2014 IL App (2d) 120817-U
No. 2-12-0817
Order filed March 18, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-383
DION SPEARS,	)	Honorable Patricia Piper Golden,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions of and sentences for first-degree murder and armed violence were affirmed where (1) the State proved defendant's guilt of first-degree murder beyond a reasonable doubt; (2) the court's error in denying defendant's motion to sever charges for trial was harmless; (3) the court's error in admitting certain portions of Randy Clark's recorded statement was harmless; and (4) the court did not abuse its discretion in admitting Stacy Luellen's testimony. Defendant's conviction of and sentence for unlawful possession of a controlled substance was vacated where it violated one-act, one-crime principles.

¶ 2 Defendant, Dion Spears, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2008)), armed violence (720 ILCS 5/33A-2(a) (West 2008)), and unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)) following a jury trial. He received

consecutive prison sentences of 57 years for first-degree murder and 16 years for armed violence, and a concurrent prison sentence of 3 years for possession of a controlled substance. Defendant appeals, arguing that (1) the State failed to prove him guilty beyond a reasonable doubt of first-degree murder; (2) the court erred in denying his motion to sever the first-degree murder charges from the remaining charges; (3) the court erred in admitting Randy Clark's audio-recorded statement pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2008)); (4) the court erred in admitting Stacy Luellen's testimony that defendant said he "stay[ed] double breasted," meaning he carried two guns; and (5) defendant's conviction of unlawful possession of a controlled substance violated one-act, one-crime principles and must be vacated. For the following reasons, we affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 During the early morning hours of February 3, 2008, outside of La Movida banquet hall on Route 31 in Elgin, Illinois, Derrick Bey was shot and killed. Moments after the shooting, a security guard confiscated a Colt revolver from the shooter. Defendant, who allegedly was the shooter, then attempted to run across Route 31 from the La Movida parking lot and was struck by a car. After loading defendant into an ambulance, paramedics discovered a 9-millimeter handgun in defendant's pocket. At the hospital, defendant regurgitated a baggie containing cocaine.

¶ 5 On February 13, 2008, the State charged defendant by complaint with, among other things, armed violence, in that defendant knowingly possessed less than 15 grams of cocaine while armed with the 9-millimeter handgun, and unlawful possession of a controlled substance, being less than 15 grams of cocaine. The police did not arrest defendant, who was in a

rehabilitation facility, unable to speak as he recovered from the traumatic brain injury he sustained when the car struck him. After defendant regained the ability to speak, police arrested him on March 24, 2009.

¶ 6 On April 22, 2009, a grand jury indicted defendant on the following six counts: first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)), in that defendant shot Bey with the Colt revolver with intent to kill (count I); first-degree murder (720 ILCS 5/9-1(a)(2) (West 2008)), in that defendant shot Bey with the Colt revolver knowing that his acts created a strong probability of death or great bodily harm (count II); armed violence (count III); aggravated unlawful use of a weapon by a felon (count IV); unlawful possession of a weapon by a felon (count V); and unlawful possession of a controlled substance (count VI).

¶ 7 A. Motion to Dismiss for Speedy-Trial Violation

¶ 8 Defendant moved to dismiss the first-degree murder counts from the indictment on the basis that the State violated the speedy-trial statute (725 ILCS 5/103-5(b) (West 2008)). Defendant argued that the grand jury indicted him for first-degree murder more than 120 days after he was taken into custody, which defendant alleged occurred on February 3, 2008. Defendant further argued that the first-degree murder charges were subject to compulsory joinder with the original charges in the complaint because they arose from the same facts. The State responded that the first-degree murder charges were "completely separated" factually from the original charges, because the shooting occurred outside of La Movida, while authorities did not discover defendant's 9-millimeter handgun or cocaine (which formed the bases for the original charges) until after he ran from the scene, was struck by a car, and was loaded into an ambulance. The court denied defendant's motion, finding that the State had not taken defendant

into custody until March 24, 2009, less than 30 days before the grand jury indicted him for first-degree murder.

¶ 9 B. Motion to Sever First-Degree Murder Counts

¶ 10 Defendant then moved, pursuant to section 114-8 of the Code (725 ILCS 5/114-8 (West 2008)), to sever the first-degree murder charges from the remaining charges in the indictment. Defendant maintained that, if all of the charges were joined for trial, prejudice would result. Defendant argued that the evidence required to prove the first-degree murder charges did not overlap with the evidence required to prove the remaining charges, all of which related to the 9-millimeter handgun and cocaine found on defendant after he fled the scene and the car struck him. The State did not contest severing the charges of aggravated unlawful use of a weapon by a felon (count IV) and unlawful possession of a weapon by a felon (count V). However, the State argued that armed violence predicated on unlawful possession of a controlled substance (count III) and unlawful possession of a controlled substance (count VI) should not be severed from the first-degree murder charges, because the events giving rise to the charges occurred only minutes apart and the witnesses would overlap. The State further argued that it would be presenting a witness who overheard defendant say that he "stay[ed] double breasted," which meant he carried two guns. The State argued that this testimony would corroborate that defendant had two guns on the night of the shooting. The court severed counts IV and V, which the State later nol-prossed, but it denied the motion to sever counts III (armed violence) and VI (unlawful possession of a controlled substance) from the first-degree murder charges. The court reasoned that the State planned to use the "double breasted" statement to circumstantially prove defendant's identity and that he possessed both the Colt revolver, which he used to murder Bey, and the 9-millimeter handgun, which formed the basis for the armed violence charge.

¶ 11 C. Motion *in Limine* to Bar "Double Breasted" Statement

¶ 12 Defendant filed a motion *in limine* to bar the State from introducing Stacy Luellen's testimony that defendant said he stays "double breasted." Defendant argued that the statement was hearsay and that Luellen's testimony that "double breasted" meant that defendant carried two guns was inadmissible lay witness opinion testimony. The court deferred ruling on the motion *in limine* until *voir dire* could be conducted outside the jury's presence to determine the basis for Luellen's understanding of what the term "double breasted" meant.

¶ 13 D. Trial

¶ 14 At trial, Crystal Coleman-Smith testified that she was married to Bey's cousin, Ramon Smith. On the night of the shooting, she went to a birthday party at La Movida. When the party was ending, she went outside and backed her Hummer into an area of the parking lot near the door of La Movida, which faced Route 31. Crystal stood outside of her vehicle waiting for Ramon and Bey. Ramon left the party with a friend named Robert West, who backed his Cadillac sedan into a spot on the driver's side of the Hummer. Bey exited the party, yelling about someone who had been "talking crap to him." Crystal and Ramon tried to calm Bey down.

¶ 15 Meanwhile, according to Crystal, a black Hyundai SUV backed into a spot on the driver's side of the Cadillac. Two men exited the SUV and stood on the passenger side. Crystal testified that Bey approached the two men and began arguing with them. She saw Bey arguing with a light-skinned man who was standing by the SUV's rear passenger-side door, which was open. Crystal testified that she and Ramon then pulled Bey back and tried to get him into the Hummer. At that point, two women exited the party and began arguing with Bey. One of the women tried to punch Bey, and a fight broke out among Crystal, Bey, and the two women. One of the bouncers tried to break up the fight. As Crystal struggled with the two women and the bouncer,

she saw Bey approach the SUV for a second time. She then heard two shots fired. She saw Bey walk away from the SUV and collapse next to the Cadillac.

¶ 16 On cross-examination, Crystal testified that the bouncer who was breaking up the fight between her and the two women pulled her toward the Cadillac. The bouncer let Crystal go, and she was walking toward her Hummer when she heard the two gunshots. Crystal saw Bey collapse on the Cadillac's driver's side near the rear of the car. The bouncers then began pepper-spraying the crowd, including Crystal. Crystal testified that the pepper-spray caused her vision to be blurred.

¶ 17 On redirect examination, Crystal testified that the light-skinned male with whom Bey was arguing was defendant. Before she heard the two gunshots, she saw Bey arguing face-to-face with defendant. She had seen defendant before. Crystal admitted that she never told police that defendant was the man with whom Bey was arguing.

¶ 18 Randy Clark testified that he did not remember being at La Movida on February 3, 2008. He also did not remember visiting the Elgin police department on February 4, 2008, or giving an audio-recorded statement. When asked if he knew Dion Spears, Clark testified, "That's him right there." When asked to identify a piece of clothing Spears was wearing, Clark said, "A gray hoodie," which a man in the gallery was wearing. Clark then testified, "That's the only Dion I know." Clark said he did not know defendant and had never met him. Clark testified that he had criminal convictions for "[a]ll types of stuff." The only specific offense he could remember was domestic battery. The State introduced into evidence certified copies of four of Clark's prior convictions.

