2017 IL App (4th) 170257-U

NO. 4-17-0257

FILED
August 31, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: W.M., a Minor	)	Appeal from
	)	Circuit Court of
(The People of the State of Illinois,	)	McLean County
Petitioner-Appellee,	)	No. 16JD166
v.	)	
W.M.,	)	Honorable
Respondent-Appellant).	)	J. Brian Goldrick,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justice Harris concurred in the judgment.
Presiding Justice Turner specially concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the trial court did not err in failing to provide respondent with a guardian *ad litem*, and (2) the court's error in admitting a witness's prior inconsistent statement without proper foundation was harmless.

¶ 2 In August 2016, the State filed a petition for adjudication of wardship, alleging respondent, W.M. (born in 1997), was a delinquent minor because he committed one count of robbery (720 ILCS 5/18-1(a) (West 2014)). After a February 2017 adjudicatory hearing, the trial court found respondent guilty of the offense charged in the petition and adjudicated respondent a delinquent minor. At the March 2017 dispositional hearing, the court made respondent a ward of the court, adjudicated him a habitual juvenile offender, and committed him to the Department of Juvenile Justice until his twenty-first birthday as required by section 5-815(f) of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5-815(f) (West 2014)).

¶ 3 Respondent appeals, contending the trial court erred by (1) failing to appoint a guardian *ad litem* or order his father, who was incarcerated at the beginning of the proceedings, to be present for W.M.'s delinquency proceedings; and (2) permitting the State to use a witness's recorded interview as substantive evidence. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The wardship petition alleged respondent committed the offense of robbery on June 21, 2015, in that he knowingly took an iPhone and United States currency from the person or presence of Jarod Maki by threatening the imminent use of force. Additionally, the petition identified respondent's parents and provided their addresses. Respondent's father was incarcerated in the Department of Corrections, and respondent's mother was living in Chicago. The record indicates respondent's parents received service of the summons in this case. The State also sent notice of the pretrial hearings in this case to both parents. At the time of the petition's filing, respondent was 18 years old and living on his own. Additionally, the State filed a separate document giving notice of its intent to prosecute respondent as a habitual juvenile offender pursuant to section 5-815 of the Juvenile Court Act (705 ILCS 405/5-815 (West 2014)).

¶ 6 A. Adjudicatory Hearing

¶ 7 On February 28, 2017, the trial court held the adjudicatory hearing in this case. The State only sent notice of the hearing to respondent's mother, who did not appear at the hearing. Respondent appeared "in person in adult custody on other matters." At the hearing, the State presented the testimony of (1) Maki, the victim; (2) Shawndell Wright, an alleged participant in the robbery; and (3) Darren Wolters, a Normal police detective. The general theory of the case was that respondent, along with Steven Alexander and Wright, entered Maki's vehicle without permission, pretended to hold a gun against Maki's head, and stole his wallet,

phone, and cash. The evidence relevant to the issues on appeal is set forth below.

¶ 8 1. *Maki's Testimony*

¶ 9 Maki testified, on the afternoon of June 21, 2015, he went by himself to the Qik-n-EZ gas station to purchase cigarettes. After he left the store and started walking to his car, three African-American males approached him. One of the males asked for change, and Maki told him that he did not have any. Maki got in his car, and the male who asked for change went to the open window on the car's front passenger side and again asked for money. Maki handed him some change. After that, the man got into the front passenger seat, and the other two males got into the backseat. Maki did not give the three males permission to enter his car. Maki then felt a hard object at the base of his skull, and the males told him to drive. He followed their directions and stopped the car when directed. After Maki stopped the car, the male sitting behind him grabbed Maki and held him to the seat. The other two males went through Maki's stuff. They took his wallet and a cellular telephone. The three males then fled the car. Maki identified the person in the photograph labeled as State's exhibit No. 1—a black male wearing a red shirt—as one of the men who sat in the backseat of his vehicle.

¶ 10 2. *Wright's Testimony*

¶ 11 Wright's testimony consisted largely of (1) denying involvement in the robbery or (2) claiming a lack of memory regarding the incident. In an attempt to lay a foundation for the admission of Wright's recorded interview with Detective Darren Wolters, the State asked Wright the following questions.

