2016 IL App (1st) 133513-U

FIFTH DIVISION
September 30, 2016

No. 1-13-3513

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	Illinois
	)	
	)	
v.	)	No. 06 CR 1141
	)	
CARNELL TYLER	)	The Honorable
	)	Michele M. Simmons ,
	)	Judge Presiding.
Defendant-Appellant.	)	
	)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Gordon and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held:* (1) The circuit court erred in denying the defendant's motion to suppress where the defendant's statements to the interviewing police officer were not an ambiguous or equivocal invocation of his right to counsel; (2) The circuit court's admission of defendant's inculpatory statements was harmless error; (3) Any error that may have occurred from the circuit court

admitting evidence of defendant's other crimes was harmless; and (4) No prejudice resulted from the prosecutions comments during closing arguments.

¶ 2 This appeal arises out of the November 25, 2005, armed robbery of Frank's Food and Liquor store located at 3644 West 139th Street, in Robbins, Illinois. During the course of the robbery, the store's owner, Fakhri "Frank" Elayyan, was shot and wounded. His daughter, Godha Elayyan, sustained a fatal gunshot wound. On January 24, 2006, a Cook County grand jury returned an indictment against defendant Carnell Tyler charging him with various counts of first-degree murder, attempt murder, aggravated battery, and armed robbery.[1]

¶ 3 Following an unsuccessful pretrial motion to suppress statements, a jury found defendant guilty of first-degree murder. The trial court sentenced defendant to natural life imprisonment based upon his prior double murder conviction on November 6, 1989.

¶ 4 I. BACKGROUND

¶ 5 On November 25, 2005, Frank and his daughter, Godha, were shot inside Frank's Food and Liquor during an armed robbery. Frank survived, but Godha died at the scene.

¶ 6 Cook County Sherriff's investigator Ronald Sachtleben processed the crime scene. There, he recovered one partially deformed copper jacketed lead projectile on the floor and two spent .380 caliber shell casings. He also recovered four sets of partial latent lifts from the counter area and four sets of partial prints from the cash register.

¶ 7 On November 26, 2005, defendant walked into the Robbins police station and claimed he needed protection from the people of Robbins. The defendant was taken into custody and later subjected to three interviews by Detective Dion Kimble of the Robbins Police Department. The interrogations were conducted on the following dates: November 27, 2005;

[1] Codefendants Robert Hill and Darion Nance were also charged and tried separately. Hill was found guilty of first-degree murder, attempt murder, and armed robbery in case number 08 CR 0023801. Nance pleaded guilty to armed robbery in case number 09 CR 1875701 in exchange for his testimony against Hill and defendant.

November 28, 2005; and December 6, 2005. All three interviews were video recorded, and defendant was read his *Miranda* rights from the same preprinted form. At trial, Detective Kimble testified that at no time did defendant appear confused or intoxicated. He also testified he believed defendant understood his rights and that defendant affirmatively acknowledged his understanding of the *Miranda* warnings.

¶ 8 Prior to questioning on November 27, 2005, defendant was read his *Miranda rights* from a preprinted form. He verbally indicated he understood each of the rights on the form, and he subsequently signed the form acknowledging his understanding and affirming his willingness to speak with Detective Kimble unassisted by counsel. Defendant told Detective Kimble that on the day of the robbery, he went to get a drink at Frank's store around 6:30 p.m. He explained that as he opened the door he heard shooting and he stepped in and saw Frank on the floor. Defendant stated he saw Darion Nance with a mask on behind the counter "shooting and wrestling", so he stepped back out the door. According to defendant, Darion ran out behind defendant, pulled down his mask, and instructed defendant to not re-enter the store. Defendant later stated Darion gave him drugs to keep quiet and that defendant had witnessed other people at the projects with masks and paint on their faces.

¶ 9 During the second interview on November 28, 2005, defendant received his *Miranda* warnings in the following exchange with Detective Kimble:

> "[Kimble]: Do you understand you have the right to talk to a lawyer before we ask ---before I ask you any questions and have him---him or her with you while during any questioning. Do you understand that?
>
> [Defendant]: Yeah
>
> [Kimble]: Do you understand that if you cannot afford to hire a lawyer, one will be appointed for you before any questions if you wish. Do you understand that?

