2021 IL App (4th) 200234-U

NO. 4-20-0234

FILED
December 30, 2021
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEITH K. GREEN, Defendant-Appellant.	)	Appeal from the Circuit Court of McLean County No. 18CF748 Honorable John Casey Costigan, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's judgment because (1) the trial court's admission of testimony containing out-of-court statements did not violate the rule against hearsay or the confrontation clause because the out-of-court statements were offered for their effect on the listener, (2) defense counsel was not ineffective for failing to object to the testimony because it was not hearsay, (3) defendant was not prejudiced by his attorney's failure to object to evidence that defendant's car was present at a prior, uncharged drug deal, and (4) the trial court did not err by failing to appoint new counsel to investigate defendant's claims of ineffective assistance.

¶ 2 In July 2019, a jury found defendant, Keith K. Green, guilty of delivery of more than 1 gram but less than 15 grams of cocaine (720 ILCS 570/401(c)(2) (West 2018)). In January 2020, the trial court sentenced defendant to 13 years in prison.

¶ 3 Defendant appeals, arguing (1) the admission of Ashley Melton's out-of-court-statements to the police (a) violated the rule against hearsay and the confrontation clause and (b) defense counsel's failure to object to the admission of these statements constituted

ineffective assistance of counsel, (2) defense counsel's failure to object to evidence that defendant's car was involved in a prior, uncharged drug deal constituted ineffective assistance of counsel, and (3) the trial court erred by not appointing new counsel to litigate defendant's *pro se* posttrial claims of ineffective assistance of trial counsel for (a) failing to interview or call Melton as a witness and (b) failing to obtain a video of Haywood Harris's interview with police.

¶ 4 We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. The Charges Against Defendant

¶ 7 In July 2018, the State charged defendant with unlawful delivery of more than 1 gram but less than 15 grams of cocaine within 500 feet of a church (*id.* § 407(b)(1)) (count I), unlawful delivery of more than 1 gram but less than 15 grams of cocaine (*id.* § 401(c)(2)) (count II), unlawful delivery of less than one gram of cocaine within 500 feet of a church (*id.* § 407(b)(2)) (count III), and delivery of less than one gram of cocaine (*id.* § 401(d)(i)) (count IV). The charges alleged, generally, that on July 23, 2018, defendant sold cocaine to a police informant (later identified as Harris).

¶ 8 In July 2019, the State dismissed counts I, III, and IV, and defendant proceeded to jury trial only on count II.

¶ 9 B. Defendant's Motion *in Limine*

¶ 10 Prior to jury selection, the trial court addressed defendant's motion *in limine* seeking to bar "any prior bad acts allegedly committed by the defendant." The State objected to defendant's motion, noting that "[this] situation doesn't occur in a vacuum. Clearly the police informant witness had a number that he could call to get drugs. Clearly that's the defendant. So there will be some limited testimony related to prior bad acts." The State explained that there was

a controlled buy operation earlier in the day during which Harris was arrested for selling drugs that he obtained from defendant. The State then advised that it intended to ask Harris whether, following his arrest, (1) he told the police who he got his cocaine from, (2) he provided the police that person's phone number, and (3) he agreed to assist the police. The State acknowledged that this would constitute "some prior bad act testimony," but asserted it was "relevant, proper and admissible to lay that foundation to move forward."

¶ 11 Defense counsel responded, "The scenario [the State] talks about is not what I was trying to stop as far as that goes. Certainly [the State is] going to be free to inquire with respect to that." Counsel objected, however, to any suggestion of "prior crimes or bad acts not associated in this case."

¶ 12 The trial court denied defendant's motion *in limine*, ruling the State could offer evidence consistent with its representations.

¶ 13 C. The Evidence at Defendant's Trial

¶ 14 1. *Kevin Raisbeck*

¶ 15 Kevin Raisbeck of the Bloomington Police Department testified that he was a member of the department's vice unit, which focused on drug investigations. In the late afternoon of July 23, 2018, Raisbeck conducted a controlled drug buy and arrested Harris for serving as the "middleman" in a drug transaction. During an interview at the police station, Harris told Raisbeck that he got his drugs from a man named "Strong" and described Strong's car as a white Buick or Chrysler. Harris then provided Strong's phone number and agreed to work with Raisbeck as a police informant.

¶ 16 As a result, Raisbeck began planning a controlled buy operation for the same evening with Strong as the target. Raisbeck briefed other officers about the plan and assigned them

different tasks, including surveillance and "takedown." Raisbeck photocopied $225 in United States currency, which was to serve as the buy money. He gave the photocopy to Todd Walcott, a detective with the Bloomington Police Department, to compare against any currency that might be recovered after the buy.

¶ 17 Raisbeck testified that after the briefing, Harris placed two phone calls to Strong while Raisbeck listened over speakerphone. In the first call, Harris spoke briefly with a male and ordered an "eight ball," which Raisbeck explained meant an eighth of an ounce of cocaine. About 30 minutes later, Harris made a second call to the same number, and the same male said he was on his way. Raisbeck stated he later interviewed defendant and recognized his voice as the male voice on both calls.

