2017 IL App (1st) 143420-U

FIRST DIVISION
August 28, 2017

No. 1-14-3420

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court of
	) Cook County, Criminal Division
Plaintiff-Appellee,	)
	)
v.	) No. 13 CR 6527-01
	)
DONALD LARKINS,	) Honorable Brian K. Flaherty,
	) Judge Presiding
Defendant-Appellant.	)

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it denied defendant's motion to suppress the identification. Defendant's sixth amendment right to counsel was not triggered prior to, or during defendant's appearance in a lineup. The trial court did not abuse its discretion when admitting into evidence an image of defendant's van on a Twitter page.

¶ 2 Following a bench trial, defendant Donald Larkins was found guilty of two counts of aggravated battery and two counts of aggravated discharge of a firearm and sentenced to concurrent terms of 12 years in prison. On appeal, defendant argues that: (1) he was denied his sixth amendment right to counsel during the lineup; (2) the court improperly allowed the State to

introduce hearsay evidence depriving defendant of his right to a fair trial. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with twelve counts of attempt first degree murder, two counts of aggravated battery, two counts of aggravated discharge of a firearm, and one count of aggravated fleeing and eluding a peace officer following the events that took place on February 1, 2013, when two victims, Quentin Martin and Demetria Garner, were shot and sustained injuries.

¶ 5 Prior to his trial, defendant filed a motion to suppress the identification testimony based on the alleged violation of his right to counsel. Defendant argued that he was denied his request to have retained counsel present during his lineup identification. During the hearing on the motion to suppress, defense counsel stated the following:

> "After [defendant] was arrested, after I voluntarily dropped him off to [sic] the police station, what I did was I informed the police officers if there was going to be a lineup or photo array they should be [sic] call me. I wanted to be present. And I called throughout the day on the 27th asking is there anything new, anything different, even in the middle of the night, anything different, Detective Wilkins is who I spoke with, they [sic] told me no.
>
> The next thing I know, I spoke with my client, and he informed me that he was placed in a lineup and that he asked for his lawyer, because that was what I told him before I left if anything occurs, you let me know you need your counsel, and I did again tell the police officers.

> Well, they put him in a lineup anyway. I wasn't present even though he was requesting my presence ***."

Defense counsel further stated that a police officer indicated that defendant was not free to leave and was under arrest.

¶ 6 The trial court indicated that it assumed, for purposes of the motion, that everything counsel said regarding his absence was true, but denied defendant's motion holding that defendant's right to counsel did not attach at the pre-indictment lineup and, therefore, there was no violation of defendant's right to counsel.

¶ 7 In relevant part, the following evidence was presented at defendant's trial. On February 1, 2013, at approximately 1:00 a.m., Gladys Smith, Demetria Garner, Andrea Taylor, "Raven" and several other friends were at Adrianna's night club located at 2024 West 163rd Street in Markham. They were having drinks in the seating area of the club when a fight broke out on the other side of the nightclub. Smith and Garner decided to leave the nightclub. As they were walking out the front entrance of the club and onto the walkway, five or six gunshots were fired outside. Smith ducked down and ran to the back of the parking lot behind the building. After hearing the second gunshot, Garner realized that she had been shot and fell to the ground. When the gunshots ceased, Smith ran back and found Garner on the ground approximately two cars length away from the front door of the nightclub. Garner had been shot in the left knee and was bleeding. Smith stayed with Garner until the ambulance arrived.

¶ 8 Andrea Taylor testified that she followed Smith and Garner out of the club, while Raven remained inside. As she was exiting the club, she observed defendant step in front of her. She saw defendant pull out a gun and point it toward the parking lot. Defendant was approximately three feet away from her. Taylor stated that defendant was wearing a hoodie or "a coat or

something." Taylor attempted to go back inside, but she was denied re-entry into the club without an additional cover charge. When she walked back outside, she did not see defendant. Taylor observed Smith screaming that Garner was shot. She then attempted to go inside the club and get Raven, but was again denied entry, so she knocked on the glass door and was able to tell Raven what had happened.

¶ 9 Quentin Martin testified that he was at Adrianna's nightclub on the night in question. While leaving the club he heard several gunshots. He had been shot in his forearm and fell on the ground, and then he heard a couple of more gunshots. Once the shooting stopped, he asked for help and was transported to the hospital.

