2017 IL App (4th) 150496-U

NO. 4-15-0496

FILED
December 18, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
DEMARTA L. CUNNINGHAM,	)	No. 12CF997
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's convictions, finding (1) the trial court did not err in allowing the State to introduce other-crimes evidence and (2) defendant did not receive ineffective assistance of counsel.

¶ 2 In December 2015, a jury found defendant, Demarta L. Cunningham, guilty of two counts of first degree murder with a firearm. The trial court sentenced him to consecutive terms of life in prison plus 25 years on both counts.

¶ 3 On appeal, defendant argues (1) the trial court erred in allowing the State to introduce other-crimes evidence and (2) he received the ineffective assistance of counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On April 7, 2012, Freedom and Central Cunningham were murdered. On July 7, 2012, defendant allegedly beat and robbed Isaiah Wiley, who then gave a statement to police

implicating defendant in the battery and robbery as well as in the murders of Freedom and Central. Wiley was then murdered on December 9, 2012.

¶ 6 In July 2012, the State charged defendant with seven counts of first degree murder in the April 2012 deaths of Freedom (counts I, II, and III) and Central (counts IV, V, and VI) (720 ILCS 5/9-1(a)(1), (a)(2) (West 2012)). The State also charged defendant with single counts of robbery (count VII) (720 ILCS 5/18-1 (West 2012)) and mob action (count VIII) (720 ILCS 5/25-1(a)(1) (West 2012)) involving Wiley.

¶ 7 Prior to trial, the State filed a motion *in limine* to admit Wiley's statements to police regarding the robbery and double murders pursuant to section 115-10.6 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/115-10.6 (West 2012)) and the common-law doctrine of forfeiture by wrongdoing (Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011)). The State indicated Wiley made his statements to police on July 16 and July 25, 2012. Phone calls between defendant and other individuals, including Rickie Kendricks, indicated defendant solicited assistance in contacting Wiley to change his statement concerning defendant's involvement in the murders and later sought to have Wiley killed. The State argued Wiley's statements were admissible due to defendant and Kendricks engaging or acquiescing in wrongdoing that was intended to, and did, produce the unavailability of Wiley as a witness. The trial court allowed the motion.

¶ 8 The State also filed a motion to admit other-crimes evidence. Therein, the State alleged defendant placed a series of phone calls to individuals between July 16 and July 25, 2012. The calls were recorded and formed the basis of the charges of harassment of a witness and intimidation of a witness in Macon County case No. 2012-CF-1027. The State argued

evidence of the offenses was relevant as other-crimes evidence to show defendant's identity, knowledge, and intent in the murder charges.

¶ 9 In April 2014, the State filed another motion to admit other-crimes evidence regarding defendant's solicitation of Kendricks to murder Wiley. At the hearing on the motion, the State argued the evidence of other crimes was admissible to show defendant's identity and guilty knowledge. The State sought to introduce two series of phone calls made by defendant from the county jail, including calls in which he sought out others to contact Wiley to change his statement, as well as calls couched in terms of "home improvement" allegedly referring to the murder of Wiley. The trial judge allowed the motions, stating, in part, as follows:

> "If a defendant is involved in a murder of person X, and the defendant has reason to believe that there was an eyewitness to the murder, person Y, and evidence suggesting that the defendant is involved in the murder of the eyewitness, is, in my view, highly probative of the identity of the defendant as being involved in the murder of X and the knowledge of the defendant regarding the planning of the murder of X. I think it's self-evident that it's extremely relevant to identity and knowledge. And having considered everything here—and I don't want to make two murder trials out of one. I believe, however, that the probative value outweighs the prejudicial effect."

The judge also noted his intent to provide the jury with a limiting instruction during trial.

