2014 IL App (1st) 131806-U

FIFTH DIVISION
December 19, 2014

No. 1-13-1806

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 10 CR 17433
	)	
SHAROD PIERCE,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justice Reyes concurred in the judgment.
Justice Gordon specially concurred in the judgment.

ORDER

¶1 ***Held***: The trial court did not abuse its discretion when it denied defendant's request to admit 911 audiotapes into evidence. The trial court's comment on the witnesses' credibility was not a material factor in defendant's conviction and therefore did not require reversal.

¶2 This case arises out of the shooting death of Anthony Carter during the early morning hours of August 31, 2010. Defendant, Sharod Pierce, was charged by indictment with the first degree murder of Carter. Prior to trial, defendant made an oral motion *in limine* to admit certain 911 audio tapes produced by the State during discovery. Defendant claimed that on the tapes,

three alleged eyewitnesses to the murder described what they witnessed to the 911 dispatcher and that those observations would contradict testimony that was going to be elicited by the State during trial. The trial court reviewed the tapes and denied defendant's motion, finding that the statements on the tapes did not qualify as excited utterances so as to be admissible as an exception to the rule against hearsay. The following evidence was presented at defendant's trial.

¶3 The State's first witness was Coredarryl Cole. Prior to trial, on September 3, 2010, Cole gave a handwritten statement to police and an Assistant State's Attorney (ASA). In his handwritten statement, which was published to the jury in this case, Cole recounted the following version of events. Cole went to the corner of Jackson and Pulaski Streets at approximately 5 p.m. on August 30, 2010, and met with Robert Wilson, Chris McCollum, Anthony Carter, Deon McCollum, and "Little Rob." Sometime around 11 p.m., Cole, Carter and Wilson went to Jackson and Keeler Streets to purchase marijuana. After they left, Cole went to 4009 West Jackson and sat on the front porch with his godmother, Nina. About an hour later, while still sitting on the porch, Cole heard seven or eight gunshots coming from the middle of the block. When the shooting stopped, Cole looked up and saw Carter lying on the grass across the street on Jackson. Cole saw more than 10 people running away. One of the people Cole saw running was "Soul," a member of the Black Souls gang. Cole had known Soul for about two years. Soul was wearing a white t-shirt, dark blue jeans and white shoes. Soul had a gun in his hand. As Soul was running, Cole saw him put the handgun underneath his shirt.

¶4 At trial, Cole testified that he had been a friend of Carter, Wilson and McCollum since grade school. Cole was a member of the Four Corner Hustlers street gang. Cole testified that just after midnight on August 31, 2010, he was with a girlfriend at his home at 315 North Long Street. Cole did not remember meeting with detectives on West Jackson Boulevard on September

3, 2010, or agreeing to speak with detectives and accompanying them to the police station. Cole explained that his "home daddy" gave the police his name but that he "had nothing" to do with Carter's murder and that he did not "know anything" because he "wasn't around" when the shooting occurred. Cole did not remember speaking with Detectives Moore and Kennedy at the police station about the victim's murder. Cole then testified that he spoke with detectives on the 4000 block of West Jackson on September 3 but that he did not accompany them to the police station. At this point, the trial court stated that it was "granting the State's attorney permission to treat the witness as hostile."

¶5 Cole then testified that he did not remember meeting with an ASA at the police station or giving a handwritten statement about Carter's murder. The State then confronted Cole with his handwritten statement. Cole acknowledged that his name was on every page of the statement and that the last page of the statement contained a picture of him at the police station on September 3. When asked if the statement contained his signature, Cole responded "[h]ow y'all know this my signature." When he was then asked if he met with ASA Mary McMahon and Detectives Mike Kennedy and Detective Bree on September 3, 2010, at approximately 10:50 p.m., Cole responded "I don't remember." When asked if he met with those people at the police station, Cole again responded "I don't remember that either." The trial court then stated, "I want to spread of record, I'm going to treat the I don't remembers from an evidentiary standpoint as indicative of a witness recalcitrant to answer the question and not an accurate representation of whether or not he recalls."

¶6 The State then read each line of Cole's statement to him and asked if he in fact made that statement to ASA McMahon. In response to each line of the statement, Cole either denied making the statement or testified that he did not "remember that." This included denying telling

the ASA that he was sitting on a porch about an hour after his friends left to buy marijuana when he heard seven or eight gunshots, that he then saw the victim lying on the grass across the street and more than 10 people running from the scene and that one of the people running away was a person Cole knew only as "Soul," a member of the Black Souls gang. Finally, Cole denied telling the ASA that "Soul" was holding a gun as he fled the scene and that as he ran away Soul put that gun underneath his shirt. When asked to make a courtroom identification of the person he knew as "Soul," Cole testified that he did not see anyone he knew by that name in the courtroom. When asked to identify the person who shot the victim, Cole testified that he did not see that person in the courtroom. Cole also denied that on September 3, 2010, he identified defendant out of a physical lineup as the person who he saw running from the scene carrying a gun. Cole agreed that he had "a 2011 drug case," for which he originally received probation and that he later violated that probation and was sent to the Illinois Department of Corrections. Cole acknowledged that he was in custody at the time of defendant's trial for failing to come to court on this case.

