THIRD DIVISION
September 9, 2015

No. 1-13-3077

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	10CR17783-01
	)	
DENNIS MAHONE,	)	The Honorable
	)	Noreen Valeria Love
Defendant-Appellant.	)	Judge Presiding

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Trial counsel was ineffective for failing to object to the admission of a witness's written statement providing that defendant said he shot the victim.

¶ 2 Having been convicted of first-degree murder after a short bench trial, and sentenced to 70 years' imprisonment, defendant Dennis Mahone appeals, claiming that his trial counsel was constitutionally ineffective for failing to object to the introduction of a handwritten statement given by his brother, Christian Alexander, in which Alexander said that in a telephone call just

after the incident, defendant admitted that he shot the victim, Vincent Cole. Defendant claims that the admission of this testimony was demonstrably improper because Alexander did not witness the shooting. The State concedes that this piece of evidence was erroneously introduced in light of our supreme court's recent decision in *People v. Simpson*, 2015 IL 116512, but contends that defendant was not prejudiced in light of the State's remaining evidence. While the question of whether prejudice ensued is a close one, we reverse and remand for a new trial.

¶ 3 I. BACKGROUND

¶ 4 The shooting that led to defendant being charged with first-degree murder occurred in the afternoon on August 8, 2010, in Maywood, a western suburb of Chicago. Defendant was affiliated with a gang known as the Four Corner Hustlers. Approximately two months earlier, JaJuan Jenkins, who was defendant's cousin and also an associate of the gang, was shot and killed, allegedly by a member of a rival gang known as GMC, which alternately stood for "Get Money Click [*sic*]" or "Get Major Cash." The State's theory at trial was that defendant killed Cole in retaliation for the shooting of Jenkins in June 2010.

¶ 5 Dominique Coffee-Smith testified that as of the date of the shooting, she was defendant's girlfriend and neighbor. They both lived near the corner of 7th Avenue and Legion Street in Maywood. At the request of defendant's father, she drove defendant to a liquor store at 5th Avenue and Lake, where he bought beer for his father. They then went to a convenience store on 5th Avenue between Madison and Green because she needed infant water. Defendant went inside while Coffee-Smith waited in her 2006 white Dodge Charger. After defendant exited the store, they began driving home and defendant spoke to someone on the phone. Shortly thereafter, defendant asked her to take him back to the convenience store so he could buy tobacco. Coffee-Smith declined to, however, because she would be late for work. As a result, defendant got out of

the car to walk back to the store. Coffee-Smith never saw defendant with a gun on the day in question.

¶ 6 When Coffee-Smith returned to her block, Alexander asked whether she had heard gunshots. In addition, defendant was not answering his phone. Concerned for his brother's safety, Alexander entered Coffee-Smith's car and they drove to the area of the convenience store, where they saw various onlookers as well as police officers, but did not see defendant. Alexander also spoke to someone on the phone. Coffee-Smith then wanted to check on her children at her cousin's house. When Coffee-Smith returned to the car after doing so, Alexander was again speaking to someone on the phone. They returned to their block where they were soon met by the police.

¶ 7 Coffee-Smith identified a surveillance video of the block in question. We note, however, that the perspective of the camera did not provide a view of the shooter. Additionally, Coffee-Smith acknowledged that after defendant was arrested in this case, he asked her not to come to court and to avoid the prosecution as well as the police. Furthermore, Coffee-Smith testified that she was present when Jenkins was shot and drove him to the hospital but defendant was not present for that shooting and never discussed "getting even." Coffee-Smith also identified recordings of defendant's phone conversations while in jail. During one phone call, defendant referred to "black" Jessica, who lived up the street. Apparently, Jessica had seen "the shit" but had not seen where "the shit" came from. Moreover, defendant appears to have referenced that witness's sexual orientation.

¶ 8 Jessica Parham, the State's sole eyewitness, testified that shortly before 1 p.m. on August 8, 2010, she and her nine-year-old daughter were waiting for Joneasha Snow, Parham's domestic partner, in the car outside the beauty supply store between the convenience store and the

currency exchange on 5th Avenue. Parham then saw defendant walk out from behind a house at the end of the block and open fire on a person in a car, shooting about six times while standing in the grass. Parham testified that she and defendant had attended the same high school and lived a block apart. In addition, she knew him by his nickname, Tony. Although Parham could not determine exactly how long the shooting lasted or how many feet she was from defendant, she was definitely able to see him and they made eye contact. After the shooting started, Parham moved her daughter into the beauty supply store. Parham subsequently approached the victim's car and saw him take his last breath. She also called 911, but did not give the dispatcher her name, identify defendant as the shooter or otherwise provide a description. In court, Parham identified the aforementioned surveillance video and explained the sequence of events shown.