¶ 10 A. The Murders of Freedom and Central Cunningham

¶ 11 In December 2014, defendant's jury trial commenced on counts I through VI. Ben Massey testified he was working as a Decatur police officer on April 7, 2012, when he responded to a report of shots fired at approximately 10:48 p.m. Upon arrival at 1261 North Clinton Street, Massey observed a black male lying on the front porch. Decatur police officer Megan Welge testified she responded to the address and the male victim was identified as Freedom Cunningham. A female victim, identified as Central Cunningham, was located in a van parked in front of the residence. Dr. Amanda Youmans, a forensic pathologist, opined the cause of death of each victim was multiple gunshot wounds.

¶ 12 On the night of the shooting, Shannel Young observed two individuals dressed in "all black" exiting a white Pontiac Grand Prix with tinted windows. After she went inside her aunt's house, she heard gunshots. Shortly thereafter, "people [got] in the car and took off."

¶ 13 Tierius Oldham testified she lived with Isaiah Wiley at 1261 North Clinton Street in April 2012. At approximately 10:30 to 10:40 p.m. on the night of the murders, Oldham heard a knock at the door and Wiley told her to answer it. She opened the door and observed "Delmonte" or "Taye," whom she identified as defendant, and Shalen Dozier. The two men entered, walked upstairs and talked with Wiley, and then left within five minutes. After locking the door and returning upstairs, Oldham "started hearing gunshots and [Wiley] pushed [her] on the floor." When she heard a knock at the door, she looked out the upstairs window and saw Freedom's van. Once she went downstairs and opened the door, she found Freedom lying on the porch.

¶ 14 Rikia Allston, Oldham's friend, was at the residence when she heard a knock at the door and saw Oldham open it. Allston recognized defendant and a man named Shalen. The two men went upstairs and then left a short time later. Within 15 minutes of defendant and

Shalen leaving the residence, Allston heard gunshots. Shortly thereafter, she heard additional gunshots.

¶ 15 Brian Cunningham, Freedom's brother and a cousin of defendant, testified he went to a residence at 1566 North Church Street in Decatur on April 4, 2012, and talked with defendant. Cunningham saw a nine-millimeter "gun with an extended clip on it sitting on the front porch." Cunningham asked how many rounds the gun and/or magazine held, and defendant told him 32 rounds.

¶ 16 Decatur police detective Scott Cline testified he recovered 31 shell casings from the scene. Sometime after the initial investigation, Cline became aware of a gun recovered in Decatur. The nine-millimeter handgun had one live round that was stamped "RWS," which refers to a German ammunition manufacturer. Cline stated all of the shell casings recovered from the murder scene bore the "RWS" marking. Cline also stated an extended-capacity magazine, which could hold 32 cartridges, was found in the area of the murders. Carolyn Kersting, a forensic scientist with the Illinois State Police, testified all 31 shell casings were fired from the gun recovered by police.

¶ 17 B. Isaiah Wiley's Implication of Defendant in the Murders

¶ 18 Prior to the testimony of Decatur police officer Ed Cunningham, the trial court instructed the jury that the ensuing evidence would relate to other crimes committed by defendant and should only be considered for the limited purpose of defendant's knowledge and identification. On July 16, 2012, Officer Cunningham responded to a fight in progress and found the victim to be Isaiah Wiley. While Wiley was arrested for an outstanding warrant, he indicated his desire to make a statement.

¶ 19 Decatur police detective Scott Hastings testified he interviewed Wiley on July 16 and July 25, 2012, at the police station. Videos of Wiley's statements were played for the jury. During his July 16, 2012, statement, Wiley said he was home asleep on the night of the murders when defendant came to the house. Defendant went upstairs and told Wiley that Freedom would be coming by to get some heroin. Defendant left, and Wiley heard gunshots within the next five minutes. Defendant later told Wiley that he shot Freedom first, then shot Central, and returned to shoot Freedom again. Wiley stated defendant had a Ruger nine-millimeter handgun with a 32-round magazine and had four bullets left after the shootings. Wiley stated defendant went to Indianapolis and returned to Decatur in May. Defendant told Wiley that Freedom stole money from defendant.