¶7 On cross-examination, Cole testified that although his name was printed on the bottom of each page of the handwritten statement, it was not in his handwriting and he did not sign the statement. Cole agreed that all of his friends were members of the Four Corner Hustlers or the Black Gangster Disciples. Further, Cole agreed that the Four Corner Hustlers were "very friendly" with the Black Gangster Disciples. Both gangs were known to "hang in and around" the intersection of Jackson and Pulaski and Cole had sold drugs at that intersection to make money. McCollum was also a member of the Four Corner Hustlers and Wilson was a Black Gangster Disciple.

¶8 Cole further agreed on cross-examination that he remembered "sitting down" with police

officers at the police station at 10:50 p.m. on September 3, 2010. Cole explained that the victim's father took him to the police station and accompanied him to the detectives' office. Cole testified that he was 15 years old at that time and that police denied his request to have his mom present when he spoke to them. When asked again if the statement previously read to him was his statement to police, Cole denied making of the statements contained therein. He also explained that he was in another neighborhood near Washington and McClair Streets with his cousin around 5 p.m. on August 30, 2010. Cole first learned of the victim's death from a text message he received on September 1, 2010. Cole testified that he did not know defendant but that he had "seen him before." Cole explained that the Black Souls gang "hung around" the West side and was not friendly with the Four Corner Hustlers in 2010.

¶9 The parties stipulated that if called to testify, ASA Mary McMahon would testify that she spoke with Cole at the police station at approximately 10 p.m. on September 3, 2010. ASA McMahon would testify that she spoke with Cole about Carter's murder and that Cole agreed to give handwritten statement. ASA McMahon would finally testify that People's Exhibit 4 was a true and accurate copy of that statement.

¶10 The State’s next witness was Christopher McCollum. McCollum testified that he was currently in the custody of the Illinois Youth Center for leaving a “placement” without permission. McCollum testified that he had been a member of the Four Corner Hustlers since he was 12 years old and that he was a friend of Gangster Disciple members, including Carter. The Four Corner Hustlers and the Black Gangster Disciples did not get along with members of the Black Souls. McCollum knew Carter for seven or eight years and described Carter as his "brother." Carter’s father was a leader of the Four Corner Hustlers and McCollum knew him well. The Four Corner Hustlers and the Gangster Disciples sold marijuana on the 4000 block of

West Jackson in August of 2010. McCollum testified that the Four Corner Hustlers controlled the drug trade on that block and that he, Carter and Wilson sold drugs together on that block. McCollum identified defendant as a member of the Black Souls.

¶11 McCollum further testified that he was released from a juvenile detention facility at approximately 6 p.m. on August 30, 2010. He then met some friends, including Wilson, at the corner of Jackson and Pulaski Streets and bought marijuana. Carter joined them around 8 p.m., and McCollum, Wilson and Carter sat in Carter's parked car in a parking lot on Jackson Street. Around 11 p.m., the group walked to a nearby gas station to buy cigars, which they intended to use to smoke Carter's marijuana. They then returned to the corner of Jackson and Pulaski. There were a number of people in the area but McCollum did not see Cole. The group continued walking on Jackson toward Karlov Street when McCollum heard someone call out his name. He looked and saw that it was defendant, whom McCollum had known for over a year from hanging around Jackson Street. McCollum also knew defendant was referred to as "Rock" or "Rocky" and knew that defendant was a member of the Black Souls. McCollum walked over to defendant, who was standing with two females and a male, none of whom McCollum knew. Defendant asked McCollum if he was "still hustling out here," and McCollum responded "no." Defendant then pulled out a gun and pressed it to the right side of McCollum's body. Wilson then approached and defendant pointed the gun at Wilson’s face and asked "you all still hustling?" Wilson said "don't shoot me." Carter then approached and walked within five feet of defendant. Defendant turned around, pointed his gun at Carter and "got shooting." Carter fell to the ground and McCollum and Wilson ran away through a vacant lot into an alley on the next block. As they were running away, McCollum heard approximately eight more gunshots. McCollum and Wilson returned to the scene approximately five minutes later and found Carter lying dead on the

ground. A crowd had gathered at that point and the police placed Wilson into a squad car. The police picked up McCollum later that day and he told them that defendant, who he identified for the police out of a photo array and knew as "Rock," shot Carter. McCollum returned to the police station two days later, on September 2, 2010, and identified defendant from a physical lineup as the person who shot Carter.

¶12 On cross-examination, McCollum testified that he made his living selling drugs and that he and his friends "got high" from marijuana on a daily basis. McCollum acknowledged that he got high the entire evening of the night that Carter was killed. McCollum testified that he did not see Cole on the porch at 4009 West Jackson or anywhere else on the block the night Carter was killed. McCollum denied that he spoke to Carter's father between the time Carter was shot and when the police picked him up the following morning.

¶13 The State's next witness was Robert Wilson. Prior to trial, Wilson also gave a handwritten statement and testified before a grand jury about Carter's murder. Wilson's handwritten statement and grand jury testimony were the same in all relevant aspects. According to that statement, Wilson followed McCollum across the street and recognized the person standing next to McCollum as a Black Soul gang member he knew as "Rock." Wilson knew Rock "from the neighborhood" since 2008. Wilson identified a photograph of defendant as Rock, the Black Soul member who hung out in Black Soul territory. There were also two girls with Rock that Wilson recognized. Those girls would get drunk with Black Soul members on Monroe and Pulaski Streets. Rock had a gun pointed at McCollum's right side and told McCollum that he better not be selling drugs out on the block or Rock would kill him. Wilson stated that Rock then pointed the gun at him and said that Wilson "better not be hustling out here." Wilson put his hands in the air and responded that he and his friends were not selling anything. Carter had

crossed Jackson and walked to where Rock was standing. Rock pointed the gun at Carter and started shooting.