> "Q. Do you remember an incident that happened in June 2015?
>
> A. No, not really. It's been—it's been too long. I've been

locked up and a lot of shit been going on.

* * *

Q. And while you were housed down in the county jail [for an unrelated offense], do you recall a detective coming to speak to you about a different incident?

A. No."

After being shown a short portion of a recording, Wright admitted the recording showed him speaking with a detective.

"Q. Now, in that—that video in that interview, do you recall speaking to the detective in that case?

A. I don't recall what was—what was being, you know, but I see myself in the video but I don't recall the incident and all that.

* * *

Q. Do you recall what you did on Father's Day that year [2015]?

A. Yeah, I didn't do nothing.

Q. You don't remember going anywhere?

A. No.

Q. Okay. Do you remember telling the detective that you went somewhere?

A. No.

Q. Okay. Is it your testimony today that you did not tell the detective you went somewhere?"

A. Yeah.

Q. Okay. So you did not tell the detective that you went to Dollar General or to Qik-n-EZ that day?

A. Don't recall."

Wright testified he was familiar with respondent and identified him in open court. He later denied having knowledge about whether respondent also went by the name "Terrell."

"Q. Do you remember seeing [respondent] on June 21st of 2015?

A. No.

Q. Is it possible that you saw him and you just don't remember?

A. No.

* * *

Q. [D]o you know an individual named Steven Alexander?

A. Yeah.

* * *

Q. [D]id you see Steven Alexander on June 21st of 2015?

A. No.

Q. Okay. You're positive you did not see him that day?

A. As I recall.

Q. Do you recall telling the detective you saw an individual named Little Steve-o that day?

A. No."

Wright went on to deny knowing anyone named Little Steve-o or an individual known as L.S.

"Q. Do you recall telling the detective that you know an individual named L.S.?

A. No.

Q. Okay. No, you don't recall, or no, you didn't tell them.

A. No, I don't recall.

Q. Okay. In the interview that you identified yourself in, you told the detective about an incident that happened on June 21st. Do you recall or what can you tell us about that incident?

A. I can't tell you too much of nothing because I don't recall the incident, like I said when I first got up here."

The State then confronted Wright about his lack of cooperation and his unwillingness to testify, and Wright admitted he did not want to testify.

"Q. And when you spoke to the detective on this date, you didn't really want to speak to him on that day[,] either. Is that right?

A. I don't recall.

Q. Okay. Do you recall telling him that you didn't want to be labeled a snitch?

A. No."

The State then showed Wright a photograph taken from the surveillance video at the Qik-n-EZ.

"Q. Do you recognize [this photo]?

A. No.

Q. Do you recall being shown this photo before?

A. No

Q. Okay. And you don't recognize the individual in State's Exhibit One [(the photograph)]?

A. No."

¶ 12 The State then played a portion of Wright's interview where Wright acknowledged the photograph, which depicted a black male in a red shirt, was of respondent, whom he also knew as "Terrell."

¶ 13 3. *Detective Wolters's Testimony*

¶ 14 Detective Wolters testified he was assigned to a case on June 21, 2015, that involved a robbery. During the investigation, he interviewed three suspects, Wright, respondent, and Alexander. Detective Wolters testified that, in his interview with Wright, Wright was cooperative but not forthcoming at first. However, by the end of the interview, Detective Wolters believed Wright had explained what actually happened. Detective Wolters testified Wright described the incident on June 21, and that was the only incident they discussed throughout the interview. The State showed a short segment of a video, and Detective Wolters identified himself and Wright in the video. He noted he only interviewed Wright once. To Detective Wolters's knowledge, the interview with Wright was a fair and accurate recording. Additionally, Detective Wolters testified respondent admitted being the person wearing the red shirt in the photograph taken from the surveillance video at the Qik-n-EZ.

¶ 15 4. *Wright's Recorded Interview*

¶ 16 After examining Detective Wolters about Wright's recorded interview, the State moved to enter the recording into evidence, and respondent’s counsel objected. He argued the

prosecutor only asked Wright questions about "a couple of specific things" and the recording was almost two hours long. Respondent's counsel contended that, since the recording was so long, "quite a bit of information was probably discussed that's well beyond the scope of the direct examination that the State had with Wright," and thus, a lot of the interview would not fall under the hearsay exception. The prosecutor noted Wright several times indicated he could not recall the June 21 incident, and Detective Wolters testified the entire interview was about the June 21 incident. The trial court overruled respondent's objection, finding the State had laid a proper foundation for the admission of the recording under section 115-10.1(c)(2)(C) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/115-10.1(c)(2)(C) (West 2014)).