¶ 20 In his July 25, 2012, statement, Wiley said Miranda Gharst contacted him the same day as his previous statement. Dozier also called him and said Gharst had to talk to Wiley about an offer of $5,000 to change his story. Wiley told Gharst he wanted $2,500 before he changed his story and $2,500 after defendant got out of jail. Wiley arranged to meet Gharst but backed out because he thought it was a setup.

¶ 21 With the same limiting instruction provided to the jury prior to his testimony, Jeff Depenbrok stated he had an "extensive" criminal history, including convictions for theft, burglary, forgery, and residential burglary. On July 18, 2012, Depenbrok was in custody at the Macon County jail. While in line with other inmates to go to bond court, he had a conversation with defendant, who stated he was in jail because someone accused him of murder. Defendant asked Depenbrok if his bond was posted if he would "shut him up." Depenbrok stated defendant was referring to a man known as "Duke," who had accused defendant of murder.

¶ 22 Decatur police detective Jason Hesse testified he listened to recorded phone calls made by defendant from the jail to other individuals between July 17 and July 19, 2012. In the first call (July 17 at 7:16 a.m.), defendant talked with an unidentified female and told her to have Wiley tell the police he is lying. During the second call (July 17 at 7:23 a.m.), defendant told an unidentified male to find Wiley and get him to make a statement. In the third call (July 17 at 7:29 a.m.), defendant told an unidentified female to "get a hold of Tempestt and Duke" and tell Duke to write a statement indicating he was lying to the police.

¶ 23 During the fourth call (July 17 at 11:49 a.m.), defendant told an unidentified female to contact Duke to write a letter saying he lied. In the fifth call (July 17 at 1:23 p.m.), defendant told an unidentified female to contact Duke and tell the police he was lying. During the sixth call (July 17 at 3:52 p.m.), defendant spoke with an unidentified male about talking with Wiley and defendant stated "we gonna [*sic*] give him the money." Defendant also told the male to contact Tierius Oldham to write a statement and she would be paid.

¶ 24 In the seventh call (July 17 at 7:54 p.m.), defendant talked to an unidentified female and told her to have Wiley write a letter. During the eighth call (July 19 at 9:56 a.m.), defendant talked to an unidentified female and said he had not been charged yet and needed a lawyer. The female thought her phone was being tapped. In the ninth call (July 19 at 10:04 a.m.), defendant talked to an unidentified female, who stated Gharst "got caught *** with some things."

¶ 25 Miranda Gharst testified she had a conversation with defendant within a month of the murders. He told her Freedom got robbed with $10,000 of defendant's money. Gharst knew Isaiah Wiley, known as Duke, and Tempestt Rawls. She received a phone call from defendant on July 17 at 7:34 a.m. where he told her to contact "Tempestt and Duke and tell Duke to come

down here and write that statement sayin [*sic*] he just lied." In another call (July 17 at 3:36 p.m.), Gharst stated Duke told Shalen he needed $5,000 to make a statement. Defendant told her to record any further calls with Shalen.

¶ 26 C. The Murder of Isaiah Wiley

¶ 27 Ebony Brady testified she was eating at a Decatur restaurant on December 9, 2012, when she received a call from Rickie Kendricks. She later gave him a ride to an apartment complex. Kendricks exited and got into another vehicle. William Robinson testified he was at home at approximately 2 p.m. that day when he heard a gunshot. He saw two individuals, one of whom held a gun, standing over a man in the street. The gunman shot the victim "several times." Decatur police officer George Kestner stated he arrived on the scene of a person down on December 9, 2012, and found Isaiah Wiley lying on the ground with three bullet wounds to the chest and two to the right arm. Wiley later died at the hospital.