¶14 At trial, Wilson testified that he was in custody at the time of trial for, among other things, failing to appear in court on this case. Wilson acknowledged that he had been convicted of "drug" offenses as a juvenile. Wilson testified that Carter was his cousin and that he and Carter were both Gangster Disciples. Wilson and Carter were close with McCollum, who was also in a gang, and all three sold drugs together on the 4000 block of West Jackson. Wilson was 15 years old in August of 2010. Wilson confirmed that he was with Carter and McCollum in the hours leading up to Carter's shooting, that they were smoking marijuana and that they went to the gas station shortly before midnight to buy cigars, which they intended to use to smoke marijuana. When the group returned to Jackson and Pulaski and were continuing onto Jackson, Wilson heard someone call out McCollum's name. When asked if he saw the person who called out McCollum's name, Wilson responded "I don't remember." Wilson testified that this person was tall and thin but that he did not remember what this person was wearing and that he did not recognize the two females who were standing with this person.

¶15 Wilson further testified that he then followed McCollum across the street to where the person who called out McCollum's name was standing. McCollum was standing approximately two to three feet from the unknown person and Wilson could see a gun, possibly a ".45 Smith and Wesson" in this person's hand. The unknown person then pointed the gun at Wilson's head and, in reaction, Wilson raised his hands and "begged for [his] life." The unidentified person asked what they were doing, and Wilson responded "[l]ike me and nobody out here hustling." Carter had walked up to the group at this point and the unidentified person shot Carter. When asked if he the person who shot Carter was in the courtroom that day, Wilson stated "[n]ot that I

know of, not that I recall." Wilson testified that he had seen defendant around the area of Jackson and Pulaski a "couple of times," but did "not really" know defendant to be in a gang and did not know defendant's nickname. When asked if he saw the unidentified person shoot Carter, Wilson responded "I ain't going to say I seen him shoot him, but, no, I heard a pow, and then me and Chris McCollum we ran and heard several more shots." Wilson testified that he heard approximately eight more shots while they were running away. Wilson and McCollum returned to the scene several minutes later and found Carter lying dead on the ground.

¶16 Wilson further testified that his uncle, who was Carter's father, approached his and McCollum while they were standing on Jackson following the shooting and told them that a person named "Rock" killed his son and that he wanted Wilson and McCollum to give the police that information. The police picked Wilson up later that day and took him to the police station for questioning. He told the police what Carter's father had told him to say. Wilson confirmed that he identified "somebody" out of a photo array to the police but explained that "they had came - - the police officers came to me and told me -- showed me a picture this is Rock, so, of course, I'm going to agree and point out the picture and say, okay, that's Rock then." Wilson agreed that his uncle told him that "Rock" killed Carter and that he did not know who Rock was, so the police "helped him out" by showing him a picture.

¶17 Wilson agreed that he signed a handwritten statement at approximately 10 p.m. on the night of August 30, 2010. Wilson testified that at the time he was young and scared of the police because they threatened to "lock [him] up" and that he therefore "was doing what [his] uncle told [him] to do." Wilson also claimed that he did not know how to read at that time and so he did not review the handwritten statement but instead "just signed my name on it, so I can get released and go back home to my family." Wilson acknowledged that a "lady" "was writing when I was

talking," but testified that he did not remember an ASA being present when the handwritten statement was taken. Wilson was asked to review the statement by the prosecutor and testified that he could not "hardly read" but that "some of this stuff in the statement a lie [*sic*] cause I ain't really tell them all that."

¶18 Wilson testified that the police came into his house on September 2, 2010, and "basically snatched me up." Wilson explained that his grandmother asked if she could accompany Wilson to the police station but that the police said "don't worry about it." At the police station, the police had Wilson look at a physical lineup. The prosecutor showed Wilson a photograph of that lineup and Wilson put his initials over defendant to indicate that defendant was the person whom he picked out of the lineup. Wilson testified, however, that he only identified defendant as "Rock" and that he did not identify defendant as the person who shot Carter.

¶19 The trial court granted the State permission to treat Wilson as a hostile witness. The State then confronted Wilson with his handwritten statement by reading to him each of the sentences contained therein and then asking Wilson if he recalled making that statement to the ASA. Wilson testified that he did not recall making the following statements: that he recognized the person standing next to McCollum on the street as a Black Soul he knew as Rock, that he knew Rock from the neighborhood since 2008 (although he testified that he had "seen him around"), that he identified Rock as the person who then pointed a gun at him, that he told Rock that he and his friends were not selling anything or making any money, that he identified Rock as the person who shot Carter, that he recognized the two girls standing with Rock, that he told an ASA that the police treated him well. Wilson also testified that he did not remember if the police gave him something to drink and eat while at the police station. Wilson denied that he read the first couple sentences of the statement to prove that he could read. Wilson also did not recall

identifying a photograph that was attached to his statement as the person he knew as Rock, the Black Soul member. Wilson identified the person in that photograph as the person the police told him was Rock and, when asked if he saw that person in the courtroom, Wilson identified defendant.

