2023 IL App (4th) 220059-U

NO. 4-22-0059

FILED
May 16, 2023
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. SANFORD MARZETTE JR., Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Winnebago County No. 18CF1813 Honorable Debra D. Schafer, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Doherty and Lannerd concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) sufficient evidence was presented to sustain defendant's convictions and to support a sentencing enhancement for the personal discharge of a firearm, (2) defendant did not establish plain error or ineffective assistance of counsel related to the other-crimes evidence presented at his trial, and (3) defendant did not establish ineffective assistance of counsel related to trial counsel's failure to call certain witnesses as part of the defense.

¶ 2 Following a bench trial, defendant, Sanford Marzette Jr., was found guilty of attempted first degree murder and aggravated battery and sentenced to 43 years' imprisonment. Defendant now appeals, challenging (1) the sufficiency of the evidence to sustain his convictions and to support a sentencing enhancement, (2) the other-crimes evidence presented at his trial, and (3) his trial counsel's failure to call certain witnesses as part of the defense. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Charges

¶ 5 In July 2018, a Winnebago County grand jury returned a bill of indictment charging defendant with four counts of attempted first degree murder (720 ILCS 5/9-1, 5/8-4(a) (West 2016)) (counts I through IV) and one count of aggravated battery (*id.* § 12-3.05(e)(1)) (count V). The charges were based on a shooting that occurred on April 9, 2017, and resulted in injuries to Matthew Lorr. It was alleged defendant and/or Miquan Sanders had discharged a firearm that resulted in Lorr's injuries. It was also alleged defendant was legally responsible for the conduct of Sanders. Count II included a sentencing enhancement for being armed with a firearm (*id.* § 8-4(c)(1)(B)), count III included a sentencing enhancement for personally discharging a firearm (*id.* § 8-4(c)(1)(C)), and count IV included a sentencing enhancement for personally discharging a firearm that proximately caused great bodily harm (*id.* § 8-4(c)(1)(D)).

¶ 6 Around the same time defendant was charged, Sanders was charged in a separate case with various criminal offenses for his involvement in the shooting of Lorr. According to an agreed statement of facts filed with this court, defendant and Sanders were represented by different appointed counsel in their respective cases, the State in each case was represented by the same counsel, and both cases proceeded simultaneously before Judge Debra Schaefer.

¶ 7 B. Motion *in Limine* to Admit Other-Crimes Evidence

¶ 8 In May 2019, the State filed a motion *in limine* seeking to introduce evidence of another crime at defendant's trial. Specifically, the State sought to introduce evidence of an armed robbery allegedly committed by defendant and Sanders a short distance away from, and around the same time as, the shooting of Lorr. The victims of that offense were Toni Thomas and Lavetta Tripp. The State asserted evidence of the armed robbery of Thomas and Tripp would be relevant

to prove identity, opportunity, and proximity in time and place. Around the same time the motion was filed in defendant's case, the State filed a similar motion in Sanders's case.

¶ 9 In July 2019, defendant appeared before the trial court to schedule a hearing on the State's motion *in limine.* When discussing scheduling, defendant's counsel acknowledged there might be additional argument from Sanders's counsel. The court inquired if the issue was the same with respect to both defendants, to which the State responded in the affirmative. The court indicated it would conduct a joint hearing on the motion; neither side objected.

¶ 10 After scheduling the hearing on the State's motions *in limine*, defendant and Sanders prepared responses. Defendant's response was filed with the circuit clerk. Sanders's response was sent to the trial court and the State. Sanders's response was not, however, filed with the circuit clerk. Sanders's response is attached as an exhibit to the agreed statement of facts filed with this court. The response is not signed by Sanders's counsel. In the response, Sanders's counsel sets forth detailed facts about the armed robbery of Thomas and Tripp and the shooting of Lorr.

¶ 11 In August 2019, the trial court conducted the hearing on the State's motions *in limine*. At the commencement of the hearing, the court noted it had learned Sanders was "going to be pleading guilty," and it would be proceeding with the State's motion "and the response filed by the defense." The court then allowed the State and defendant's counsel to give lengthy proffers as to the facts of the armed robbery of Thomas and Tripp and the shooting of Lorr. The court also allowed the State and defendant's counsel to give oral arguments respectively in support of and against the motion. After hearing from the parties, the court took the matter under advisement, stating:

> "I guess I want to think about it a little bit and—I didn't read the cases in anticipation of this. The—Mr. Sanders'[s] motion had a lot

more facts relating to the case than either of your motions did. So I had some familiarity with it coming into it, but you've added some things today so I want to think about it."

¶ 12 In September 2019, the trial court granted the State's motion *in limine*. In its oral pronouncement of its decision, the court stated:

"The State was seeking that [evidence of the armed robbery of Thomas and Tripp] be admitted to show identity, opportunity[,] and proximity [in] time and place.

After the hearing I have a much greater—and also with the help of the co-defendant's motion *in limine* response, because that laid out the details—but also with the hearing, it laid out the facts and circumstances of it.

And on that basis, I do believe that it is appropriate to allow the State to present evidence concerning the armed robbery to show identity, opportunity, and proximity [in] time and place.

It is prejudicial. Of course, that's the reason they want it. I don't find it's unduly prejudicial. It is relevant to those issues."

¶ 13 According to the agreed statement of facts filed with this court, Sanders pleaded guilty "before [his response to the State's motion *in limine*] was filed," and the trial court, "[i]n deciding [the] motion in [defendant's] case, *** took into consideration [Sanders's] response to [the motion]."

¶ 14 C. Defense Counsel's Proffer

¶ 15 During the August 2019 hearing on the State's motion *in limine*, defense counsel,

during his proffer, discussed certain statements allegedly made to the police after the shooting of Lorr.

¶ 16 According to defense counsel, Jacob Price heard gunshots and witnessed a black male get out of a vehicle wearing a gray or white T-shirt and a black skullcap. Counsel noted Price did not give a description of "the driver." Price then "did a showup" that included defendant and Sanders. With respect to that showup, counsel asserted: "He actually says, 'Not the person involved in this. I've never seen that person before.' And he says that for both suspects, your Honor. 'I do not recognize,' for one suspect and, 'Not the person outside the Intrepid,' for the other."

¶ 17 Defense counsel asserted Joaquin Haugabook stated he saw a black male wearing an orange and black hat and a light-colored shirt get out of a vehicle. Haugabook then did "a showup" that included defendant and Sanders. As to that showup, counsel asserted Haugabook "did not recognize either suspect" and had "never seen them before."

¶ 18 Defense counsel asserted Quintrell Scott stated he was in the vehicle in which Lorr was shot. Scott reported observing a black male who had medium dreadlocks and possessed a handgun with a laser beam exit the front passenger side of a vehicle. Scott then did "a showup." With respect to that showup, counsel asserted: "[Scott] [d]id not recognize suspects one or two in the showup. Not just, 'I'm not sure,' but, 'These aren't the people that did this.' "

¶ 19 D. Motion *in Limine* to Admit Recorded Phone Calls

¶ 20 In December 2019, the State filed a motion *in limine* seeking to introduce recorded phone calls at defendant's trial. Specifically, the State sought to introduce multiple recorded phone calls defendant made from the jail. The State asserted the phone calls were relevant to establish defendant's consciousness of guilt. In addition, the State asserted certain statements made during

the phone calls were admissible as tacit admissions, in that defendant heard the incriminating statements and had the opportunity to reply but remained silent.