¶ 19 Ubaldo Martinez testified that he worked part-time as a security officer at banquet halls. For approximately eight years, he had served as an auxiliary police officer for the City of

Kankakee. He and his brother, Joseph Martinez, were hired to provide security for the party at La Movida. Because the facility lacked sufficient bartenders, the owner of La Movida asked Joseph to tend bar that evening, which he did. There were 200 to 300 people at the party.

¶ 20 Ubaldo testified that, shortly before 2 a.m., when the party was ending, he assisted in breaking up a fight in the banquet hall between two males. He escorted one of the men, whom he later identified as Bey, out of the banquet hall. He saw Bey walk to a Hummer in the parking lot, which then pulled up next to the banquet hall entrance. According to Ubaldo, Bey exited the Hummer and began arguing with the other man who had been involved in the fight, as well as some women. Ubaldo tried to break up the argument. Ubaldo then witnessed another man, who had not been part of the argument, walk up and punch Bey in the face. Ubaldo testified that the man who punched Bey then walked to a black SUV that was parked parallel to Route 31 and sat in the passenger seat. According to Ubaldo, the black SUV had two doors.

¶ 21 Ubaldo testified that Bey then ran to the black SUV and began punching the man sitting in the passenger seat. According to Ubaldo, when Bey opened the SUV's passenger door to continue punching the man, Ubaldo "bear hugged" Bey and "swung him away from the vehicle." Ubaldo testified that, at the moment he "went to swing [Bey] around," he heard two gunshots and saw a flash coming from the passenger area of the vehicle. Ubaldo released Bey, who stumbled and then collapsed. Ubaldo testified that he then looked at the man sitting in the passenger seat and saw that he was holding a gun. According to Ubaldo, he reached into the vehicle and grabbed the gun from the man. Ubaldo told his brother to "grab that guy," and his brother began struggling with the man.

¶ 22 Ubaldo testified that the driver of the black SUV began driving the vehicle, so Ubaldo pointed his own weapon at the driver, ordering him to stop. The driver complied and, at some

point while Joseph continued struggling with the shooter, exited the vehicle. Ubaldo assisted his brother, who was still struggling to subdue the man, by "dry stun[ning]" the man with his taser. According to Ubaldo, the man then broke free from his brother and "basically just jumped through the vehicle," exiting through the driver-side door, which was open. Ubaldo testified that the man then attempted to run across Route 31 and was struck by a northbound vehicle. Ubaldo called 911 and stood by the man until police arrived minutes later. When asked if there was any question in his mind whether the man from whom he grabbed the gun was the same man who was struck by the car on Route 31, Ubaldo testified, "No question." When asked if he could identify the man as defendant, Ubaldo said he could not.

¶ 23 On cross-examination, Ubaldo testified that there were five or six security guards for the party. Ubaldo testified that the man with whom Bey was fighting inside the banquet hall just before 2 a.m. was wearing a white t-shirt with blue writing on it. Ubaldo further testified that Bey was in the passenger seat of the Hummer when it drove to the front of the banquet hall. According to Ubaldo, a female was driving the Hummer. Ubaldo testified that Bey and "some girls" exited the Hummer and began fighting with the man in the white t-shirt and a number of other women. Ubaldo estimated that there were 30 to 40 people outside of the banquet hall. Someone then pepper-sprayed the crowd, although Ubaldo did not believe that it was a security guard who did so. Ubaldo testified that he saw the black SUV back into a spot near the banquet hall entrance and saw a man exit the SUV, walk up to Bey, and punch him in the face three times. The man returned to the SUV and closed the door. According to Ubaldo, Bey began punching the man through the open window of the passenger door. It was when Bey opened the passenger door that Ubaldo "bear hugged" him. Ubaldo testified that he turned to his left when

he swung Bey away from the SUV, so that Bey's right side was facing the vehicle. Ubaldo testified that he heard the two gunshots at "the same time that [he] turned him."

¶ 24 Ubaldo further testified that, after his brother pulled the man out of the vehicle and began struggling with him on the ground, two other men dressed in black remained in the SUV. The man with whom his brother was struggling was wearing a black hooded sweatshirt, which came off when he broke free and ran into Route 31. Ubaldo admitted that, when police showed him a line-up that supposedly contained a picture of defendant, Ubaldo identified a different man as the person from whom he grabbed the gun.

¶ 25 Ubaldo was impeached with statements he gave to police on the night of the shooting. Ubaldo recalled telling police that, when he heard the two gunshots, "we were fighting with that, um, male to pull him off of him, [and] he just kind of got up on his own, you know, quit fighting, you know, walked away." Ubaldo also recalled telling police that, after "we fell out of the vehicle with him *** he pretty much struggled and got away. He took off running, um, around the backside of the vehicle I believe."

¶ 26 Elgin police officer Donald Thiel testified that, when he was dispatched to La Movida shortly after 2 a.m. on February 3, 2008, he arrived to find another officer standing with Ubaldo near defendant, who was lying in the street. Ubaldo handed Officer Thiel a Colt .32 revolver with black electrical tape on the handle.

¶ 27 Elgin police officer Joseph Sostre testified that, on February 3, 2008, his sergeant assigned him to accompany defendant in the ambulance to the hospital. Officer Sostre made an in-court identification of defendant. He testified that, shortly after paramedics placed defendant in the ambulance, they were cutting his jeans off and located a 9-millimeter handgun wrapped in a blue bandana. Officer Sostre gave the handgun to an evidence technician. The officer further

testified that, while he was sitting with defendant in one of the emergency rooms at the hospital, defendant began coughing and regurgitated a small plastic baggie containing a white substance that appeared to be cocaine.

¶ 28 Elgin police officer Miriam Uribe testified that, on February 3, 2008, she went to the emergency room at Sherman Hospital and tested defendant's hands for gunshot residue. She also collected defendant's clothes. Officer Uribe testified that she collected a black hooded sweatshirt, a blue long-sleeved t-shirt, a multicolored shirt, a pair of boxer shorts, a blue tank top, and a pair of jeans with a belt and a phone case. Officer Uribe testified that she later performed gunshot residue tests on Ubaldo and Joseph Martinez. On cross-examination, Officer Uribe testified that she did not physically take the clothes off of defendant. She merely collected the clothes that someone else had removed from defendant and placed in bags. On redirect examination, Officer Uribe testified that she did not collect any shoes from defendant.

¶ 29 Robert Berk testified that he is employed as a trace evidence analyst for the Illinois State Police. Berk testified that he analyzed the gunshot residue kits performed on defendant, Bey, Ubaldo, and Joseph. According to Berk, a positive test result requires locating three or more gunshot residue particles. Berk testified that the residue kit from Bey located 50 particles on each hand, which is the maximum number of particles the instrument will detect. The residue kit from defendant located 7 particles on his right hand and 11 particles on his left hand. The residue kits from Ubaldo and Joseph were negative for the presence of gunshot residue. Berk testified that the high number of particles on Bey's hands was consistent with being down range of a discharged firearm, because the majority of the gunshot residue travels down range. Berk further testified that the lower number of particles on defendant's hands was consistent with having fired a gun. According to Berk, the negative test results from Ubaldo and Joseph meant

either that they were not in the vicinity of the discharged firearm or the gunshot residue was removed by activity.

¶ 30 On cross-examination, Berk testified that, if a person had his hands around Bey at the time Bey was shot, he would expect that person to have some gunshot residue on his hands. Berk further testified that hand-washing would remove gunshot residue. Berk testified that he would not expect gunshot residue to stay on a person's hands for more than six hours.

¶ 31 Illinois State Police forensic scientist Patrick Powers testified that he examined the Colt revolver and the 9-millimeter pistol. He located no latent fingerprints on the weapons or on the ammunition or shell casings recovered from the weapons.

¶ 32 Russell McClain testified that he was a forensic scientist for the Illinois State Police. McClain testified that he analyzed the Colt revolver, the 9-millimeter handgun, and the bullet recovered from Bey's body. According to McClain, there were two expended cartridges in the Colt revolver. McClain further testified that the bullet recovered from Bey's body was fired from the Colt revolver.

¶ 33 Elgin police detective Brian Gorcowski testified that he and Detective Wolek took an audio-recorded statement from Randy Clark at the Elgin police department at 12:16 a.m. on February 4, 2008. Gorcowski identified People's Exhibit 54 as a CD containing a recording of the statement and People's Exhibit 53 as a transcript of the statement. The court admitted Exhibits 53 and 54 over defendant's objection and allowed the recorded statement to be played for the jury.