¶ 28 Tempestt Rawls, Wiley's girlfriend, testified she was at defendant's birthday party on July 15, 2012, when he angrily told Wiley he was taking him back to Detroit. Wiley walked away from him. The next day, defendant and Demetrius Beavers "started jumping" on Wiley and assaulted him. When Rawls tried to intervene, defendant said "Bitch, if you do, I'm going to kill you." Wiley later gave a statement to the police. In the days that followed, Wiley received phone calls from Shalen Dozier. Wiley and Rawls left Decatur for a few days but then returned. On December 9, 2012, Rawls and Wiley were outside her mother's house when "Rickie came up from the back and just got to shooting" Wiley. While she initially identified Lowell Turner as the shooter, Rawls later identified Kendricks as the shooter.

¶ 29 D. The Isaiah Wiley Murder Investigation

¶ 30 Erica Bobbitt testified she was the director of the surgical neuro and oncology unit at Decatur Memorial Hospital in November 2012. Between November 23 and November 29, 2012, Wiley was hospitalized and found to have a blood clot. During his stay, Wiley was cared for, in part, by Amy Meyer, a certified nursing assistant.

¶ 31 The parties stipulated that certain records corresponded to various phone numbers, including 217-775-8283 (Freedom), 217-454-1125 (Wiley), and 217-330-0897 (unknown). Decatur police officer David Dailey testified to other phone numbers found at the scene of the murders, including 217-775-8284 (Central) and 217-519-3501 (Freedom). The top three numbers on Freedom's 8283 phone were 217-330-0897 (110 times), 217-775-8284 (77 times), and 312-437-4191 (50 times).

¶ 32 Dailey examined phone calls between the 0897 number and Wiley's phone. A call was made to Wiley's phone at 10:38 p.m. on April 7, 2012, for 35 seconds, followed by a second call at 10:39 p.m. for 9 seconds. Wiley's phone then called the 0897 number at 10:39 p.m. for five seconds. A third call came to Wiley at 10:39 p.m. Freedom's phone received a call from the 0897 number at 10:39 p.m. that lasted 37 seconds. There were other calls between Wiley's phone and the 0897 number between 10:44 p.m. and 10:49 p.m. Shots were reported at 10:47 p.m.

¶ 33 Dailey attempted to establish the owner of the 0897 number but it was a prepaid phone, which does not require personal information to be provided. Jeremy Bauer, a staff operation specialist with the Federal Bureau of Investigation in Chicago, testified he analyzed the location of the 0897 number based on cell tower geographic information. In comparing a map showing the location of 1566 North Church Street (defendant's address) and 1261 North Clinton Street (the double murder scene), Bauer stated the homes were served by two different towers.

Two calls were made from the sector covering 1261 North Clinton Street at 10:23 and 10:24 p.m. on the night of the murders. An additional 22 phone calls were made between 10:34 and 11:01 p.m. in the same sector as the murder. The 0897 number returned to the sector servicing 1566 North Church Street for a call at 11:03 p.m.

¶ 34 Dailey stated each inmate in the Macon County jail is assigned a five-digit pin number during the booking process. When the inmate makes a call, he is prompted to enter the pin number. The calls are then recorded. Dailey stated there were no calls using defendant's pin number to the phone number belonging to Kendricks, although it is common for inmates to use different pin numbers because "they know law enforcement is listening." Dailey stated he was familiar with the voices of defendant and Kendricks and testified to numerous phone conversations between the two men.

¶ 35 In the first call (November 11, 2012, at 1:16 p.m.), defendant and Kendricks discussed a house Kendricks was working on. Kendricks stated he "got a visual on the house yesterday," and defendant stated he was "just worried bout [*sic*] you fixin [*sic*] that house up."

¶ 36 During the second call (November 19 at 5:30 p.m.), defendant remarked that individuals were not working on the house. Kendricks stated they were working on it but were slowed by cold weather. At the conclusion of the third call (November 19 at 5:48 p.m.), defendant told Kendricks to "get on the house too for me man, right away bro." In the fourth call (November 27 at 9:27 p.m.), defendant asked about the house and Kendricks told him he knew an individual who worked at the hospital and another person had been "real sick" with "blood clogs."