¶ 10 After the shots were fired, a van fled from the parking lot driving erratically. A number of police cars chased the van northbound on Dixie Highway. The speeding van proceeded onto Interstate 57 North until it exited at 127th Street. Three police vehicles attempted to curb the van by activating emergency lights, but the van continued to speed through the residential area until it crashed. The vehicles were traveling on gravel streets and the van's wheels rose up gravel and dust which affected visibility. Officer Anderson testified that he could not see who was driving because the van had tinted windows, but did observe several individuals inside the van. Once the dust cleared, Officer Anderson observed multiple doors of the van open, but did not see anybody exiting the vehicle. The officers conducted a canvas of the area, searching several yards. Officer Brooks recovered a blue Pelle Pelle coat which exhibited the insignia "Big Don Ent" in front of a residence driveway located in the 2500 block of Wood Street, a half block away from where the van crashed.

¶ 11 Detective Wilkins, a trained evidence technician at the time, took photographs of the scene where the shootings took place and collected four shell casings in front of Adrianna's

parking lot. The blue Pelle Pelle coat was inventoried and sent to the crime lab for testing. Ellen Chapman, a forensic scientist, performed the testing on the coat and concluded that the left and right cuffs of the jacket contained a minimum of three tri-component gunshot residue particles. Chapman determined that the right cuff contacted a primer gunshot residue particle or was in the vicinity of a discharged firearm. Similarly, the left cuff contacted gunshot residue or was in the vicinity of a discharged firearm. Patricia Wallace, an expert in the field of firearm examination testified that the four .45 auto fire cartridges recovered from the scene of the shootings were fired from the same firearm.

¶ 12 On February 27, 2013, pursuant to Detective Wilkins' request, defendant went to the police station. No arrest warrant had been filed at that time. Defendant was placed in a lineup. Taylor identified defendant in the lineup as the person she observed pull out a gun at Adrianna's. Taylor also identified defendant from a photo array.

¶ 13 While investigating the case, Officer Francisco spoke with Shakita Jones and viewed Jones' page on Instagram where he observed a photo of Jones with defendant. In that photo, defendant was wearing a navy blue and khaki sports jacket, which included the visible writing "BIG DON," "N" and "T." Officer Francisco also located a photo of a van similar to the one they were pursuing on a Twitter page for "Big Don Ent."

¶ 14 On February 2, 2013, Assistant State's Attorney Jennifer Keating spoke with John Robinson at the Markham police department. In a written statement, Robinson stated that defendant lived across the street from him, worked as a promoter at clubs and often got him free entrance into clubs. On February 1, 2013, at approximately 12:15 a.m., he met defendant at Adrianna's. Defendant got Robinson into the club for free. Robinson identified a photo of defendant's coat bearing defendant's name "Don" on the front of it and told ASA Keating that

defendant was wearing that coat at the club that night. The photograph identified by Robinson depicted a blue coat displaying the insignia "Big Don Ent." Robinson stated that defendant was there with two other men, Darius Sims and "Weezy." Robinson was at the club for two hours before defendant got into a fight and punched a black male with dread locks in his hair. Robinson told ASA Keating that defendant's blue GMC van was parked in the VIP section of the parking lot near the side door. Robinson indicated that defendant removed a black semi-automatic handgun from the van and told Robinson that he should leave. Robinson walked to his car which was parked in the regular lot, and after getting into his car, he heard three or four gunshots. Robinson observed people running in the parking lot and defendant's van take off. He followed defendant's van on I-57 until it exited at 127th Street.

¶ 15 As Robinson was driving on I-57 he observed a Markham police car following defendant's van. Robinson called defendant and asked him what happened and if he had shot someone. Robinson told ASA Keating that defendant told him that "he fanned their ass," which he understood to mean he shot someone. Robinson was on the phone with defendant when the police vehicles were following defendant and activated their lights. Robinson then drove home.

¶ 16 Robinson also told ASA Keating that approximately ten minutes later, he received a call from defendant, and defendant told him that he was hiding out. Defendant told Robinson to check defendant's abandoned van and see if the police officers were there. Robinson left his house and went to the location where defendant told him the van would be. Robinson called defendant and defendant told him to go look nearby for his coat and gun. Robinson did not see either object.