¶20 Wilson acknowledged telling the ASA that he heard Rock tell McCollum that he better not be selling drugs on the block or Rock would kill him, that he noticed Rock was holding a gun pointed at McCollum's right side, that Wilson put his hands up after Rock pointed the gun at him, that Carter was shot. Wilson agreed that he remembered the ASA reading the statement to him after he signed it, and that the statement he signed was the same statement the prosecutor showed him in court. Wilson agreed that the ASA did not make any threats to him but he testified that the police said they would let him leave if he signed the statement and that he "did what they told me to do."

¶21 The State then confronted Wilson with his grand jury testimony he gave on September 13, 2010. Wilson testified that he did not recall giving any grand jury testimony. The State read to Wilson the questions he was asked by the prosecutor before the grand jury and the responses that Wilson made to those questions and then asked him if he in fact was asked those questions and gave those answers. In each instance, Wilson testified that he "did not recall." He also did not recall being asked how he was treated the night he gave a handwritten statement at the police station or responding that he had been treated well. Wilson similarly testified that he did not recall telling the grand jury that he viewed a photo array on August 31, 2010, and that he identified a photograph, Grand Jury exhibit 3, as the person who shot Carter. Wilson also did not recall telling the grand jury that he subsequently viewed a physical lineup and that the person he identified in that lineup was the same person depicted in Grand Jury exhibit 3. Wilson

acknowledged that the person depicted in Grand Jury exhibit 3 was defendant, but reiterated that the police showed him a photograph and said that was Rock and that Wilson simply agreed with the police.

¶22 On cross-examination, Wilson reiterated that his uncle told him to identify Rock as the person who shot Carter and that defendant was not the person who shot Carter. He also testified that when he viewed a physical lineup, he simply pointed to the person the police previously identified for him in the photo array as Rock.

¶23 ASA Michele Popielewski testified that she interviewed Wilson on August 31, 2010, and memorialized his statement. ASA Popielwski testified that Wilson agreed to give the statement, that he read portions of the statement back to her after it was taken, and that she read the statement back to Wilson as he followed along. ASA Popielewski further testified that she spoke to Wilson alone and that Wilson told her that he had been treated well by the police. The remainder of the ASA's testimony consisted of the prosecutor reading that statement to the ASA and then asking her if Wilson made those statements during the course of ASA Popielewski's interview with Wilson. In each instance, the ASA testified that Wilson made those statements to her during the interview. In this manner, the State elicited the substance of Wilson’s handwritten statement.

¶24 Former ASA Michael Cheronis testified that he presented Wilson to the grand jury on September 13, 2010. The ASA met with Wilson prior to his testimony before the grand jury in order to gather information. ASA Cheronis's testimony consisted primarily of the prosecutor reading questions and answers from Wilson's grand jury testimony and asking the ASA if they were accurate. ASA Cheronis testified that they were and the substance of Wilson's grand jury testimony was thereby elicited. As noted, that testimony was consistent with his handwritten

statement. Wilson also testified before the grand jury that he agreed to view a photo array and physical lineup and answered "no" when asked if the police told him who to identify. Wilson testified before the grand jury that he identified defendant in the photo array and physical lineup as "Rock," the person who shot Carter.

¶25 At this point in trial, defendant asked the court to reconsider its ruling on the admissibility of the 911 calls. The court again found that the calls did not qualify as excited utterances and denied defendant's request.

¶26 Chicago Police Detective Carol Moresso testified to the condition of the crime scene and the course of the police investigation. In relevant part, the detective testified that four spent .45 caliber shell casings were recovered from the scene as well as bullet fragments and marijuana. It was later determined that the spent casings were all fired from the same handgun. No fingerprints were recovered from the casings and the firearm used to kill Carter was never recovered. Detective Moresso interviewed McCollum at the police station during the early morning hours of August 31, 2010. McCollum described the shooter as a black male, age eighteen to twenty, 5'11", thin with light skin. The shooter was wearing a white t-shirt, blue jeans and gym shoes. Detective Moresso testified that McCollum never told her that the shooter was someone he knew as "Rock."

¶27 Chicago police officer Michael Moreth testified that after speaking with Detective Moresso, he picked up McCollum and Wilson on August 31 and brought them to the police station for questioning. Officer Moreth showed McCollum a photo array and McCollum identified defendant as the person who shot Carter. The officer denied telling McCollum whom to identify from the photo array. After McCollum viewed the photo array, he spoke with an ASA, who took his handwritten statement. After learning that defendant was in custody, Officer

Moreth and his partner brought McCollum and Wilson back to the police station to view a physical lineup. Both McCollum and Wilson picked defendant out of the lineup and identified defendant as the person who shot Carter. The officer further testified that on September 3, 2010, Cole viewed a physical lineup and picked defendant out of that lineup as the person he saw running from the scene after the shooting with a gun in his hand. Officer Moreth testified that he was unaware that Cole had any information about the shooting until Cole was brought to the police station.

¶28 Detective Michael Kennedy testified that he worked with Officer Moreth on the investigation of Carter's murder. Detective Kennedy further testified that Wilson viewed a photo array on August 31 and identified defendant as the person who shot Carter. The detective testified that he did not tell Wilson whom to identify.