[Defendant]: Yes

[Kimble]: Okay. Do you understand that---do you understand all the rights, these rights and I---you wish to give a statement to me, right?

[Defendant]: No, I don't wish to give no statement.

[Kimble]: Well, you wish to talk to me, that's the same thing?

[Defendant]: Yeah, I wish---I'll talk to you.

[Kimble]: Okay. I need you to sign right here…

[Defendant]: But…

[Kimble]: It's the same, the same thing as yesterday, man it's nothing, nothing different.

[Defendant]: I can't get no lawyer?

[Kimble]: You---I mean if you want a lawyer, yeah, but we talking. I mean that's just all the things I asked you to do. Same as yesterday, we're talking. Yesterday."

¶ 10 Defendant subsequently signed the preprinted form containing the *Miranda* rights, spoke with Detective Kimble and was released from custody. A week later, defendant was arrested and immediately brought in for interrogation. Kimble read defendant his rights from a preprinted form, and defendant again signed the waiver agreeing to talk. During the third interrogation, defendant made several incriminating statements. About an hour into the interrogation, defendant requested an attorney and the questioning stopped.

¶ 11 Defendant was later charged with numerous counts of first degree murder, attempt murder, aggravated battery, and armed robbery; however, the State chose to proceed on two counts of knowing/intentional murder and one count of felony murder predicated on armed robbery.

¶ 12 Before trial, defendant filed a motion to suppress his statements made during the interrogations. The motion alleged, *inter alia,* that the police continued to interrogate the defendant after he had invoked his right to counsel and that he was incapable of knowingly waiving his *Miranda* rights due to mental illness. After reviewing the videos the interrogations, the court denied defendant's motion to suppress.

¶ 13 Defendant also filed a motion to exclude portions of the interrogation videos, including all references to defendant's prior murder conviction and to his time in prison. The parties agreed to most of the redactions, and of the ones the parties disagreed on, the court granted defendant's motion in regard to all but one of them.

¶ 14 On March 7, 2006, the police had Frank view a photo array. Frank said he did not know any of the people photographed. He explained that he was unable to identify anyone because all of the photos were not clear. On October 20, 2006, Frank was taken to view a lineup. There, he identified the defendant, and the officer who conducted the lineup testified at trial that defendant was the person whom Frank had identified. On cross-examination, Frank testified that his family had told him defendant was arrested while Frank had been hospitalized and that defendant was someone he recognized from the neighborhood. Additionally, Frank testified that he did not know a person named Carnell Tyler. Frank's oldest daughter also testified that Frank's family had told him that defendant was arrested while Frank was hospitalized.

¶ 15 On December 5, 2005, Terry Holloway[2] spoke with the police and an assistant state's attorney about what she knew regarding Godha's murder. The State Attorney's Office provided hotel accommodations, money for food, and helped relocate Terry because she had

[2] Terry was engaged to and living with defendant's uncle Carlos Tyler at the time of the robbery.

expressed concern for her life. Terry agreed to testify on behalf of the state and received immunity for her cooperation.

¶ 16 On the night of the murder, Carlos Tyler had been on house arrest awaiting trial. Sometime afterwards, Carlos was taken off house arrest and brought to jail. On December 6, 2005, Carlos spoke with an assistant state's attorney and a detective about what he knew regarding Godha's murder. Carlos admitted he was using crack cocaine in the days leading up to the murder, and that he had been convicted of three burglaries, two robberies and one possession of a stolen motor vehicle. Carlos agreed to cooperate and to testify in exchange for immunity.

¶ 17 At trial, the State called Frank, Terry, Carlos and Darion as its four occurrence witnesses.

¶ 18 Terry testified that a week or two before Thanksgiving, she and defendant went to Frank's store, and defendant and Godha argued over lottery tickets. Terry stated that, as they were leaving the store, defendant was angry and said "he was going to get that bitch." Terry also testified that the day before the robbery, the defendant went to Carlos and Terry's apartment and told them he did not like Frank or his daughter, and that he was going to rob Frank and "kill this bitch." Carlos testified that he and his little brother then tried to talk the defendant out of his plan.

¶ 19 The following afternoon, defendant returned to Carlos' apartment looking for a "throwaway"[3] and black shoe polish. Carlos did not provide the defendant with a gun, and Terry testified that they no longer had any black shoe polish, so defendant left.