¶ 18 Raisbeck further testified that before leaving for the buy location, he searched Harris, confirmed Harris had no drugs, and gave Harris the $225 buy money. Raisbeck then drove Harris to the buy location and dropped him off. Surveillance officers were in place to continuously watch Harris. Three minutes passed before Harris returned to Raisbeck's car and gave Raisbeck a bag of powder cocaine.

¶ 19 After the controlled buy, Raisbeck released Harris and went to the jail to interview defendant, who had been arrested immediately following the buy by the "takedown" officers. Defendant's interview was recorded, and the State played it for the jury.

¶ 20 During the interview, defendant provided his phone number, which was the same number Harris had called to order the eight ball. Defendant stated that his friend, Ashley Melton, was in the car with him during the buy and his arrest. Defendant explained, "She was going to get some mail from her father's house. I had picked her up to take her to her father[']s house to get some mail because she ain't picked up her mail for months or something." During the interview,

defendant also admitted he "makes curves" "here and there" to make a "little extra" cash. (Defendant later explained "making curves" meant obtaining drugs for people.) Raisbeck clarified, "And then you just sell some coke on the side to get some extra dollars?" Defendant answered, "Just a little bit. Just to *** get by." Raisbeck asked defendant if, just before his arrest, anything was thrown out of his car. (Other officers had recovered cash on the street in defendant's path of travel following the drug transaction). Defendant denied that either he or Melton threw anything out of the car, but when confronted with the fact that officers may have seen or video recorded money being thrown out the passenger side of the car following the meeting with Harris, defendant stated, "I told her to."

¶ 21 On cross-examination, defense counsel asked Raisbeck about his decision to make Harris a confidential informant:

> "Q: Okay. So Haywood Harris was considered as a confidential source, correct?
>
> A: Yes.
>
> Q: And that's because you talked to him when he was arrested on that same day; is that right?
>
> A: Correct.
>
> Q: And you were impressed with the fact that he was honest?
>
> A: Correct.
>
> Q: Now, what about Haywood Harris made you believe he was honest?
>
> A: Everything he said was shown of what happened earlier in the day."

Raisbeck's answer, repeated here verbatim, may have led the jury to believe Harris communicated to Raisbeck certain facts that proved to be true.

¶ 22 Near the close of his cross-examination, defense counsel asked Raisbeck the following about Melton:

"Q: Okay. Did you interview Ashley Melton?

A: Yes, I did.

Q: Ultimately, did you let her go?

A: Yes.

Q: Now, you had information at the time you interviewed her that she was in the car with [defendant]?

A: Correct, she was the front-seat passenger.

Q: Did you also have information that she had been in the car when Mr. Harris was in the car?

A: Yes.

Q: Did you consider her a participant or a witness in the transaction you say happened?

A: She would have been a potential witness is how I would have considered her.

Q: All right. And did you interrogate her with respect to what she saw in the car?

A: Yes.

Q: Now, ultimately, she was released?

A: Yes, she was.

Q: Her phone was returned to her?

A: Yes.

Q: All right. And are you aware whether she's been subpoenaed as a witness here today?"

The State's relevance objection was sustained, and defense counsel continued:

"Q: Since your interrogation, have you met with Ms. Melton?

A: No, I have not."

¶ 23 The State began its redirect examination by instructing Raisbeck, "Tell the jury why you let Ashley Melton go." In response, Raisbeck explained that he let Melton go because "[s]he claimed to have no knowledge other than receiving a bunch of trash from [defendant], which she threw out the window. She said she was just going to get mail from her father's house, and she had no idea what was going on."

¶ 24 The State then asked a series of questions about Raisbeck's decision to sign Harris up as an informant:

"Q: What are you looking for when you cultivate people as an informant?

A: Their source.

Q: And, generally, are you also looking for something related to honesty?

A: Yes.

Q: What are you looking for?

A: Some kind of cooperation.

Q: And, when asked about Haywood Harris, you were asked everything that happened that made you believe that. What are you talking about earlier in the day?

A: We had placed Mr. Harris under surveillance earlier in the day prior to his arrest, because we were making a controlled purchase from him.

Q: And [were] there any links to any cars or anything like that related to

this?

A: We saw [defendant's] Chrysler 300 show up and then Mr. Harris called our [confidential source] and told the [confidential source] in that case to come over because he had the cocaine.

Q: And that was the buy that Haywood Harris middled or was arrested for?

A: Correct."

¶ 25 2. *Haywood Harris*

¶ 26 Haywood Harris testified that he used to have a drug problem but stopped using cocaine when he was arrested by Raisbeck in July 2018. He signed up that day to work as a police informant. He did not get paid to act as an informant but hoped to help himself with his charges. Harris testified that he told Raisbeck who he could get drugs from and provided the phone number that he called to get drugs.

¶ 27 Harris stated that he called defendant and ordered an "eight ball." Defendant agreed to sell Harris an eight ball, and they arranged to meet in the parking lot of Harris's apartment. After the call, Raisbeck searched Harris, gave him approximately $200, and drove him to the buy location. When Harris saw defendant's white Chrysler, he got out of Raisbeck's car and walked around to the back of the building.