¶29 The parties stipulated that if called to testify, Cook County Deputy Medical Examiner James Filkins would testify that he performed an autopsy on Carter. The medical examiner would also testify that he noted nine gunshot wounds to Carter, one of which showed evidence of close-range firing. Filkins' opinion was that Carter died of multiple gunshot wounds and that the manner of death was homicide.

¶30 The parties also stipulated that if called as a witness, private detective John Edward Byrne would testify that he interviewed Wilson on November 23, 2012, and that Wilson never mentioned to the detective that Carter's father told him to say who committed the murder.

¶31 The State then rested and defendant called Officer Kravitz as a witness. The officer's testimony is not relevant to the issues raised on appeal.

¶32 The jury found defendant guilty of first degree murder and found that defendant personally discharged a firearm causing Carter's death. The trial court sentenced defendant to 35

years' imprisonment for first degree murder and to a consecutive sentence of 25 years' imprisonment for personally discharging a firearm. This appeal followed.

¶33 Defendant first contends that the trial court erred when it denied defendant's motion *in limine* seeking to admit the 911 tapes into evidence.

¶34 As previously noted, prior to trial defendant moved *in limine* to introduce recordings of various calls made to 911 after the shooting. Three of those calls are relevant to this appeal. In the first call, an unknown woman identified herself as an off-duty police officer and stated that there were "just shots fired at Pulaski and Jackson." The caller then said "[s]ome guys running through an alley. There is like four of them, running eastbound." When asked by the dispatcher if she could see well enough to get a description, the caller responded, "No ma'm they just ran." The caller further stated that she was "pulling up to the red light" and that "then I heard the shots, and I saw these boys scatter and a car take off. I didn't see, I just saw a car go westbound on Jackson."

¶35 The next caller identified himself as "officer Dukay from the Lions security" and stated "I'm over here on Madison and Karlov behind the [F]ootlocker." The caller continued, "We have multiple shots fired. Coming from about two blocks, that is gonna be south of us." When asked about a description, the caller stated "No, nothing now. I am watching for now. Oh, ok I got four male blacks and four male blacks in white t-shirts, black pants fleeing the area." When asked which direction they were running, the caller responded "they are heading toward me."

¶36 The third caller was an unknown civilian. The caller stated "we need an ambulance at 4032 Jackson and Pulaski, guy just got shot *** he's not breathing." The caller stated that the police were already on the scene. When asked if he saw the shooter, the caller responded, "No, we didn't see sh**." When asked if anyone saw the shooter, the caller stated "[n]obody see [*sic*]

the shooter right now man. They were in a car man. He can't move they need the body to be on it right now." When asked what kind of car it was, the caller responded, "[w]e don't know what kind of car. We just saw a car come down the alley and the shot man, and it be over with." When asked about the color of the car, the caller responded, "We don't man, we just [saw] cars coming down the block and steady start shooting."

¶37 Defendant argued that the calls mentioning a car were relevant because they contradicted the expected eyewitness testimonies, which never mentioned a car. Defendant also argued that the information about four "male blacks" running painted a different perspective of who was fleeing the scene. Defendant claimed that the calls were admissible as excited utterances.

¶38 The trial court denied defendant's motion. The trial court noted that the identity of the alleged off-duty police officer was unknown. Further, the court found that the called described things following the incident, not the incident itself, and did not have an excited demeanor during the call. The court stated that it did not know if the caller was simply repeating information provided to them by someone else. The court found that the security guard's location, well away from the scene of the shooting, suggested that he was not "on view" in any way. The court noted that the security guard did not state that any of the people fleeing were the shooter and did not indicate where the group was running. The court found that the call was too far removed from the incident and that the caller reported observations with no sound of excitement. The court also noted that the unknown civilian caller stated that "nobody saw the shooter." The caller's statement that a man "got shot" indicated to the court that the event had already occurred. The court was unable to determine whether this was a first-hand observation. The court thus found that the calls did not meet the standard required for an excited utterance exception to the rule against hearsay.

¶39 Defendant asked the court to reconsider its ruling near the end of the State's presentation of its case. The court explained that the essence of hearsay exceptions always came down to the reliability of the statement and specifically whether the out-of-court statement carried with it facts which tended to make the statement more reliable than general out-of-court statements. The court stated that in this case, the off-duty police officer's statement did not adequately, accurately or specifically describe the incident in any meaningful way. Although she stated that she saw a car, she did not say that she saw the shooter or anyone with a gun. Moreover, the court observed that the off-duty police officer's statement did not contradict anything testified to by the witnesses. The court noted that the witnesses had testified that there were other people on the scene, that other people fled and that there were cars in the area, which was a busy intersection. The court therefore again denied defendant's request to admit the 911 audio tapes.

¶40 Defendant now claims that the tapes should have been admitted because they fell within the excited utterance exception to the rule against hearsay. Defendant asserts that the tapes were exculpatory because the callers mentioned a car being involved in the shooting, a fact that was not testified to by any of the State's eyewitnesses. Defendant asserts that the court's ruling prejudiced him because it denied him a means to challenge the version of events that was testified to by the State's witnesses.

¶41 "The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion." *People v. Becker*, 239 Ill. 2d 215, 234 (2010). As with the general decision whether to admit evidence, the trial court has discretion to determine whether statements are hearsay and if so, whether they are admissible under an exception to the rule against hearsay. *People v. McNeal*, 405 Ill. App. 3d 647, 666 (2011). That decision will only be reversed if it constitutes an abuse of

discretion. *Id*. An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would agree with the position adopted by the trial court. *Id*.