¶ 21 At a hearing that same month, the trial court, after entertaining arguments from the parties, reserved judgment on the State's motion *in limine* until the issue was raised at trial.

¶ 22 E. Bench Trial

¶ 23 In December 2019, the trial court conducted a bench trial. The following is gleaned from the evidence presented.

¶ 24 1. *Evidence of the Shooting of Matthew Lorr*

¶ 25 Matthew Lorr testified, around 12:20 a.m. on April 9, 2017, he and a man who went by the name of "Cuz" were in Lorr's parked vehicle, a red Dodge Neon, outside a house located at 201 Willard Avenue in Rockford, Illinois. His vehicle was parked in a residential area with "very dim" streetlights. Lorr heard "the sound of tires" and then looked up and saw a tall black man approaching from a silver four-door Dodge Intrepid. The man was approximately 10 feet in front of Lorr's vehicle. Lorr testified the man discharged approximately six shots into houses and then, after noticing Lorr in his vehicle, fired "whatever was left in the magazine into [Lorr's] vehicle." Lorr believed he was shot at about six times. Lorr's glasses were shot off his face "within the first or second shot." Lorr sustained injuries to his nose, upper lip, shoulder, neck, and thumb. Photographs of the injuries to Lorr and the damage to his vehicle were admitted into evidence. In addition, photographs showing eight cartridge cases on the ground near Lorr's vehicle were admitted into evidence. Four of the cases were in the street, and four of the cases were in the grass. Lorr testified the man approached Lorr's vehicle after the shooting and patted him down and demanded money. The man then put a firearm to Lorr's head, told him it was his time to die, and pulled the trigger. The firearm clicked but no bullet was fired. The man then returned to the Intrepid

"and they took off." Police were called, and Lorr was transported to the hospital for medical treatment. Lorr could not identify the man he observed shooting.

¶ 26 Gary Ibach testified he witnessed the shooting outside 201 Willard Avenue while sitting on the porch of a nearby house. He observed what appeared to be a light-colored, silver full-size American car, possibly a Riviera or Intrepid, stop in the middle of the street, approximately 10 feet away from a parked red Dodge Neon. Ibach acknowledged he could be mistaken about the color of the light-colored vehicle given the lighting at the time and the orange tint from the streetlights. After the light-colored vehicle stopped, Ibach observed a man get out of the passenger side of the vehicle, walk around the back of that vehicle, and then walk towards the Neon. Ibach then heard the man say something about money. At that point, Ibach noticed the man had a firearm in his hand. Ibach then heard approximately 5 to 10 shots. Ibach testified, "as far as [he] could tell," the driver of the light-colored vehicle remained in the vehicle, and all of the shooting came from the person who exited that vehicle. Ibach testified he "ducked [his] head down" after the first two shots but believed the shots sounded identical. Ibach was impeached with a statement he made after the shooting to a police officer indicating he observed the man fire seven shots. Ibach could not identify the man he observed shooting.

¶ 27 Police Officer Michael Schneider responded to the shooting outside 201 Willard Avenue shortly after it occurred. When driving towards the scene in an unmarked police vehicle, Officer Schneider noticed a vehicle that matched the description of the vehicle reportedly involved in the shooting-a silver Dodge Intrepid-leaving the Auburn Manor housing complex. Officer Schneider executed a U-turn, at which point he was able to observe the driver of the suspect vehicle to be a black male with a white hat. After completing the U-turn, Officer Schneider accelerated towards the suspect vehicle and activated his lights and sirens. The suspect vehicle did not stop,

and a pursuit ensued. Officer Schneider testified the suspect vehicle continued to pull away, despite his vehicle traveling at approximately 80 miles per hour. The suspect vehicle, after making multiple turns, proceeded towards a residential area. Officer Schneider lost sight of the vehicle for a period of approximately two to five minutes, at which time he and other police officers canvassed the area. While proceeding past a residence located at 2117 Quincy Street, Officer Schneider observed a black male with a red and blue jacket, whom he later identified as defendant, knocking loudly on the door to that residence and yelling for someone to let him into the house. Officer Schneider then observed "the Intrepid in the driveway." Officer Schneider exited his vehicle and, while wearing a vest which identified him as a police officer, called for defendant. At that point, Officer Schneider observed another man crouched by the Intrepid. The man by the Intrepid took off running, and defendant entered the house.

¶ 28 Upon the arrival of other police officers at 2117 Quincy Street, Officer Schneider proceeded towards the residence and past the Intrepid, which he noticed had its windows closed, appeared to be more "champagne-colored" than silver, and was hot to the touch. At that point, Officer Matthew Shelton, who had joined Officer Schneider, advised he saw a firearm through the window of the Intrepid. Officer Schneider looked through the driver's side front window and could see the firearm tucked between the driver's seat and the driver's side doorframe. He then opened the unlocked door and observed the firearm, which was a .40-caliber Hi-Point. The firearm was empty and had its slide in a locked-back position. He also observed a white hat on the driver's side floorboard and a .40-caliber cartridge and a Michael Kors bag in the backseat. Officer Schneider identified the white hat as the hat he previously saw the driver of the suspect vehicle wearing. Officer Schneider noticed the Intrepid was parked in a manner in which it was in contact with another vehicle, a Charger, in front of it. Officer Schneider took photographs of the items he

observed inside the Intrepid and the manner in which the Intrepid was parked. Those photographs were admitted into evidence.

¶ 29 After securing the firearm discovered in the Intrepid, Officer Schneider and other police officers knocked on the front door of the residence at 2117 Quincy Street and, after a few minutes, they were allowed to enter the house by one of its occupants. Officer Schneider discovered defendant on the floor underneath a blanket in the living room, apparently sleeping. Officer Schneider tried to wake defendant by calling out to him and shaking his body, but defendant did not wake up. Officer Schneider did a quick walk through of the residence and, in a bedroom, located the red and black jacket which he previously saw defendant wearing. At that point, Officer Schneider returned to defendant and was able to wake him and take him into custody. Officer Schneider asked defendant how long he had been sleeping, to which defendant stated several hours. A key discovered near defendant was found to operate the Intrepid in the driveway.

¶ 30 While the investigation at 2117 Quincy Street was in progress, other police officers, including Richard Beaufils and Gary Kiely, responded to 2007 North Winnebago Street in search of the individual who fled from 2117 Quincy Street. The officers searched a garage at 2007 North Winnebago Street and located Sanders, a .40-caliber Glock Model 22, and an extended magazine. Attached to the bottom of the discovered firearm was an aftermarket laser sight. Sanders was taken into custody. Photographs of the firearm were admitted into evidence. The owner of the garage testified the firearm discovered therein did not belong to him.