¶ 20 Defendant returned within the hour and asked Carlos to paint his face with black shoe polish, but Carlos refused. Carlos testified that Terry helped paint the defendant's face but

[3] Carlos explained that a "throwaway" is a gun used in a robbery and subsequently disposed of.

stopped after Carlos objected. Terry agreed that Carlos told her to stop but testified that she did not. Carlos testified that before the defendant left the apartment again, the defendant asked Terry for a jacket. Terry testified that defendant asked Tyrone for a throwaway gun and subsequently left when no one gave him one. She also testified that she gave her coat to the defendant when he returned to the apartment, and afterwards, the defendant and Darion got into a truck and left.

¶ 21 Frank testified, through an Arabic interpreter, that he, his daughter Godha, and another employee were working at the store at 8:00 p.m., when two men entered the store. His daughter was behind the counter and Frank was sitting in the back of the store, about 25 feet from the door. The first person to enter the store approached Frank and shot him in the chest. The second person stood by the door. The shooter had black paint on his face and was screaming, though Frank could not understand him. Frank testified he recognized the shooter because he had come into the store several times a day for the last three or four years. Frank became dizzy and started seeing double. The shooter jumped over the counter and approached Godha. Frank did not see what happened next because he passed out. When asked if he could identify the defendant as the shooter in open court, he replied that he was unable to. Frank, who was 70, explained that "My vision is weak. I can't tell everybody, but it is weak…I can't really concentrate from far."

¶ 22 Darion testified Robert Hill was the owner and driver of the truck. Hill parked his truck down the street from Frank's store and asked for Darion's .380 pistol. Hill then instructed Darion to go see who was inside of Frank's store. Darion reported that Frank, a young lady, and an unidentified man were present in the store. Hill instructed Darion to return to the store and make sure no one else was inside. As Darion walked through the alley, he noticed

defendant was behind him. Darion entered the store and went to the counter where Godha was. Darion saw defendant enter the store and shoot in Frank's direction. Darion testified that he ran out of the store, but reopened the door to see Frank on the ground and defendant with a gun reaching over the counter. Darion then ran back to the truck and heard a few gunshots. Darion testified that the defendant returned a few minutes later carrying the cash register drawer.

¶ 23 Terry testified that about 15-20 minutes after she saw the defendant and Darion leave, the defendant, Hill, and Darion returned to the apartment with a cash register drawer wrapped in the coat she had given the defendant. Both Carlos and Terry testified defendant still had shoe polish on his face when he returned. Carlos testified that he saw defendant, Hill and Darion trying to tear open the cash register drawer. Carlos testified he opened the register drawer with a screw driver. Defendant then split the money between himself, Darion, and Hill; he also gave Carlos and Terry about $25 each. Darion testified that he then left, but noticed the gun on the banister and took it as he was leaving

¶ 24 Terry testified that she, Carlos, and defendant then smoked some crack. Both Terry and Carlos testified that defendant stated he shot Frank and Godha. Defendant later asked Carlos to get rid of the jackets and the register drawer and then left. Carlos collected the items and threw them in the flea market dumpster behind the apartment.

¶ 25 At trial, the parties stipulated that Anne Stevenson, an expert in the field of fingerprint analysis and comparison, examined the eight latent prints recovered from the crime scene as well as the two discharged cartridge cases. In her expert opinion, she concluded there were no latent prints on the recovered items suitable for comparison. Caryn Tucker, an expert in the field of firearms identification, examined the two recovered .380 cartridge cases as well

as the fired bullet jacket fragment. She testified that, in her expert opinion, the two discharged cartridge cases were fired from the same firearm, and the bullet jacket fragment was consistent with a .380/38 caliber bullet jack fragment.

¶ 26 At closing argument, defenses counsel argued that defendant was not the shooter but "like a prop in a play" who was used as a "scapegoat" by is his accomplices. Counsel argued that if the jury believed defendant was the shooter, it should find defendant not guilty by reason of insanity. In response, the prosecutor characterized defendant as a "cold-hearted, vicious killer." The prosecutor also criticized the defense's theory of the case and argued that defendant was asking the jury to accept his stories and lies and was asking that the jury let him "walk out this door as a free man."

