2016 IL App (3d) 140030-U

Order filed July 11, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0030 Circuit No. 12-CF-2476
SJOLANTE Q. CROWDER,	)	The Honorable Amy Bertani-Tomczak,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: In a first degree murder case, defense counsel did not render ineffective assistance when he did not pursue further redaction of the recording of the defendant's police interview, as the admission of the detectives' statements into evidence was proper. In addition, while the circuit court erred when it allowed the State to impeach one of its own witnesses, defense counsel did not render ineffective assistance when he abandoned the argument in the circuit court because part of the impeachment evidence was substantively admissible as a prior inconsistent statement and because the defendant could not establish a reasonable probability that the outcome of the proceeding would have been different regarding the other part of the impeachment evidence.

¶ 2 The defendant, Sjolante Q. Crowder, was convicted of two counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 2012)) and one count of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)) and was sentenced to imprisonment for natural life on the two counts of first degree murder and to 15 years of imprisonment for attempted first degree murder. On appeal, the defendant argues that: (1) defense counsel was ineffective for failing to ensure that recordings of the defendant's interview by the police were properly redacted; and (2) the circuit court erred when it allowed the State to impeach one of its own witnesses and when it admitted a recording of that witness' interview by the police. We affirm.

¶ 3 FACTS

¶ 4 On November 8, 2012, the State charged the defendant by indictment with four counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2012)) and one count of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)). The indictment alleged that the defendant shot and killed Adrien Knox and Delasse Lanier, and shot and injured Jordan Caples.

¶ 5 Prior to trial, defense counsel filed a motion *in limine* that sought to prohibit the State from presenting a recording of the defendant's statements to police on October 24, 2012. The motion alleged that the statements made by the detectives conducting the interview were highly prejudicial and constituted hearsay.

¶ 6 The court heard arguments on the motion on July 29, 2013, and took the matter under advisement. On September 11, 2013, defense counsel stated the following in court:

> "First of all, with respect to my motion *in limine,* I believe that myself and Assistant State's Attorney Mr. Fitzgerald, we're going to work out, redact certain portions and agree to an admission of certain aspects of his statement with the police. So I

> think that is going to be rendered moot in my motion, Judge. So I'd ask to -- just in case you don't enter and continue that, but I am sure that we're going to have a resolution."

The record on appeal does not reflect that any ruling was ever issued on defense counsel's motion *in limine*.

¶ 7 A jury trial was held over several days in September 2013. Evidence presented at trial indicated that on October 23, 2012, between 6:30 p.m. and 7 p.m., a group of people were standing near a parked car in the 700 block of Second Street in Joliet when a dark colored sport-utility vehicle (SUV) drove past at a slow rate of speed. Shortly after the SUV turned and disappeared from view, an African-American male, dressed in black and wearing a hooded sweatshirt with the hood up, walked up near the group. He pulled a gun out of his pocket, aimed at the group, and began firing. Adrien Knox was shot once in the left side of his chest and died. Delasse Lanier was shot in the back of his left shoulder and died. Jordan Caples was shot once in his shoulder and survived. A 911 call regarding the shooting was placed at 6:53 p.m.

¶ 8 Numerous witnesses testified during the jury trial. Delasse Lanier's sister, Addie, testified that she was in the group of people at the time of the shootings. She stated that the shooter was a short African-American male dressed in black with a hood up. She recognized the shooter as the defendant, whom she knew and whose nickname was "Mookjilla." According to the testimony of a detective elicited later during the trial, Addie was hysterical at the scene and could not provide answers to any questions. However, she identified the defendant from a photo lineup while at the hospital on the night of the shootings.

¶ 9 Jameka Hargrove testified that she was in the group of people at the time of the shootings. She did not see the shooter walk up, but she did see him when he started shooting.

She saw his hairstyle; it was a low Mohawk with faded sides. She recognized the shooter as the defendant, whom she knew. However, according to testimony of a detective elicited later during the trial, Hargrove could not identify the shooter from a photo lineup that was shown to her.