¶ 31 On the evening of April 9, 2017, defendant was interviewed by Detective James Gulley. An audio and video recording of the interview was admitted into evidence. During the interview, defendant refused to provide many details about where and with whom he had been prior to the shooting. Defendant reported he arrived at his sister's residence, 2117 Quincy Street,

sometime after 10:30 p.m. on April 8, 2017, and then remained there until he was taken into custody. He explained he was briefly locked out of his sister's residence after he went outside to smoke a cigarette. Defendant asserted he was not involved in a police chase, was not at the Auburn Manor apartment complex, and did not know Sanders. Defendant acknowledged he had the only key to his vehicle, the Dodge Intrepid found in the driveaway at his sister's residence, and had not let anyone borrow his vehicle. Defendant asserted he was unaware of a gun or ammunition being in his vehicle. Defendant refused to submit a sample for deoxyribonucleic acid (DNA) testing.

¶ 32 Christina Davis, an expert in forensic science, including the analysis of firearms and ballistic evidence, determined the four cartridge cases recovered in the street were fired from the .40-caliber Glock Model 22 that was found near Sanders, and the four cartridge cases recovered in the grass were fired from the .40-caliber Hi-Point that was found in defendant's vehicle.

¶ 33 Sanders, a witness called by the defense, testified he was serving a prison sentence for pleading guilty to the attempted first degree murder of Lorr. Sanders asserted defendant was not involved in the shooting, and he did not know him at the time of the shooting.

¶ 34 Sanders explained, on April 8, 2017, he met up with a person who went by the name of "Slip." He had known Slip for approximately four years. Slip was from Chicago. He described Slip as "light skinned, black, like 160-something pounds." He did not know Slip's given name or any of Slip's friends or family members.

¶ 35 Sanders asserted he and Slip drove around in Slip's "silver Chevy Cobalt or something like that" and "smoked." Eventually, they "pulled up on" Lorr. Sanders testified, "I was trying to rob him." Sanders exited the vehicle and demanded money from Lorr. While holding a firearm in each hand, he then started shooting. Sanders initially testified he returned to Slip's vehicle after the shooting ended. He later testified he fired one or two shots while running to Slip's

vehicle. After the shooting, Sanders and Slip went to the Auburn Manor apartment complex for 5 to 10 minutes. They then left and were involved in a high-speed chase with the police.

¶ 36 Sanders testified he and Slip successfully evaded the police for "[l]ike a minute," at which time he exited Slip's vehicle while it was moving, and then Slip drove away. When asked if he took anything with him when he exited Slip's vehicle, Sanders initially testified, "I took my gun." On further inquiry, Sanders indicated he took two firearms with him. Moments after exiting Slip's vehicle, Sanders saw the police. Sanders testified he opened the door to a vehicle, placed one of the firearms inside of it, and then took off running. Sanders was impeached with a prior statement indicating he told a defense investigator he threw the firearm in the vehicle through an open window. When asked why he did not place both firearms in the vehicle, Sanders testified, "Because that's the gun I shot him with, and I didn't want to get caught with it. And, plus, it had no more bullets, so it was of no use." When asked how he knew which firearm caused the injury to Lorr, Sanders testified, "Because the Hi-Point is the one that I was pointing at him, shootin' in the direction. I never pointed the Glock in his direction. I pointed the Glock at whoever he was with that was running on the side of the house." Sanders did not recall if he placed anything else into the vehicle. Sanders, along with the other firearm, were later discovered in a garage.

¶ 37 2. *Evidence of the Armed Robbery of Toni Thomas and Lavetta Tripp*

¶ 38 Toni Thomas testified, around 12 a.m. on April 9, 2017, she and Lavetta Tripp were in Thomas's parked vehicle outside of a residence located at 814 North Day Avenue in Rockford. 814 North Day Avenue was less than a mile away from 201 Willard Avenue. Thomas observed two black men approach each side of her vehicle. The man that approached the driver's side, where Thomas was seated, had a black gun with "[a] red beam." The man on the driver's side put the gun up against the window and said something. At some point, the man told her and Tripp to exit her

vehicle. Thomas indicated she was "told to look straight ahead," and she did not look at the person on the other side of her vehicle. At some point, the man next to Thomas searched Thomas's bra and waist, asked for money, and searched her vehicle, including the trunk. Thomas indicated she had difficulty recalling "exactly what was said" because the incident occurred years earlier. Thomas did not recall the man on the passenger side of her vehicle saying or doing anything. At one point, the man next to her threatened to kill her and Tripp and "shoot up the house" if they looked at the men. The men eventually took Thomas's billfold and iPhone and "some things" from Tripp. Thomas believed the men took "a name brand" bag from Tripp but could not recall the specific brand. The State asked Thomas if it was a Michael Kors bag, to which Thomas indicated she could not recall. Thomas testified the men eventually left in a vehicle. She could not recall which direction the vehicle went but believed it may have been northbound. Shortly after the armed robbery, Thomas, with the assistance of the "Find My iPhone" feature, was able to find her billfold and iPhone. They were found in a dumpster at the Auburn Manor apartment complex.

¶ 39 Thomas spoke with police and was given a photographic line-up on April 9, 2017. According to Thomas, she was initially taken to a house and shown some people who had been arrested. Thomas testified she did not recognize any of those people as being involved in the armed robbery. Thomas was later given a photographic line-up. Thomas initially identified two photographs as possibly depicting the man who was on the driver's side of her vehicle. After further examination, she was able to identify one of those photographs as depicting the man. Thomas initially testified it was "the eyes that stood out" in the photograph. She later testified the officer administering the line-up was "more leaning" towards the photograph she selected. The police officer who administered the line-up, Officer David Patterson, testified he did not make any motions in the direction of the photograph that Thomas selected. The photograph Thomas selected

depicted Sanders.

¶ 40 On April 13, 2017, Thomas met with Detective Brad Shelton to give a statement about the armed robbery. Thomas testified she was truthful during the meeting and reported "what happened on [April 9, 2017]." Based on that report, Detective Shelton prepared a typed two-page statement, which Thomas then reviewed and signed, indicating she had no corrections. The State asked Thomas and Detective Shelton about the following statements within the written statement: (1) "The subjects then told us to get out of the car, which we did"; (2) "They also opened the trunk and looked for something to take from the trunk"; (3) "[T]hey kept telling us not to look at them"; (4) "They took my wallet and phone along with [Tripp's] Michael Kors backpack/purse"; (5) "They threatened to kill us and said they would shoot up the house"; (6) "They kept telling us to look away and if we looked at them they would kill us"; and (7) "We heard the vehicle leave northbound on N. Day towards Auburn." Thomas struggled with recalling whether she made the specific statements. On cross-examination, Thomas testified it was possible that, when she referred to "they" or "them" in the written statement, she may have only been referring to the man with whom she spoke. Detective Shelton testified Thomas made the statements. At the conclusion of the trial, the State moved to admit the written statement. After defendant objected, the trial court stated, "I'll just rely on the testimony of the officer."

