Johnson*, 385 Ill. App. 3d 585, 609 (2008) (a reviewing court may correct the mittimus at any time).

¶ 42 III. CONCLUSION

¶ 43 For the foregoing reasons, we correct the mittimus to reflect one conviction for first-degree murder and affirm the judgment in all other respects.

¶ 44 Affirmed; mittimus corrected.