¶42 The hearsay rule generally prohibits the introduction of an out-of-court statement offered to prove the truth of the matter asserted therein. *People v. Williams*, 238 Ill. 2d 125 (2010). "Hearsay" is a statement, other than one made by the declarant while testifying at a trial or hearing, that is offered in evidence to prove the truth of the matter asserted. Ill. Evid. Rule 801(c). The "statement" at issue may consist of either (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion. Ill. Evid. Rule 801(a). However, there are exceptions to the rule. *McNeal*, 405 Ill. App. 3d at 666. Specifically, hearsay is not admissible except as provided by the Illinois Rules of Evidence, other rules prescribed by the Illinois Supreme Court, or by state statute. Ill. Evid. Rule 802.

¶43 An excited utterance is not excluded by the rule against hearsay. Ill. Evid. Rule 803(2). An "excited utterance" is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Ill. Evid. Rule 803(2). Our supreme court has explained the standards regarding the admissibility of hearsay under the excited utterance exception as follows:

> "For a hearsay statement to be admissible under the spontaneous declaration exception, there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, there must be an absence of time for the declarant to fabricate the statement, and the statement must relate to the circumstances of the occurrence. *Williams*, 193 Ill. 2d at 352. Courts employ a totality of the circumstances analysis in determining whether a hearsay statement is admissible under the spontaneous declaration

exception. *Williams*, 193 Ill. 2d at 352. The totality of the circumstances analysis involves consideration of several factors, including time, the mental and physical condition of the declarant, the nature of the event, and the presence or absence of self-interest. *Williams*, 193 Ill. 2d at 352." *People v. Sutton*, 233 Ill. 2d 89, 107 (2009).

¶44 There is no dispute in this case that the statements contained on the 911 audio tapes were hearsay because defendant offered them to prove the truth of the matter asserted therein. The issue is whether those statements were nevertheless admissible because they were relevant and they fell within the excited utterance exception to the rule against hearsay.

¶45 We find that the trial court did not abuse its discretion when it denied defendant's request to admit the 911 audiotapes into evidence. First, two of the calls on the tapes were not relevant. Evidence which is not relevant is not admissible. Ill. Evid. Rule 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. Evid. Rule 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ill. Evid. Rule 403.

¶46 In this case, the 911 calls made by the off-duty police officer and security guard were not relevant because they did not contradict the witnesses' testimony and offered nothing new. The off-duty officer stated that she heard shots fired and then saw four boys running through an alley and a silver car "take off." However, all of the testimony indicated that the shooting took place near a major intersection and that there were many people in the area and cars parked on the street at the time of the shooting. The fact that a silver car did "take off" does not prove that

defendant was not the shooter. Further, McCollum and Wilson testified that the shooter was already standing on the street when they heard him call out McCollum's name and they also both testified that they fled after the first shot was fired, that they heard more shots as they fled and that they did not return to the scene until several minutes later, after the shooter was gone. Neither witness was asked about a car or other people fleeing the scene. For these reasons, Wilson and McCollum's testimony would not have been contradicted by the off-duty officer's statements. Similarly, Cole stated that he saw 10 people, including defendant, running from the scene, which is not inconsistent with the off-duty officer's statement that a group of boys ran through an alley and that she saw "boys scatter" after the shooting. Further, the off-duty officer's statement about a vehicle driving away from the scene did not contradict Cole's statement because the off-duty officer also stated that the boys were on foot and Cole made no assertion as to where any of the individuals he saw running went after passing his position on the porch.

¶47 Moreover, there is no indication that that the boys running from the area or the vehicle was involved in the shooting. The off-duty officer never stated that the boys were involved in the shooting or that any of them were carrying a weapon. She also never stated that anyone involved in the shooting entered the car or that the car was otherwise connected to the shooting. Not only did the officer's statements not contradict the witnesses' testimony, those statements were insufficient to support the inference that the four boys or the vehicle were involved in the shooting and any inference to the contrary is entirely speculative.

¶48 The same is true regarding the call made by the security guard. The security guard only stated that shots were fired about two blocks away and that four black males were running away from that area and towards the security guard. These statements do not contradict Cole's statement that he saw more than ten people flee the scene or McCollum and Wilson's statements

that they fled the scene immediately after the first shot. Just like the off-duty officer, the security guard, who did not appear to witness the shooting, never stated that the boys he saw fleeing were connected to the shooting. Thus, the security guard's statements were consistent with the evidence presented at trial and there was insufficient evidence to support an inference that the four males were connected to the shooting. For these reasons, the calls from the off-duty officer and the security guard were properly excluded on relevance grounds.

¶49 Moreover, we find that all three of the calls were properly excluded because there was no evidence to support the inference that the callers personally observed the events they reported during their calls to 911. In this respect, this case is distinguishable from *People v. Fields*, 71 Ill. App. 3d 888 (1979), a case relied upon by defendant. In *Fields*, the victim was robbed by a man who she then chased until he jumped into a waiting car. As the car pulled away, people began to come out of nearby buildings and the victim shouted to them to get the car's license plate. The victim further testified that four or five chased after the car and called out its license plate number. The victim also testified that a man near her wrote down the number on a piece of paper, which she gave to two policeman who arrived shortly thereafter. *Id*. at 890. The officers testified at trial that the victim provided that license plate number and to how that number led police to the defendants. *Id*. at 891. Prior to trial, the defendants had made a motion to prevent the State from using hearsay statements regarding the license plate number to link defendants to the crime on the grounds that the victim had not personally seen the license plate and that defendants had no opportunity to cross-examine those who did see it as to their perception, recollection or ability to observe since those witnesses were not at trial. The trial court denied this motion. *Id*. at 892.