¶ 41 Admitted into evidence without objection was a recording of a June 21, 2017, jail-house phone call between defendant and a woman. At that time, defendant was in custody on charges related to the armed robbery of Thomas and Tripp. During the recording, defendant asked the woman to talk to "Toni" at 814 North Day Avenue. Defendant explained to the woman that Toni had said her iPhone and some money had been taken from her. He asked the woman to convince Toni to sign an affidavit, which he indicated was his "only way home." Defendant

asserted the content of the affidavit would be completed after it was signed. Defendant suggested the woman offer Toni a few hundred dollars and tell her he was "off drugs" and did not know what he was doing. The woman commented Toni likely wanted defendant "to sit [in jail] just because you did that s***." Defendant did not respond to this comment. Instead, he asserted Toni would take the money and suggested the woman on the phone would take the money if she was robbed. Defendant told the woman, "Please don't, don't bug up, or don't shoot no, nothing stupid." The woman responded, "That ain't me. That's your a***. I didn't do what you did." Defendant did not respond to this comment. The woman also asked defendant why he did "that," to which defendant stated he "wasn't thinking right." Defendant then followed up that he didn't do anything.

¶ 42 Thomas testified, sometime in June 2017, notes had been left for her at 814 North Day Avenue asking for her to call a woman. Thomas could not recall the woman's name. The notes were related to the armed robbery, but Thomas could not recall the specifics of them. The notes made her feel "disgusted." Thomas explained: "Because [the notes] brought up something that I wanted to forget. Um, that's just something that I wanted to put behind me just like I wanted to put behind me when you guys threatened me to go to jail if I didn't come here." With respect to the latter comment, Thomas believed the State had not appropriately handled the armed robbery of her and Tripp, stating the State had not asked her about how the incident affected her or whether she needed counseling, but instead "basically bullied" her to testify in the instant case and was "very disrespectful." Thomas believed the instant case had nothing to do with her. Thomas acknowledged telling the State that she would say she did not recall if asked to testify in the instant case and that she would say that because she was afraid. Thomas testified she was afraid because of the armed robbery and not because of the notes. Thomas acknowledged she contacted the police about the notes.

¶ 43 A June 26, 2017, recording of a jailhouse phone call between defendant and a woman was admitted into evidence without objection. During the recording, the woman indicated she left a note at a house for "Toni" and then later spoke with Toni by telephone. The woman indicated she learned what had happened from Toni and was mad at defendant, to which defendant stated he was mad at himself. The woman stated Toni indicated defendant was not the one that pointed a gun at her, she was glad the men went to jail, and she did not want to testify or have the men go to prison. The woman also stated Toni refused to provide an affidavit and demanded she not be contacted again. After hearing from the woman, defendant responded, "What can I say? I am f*** now."

¶ 44 Thomas testified about another incident which occurred sometime after the armed robbery, possibly in August 2017. During that incident, a woman who was in a vehicle that was driving slowly past Thomas looked at Thomas and said, " 'That's that b*** right there.' " Thomas hurried away and contacted the police about the incident.

¶ 45 Sanders acknowledged he was serving a prison sentence for pleading guilty to the armed robbery of Thomas and Tripp. When initially asked if he took a Michael Kors bag during that robbery, Sanders testified, "I didn't take nothin' from nobody." When later asked if "a Michael Kors backpack and wallet and a cell phone were taken" during the robbery, Sanders testified, "Correct." Sanders testified he did not commit the armed robbery and pleaded guilty because it would have been difficult for him to fight the charge given the fact his gun had a "beam on it."

¶ 46 3. *The Trial Court's Findings*

¶ 47 After its consideration of the evidence and arguments presented, the trial court found the State had proven defendant guilty of attempted first degree murder and aggravated battery. It also found the State had proven defendant was armed and had personally discharged a

firearm during the commission of the attempted first degree murder but had not proven his personal discharge of the firearm proximately caused great bodily harm to Lorr. As a result, the court entered findings of guilt on counts I, II, III, and V, but not count IV.

¶ 48 In rendering its findings, the trial court made certain factual determinations with respect to the circumstances of the shooting of Lorr. The court determined (1) Lorr was shot "in the course of an armed robbery"; (2) there were at least two people involved in the armed robbery, a passenger and a driver of the suspect vehicle; (3) two firearms were discharged during the armed robbery; (4) it was unknown which firearm discharged the bullets which caused injury to Lorr; and (5) Sanders was the observed shooter and the passenger of the suspect vehicle.

¶ 49 The trial court also determined defendant's vehicle was the suspect vehicle involved in the shooting of Lorr and the later police chase. In support of that determination, the court noted (1) Officer Schneider's identification of defendant's vehicle as the vehicle which he observed during the police chase, (2) defendant's vehicle matched the color and model of the suspect vehicle, (3) a white hat was found on the driver's side floorboard of defendant's vehicle that matched the description of the hat of the driver involved in the police chase, (4) defendant's vehicle was found in an area where the vehicle in the police chase may have escaped, and (5) defendant's vehicle was hot to the touch despite defendant reporting it had not been recently driven.

¶ 50 Finally, the trial court determined defendant was involved in the shooting of Lorr. In support of that determination, the court noted (1) defendant was discovered near his vehicle approximately two to five minutes after it was involved in the police chase; (2) at the time of his discovery, defendant was seen "pounding on the front door" of a residence; (3) at the time of defendant's discovery, Sanders was found near defendant's vehicle; (4) a firearm, which was later

determined to be connected to cartridge cases found at the scene of the shooting, was discovered between the driver's seat and the doorframe of defendant's vehicle; (5) defendant was acting as if he was asleep, despite previously being outside and seeing police; and (6) defendant had the key to his vehicle near him. In determining defendant was involved in the shooting of Lorr, the court found both defendant's denial of any involvement in the shooting and Sanders's account of the shooting not credible.

¶ 51 In determining defendant was involved in the shooting of Lorr, the trial court further relied on defendant's involvement in the armed robbery of Thomas and Tripp. The court found defendant was involved in the armed robbery of Thomas and Tripp based upon (1) a bag which matched the description of Tripp's bag being found in defendant's vehicle; (2) defendant's vehicle being seen leaving the Auburn Manor apartment complex where Thomas's stolen items were later discovered; and (3) the statements made by defendant during the recorded phone calls, including the lack of any response to certain statements of the woman on the call.

¶ 52 With respect to the recorded phone calls, the trial court specifically stated:

> "During the course of those conversations, [defendant] was saying things like 'We need to get the affidavit…'—I'm absolutely paraphrasing, but '…it's the only way I'm gonna come home. Just say I didn't…'—I'm quoting the swear word '…just say I didn't know what the [f***] I was doing. This is my only way home.'
>
> The woman on the phone indicated 'She probably wants you to sit there just because you did that [s***]'; um, 'I didn't…'—'I didn't do what you did.' And in response, there was no comment of 'I didn't do anything.'