¶ 37 In the fifth call (November 29 at 5:49 p.m.), defendant asked Kendricks if any work had been done on the house. Kendricks stated he "hollered at dog twice" but the man was in the hospital with "them clogs." Defendant reminded him he was going to court in March.

¶ 38 During the sixth call (November 29 at 7:19 p.m.), Kendricks brought up his "source," a woman that worked at the "spital" [*sic*] named Amy. In the seventh call (November 29 at 7:28 p.m.), defendant said he would be getting out of jail in 90 days. Kendricks said he was trying "to get this house together" before "the snow touched down." Defendant stated "we need that investment property."

¶ 39 During the eighth call (December 7 at 8:52 p.m.), defendant talked to a carload of unidentified individuals. At one point, he told a female to watch the news tomorrow. In the ninth call (December 9 at 12:56 p.m.), Kendricks stated he would have some "good news" for defendant, as he was "almost finished" and just had to "put the siding up." Kendricks said "it was supposed to be done yesterday," but one of his workers left early. During the tenth call (December 9 at 1:17 p.m.), defendant told Kendricks to "finish that house up. *** I'm waiting on that new paint." Kendricks stated it was "supposed to be done yesterday." In the twelfth call (December 17 at 9:30 a.m.), defendant told Kendricks to keep working on the house so it would be finished when defendant got out. Kendricks stated "the roof is good and it's a three dimensional." During the thirteenth call (December 20 at 8:09 p.m.), Kendricks said he was almost finished with the house and mentioned how everything was "all black" and "smoked out."

¶ 40 On cross-examination, counsel inquired as to whether Detective Dailey was of the opinion that defendant's statements about repairing a house were really discussions about killing Wiley, and Dailey responded in the affirmative and stated there was "no doubt in [his] mind." Dailey stated he had been informed that defendant owned property but it was not in his name.

Regarding the calls about the house that took place after Wiley's death, Daily remarked the previous calls did not involve laughter, but after Wiley's death, "they laugh about it." They also talked about the house being "blacked out," and Dailey stated the color black is associated with death. When asked if he interpreted the use of the phrase "black bar" to be a gun, Daily stated "[t]here is no doubt in my mind that these calls are discussing fixing up a house, the murder of Wiley." Following an objection, the trial court instructed the jury to disregard the portion of Dailey's response dealing with his personal opinion.

¶ 41 E. Defendant's Case

¶ 42 In the defense case, Brenda Johnson testified she helped raise defendant since he was in second grade. She lived at 1566 North Church Street and, although her name was on the title, it was defendant's house. She stated defendant had "at least three more houses" in Decatur. Her house "needed a lot of work." When asked if there was any significance to the house being "smoked out" and "everything is black," Johnson stated the floor is "a grayish black color" and there is a "black bar that was supposed to go in the basement." Since July 2012 when defendant was incarcerated, Johnson stated Kendricks did some work around the house.

¶ 43 Defendant testified he and Freedom "sold drugs together." Freedom would travel to Chicago to obtain drugs. Upon his return, they would split the drugs between him, defendant, and Freedom's brother, Jacoby Cunningham. Defendant stated he never gave money to Freedom, as Freedom's "connection in Chicago always fronted him the drugs." Defendant testified Wiley also sold drugs for him. Defendant got into a fight with Wiley on July 16, 2012, after defendant found money missing from his house, which Wiley was in charge of at the time.

¶ 44 When asked about paying Wiley $5,000 to change his statement, defendant stated he wanted any conversation recorded because Wiley was blackmailing him for money.

Defendant stated he never asked Kendricks in code to kill Wiley. Defendant testified he acquired several properties in Detroit at one time, sold them, and then acquired more in Decatur. He acquired the house at 1566 North Church Street in 2011. He did not have title to any of his properties because he sold drugs and did not want them taken by law enforcement. Defendant testified the jail calls to Kendricks involved him fixing properties, and the guy with the "blood clogs" was the one Kendricks was trying to buy a house from.