¶ 27 The jury found defendant guilty of murder. Following the denial of defendant's motion for a new trial, the case proceeded to sentencing. Taking into account defendant's prior double murder conviction from November 6, 1989, the trial court sentenced defendant to natural life imprisonment. Defendant now appeals.

¶ 28 III. ANALYSIS

¶ 29 A. Invocation of Right to Counsel

¶ 30 In reviewing a trial court’s ruling on a motion to suppress evidence, we apply a two-part standard of review. *People v. Timmsen*, 2016 IL 118181, ¶ 11. First, we give great deference to the trial court's factual findings when ruling on a motion to suppress evidence and will reverse the court's ruling only if the findings are against the manifest weight of the evidence. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Second, we review *de novo* the trial court's ultimate legal conclusion as to whether suppression is warranted. *Timmsen*, 2016 IL 118181, ¶ 11.

¶ 31 In this case, the specific police interrogation at issue was recorded and there is no factual dispute regarding the words defendant used and the manner in which he spoke them during the interrogation. The sole issue here is whether the defendant's words constituted an unequivocal request for counsel. Therefore, our analysis focus on the correctness of the trial court's legal conclusion that the defendant's incriminating statements were not taken in violation of his fifth amendment right to counsel. See, e.g., *People v. Gaytan*, 2015 IL 1116233, ¶ 19.

¶ 32 Defendant's first contention on appeal is that, during the November 28, 2005, interview with Detective Kimble, the Robbins police violated his sixth amendment right to counsel when the police continued to interrogate him after he expressed his desire to speak with an attorney.

¶ 33 Under *Miranda v. Arizona*, 384 U.S. 436 (1966), and as a means to protect the fifth amendment right against self-incrimination, an individual subjected to custodial interrogation or under the imminent threat of interrogation is entitled to have retained or appointed counsel present during the questioning. *People v. Harris*, 2012 IL App 100678, ¶ 69 (citing *Miranda*, 384 U.S. at 444–45; *People v. Schuning*, 399 Ill. App. 3d 1073, 1081–82 (2010)). If the accused requests counsel at any time during the interview, she cannot be subject to further questioning until a lawyer has been made available or the individual reinitiates conversation. *Id.* (citing *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981); *In re Christopher K.*, 217 Ill. 2d 348, 376 (2005)). The purpose of this bright-line rule is to prevent police from either deliberately or unintentionally persuading the accused to incriminate himself notwithstanding his earlier request for counsel's assistance. *Smith v. Illinois*, 469 U.S. 91, 98 (1984); see also *Davis v. United States*, 512 U.S. 452, 458 (1994) (the right to counsel is

designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights).

¶ 34 "In applying this rigid prophylactic rule developed in *Edwards,* courts must determine whether the accused actually invoked her right to counsel." *Harris*, 2012 IL App 100678 ¶ 69 (citing *Davis,* 512 U.S. 452 at 458; *In re Christopher K.,* 217 Ill. 2d at 376.) This is an objective inquiry, which at a minimum requires some statement that reasonably can be construed as an expression of a desire for counsel. *Id.* (citing *Davis*, 512 U.S. at 459; *In re Christopher K.,* 217 Ill. 2d at 378). A trial court may consider the proximity between the *Miranda* warnings and the purported invocation of the right to counsel in determining how a reasonable officer in the circumstances would have understood the suspect's statement. *In re Christopher K.*, 217 Ill. 2d at 381. The primary focus of the inquiry, however, should remain on the nature of the actual statement at issue. *Id.* A reference to an attorney that is ambiguous or equivocal, according to a reasonable officer in the circumstances, does not require cessation of questioning. *Davis*, 512 U.S. at 459 (finding "maybe I should talk to a lawyer" to be an ambiguous invocation); see also *In re Christopher K.*, 217 Ill. 2d at 378-81. However, "the defendant need not articulate his desire in the manner of a Harvard linguist, but he must articulate his desire in a clear enough manner that a reasonable officer in the circumstances would understand the statement to be a request for an attorney." *Schuning*, 399 Ill. App. 3d at 1082.

¶ 35 Here, the State claims that defendant did not unambiguously request counsel until his third interrogation. Specifically, the State argues defendant's purported invocation was ambiguous and was "phrased as a question rather than a direct statement of intent or a request." We disagree.