¶ 34 On the recording, Clark stated that, about a week prior to the party at La Movida, "Little Derrick"[1] and a girl named Sharday got into a fight, and Little Derrick broke her hand. At the

[1] Crystal testified that Bey's nickname was "Little D."

party at La Movida, Little Derrick was arguing with Sharday and her friend Marjuan. The fight moved outside to the parking lot but was broken up. Little Derrick was "charged up" and ready to "fight anybody," and he approached the passenger side of a dark-colored SUV. Little Derrick "had some words" with "Little Dion." Clark then heard "some like [*sic*] little firecrack," and saw Little Derrick fall into someone's hands. Clark stated that Little Dion then "took off running" and was hit by a car, but Clark "didn't see all that." Clark "heard it from somebody else today." Clark stated that he knew it was Little Dion in the backseat of the SUV, because Clark walked by the SUV on the way to the parking lot and saw inside. According to Clark, the SUV's doors were closed, but the front windows were open. Clark said that Star Morrison was driving the SUV, and he thought that Kevin Coley, who was wearing a white and blue t-shirt, was in the front passenger seat. Clark further stated that, two weekends before the party at La Movida, he was at Little Dion's "baby mama's house," and Little Dion showed him a .32 revolver with black tape on the handle that Little Dion said he had purchased for $40. According to Clark, the gun was distinctive, because it had a button on the side to open the cylinder that held the bullets. Clark identified the Colt revolver used in the shooting as the gun Little Dion showed him. Clark said that Little Dion told Clark he owned a 9-millimeter handgun, but Clark had never seen it.

¶ 35 After the statement was played for the jury, defendant moved for a mistrial. He argued that Clark's professed inability to recall giving an audio-recorded statement was insufficient grounds for impeachment with the statement. Defendant further argued that, in order to properly impeach Clark with his recorded statement, the State needed to confront Clark with the specific subject matter of the statement, which it had not done. The court denied defendant's motion.

¶ 36 The State next called Stacy Luellen. Outside of the presence of the jury, Luellen testified that he understood the term "double breasted" to mean that a person possessed two of something, like a gun. Luellen testified that the term was "just how people talk" in his neighborhood and that it was a term that his friends used. The court indicated that it would allow Luellen to testify.

¶ 37 In the jury's presence, Luellen testified he entered into an agreement with the State's Attorney to testify in defendant's case. In exchange, the State's Attorney agreed to recommend a one-year sentence on a pending criminal-damage-to-property charge and to dismiss a charge of intimidating a witness. Luellen testified that, on either February 1 or 2, 2008, he was with defendant and a group of people. According to Luellen, defendant had a cast on his hand, and the group was making jokes that defendant would not be able to defend himself in a fight. Luellen testified that defendant said, " 'I'll pop one of you niggers.' " According to Luellen, someone in the group then said, " '[Y]ou ain't got any,' " to which defendant replied, " '[W]ell, I stay double breasted.' " Luellen testified that "double breasted" meant that defendant carried two guns. Luellen testified that defendant's statement "was a joke" and that he did not see defendant with any guns.

¶ 38 Elgin police officer James Bailey testified that he was dispatched to La Movida at 2:51 a.m. on February 3, 2008. He assisted another officer in the collection and preservation of evidence. Officer Bailey testified that he recovered a size 8, right, brown Nike shoe from the parking lot near the passenger side of the Hummer. He further testified that he recovered the matching shoe in the northbound lanes of Route 31 directly in front of La Movida.

¶ 39 Dr. Larry Blum testified that he was an independent forensic pathologist who performed autopsies. Dr. Blum testified that Dr. Brian Mitchell, the pathologist who performed Bey's autopsy, had passed away. Dr. Blum had reviewed Dr. Mitchell's report, records, and

photographs from Bey's autopsy. According to Dr. Blum, Bey received two gunshot wounds—one to the left upper chest and one to the left groin area. Bey's clothing and skin had visible gun powder residue around the left upper chest wound. The bullet entered Bey's left chest and traveled down and to the right, piercing Bey's heart and liver before lodging under the skin on the right side of the chest. Dr. Blum testified that the bullet fired into Bey's groin travelled down and to the right and exited Bey's body.

¶ 40 On cross-examination, Dr. Blum testified that the left upper chest wound was "an inch or so" to the left of Bey's left nipple. Dr. Blum further testified that the bullet entered through the fourth rib on the left side and lodged near the ninth rib on the right side, which was lower than the fourth rib. When asked whether the bullet's trajectory would have been possible had Bey's right side been facing the shooter, Dr. Blum testified, "No." On redirect examination, Dr. Blum agreed that the trajectory of the bullet would have been possible had Bey been bent over or squatting, with his left side facing the shooter.

¶ 41 The State's final witness, Joseph Martinez, testified that he was an officer for the Kankakee police department. Joseph testified that, on February 2, 2008, he tended bar at a party at La Movida, where he sometimes provided off-duty security. After last call, Joseph was standing in front of La Movida when he heard two or three gunshots. He then saw his brother, Ubaldo, approaching a dark-colored SUV with his gun drawn. According to Joseph, the SUV's passenger door was open. Joseph ran over to assist his brother, who was issuing commands to someone in the vehicle to drop something and exit the vehicle. Joseph testified that the person in the passenger seat was not obeying his brother's commands, so he grabbed the man and pulled him out of the vehicle. Joseph turned the man around, pinned him against the passenger seat of the car, and tried to handcuff him. The man kept struggling and eventually broke free.

According to Joseph, the man exited the SUV's open driver-side door and ran into the street, where a car struck him. Joseph testified that the man was wearing jeans without a belt and that his pants were sliding down during the struggle, revealing blue boxer shorts. Joseph identified the blue boxer shorts that officers recovered from defendant as the boxer shorts the man was wearing. Joseph testified that, following the struggle, he ran into La Movida to retrieve his off-duty weapon, then he stood next to the man lying in the street until police arrived.

¶ 42 The State rested, and defendant rested after introducing two photographs into evidence. Both photographs were of the x-ray showing the bullet in the right side of Bey's chest.

¶ 43 The jury found defendant guilty on all counts. The jury further found that defendant personally discharged the firearm that proximately caused Bey's death. After the trial court sentenced defendant and denied his posttrial motion, defendant timely appealed.

¶ 44 II. ANALYSIS

¶ 45 Defendant raises five issues on appeal: (1) whether the State proved him guilty beyond a reasonable doubt of first-degree murder; (2) whether the court erred in denying his motion to sever the first-degree murder charges from the remaining charges; (3) whether the court erred in admitting Clark's audio-recorded statement pursuant to section 115-10.1 of the Code; (4) whether the court erred in admitting Luellen's testimony that defendant said he "stay[ed] double breasted," which meant he carried two guns; and (5) whether his conviction of unlawful possession of a controlled substance violated one-act, one-crime principles and must be vacated.

¶ 46 A. Sufficiency of the Evidence

¶ 47 Defendant contends that his conviction of first-degree murder was based on evidence that was inconsistent, improbable, and contrary to human experience and must be reversed. He cites

a number of instances of alleged conflicts or inconsistencies in the evidence to support his position, which we address in turn.

¶ 48 When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The reviewing court should not substitute its judgment for that of the trier of fact, who is responsible for weighing the evidence, assessing the credibility of witnesses, resolving conflicts in the evidence, and drawing reasonable inferences and conclusions from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). However, a reviewing court must set aside a defendant's conviction if a careful review of the evidence reveals that it was so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 49 Defendant argues that Crystal's account of the altercation between Bey and defendant conflicted with Ubaldo's account. Defendant points out that Crystal testified that Bey was arguing with two men outside of the black Hyundai SUV, that one of the men was defendant, and that Bey stood face-to-face with defendant in front of the SUV's open rear passenger-side door. Defendant points out that Ubaldo testified that Bey ran to the SUV and began punching a man through the open window of the SUV's front passenger door.

¶ 50 We disagree with defendant that Crystal's and Ubaldo's testimonies necessarily were in conflict. Crystal testified that she saw Bey approach the SUV and begin arguing face-to-face with defendant and another man; that she and her husband, Ramon, pulled Bey away from the

two men; and that a fight then broke out involving her, Bey, and two women. According to Crystal, Bey approached the SUV a second time while she continued fighting with the women. Crystal testified that a bouncer broke up the fight involving the two women and that, after the bouncer released her, she was walking toward her Hummer when she heard two gunshots. Ubaldo, on the other hand, testified that, while Bey was arguing with a man and "some girls," another man walked up and punched Bey three times in the face. Bey then ran to the SUV and began punching the man through the SUV's open passenger-side window.

¶ 51 Crystal's and Ubaldo's testimonies are easily reconciled. The face-to-face altercation between Bey and defendant that Crystal testified took place outside of the SUV's open rear passenger-side door occurred prior to the fight involving Crystal, Bey, and the two women. Ubaldo witnessed Bey punching the man through the open window of the SUV's front passenger door *after* the altercation involving Crystal, Bey, and the two women had already begun. At the time Ubaldo saw Bey punching the man in the SUV, Crystal was still involved in the altercation with the two women, which a bouncer was attempting to break up. Crystal testified that, while she was still struggling with the two women, she saw Bey return to the SUV. It is reasonable to infer that it was when Bey returned to the SUV the second time that Ubaldo witnessed him punching the man through the open passenger window. Crystal did not witness this altercation between Bey and defendant, because she was continuing to fight with the two women. Crystal testified that she was walking back to her Hummer (which meant her back was to the SUV) when she heard the two gunshots.