¶ 28 Harris testified that he got into the back seat of defendant's car. A female whom Harris did not know was in the passenger seat. Harris testified that she never turned around and was not paying attention to what was going on. Harris was in defendant's car for 30 to 40 seconds, during which time he handed defendant the money and defendant handed him an eight ball. Harris then exited defendant's car, walked to Raisbeck's truck, and gave Raisbeck the cocaine.

¶ 29 3. *Other Law Enforcement Witnesses*

¶ 30 Several other officers with the Bloomington Police Department testified about their participation in the controlled buy involving defendant.

¶ 31 Officer Steven Brown testified that he was assigned to conduct general surveillance. He was in plain clothes when he saw defendant arrive at the buy location in the white Chrysler 300 with a female passenger. Approximately two minutes later, Brown saw Harris arrive and get in the back of defendant's vehicle. Harris was in defendant's car for less than a minute before he exited and walked back from where he came. Defendant drove away, and Brown followed briefly at a distance before he saw other surveillance units take over.

¶ 32 Officer Jared Johnson testified that his task was to arrest the suspect after the controlled buy. At the briefing prior to the buy, Raisbeck described the suspect as a black male and the suspect vehicle as a white Chrysler 300. After the buy occurred, Johnson initiated a traffic stop on the Chrysler. Defendant was the driver. Johnson arrested defendant and identified him in court.

¶ 33 Officer Pedro Diaz testified that, following defendant's arrest, Diaz searched the path defendant's vehicle travelled. Diaz located $205 in cash on the west side of the street. Based on its location, Diaz believed it was thrown from the passenger side of the Chrysler.

¶ 34 Officer Todd Walcott testified that prior to the buy, Raisbeck provided Walcott with a printed scan of the buy money for the purpose of comparing serial numbers to any currency that might be recovered after the buy. After defendant's arrest, Walcott searched defendant and Melton but did not find anything. When Walcott searched defendant's car, Walcott found a $20 bill on the front passenger seat, $940 in the center console, and a black flip phone on the driver's seat. Diaz pointed Walcott to $205 found in the street, which Walcott collected. Walcott confirmed by serial number that the $20 recovered from the passenger seat and the $205 recovered from the

street were the buy money. Walcott also testified that when he dialed the phone number Harris used to order the cocaine, the black flip phone recovered from the Chrysler's driver's seat rang.

¶ 35 Joni Little, a forensic scientist employed by the Illinois State Police, testified that she tested the cocaine from the controlled buy and determined it to be 3.6 grams of cocaine.

¶ 36 The State then rested.

¶ 37 4. *Defendant's Testimony*

¶ 38 Defendant testified that he and Harris were friends who both "dibble-dabble" in drugs "a little bit." Defendant testified that Harris called him in the evening of July 23, 2018, and asked defendant to "come get him." Defendant drove to Harris's house with Melton in his car. Harris got in defendant's car, said something to Melton, then handed something to her, and then got out of the car. Defendant denied that a drug transaction took place in his car. He acknowledged being pulled over by police. He testified that the statements he made during the interview with Raisbeck were accurate but explained that when he talked about "curves"—that is, selling cocaine—he was referring to his past. He further testified that he was trying to protect Melton in the interview because she had recently had a baby.

¶ 39 On cross-examination, defendant acknowledged talking to Harris on the phone but denied that Harris asked him for an eight ball. The prosecutor then asked, "And, the white Chrysler earlier in the day [that] Detective Raisbeck saw on the middle deal [Harris] was arrested on, that was you, wasn't it?" Defendant answered, "No," and further denied that he sold any drugs that day. Defendant testified that he could not remember when he last sold drugs.

¶ 40 The jury found defendant guilty.

¶ 41 D. Posttrial Proceedings

¶ 42 Defendant filed a motion for a new trial in which he argued the trial court erred by

denying his motion *in limine* regarding prior bad acts evidence. The court denied defendant's motion for a new trial.

¶ 43 Subsequently, defendant *pro se* sent a letter to the trial court stating that his "attorney's performance before and at trial was ineffective." Defendant did not specify in what manner his attorney's performance was ineffective.

¶ 44 Over two days in October and November 2019, the trial court conducted a *Krankel* hearing on defendant's allegations of ineffective assistance. See *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). Defendant orally raised 14 claims of ineffective assistance. Relevant to this appeal, he complained (1) counsel failed to interview or cross-examine Melton, who "could have stated that she made the buy," and (2) counsel failed to obtain the video of Harris's interview with Raisbeck on July 23, 2018, which could show that Harris was under duress or coercion, or under the influence of alcohol or drugs.

¶ 45 Regarding Melton, defense counsel responded that he reviewed Melton's written and video recorded statements more than once and concluded they were "damning" to defendant. Counsel explained he had "no reason to expect that she would testify in any different way if she showed up at trial."