¶50 The defendants challenged that ruling on appeal. The appellate court reviewed the factors

necessary to bring a statement with the excited utterance exception to the hearsay rule. *Id*. The court then noted that under that exception, the statement need not be made by a participant in the event to qualify as an excited utterance but that "it must appear at least inferentially that the declarant observed the matters he reports and that there is nothing to make a contrary inference more probable." *Id*. at 893. The court noted that in the case before it, the victim had testified that four or five people chased the car and called out the license number and therefore it "clearly appeared that the declarants personally observed the license plate." *Id*.

¶51 Regarding the ability to observe and the accuracy of the declarants' observations, the court observed that the declarants were not required to be present at trial for their statements to be admissible. *Id*. However, the court also noted that "if the nature of the declaration or circumstances when made indicate that the bystander did not observe the act or fact declared, the declaration should be excluded." *Id*. The court then observed that the victim testified to the time of day, lighting conditions, speed of the car and the "location and viewpoint of the declarants" such that all of those factors could be argued to the jury. *Id*. at 894. The court concluded that the accuracy and reliability of the observation was suggested by the fact that several people observed the license plate and concurred in the number" and thus found no error in the declarations having been admitted into evidence. *Id*.

¶52 The facts in this case stand in stark contrast to those in *Fields*. In this case, there was no evidence presented indicating that any of the callers on the 911 tapes observed the matters they reported. No witness took the stand to provide testimony concerning the "location and viewpoint of the declarants," as in *Fields*, 71 Ill. App. 3d at 894.

¶53 Further, the civilian caller was not identified and it is unclear whether his statements were based on his own observations. There was also no testimony as to that caller's ability to observe

the events he reported. The language used by that caller makes it unclear whether he was reporting his own observations. The caller consistently used the pronoun "we" when answering the dispatcher's questions. For example, the caller responded "we didn't see sh**" when asked if he saw the shooter. Additionally, it is unclear whether the shooter or shooters arrived in one car or multiple cars or whether the car was observed in an alley or on the street. At one point the caller stated "they were in a *car*" and "we just saw a *car* come down the *alley* and the shot." (Emphasis added.) The caller later stated, however, that "we just [saw] *cars* coming down the *block* and steady start shooting." (Emphasis added.). Finally, although the caller claimed to have seen the car or cars, he was unable to provide any description of the car or cars to the dispatcher. Considering all of the above, we cannot say that the trial court's decision to exclude this call was arbitrary or fanciful or that no reasonable person would have taken the view of the trial court. Thus, we cannot say that the trial court's determination was an abuse of discretion.

¶54 With respect to the security guard, there was insufficient information to determine whether his statement related to the startling event. The security guard was not at the scene of the shooting and in fact he stated that he was "about two blocks away" from the shots. However, it is unclear how the guard estimated that the shooting he heard was two blocks away. Further, even given the distance that he estimated, there is nothing to indicate that the boys he saw running had any connection to the shooting.

¶55 As in this instance no in-court testimony was provided to establish the foundational requirements for an excited utterance, the court was left with only the content of the calls with which to perform its totality of the circumstances analysis including the factors of time, the condition of the declarants, the nature of the event, and the presence or absence of self-interest. See *Williams*, 193 Ill. 2d at 352. We also note that in this situation, where no witness testified in

court as to the circumstances surrounding the making of these phone calls, the potential exists for fabricated or at least unreliable evidence being admitted.

¶56 For all of these reasons, we cannot say that the trial court abused its discretion when it denied defendant's motion to admit the 911 calls into evidence.

¶57 Additionally, even if we were to hold that the unknown civilian caller's 911 recording should have been admitted, its exclusion was harmless. "When deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008).

¶58 Here, as noted, the contents of the unknown civilian caller's 911 recording were vague and somewhat disjointed. In contrast, the State's evidence of defendant's guilt was overwhelming. McCollum provided eyewitness testimony that defendant was the person who shot and killed Carter. McCollum testified that the disagreement was over drug sales on the street corner and that defendant confronted McCollum, Wilson and Carter and that defendant ultimately shot Carter. This testimony was corroborated by other evidence presented at trial. All of the evidence indicated that Carter, Wilson and McCollum belonged to one of two gangs that sold drugs in the area and that defendant belonged to a rival gang. Further, in his handwritten statement and grand jury testimony, Wilson corroborated McCollum's trial testimony in all respects and he either stated in his handwritten statement or testified before the grand jury that defendant was the person who shot and killed Carter. Cole also corroborated McCollum's testimony and Wilson's prior statements when he indicated in his handwritten statement that he

heard gunshots and then saw defendant running from the scene with a gun in his hand. The detectives' testimony also established that McCollum and Wilson identified defendant from a photo array and a physical lineup as the person who shot the victim and that Cole identified defendant from a physical lineup as the person he saw running from the scene with a gun in his hand after the shooting. In light of this evidence, the exclusion of the unknown civilian's 911 call, if error, was harmless.