¶ 17 On March 7, 2013, Robinson testified before the grand jury consistently with his statement made to the police. During the testimony, Robinson identified a photograph of

defendant's blue Pelle Pelle jacket which defendant was wearing on February 1, 2013. Robinson testified that he knew it was defendant's jacket because it had "Big Don Ent" on it, which was defendant's nickname.

¶ 18 At defendant's trial, Robinson testified that he spoke with defendant at the nightclub but did not remember if defendant was involved in the commotion inside the club. Robinson testified that he did not recall the events during or after the shootings because he could not remember that night and "[i]t's all a blur." Robinson described the coat recovered by police as familiar, that he had previously seen defendant wear, but did not recall if defendant was wearing a coat the night of the shootings. Robinson acknowledged that defendant drove a blue GMC van with rims, but testified he did not recall which vehicle defendant drove that night. Defendant's statements made to the police and his testimony before the grand jury were introduced into evidence.

¶ 19 The DNA testing conducted on the jacket was compared with defendant's profile and defendant could not be excluded as a possible contributor to the major DNA profile identified.

¶ 20 Daniel Alexander testified as a defense witness. On February 1, 2013, he was working as a security guard at Adrianna's. A fight ensued in the back of the club and he was instructed to escort people out of the club. Alexander testified that he saw defendant, whom he had known for a few months as a promoter at work, standing in the line to re-enter the club wearing a white t-shirt and blue jeans. He identified defendant's Pelle Pelle coat but stated that defendant was not wearing that jacket when he saw him at the club that night. Alexander testified that he heard two or three gunshots outside, the line at the door dispersed, and defendant was in line with approximately 40-50 people when he heard the gunfire. He stated that he did not see defendant with a weapon.

¶ 21 Alexander acknowledged that he did not provide this information to the police after defendant went to jail. He also failed to provide this information when State's Attorney Investigator Murtaugh contacted him in July 2014. Instead, Alexander contacted defendant's attorney through defendant's friend just a few months prior to trial, 18 months after the shooting. According to Alexander, he decided to testify because he heard defendant was incarcerated and his conscience dictated him to come forward with the information.

¶ 22 The trial court found defendant guilty of two counts of aggravated battery and aggravated discharge of a firearm. Defendant filed a motion for a new trial, which was denied. The court sentenced defendant to concurrent terms of 12 years in prison. This appeal follows.

¶ 23 ANALYSIS

¶ 24 Motion to Suppress the Identification

¶ 25 Defendant argues that the trial court erred in denying his motion to suppress the identification when the police violated his due process rights by denying defense counsel's access to the lineup held in this case. Defendant acknowledges that a defendant's right to counsel does not attach at the pre-indictment lineup, but claims that the circumstances in the instant case are "different" because defense counsel was already representing defendant in the case and counsel informed the police to notify him of any new proceedings in defendant's case. Defendant maintains that the police failed to inform counsel of the lineup proceedings in violation of defendant's due process rights.

¶ 26 In reviewing an order denying a defendant's motion to suppress evidence mixed questions of law and fact are presented. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). Factual findings made by the trial court will be upheld unless they are against the manifest weight of the

evidence while the trial court's application of the facts to the issues presented and the ultimate question of whether the evidence should be suppressed is subject to *de novo* review. *Id.*

¶ 27 Prior to the initiation of adversary proceedings, a person does not have a constitutional right to counsel when he takes part in a lineup. *People v. Bolden*, 197 Ill. 2d 166, 175–76, 756 (2001). The sixth amendment right to counsel does not attach until the initiation of adversary proceedings against the person, whether by formal charge, preliminary hearing, indictment, information, or arraignment. *Id.* citing *Moran v. Burbine*, 475 U.S. 412, 429-30 (1986); *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972); *United States v. Wade*, 388 U.S. 218, 226-27 (1967); *People v. Garrett*, 179 Ill. 2d 239, 247-48 (1997). An arrest by itself without any formal charge does not trigger the right to counsel. *People v. Williams*, 244 Ill. App. 2d 5, 9 (1991) citing *United States v. Gouveia*, 467 U.S. 180, 189-90 (1984).

¶ 28 Here, we agree with the trial court's determination that defendant's right to counsel did not attach when the lineup was conducted. No adversarial judicial proceedings were initiated against defendant, and defendant did not appear before a judge prior to the lineup. The record indicates that defendant appeared at the station on February 27, 2013, absent an arrest warrant or complaints being filed. The following day, prior to any charges being filed, Andrea Taylor identified defendant in a lineup. Only on March 20, 2013, a criminal complaint was filed against defendant. Accordingly, the sixth amendment right to counsel did not attach at defendant's lineup.