¶ 17 The trial court thereafter watched the almost two-hour recording of Detective Wolters's interview of Wright in chambers. Wright's interview took place a few weeks after June 21, 2015. During the interview, Detective Wolters explained what he was investigating and noted it was separate from the incident for which Wright was arrested. Wright gave several versions of what happened on June 21, 2015. When first asked about that date, Wright noted that was Father's Day and stated he spent time with family. Wright also stated he went to the Dollar General store. Eventually, he told Detective Wolters that he, "Terrell," and another person got into the victim's car. "Terrell" was wearing a red shirt and sitting in the backseat behind the driver/victim. After they drove off, "Terrell" put his cellular telephone to the victim's neck like he had a gun and said, "Give me all of your shit." The driver gave him some cash and his cellular telephone. Throughout the recording, Wright referred to "Terrell" as the main perpetrator but eventually acknowledged that was the man's nickname. Wright identified respondent as "Terrell" by stating his actual first name, and he noted the death of W.M.'s brother. He identified the other man, who was wearing black and sitting in the front passenger

seat, as "L.S.," "Little Steve-o," and Steven. Wright later admitted Steven was his half-brother, Steven Alexander.

¶ 18 After the trial court watched the recording, the State rested. Wright did not return to the stand for further direct examination or to be cross-examined on the contents of the recording. Respondent's counsel did not present any other evidence. After considering the evidence, the court found the State had proved beyond a reasonable doubt respondent had committed the robbery.

¶ 19 B. Dispositional Hearing

¶ 20 On March 27, 2017, the trial court held the dispositional hearing. The State sent respondent's mother notice of the hearing, but she did not appear. The social investigation report noted respondent's father's address and whereabouts were unknown. After hearing the evidence, the court made respondent a ward of the court and adjudicated him a habitual juvenile offender under section 5-815 of the Juvenile Court Act (705 ILCS 405/5-815 (West 2014)). Because respondent was a habitual juvenile offender, the court sentenced him to the Department of Juvenile Justice until his twenty-first birthday, as required by section 5-815(f) of the Juvenile Court Act (705 ILCS 405/5-815(f) (West 2014)).

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, respondent asserts the trial court erred by (1) failing to appoint a guardian *ad litem* or order his father, who was incarcerated at the beginning of the proceedings, to be present for W.M.'s delinquency proceedings; and (2) permitting the State to use Shawndell Wright's recorded interview as substantive evidence. We address these issues in turn.

¶ 24 A. Concerned Adult

¶ 25 Respondent first asserts the trial was required to appoint a guardian *ad litem* for him since he did not have a concerned adult representing his interests. Specifically, respondent seeks a bright-line rule that a guardian *ad litem* must be appointed in all delinquency cases where a concerned adult is not present. He recognizes he did not raise this issue in the trial court and requests we review the matter under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). Thus, we begin our analysis by determining if any error occurred. See *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010) (noting the first step in conducting a plain-error analysis is determining whether any error occurred). Since respondent sets forth his argument as a legal question and not based on the facts of his case, our review is *de novo*. See *People v. Carter*, 392 Ill. App. 3d 520, 523, 912 N.E.2d 266, 269 (2009).

¶ 26 While respondent cites examples of other categories of cases where a guardian *ad litem* must be appointed, we find it unnecessary to examine them because a statute governs the appointment of a guardian *ad litem* in delinquency cases. Section 5-610(1) of the Juvenile Court Act (705 ILCS 405/5-610(1) (West 2014)) provides the following: "The court may appoint a guardian *ad litem* for the minor whenever it finds that there may be a conflict of interest between the minor and his or her parent, guardian or legal custodian or that it is otherwise in the minor's interest to do so." Since the provision uses the language "may appoint" a guardian *ad litem*, and the use of the word "may" connotes discretion (*Krautsack v. Anderson*, 223 Ill. 2d 541, 554, 861 N.E.2d 633, 643 (2006)), the language of the provision gives the trial court discretion to appoint a guardian *ad litem* but does not require it to do so. Our supreme court has stated the following: "Unlike abuse and neglect proceedings, there is no requirement that a guardian *ad litem* be appointed in delinquency proceedings." *People v. Austin M.*, 2012 IL 111194, ¶ 71, 975 N.E.2d 22. If the legislature intended to require the appointment of a guardian *ad litem* whenever a