> He wasn't saying 'You have to talk to her and get an Affidavit because I didn't do anything.' Instead, it was 'It's the only way I'm gonna come home,' and 'I'm [f***] now'; that was another statement he made.
>
> There was plenty of opportunity in the course of those calls if he hadn't committed the armed robberies to say 'I didn't do them,' and 'I don't want to go to prison for them' or a conversation about innocence. And it was more conversation of 'I need this woman's help to get out of it.'
>
> So it was clear from the phone calls that [defendant] was involved in the armed robbery of Toni Thomas and Lavetta Tripp.
>
> And if he was involved in the armed robbery, he was involved in the attempted murder because of the chain of events as described in this trial, the evidence that was found in his car and the ballistic evidence that was received."

¶ 53 As to its finding the State had proven defendant was armed and personally discharged a firearm during the commission of the attempted first degree murder, the trial court noted (1) the locations of the different cartridge cases, (2) the locations where the two firearms were found, and (3) Sanders was the passenger in defendant's vehicle.

¶ 54 F. Posttrial Proceedings

¶ 55 In January 2020, defendant filed a timely motion for a new trial. After being appointed new counsel, he amended his motion. Following a hearing, the trial court denied defendant's amended motion. The court later merged its findings of guilt and sentenced defendant

to 43 years' imprisonment, which included a 20-year sentencing enhancement for the personal discharge of a firearm.

¶ 56 This appeal followed.

¶ 57 II. ANALYSIS

¶ 58 On appeal, defendant challenges the (1) the sufficiency of the evidence to sustain his convictions and to support the sentencing enhancement for the personal discharge of a firearm, (2) the other-crimes evidence presented at his trial, and (3) his trial counsel's failure to call certain witnesses as part of the defense. We address each of defendant's complaints in turn.

¶ 59 A. Challenge to the Sufficiency of the Evidence

¶ 60 First, defendant challenges the sufficiency of the evidence to sustain his convictions and to support the sentencing enhancement for the personal discharge of a firearm. Specifically, defendant argues the State failed to show he was accountable for the attempted first degree murder and aggravated battery of Lorr and, alternatively, that he personally discharged a firearm during the commission of the attempted first degree murder.

¶ 61 1. *Challenges to the Sufficiency of the Evidence*

¶ 62 This court, when presented with a challenge to the sufficiency of the evidence to sustain a conviction, must determine "whether, after viewing all the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Brand*, 2021 IL 125945, ¶ 58, 190 N.E.3d 149. Similarly, this court, when presented with a challenge to the sufficiency of the evidence to support a sentencing enhancement, must determine whether, after viewing the evidence in the light most favorable to the State, "any rational trier of fact could have found that [the sentencing

enhancement] was established beyond a reasonable doubt." *People v. Trzeciak*, 2014 IL App (1st) 100259-B, ¶ 57, 21 N.E.3d 732.

¶ 63 When considering any challenge to the sufficiency of the evidence, it is not this court's function to retry the defendant. *People v. Swenson*, 2020 IL 124688, ¶ 35, 181 N.E.3d 116. "The trier of fact determines the credibility of the witnesses, decides what weight to give their testimony, resolves conflicts in the evidence, and draws reasonable inferences from that evidence." *Id.* ¶ 36. Circumstantial evidence is sufficient to sustain a conviction or support a sentencing enhancement, so long as it shows the offense or sentencing enhancement has been proven beyond a reasonable doubt. *People v. Milka*, 211 Ill. 2d 150, 178, 810 N.E.2d 33, 49 (2004); *Trzeciak*, 2014 IL App (1st) 100259-B, ¶ 58.

¶ 64 2. *Whether Sufficient Evidence was Presented to Sustain Defendant's Convictions*

¶ 65 Defendant argues there is insufficient evidence to sustain his convictions under a theory of accountability. Specifically, defendant asserts there was no evidence showing he shared Sanders's specific intent to commit the attempted first degree murder and aggravated battery of Lorr or was involved in a common criminal design. With respect to the latter, defendant contends there was no evidence showing the charged offenses committed by Sanders were related to, or in furtherance of, any offense defendant agreed to commit.

¶ 66 In response, the State argues sufficient evidence was presented to show defendant was accountable for the charged offenses. Specifically, the State asserts sufficient evidence was presented to show (1) defendant engaged in a common criminal design with Sanders and (2) the acts against Lorr occurred in furtherance of that common design.

¶ 67 Section 5-2(c) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/5-2(c) (West 2016)) provides a person may be held legally accountable for the conduct of another when,

"either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." "[T]o prove that a defendant possessed the intent to promote or facilitate the crime, the State may present evidence that either (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design." *People v. Fernandez*, 2014 IL 115527, ¶ 13, 6 N.E.3d 145. "Shared intent and common design are two distinct accountability schemes—two separate bases upon which the State can prove legal accountability." (Internal quotation marks omitted.) *People v. Jackson*, 2020 IL App (4th) 170036, ¶ 38, 165 N.E.3d 523.

¶ 68 In a common-design case, "the State need not prove that the defendant and the principal shared the same intent *vis-à-vis* the charged crime"; instead, "the State need only prove the accused had the specific intent to promote or facilitate *a* crime." (Emphasis in original and internal quotation marks omitted.) *People v. Phillips*, 2014 IL App (4th) 120695, ¶ 43, 14 N.E.3d 1. "Once the State proves the accused intended to promote or facilitate *a* crime, it has established the accused's responsibility for *any* criminal act done in furtherance of the intended crime." (Emphases in original and internal quotation marks omitted.) *Id.*; see also *Fernandez*, 2014 IL 115527, ¶ 13 ("[I]f two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts.").

¶ 69 In this case, the circumstantial evidence, viewed in the light most favorable to the State, shows defendant and Sanders engaged in a common criminal design to rob multiple individuals at gunpoint. See *Jackson*, 2020 IL App (4th) 170036, ¶ 47, 165 N.E.3d 523 (discussing

several factors—none of which are addressed by defendant in this appeal—that may demonstrate whether a common design existed and whether a defendant joined it). Then, during the commission of the armed robbery of Lorr, Sanders committed attempted first degree murder and aggravated battery. The actions of Sanders were related to, and in furtherance of, the armed robbery. In sum, the circumstantial evidence is such that it could be reasonably concluded beyond a reasonable doubt that Sanders committed the attempted first degree murder and aggravated battery of Lorr in furtherance of the common criminal design of defendant and Sanders to rob multiple individuals at gunpoint. After our review, we find there is sufficient evidence to sustain defendant's convictions under a theory of accountability.

¶ 70 3. *Whether Sufficient Evidence was Presented to Support the Sentencing Enhancement for the Personal Discharge of a Firearm*

¶ 71 Defendant argues there is insufficient evidence to support the sentencing enhancement for the personal discharge of a firearm. Specifically, defendant asserts there was no evidence showing he actually discharged a firearm during the Lorr shooting.

¶ 72 The State, in response, argues sufficient evidence was presented to support the sentencing enhancement for the personal discharge of a firearm. Specifically, the State asserts sufficient evidence was presented to show defendant discharged the firearm found inside his vehicle during the commission of the attempted first degree murder of Lorr.