¶ 45 On the day of the murders, defendant was smoking and drinking at his "house on Church Street." He went to a liquor store around 8:30 or 9 p.m. He stated he never went to 1261 North Clinton Street on the day of the murders. He also stated the 0897 number belonged to Shalen Dozier.

¶ 46 Donita Matthews, a cousin to both defendant and Freedom, testified she was drinking with several people, including defendant, on April 7, 2012, when they learned of the shooting. Defendant had gone to buy liquor at 8:30 or 9 p.m. and returned 10 to 15 minutes later. Matthews stated she was with defendant from 10 p.m. on, including when they heard Freedom and Central had been killed

¶ 47 F. The Jury's Verdict, Defendant's Posttrial Motion, and the Sentence

¶ 48 Following closing arguments, the jury found defendant guilty. As to both victims, the jury found the State proved the allegation that defendant personally discharged a firearm that proximately caused death to another person in committing first degree murder.

¶ 49 In May 2015, defense counsel filed a posttrial motion, raising multiple issues, including the improper admission of other-crimes evidence and improper comments made by Detective Dailey. The trial court denied the motion. Thereafter, the court sentenced defendant to consecutive terms of life in prison plus 25 years. This appeal followed.

¶ 50 II. ANALYSIS

¶ 51 A. Other-Crimes Evidence

¶ 52 Defendant argues reversible error occurred when the State introduced extensive other-crimes evidence that allowed the jury to convict him of the murder of Freedom and Central by trying him for the attempted bribery and murder of Wiley. We disagree.

¶ 53 Initially, we note the State argues defendant did not properly preserve the issue pertaining to the attempted bribery of Wiley because defense counsel did not raise it in the posttrial motion. Thus, the issue is forfeited on appeal. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must object at trial and raise the issue in a posttrial motion to preserve the issue for review). Defendant, however, asks this court to review the issue as a matter of plain error.

¶ 54 The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error in two instances:

> "(1) where a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error and (2) where a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process ***." *People v. Belknap*, 2014 IL 117094, ¶ 48, 23 N.E.3d 325.

¶ 55 Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first step in the analysis, we must determine "whether there was a clear or obvious error at trial."

People v Sebby, 2017 IL 119445, ¶ 49; *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272.

¶ 56 Evidence of other crimes is generally inadmissible to show a defendant's propensity to commit the charged criminal conduct. *People v. Donoho*, 204 Ill. 2d 159, 170, 788 N.E.2d 707, 714 (2003). Such evidence, while relevant, is excluded because it "has 'too much' probative value." *Donoho*, 204 Ill. 2d at 170, 788 N.E.2d at 714 (quoting *People v. Manning*, 182 Ill. 2d 193, 213, 695 N.E.2d 423, 432 (1998)). However, "[e]vidence of other offenses may be admissible to demonstrate 'motive, intent, identity, absence of mistake, *modus operandi*, or any other relevant fact other than propensity.' " *People v. Smith*, 2015 IL App (4th) 130205, ¶ 21, 29 N.E.3d 674 (quoting *People v. Vannote*, 2012 IL App (4th) 100798, ¶ 37, 970 N.E.2d 72); see also Ill. R. Evid. 404 (eff. Jan. 1, 2011) (stating other crimes evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). That said, "[e]ven when such evidence is offered for a permissible purpose and not solely for propensity, such evidence will not be admitted if its prejudicial impact substantially outweighs its probative value." *People v. Chapman*, 2012 IL 111896, ¶ 19, 965 N.E.2d 1119; see also *People v. Abernathy*, 402 Ill. App. 3d 736, 749, 931 N.E.2d 345, 356 (2010) (noting "other-crimes evidence may be excluded if the trial court determines, after conducting a balancing test, that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant").