parent or guardian was not present, it could have expressly done so in the statute. The legislature required such in a prior version of the Juvenile Court Act (Ill. Rev. Stat. 1973, ch. 37, ¶ 704-05). This court will not write a new requirement into the Juvenile Court Act. Accordingly, we hold section 5-610(1) of the Juvenile Court Act (705 ILCS 405/5-610(1) (West 2014)) does not require a trial court to appoint a guardian *ad litem* for a respondent in a delinquency case when the respondent does not have a concerned adult present at the delinquency proceedings.

¶ 27 Respondent further argues that, even if this court finds the trial court was not required to appoint a guardian *ad litem*, the trial court should have ordered respondent's father to attend the proceedings. However, respondent fails to cite a statutory provision requiring the trial court to order an incarcerated parent's presence at his or her child's delinquency proceedings. Instead, he cites a statutory provision (705 ILCS 405/5-110 (West 2014)) and two cases (*In re Marcus W.*, 389 Ill. App. 3d 1113, 1127, 907 N.E.2d 949, 960 (2009) (quoting *In re J.W.*, 87 Ill. 2d 56, 62-63, 429 N.E.2d 501, 504 (1981)), all of which address the important role parents play in delinquency proceedings. While we do not disagree with respondent's sentiment that parents can have an important role in delinquency proceedings, it is not our role to write statutes. The requirement respondent asserts does not exist in the Juvenile Court Act as written by the legislature. Accordingly, we find the trial court did not err as a matter of law by not appointing a guardian *ad litem* for respondent or ordering his father to be present at the delinquency proceedings when no other concerned adult was present. Since we have found no error, we do not address whether plain error occurred.

¶ 28 B. Wright's Recorded Statement

¶ 29 1. *Admission of the Recording Under Section 115-10.1*

¶ 30 Respondent contends the trial court erred by allowing the State to use Wright's recorded interview as substantive evidence under section 115-10.1 of the Procedure Code (725 ILCS 5/115-10.1 (West 2014)) without first laying the proper foundation for admitting such evidence.

¶ 31 Generally, a witness's statements out of court and out of the presence of the respondent constitute pure hearsay and are incompetent as substantive evidence. *People v. Simpson*, 2015 IL 116512, ¶ 27, 25 N.E.3d 601. However, section 115-10.1 of the Procedure Code allows a party to use a witness's prior inconsistent statement as substantive evidence under certain circumstances. *Id.* ¶ 27. The determination of whether a witness's prior statements are inconsistent with his present testimony rests within the trial court's sound discretion. *People v. Flores*, 128 Ill. 2d 66, 87-88, 538 N.E.2d 481, 489 (1989). Thus, this court will not disturb the court's decision absent an abuse of that discretion. *Id.* at 88, 538 N.E.2d at 489. An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, or unreasonable, or when no reasonable person would agree with the trial court's position. *People v. Becker*, 239 Ill. 2d 215, 234, 940 N.E.2d 1131, 1142 (2010). "Laying the foundation for the admission of a prior inconsistent statement as substantive evidence under section 115-10.1 of the Code is essentially the same as laying the foundation to impeach a witness with his prior inconsistent statement." (Internal quotation marks omitted.) *People v. Grayson*, 321 Ill. App. 3d 397, 405, 747 N.E.2d 460, 467-68 (2001).

¶ 32 In this case, Wright generally testified to a lack of memory about the "incident" on June 21, 2015, which is sufficient to trigger the application of section 115-10.1. See *Flores*, 128 Ill. 2d at 87-88, 538 N.E.2d at 488-89 (a witness's professed memory loss may trigger the application of section 115-10.1); *People v. Brothers*, 2015 IL App (4th) 130644, ¶ 65, 39 N.E.3d

1101 (the purpose of section 115/10.1 is to protect the parties from witnesses who disavow prior statements or profess an inability to recall the subject matter); *People v. Martin*, 401 Ill. App. 3d 315, 319, 927 N.E.2d 877, 881 (2010) (if a witness cannot recall a prior statement, the prior statement should be admitted as a contradiction). However, the State must thereafter establish the necessary foundation to admit the prior inconsistent statement.