¶ 36 We reject the State's suggestion that defendant's invocation was ambiguous because it was structured as a question rather than as an affirmative statement. Several jurisdictions, including our own, have observed that defendants may invoke their right to counsel by using a question rather than an affirmative statement. See, *e.g.*, *People v. Harris*, 2012 IL App 100678, ¶ 17 (finding "is it possible if I can uh—have a few days to get an attorney" to be an unambiguous request); see also *People v. Howerton*, 335 Ill. App. 3d 1023, 1026 (2003)(holding "Well, can I have a lawyer then?" was a valid request invoking defendant's right to counsel); *United States v. Lee*, 413 F.3d 622, 625 (7th Cir. 2005) (holding "Can I have a lawyer?" was sufficient to invoke his right to counsel); *State v. Barber*, 197 Ga. App. 353, (1990) (acknowledging the police terminated the interrogation when defendant asked "I can't get no lawyer?"). We find defendant's request, coupled with the surrounding circumstances, could only be reasonably interpreted as an unambiguous request for counsel.

¶ 37 Defendant was first interrogated on November 27, 2005. Prior to questioning, defendant was read his *Miranda* rights from a preprinted form. He was presented with the form for review, indicated he understood his rights and signed the waiver. The next day, defendant was interrogated again. The initial exchange occurred much the same way as it had the day before. Defendant was reread his rights from the same preprinted form and was asked to sign the waiver; however, this time defendant expressed apprehension before signing. Detective Kimble proceeded to reassure defendant that the circumstances were the same as they had been the day before, but rather than acquiesce, defendant immediately asked "I can't get no lawyer?" Detective Kimble responded, "You---I mean if you want a lawyer, yeah, but we talking. I mean that's just all the things I asked you to do. Same as yesterday, we're talking. Yesterday." Defendant then signed the waiver.

¶ 38 On appeal, neither party disputes whether defendant understood his *Miranda* warnings. Detective Kimble testified that defendant never appeared to be confused during any of the interrogations. He also testified that he believed defendant understood his *Miranda* warnings and that defendant had acknowledged his understanding. It is clear that a defendant familiar with the waiver form, who was not confused and who had indicated he understood his rights, was in fact invoking his right to counsel by asking "I can't get no lawyer?" Defendant's request came seconds after being read his *Miranda* rights and immediately before signing a form waiving those rights. See *In re Christopher K.*, 217 Ill. 2d at 381 (holding a trial court may consider the proximity between the *Miranda* warnings and the purported invocation of the right to counsel in determining how a reasonable officer in the circumstances would have understood the suspect's statement); see also *People v. Schuning,* 399 Ill. App. 3d at 1086-90 (where the court considered the circumstances in which the invocation was made to determine whether defendant's request was unequivocal).

¶ 39 Moreover, the detective's cryptic response, and his attempt to dissuade defendant from invoking his rights, indicate he understood defendant's intentions. The detective responded to defendant's request in the affirmative. He then proceeded to dissuade defendant from invoking his right to counsel by implying counsel was unnecessary as they were "just talking" and that the circumstances were the same as they had been the day before when defendant waived his right to counsel. This is the conduct the right to counsel is designed to prevent. See *Smith v. Illinois,* 469 U.S. at 98; see also *Davis v. United States,* 512 U.S.at 458. Once defendant requested an attorney, questioning should have ceased until counsel was made available or defendant reinitiated contact with the police. See *Edwards,* 451 U.S. at 484–85.

¶ 40 We find misplaced the State's reliance on *In re Christopher K*, 217 Ill. 2d 348 (2005), *People v. Oaks*, 169 Ill. 2d 409 (1996), *People v. Quevedo*, 403 Ill. App. 3d 282 (2010), and *People v. Evans*, 125 Ill. 2d 50, 75 (1988). In *Christopher K*., the defendant attempted to invoke his right to counsel by asking "Do I need a lawyer?" 217 Ill. 2d at 383. There, the court compared the language in defendant's purported invocation to the language used by the defendant in *Oaks*. *Id.* The court noted that the two invocations, "Do I need a lawyer?" and "Should I see a lawyer", were virtually identical. *Id.* Consequently, the supreme court in *Christopher K* concluded, as it also did in *Oaks*, that the defendant was asking for advice rather than making an assertion of his desire for counsel. *Id.* Unlike in *Christopher K* and *Oaks*, the defendant did not ask Detective Kimble whether he thought he needed a lawyer or if he should see a lawyer; defendant did not ask him for advice at all. Rather, he requested counsel be present before signing the preprinted form waiving his *Miranda* rights.