¶ 73 Section 8-4(c)(1)(C) of the Criminal Code (720 ILCS 5/8-4(c)(1)(C) (West 2016)) provides "an attempt to commit first degree murder during which the person *personally discharged* a firearm is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court." (Emphasis added.) Our supreme court has found similar language found in another statute made principles of accountability inapplicable—"personally discharged" means

one "who actually discharged a firearm." *People v. Rodriguez*, 229 Ill. 2d 285, 294-95, 891 N.E.2d 854, 859-60 (2008). Absent any argument to the contrary, we find, for the 20-year sentencing enhancement in section 8-4(c)(1)(C) to be applicable, it must be shown the charged defendant actually discharged a firearm during the commission of the attempted first degree murder. See also *People v. Flynn*, 2012 IL App (1st) 103687, ¶ 45, 983 N.E.2d 8 ("[T]he unambiguous language of section 8-4(c)(1)(C) establishes that an accountable defendant *** who personally discharged a firearm during the commission of the offense of attempted first degree murder, is subject to section 8-4(c)(1)(C)'s 20-year sentence enhancement.").

¶ 74 In this case, the circumstantial evidence, viewed in the light most favorable to the State, shows two firearms were discharged during the Lorr shooting. The cartridge cases ejected from one of the firearms were found in the street, while the cartridge cases ejected from the other firearm were found in the grass. Shortly after the shooting, one of the discharged firearms was found in defendant's vehicle, and the other discharged firearm was found near Sanders, who admittedly discharged that firearm and was a passenger in the vehicle that fled from the shooting. The firearm found in defendant's vehicle was discovered between the driver's seat and doorframe of the vehicle. It was empty and had its slide in a locked-back position. Except for the testimony from Sanders, which the trial court found not credible, no witness identified the man observed outside the suspect vehicle as discharging two firearms. In sum, the circumstantial evidence is such that it could be reasonably concluded beyond a reasonable doubt that defendant personally discharged a firearm during the commission of the attempted first degree murder. After our review, we find there is sufficient evidence to support the sentencing enhancement for the personal discharge of a firearm.

¶ 75 B. Challenge to the Other-Crimes Evidence

¶ 76 Next, defendant challenges the other-crimes evidence presented at his trial. Specifically, defendant argues the trial court, with respect to the evidence of the armed robbery of Thomas and Tripp, erroneously (1) *sua sponte* considered information from an unfiled and unsigned document in another case when ruling on the motion *in limine* in this case, (2) allowed the State to hold a mini-trial about defendant's participation in the armed robbery, (3) admitted evidence of Thomas's out-of-court statement to police in order to establish the bag found in defendant's vehicle was the same brand as the bag taken from Tripp, (4) allowed the State to impeach Thomas by reading portions of her out-of-court statement to police into evidence; and (5) admitted the recorded phone calls defendant made from jail.

¶ 77 1. *Forfeiture*

¶ 78 At the outset, defendant concedes he has forfeited review of the purported errors by failing to adequately present them before the trial court. See *People v. Sebby*, 2017 IL 119445, ¶ 48, 89 N.E.3d 675 ("To preserve a purported error for consideration by a reviewing court, a defendant must object to the error at trial and raise the error in a posttrial motion. [Citation.] Failure to do either results in forfeiture."). Ordinarily, defendant's forfeiture would end our inquiry. See *People v. Denson*, 2014 IL 116231, ¶ 13, 21 N.E.3d 398 ("[F]orfeiture rules exist to encourage defendants to raise issues in the trial court, thereby ensuring both that the trial court has an opportunity to correct any errors prior to appeal and that the defendant does not obtain a reversal through his or her own inaction."). However, defendant requests the purported errors be reviewed as a matter of plain error and ineffective assistance of counsel.

¶ 79 2. *Plain-Error Review*

¶ 80 We begin with defendant's request for the purported errors to be reviewed as a matter of plain error. The plain-error doctrine provides a "narrow and limited exception" to the

general rule of forfeiture. *People v. Reese*, 2017 IL 120011, ¶ 72, 102 N.E.3d 126. Under the plain-error doctrine, a reviewing court may disregard a defendant's forfeiture and consider an unpreserved claim of error "when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant (first-prong plain error) or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process (second-prong plain error)." *People v. Schoonover*, 2021 IL 124832, ¶ 27, 190 N.E.3d 802. The defendant bears the burden of persuasion in establishing plain error. *People v. Hartfield*, 2022 IL 126729, ¶ 50, 202 N.E.3d 890.

¶ 81 3. *Clear or Obvious Error*

¶ 82 Under the plain-error doctrine, the initial question "is whether a clear or obvious error occurred." *Schoonover*, 2021 IL 124832, ¶ 30.

¶ 83 a. Whether the Trial Court Clearly Erred by Considering Information From an Unfiled and Unsigned Document in Another Case When Ruling on the Motion *In Limine* in This Case

¶ 84 First, defendant argues the trial court clearly erred when it *sua sponte* considered information from an unfiled and unsigned document in another case when ruling on the motion *in limine* in this case. Specifically, defendant, while acknowledging trial courts maintain broad discretion with respect to motions *in limine*, contends the court's consideration of the information from the unfiled and unsigned document in Sanders's case when ruling on the motion *in limine* in defendant's case was an abuse of discretion. In support, defendant primarily relies on the general principle from case law that a court's deliberations should be based upon matters of record.

¶ 85 In response, the State contends it was "proper" for the trial court to consider the unfiled response from Sanders's case when ruling on the motion *in limine* in defendant's case. In

support, the State (1) highlights the broad discretion accorded to trial courts with respect to motions *in limine*, (2) suggests "officers of the court were presenting [the unfiled response] as true," and (3) distinguishes the cases cited by defendant on factual grounds.

¶ 86 Motions *in limine* generally allow trial courts to review and make decisions on the admissibility of contested evidence prior to trial. *People v. Stevenson*, 2014 IL App (4th) 130313, ¶ 26, 12 N.E.3d 179. As both parties acknowledge, a trial court is accorded broad discretion with respect to motions *in limine*. *People v. Kirchner*, 194 Ill. 2d 502, 539, 743 N.E.2d 94, 113-14 (2000). As such, this court will ordinarily defer to a trial court on a motion *in limine*, unless we find an abuse of discretion. *People v. Hillis*, 2016 IL App (4th) 150703, ¶ 111, 65 N.E.3d 357. An abuse of discretion occurs where a court has "acted arbitrarily, exceeded the bounds of reason, or ignored or misapprehended the law." (Internal quotation marks omitted.) *Id*.

¶ 87 As our supreme court has stated, "The law is well settled that, exclusive of certain matters of which the court may take judicial notice, the deliberations of the trial judge are limited to the exhibits offered and admitted in evidence and the record made before [the judge] in open court." *People v. Rivers*, 410 Ill. 410, 416, 102 N.E.2d 303, 306 (1951). While, as the State asserts and defendant concedes, the court's statement in *Rivers* related to a judge's deliberations following a trial, we find the statement equally applicable to a judge's deliberations following a hearing on a motion *in limine*—a court's deliberations on this, too, should be based upon matters of record.