¶ 52 Defendant next asserts that Ubaldo's testimony that the gunshots came from inside the SUV as he was turning Bey's left side away from the SUV conflicted with Dr. Blum's testimony that the lethal bullet entered Bey's upper left chest and travelled to his lower right chest.

Defendant also cites Robert Berk's testimony that, if Ubaldo was holding Bey in a "bear hug" at the time the shots were fired, one would expect to find gunshot residue on Ubaldo's hands.

¶ 53 While we agree with defendant that there was some degree of conflict between Ubaldo's testimony and the evidence of the bullet's path in Bey's body, the conflict did not render the jury's conclusion that defendant shot Bey implausible or contrary to human experience, as defendant contends. Ubaldo testified that he heard two gunshots at the moment he "went to swing [Bey] around." On cross-examination, Ubaldo testified that he heard the two gunshots at "the same time that [he] turned him." Ubaldo's testimony left open the possibility that defendant fired the gunshots at the moment that Ubaldo began turning Bey to the left, but before Ubaldo actually had turned him to the left. Furthermore, Dr. Blum testified that the trajectory of the bullet would have been possible had Bey been bent over or squatting, with his left side facing the shooter. If Bey was leaning into the SUV punching defendant at the time Ubaldo "bear hugged" him, defendant could have fired the gun into Bey's upper left chest. Ubaldo's testimony also did not rule out the possibility that defendant reached out with the gun and fired it into Bey's upper left chest. As to the absence of gunshot residue on Ubaldo's hands, Berk testified that it could have been removed through hand washing. Any conflict between Ubaldo's testimony and the evidence of the bullet's path in Bey's body was for the jury to resolve and did not render its verdict unreasonable, improbable, or unsatisfactory so as to create a reasonable doubt of defendant's guilt.

¶ 54 Defendant also argues that Ubaldo testified that he saw Bey enter the Hummer and drive it to the front of La Movida, while Crystal testified that she drove the Hummer to the front of La Movida prior to Bey's exiting the banquet hall. This inconsistency is immaterial to defendant's conviction of first-degree murder, which required the State to prove that defendant shot Bey

without lawful justification and either intended to kill or do great bodily harm. 720 ILCS 5/9-1(a)(1), (2) (West 2008); *People v. Alvarez-Garcia*, 395 Ill. App. 3d 719, 732 (2009). Moreover, contrary to defendant's contention, Ubaldo testified that he saw a female drive the Hummer to the front of La Movida and saw Bey in the passenger seat.

¶ 55 Defendant contends that Ubaldo's testimony that he remained outside after escorting Bey to the parking lot conflicted with Joseph's testimony that, after security guards escorted two males out of the banquet hall following a fight just before 2 a.m., Ubaldo remained inside the building. Again, this inconsistency is immaterial to defendant's conviction of first-degree murder. Any inconsistency aside, Joseph testified that, shortly after he exited La Movida, he heard gunshots and saw Ubaldo approaching a dark SUV with his gun drawn, which corroborated Ubaldo's account of the shooting.

¶ 56 Defendant also contends that Ubaldo's testimony that there were three men wearing black in the SUV was inconsistent with Clark's statement and Joseph's testimony. Clark told police that Star Morrison, a female, was driving the SUV and that the SUV's passenger was wearing a white shirt with blue writing. Joseph testified that there were two men in the SUV, a driver and a passenger. He also testified that the man with whom he was struggling was wearing a black hooded sweatshirt. While we agree with defendant that there was some degree of inconsistency among these three accounts of who was in the vehicle and what they were wearing, this inconsistency was properly before the jury and did not render its verdict unreasonable, improbable, or unsatisfactory so as to create a reasonable doubt of defendant's guilt. This is especially true in light of Ubaldo's testimony that there was "no question" in his mind that the man from whom he grabbed the Colt revolver was the man who ran into Route 31 and was struck by a car. Furthermore, police recovered a black hooded sweatshirt belonging to defendant, and

Joseph identified the blue boxer shorts recovered from defendant as the ones he saw defendant wearing during the struggle in the SUV's passenger seat.

¶ 57 Defendant next contends that Ubaldo never was able to identify defendant as the shooter and even selected the wrong person in a photographic line-up following the incident. Again, this was a matter for the jury to consider in light of the other evidence. Although he did not identify defendant, Ubaldo testified that there was "no question" in his mind that the man from whom he grabbed the Colt revolver was the man who ran into Route 31 and was struck by a car. Moreover, there was substantial evidence corroborating Ubaldo's testimony, including the gunshot residue on defendant's hands, Robert Berk's testimony that the amount of gunshot residue found on defendant's hands was consistent with defendant being the shooter, and the evidence linking defendant to the Colt revolver.

¶ 58 Defendant contends that the physical evidence established that he was wearing a belt at the time of the shooting, which conflicted with Joseph's testimony that defendant's pants slid down during the struggle because he was not wearing a belt. Not only was this conflict in the evidence immaterial, but also it was properly before the jury, and it did not render the jury's verdict unreasonable, improbable, or unsatisfactory. Moreover, Joseph identified the blue boxer shorts recovered from defendant as the ones the man with whom he was struggling was wearing.

¶ 59 Defendant asserts that Ubaldo's testimony that he grabbed the Colt revolver from the shooter prior to drawing his own weapon was improbable. According to defendant, "[t]here was no need for Ubaldo to risk his own life to take the Colt from defendant." Defendant maintains that it would have been more reasonable for Ubaldo to draw his own weapon first. Once again, Ubaldo's testimony was evidence for the jury to weigh, and it did not render the jury's verdict unreasonable, improbable, or unsatisfactory. Further, we cannot agree with defendant that it was

unreasonable or improbable for Ubaldo, in the heat of the moment, to grab the Colt revolver from defendant prior to drawing his own weapon. Drawing his own weapon first may in fact have escalated the situation and put Ubaldo in greater danger of being shot.

¶ 60 Defendant also argues that Clark's statement and Luellen's testimony were not credible. However, credibility is a matter within the province of the jury and is not a proper basis for a reviewing court to reverse a defendant's conviction. *Sutherland*, 223 Ill. 2d at 242.

¶ 61 Defendant's final contention is that, because the 9-millimeter handgun was not defaced, "it makes little sense" for defendant to also carry a defaced Colt revolver. Defendant asks, "Why would defendant carry such a weapon?" Based on the evidence presented, a rational trier of fact could have found that defendant carried both weapons.

¶ 62 In sum, defendant has not shown that, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found him guilty of first-degree murder beyond a reasonable doubt.

¶ 63 B. Severance of First-Degree Murder Charges

¶ 64 Defendant contends that the trial court abused its discretion in denying his motion to sever the first-degree murder charges from the armed violence and unlawful possession of a controlled substance charges. Defendant maintains that the charges were not part of the "same comprehensive transaction" and that trying the charges together resulted in prejudice. Defendant argues that, had the trial court severed the charges, there was "a real possibility" that the jury would have acquitted him of murder. Defendant further contends that evidence of his possession of the 9-millimeter handgun and cocaine constituted other-crimes evidence that would not have been admissible in a separate trial on the first-degree murder charges.

¶ 65 Initially, defendant acknowledges that he did not specifically raise the issue of severance in his posttrial motion. Nevertheless, he contends that he raised it generally, when he argued that "[t]he fact that [defendant] allegedly possessed a firearm that was not the murder weapon should not have been introduced by the State, because it has nothing to do with the shooting of Derrick Bey and was unjustly prejudicial to the defendant." On appeal, the State does not argue that defendant forfeited the issue of severance by failing to raise it in his posttrial motion. Especially in light of the State's failure to address the issue, we agree with defendant that his general allegation in his posttrial motion was sufficient to preserve the issue. See *People v. Pasch*, 152 Ill. 2d 133, 168 (1992) (finding that the defendant had not waived an issue for purposes of appellate review where his allegation in his posttrial motion was "fairly general" but "sufficient to alert the court as to one of his reasons for requesting a new trial").

¶ 66 The State raises a different forfeiture argument. The State maintains that defendant forfeited the issue of severance, because, in his motion to dismiss the first-degree murder charges on speedy trial grounds, he argued that all of the charges in the indictment were subject to compulsory joinder, because they "arose from the same facts." In his motion to sever the first-degree murder charges from the remaining charges, by contrast, defendant argued that the charges were not part of the same comprehensive transaction. The State contends that defendant "should be barred now" from arguing on appeal that the first-degree murder charges were "completely separate" from the remaining charges.