¶ 29 Nonetheless, defendant argues that a different rule should apply in this case because he was already represented by counsel and because the police ignored defense counsel's request to be notified of any changes in defendant's case. Defendant argues that the police conduct in the instant case amounts to "a federal constitutional error" citing *Brewer v. Williams*, 430 U.S. 387

(1977) and *Mapp v. Ohio*, 367 U.S. 643 (1961). But neither *Brewer*, 430 U.S. 387 (holding that use of defendant's admission that he killed his abductee was in violation of defendant's sixth amendment right to counsel where the admission was made after defendant was indicted for abducting the victim and before defendant's attorney met with defendant), or *Mapp*, 367 U.S. 643 (holding that evidence resulting from an illegal search and seizure was inadmissible against the defendant at either a state or federal trial) addressed the sixth amendment right to counsel at lineup and, therefore, are inapposite to the instant case. In fact *Brewer* recognized that "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time judicial proceedings have been initiated against him." *Brewer*, 430 U.S. at 388.

¶ 30 We find *People v. Bolden*, 197 Ill. 2d 166 (2001) instructive here. In *Bolden*, the defendant and his counsel went to the police station in response to the detectives' inquiries regarding the defendant's participation in the shootings where two people were killed and one was injured. *Id.* at 167. Defendant was not under arrest and had not been charged in the case. *Id.* at 169. The defendant agreed to take part in a lineup and his attorney discussed with detectives to allow him to be present during the lineup. *Id.* at 171. Ultimately, the police officers refused to permit the defendant's lawyer to observe the witness during the lineup. *Id.* Defendant filed a motion to suppress the identification arguing, among other reasons, that a suspect who is represented by counsel has a right, as a matter of due process, to have counsel present during the identification process. *Id.* The trial court denied defendant's motion to suppress and the appellate court affirmed. *Id.* at 174.

¶ 31 Our supreme court held that, although defendant was already represented by counsel and the detectives initially agreed to permit counsel to observe the lineup, but later denied counsel's

request, no violation of due process rights occurred. *Id.* at 177. Based on long establish precedent the court held that, prior to the initiation of adversary proceedings, a person does not have a constitutional right to counsel when taking part in a lineup. *Id.* Just as in *Bolden*, here, defendant's right to counsel did not attach until adversarial proceedings were initiated against him even if he was already represented by counsel at the time of the lineup. At the time of the lineup, no adversarial proceedings were initiated against defendant, and therefore, defendant's constitutional right to counsel was not violated. The trial court properly denied defendant's motion to suppress the identification.

¶ 32 Defendant argues next that the intentional and deliberate conduct of the police violated Illinois law, 725 ILCS 5/103-4 (West 2012), when the police unreasonably denied defense counsel's request to be notified of the identification procedures, and that it was reasonable for defendant to request the presence of his attorney at the police station for the lineup. Section 103-4 states:

> "Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable. When any such person is about to be moved beyond the limits of this State under any pretense whatever the person to be moved shall be entitled to a reasonable delay for the purpose of obtaining counsel and of availing himself of the laws of this State for the security of personal liberty." 725 ILCS 5/103-4 (West 2012).

¶ 33 Defendant acknowledges that he did not argue this issue in his motion to suppress or include it in the posttrial motion, but asks us to review it under plain error. Defendant also asks us to review the forfeited error on the basis that he was denied effective assistance of counsel as a result of his counsel's failure to preserve the error for review.

¶ 34 Under plain error review, we will grant relief to a defendant in either of two circumstances: (1) if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) if the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Before addressing either of those prongs of the plain-error doctrine, however, we must determine whether a "clear or obvious" error occurred at all. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009).