¶ 33 Section 115-10.1 (725 ILCS 5/115-10.1 (West 2014)) provides, in pertinent part, as follows:

> "In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement—
>
> * * *
>
> (2) narrates, describes, or explains an event or condition of which the witness 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."

¶ 34 Respondent contends the State failed to lay the necessary foundation showing Wright's recorded statements were inconsistent with his trial testimony. In particular, respondent argues (1) Wright was not available for cross-examination as required by section 115-10.1, and (2) the State failed to ask the necessary procedural questions to establish Wright had indeed made an inconsistent statement. Because we find respondent's second argument dispositive, we find it unnecessary to address respondent's first argument.

¶ 35 In support of his argument that the State failed to lay the necessary foundation, respondent cites this court's decision in *Grayson*.

In *Grayson*, 321 Ill. App. 3d at 404, 747 N.E.2d at 467, the trial court allowed the State to play a 9-1-1 call placed by a witness. Before the recording was admitted, the State only asked the witness if it was his voice on the tape, and the witness answered affirmatively. *Id.* at 405, 747 N.E.2d at 467. The court also listened to the recording and found it was inconsistent with the witness's trial testimony. *Id.* This court found the admission of the recording under section 115-10.1 was erroneous because the State failed to establish the inconsistency of the recording with the witness's trial testimony, as the witness was never confronted with the statement during his testimony. *Id.* at 406-07, 747 N.E.2d at 468. This court emphasized "a key aspect to establishing the foundation for the admissibility of a prior inconsistent statement is the need to confront the witness *while on the witness stand* with that statement." (Emphasis in original.) *Id.* at 406, 747 N.E.2d at 468. This court went on to explain:

> "One of the important reasons for the requirement that a witness be confronted with his allegedly prior inconsistent statement while still on the witness stand is to provide the opposing party with the opportunity to ask the witness to explain or clarify the inconsistent

> statement. When a witness is not confronted with his prior inconsistent statement, as occurred here when [the witness] was not confronted with the statement he made in the recording of his 911 call, the opposing party is deprived of the opportunity to ask the witness to explain the inconsistency, if he can." *Id.* at 407, 747 N.E.2d at 468-69.

¶ 36 Although the State in this case certainly asked more questions about Wright's prior testimony than the prosecutor asked the witness in *Grayson*, we nonetheless find *Grayson* analogous and instructive in the present case.

¶ 37 To properly lay the foundation necessary to admit the prior inconsistent statement, the State must first confront the witness with the specific inconsistent statement. See, *e.g.*, *People v. Lewis*, 2017 IL App (4th) 150124, ¶ 38, 78 N.E.3d 527; *Grayson*, 321 Ill. App. 3d at 406, 747 N.E.2d at 468; *People v. Moore*, 301 Ill. App. 3d 728, 732-33, 704 N.E.2d 80, 83 (1998) (to admit a prior inconsistent statement, the witness must first be questioned about the "place, circumstances, and substance" of the challenged statement). Similar to *Grayson*, the State failed to ask Wright the specific questions necessary to demonstrate a prior inconsistent statement with respect to the robbery. The State asked Wright questions such as (1) "Do you remember an incident that happened in June 2015?"; (2) "Do you remember telling the detective that you went somewhere?"; (3) "Do you remember seeing [W.M.] on June 21st of 2015?"; and (4) "Do you recall what you did on Father's Day?" The State did not once ask Wright about the robbery or statements he made to the detective regarding the robbery. The question that most closely resembles an attempt to impeach Wright's prior statement was, "So you did not tell the detective that you went to Dollar General or to Qik-n-EZ that day?"

¶ 38 The State asserts it would not be feasible to confront Wright with every statement made on the two-hour recording. However, the issue is not whether the State confronted Wright with every statement on the two-hour recording. The issue is whether Wright was specifically confronted with his prior inconsistent statements regarding the robbery and W.M.'s involvement. He was not.