¶ 67 We disagree with the State's forfeiture argument. Arguing that two or more charges are subject to compulsory joinder for purposes of a speedy-trial analysis does not preclude a defendant from later arguing that the same charges should be severed for trial. Even had defendant succeeded in arguing that the charges were subject to compulsory joinder, section

3-3(c) of the Criminal Code would have permitted the trial court "in the interest of justice" to sever the charges for trial. 720 ILCS 5/3-3(c) (West 2008). Furthermore, all of the cases the State cites in support of its forfeiture argument involve the doctrine of invited error, which does not apply here, given that the court never accepted defendant's position. See, *e.g.*, *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000) (noting that the rationale underlying the invited error doctrine is that "[i]t would be manifestly unfair to allow one party a second trial upon the basis of error which he injected into the proceedings" (internal quotation marks omitted)).

¶ 68 Defendant similarly argues that the State should be barred from arguing on appeal that the charges were part of the same comprehensive transaction, since the State argued in response to his speedy-trial motion that the charges were "completely separated" factually. Again, the issue of a speedy-trial violation was distinct from the issue of severance. Arguing that the charges were not subject to compulsory joinder did not bar the State from later arguing that the charges should be joined for trial. Moreover, because the trial court did not accept the State's position that the charges were completely separated (instead denying the speedy-trial motion based on the date defendant was taken into custody), the doctrine of invited error does not apply, and the State is not barred from arguing on appeal that the charges were part of the same comprehensive transaction for purposes of severance.

¶ 69 Turning to the merits of defendant's argument, section 114-7 of the Code permits a trial court to order two or more charges to be tried together if they could have been joined in a single charging instrument. 725 ILCS 5/114-7 (West 2008). Section 111-4 of the Code, in turn, provides that two or more offenses may be joined in a single charging instrument if the offenses are "based on the same act or on 2 or more acts which are part of the same comprehensive transaction." 725 ILCS 5/111-4(a) (West 2008). If it appears that the defendant would be

prejudiced by joining the charges for trial, however, a court may sever the charges. 725 ILCS 5/114-8 (West 2008); see also 720 ILCS 5/3-3(c) (West 2008) (permitting a court to sever charges for trial "in the interest of justice" even if the charges were joined in a single prosecution pursuant to the compulsory joinder statute). A trial court has substantial discretion in deciding whether to sever, and its decision will not be reversed absent an abuse of that discretion. *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 68. A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the trial court's view. *People v. Garcia-Cordova*, 2011 IL App (2d) 070550-B, ¶ 82.

¶ 70 Courts look to a number of factors to determine if two or more offenses were part of the "same comprehensive transaction" so as to be susceptible to joinder. *Anderson*, 2013 IL App (2d) 111183, ¶ 69. The factors include: the proximity in time and location of the offenses, the identity of evidence needed to demonstrate a link between the offenses, whether there was a common method in the offenses, and whether the same or similar evidence would establish the elements of the offenses. *Anderson*, 2013 IL App (2d) 111183, ¶ 69; *People v. Walston*, 386 Ill. App. 3d 598, 601 (2008). No one factor is controlling, and the decision to sever turns on the facts of each particular case. *People v. Patterson*, 245 Ill. App. 3d 586, 588 (1993).

¶ 71 The factor of the proximity in time and location of the offenses is "probably the most helpful." *Walston*, 386 Ill. App. 3d at 603. "[A]s events become separated by time and distance, the likelihood decreases that they may be considered part of the same comprehensive transaction." *Walston*, 386 Ill. App. 3d at 603. Defendant concedes that the offense of first-degree murder occurred "relatively close in time and location" to the offenses of armed violence and unlawful possession of a controlled substance. Indeed, because the 9-millimeter handgun and cocaine were recovered from defendant after he was rendered unconscious while fleeing the

scene of the shooting, it is practically indisputable that he possessed the firearm and drugs at the same time and in the same location that the shooting occurred. See *People v. Ott*, 237 Ill. App. 3d 119, 123 (1992) (affirming the joinder of charges where "the offenses occurred within hours of each other at the same location, and, in fact, defendant was committing the possession offense while the delivery offense occurred").

¶ 72 The factor of the identity of evidence needed to demonstrate a link between the offenses "asks not whether evidence of the two crimes is similar or *identical* but rather whether the court can *identify* evidence linking the crimes." (Emphases in original.) *Walston*, 386 Ill. App. 3d at 605. In *People v. Reynolds*, 116 Ill. App. 3d 328 (1983), for example, the appellate court affirmed the joinder of charges arising out of the robbery of a Burger King with charges arising out of the theft of a police squad car that occurred later the same day. *Reynolds*, 116 Ill. App. 3d at 334-35. While fleeing the Burger King, the defendant was pulled over for speeding. *Reynolds*, 116 Ill. App. 3d at 335. The defendant held the police officer at gunpoint and stole his squad car. *Reynolds*, 116 Ill. App. 3d at 335. Police later found in defendant's vehicle a Burger King cup, a hat, and a pair of sunglasses. *Reynolds*, 116 Ill. App. 3d at 335. In affirming the denial of the motion to sever, the appellate court reasoned that "[t]he second offense supplied evidence which linked the defendant with the hat, gun and sunglasses that the witnesses in the first offense described." *Reynolds*, 116 Ill. App. 3d at 335.

¶ 73 In contrast to the evidence that provided a strong link between the crimes in *Reynolds*, the evidence linking the crimes in *People v. Pullum*, 57 Ill. 2d 15 (1974), provided only a "thread of continuity." In *Pullum*, the defendant stole a Cadillac and 16 days later was found driving the Cadillac with marijuana in his possession. *Pullum*, 57 Ill. 2d at 16-17. The supreme court held that it was error not to sever the armed robbery charge, which arose out of the theft of the

Cadillac, from the possession-of-marijuana charge, because the "only thread of continuity between the two offenses [wa]s that the defendant was in possession of marijuana and the *** Cadillac at the time of his arrest." *Pullum*, 57 Ill. 2d at 18. Otherwise, the offenses were not "in any way connected." *Pullum*, 57 Ill. 2d at 18.

¶ 74 Similarly, in *People v. Fleming*, 121 Ill. App. 2d 97 (1970), the court held that it was error not to sever two theft charges for trial where the "only visible thread of continuity between the two offenses [wa]s that the same automobile played a role in each." *Fleming*, 121 Ill. App. 2d at 103. The court reasoned, "Such an incidental connection cannot satisfy the plain meaning of the *** statutory requirement that the separate offenses charged in a single indictment should arise out of the same 'comprehensive transaction.' " *Fleming*, 121 Ill. App. 2d at 103.

¶ 75 Here, the only evidence the trial court identified linking the first-degree murder offense to the armed violence and unlawful possession of a controlled substance offenses (both of which had possession of the cocaine as an element) was Luellen's testimony that, one or two days prior to the shooting, defendant said that he stayed "double breasted." While Luellen's testimony may have been circumstantial evidence that defendant owned or possessed both the 9-millimeter handgun that formed the basis for the armed violence charge and the Colt revolver used in Bey's murder, the testimony did not link the offenses in the sense of establishing that they were part of the same comprehensive transaction. Rather, defendant's common ownership of the 9-millimeter handgun and the Colt revolver merely was a "thread of continuity" among otherwise unrelated crimes. The 9-millimeter and the baggie of cocaine did not directly link defendant to Bey's shooting in the manner that the hat, gun, and sunglasses linked the defendant in *Reynolds* to the robbery of the Burger King. Other than defendant's common ownership of the two firearms, no other evidence linked the crimes.

¶ 76 The factor of whether there was a common method in the offenses "asks whether the offenses were part of a 'common scheme,' so that each of the offenses supplies a piece of a larger criminal endeavor of which the crime charged is only a portion." *Anderson*, 2013 IL App (2d) 111183, ¶ 72. Here, nothing suggested that the crimes were pieces of a larger criminal endeavor. Although police recovered the 9-millimeter handgun and the baggie of cocaine following defendant's flight from the scene of the murder, defendant's possession of those items was not an "outgrowth" of Bey's shooting, as the theft of the squad car was an "outgrowth" of the Burger King robbery in *Reynolds (Reynolds*, 116 Ill. App. 3d at 335). The crimes also did not spring from a common motive *(People v. Harmon*, 194 Ill. App. 3d 135, 140 (1990)), they were not part of "an overall plan" *(People v. Wells*, 184 Ill. App. 3d 925, 930 (1989)), and they were not part of an ongoing crime "spree" *(People v. Mikel*, 73 Ill. App. 3d 21, 27 (1979)).

¶ 77 The factor of whether the same or similar evidence would establish the elements of the offenses also is absent. The offense of first-degree murder has no elements in common with the offenses of armed violence and unlawful possession of a controlled substance.

¶ 78 In sum, the only factor that weighed in favor of joining the first-degree murder charges with the charges of armed violence and unlawful possession of a controlled substance was the factor of proximity in time and location. Yet, even the proximity in time and location of the offenses appears not to have been a result of the offenses being part of the same comprehensive transaction but, rather, a result of happenstance. The remaining factors—the identity of evidence linking the offenses, whether there was a common method in the offenses, and whether the same or similar evidence would establish the elements of the offenses—all weigh in favor of severing the charges for trial. Because the relevant considerations overwhelmingly weighed in favor of

concluding that the offenses were not part of the same comprehensive transaction, the trial court abused its discretion in denying defendant's motion to sever the charges for trial.