¶ 46 Regarding the video of Harris's interview, counsel responded that (1) he noticed the State had not produced some videos that were mentioned in the written discovery and (2) he "engaged with the State" regarding discovery. Counsel explained that the prosecutor asked him what he "wanted to see," and "before I could get over there to see them to [*sic*] his office, he provided me with a set of those." Defense counsel asserted that he "had gotten everything that there was to get."

¶ 47 In a written order, the trial court found defense counsel's decision regarding Melton

to be a matter of trial strategy. It further found that defendant's claim regarding discovery was "conclusory, legally immaterial, misleading[,] and trial strategy." The court found that there was no basis to appoint new counsel to investigate defendant's claims of ineffective assistance.

¶ 48 In January 2020, the trial court conducted a sentencing hearing and imposed a sentence of 13 years' imprisonment.

¶ 49 This appeal followed.

¶ 50 II. ANALYSIS

¶ 51 Defendant appeals, arguing (1) the admission of Ashley Melton's out-of-court-statements to police (a) violated the rule against hearsay and the confrontation clause and (b) defense counsel's failure to object to the admission of these statements constituted ineffective assistance of counsel, (2) defense counsel's failure to object to evidence that defendant's car was involved in a prior, uncharged drug deal constituted ineffective assistance of counsel, and (3) the trial court erred by not appointing new counsel to litigate defendant's claims of ineffective assistance of counsel for (a) failing to interview or call Melton as a witness and (b) failing to obtain a video of Haywood Harris's interview with police.

¶ 52 We disagree and affirm.

¶ 53 A. Melton's Out-Of-Court Statements to Raisbeck

¶ 54 Defendant first argues that the admission of Melton's out-of-court statements to Raisbeck violated the rule against hearsay and defendant's confrontation clause rights. Defendant acknowledges that this issue was not properly preserved but requests review under the second prong of the plain-error doctrine. Alternatively, defendant contends his counsel rendered ineffective assistance by failing to raise and preserve these claims in the trial court. We address these claims in turn.

¶ 55 1. *Plain Error*

¶ 56 a. The Applicable Law

¶ 57 To preserve an error for review, a defendant must both object to the error at trial and raise the error in a posttrial motion. *People v. Sebby*, 2017 IL 119445, ¶ 48, 89 N.E.3d 675. The failure to do either results in forfeiture. *Id.*

¶ 58 A reviewing court may consider a forfeited error under the plain-error doctrine when a clear or obvious error occurred and (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007).

¶ 59 "The defendant bears the burden of establishing plain error." *People v. Kitch*, 239 Ill. 2d 452, 461, 942 N.E.2d 1235, 1241 (2011).

¶ 60 "Hearsay is an out-of-court statement offered to establish the truth of the matter asserted." *People v. Moss*, 205 Ill. 2d 139, 159, 792 N.E.2d 1217, 1229 (2001). "[T]estimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not hearsay." *People v. Banks*, 237 Ill. 2d 154, 180, 934 N.E.2d 435, 449 (2010); see also *People v. Hanson*, 238 Ill. 2d 74, 102, 939 N.E.2d 238, 255 (2010) ("An out-of-court statement is admissible if it is offered for some purpose other than to establish the truth of the matter asserted and does not constitute hearsay.").

¶ 61 The confrontation clause of the sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amend. VI. The "primary object" of the sixth amendment is "testimonial

hearsay." *Crawford v. Washington*, 541 U.S. 36, 53 (2004). Accordingly, "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. However, the confrontation clause does *not* bar the admission of testimonial statements that are admitted for purposes other than proving the matter asserted. *Id.* at 59 n.9. A court need consider whether a statement was testimonial only if it was, in fact, a hearsay statement offered to prove the truth of the matter asserted. *People v. Williams*, 238 Ill. 2d 125, 142, 939 N.E.2d 268, 277 (2010) (citing *Crawford*, 541 U.S. at 59 n.9).

¶ 62 b. This Case

¶ 63 The first step under either prong of the plain-error doctrine is to determine whether a clear or obvious error occurred at trial. *Sebby*, 2017 IL 119445, ¶ 49. Defendant claims the trial court erred by admitting the following testimony by Raisbeck explaining why he let Melton go: "She claimed to have no knowledge other than receiving a bunch of trash from [defendant], which she threw out the window. She said she was just going to get mail from her father's house, and she had no idea what was going on." Defendant contends that Raisbeck's testimony regarding Melton's out-of-court statements constituted inadmissible hearsay and violated his confrontation clause rights, thus depriving him of a fair trial. We disagree.

¶ 64 Raisbeck's testimony did not constitute inadmissible hearsay because it was not offered for the truth of the matter asserted. The context in which this testimony was given is material to our determination. On cross-examination, defense counsel asked Raisbeck if he considered Melton to be a participant or a witness in the drug transaction. Raisbeck answered that he considered Melton to be "a potential witness." Defense counsel then asked Raisbeck (1) if he interrogated Melton, (2) whether he released Melton, (3) whether he knew if Melton had been

subpoenaed to testify at defendant's trial, and (4) whether Raisbeck had spoken to Melton since he interrogated her. On redirect examination, the State instructed Raisbeck, "Tell the jury why you let Ashley Melton go." Raisbeck responded with the complained-of testimony.