¶ 39 The vague questions and lack of specificity failed to provide the necessary foundation for admitting Wright's statement under section 115-10.1. Instead, the State should have asked questions such as (1) "Did you say in the recorded interview you met W.M. at the Qik-n-EZ on the night of June 21, 2015?"; (2) "Did you say during the recorded interview that W.M. got into the victim's car?"; and (3) "Did you say in the recorded interview that W.M. held a phone to the victim's neck?" If Wright answered these specific questions inconsistently, the State would have provided sufficient foundation to admit the recording pursuant to section 115-10.1. Because the State failed to lay the proper foundation to justify admitting Wright's recorded interview under section 115-10.1, we conclude the trial court abused its discretion by admitting the recording.

¶ 40 2. *Harmless Error*

¶ 41 Having determined the trial court erred by admitting Wright's interview, we now turn to whether the error was harmless.

¶ 42 "The improper admission of evidence is harmless where there is no reasonable probability that, if the evidence had been excluded, the outcome would have been different." (Internal quotation marks omitted.) *Brothers*, 2015 IL App (4th) 130644, ¶ 97, 39 N.E.3d 1101. In determining whether the error was harmless, the reviewing court may "(1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly

admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." (Internal quotation marks omitted.) *Id.* ¶ 98. The State bears the burden of demonstrating harmless error. *People v. McLaurin*, 235 Ill. 2d 478, 495, 922 N.E.2d 344, 355 (2009).

¶ 43 Here, Maki testified three individuals entered his vehicle, and one of the individuals in the backseat wore a red shirt. After viewing a photograph taken from the surveillance footage at the Qik-n-EZ, Maki identified the person in the photograph as one of the individuals in the backseat of his car. Respondent corroborated the identification when he admitted to Detective Wolters that he was the person in the red shirt pictured in the surveillance photograph. According to Maki, one of the individuals in the backseat held an object to his head that he believed to be a gun. After he drove from the Qik-n-EZ, one of the individuals in the car restrained him as the other two rummaged through his belongings and took his wallet, cash, and phone. Based on the remaining evidence, we conclude Wright's recorded interview was cumulative and, therefore, the admission of his statement constituted harmless error.

¶ 44 III. CONCLUSION

¶ 45 Based on the foregoing, we affirm the trial court's judgment. As part of our judgment, we grant the State its $75 statutory assessment against respondent as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 46 Affirmed.

¶ 47 PRESIDING JUSTICE TURNER, specially concurring:

¶ 48 While I agree with the majority’s affirmation of the McLean County circuit court's judgment, I disagree with its finding the State failed to lay a proper foundation for the

admission of Wright's recorded statement. Thus, unlike the majority, I do not rely on harmless error to conclude the circuit court's judgment should be affirmed.

¶ 49 Section 115-10.1 of the Procedure Code (725 ILCS 5/115-10.1 (West 2014)) provides for the admission of prior statements as substantive evidence when (1) the witness has made a prior statement that is inconsistent with his testimony at trial, (2) the witness is subject to cross-examination concerning the statement, and (3) the prior statement "narrates, describes, or explains an event or condition of which the witness had personal knowledge" and one of three *alternative* grounds exists. First, section 115-10.1(c)(2)(A) (725 ILCS 5/115-10.1(c)(2)(A) (West 2014)) provides for the admissibility of such a statement if it "is proved to have been written or signed by the witness." Second, section 115-10.1(c)(2)(B) (725 ILCS 5/115-10.1(c)(2)(B) (West 2014)) allows for the admissibility of such a statement if the witness acknowledges under oath having made the statement (also referred to as the acknowledgment requirement). Last, section 115-10.1(c)(2)(C) (725 ILCS 5/115-10.1(c)(2)(C) (West 2014)) permits the admissibility of such a statement if "the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means."