¶ 79 The State argues that any error in denying defendant's motion to sever was harmless. "A defendant is not prejudiced by the improper joinder of charges if, had separate trials been given, defendant still would have been convicted." *People v. Gonzalez*, 339 Ill. App. 3d 914, 922 (2003). Similarly, misjoinder "will be deemed harmless where the evidence of all of the charged crimes would have been admissible in the separate trials that would have taken place if not for the misjoinder." *Walston*, 386 Ill. App. 3d at 609. When considering harmless error, the State bears the burden of proving beyond a reasonable doubt that the outcome of the trial would have been the same absent the error. *People v. Thurow*, 203 Ill. 2d 352, 363 (2003).

¶ 80 The State argues that the error was harmless because the evidence of defendant's guilt was overwhelming. We agree. Addressing the armed violence and unlawful possession of a controlled substance charges first, the evidence establishing defendant's guilt of those offenses was not disputed. Given that paramedics recovered the 9-millimeter handgun from defendant after he had been rendered unconscious when he was struck by the car, and that defendant regurgitated the baggie of cocaine in the hospital, defendant could not reasonably have disputed the evidence supporting those charges. There is no reasonable probability that the jury would have reached different verdicts on the armed violence and unlawful possession of a controlled substance charges had they been tried separately from the first-degree murder charges.

¶ 81 Turning to the first-degree murder offense, the evidence of defendant's guilt was overwhelming. Crystal testified that she witnessed Bey arguing face-to-face with defendant moments before the shooting. She further testified that, after she heard gunshots, she saw Bey stumbling away from the black SUV next to which Bey had been arguing with defendant.

¶ 82 Ubaldo testified that he witnessed a man approach Bey in the parking lot and punch him in the face. Ubaldo then witnessed the man return to a dark SUV, where he sat in the front passenger seat. According to Ubaldo, Bey approached the SUV and began punching the man through the open passenger window. When Bey opened the door to continue punching the man, Ubaldo "bear hugged" Bey. At the moment Ubaldo began turning Bey, he heard two gunshots and saw flashes coming from the SUV's passenger area. Ubaldo testified that he released Bey, who stumbled away and collapsed. Ubaldo then personally grabbed the Colt revolver from the shooter, who remained sitting in the passenger seat. According to Ubaldo, there was "no question" in his mind that the man from whom he grabbed the Colt revolver was the man who shortly thereafter ran across Route 31 and was hit by a car. Ubaldo's testimony indicated that he continuously observed the shooter from the time he grabbed the Colt revolver out of the shooter's hands to the time he broke free, exited the SUV, and was struck by the car on Route 31. Although Ubaldo did not identify defendant in court, and even misidentified the shooter in a photo line-up, his testimony was very strong evidence that defendant was the shooter.

¶ 83 Ubaldo's brother, Joseph, testified that he heard two or three gunshots and then saw Ubaldo, with his gun drawn, issuing commands to a man seated in the SUV's passenger seat. Joseph testified that he attempted to subdue and handcuff the man, but the man broke free, exited the SUV's open driver-side door, and ran into the street, where a car struck him. Joseph further testified that, during the struggle, the man's pants slid down, revealing blue boxer shorts. Joseph identified the blue boxer shorts that officers recovered from defendant as the boxer shorts the man was wearing. Not only did Joseph's testimony corroborate Ubaldo's testimony, but also, like Ubaldo's testimony, it was very strong evidence that defendant was the shooter.

¶ 84 The State also presented Robert Berk's testimony that the gunshot residue on defendant's hands was consistent with his being the shooter. Furthermore, in his audio-recorded statement, Randy Clark identified the Colt revolver as the gun defendant showed him one to two days prior to the shooting. Clark recognized both the black electrical tape on the gun's handle and the unique push-button used to open the revolver's cylinder, which were very distinct features.

¶ 85 Taken together, the evidence of defendant's guilt of first-degree murder was overwhelming. Even if the first-degree murder charges had been tried in a separate trial that excluded evidence of defendant's possession of the 9-millimeter handgun and the baggie of cocaine, there is no reasonable possibility that the jury would have reached a different verdict. Although there were minor inconsistencies among certain witnesses' testimonies—which we addressed above—the evidence of defendant's guilt was overwhelming.

¶ 86 Furthermore, we disagree with defendant's contention that his possession of the 9-millimeter handgun would not have been admissible as part of other-crimes evidence at a separate trial on the first-degree murder charges, which supports our conclusion that the error of denying the motion to sever was harmless.

¶ 87 Generally, evidence of a defendant's other crimes, wrongs, or acts is inadmissible to demonstrate the defendant's propensity to commit crime. *People v. Pikes*, 2013 IL 115171, ¶ 11; Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). The rationale underlying this rule is that other-crimes evidence threatens to " 'so overpersuade [the jury] as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.' " *Walston*, 386 Ill. App. 3d at 610 (quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)). As a result, evidence of a defendant's other crimes is admissible only "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Our supreme court has stated that " 'evidence of other crimes committed by the defendant may be admitted if relevant to establish any material question other than the propensity to commit a crime.' " *Pikes*, 2013 IL 115171, ¶ 13 (quoting *People v. Thingvold*, 145 Ill. 2d 441, 452 (1991)). Even where other-crimes evidence is otherwise admissible, it should not be admitted if its probative value is substantially outweighed by its prejudicial effect. *Pikes*, 2013 IL 115171, ¶ 11; Ill. R. Evid. 403 (eff. Jan. 1, 2011).

¶ 88 At oral argument, defense counsel conceded that the evidence of defendant's possession of the 9-millimeter handgun, when combined with Luellen's testimony regarding the "double breasted" statement, had at least some probative value in establishing that defendant also possessed the Colt revolver used in Bey's shooting. Defendant maintains that the 9-millimeter handgun nevertheless would not have been admissible as part of other-crimes evidence at a separate trial on the first-degree murder charges, because the State had other evidence to establish his identity as the shooter.

¶ 89 The problem with defendant's argument is that his identity as the shooter was disputed, and the evidence linking him to the Colt revolver helped the State to prove its case. See *People v. Houseton*, 141 Ill. App. 3d 987, 992-93 (1986) (noting that, "where the State has positive identification evidence, it is not precluded from offering additional evidence that is based on other alleged crimes," where a defendant's identity is disputed). Although, taken together, the evidence of defendant's guilt was overwhelming, the identification of defendant as the shooter was not undisputed. Ubaldo, the State's key witness, was unable to identify defendant in court and actually admitted to selecting someone other than defendant as the shooter in a photo line-up shortly after the shooting. Defendant cross-examined Ubaldo on this point. The cases on which defendant relies, in which identity was not at issue, are distinguishable on this basis. See *People*

v. Boand, 362 Ill. App. 3d 106, 124 (2005) (holding that other-crimes evidence was inadmissible to establish identity in a sexual assault case where "[n]o one dispute[ed] that defendant was in the bedroom" with the victim and identity was not at issue); *People v. Barbour*, 106 Ill. App. 3d 993, 1000 (1982) (holding that other-crimes evidence to establish identity in a sexual assault case was inadmissible where the defendant admitted to intercourse with the victims and identity was never at issue).

¶ 90 We also disagree with defendant that the prejudicial effect of admitting evidence of his possession of the 9-millimeter handgun substantially outweighed the evidence's probative value. Otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Ill. R. Evid. 403 (eff. Jan. 1, 2011). Prejudice in this context refers to the admission of evidence that "will somehow cast a negative light upon a defendant for reasons that have nothing to do with the case on trial." *People v. Pelo*, 404 Ill. App. 3d 839, 867 (2010). The evidence of defendant's possession of the 9-millimeter handgun did little more to cast defendant in a negative light than Clark's recorded statement that he saw defendant with the murder weapon mere days before the shooting. Any prejudicial effect of admitting the evidence of defendant's possession of the 9-millimeter handgun was minimal.

¶ 91 C. Clark's Recorded Statement

¶ 92 Defendant contends that the trial court abused its discretion in admitting Randy Clark's audio-recorded statement pursuant to section 115-10.1 of the Code (725 ILCS 5/115-10.1 (West 2008)). Defendant argues that (1) the State failed to lay a proper foundation for admission of the statement, and (2) the recorded statement did not narrate, describe, or explain an event or

condition of which Clark had personal knowledge. Defendant concedes that he did not preserve this issue for appeal but maintains that the admission of Clark's statement was plain error.