¶ 9 Parham testified that she did not wait at the scene to talk to the police because she knew defendant, and they had mutual friends. Parham later heard other people discuss the possibility that defendant was the shooter. A couple of days after the incident, the police contacted her and she met Detective Charles Porter at a McDonald's restaurant outside of the area. She told the police what she had observed, provided defendant's name and identified his photograph from a photo array, in which only defendant was wearing a white t-shirt, but Parham did not inform the police that she made eye contact with defendant during the shooting. On August 24, 2010, Parham spoke to Assistant State's Attorney (ASA) Julie Nikolaevskaya. Although defendant himself never threatened her following the shooting, the State's Attorney's Office ultimately arranged for Parham to move due to statements made to her by certain individuals.

¶ 10 Alexander testified that he believed the GMCs were responsible for Jenkins' death, but Alexander did not know who shot him. In addition, Alexander had discussed that incident with defendant but defendant did not say he believed the GMCs were responsible. Alexander later

testified, however, that he believed Cole to be a GMC and a friend of the person Alexander and defendant believed shot Jenkins. Furthermore, Alexander first testified that he, defendant and Jenkins were merely associated with the Four Corner Hustlers but then testified that they were members.

¶ 11 Alexander was at home on August 8, 2010, when he heard multiple gunshots. He then went outside and saw Coffee-Smith, who had returned from buying beer for Alexander's father. Out of concern that a GMC had shot defendant, he got in Coffee-Smith's car so they could search for him. They drove around the corner onto 5th Avenue and then turned onto Green, where Alexander observed commotion. While Alexander and Coffee-Smith were driving home again, Alexander spoke to defendant on the phone. The brothers confirmed that they were safe and expressed their love for one another but Alexander denied that defendant had said, "I just got V.C. on 5th. I just shot him." Similarly, Alexander denied telling Coffee-Smith that defendant had just shot someone. Alexander further testified that he had never seen defendant with a 9-millimeter firearm.

¶ 12 After Alexander and Coffee-Smith returned home, the police arrived and indicated that Coffee-Smith's car had been observed near the shooting. The police searched Alexander and let him go but later returned. As soon as Alexander exited the house, the police handcuffed him and slammed his head on the police car. On the way to the police station, the police said he would be charged for the murder that had just occurred on 5th Avenue. When Alexander responded that he had been at home in bed, the police said he would never be released from prison.

¶ 13 In a locked room at the police station, the police removed Alexander's handcuffs. Detective Porter then told Alexander to "give up" defendant or face murder charges and a 60-year prison term. Detective Porter also told him that if Alexander would agree with what the

detective said and sign a written statement, he would go home. Otherwise, Alexander would not be released. No one else was in the room at that time. At about 9:30 p.m. the next day, after Alexander had been awake for over 30 hours, he signed a statement handwritten by ASA Barbara Bailey. He gave ASA Bailey the information he had rehearsed with the police. Although ASA Bailey had not forced him to make that statement, Detective Porter had. Instead of informing ASA Bailey of this alleged coercion, Alexander told her he had been treated "good, perfect [*sic*]." Additionally, Alexander first denied reviewing the statement but then acknowledged a correction he had made. Although Alexander essentially claimed that a reading disability prevented him from being able to read well, he acknowledged demonstrating his ability for ASA Bailey by reading the first paragraph of the statement out loud. He was able to do so because the first paragraph contained only small words. Moreover, Alexander denied telling ASA Bailey that defendant believed that the GMCs were responsible for shooting Jenkins but subsequently acknowledged telling ASA Bailey that he and defendant thought Cole was a friend of the person who shot Jenkins.