¶ 57 "If other crimes evidence is admitted, it should not lead to a mini-trial of the collateral offense; the court should carefully limit the details to what is necessary to illuminate the issue for which the other crime was introduced." *People v. Nunley*, 271 Ill. App. 3d 427,

432, 648 N.E.2d 1015, 1018 (1995). "The admissibility of other-crimes evidence lies in the trial court's sound discretion, and we will not disturb that court's decision absent a clear abuse of discretion." *People v. Johnson*, 368 Ill. App. 3d 1146, 1155, 859 N.E.2d 290, 298 (2006). Our supreme court has noted "an abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. McDonald*, 2016 IL 118882, ¶ 32, 77 N.E.3d 26; see also *People v. Lerma*, 2016 IL 118496, ¶ 32, 47 N.E.3d 985 (stating "[a]buse of discretion is a highly deferential standard of review").

¶ 58 In the case *sub judice*, the State sought to introduce other-crimes evidence pertaining to defendant's attempt to (1) have Wiley change his statement about defendant's involvement in the double murder and (2) solicit Kendricks to murder Wiley. The State indicated the evidence was relevant to show defendant's identity and guilty knowledge. The trial court allowed the motions, finding, in part, the evidence was "extremely relevant to identity and knowledge."

¶ 59 The other-crimes evidence at issue in this case was relevant to establish defendant's consciousness of guilt and identification as the murderer of Freedom and Central. See *People v. Baptist*, 76 Ill. 2d 19, 27, 389 N.E.2d 1200, 1204 (1979) (finding evidence that the defendant attempted to kill eyewitnesses was relevant and admissible because it showed a consciousness of guilt); see also *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 21, 13 N.E.3d 1280 (finding the defendant's threat to kill the victim and a witness was an attempt to intimidate witnesses and avoid police detection, which showed a consciousness of guilt). Thus, it was admissible.

¶ 60 Defendant argues the State introduced "excessive evidence" in the two areas of other-crimes evidence, pointing toward defendant's phone calls from jail and the witnesses' description of Wiley's murder. However, the State's evidence was detailed only to the extent necessary to prove guilty knowledge and identity. Moreover, it was not presented in excessive detail but sought to provide the jury with a picture of what occurred after the double murders. While the evidence was prejudicial, "it is not all prejudicial evidence that must be excluded but, rather, only that which is *unfairly* prejudicial." (Emphasis in original.) *People v. Rutledge*, 409 Ill. App. 3d 22, 25, 948 N.E.2d 305, 308 (2011). The trial court also instructed the jury prior to the presentation of the other-crimes evidence and during jury instructions at the close of the case that evidence received on the issue of defendant's knowledge and identification could only be considered for that limited purpose. See *People v. Luczak*, 306 Ill. App. 3d 319, 328, 714 N.E.2d 995, 1001 (1999) (noting the use of a limiting instruction "substantially reduces the prejudicial effect of the other crimes evidence"); *People v. Illgen*, 145 Ill. 2d 353, 376, 583 N.E.2d 515, 525 (1991) (stating that, on the issue of other-crimes evidence and jury instructions, "[f]aith in the ability of a properly instructed jury to separate issues and reach a correct result is the cornerstone of the jury system").

¶ 61 Here, the other-crimes evidence was relevant and admissible. In considering whether to allow the evidence, the trial court "engag[ed] in a meaningful assessment of the probative value versus the prejudicial impact of the evidence" (*Donoho*, 204 Ill. 2d at 186, 788 N.E.2d at 724) and concluded the probative value outweighed the prejudicial effect. We find the court's decision to allow the other-crimes evidence was not unreasonable, fanciful, or arbitrary. As we find no error, we hold defendant to his forfeiture of the attempted bribery issue and

conclude the court did not abuse its discretion in allowing the State to introduce evidence pertaining to Wiley's murder.

¶ 62 B. Assistance of Counsel

¶ 63 Defendant argues trial counsel was ineffective when counsel elicited opinion testimony from Detective Dailey that he believed defendant and Kendricks were referring to murdering Wiley when they discussed "working on a house" during recorded phone calls. We disagree.