¶ 93 Plain error is a limited and narrow exception to the general forfeiture rule. *People v. Hampton*, 149 Ill. 2d 71, 100 (1992). To obtain relief under the plain-error rule, a defendant must show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). If a court determines that no error occurred, it need not go any further in the plain-error analysis. *People v. Moreira*, 378 Ill. App. 3d 120, 131 (2007). Only if an error has occurred is a court required to determine if relief is warranted by looking to whether (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) the error was 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. Naylor*, 229 Ill. 2d 584, 593 (2008); Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Defendant bears the burden of persuasion under either prong. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 94 The first step in addressing defendant's plain error argument is to determine whether error occurred. Section 115-10.1 of the Code provides, in pertinent part, that a witness's prior inconsistent statement is not inadmissible under the hearsay rule (1) if the witness is subject to cross-examination concerning the statement; (2) the statement narrates, describes, or explains an event or condition of which the witnesses had personal knowledge; and (3) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording. 725 ILCS 5/115-10.1 (West 2008); see also Ill. R. Evid. 801(d)(1) (eff. Jan. 1, 2011) (containing the same rule). A witness's prior statement need not directly contradict the witness's trial testimony to qualify as "inconsistent" within the

meaning of section 115-10.1 of the Code. *People v. Flores*, 128 Ill. 2d 66, 87 (1989). The term also includes evasive answers, silence, or changes in position. *People v. Martin*, 408 Ill. App. 3d 891, 895 (2011). " 'One of the policies underlying section 115-10.1 of the Code is to protect parties from 'turncoat' witnesses who back away from a former statement made under circumstances indicating that it was likely to be true.' " *Martin*, 408 Ill. App. 3d at 895 (quoting *People v. Tracewski*, 399 Ill. App. 3d 1160, 1165 (2010)). The determination of whether a witness's prior statement is inconsistent with the witness's trial testimony is a matter within the trial court's sound discretion and will not be reversed absent an abuse of that discretion. *Flores*, 128 Ill. 2d at 87-88.

¶ 95 In *Flores*, which involved a prosecution for armed robbery and murder, one of the State's witnesses testified that he could not recall the content of his grand jury testimony and that he did not remember having a conversation with the defendant about the murder. *Flores*, 128 Ill. 2d at 78-79. Upon further questioning, the witness acknowledged that he testified before the grand jury that the defendant told him about shooting the victim. *Flores*, 128 Ill. 2d at 79. On appeal, the defendant argued that it was error to admit the witness's grand jury testimony pursuant to section 115-10.1 of the Code, because it was not inconsistent with his trial testimony. *Flores*, 128 Ill. 2d at 87. The supreme court disagreed, reasoning that the trial court did not abuse its discretion in concluding that the witness's "professed memory loss" at trial was inconsistent with his grand jury testimony. *Flores*, 128 Ill. 2d at 88; see also *Martin*, 408 Ill. App. 3d at 895 ("[The witness's] testimony contradicted her written statement in that she professed her inability to remember it."); *People v. Wheately*, 187 Ill. App. 3d 371, 380 (1989) ("[T]he trial court did not abuse its discretion when it found [the witness's] claimed memory loss was inconsistent with his prior testimony ***.").

¶ 96 The trial court did not abuse its discretion when it determined that Clark's professed memory loss at trial was inconsistent with his audio-recorded statement. Clark testified that he did not remember being at La Movida on February 3, 2008, that he did not remember visiting the Elgin police department on February 4, 2008, and that he did not remember giving an audio-recorded statement. This was inconsistent with his recorded statement, in which Clark described in detail the events that took place outside of La Movida on the night of the shooting, among other things. The court did not abuse its discretion in concluding that Clark's testimony was inconsistent with the recorded statement.

¶ 97 Defendant relies on *People v. Grayson*, 321 Ill. App. 3d 397 (2001), to support his argument. In *Grayson*, one of the State's witnesses testified that he had listened to a tape-recording of a 911 call earlier in the day. *Grayson*, 321 Ill. App. 3d at 404-05. The State asked the witness if it was his voice on the tape, and the witness answered affirmatively. *Grayson*, 321 Ill. App. 3d at 405. The court then admitted the tape into evidence. *Grayson*, 321 Ill. App. 3d at 405. The appellate court held that it was error to admit the tape pursuant to section 115-10.1 of the Code, because the State failed to lay a foundation by establishing the inconsistency of the recording with the witness's trial testimony. *Grayson*, 321 Ill. App. 3d at 405-07. The court reasoned that the State failed to confront the witness with his statements on the recording, which the witness could have either admitted or denied. *Grayson*, 321 Ill. App. 3d at 406.

¶ 98 *Grayson* is inapposite. While the State in *Grayson* failed to establish *any* inconsistency between the witness's trial testimony and his statements on the 911 call, the State in this case established an inconsistency when it confronted Clark with his audio-recorded statement and Clark professed complete memory loss regarding the statement. Because professed memory loss

is sufficient to establish inconsistency for purposes of section 115-10.1 of the Code (*Flores*, 128 Ill. 2d at 88), once Clark professed memory loss, the State was not required to engage in the superfluous task of confronting him with specific statements on the recording, as defendant contends. Moreover, the State confronted Clark with the date, time, place, and general subject matter of his audio-recorded statement, as well as with the parties present when he gave the statement, which further distinguishes this case from *Grayson*.

¶ 99 Defendant also contends that it was error to admit Clark's audio-recorded statement pursuant to section 115-10.1 of the Code because much of the statement did not narrate, describe, or explain events or conditions of which Clark had personal knowledge. "For a witness's out-of-court statement to satisfy the personal knowledge requirement, the witness must have actually seen the events that form the subject matter of the statement." *People v. Simpson*, 2013 IL App (1st) 111914, ¶ 18. The personal knowledge requirement excludes statements made to the witness by a third party, where the witness has no firsthand knowledge of the event that is the subject of the statements. *People v. Bueno*, 358 Ill. App. 3d 143, 157 (2005).

¶ 100 While much of Clark's audio-recorded statement concerned matters of which he had personal knowledge, some of it did not. Clark told police that he did not witness defendant running across Route 31 or being hit by a car. Rather, Clark said he "heard [this information] from somebody else." Clark also told police that he believed defendant owned a 9-millimeter handgun based on statements defendant made to him, but Clark said he had never seen the gun. Clark also said that defendant told him he purchased the Colt revolver (which he showed Clark) for $40. Because Clark did not have personal knowledge of these three matters (that defendant was hit by a car, that defendant owned a 9-millimeter handgun, and that defendant paid $40 for

the Colt revolver), it was error for the trial court to admit these portions of Clark's audio-recorded statement.

¶ 101 However, the trial court's error did not rise to the level of plain error. Defendant contends that the erroneous admission of portions of Clark's statement was plain error because the evidence against him was closely-balanced. The evidence against defendant was not closely balanced. As we concluded above, although there were minor inconsistencies among certain witnesses' testimonies, the evidence of defendant's guilt was overwhelming.

¶ 102 Moreover, the portions of Clark's statement that concerned matters of which he did not have personal knowledge either were not contested issues or were collateral. Defendant could not reasonably deny that he possessed the 9-millimeter handgun that paramedics retrieved from his pocket, or that he was struck by a car while attempting to cross Route 31 following the shooting. Further, while the court should not have admitted Clark's statement that defendant purchased the Colt revolver for $40, how much defendant paid for the gun was a collateral matter. Clark's statement regarding how much defendant paid for the gun also could not have prejudiced defendant, considering Clark's statement that defendant actually showed him the gun, and that Clark identified the revolver used in the shooting as the one defendant showed him. The trial court's erroneous admission of these portions of Clark's statement did not threaten to tip the scales of justice against defendant.

¶ 103 In response to the State's argument that defendant failed specifically to object to Clark's recorded statement on the bases of lack of foundation and lack of personal knowledge, defendant argues in his reply brief that his trial counsel was ineffective for failing to object to the statement. Because we conclude that it was not plain error to admit Clark's statement, defendant's ineffective-assistance-of-counsel argument also fails. See *People v. White*, 2011 IL 109689, ¶¶

133, 134 (holding that a defendant's inability to establish prejudice resolved both his argument under the closely-balanced prong of plain error and his ineffective-assistance-of-counsel argument).

¶ 104 D. Luellen's "Double Breasted" Testimony

¶ 105 Defendant argues that the trial court abused its discretion in admitting Luellen's testimony (1) that defendant said he stayed "double breasted" and (2) that the phrase meant that defendant carried two guns. Again, defendant acknowledges that he did not preserve the issue for appeal but contends that the admission of Luellen's testimony was plain error.

¶ 106 "Generally, a lay witness may not offer an opinion as to the meaning of another's out-of-court statement." *People v. Jackson*, 2013 IL App (3d) 120205, ¶ 21. Rather, a witness is required to recite the out-of-court statement as accurately as possible without offering his or her opinion as to what the statement might mean. *People v. McCarter*, 385 Ill. App. 3d 919, 934 (2008). It is within the province of the jury to determine the meaning of an out-of-court statement. *Jackson*, 2013 IL App (3d) 120205, ¶ 21. A lay witness's opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Ill. R. Evid. 701 (eff. Jan. 1, 2011).