¶ 65 The State did not elicit Melton's statements to Raisbeck for their truth—that is, to prove that Melton did not know what was going on, that defendant told her to throw trash out the window, and that she was just going to her father's house. Instead, the State clearly elicited this testimony to explain why Raisbeck released Melton after interrogating her. Statements offered to demonstrate their effect on the listener are not hearsay. *People v. Whitfield*, 2018 IL App (4th) 150948, ¶ 47, 103 N.E.3d 1096.

¶ 66 Accordingly, we conclude that Raisbeck's testimony about Melton's statements did not constitute hearsay. Because there was no hearsay, the confrontation clause is not implicated. Because there was no error, there can be no plain error.

¶ 67 We note that defendant argues plain error only under the second prong of the doctrine. However, the error defendant asserts in this case is not of the proper type for review under the second prong of the plain-error doctrine.

¶ 68 The Illinois Supreme Court has equated the second prong of the plain-error doctrine with structural error. *People v. Thompson*, 238 Ill. 2d 598, 613-14, 939 N.E.2d 403, 413 (2010). An error is structural when it "renders a criminal trial fundamentally unfair or unreliable in determining guilt or innocence." *People v. Averett*, 237 Ill. 2d 1, 12-13, 927 N.E.2d 1191, 1198 (2010). The United States Supreme Court has found error to be structural only in a " 'very limited class of cases.' " *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Structural errors include "a complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the

selection of a grand jury, and a defective reasonable doubt instruction." *Averett*, 237 Ill. 2d at 13 (citing *Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006)).

¶ 69 The Illinois Supreme Court, in *People v. Patterson*, 217 Ill. 2d 407, 424-25, 841 N.E.2d 889, 899-900 (2005), considered whether the admission of grand jury testimony from the defendant's girlfriend, who invoked the fifth amendment at trial, violated the confrontation clause. The specific issue before the court was whether a confrontation clause violation is subject to harmless-error review. *Id.* at 423. The court held that confrontation clause violations, such as the one that was before it, "are not 'structural defects in the constitution of the trial mechanism' that affect '[t]he entire conduct of the trial from beginning to end.' " *Id.* at 424 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)). Instead, the improper admission of the nontestifying witness's grand jury testimony was "more accurately described as a 'trial error,' *i.e.*, an 'error which occurred during the presentation of the case to the jury.' " *Id.* at 425 (quoting *Fulminante*, 499 U.S. at 307-08).

¶ 70 Accordingly, even if we determined the admission of Melton's out-of-court statements through Raisbeck's testimony to be error—which, we repeat, we do not—it would not be error subject to a second-prong plain-error analysis.

¶ 71 Defendant cites *People v. Fillyaw*, 409 Ill. App. 3d 302, 948 N.E.2d 1116 (2011), for the proposition that the erroneous admission of a co-defendant's hearsay statements in a joint trial is reviewable under second-prong plain error. However, we agree with the State that *Fillyaw* is distinguishable. *Fillyaw* involved the admission of a codefendant's out-of-court statement which directly implicated the defendant. *Id.* at 317. Both the Illinois and United States Supreme Courts have found the admission of such statements to require reversal. See *Bruton v. United States*, 391 U.S. 123, 136 (1968); *People v. Duncan*, 124 Ill. 2d 400, 413-14, 530 N.E.2d 423, 429 (1988).

¶ 72 However, the case before us involved neither a codefendant nor an admission implicating defendant. As such, *Fillyaw* has no application.

¶ 73 Defendant's reliance on *People v. Knight*, 323 Ill. App. 3d 1117, 1125, 753 N.E.2d 408, 415 (2001), is similarly misplaced. *Knight* involved the trial court's denial of the defendant's right to cross-examine a police officer regarding his surveillance position and did not address whether a hearsay statement that violates the confrontation clause is subject to second-prong plain error review. The facts of the present case are more akin to those the Illinois Supreme Court considered in *Patterson*.

¶ 74 We conclude that the admission of Melton's out-of-court statements to Raisbeck did not violate the rule against hearsay or the confrontation clause. Even if it did, the error would not be subject to second-prong plain error review. Because defendant did not raise this error before the trial court and he has not established plain error, he has forfeited this claim.

¶ 75 2. *Ineffective Assistance*

¶ 76 Defendant also contends that his counsel's failure to object to the admission of Melton's out-of-court statements constituted ineffective assistance of counsel.

¶ 77 a. The Applicable Law

¶ 78 "To demonstrate ineffective assistance of counsel, a defendant must show that (1) the attorney's performance fell below an objective standard of reasonableness and (2) the attorney's deficient performance prejudiced the defendant in that, absent counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *People v. Jackson*, 2020 IL 124112, ¶ 90, 162 N.E.3d 223 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Because the defendant must satisfy both prongs of this test, the failure to establish either is fatal to the claim." *Jackson*, 2020 IL 124112, ¶ 90 (citing

Strickland, 466 U.S. at 697).