¶59 Defendant next contends that the trial court invaded the province of the jury and denied him a fair trial when the court commented on the veracity and credibility of Cole's testimony. Defendant's argument is based on the following comment made by the trial court during Cole's direct testimony after Cole testified that he did "not remember" such things as meeting with detectives on Jackson Street or meeting with detectives at the police station: "I want to spread of record, I'm going to treat the I don't remembers from an evidentiary standpoint as indicative of a witness recalcitrant to answer the question and not an accurate representation of whether or not he recalls."

¶60 The State initially responds that defendant forfeited this issue because he did not object to the trial court's comment when it was made or include the issue in his post-trial motion. The rule of forfeiture, however, is not rigidly applied when the trial judge's conduct is the basis for the objection and the failure to object to a judge's comments at trial and in a post-trial motion does not forfeit the issue for review. *People v. Sprinkle*, 27 Ill. 2d 398, 399–400 (1963). As a result, we will not consider the issue to be forfeited.

¶61 "Because a jury may be unduly influenced by the comments or actions of the trial judge, every defendant is entitled to a trial free from improper or prejudicial remarks by the presiding judge." *People v. Campbell*, 232 Ill. App. 3d 597, 601 (1992). Thus, a trial judge should "not

make any comments or insinuations indicative of an opinion on the credibility of a witness." *People v. Brown*, 200 Ill. App. 3d 566, 576. However, "[f]or the comments or questioning by a trial judge to constitute reversible error, the defendant must demonstrate that they were a material factor in the conviction or that prejudice appears to have been the probable result." *Id*.

¶62 The State posited at oral arguments that in this instance the trial court was simply alerting counsel that he considered Cole to be an adverse witness. While that may be so, in light of the above principles, we agree with defendant that the trial court's comment should have been made outside the presence of the jury and that this was error. Nevertheless, we find that the comment is not reversible error because it was not a material factor in defendant's conviction in light of the overwhelming evidence of defendant's guilt. This evidence included McCollum's in-court testimony that defendant was the shooter, which was buttressed by Wilson and Cole's prior statements and the eyewitnesses' prior identifications of defendant from a photo array and physical lineup as either the shooter or the person seen running from the scene holding a gun after the shooting. This evidence made a strong case of defendant's guilt. We also note that the trial court instructed the jury before its deliberations that "[n]either by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or what your verdict should be" and that "[o]nly [the jurors] are the judges of the believability of the witnesses and the weight to be given to the testimony of each of them." We presume that jurors follow the instructions given to them by the circuit court. See *People v. Sutton*, 353 Ill. App. 3d 487, 505 (2004) ("Jurors are presumed to follow the trial court's instructions"). For the all these reasons, we find that the trial court's comment was harmless error.

¶63 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶64 Affirmed.

¶65 JUSTICE GORDON, specially concurring:

¶66 I must write separately on one issue and that is the 911 tapes of calls made to the police 911 number. The first caller identified herself as an off-duty police officer, claimed that she heard shots, "saw these boys scatter and a car take off." I believe that the information given appears to be reliable and satisfies the concept of an excited utterance.

¶67 The second caller claimed to be a security officer who said, "I got four male blacks in white t-shirts, black pants fleeing the area." No mention of a vehicle. That call also satisfied the concept of an excited utterance.

¶68 The third caller was an unknown civilian. The caller stated " we need an ambulance at 4032 Jackson and Pulaski, guy just got shot *** he's not breathing." The caller stated that the police were already on the scene. When asked if he saw the shooter, the caller responded, "No, we didn't see sh**." When asked if anyone saw the shooter, the caller stated "[n]obody see [*sic*] the shooter right now man. They were in a car man. He can't move they need the body to be on it right now." When asked what kind of car it was, the caller responded, "[w]e don't know what kind of car. We just saw a car come down the alley and the shot man, and it be over with." When asked about the color of the car, the caller responded, "We don't man, we just [saw] cars coming down the block and steady start shooting."

¶69 The majority finds that the 911 calls made by the off-duty police officer and security guard were not relevant because they did not contradict the testimony of the witnesses and offered nothing new. In addition, the majority finds that all three of the calls were properly excluded because there was no evidence to support the inference that the callers personally observed the events they reported. I totally disagree. The defendant has the right to tell his side of the story. The off-duty officer stated that she saw four boys running through an alley and a

silver car "take off." How can the majority say "there was no evidence to support the inference that the callers personally observed the events"? The security officer said, "I got four male blacks in white t-shirts, black pants fleeing the area." In the streets of Chicago, I will take judicial notice that the term "got" means I saw in the context given. The unknown civilian said, "we just [saw] cars coming down the block and steady start shooting." Although we do not know for sure what "we" means in the context given, a reasonable interpretation would be the unknown civilian and the people with him. It is wrong to say two of these calls are irrelevant because all three calls should be received in evidence for the jury's consideration. The totality of the circumstances should be considered in the analysis and that was not done here.

¶70 With that being said, I agree with the majority that the evidence of defendant's guilt was overwhelming and the exclusion of the recordings was harmless error. McCollum, Wilson and Cole provided eyewitness testimony in the statements they gave that the defendant was the person who shot and killed Carter over a disagreement concerning drug sales on the street. The fact that someone thought the gunfire came from an automobile does not change the eyewitness testimony of the shooting by someone who was close in proximity and who may have had a better view of the events.