¶ 107 The State contends that an exception to the general rule prohibiting lay witnesses from offering opinions as to the meaning of out-of-court statements applies here, because Luellen had special knowledge and familiarity with the phrase "double breasted," and Luellen's testimony aided the jury. The State cites *People v. Williams*, 264 Ill. App. 3d 278 (1993), for the rule that

an exception exists "where a non-expert witness has special knowledge and familiarity with a subject, and his opinion may aid the jury in its deliberations." *Williams*, 264 Ill. App. 3d at 287.

¶ 108 We agree with the State that the exception applies here. None of the cases upon which defendant relies involved testimony from lay witnesses who had special knowledge and familiarity with the meaning of words or phrases. In *People v. Linkogle*, 54 Ill. App. 3d 830 (1977), the trial court erred in allowing a mother to testify to her opinion that, when her child said she saw the defendant "wriggle his thing," she meant "an up-and-down motion of his penis." *Linkogle*, 54 Ill. App. 3d at 832. As the court in *People v. Lewis*, 147 Ill. App. 3d 249 (1986), observed, "[t]here was no indication that the child [in *Linkogle*] was using the word 'wriggle' in a sense distinct from its sense as an English word." *Lewis*, 147 Ill. App. 3d at 257. In *People v. Brown*, 200 Ill. App. 3d 566 (1990), which involved a charge of aggravated criminal sexual assault, the trial court improperly permitted a lay witness to testify to what he thought the defendant meant by the remark "have some of this." *Brown*, 200 Ill. App. 3d at 579. The appellate court reasoned that, given that the persons in the bedroom at the time the defendant made the remark had been drinking heavily and there were at least two naked people in the bedroom, the remark had more than one possible meaning. *Brown*, 200 Ill. App. 3d at 579. As with the mother in *Linkogle*, who did not have special knowledge or familiarity with the meaning of the word "wriggle," the witness in *Brown* did not have special knowledge or familiarity with the meaning of the words "have some of this."

¶ 109 Similarly, in *Williams*, a first-degree murder case, the appellate court held that it was error to allow four witnesses to offer their opinions of what the defendant meant when he said the victim "died like a bitch." *Williams*, 264 Ill. App. 3d at 287. The court reasoned that "[t]here was no showing made that these witnesses had any special knowledge which would permit them

to explain [the] defendant's comment, or that any assistance to the jury in interpreting his words was necessary." *Williams*, 264 Ill. App. 3d at 287.

¶ 110 *Brown*, *Linkogle*, and *Williams* are distinguishable from *Lewis*, where the appellate court held that it was not error to permit a mother to testify to what her daughter meant when she said "cootch," "bootie," and "his thing." *Lewis*, 147 Ill. App. 3d at 257. In *Lewis*, the mother testified that when her daughter said "cootch," she meant vagina; when she said "bootie," she meant buttocks; and when she said "his thing," she meant his penis. *Lewis*, 147 Ill. App. 3d at 257. The appellate court reasoned that the mother "testified only regarding her personal knowledge of the meanings [she] taught her daughter to associate with those words." *Lewis*, 147 Ill. App. 3d at 257.

¶ 111 This case is more similar to *Lewis* than it is to *Brown*, *Linkogle*, or *Williams*. The *voir dire* of Luellen conducted outside of the jury's presence established that defendant's statement, "I stay double breasted," did not have a common meaning that the jury could have understood without the aid of additional testimony. Rather, just as the terms "cootch," "bootie," and "thing" apparently had specific meanings between the mother and daughter in *Lewis*, the phrase "double breasted" had a specific meaning among Luellen, defendant, and their peers. Luellen testified that the phrase "double breasted" was "just how people talk" in his neighborhood and that it was a phrase that he and his friends used. The phrase was being used "in a sense distinct from its sense as an English word" (*Lewis*, 147 Ill. App. 3d at 257), unlike the term "wriggle" in *Linkogle* or the words "have some of this" in *Brown*. Because Luellen had special knowledge and familiarity with the meaning of the phrase "double breasted," and because Luellen's testimony assisted the jury in its deliberations, the trial court did not abuse its discretion in allowing Luellen's testimony.

¶ 112 Luellen's testimony also did not exceed the permissible scope of lay opinion testimony pursuant to Illinois Rule of Evidence 701, which prohibits a lay witness from giving opinion testimony that is "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Ill. R. Evid. 701 (eff. Jan. 1, 2011). Although we have located no Illinois case addressing whether the interpretation of a slang or street term constitutes "specialized knowledge" within the scope of Illinois Rule of Evidence 702, other courts have held that, where a witness's knowledge of a slang term's meaning is acquired through "the everyday process of language acquisition," rather than through "special training or scientific or other specialized professional knowledge," then it does not qualify as "specialized knowledge" requiring expert testimony. *King v. United States*, 74 A.3d 678, 682-83 (D.C. 2013); see also *United States v. Saulter*, 60 F.3d 270, 276 (1995) (holding that it was proper to permit a lay witness to testify to the meaning of drug slang where the witness had knowledge of the terms from his general drug dealings and was part of the same organization as the person whose statements the witness was interpreting); *State v. Johnson*, 706 A.2d 1160, 1172 (N.J. Super. Ct. App. Div. 1998) (holding that it was proper to permit a lay witness to testify to what the defendant meant when he said "get paid," because the witness's knowledge of the term was based on his having heard the term on the streets and in prison, and because his testimony was limited to his own personal knowledge of the term as opposed to speculation about the defendant's knowledge of the phrase).

¶ 113 Defendant also argues that, even if Luellen's testimony was otherwise admissible, the trial court abused its discretion in admitting it because the prejudicial effect of the testimony substantially outweighed its probative value. Defendant contends that the prejudicial effect of

Luellen's testimony was amplified when Luellen testified that defendant said he would " 'pop one of you niggers.' "

¶ 114 Luellen's testimony regarding the "double breasted" statement tended to corroborate the State's theory that defendant had two guns on the night of the shooting. Luellen's testimony, like the evidence of defendant's possession of the 9-millimeter handgun, did little more to cast defendant in a negative light than Clark's recorded statement that he saw defendant with the murder weapon mere days before the shooting. While Luellen's testimony regarding the " 'pop one of you niggers' " statement may have had some prejudicial effect, its prejudicial effect was minimal. Luellen repeatedly emphasized that defendant made the statement in a joking manner, and the statement provided context to defendant's "double breasted" comment. The probative value of Luellen's testimony was not substantially outweighed by its prejudicial effect.

¶ 115 In sum, because the court did not err in admitting Luellen's testimony, we need not proceed further with a plain-error analysis. See *Moreira*, 378 Ill. App. 3d at 131 (noting that, if a court determines that no error occurred, it need not go any further in the plain-error analysis).

¶ 116 In response to the State's argument that defendant failed to object to Luellen's testimony concerning the " 'pop one of you niggers' " statement, defendant argues in his reply brief that his trial counsel was ineffective for failing to object to the testimony. Because we conclude that it was not error for the court to admit the statement, defendant's ineffective-assistance-of-counsel argument necessarily fails. See *People v. Edwards*, 195 Ill. 2d 142, 165 (2001) ("Counsel cannot be considered ineffective for failing to make or pursue what would have been a meritless objection."). Even assuming *arguendo* that it was error to admit the testimony, defendant's argument still would fail, because he could not establish prejudice in light of the overwhelming evidence of his guilt. See *White*, 2011 IL 109689, ¶¶ 133, 134 (holding that a defendant's

inability to establish prejudice resolved both his argument under the closely-balanced prong of plain error and his ineffective-assistance-of-counsel argument).

¶ 117 E. Violation of One-Act, One-Crime Principles

¶ 118 Defendant contends that his conviction of unlawful possession of a controlled substance violated one-act, one-crime principles and must be vacated. The State concedes error on this point. "It is well settled that multiple convictions of both armed violence and the underlying felony cannot stand where a single act is the basis for both charges." *People v. Smith*, 258 Ill. App. 3d 261, 263 (1994). Here, defendant's conviction of armed violence was predicated on the offense of unlawful possession of a controlled substance. Therefore, the conviction of and sentence for unlawful possession of a controlled substance must be vacated. See *People v. Donaldson*, 91 Ill. 2d 164, 170 (1982) ("[M]ultiple convictions for both armed violence and the underlying felony cannot stand where a single physical act is the basis for both charges.").

¶ 119 III. CONCLUSION

¶ 120 For the reasons stated, we vacate defendant's conviction of and sentence for unlawful possession of a controlled substance. The remainder of the judgment of the circuit court of Kane County is affirmed.

¶ 121 Vacated in part; affirmed in part.