¶ 79 "When a claim of ineffective assistance of counsel was not raised at the trial court, this court's review is *de novo*." *People v. Sturgeon*, 2019 IL App (4th) 170035, ¶ 85, 126 N.E.3d 703.

¶ 80 b. This Case

¶ 81 In this case defendant fails to establish either (1) that his attorney's performance was deficient or (2) that he was prejudiced. As explained earlier, Raisbeck's testimony regarding Melton's out-of-court statements did not constitute hearsay because Melton's statements were not offered for their truth. Because the statements were not hearsay, the confrontation clause was not implicated. Any objection to the admission of the testimony would have been meritless. Counsel cannot be deficient for failing to make a meritless objection. *People v. Edwards*, 195 Ill. 2d 142, 165, 745 N.E.2d 1212, 1225 (2001). For the same reason, defendant was not prejudiced.

¶ 82 Accordingly, defendant's claim that defense counsel was ineffective for failing to object to Raisbeck's testimony containing Melton's out-of-court statements fails.

¶ 83 B. Admission of Other Crimes Evidence

¶ 84 Defendant next argues that he was denied his right to effective counsel by his attorney's failure to object to the State's elicitation of evidence that defendant's car was involved in a prior, uncharged drug deal. Specifically, defendant argues that during the State's redirect examination of Raisbeck, when asked about the earlier controlled buy of drugs from Harris, Raisbeck testified as follows: "We saw [defendant's] Chrysler 300 show up, and then Mr. Harris called our [confidential source] and told the [confidential source] in that case to come over because he had the cocaine." Defendant contends the implication of this testimony is that defendant supplied the cocaine to Harris, who then sold it to the confidential source. Because defendant was

never charged for that conduct, defendant maintains, the testimony was improper other crimes evidence and his attorney was ineffective for failing to object to its admission. Defendant also contends that had counsel appropriately argued at the hearing on the motion *in limine* that such evidence was inadmissible, the trial court would have granted defendant's motion and the State would have been precluded from eliciting Raisbeck's testimony.

¶ 85 1. *The Applicable Law*

¶ 86 a. Other Crimes Evidence

¶ 87 "Other-crimes evidence encompasses misconduct or criminal acts that occurred either before or after the alleged criminal conduct for which the defendant is standing trial." *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 61, 991 N.E.2d 396. "Evidence of crimes for which a defendant is not on trial is inadmissible if relevant merely to establish the defendant's disposition or propensity to commit crime." *People v. Moore*, 2012 IL App (1st) 100857, ¶ 46, 964 N.E.2d 1276. However, "[e]vidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crimes." *People v. Pikes*, 2013 IL 115171, ¶ 11, 998 N.E.2d 1247.

¶ 88 b. Ineffective Assistance

¶ 89 Allegations of ineffective assistance of counsel are analyzed under the familiar two-prong *Strickland* test, discussed above. *Supra* ¶ 78.

¶ 90 2. *This Case*

¶ 91 Here, the trial court ruled, at the hearing on defendant's motion *in limine*, that the State could ask Harris limited questions that might touch upon defendant's prior bad acts. Specifically, the State could inquire of Harris whether (1) upon his arrest, he told the police who he got his drugs from, (2) he gave the police that person's phone number, and (3) he agreed to

assist the police. In fact, the State asked precisely those questions of Harris during its direct examination of him.

¶ 92 The State did not elicit testimony from any witness that defendant's Chrysler was present at the earlier controlled buy until *after* defense counsel cross-examined Raisbeck. During that examination, defense counsel asked Raisbeck a series of questions about his decision to sign Harris up as an informant. The clear implication of the line of questioning was that Harris was not a reliable person and Raisbeck exercised poor judgment in signing him up as an informant. Defense counsel asked Raisbeck, "Now what about Haywood Harris made you believe he was honest?" Raisbeck answered, "Everything he said was shown of what happened earlier in the day." Defense counsel, perhaps sensing that he had left the jury wondering what happened earlier in the day and what Harris had said about it, moved on to another line of questioning.

¶ 93 However, defense counsel's questions to Raisbeck opened the door for the State to rehabilitate Raisbeck's decision to use Harris as an informant. On redirect examination, the State asked Raisbeck, "What are you talking about earlier in the day?" Raisbeck responded that defendant's Chrysler was present at the earlier buy. The clear implication of Raisbeck's answer was that he believed Harris to be an honest informant because the details Harris provided were consistent with what the police themselves observed.

¶ 94 It is well-established that "a defendant can open the door to the admission of evidence that, under ordinary circumstances, would be inadmissible." *People v. Harris*, 231 Ill. 2d 582, 588-89, 901 N.E.2d 367, 370-71 (2008) (concluding defendant's testimony, "I don't commit crimes," opened the door for admission of his prior adjudications for purposes of impeachment); see also *People v. Gilliam*, 172 Ill. 2d 484, 514-15, 670 N.E.2d 606, 620 (1996) (holding defendant's contention that his lengthy detention rendered his confession involuntary opened the

door to previously barred other crimes evidence that explained the length of his detention); *People v. Lynn*, 388 Ill. App. 3d 272, 280-82, 904 N.E.2d 987, 993-95 (2009) (concluding defense counsel's questioning about the number of stops the officer had made since defendant's arrest opened the door to otherwise irrelevant evidence that not all of those stops result in arrests). Here, as in the cited cases, defense counsel's cross-examination of Raisbeck opened the door for the State's rehabilitation of Raisbeck.