¶ 50 In *Grayson*, 321 Ill. App. 3d at 404, 747 N.E.2d at 467, this court addressed the admission of a 9-1-1 call recording as a prior inconsistent statement under section 115-10.1(c)(2)(C). The witness was never asked any questions about the substance of his prior statement. *Grayson*, 321 Ill. App. 3d at 405, 747 N.E.2d at 467. Thus, the proper foundational requirements explained in *People v. Hallbeck*, 227 Ill. App. 3d 59, 62-63, 590 N.E.2d 971, 972-73 (1992), and the inconsistency required for admission by section 115-10.1(a) were clearly not established. Despite the fact the recording of the 9-1-1 call was clearly inadmissible, the *Grayson* court went further and noted its approval of Justice Wolfson's dissent in *People v.*

McDonald, 276 Ill. App. 3d 466, 480, 658 N.E.2d 1251, 1259 (1995). See *Grayson*, 321 Ill. App. 3d at 408, 747 N.E.2d at 469-70. Specifically, it noted the following:

¶ 51 "Justice Warren Wolfson wrote that '[t]he operative word in section 115-10.1(c)(2)(B) is "acknowledge." The witness must "acknowledge" the *words* attributed to him by the police officer, not that he made some unspecified statement. Otherwise, the witness' statement would be whatever the police officer says it is.' (Emphasis added.)" *Grayson*, 321 Ill. App. 3d at 408, 747 N.E.2d at 469-70 (quoting *McDonald*, 276 Ill. App. 3d at 480, 658 N.E.2d at 1259 (Wolfson, J., dissenting)).

¶ 52 Justice Wolfson's observations are correct for section 115-10.1(c)(2)(B) where the witness's prior statements are not memorialized by a written statement or recording. As Justice Wolfson further noted, "[t]he risk of misuse is highest when the purported prior statement is oral. That is why the statute exacts a higher foundational standard before oral statements can be considered as substantive evidence." *McDonald*, 276 Ill. App. 3d at 482, 658 N.E.2d at 1261 (Wolfson, J., dissenting).

¶ 53 However, with a recording that is admissible under section 115-10.1(c)(2)(C), the concerns raised by Justice Wolfson regarding section 115-10.1(c)(2)(B) do not apply. The danger of the police attributing an unacknowledged statement to a witness is not present because the statement is memorialized by the recording. The prior statement is shown to have actually been made by the requirement the proponent must prove the statement was accurately recorded. See 725 ILCS 5/115-10.1(c)(2)(C) (West 2014). Thus, the same high foundational requirements for section 115-10.1(c)(2)(B) are not necessary for section 115-10.1(c)(2)(C). Accordingly, I disagree with *Grayson*'s *dicta* that the higher foundational requirements of section 115-10.1(c)(2)(B) are applicable to statements admissible under section 115-10.1(c)(2)(C) (see

Grayson, 321 Ill. App. 3d at 408, 747 N.E.2d at 470) and the majority's finding *Grayson* is analogous and instructive in this case (*supra* ¶ 36). I further note that, unlike this case, *Grayson* did not involve a witness who professed memory loss.

¶ 54 At issue here is whether the State asked enough questions about the substance of Wright's statements to Detective Wolters to establish a sufficient foundation and establish an inconsistency. Unlike *Grayson*, where the State did not at all question the witness about the substance of the prior statement, the prosecutor in this case did question Wright about his recorded interview. Wright had testified he could not recall the June 21, 2015, incident, or even seeing respondent on that date. In fact, he testified it was not even possible he saw respondent on June 21, 2015. Wright persisted in his memory loss even after the prosecutor showed Wright small clips of his recorded statement to Detective Wolters and questioned him about (1) what he did on Father's Day, which was June 21, 2015; (2) the Qik-n-EZ where the incident began; and (3) the name of the alleged third participant.

¶ 55 Our supreme court has held "[a] witness' prior testimony, however, does not have to directly contradict testimony given at trial to be considered inconsistent within the meaning of that term set out in section 115-10.1." *Flores*, 128 Ill. 2d at 87, 538 N.E.2d at 488. It further found a witness's professed memory loss of a matter can constitute a contradiction of a former affirmation of it. *Flores*, 128 Ill. 2d at 87-88, 538 N.E.2d at 488-89. Since *Flores* provides professed memory loss is sufficient to establish inconsistency for purposes of section 115-10.1 (*Flores*, 128 Ill. 2d at 88, 538 N.E.2d at 489), once Wright persisted in his professed memory loss, the State was not required to engage in furthering questioning of Wright. Here, the State asked questions of Wright indicating the date, time, place, and general subject matter of his recorded statement to Detective Wolters in compliance with the foundational requirements set

forth in *Hallbeck*, 227 Ill. App. 3d at 62, 590 N.E.2d at 972. The State did not have to ask the further questions suggested by the majority to establish the foundation.