¶ 35 Defendant cites *Escobedo v. Illinois*, 378 U.S. 478 (1964) for the argument that defense counsel was improperly denied access during the lineup procedure. In *Escobedo v. Illinois*, 378 U.S. 478 (1964) the police refused a suspect's request to speak with his attorney during a pre-indictment interrogation and the police failed to advise the defendant that he had the right to remain silent. *Id.* at 491. The court in *Escobedo* held that the police conduct violated the suspect's right to the assistance of counsel under the sixth amendment. *Id.*

¶ 36 Unlike *Escobedo*, defendant here was not interrogated by the police and was not refused his right "to consult" with his attorney. The record indicates that defendant consulted with defendant prior to leaving the station, and defendant's only complaint was that defense counsel was not physically present for the lineup. Unlike *Escobedo* where counsel was refused access to defendant while under interrogation and the police failed to advise the defendant about his rights

to remain silent, here, defense counsel was not denied access to the lineup when counsel was not even present at the station when the lineup was conducted.

¶ 37 Furthermore, section 103-4 addresses the "right to consult" with an attorney while in custody and does not supersede clear precedent that the sixth amendment right to counsel does not attach at the lineup conducted prior to the "the initiation of adversary, judicial criminal proceedings * * * by way of formal charge, preliminary hearing, indictment, information, or arraignment." *People v. Lewis*, 2015 IL App (1st) 130171, ¶ 32. Accordingly, the court did not err in denying defendant's motion to suppress and we find no error to justify the application of the plain error doctrine.

¶ 38 Defendant also argues that counsel performed deficiently by failing to raise the violation of section 103-4 in the motion to suppress or in the posttrial motion. To be entitled to relief for ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that he suffered prejudice as a result. *People v. Scott*, 2015 IL App (1st) 131503, ¶ 27. Unless the defendant makes both showings under *Strickland*, we cannot conclude that he received ineffective assistance. See *People v. Munson*, 171 Ill. 2d 158, 184 (1996). As noted above, defendant's argument under section 103-4 has no merit and, therefore, defendant cannot show that counsel's performance was unreasonable for failing to raise it. Defendant is not entitled to relief under his claim of ineffective assistance of counsel.

¶ 39 The Hearsay Evidence Claim

¶ 40 Defendant argues next that the trial court improperly allowed hearsay evidence depicting a photograph of a Twitter page for "Big Don Ent" in violation of defendant's sixth amendment right to confrontation. Defendant acknowledges that he forfeited this claim as he failed to raise

an objection to the admission of this evidence during trial or in his posttrial motion but asks us to review it for plain error. Defendant also alleges that he received ineffective assistance of counsel because trial counsel did not properly preserve this error for review when failing to object and to include it in the posttrial motion.

¶ 41 The admission of evidence is within the sound discretion of the trial court and its ruling should not be reversed absent a clear showing of abuse of that discretion. *People v. DeSomer*, 2013 IL App (2d) 110663, ¶ 12. An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 42 The doctrine of plain error may be invoked where the evidence is closely balanced or where the error is of such magnitude that the accused is denied a fair trial. *People v. Westefer*, 169 Ill. App. 3d 59, 64 (1988). Before addressing either of these prongs of the plain-error doctrine, however, we must determine whether a "clear or obvious" error occurred at all. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). We find no error.

¶ 43 Hearsay is defined in evidence as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801 (eff. Jan. 1, 2011); see *People v. Sorrels*, 389 Ill. App. 3d 547, 553 (2009). Unless an exception applies, hearsay is inadmissible. *Id.* When an out-of-court statement is offered for some other purpose than to establish the truth of the matter asserted, the statement is not hearsay and is admissible. *People v. Kliner*, 185 Ill. 2d 81, 150 (1998).

¶ 44 Here, the image from the Twitter account for "Big Don Ent" containing a picture of a van listed for sale was not admitted to prove that the vehicle was for sale, but rather was introduced to show that the photograph of the van was depicted on the Twitter page for "Big Don Ent,"

defendant's name and entertainment business. Officer Francisco referring to the exhibit testified to the name "Big Don Ent" indicated at the top of the Twitter account page and stated that the photograph of the van on the Twitter page was "similar to the one [police] were pursuing." The information listed on the exhibit regarding the sale of the van was not offered for the truth of the matter asserted and was never addressed by Officer Francisco. The photo merely corroborated the Officer's testimony that the abandoned van which fled the shooting scene was driven by defendant. Therefore, since the exhibit did not contain an out-of-court statement offered for the truth of the matter asserted, does not constitute inadmissible hearsay, and the confrontation clause is not implicated.