¶ 95 However, we need not definitively determine whether defense counsel's performance was objectively unreasonable because defendant cannot establish the second prong of the *Strickland* test—namely, that he was prejudiced by Raisbeck's testimony that defendant's Chrysler was present at the earlier buy.

¶ 96 First, the fact that defendant's Chrysler was present at the earlier buy is minimal in comparison to the other evidence presented at trial that defendant was involved in the drug trade. Defendant stated in his recorded interview with Raisbeck that he sells cocaine to make extra cash. We acknowledge that, at trial, defendant claimed he was talking about his past. However, during the interview, defendant repeatedly spoke in the present tense. For example, in the recorded interview, Raisbeck asked defendant, "How much are you selling?" Defendant responded, "Just about whatever. When somebody asks I go get it and give them whatever." Raisbeck then asked defendant "Who do you get your coke from?" Defendant offered, "[H]elp me[,] I help you," and proceeded to tell Raisbeck who defendant bought his cocaine from, in what amounts, and for what price. Raisbeck asked defendant, "How much did you get today?" Defendant responded, "[A]round, like a ball." Raisbeck sought clarification and asked, "You just got one ball from him today?" Defendant responded, "No. We had talked two times." This evidence, which defendant does not challenge, was presented to the jury and established that defendant was actively involved

in selling drugs on July 23, 2018.

¶ 97 Moreover, the remaining evidence at trial was overwhelming of defendant's guilt. Defendant admitted to Raisbeck that he sells drugs occasionally. Raisbeck listened to Harris place an order for cocaine to a male voice that Raisbeck later identified as defendant's. Raisbeck heard defendant tell Harris he was on his way. Harris was searched prior to the transaction and was not in possession of drugs. Harris was under constant surveillance during the three minutes that passed from the time Harris exited Raisbeck's car with no cocaine and returned to Raisbeck's car with cocaine, except for the brief time Harris was in defendant's Chrysler. Police stopped defendant's Chrysler blocks away from the buy location and the buy money, matched by serial number, was found in his car and in his path of travel. The phone found in defendant's car rang when Wolcott dialed the number that Harris called to order the cocaine.

¶ 98 Weighed against all of the other evidence, the fact of defendant's car being at the earlier buy is of minimal significance. Accordingly, we conclude that no reasonable probability exists that, but for counsel's failure to object, the outcome of the trial would have been different. Because defendant has failed to show that he was prejudiced by the admission of evidence that his car was present at the earlier controlled buy, his claim of ineffective assistance of counsel fails.

¶ 99 C. The Trial Court's Decision Not To Appoint *Krankel* Counsel

¶ 100 Defendant's last contention on appeal is that the trial court erred by not appointing new counsel to litigate defendant's posttrial claims of ineffective assistance of counsel when the *Krankel* inquiry showed possible neglect of defendant's case by trial counsel. Specifically, defendant complains his trial counsel failed to (1) interview Melton and (2) obtain a video recording of Harris's interview with Raisbeck. The State responds that the trial court's decision was correct because defendant's claims of ineffective assistance lacked merit.

¶ 101 1. *The Law*

¶ 102 a. *Krankel* Inquiries

¶ 103 "A *pro se* posttrial motion alleging ineffective assistance of counsel is governed by the common-law procedure developed by [the Illinois Supreme Court in *Krankel*], and refined by its progeny." *People v. Roddis*, 2020 IL 124352, ¶ 34, 161 N.E.3d 173. When after trial a defendant presents a *pro se* claim of ineffective assistance of counsel, the trial court should first conduct an inquiry to examine the factual basis of the defendant's claim. *Id.* ¶ 35. "If the court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion." *Id.* "However, if the allegations show possible neglect of the case, new counsel should be appointed." *Id.*

¶ 104 "[I]f the trial court has properly conducted a *Krankel* inquiry and has reached a determination on the merits of the defendant's *Krankel* motion, [a reviewing court] will reverse only if the trial court's action was manifestly erroneous." *Jackson*, 2020 IL 124112, ¶ 98. "Manifest error is error that is clearly evident, plain, and indisputable." *Id.*

¶ 105 b. Ineffective Assistance

¶ 106 When examining whether an attorney's performance fell below an objective standard of reasonableness, reviewing courts are "highly deferential" of counsel's performance because there " 'are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.' " *Sturgeon*, 2019 IL App (4th) 170035, ¶ 82 (quoting *Strickland*, 466 U.S. at 689). "The defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *Id.* ¶ 83. "Counsel's strategic choices are virtually unchallengeable on appeal." *Id.* Whether and how to conduct a cross-examination is generally a matter of trial strategy. *Id.*

Similarly, the decision of whether to call a witness is generally strategic and reserved to trial counsel's discretion. *Jackson*, 2020 IL 124112, ¶ 106.