¶ 41 Moreover, the rulings in *Quevedo* and *Evans* are similarly distinguishable. In both cases, the defendants interrupted detectives in the middle of reading *Miranda* rights for clarification purposes. *People v. Harris*, 2012 IL App 100678, ¶ 73. In *Evans*, the defendant stated: " 'We can take time for you to get a PD [public defender], right?' " *Id.* (quoting *Evans*, 125 Ill. 2d at 74). When the police officer responded that it would " 'take a little while,' " that questioning would stop, and that he would call the public defender, the defendant said, " '[n]o, go ahead.' " *Id.* In *Quevedo*, after a series of lengthy exchanges between the police and defendant clarifying the right to counsel, defendant stated: " '[u]hhhh-huh. Then we're still going to wait until the attorney arrives,' " and later, " 'can the attorney come right now? Right this minute?' " *Harris*, 2012 IL App 100678, ¶ 73 (quoting *Quevedo*, 403 Ill. App. 3d at 293. The police responded that an attorney was not available that night but that defendant

could request counsel and end the conversation at any time. *Id.* Defendant then stated, " '[n]o, then let's do it like you say. I'll answer what-what you guys ask me.' " *Id*. In both cases, the courts determined that the defendants did not make unambiguous requests for counsel but, rather, were merely inquiring after the availability of a lawyer. *Id.*; see *Evans*, 125 Ill. 2d at 75; see also *Quevedo*, 403 Ill. App. 3d at 293–94.

¶ 42 The only characteristic shared between defendant's invocation before us and those of the defendant's in *Quevedo* and *Evans*, is all three invocations take the form of a question; however, where courts have held the defendant was merely inquiring into the availability of counsel, the defendants made an express reference to time, which is lacking here.

¶ 43 We note the language defendant used in the present case is most similar to the defendant's language used in *People v. Howerton*, 335 Ill. App. 3d 1023, 1026 (2003). There, the reviewing court recognized that the query "Well, can I have a lawyer then?", was sufficient to invoke the defendant's fifth amendment right to counsel.

¶ 44 Aside from defendant's use of the double negative, the query "I can't get no lawyer?" is virtually identical to the query "Well, can I have a lawyer then?" See *Christopher K*, 217 Ill. 2d at 383 (noting defendant's invocation of "Do I need a lawyer?" was virtually identical to the defendant's invocation "Should I see a lawyer?" in *People v. Oaks*, 169 Ill. 2d 409 (1996)). Moreover, both invocations were made immediately after a police officer presented them with information implicating their *Miranda* rights. In *Howerton*, defendant was told by police he was being charged with the same offense as another suspect in the crime. 335 Ill. App. 3d at 1026. He immediately responded by saying "Well, can I have a lawyer then?" *Id.* Here, defendant invoked his right to counsel immediately after having his *Miranda* warnings read to him from a preprinted form. See *Christopher K*, 217 Ill. 2d at 381 (Holding a trial

court may consider the proximity between the *Miranda* warnings and the purported invocation of the right to counsel in determining how a reasonable officer in the circumstances would have understood the suspect's statement). Detective Kimble went through each of defendant's right and asked him whether he understood them. Once defendant verbally indicated he understood all of the *Miranda* warnings, Detective Kimble instructed defendant to sign the form acknowledging his understanding and affirming his willingness to speak with Detective Kimble unassisted by counsel. Defendant immediately responded "I can't get no lawyer?" Thus, considering defendant's words and the circumstances in which he used them, we conclude defendant made a sufficient invocation of his right to counsel.

¶ 45 We also reject the State's argument that the surrounding circumstances rebut defendant's claim that his statement was an articulation of a desire for counsel. Specifically, the State alleges that defendant's actions, following his request for counsel, rebut any inference that defendant was unwilling to proceed without an attorney present. It is well settled that an accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. *Smith*, 469 U.S. at 100. Further, when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. *Edwards*, 451 U.S. at 484.