¶ 10 Tatashia Cameron testified that she saw the shooter, who had a Mohawk, once he began firing. She identified the defendant (with whom she was familiar, although she did not know him personally) from a photo lineup on the night of the shootings. She had seen him earlier in the day at a neighborhood store; he was with several other individuals in a dark colored SUV. She also knew the defendant's nickname, "Mookjilla."

¶ 11 Jordan Caples testified that he was in the group of people at the time of the shootings. He saw a black SUV drive past at a slow rate of speed and an individual walk up shortly after the SUV turned down the street. The individual was wearing a dark hooded sweatshirt. He did not see the gun, but he heard the shots. He had been shot in the back, and he knew the defendant as the shooter.

¶ 12 Andrea Brooks testified that she was in the group of people at the time of the shootings. Her son, Delasse Lanier, was shot in the back. The shooter was wearing a black hooded sweatshirt, was African-American, was thin, and was an average height of about 5'7" to 5'9". She could not identify the shooter, even though she saw his face.

¶ 13 Geraldine Lindsey testified that she saw the shooter walk up; he was wearing a dark hooded sweatshirt and had a Mohawk. He stood behind her. She turned to look at the shooter once a shot had been fired, and she recognized the shooter as the defendant. She identified the defendant as the shooter from a photo lineup shown to her in the early morning hours of October 24, 2012. She knew the defendant's nickname, "Mookjilla." She also stated that she had a

felony conviction for retail theft, but she stated that her testimony at the defendant's trial was not made in connection with any agreement regarding the retail theft charge.

¶ 14 Anthony Stallings testified that he was Andrea Brooks' son and that he was with the group of people around the time of the shootings. When the SUV drove past, he said that he saw two individuals in the car through the windshield, who put hoods over their heads. Moments later, an individual wearing black walked up and stopped on the sidewalk for a short time. This individual then walked toward the middle of the street, stopped, then walked back toward the sidewalk. Stallings got into the parked car's back passenger seat because he had a feeling that something bad was about to happen. The individual walked up near where Stallings was sitting, pulled a gun from his sweatshirt's pocket with his right hand, aimed, and fired a shot. The individual rushed past the area between a tree and the rear passenger door of the car in which Stallings was sitting, then fired two more times. He saw the shooter's face and knew him as "Mookjilla," but he told the police at the scene that he did not know who the shooter was. Stallings said this because he was mad and he wanted to exact vengeance himself. He identified the defendant in court as the shooter.

¶ 15 James Hayden testified that he was a friend of the defendant. On the morning of October 23, 2012, he woke up at Shaquan Meadows' house. He went home, cleaned, and returned to Meadows' house around 6 or 7 p.m. Hayden testified that he did not remember giving an interview to the police on December 20, 2012, in which he said he returned to Meadows' house around 3 p.m. He testified that when he arrived at Meadows' house around 6 or 7 p.m., he learned that some people had been shot. Bryson Carter (who did not testify at the defendant's jury trial) arrived at Meadows' house shortly thereafter, followed a few minutes later by the defendant, who had a low-top fade haircut buzzed down to the scalp and who was under the

influence of marijuana on that day. Hayden also denied telling the police the following during his interview: (1) that when the defendant arrived, he was pacing around the house and sweating a bit; (2) that the defendant said, "the mother fuckers dead, the mother fuckers gone" when they asked him what had happened in the neighborhood; (3) that on October 24, 2012, when the defendant left Meadows' house, he said that if anyone asked for him, tell them that you have not seen me; and (4) that he saw the defendant with a .32-caliber revolver months prior to the shootings. Hayden also testified that he had a pending retail theft charge against him.

¶ 16 Joliet detective Patrick Schumacher testified that he interviewed James Hayden at the police department on December 20, 2012. Two clips from the recorded interview were played for the jury over defense counsel's objection. The clips were not transcribed, but from the time stamps the prosecutor mentioned in court, the first clip contained Hayden telling the police that the defendant was pacing around Meadows' house upon arrival and that the defendant said "the mother fuckers dead, the mother fuckers gone" when asked about the police presence in the neighborhood. The second clip contained Hayden telling the police that he had seen the defendant with a .32-caliber gun several months prior to the shootings.