¶ 45 Furthermore, even assuming *arguendo* that the court improperly admitted the photograph, defendant did not argue that the evidence was closely balanced, and therefore has waived plain review error review under the first prong. *People v. Hillier*, 237 Ill. 2d 539, 549 (2010) (noting that a defendant cannot meet his burden of persuasion on either prong of the plain error when failing to argue the elements of plain error). Under the second prong, the defendant must prove there was plain error and that the error was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187. Defendant's second prong claim consists of a single sentence asking us to employ the plain error rule because the "rights invoked here are substantial, and involve the Confrontation Clause, and the right to a fair trial."

¶ 46 We find defendant's argument unpersuasive. Confrontation errors, although constitutional violations, do not automatically warrant reversal. *People v. Johnson*, 116 Ill. 2d 13, 28 (1987). The admission of hearsay evidence is harmless error if there is no reasonable possibility the verdict would have been different had the hearsay been excluded. *People v.*

McCoy, 238 Ill. App. 3d 240, 249 (1992) (finding admission of hearsay by a police officer that included the substance of a conversation was harmless error). Thus, even were we to credit defendant's argument that the photograph constituted hearsay evidence, we conclude that the admission of this evidence was harmless error because there is no reasonable possibility that the result of defendant's trial would have differed had this evidence been excluded.

¶ 47 The evidence presented at trial against defendant was substantial. Eyewitness Andrea Taylor identified defendant in a photo array, in a lineup, and at trial as the person who held a gun and pointed it toward the parking lot following several gunshots that injured the two victims. Officer Anderson was on patrol nearby, heard a "popping noise" and observed a large van drive erratically from the parking lot. A police chase ensued. Although the officers did not observe the occupants of the van exit due to the poor visibility from the dust, they did canvas in the nearby area. A blue Pelle Pelle coat customized with "Big Don Ent," an insignia depicting defendant's nickname and entertainment business, was recovered from a residence half a block from the van. DNA analysis performed on the coat revealed that defendant could not be excluded as a possible contributor to the major male DNA profile identified. A gunshot residue analysis determined that the right and the left cuffs of the coat contacted gunshot residue or were in the environment of a discharged firearm.

¶ 48 Robinson made a written statement to the police implicating defendant in the crimes and testified consistently before the grand jury. Robinson stated that defendant was wearing the blue Pelle Pelle coat that displayed a "Big Don Ent" insignia on the night of the shooting and that defendant got into a fight inside the club. Robinson also stated that after they were thrown out of the club, defendant removed a black semi-automatic handgun from his blue GMC van that was parked in the VIP section of the club. Robinson indicated that he spoke with defendant on the

phone, and defendant acknowledged that he "fanned their ass" meaning he shot someone. Defendant instructed him to recover the gun and the coat that defendant left in the vicinity of the abandoned van. Although at trial Robinson attempted to recant his testimony before the grand jury and the statements made to the police, the trial court rejected the recanting testimony as unreliable.

¶ 49 Similarly, the trial court rejected the testimony of defense witness Daniel Alexander, as incredible. Alexander testified that he observed defendant, who was wearing a white t-shirt and blue jeans standing in line to enter the club at the time he heard the gunshots. But Alexander did not come forward with the information until 18 months after the shooting although the police had previously contacted him regarding the events that took place that night. Based on this record, there was substantial evidence supporting defendant's conviction, and even if the court had excluded the photograph, there is no reasonable probability that the outcome of defendant's trial would have been different. Additionally, the Twitter photograph at issue was never mentioned during closing arguments, and the trial court did not reference it during its finding of defendant's guilt. In sum, even assuming that an error occurred, the error would be harmless.

¶ 50 Finally, in a further attempt to circumvent the forfeiture rule, in two sentences without argument or analysis, defendant contends that trial counsel was ineffective for failing to object to the introduction of the photograph. To be entitled to relief for ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that he suffered prejudice as a result. *People v. Scott,* 2015 IL App (1st) 131503, ¶ 27. As noted above, the evidence of defendant's guilt was substantial and defendant failed to establish that but for counsel's failure to object to the introduction of the evidence, the outcome of his trial would have been different. Therefore, defendant is not entitled to relief

under his claim of ineffective assistance of counsel when he did not establish that he was prejudiced by counsel's alleged deficient performance.

¶ 51 CONCLUSION

¶ 52 Based on the foregoing, we affirm.

¶ 53 Affirmed.