¶ 46 We also agree with the defendant that the exception to the *Edwards* rule created by *Maryland v. Shatzer*, 559 U.S. 98, 110-11 (2010) is inapplicable to this case. In *Shatzer*, the United States Supreme Court held that police may reinitiate questioning with a suspect who

invoked his right to counsel at least 14 days after the suspect has been released from police custody. *Id.* The Supreme Court of Illinois has acknowledged that the potential for coercion exists during custody and lingers for 14 days beyond the custodial period. *Schuning*, 399 Ill. App. 3d at 1086. Defendant invoked his right to counsel on November 28, 2005, while in custody. That request was never honored. He was subsequently released and then arrested and interrogated eight days later. Under these facts, we cannot agree that the potential for coercion did not continue throughout the second interrogation, throughout the break in questioning, and throughout the third interrogation. *Id.* Therefore, considering the cases cited by defendant and *Shatzer's* instruction regarding the lingering effect of coercive environments, we agree with defendant that his request for an attorney, while in custody, sufficiently triggered *Edwards'* protection. *Id.*

¶ 47 B. Harmless Error

¶ 48 The State contends that even if the defendant's statements were taken in violation of his sixth amendment right to counsel, their admission into evidence was harmless beyond a reasonable doubt. We agree.

¶ 49 Confessions obtained in violation of the sixth amendment right to counsel are involuntary confessions. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); see also *People v. Harris*, 2012 IL App 100678, ¶ 75. The admission of an involuntary statement or confession is a constitutional violation subject to harmless error review. *People v. Mitchell*, 152 Ill. 2d 274, 327 (1992). "Because constitutional rights as enunciated in *Miranda* are in issue, for this error to be harmless, it would have to be harmless beyond a reasonable doubt." *People v. Fort*, 2014 IL App 120037, ¶ 19 (quoting *People* v. *Szerletich*, 86 Ill. App. 3d 1121, 1129 (1980)). An error is considered harmless where the reviewing court can conclude that absent

the error the outcome of the trial would not have been different. *Neder v. United States*, 527 U.S. 1, 18 (1999); *People v. Burnfield*, 295 Ill. App. 3d 256, 263 (1998).

¶ 50 In the present case, the State argues that absent the admission of the involuntary confession, the outcome of the trial would not have been different because the evidence of defendant's guilt was overwhelming. The record demonstrates that the prosecution presented four occurrence witnesses, Frank, Darion, Carlos and Terry. Frank testified that the man who shot him was the defendant. Frank testified he recognized the defendant because he had been coming into his store several times a day for the last three to four years, and the defendant's mother and grandmother lived next door to Frank's store. Frank also testified that, at the time he was shot, the shooter was four to five feet away from him and had black paint on his face. Further, Frank positively identified the defendant out of a lineup. A single witness's identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Moreover, Darion, Carlos and Terry corroborated Frank's testimony. All three testified that the defendant had black paint on his face. Darion testified he saw defendant shoot in Frank's direction and that defendant, gun in hand, was reaching over the counter where Godha was. Frank testified that after defendant shot him in the chest, defendant jumped over the service counter and went towards Ghoda. Further, Darion testified that he had given the defendant his .380 caliber gun to commit the robbery, which was consistent with the expert ballistics testimony regarding the shell casings recovered at the crime scene.

¶ 51 Consequently, the State has met its burden by demonstrating beyond a reasonable doubt that the admission of the involuntary confession was harmless in light of the overwhelming evidence of defendant's guilt.

¶ 52 C. Other Crimes Evidence

¶ 53 Defendant argues that the trial court erred by allowing certain unredacted portions of the videos of defendant's interrogations to be played in open court, which permitted the jury to hear other crimes evidence about defendant's previous incarceration for double murder, which defendant claims amounted to plain error and him being denied a fair trial.

¶ 54 In support of his argument, defendant points to five instances where he believes the jury should not have been permitted to hear evidence of his other crimes. During the first interrogation, Detective Gleason states, "Like Sergeant Kimble said you been down that road before. I'm sure you've been down it many times (inaudible) cold blooded shit, cold blooded shit." Later in that interrogation, Detective Kimble envisions a hypothetical conversation between Darion and defendant in which Darion threatens defendant by telling him, "I'm gonna send you back to the joint." Kimble then suggested that Darion placed the blame on defendant because he cannot take prison time, while defendant can take prison because he previously "took 16 years." Further, while describing past conflicts he had with Darion, defendant contrasts his behavior while serving "penitentiary time" with that of Darion. During the third interrogation, Kimble, believing that defendant was supplying cover for Darion and Rob, states, "I know you did a bit before and I know you just like, basically fuck this shit, I do this against but I ain't fitting to tell on nobody (inaudible) those niggers hold just as much responsibility as you."