¶ 56 While the majority declines to address defendant's argument regarding cross-examination, I find it important and necessary to explain why the State's foundation fulfilled the cross-examination requirement of section 115-10.1(b) of the Procedure Code (725 ILCS 5/115-10.1(b) (West 2014)) and did not inhibit defense counsel's cross-examination of Wright. The cross-examination requirement is different for sections 115-10.1(c)(2)(C) and 115-10(c)(2)(B). With section 115-10(c)(2)(B) of the Procedure Code (725 ILCS 5/115-10.1(c)(2)(B) (West 2014)), the foundational requirement can be and, in fact, must be established solely by the witness who made the prior inconsistent statement. See *Brothers*, 2015 IL App (4th) 130644, ¶ 75, 39 N.E.3d 1101. However, under section 115-10(c)(2)(C) (725 ILCS 5/115-10.1(c)(2)(C) (West 2014)), the proponent of the prior inconsistent statement must prove the statement was accurately recorded. Generally, it is the police who have preserved the witness's prior statement (see *Brothers*, 2015 IL App (4th) 130644, ¶ 92, 39 N.E.3d 1101), and thus, testimony from the officer who preserved the witness's statement is necessary for the admissibility of the prior inconsistent statement under section 115-10(c)(2)(C). In this case, Detective Wolter's testimony as to the accuracy of the recorded statement was necessary for Wright's recorded statement to be admissible. Thus, the State could not have played the recorded statement while Wright was still on the stand. Here, Wright testified at trial and was subject to cross-examination, but defense counsel chose not to question him at all. Moreover, defense counsel could have recalled Wright after the recorded statement was played to explain or clarify the recorded statement. As demonstrated by the following cases, Wright was subject to cross-examination about the prior statements as required by section 115-10.1(b), and defense counsel could have questioned

Wright about his recorded statement.

¶ 57 In *People v. Lewis*, 223 Ill. 2d 393, 404, 860 N.E.2d 299, 306 (2006), our supreme court addressed the meaning of the requirement "subject to cross-examination concerning the statement" under the hearsay rule exception contained in section 115-12 of the Procedure Code (725 ILCS 5/115-12 (West 2002)). The court applied the United States Supreme Court's holding "a witness is 'subject to cross-examination' when he or she is placed on the witness stand, under oath, and responds willingly to questions." *Lewis*, 223 Ill. 2d at 404, 860 N.E.2d at 306 (citing *United States v. Owens*, 484 U.S. 554, 561 (1988)). The *Lewis* court rejected the defendant's argument he was prevented from cross-examining the witness about her out-of-court statement because it was not raised by the State on direct examination. *Lewis*, 223 Ill. 2d at 404, 860 N.E.2d at 306. Our supreme court also noted the defendant could have recalled the witness for cross-examination after the detective testified about the out-of-court statement. *Lewis*, 223 Ill. 2d at 405, 860 N.E.2d at 306. Similarly, in *People v. Dixon*, 256 Ill. App. 3d 771, 777, 628 N.E.2d 399, 404 (1993), which addressed admissibility of an out-of-court statement under section 115-10.1 (Ill. Rev. Stat. 1989, ch. 38, ¶ 115-10.1), the court rejected the defendant's assertion he could not effectively cross-examine the witness or challenge the truth of the out-of-court statement because the witness was not on the stand when the statement was admitted into evidence. The *Dixon* court noted defense counsel had the option of recalling the witness after the State presented the testimony of the person who observed the witness make his written statement. *Dixon*, 256 Ill. App. 3d at 777, 628 N.E.2d at 404. In both cases, the reviewing courts found the cross-examination requirement was fulfilled and noted the defendant could not claim a lack of opportunity to cross-examine when the defendant did not even attempt to cross-examine the witness. See *Lewis*, 223 Ill. 2d at 404-05, 860 N.E.2d at 306; *Dixon*, 256 Ill. App.

3d at 777, 628 N.E.2d at 403-04.

¶ 58 Accordingly, I would find the circuit court did not abuse its discretion in admitting Wright's recorded interview as substantive evidence under section 115-10.1(c)(2)(C) of the Procedure Code (725 ILCS 5/115-10.1(c)(2)(C) (West 2014)).