¶ 17 Schumacher also testified that he interviewed the defendant at the police department on October 24, 2012, the day after the shootings when the defendant had been arrested. The interview was recorded and was played for the jury after a stipulation was entered that the recording was redacted by agreement of the parties.

¶ 18 The interview of the defendant lasted well over two hours. During the interview, the defendant gave several versions of his whereabouts on the day of the shootings. The defendant initially said that he had been at his mother's house all day. During this portion of the interview, the detectives made several statements that witnesses had said the defendant was not at home

during the day and that he had done some shooting. When pressing the defendant on whether his version was the truth, one of the detectives referred to the fact that numerous people had said the defendant was out in the area on the day of the shootings, stating "if ten people say that's a pile of shit right there, would you believe that's a pile of shit?" He also said, "it's probably a pile of shit." Shortly thereafter, a break was taken.

¶ 19 When the detectives returned, they told the defendant that they had checked on his story, and the defendant's mother said that he had not been at her house the day before. They also told him that the police had been to his house last night, that they had searched the house, and that the defendant was not there even though he was now telling the detectives that he was there. One of the detectives said that the defendant was lying, which the defendant denied. The detectives continued to press the defendant on the fact that people had told them that the defendant had done some shooting. The defendant denied ever touching a gun. The detectives continued to press the defendant, and one of them said that people had told them that "Mookjilla" had done the shooting. A detective also said that the defendant had shot three people.

¶ 20 The defendant then told the detectives that he was at Shaquan Meadows' house that day. During this portion of the interview, the detectives made several statements to the defendant about how they thought he was concocting stories and lying, including that the defendant kept changing his story and including inquiries as to how were they supposed to believe him. After numerous questions about where the defendant was between 6 and 7 p.m. on the day of the shootings, the defendant finally said that he was at Wal-Mart. After more accusations that he was not telling the truth, the defendant next said that he had gone to the house of someone whom he called his uncle, although there was no relation. He went there after leaving Meadows' house around 9 p.m. and stayed there the rest of the night.

¶ 21 Later, one of the detectives asked the defendant if he had any gang affiliation. The defendant denied any gang affiliation, but one of the detectives told the defendant about a picture on Facebook of him flashing a gang sign.

¶ 22 The remainder of the interview contained, in essence, the defendant describing the places he went on the day of the shootings and whom he was with, and the detectives expressing their disbelief.

¶ 23 Schumacher was called to the stand after the recording of the defendant's interview was finished, and he testified that the defendant gave several versions of where he was on the day of the shootings. First, the defendant told Schumacher and detective Tom Ponce that he was at his mother's house all night. When the detectives checked with the defendant's mother, they learned that she had not seen the defendant in two days. Second, the defendant said that he was at Shaquan Meadows' house all night. The detectives checked with some of the individuals who were at Meadows' house that night, including Hayden, and these individuals said that the defendant was not there all night. Third, the defendant claimed that he had stayed the night at his uncle's house. In addition, Schumacher testified that according to a phone call the defendant placed on October 31, 2012, the defendant told the individual to whom he was speaking that he was with "China" from 3 p.m. to 10 p.m. on the day of the shootings.

¶ 24 The State started presenting the testimony of Joliet detective Darrell Gavin, who was qualified as an expert on Joliet-area street gangs. He supervised the gang and criminal intelligence unit and testified that the area in which the shootings took place in this case was within Gangster Disciple territory. When the State asked him a question regarding whether the victims were associated with a gang, the court sustained an objection from defense counsel. After a discussion, the circuit court ordered the State to provide defense counsel with

information on the victims that was contained within a gang member and gang associate database. Later during the trial, the State informed the court that it was changing its intention regarding gang evidence from motive to impeachment. The court denied the State's motion, and subsequently instructed the jury to disregard Gavin's testimony in its entirety.

¶ 25 Testimony was also elicited regarding the gun. Bullets retrieved from Adrien Knox and Delasse Lanier were .32-caliber. No shell casings were found at the scene, and testimony was elicited that a revolver would not eject shell casings upon firing. Lindsey testified that the gun used by the shooter looked like a silver revolver.