¶ 55 The parties dispute whether the evidence of defendant's other crimes was erroneously admitted into evidence and properly preserved on appeal. However, even assuming *arguendo* that it was error to admit the other-crimes evidence, such error was harmless and does not require reversal in light of the competent evidence at trial which established defendant's guilt beyond a reasonable doubt. See *People v. Nieves*, 193 Ill. 2d 513, 530 (2000). The "improper introduction of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based upon its admission." *People v. Martin*, 2012 IL App 093506, ¶ 43 (citing *People v. Nieves*, 193 Ill. 2d at 530).

¶ 56 Here, the record indicates that the evidence of defendant's guilt, even without the other crimes evidence, was overwhelming. Both Frank and Darion testified that defendant was the shooter. Frank identified the defendant in a physical lineup and testified that defendant had black paint on his face during the robbery. See *People v. Petermon*, 2014 IL App 113536, ¶ 30 (where the identification of defendant constitutes the central question in a criminal prosecution, the testimony of even a single witness is sufficient to convict where the witness is credible and viewed the accused under conditions permitting a positive identification to be made). Darion, Carlos and Terry also testified that defendant had black paint on his face. Darion testified that defendant's face was painted during the commission of the robbery and Terry and Carlos testified that defendant's face was painted black in preparation for the robbery. Frank also testified that he was close to defendant when he shot him and that he knew who defendant was because defendant had come into his store several times a day for the past three to four years. Thus, based on the two separate eyewitness identifications of defendant as the shooter, and Terry and Carlos's corroborating testimonies, any error associated with the admission of the other crimes evidence was harmless. *Id.*

¶ 57 Alternatively, defendant argues that his trial counsel was ineffective for failing to object at trial to the admission of the unredacted portions of the videos of defendant's interrogations. To show ineffective assistance of counsel, a defendant must demonstrate that "his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Patterson,* 192 Ill. 2d 93, 107 (2000) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984). A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness. *Patterson,* 192 Ill. 2d at 107.Where a reviewing court finds that a defendant claiming ineffective assistance of counsel did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient. *People v. Bull,* 185 Ill. 2d 179, 203 (1998). Thus, since we have concluded that the admission of other-crimes evidence was harmless, defendant cannot demonstrate that he was prejudiced by his trial counsel's failure to object to its admission.

¶ 58 D. Improper Remarks During Closing Argument

¶ 59 Defendant contends the prosecutor made several improper remarks during closing and rebuttal arguments which deprived him of a fair trial. He alleges that the prosecutor disparaged the defense throughout rebuttal argument and improperly commented on the consequences of the jury's verdict, which mislead the jury by arguing that defendant would "walk out [the] door a free man" unless the jury found him guilty of first degree murder.

¶ 60 A prosecutor is given great latitude in making closing arguments, and the trial court's determination of the propriety of the argument will stand absent a clear abuse of

discretion. *People v. Cisewski*, 118 Ill. 2d 163, 175 (1987). In reviewing comments made at closing arguments, the reviewing court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them. *Nieves*, 193 Ill.2d at 533. Prosecutorial misconduct in closing argument is substantial and requires reversal if the improper remarks constituted a material factor in a defendant's conviction. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *Id.*

¶ 61 Defendant urges us to conclude that the sum of the prosecutor's alleged misconduct warrants this court granting him a new trial. However, even assuming *arguendo* that the prosecutor's comments were improper, we cannot say that the aggregate effect constituted either substantial prejudice or a material factor in defendant's conviction because, as we have previously concluded, the evidence of defendant's guilt was overwhelming. *People v. Hammonds*, 354 Ill. Dec. 70 (2011).

¶ 62 Accordingly, for the reasons set forth above, we affirm the judgment of the Circuit Court of Cook County.

¶ 63 Affirmed.