¶ 14 The parties stipulated that ASA Bailey would testify that the handwritten statement memorialized what Alexander stated during his interview. The statement indicated, among other things, that Alexander, Jenkins and defendant were members of the Four Corner Hustlers, while Cole was a member of GMCs. Defendant and Alexander suspected that the GMCs were responsible for shooting Jenkins and more specifically, that Cole was a friend of the individual the two brothers believed actually shot Jenkins. While looking for defendant with Coffee-Smith after the shooting, Alexander had a phone conversation with defendant, who said, "I just got V.C. on 5th. I just shot him." Defendant also told Alexander, "I love you bro. Be safe." Alexander reciprocated the sentiment. After that conversation, Alexander told Coffee-Smith that

defendant shot someone. Alexander further stated that at some point, he had seen defendant with a 9-millimeter firearm but believed the gun had been stolen from defendant. Moreover, the Four Corner Hustlers had guns stashed outside Maywood because "anything can happen."

¶ 16 Detective Porter testified that during his investigation, he learned that defendant was the last person to leave the convenience store before the shooting occurred. The detective also viewed the surveillance video from the currency exchange, which was two storefronts away. While viewing the video, Detective Porter noticed a white Charger but could not make out the person shooting. Detective Porter, who knew where defendant lived based on previous contact, then went to Seventh and Legion with Detective Vargas and Officer Daniels. Detective Porter observed a white Charger, spoke to Coffee-Smith and arranged for her to drive herself to the police station. In addition, Detective Porter then spoke with defendant's father and grandfather, who said that defendant no longer lived there. Accordingly, Detective Porter asked to speak to Alexander. When Detective Porter asked where defendant was, Alexander responded. Based on that response, Detective Porter asked him to come to the police station and Officer Daniels transported him there. Detective Porter did not threaten Alexander, however.

¶ 17 At the police station, Detective Porter interviewed Coffee-Smith before speaking with Alexander. Detective Porter also advised the patrol unit to bring defendant in for a homicide investigation should anyone find him. The next day, Detective Porter interviewed Coffee-Smith and Alexander again, and contacted felony review to take their statements. Detective Porter was not present for Alexander's interview with ASA Bailey, however, because Detective Porter was out looking for defendant. In addition, Detective Porter never told Alexander what to say and did not have him memorize concocted facts to tell the ASA. Furthermore, Detective Porter never

told Alexander that he would be charged with murder and go to prison for 60 years if he did not implicate his brother.

¶ 18 Three days after the shooting, Detective Porter went to the beauty supply store to view a surveillance video, which showed a black female. On the same day, he used the description of a car to find Snow, who directed him to Parham. Upon Detective Porter's request, Parham called him. She also identified defendant as the shooter. Specifically, Detective Porter, Detective Peck, and Parham met that evening in a McDonald's parking lot, where Parham identified defendant as the shooter from a photo array. Porter acknowledged that defendant was the only person wearing a white t-shirt in the photographs. In addition, Parham said she went to school with defendant and lived down the street from him. Parham did not, however, tell Detective Porter that she had heard rumors that defendant was the shooter. Parham later spoke to an ASA and testified before a grand jury. Defendant was apprehended by Sergeant Patrick Grandberry the next day.

¶ 19 Sergeant Grandberry testified that although he had photographed the crime scene from the shooting at issue, on September 2, 2010, he was searching for offenders with respect to a different shooting. As Sergeant Grandberry was driving, he saw defendant and two other individuals jump over a fence. Defendant, who had a gun in his hand, began to run and Sergeant Grandberry pursued him on foot. Defendant ultimately ran to the front of a house on Fourth Avenue where he knocked on the door and yelled, "Let me in, let me in." Grandberry then apprehended him and subsequently recovered a .380 caliber firearm from behind a garbage can that defendant had visited during the pursuit. We note that the firearm was not connected to the present offense.

¶ 20 The parties stipulated that Cole sustained two gunshot wounds to his right back, which punctured, among other things, his heart and right lung. Cole was also shot in the right arm and

the bridge of his nose. In addition, Cole sustained graze wounds to his right axilla and arm, as well as his lower back. He died of multiple gunshot wounds in the manner of homicide. Furthermore, ballistics evidence found at the scene and found in the victim's body were fired from the same 9-millimeter Luger.

¶ 21 Following closing arguments, the trial court found defendant guilty of first-degree murder, finding that Parham was credible, and that Alexander did not fabricate the statement he gave to ASA Bailey. In addition, the court found defendant's statement to Alexander, that defendant had just shot Cole, supported the court's finding of guilt. The trial court subsequently denied defendant's motion for a new trial and sentenced defendant to 70 years in prison. The court denied his motion to reconsider his sentence.