¶ 26 After the State rested, the defense presented the testimony of several witnesses. Joliet detective Carlos Matlock testified that Tatashia Cameron could not identify the shooter when interviewed at the scene because the shooter was wearing black and had a hood up. Detective Schumacher testified that the defendant said during the October 24, 2012, interview that he claimed he was at his mother's house because, due to his juvenile probation, that was where he was supposed to be.

¶ 27 Raven Hughes testified that she had known the defendant for approximately three years and had dated him between March and the end of July 2012. She said the defendant had a Mohawk in May 2012 until around the beginning of July 2012. She also said she was with him on October 22, 2012, that they had gone to get tacos, and that he did not have a Mohawk at that time.

¶ 28 Symone Lopez testified that she had known the defendant for about three or four years. On October 23, 2012, she was at Shaquan Meadows' house with several other people. She got there around 6:30 p.m., and the defendant arrived there around 7 or 7:15 p.m. and was there for a

few minutes. She said that she thought he was wearing a white t-shirt and no jacket. She stated on cross-examination that the defendant appeared to be sweating.

¶ 29 Shaquan Meadows testified that on October 23, 2012, at approximately 6 p.m., he was at his house with Bryson Carter, James Hayden, and Symone Lopez. He could not recall what time the defendant arrived or what he was wearing. They played video games that night, and he said that the defendant was with him until 9 or 10 p.m. On cross-examination, he stated that the defendant arrived at his house after being dropped off there by Raven Hughes around 6 p.m. The defendant had tacos. Meadows also stated that he could not recall telling the police during a December 20, 2012, interview that he last saw the defendant around 2 p.m. on the day of the shootings. He also could not recall telling the police during that interview that the defendant was wearing a black t-shirt on the day of the shootings.

¶ 30 The defendant testified, and the only question defense counsel asked him was whether he shot Adrian Knox, Delasse Lanier, and Jordan Caples. The defendant said he did not. On cross-examination, the prosecutor began asking the defendant numerous questions, and defense counsel objected, claiming that all of the questions were beyond the scope of direct examination. The court overruled the objection. The prosecutor's questions focused on the defendant's changing versions of where he was on the day of the shootings. The defendant also said that he had never touched a gun and that he had a Mohawk until the beginning of August.

¶ 31 In rebuttal, the State recalled Schumacher and played the recorded interview of Shaquan Meadows for the jury.

¶ 32 At the close of the trial, the jury returned guilty verdicts on all three counts.

¶ 33 Defense counsel filed a motion for a new trial, which did not include any claims regarding the recording of the defendant's interview by the police. The motion did include an

argument that the circuit court erred when it allowed the State to impeach its own witness—Hayden—because Hayden's professed lack of recollection regarding his statements to the police did not damage the State's case. However, at the hearing on the motion, defense counsel withdrew the argument related to the impeachment of Hayden; counsel stated that the argument was not meritorious. The motion was denied, and the defendant appealed.

¶ 34 ANALYSIS

¶ 35 The defendant's first argument on appeal is that defense counsel was ineffective for failing to ensure that the recordings of the defendant's interview by police were properly redacted. The defendant contends that defense counsel's deficient performance allowed hearsay statements and personal opinions of the detectives in the recordings to be admitted for their truth and as substantive evidence of the defendant's guilt.

¶ 36 The United States Constitution and the Illinois Constitution grant a criminal defendant the right to the effective assistance of counsel. *People v. McCarter*, 385 Ill. App. 3d 919, 928 (2008). To establish that trial counsel was ineffective, a defendant must establish both that counsel's performance fell below an objective standard of reasonableness and that a reasonable probability exists that the result of the proceeding would have been different absent counsel's errors. *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under the first prong of the test, counsel's conduct "is measured by an objective standard of competence under prevailing professional norms." *Id.* at 327 (quoting *People v. Evans*, 186 Ill. 2d 83, 93 (1999)). In addition, the defendant must overcome a strong presumption that counsel's conduct was the result of sound trial strategy. *Id.*

¶ 37 Under the second prong of the test, a defendant is *not* required to prove that the outcome of his or her trial would have been different. *Id.* "Rather, although a defendant must show a

reasonable probability that the result of the proceeding would have been different, 'the prejudice prong *** is not simply an "outcome-determinative" test but, rather, may be satisfied if defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair.' " *Id.* (quoting *People v. Jackson*, 205 Ill. 2d 247, 259 (2001)).