¶ 107 2. *This Case*

¶ 108 a. Alleged Failure To Interview or Call Melton as a Witness

Defendant first argues that the trial court erred by not appointing new counsel because he demonstrated at the *Krankel* inquiry that defense counsel rendered ineffective assistance by failing to investigate and call Melton to testify at trial. We disagree.

¶ 109 First, defendant has not established that his counsel conducted an inadequate investigation into Melton's testimony. Melton gave a recorded statement to the police denying knowledge of the drug transaction and stating defendant asked her to throw a piece of trash out of the window. At the *Krankel* inquiry, defense counsel maintained that he viewed Melton's recorded statement and had no reason to believe she would testify differently at trial. And defendant offers no reason to believe Melton would have testified differently. When presenting his *pro se* claims, defendant stated the following to the court regarding Melton:

> "She could have got on the stand and said anything. She could have been possibly an exculpatory witness, whatever. We do not know because he failed to call her. He failed to interview her. Her interview from then on 7/23/2018 could have been different like everyone else['s] statement was on 7/15 of 2019. So we don't know what she would have said."

Defendant's own words establish that his claim is conclusory and lacks a factual basis to support it.

¶ 110 Second, defense counsel's decision not to call Melton at trial was sound trial strategy. Defendant told the police, in a recorded interview that was played for the jury, the same

thing that Melton had told the police—namely, that she knew nothing about the drug transaction and defendant had asked her to throw a piece of trash out the window. Had defense counsel called Melton, she would have either (1) maintained her statement to the police, which would have added nothing to defendant's case, or (2) changed her story, which would have conflicted with both her *and* defendant's prior statements to the police, eroding the credibility of both of them.

¶ 111 Defendant cites no authority that requires an attorney to conduct his own interview of witnesses already interviewed by police. All the cases cited by defendant, *People v. Makiel*, 358 Ill. App. 3d 102, 107, 830 N.E.2d 731, 738-39 (2005), *People v. Truly*, 230 Ill. App. 3d 948, 953-55, 595 N.E.2d 1230, 1233-35 (1992), and *People v. Gibson*, 244 Ill. App. 3d 700, 703-04, 612 N.E.2d 1372, 1374-75 (1993), involve the failure to investigate or call alibi witnesses or witnesses that would (1) exonerate defendant or (2) corroborate his defense. That is simply not the situation here. Melton was not an alibi witness, nor was there any reason to believe she would change her statement to exonerate defendant or corroborate his defense, which, incidentally, was that Melton was the one who committed the crime. It is simply unbelievable that Melton would suddenly confess to the crime like a scene from *A Few Good Men*. Defense counsel was not unreasonable for expecting her to stick to her story of noninvolvement.

¶ 112 We conclude that the trial court correctly declined to appoint new counsel to investigate defendant's claim because it lacked merit.

¶ 113 b. Alleged Failure To Obtain Discovery

Defendant also argues that the trial court should have appointed new counsel to investigate his claim that trial counsel failed to obtain in discovery the video of Harris's interview with Raisbeck. Defendant contends that the trial court erred by concluding this claim was "conclusory, legally immaterial, misleading and trial strategy," because defense counsel's

response "[did] not actually address the factual basis of [defendant's] allegation."

¶ 114 At the *Krankel* hearing, defense counsel explained the following sequence of events.

> "I did engage with [the prosecutor] regarding discovery in the case. And [the prosecutor] asked me what I was—what I wanted to see. *** I noticed [the prosecutor] had not produced some videos that were mentioned in the written discovery. And before I could get over there to see them to his office, he provided me with a set of those."

Defendant responded as follows:

> "[T]he video, so now he has possession of it. He never showed me. He never told me about it. ***
>
> So if he had this information in this DVD and he didn't disclose and let me know because I wouldn't even be seeking sanction. I wouldn't even be bringing the issue up right now. ***
>
> I never saw it. I never knew that he had it. He never talked to me about this, that he actually got it from [the prosecutor]."

Defense counsel then represented, "I had gotten everything that there was to get."

¶ 115 "A trial court may base its *Krankel* decision on: (1) the trial counsel's answers and explanations; (2) a 'brief discussion between the trial court and the defendant'; or (3) 'its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face.' " *People v. Tolefree,* 2011 IL App (1st) 100689, ¶ 22, 960 N.E.2d 887 (quoting *People v. Moore*, 207 Ill. 2d 68, 78-79, 797 N.E.2d 631, 638 (2003)).

¶ 116 The record establishes that defense counsel followed up with the prosecution about

missing discovery—specifically, videos—and received "everything there was to get." Upon learning this at the *Krankel* hearing, defendant advised that, had he known, he would not have presented this complaint. Moreover, the court correctly relied on defense counsel's explanations, the court's discussion with the defendant, and the insufficiency of defendant's allegations on their face to conclude that defendant's claim was meritless. Its decision to not appoint new counsel, based on this record, was not manifestly erroneous.

¶ 117 III. CONCLUSION

¶ 118 For the reasons stated, we affirm the trial court's judgment.

¶ 119 Affirmed.