¶ 22 II. ANALYSIS

¶ 23 Defendant's main contention on appeal concerns the substantive use of Alexander's written statement that defendant had admitted to the shooting of Cole in a telephone call. Defendant argues that while section 115.10(c)(2) of the Code of Criminal Procedure (725 ILCS 5/115.10 (c)(2) (West 2010)) permits the substantive admission of prior inconsistent statements, this section specifically demands that the statement be about something of which the witness has "personal knowledge," something that Alexander clearly did not have as he did not witness the shooting. Pursuant to *Simpson*, 2015 IL 116512, ¶ 32, in which our supreme court held that section 115.10(c)(2) requires that the witness have personal knowledge of the crime itself, as opposed to mere knowledge of the defendant's verbal admission, defendant claims that this statement was inadmissible and his counsel was constitutionally ineffective for not objecting at trial. Alternatively, defendant contends the admission of the out-of-court statement constituted plain error. Defendant further argues that Alexander's out-of-court statement was not otherwise

the subject of proper impeachment because Alexander's testimony did not affirmatively damage the State's case.

¶ 24 The State agrees that the substantive admission of the out-of-court statement was violative of *Simpson*. We note that we are in a markedly different posture here, if only because this case was tried before a judge, not a jury, as was the case in *Simpson*. *Id*. ¶ 1. As a result, we would ordinarily conclude that the trial judge considered only the appropriate evidence when rendering a decision, while not considering any improperly admitted evidence. See *People v. Smith*, 2013 IL App (2d) 120691, ¶ 10 (Ordinarily, we presume the trial court followed the law unless the record indicates otherwise). In her oral comments while rendering her verdict, however, the trial judge went to some lengths to refer to the statement by defendant's brother, noting "[h]e knew what the facts were. He told [ASA] Barb Bailey what the facts were." Additionally, the court observed that Alexander's statement was corroborated by his testimony, both of which represented that defendant said he loved him. The court went on to observe that defendant told his brother that "he just took care—or he just got VC, and he knew VC to be Vincent Cole. And this is all of the little pieces to put together circumstantially." Alexander's out-of-court statement concerning defendant's admission clearly had an effect on the trial court judge, who expressly relied on it. *Cf. Simpson*, 2015 IL 116512, ¶ 36 (observing that the effect of a confession on a jury is incalculable). Accordingly, we agree with the State's concession in that regard. Furthermore, the State does not dispute defendant's assertion that Alexander's statement was not available for impeachment purposes. Instead, the State maintains that due to the overwhelming evidence presented, defendant cannot show that trial counsel was ineffective or that plain error occurred.

¶ 25 To demonstrate that trial counsel was ineffective, a defendant must show both that (1) counsel's performance was objectively unreasonable; and (2) a reasonable probability exists that but for counsel's errors, the result of proceedings would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81. A reasonable probability is that which is sufficient to undermine confidence in the outcome. *People v. Hale*, 2013 IL 113140, ¶ 18. In addition, the question is whether the defendant received a fair trial that resulted in a judgment worthy of confidence, not whether he would more likely than not have received a different verdict had counsel not been deficient. *People v. Morris*, 2013 IL App (1st) 111251, ¶ 16. The reviewing court may find prejudice even where the probability that a minimally competent attorney would have achieved an acquittal is far less than 50 %, so long as an acquittal would be reasonable. *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008). We review whether counsel was ineffective *de novo*. *Hale*, 2013 IL 113140, ¶ 15.

¶ 26 The State does not contest defendant's assertion that trial counsel failed to object and thus, was deficient. We too find no strategic reason for trial counsel's failure to object to Alexander's prior statement regarding his phone call with defendant, who allegedly stated that he had shot Cole. As the supreme court observed in *Simpson*, confessions constitute the most powerful evidence that the State can offer. See *Simpson*, 2015 IL 116512, ¶ 36. In addition, appellate case law supported such an objection even prior to *Simpson*. *Id*. ¶ 32. The State argues, however, that defendant cannot establish prejudice because "it cannot be found that even if counsel had objected and successfully excluded [Alexander's] statement, defendant would have been acquitted." The aforementioned case law, however, shows that the State has improperly amplified defendant's burden. He need not demonstrate that he would actually have been acquitted. We find *Simpson* provides further guidance.