¶ 38 Because defense counsel did not raise his own ineffectiveness in the circuit court, there is no ruling for us to review. In such situations, we review *de novo* whether defense counsel was ineffective. *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 104. In other words, our task is to perform the same analysis that the circuit court would have performed had the issue been raised there. *Id.*

¶ 39 In this case, the defendant concedes that his own statements from the recordings of his police interview were admissible against him. However, the defendant challenges defense counsel's decision not to pursue the motion *in limine* that he filed regarding the recordings, which allowed the numerous hearsay statements and statements of opinion made by the detectives to be admitted into evidence.

¶ 40 We find the Second District's decision in *People v. Theis*, 2011 IL App (2d) 091080, to be instructive on this issue. In *Theis*, the defendant argued that a videotape of his interview was inadmissible as substantive evidence because it contained hearsay assertions from a detective. *Id.* ¶ 32. The court rejected this argument:

> "[D]efendant's argument that [the detective's] statements were hearsay is incorrect. 'It is well established that a taped conversation or recording, which is otherwise competent, material and relevant, is admissible so long as it is authenticated and shown

> to be reliable through proper foundation.' *People v. Griffin*, 375 Ill. App. 3d 564, 570 (2007). A taped conversation is not hearsay; rather, it is a 'mechanical eavesdropper with an identity of its own, separate and apart from the voices recorded.' *Griffin*, 375 Ill. App. 3d at 571. In this case, defendant does not argue that the State failed to lay a proper foundation for the admission of the videotaped interrogation. Therefore, [the detective's] alleged hearsay statements during defendant's videotaped interview were admissible.
>
> Further, hearsay is an out-of-court statement offered to establish the truth of the matter asserted. *People v. Robinson*, 391 Ill. App. 3d 822, 834 (2009). Thus, an out-of-court statement that is necessary to show its effect on the listener's mind or explain the listener's subsequent actions is not hearsay. *Robinson*, 391 Ill. App. 3d at 834. In this case, absent [the detective's] statements, defendant's answers would have been nonsensical. Thus, for the two reasons stated above, [the detective's] statements were not hearsay and the trial court did not err in failing to, *sua sponte*, redact his statements from the videotaped interview." *Theis*, 2011 IL App (2d) 091080, ¶¶ 32-33.

¶ 41 Here, there is no challenge to the foundation laid by the State for the recordings of the defendant's police interview. This case is analogous to *Theis*. Not only were the detectives' statements admissible, even if they were hearsay, they would also have been admissible to place

the defendant's statements to the detectives in their proper context. *Id.*; see also *United States v. Foster*, 701 F.3d 1142, 1150-51 (2012) (citing cases on the admissibility of statements offered to provide context for other admissible statements).

¶ 42 Because the detectives' statements were not hearsay, there is no merit to the defendant's additional contention that their admission violated his right to confront the witnesses against him. *Theis*, 2011 IL App (2d) 091080, ¶ 34 (holding that "admissible evidence that is not hearsay does not implicate the right of confrontation under either the United States or the Illinois Constitution"); see also *Foster*, 701 F.3d at 1150-51.

¶ 43 We also reject the defendant's claim that allowing the detectives' statements into evidence invaded the province of the jury as the trier of fact in that the detectives' personal opinions of the defendant's credibility constituted improper opinion testimony. The same argument was made and rejected in *Theis* because the detective's "opinions about defendant's guilt were made to defendant during the interview and explained the logic of the interview and defendant's answers." *Id*. ¶ 36. Further, as was the case in *Theis*, the three cases the defendant in this case chiefly relies upon for his argument are inapplicable. *Id*. ¶¶ 36-37 (distinguishing *People v. Munoz*, 398 Ill. App. 3d 455 (2010), *People v. Crump*, 319 Ill. App. 3d 538 (2001), and *People v. McClellan*, 216 Ill. App. 3d 1007 (1991) because all three involved direct testimony of police officers that they either believed the defendant was guilty or did not believe the defendant's version of events). Because the detectives' statements here were used for a proper purpose, they did not invade the province of the jury as the defendant alleges. *Id.* 37.