¶ 88 In this case, the record shows the trial court considered "details" from an unfiled and unsigned response in Sanders's case when ruling on the motion *in limine* in defendant's case. The record suggests Sanders's counsel provided the court with a courtesy copy of Sanders's response at a time when Sanders's case was still pending. The court would likely have been unaware Sanders's counsel had not yet filed the response of record; consequently, it is unsurprising

the court reviewed the response in preparing for the hearing on the motions *in limine*. By the time of the hearing, however, Sanders was no longer in the case, and his response had never been filed of record. It was, therefore, improper for the court to consider it. It is undisputed the "details" from the unfiled and unsigned response were not matters of which the court could take judicial notice. See *People v. Davis*, 65 Ill. 2d 157, 161, 357 N.E.2d 792, 794 (1976) ("[M]atters susceptible of judicial notice include facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy." (Internal quotation marks omitted.)). The unfiled response was also, contrary to the suggestion of the State, not adopted or offered by either the State or defendant's counsel. See *Stevenson*, 2014 IL App (4th) 130313, ¶ 29 (noting offers of proof during a motion *in limine* can take the form "of live testimony or counsel's representations that the court finds sufficiently credible and reliable"). After our review, we find the trial court's consideration of "details" from an unfiled and unsigned response in another case when ruling on the motion *in limine* in this case amounted to an abuse of discretion and clear error.

¶ 89 b. Whether the Trial Court Clearly Erred With Respect to the Amount of Other-Crimes Evidence Admitted Against Defendant

¶ 90 Second, defendant argues the trial court clearly erred when it allowed the State to hold a mini-trial about his participation in the armed robbery of Thomas and Tripp. Specifically, defendant asserts the State's elicitation of testimony from Thomas about the actions of the man next to her side of her vehicle, as well as its impeachment of Thomas with statements she made about the actions and statements of both men, was far more evidence than was required to illustrate identity, opportunity, and proximity in time and place, and the record shows the court made "additional" findings regarding the armed robbery of Thomas and Tripp.

¶ 91 In response, the State argues the evidence it presented of the armed robbery of Thomas and Tripp did not result in an improper mini-trial. Specifically, without addressing the complained-of testimony and impeachment, the State asserts defendant has not overcome the presumption the trial court considered the other-crimes evidence for a permissible purpose.

¶ 92 Our supreme court has stated, "[A] trial court should carefully limit evidence of other crimes to that which is relevant for the purpose it was admitted." *People v. Robinson*, 167 Ill. 2d 53, 66, 656 N.E.2d 1090, 1096 (1995). Doing so, the supreme court explained, "can limit prejudice to the defendant and prevent a 'mini-trial' on collateral issues." *Id.* at 66-67.

¶ 93 In a bench trial, however, "it is presumed that the trial court considered the other-crimes evidence for the limited purpose for which it was introduced." *People v. Nash*, 2013 IL App (1st) 113366, ¶ 24, 993 N.E.2d 56. Indeed, "[t]he rule generally barring other-crimes evidence is based on the belief that the introduction of the evidence may over-persuade a jury to convict a defendant only because the jury believes the defendant is a bad person deserving punishment." *Id.*

¶ 94 Absent from the record in this case is a showing the trial court considered the other-crimes evidence outside of the announced parameters when reaching its decision. Defendant highlights comments from the court's lengthy oral pronouncement of its decision in which it questioned why the robbers did not shoot Thomas and Tripp, indicated Thomas and Tripp were fortunate to have just been robbed, and theorized what evidence ultimately led to defendant being charged in this case. These comments, however, do not rebut the presumption the court considered the other-crimes evidence for the limited purpose for which it was introduced. After our review, we find no clear error related to the amount of other-crimes evidence admitted against defendant.

¶ 95 c. Whether the Trial Court Clearly Erred by Allowing Evidence of Thomas's

Out-of-Court Statement to Police in Order to Establish that the Bag Found in Defendant's Vehicle Was the Same Brand as the Bag Taken From Tripp

¶ 96 Third, defendant argues the trial court clearly erred by allowing evidence of Thomas's out-of-court statement to police in order to establish the bag found in defendant's vehicle was the same brand as the bag taken from Tripp. Specifically, defendant asserts Thomas's statement was inadmissible as a past recollection recorded or a prior inconsistent statement.

¶ 97 In response, the State argues there was no abuse of discretion related to the admission of evidence of Thomas's out-of-court statement. Specifically, the State asserts the statement was admissible as both a prior inconsistent statement and a past recollection recorded.

¶ 98 Section 115-10.1(c)(2)(A) of the Code of Criminal Procedure of 2012 (725 ILCS 5/115-10.1(c)(2)(A) (West 2016)) allows a party to use a witness's out-of-court statement as substantive evidence where, in relevant part, (1) the statement is inconsistent with the witness's testimony at trial, (2) the witness is subject to cross-examination, (3) the statement describes an event or condition of which the witness had personal knowledge, and (4) the statement is proved to have been signed by the witness.

¶ 99 The admission of evidence lies within the sound discretion of a trial court. *People v. Brand*, 2021 IL 125945, ¶ 36, 190 N.E.3d 149. As such, this court will ordinarily defer to a trial court on matters concerning the admission of evidence, unless we find an abuse of discretion. *Id.*

¶ 100 In this case, defendant does not dispute Thomas's out-of-court statement that the men took Tripp's Michael Kors bag was both signed by Thomas and inconsistent with Thomas's trial testimony. Defendant also does not dispute Thomas was subject to cross-examination about her out-of-court statement. Defendant only disputes whether there was sufficient evidence to show Thomas had personal knowledge of the brand of the bag. In her statement to police, Thomas

provided a detailed account of the armed robbery and the events leading up to it. With respect to the armed robbery, Thomas stated, in relevant part, "They took my wallet and phone along with [Tripp's] Michael Kors backpack/purse." We find this statement sufficient to show Thomas had personal knowledge of the brand of the bag. There is nothing in Thomas's account to the police to indicate Thomas learned of the brand of the bag from a third party as opposed to her personal observation. After our review, we find no clear error related to allowing evidence of Thomas's out-of-court statement to the police in order to establish the bag found in defendant's vehicle was the same brand as the bag taken from Tripp.

¶ 101 d. Whether the Trial Court Clearly Erred by Allowing the State to Impeach Thomas by Reading Portions of Her Out-of-Court Statement to Police Into Evidence

¶ 102 Fourth, defendant argues the trial court clearly erred by allowing the State to impeach Thomas by reading portions of her out-of-court statement to police into evidence. Specifically, defendant asserts Thomas's out-of-court statements to police about the statements and actions of the man near Tripp should not have been used as impeachment because Thomas's testimony she did not recall any statements or actions of that man did not affirmatively damage the State's case.

¶ 103 In response, the State argues there was no abuse of discretion related to allowing the impeachment of Thomas with portions of her prior out-of-court statement. Specifically, the State asserts Thomas's trial testimony was more than a mere disappointing lack of memory and did affirmative damage to its case.