¶ 27 There, the defendant was tried before a jury and convicted of a brutal, baseball bat beating which killed a man. *Id*. ¶¶ 1, 3, 5. At trial, one witness, Vonzell Franklin, suddenly could not remember what the defendant told him about the beating and the State presented Franklin's videotaped statement in which he relayed that defendant said he hit the victim with a bat 30 times. *Id*. ¶ 1. After finding that counsel was deficient for failing to object (*Id*. ¶ 36), the supreme court considered prejudice. The court acknowledged that the record contained ample evidence supporting defendant's guilt. *Id*. ¶ 37. Specifically, an eyewitness saw the offenders from 10 feet away and testified he could see them "very well." *Id*. The eyewitness identified the defendant from a lineup and testified he was 100% sure of his lineup identification. Furthermore, the defendant's accomplices and the defendant's own witness placed him at the scene. *Id*.

¶ 28 Notwithstanding such evidence, our supreme court found a reasonable probability existed that, but for counsel's error in not keeping out a witness's statement that the defendant said he hit the victim with a bat 30 times, the result of proceedings would have been different. *Id*. ¶¶ 1, 39. The court found the confession was a powerful piece of evidence and that the eyewitness was unable to identify the defendant at trial, even though that could have been reasonable given the passage of time. *Id*. ¶ 39. In addition, a defense investigator testified that the eyewitness said he was "only 90% sure" of his lineup identification. *Id*. Furthermore a trier of fact could be skeptical of accomplice testimony given certain preferential treatment the accomplices received in the justice system. *Id*. Our supreme court found the defendant had established prejudice, even though prejudice presented a close question. *Id*. ¶¶ 37, 39.

¶ 29 We, too, view this as a close question under the facts. As in *Simpson*, the evidence to sustain defendant's conviction is clearly sufficient. It is indisputable that defendant was in the area of the shooting. Coffee-Smith testified that just before the shooting, defendant was returning

to Fifth Avenue. In addition, Detective Porter had learned that defendant was the last person in the convenience store before the shooting. Moreover, Parham witnessed the shooting in broad daylight and claimed no difficulty in identifying defendant as the shooter, as she knew him. Although defendant has questioned whether Parham's distance from the shooter was too great to identify him, the video surveillance, photographs, and testimony regarding the layout of the block from Coffee-Smith and Porter, would permit a trier of fact to determine that Parham was able to see the shooter. Parham also identified his photograph. Furthermore, a trier of fact could reasonably determine, as the trial court did here, that Parham did not come forward immediately because she had to continue living in the Maywood community, particularly in light of her eventual move out of the community due to "difficulties" following this case. Moreover, Alexander, in his prior statement, acknowledged having previously seen defendant with a 9-millimeter firearm, the same caliber of weapon used in the present offense.

¶ 30 On the other hand, a trier of fact would not be required to make that determination. In addition, the shooter cannot be clearly seen on the surveillance video and a trier of fact would be entitled to question whether Parham's distance from the shooter and the particular angle of her view, as well as the need to protect her daughter in the backseat, undermined the credibility of her testimony that she could see him, notwithstanding Parham's testimony that those factors did not impede her view. A trier of fact could also determine that Parham's failure to identify defendant to the 911 dispatcher and wait for the police at the scene impacted her credibility. In addition, the State emphasizes the recorded phone call in which defendant indicated that Parham had seen "the shit" but had not seen where "the shit" came from. Although the State presumes this means defendant knew Parham had seen the shooting because he, as the shooter, saw her at the scene, he could also have been repeating what he had heard from others, particularly given

that he did not corroborate her testimony that she made eye contact with him. Moreover, the gun was never recovered and no other physical evidence directly connected defendant to the shooting. Similarly, Coffee-Smith testified that she did not see defendant with a weapon before the shooting, although we acknowledge her potential bias as defendant's girlfriend.

¶ 31 Given the range of credibility determinations available to a trier of fact, we find defendant has sufficiently demonstrated prejudice. To be clear, we do not find that defendant more likely than not would have been acquitted absent the admission of Alexander's statement containing defendant's inculpatory statements, but a *reasonabl*e probability exists that, but for counsel's deficiency, the result of proceeding would have been different, as the State's case essentially rested on the credibility of one eyewitness.

¶ 32 III. CONCLUSION

¶ 33 Having determined that defendant has shown trial counsel was ineffective for failing to object to the admission of Alexander's statement that defendant said he shot Cole, we reverse and remand for a new trial by a different trial judge. In light of our determination, we need not consider defendant's remaining contentions.

¶ 34 Reversed and Remanded.