¶ 44 In sum, we hold that no error occurred in the admission of the detectives' statements from the recordings of their interview of the defendant. Because no error occurred, defense counsel

was not ineffective for failing to ensure any further redaction of the recordings of the defendant's police interview.

¶ 45 The defendant's second argument on appeal is that the circuit court erred when it allowed the State to impeach its own witness—Hayden—with the recording of the interview he gave to the police.

¶ 46 Initially, the defendant argues that this issue was properly preserved for appeal because defense counsel both timely objected at trial and raised the issue in a posstrial motion. We disagree.

¶ 47 "A movant has the responsibility to obtain a ruling on his motion if he is to avoid forfeiture on appeal." *People v. Urdiales*, 225 Ill. 2d 354, 425 (2007). In this case, defense counsel abandoned this impeachment argument during the hearing on the posttrial motion, thereby depriving the circuit court of the opportunity to rule on the issue. Accordingly, we hold that the defendant has forfeited the issue on appeal. See *id.*

¶ 48 The defendant further argues that if his argument was not properly preserved for appeal, then defense counsel was ineffective for abandoning the argument.

¶ 49 In this case, the defendant challenges the use of two portions of Hayden's interview to police—one clip showed Hayden telling the police that while at Meadows' house, the defendant said with regard to what had happened in the neighborhood that "the mother fuckers dead, the mother fuckers gone." The second clip showed Hayden telling the police that he had seen the defendant with a gun several months before the shootings occurred.

¶ 50 The State on appeal agrees with the defendant that it was error to allow the prosecutor to impeach his own witness—Hayden—with the clips of Hayden's interview to police. We agree with the parties that this did, in fact, constitute error. A witness's prior inconsistent statement is

not admissible as impeachment evidence unless the witness's trial testimony affirmatively damages the State's case against the defendant. *People v. Blakey*, 2015 IL App (3d) 130719, ¶ 49. Here, Hayden's professed lack of recollection regarding his interview to police did not affirmatively damage the State's case. *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 45 (holding that "a witness's professed lack of memory, standing alone, does not 'affirmatively damage' a party's case for the purpose of impeaching one's own witness" (quoting Michael H. Graham, Graham's Handbook of Illinois Evidence, § 607.4 (10th ed. 2010)). Under these circumstances, we agree that it was error to allow the prosecutor to introduce the recording of Hayden's interview to the police as impeachment evidence.

¶ 51 The defendant further argues that neither of the clips was admissible as substantive evidence.

¶ 52 "It is a well settled general rule that what a witness states out of court and out of the presence of the defendant is pure hearsay and is incompetent as substantive evidence." *People v. Simpson*, 2015 IL 116512, ¶ 27. However, a witness's prior inconsistent statement can be admitted as substantive evidence if it meets the requirements of Illinois Rule of Evidence 801(d)(1) (eff. Jan. 1, 2011), which provides that a statement is not hearsay if:

> "In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
>
> (A) inconsistent with the declarant's testimony at the trial or hearing, and—
>
> * * *

> (2) narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and
>
> * * *
>
> (c) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording[.]"

¶ 53 The defendant concedes that the second clip—in which Hayden told the police that he saw the defendant with a gun several months prior to the shootings—does not run afoul of Rule 801(d)(1). Rather, the defendant claims that it was inadmissible "other-crimes evidence." We disagree.

¶ 54 " 'The term "other-crimes evidence" encompasses misconduct or criminal acts that occurred either before or after the allegedly criminal conduct for which the defendant is standing trial.' " *People v. McLaurin*, 2015 IL App (1st) 131362, ¶ 53 (quoting *People v. Spyres*, 359 Ill. App. 3d 1108, 1112 (2005)); see Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Here, Hayden's statement to the police was simply that he saw the defendant with a gun several months prior to the shootings. The mere possession of a gun is not necessarily a crime, and there were no associated statements to suggest that the defendant was engaged in any type of misconduct or criminal activity when he allegedly possessed a gun at that time. See *id*. Accordingly, we hold that the second clip did not constitute "other-crimes evidence." Thus, because the second clip did not constitute "other-crimes evidence" and because it was admissible under section 115-10.1,

we hold that defense counsel could not have been ineffective for abandoning any argument related to the second clip at the posttrial hearing.