¶ 64 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show "counsel's performance 'fell below an objective standard of reasonableness.' " *People v. Valdez*, 2016 IL 119860, ¶ 14, 67 N.E.3d 233 (quoting *Strickland*, 466 U.S. at 688). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 65 Pertinent to this issue, defendant points toward defense counsel's questioning of Detective Dailey on the topic of phone calls between defendant and Kendricks pertaining to home repairs. During cross-examination, counsel asked Dailey whether he was of the opinion

that when defendant "asks him to repair a house that he is really talking about go kill Mr. Wiley." Dailey responded, "Yes, sir. There's no doubt in my mind."

¶ 66 Defense counsel later asked Dailey about a phone call between defendant and Kendricks that occurred eight days after Wiley's murder and whether Dailey still thought defendant was "talking about killing Wiley." Dailey responded, in part, as follows:

> "Yes, sir. If you listen to the initial calls talking about fixing the house, there is never any laughter.
>
> * * *
>
> They are laughing about it still and they're talking about the house being all blacked out, 'everything is blacked out, man. Blacked out,' and they're laughing about it. What do we associate the color black with? Death."

¶ 67 Later, when defense counsel asked whether Dailey thought a "bar being black" meant a gun, Dailey stated "[t]here is no doubt in my mind that these calls are discussing fixing up a house, the murder of Wiley." Counsel objected, stating Dailey's opinion was improper and "a deliberate attempt to influence the jury." The court instructed the jury to disregard the portion of the response dealing with Dailey's personal opinion.

¶ 68 "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court. Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable." *People v. Pecoraro*, 175 Ill. 2d 294, 326-27, 677 N.E.2d 875, 891 (1997).

¶ 69 In this case, defense counsel was well aware of the State's theory regarding the phone calls. In his opening statement, counsel even mentioned the State's "speculation" that the conversations between defendant and Kendricks contained "some form of code where fixing a house means kill Wiley." Counsel's questions to Dailey were asked for the strategic purpose of discrediting Dailey's investigation by contending Dailey assumed defendant's involvement in the crime without knowing all of the facts. After hearing Dailey's opinion, counsel asked him if he questioned anyone about defendant owning property and repairing them for rental. He continued to ask him whether he saw new siding on the house at 1566 North Church Street or noticed whether repairs had been made. Thus, counsel's questions attempted to show Dailey erroneously assumed defendant sought to have Wiley killed, when a seemingly innocent explanation could be given to the home-repair conversations. While the opinion of a lay witness is generally not admissible into evidence (*People v. Brown*, 200 Ill. App. 3d 566, 578-79, 558 N.E.2d 309, 316-17 (1990)), we find, given the State's theory as to the conversations, it was not unreasonable for defense counsel to attempt to discredit Dailey by showing his bias toward defendant in the investigation.

¶ 70 Even if we found defense counsel's questioning improper, we find defendant cannot establish the prejudice prong of the *Strickland* standard. Under this prong, courts ask "whether defendant has established that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v. Simpson*, 2015 IL 116512, ¶ 37, 25 N.E.3d 601. "A 'reasonable probability' is defined as 'a probability sufficient to undermine confidence in the outcome.' " *Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601 (quoting *Strickland*, 466 U.S. at 694).

¶ 71 Given its pretrial motions, the State's theory that the jail calls between defendant and Kendricks concerned the killing of Wiley was well known. By playing the tape recordings, the State placed the conversations before the jury, and Dailey's belief as to any hidden meaning was an obvious inference to be drawn from the evidence. Otherwise, there would be no reason to play them. Dailey's lay opinion did not invade the province of the jury by telling it whom to believe because the jury was free to disregard it and come to its own conclusion, especially in light of defendant's evidence regarding the purchase and renovation of multiple houses. As defendant cannot show a reasonable probability that the result of the proceeding would have been different had counsel not asked Dailey the questions at issue and as Dailey's answers did not undermine confidence in the jury's verdict, his claim of ineffective assistance of counsel fails.

¶ 72 III. CONCLUSION

¶ 73 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 74 Affirmed.