¶ 55 With regard to the first clip, the defendant claims that the clip did not qualify for the hearsay exception in Rule 801(d)(1). In particular, the defendant claims that a proper foundation could not be laid for the clip because Hayden lacked personal knowledge of the event to which the defendant was referring. We agree.

¶ 56 Rule 801(d)(1) provides, in relevant part, that a prior inconsistent statement of a witness is inadmissible as substantive evidence if the witness lacks personal knowledge of the event to which the declarant's statement referred. Ill. R. Evid. 801(d)(1)(A)(2) (eff. Jan. 1, 2011); see *Simpson*, 2015 IL 116512, ¶ 34. Here, it is undisputed that Hayden had no knowledge of the event to which the defendant was referring when he allegedly said "the mother fuckers dead, the mother fuckers gone." Under these circumstances, the clip from Hayden's police interview that was related to the defendant's comment was not admissible under Rule 801(d)(1). *Id*. Accordingly, because there was no basis to admit the first clip as substantive evidence, we must now determine whether defense counsel's abandonment of that argument constituted ineffective assistance.

¶ 57 As we stated above, to establish that trial counsel was constitutionally ineffective, a defendant must establish both that counsel's performance was objectively unreasonable and that but for counsel's deficient performance, a reasonable probability exists that the outcome of the proceeding would have been different. *Manning*, 241 Ill. 2d at 326. A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶ 58 With regard to the first prong of the test for ineffective assistance of counsel, we can conceive of no strategic reason for defense counsel to abandon the argument related to the admissibility of the first clip of Hayden's police interview. While the defendant's alleged comment was not an actual confession, it nonetheless indicated that the defendant possessed some knowledge of what had occurred in the neighborhood. Even if it was not inculpatory, it certainly painted a picture of the defendant as being at least callous and, at most, pleased that someone had been killed. Under these circumstances, we hold that defense counsel's abandonment of this argument at the posttrial hearing constituted objectively unreasonable representation.

¶ 59 With regard to the second prong of the test for ineffective assistance of counsel, the defendant argues that the identification testimony presented by the State was weak such that a reasonable probability exists that, but for defense counsel's abandonment of the argument regarding the first clip, the outcome of the proceeding would have been different. We disagree.

¶ 60 Our review of the records reveals that the State's identification evidence was in fact strong. As we acknowledged above, the defendant's alleged statement that "the mother fuckers dead, the mother fuckers gone[,]" made in response to inquiries about what was happening in the neighborhood, portrayed the defendant as callous or even pleased that someone had been killed and suggested that he knew something about what had occurred. This was evidence that could have carried substantial weight in the minds of the jurors. However, the State presented testimony from several witnesses who identified the defendant as the shooter. Addie Lanier testified that she recognized the shooter as the defendant, whom she knew as "Mookjilla." She also picked him out of a photo lineup. Tatashia Cameron could not identify the shooter at the scene, but she did identify the defendant as the shooter from a photo lineup a few hours after the

shootings. Anthony Stallings testified that he recognized the defendant as the shooter, although he did not initially tell the police who the shooter was because he wanted to find him to exact revenge. Geraldine Lindsey testified that she recognized the defendant as the shooter; she also picked him out of a photo lineup. Further, the defendant was shown to be not credible; when he was interviewed by the police, he gave several versions of his whereabouts on the day of the shootings. In light of this evidence against the defendant, we find that the defendant has not established that, but for defense counsel's action, a reasonable probability exists that the outcome of the proceeding would have been different. For these reasons, we hold that defense counsel did not render ineffective assistance when he decided to abandon the argument regarding the admission of Hayden's statement to the police regarding the defendant's alleged comment.

¶ 61 CONCLUSION

¶ 62 The judgment of the circuit court of Will County is affirmed.

¶ 63 Affirmed.