¶ 104 The impeachment of witnesses is governed by Illinois Supreme Court Rule 238 (eff. April 11, 2001). See Ill. S. Ct. R. 433 (eff. April 1, 1982) (making Rule 238 applicable to criminal cases). Rule 238 provides: "The credibility of a witness may be attacked by any party,

including the party calling the witness. *** If the court determines that a witness is hostile or unwilling, the witness may be examined by the party calling the witness as if under cross-examination." Ill. S. Ct. R. 238 (eff. April 11, 2001).

¶ 105 Before a party may impeach its own witness with a prior inconsistent statement, the party must "show that the witness's testimony has damaged its position." *People v. Leonard*, 391 Ill. App. 3d 926, 933, 911 N.E.2d 403, 410 (2009). That is, the witness's testimony must have given "positive aid to an adversary's case." (Internal quotation marks omitted.) *People v. Cruz*, 162 Ill. 2d 314, 360, 643 N.E.2d 636, 658 (1994). Witness testimony is not affirmatively damaging when it is "merely negative in its effect on the examiner's case." *Id*.

¶ 106 The decision of whether to allow impeachment lies within the sound discretion of the trial court. See *Leonard*, 391 Ill. App. 3d at 934. As such, this court will ordinarily defer to the trial court on matters concerning the impeachment of a witness, unless we find an abuse of discretion. See *id.*

¶ 107 In this case, Thomas testified about certain statements and actions of the man on her side of her vehicle, Sanders. She asserted a lack of knowledge and recollection with respect to the actions of the man on the other side of her vehicle, who the State alleged was defendant. Thomas previously, in her statement to the police, attributed threatening words and conduct to both men outside her vehicle, which supported the State's theory defendant and Sanders were engaged in a common criminal design to commit armed robberies. Thomas's professed limited knowledge and recollection, particularly where there was other evidence of Thomas not wishing to testify and of attempts to influence Thomas's testimony, could reasonably be found to have affirmatively damaged the State's case. After our review, we find no clear error related to allowing

the State to impeach Thomas by reading portions of her out-of-court statement to police into evidence.

¶ 108 e. Whether the Trial Court Clearly Erred by Admitting the Recorded Phone Calls Defendant Made From Jail

¶ 109 Last, defendant argues the trial court clearly erred by admitting the recorded phone calls he made from the jail. Specifically, defendant asserts the calls were not admissible as evidence of forfeiture by wrongdoing or as a tacit admission of guilt.

¶ 110 In response, the State argues the trial court "properly considered portions of jail calls made by defendant for purposes of forfeiture by wrongdoing, tacit admission of guilt, and consciousness of guilt." Specifically, the State asserts (1) "[d]efendant's jail calls are admissible under the doctrine of forfeiture by wrongdoing," (2) "[d]efendant's evasive response to [the woman's] comment about his participation in the robbery is admissible as affirmative evidence of defendant's guilt," and (3) the court "properly considered the content of the jail calls[ ] for consciousness of guilt."

¶ 111 An out-of-court statement of a party opponent, offered against that party for a relevant purpose, is a nonhearsay, admissible statement. Ill. R. Evid. 801(d)(2) (eff. Oct. 15, 2015). This includes "a statement of which the party has manifested an adoption or belief in its truth." Ill. R. Evid. 801(d)(2)(B) (eff. Oct. 15, 2015). "Adopted statements include what the case law calls a 'tacit admission.' " *People v. Colon*, 2018 IL App (1st) 160120, ¶ 16, 117 N.E.3d 278.

¶ 112 Under the tacit admission rule, "[w]hen an incriminating statement is made in the presence and hearing of an accused and the statement is not denied, contradicted, or objected to, both the statement and the failure to deny it are admissible at trial as evidence of the accused's acquiescence in its truth." *People v. Ruiz*, 2019 IL App (1st) 152157, ¶ 35, 126 N.E.3d 458.

> "The necessary elements for admissibility under the tacit admission rule are (1) that the statement incriminates the defendant such that the natural reaction of an innocent person would be to deny it, (2) that the defendant heard the statement, and (3) that the defendant had an opportunity to reply or object and instead remained silent." *Colon*, 2018 IL App (1st) 160120, ¶ 18.

¶ 113 Again, the admission of evidence lies within the sound discretion of a trial court. *Brand*, 2021 IL 125945, ¶ 36. As such, this court will ordinarily defer to the trial court on matters concerning the admission of evidence, unless we find an abuse of discretion. *Id*.

¶ 114 In this case, defendant does not dispute the statements made by him during the phone calls were offered against him for a relevant purpose. Defendant's statements were, therefore, admissible as nonhearsay, party opponent statements. The incriminating statements made by the woman in the phone calls, at least those statements relied upon by the trial court, could also reasonably be found to be admissible as tacit admissions of guilt. Specifically, it could be reasonably concluded (1) the statements by the woman, considered in context, incriminated defendant such that the natural reaction of an innocent person would be to deny them; (2) defendant heard the statements; and (3) defendant had an opportunity to reply or object and instead remained silent. After our review, we find no clear error related to admitting the recorded phone calls defendant made from the jail.

¶ 115 4. *First-Prong Plain Error*

¶ 116 Having found defendant established clear error with respect to the trial court's consideration of information from an unfiled and unsigned document in another case when ruling on the motion *in limine* in this case, our next question under the plain-error doctrine is whether

"the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *Schoonover*, 2021 IL 124832, ¶ 27.

¶ 117 "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53. This generally involves "an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id.*

¶ 118 In this case, defendant argues the evidence is closely balanced with respect to whether he was involved in the shooting of Lorr. In support, defendant emphasizes no eyewitness, fingerprint, DNA, or gunpowder residue evidence linked him to the shooting. While we acknowledge no direct evidence linked defendant to the shooting, we find substantial circumstantial evidence-evidence which was discussed at length by the trial court in its oral pronouncement of its decision-established the necessary link. Additionally, we find the accounts of defendant and Sanders had significant inconsistencies and were largely uncorroborated. This case did not come down to a mere contest of credibility. After our review, we find the evidence was not closely balanced.

¶ 119 5. *Second-Prong Plain Error*

¶ 120 Our final question under the plain-error doctrine is whether the clear error with respect to the consideration of information from an unfiled and unsigned document in another case when ruling on a motion *in limine* is an "error [***] so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Schoonover*, 2021 IL 124832, ¶ 27.

¶ 121 Our supreme court has equated second-prong plain error with "structural error." *People v. Moon*, 2022 IL 125959, ¶ 28. "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or is an unreliable means of determining guilt or innocence." *Id*. When presented with a claim under the second prong of the plain-error doctrine, it is this court's responsibility to determine whether the complained-of error constituted structural error. *Id*. ¶ 30.

¶ 122 In this case, defendant argues the consideration of information from an unfiled and unsigned document in another case when ruling on a motion *in limine* is a "significant error" that "undermines the integrity of the judicial process." We disagree. Regardless of how a trial court rules on a motion *in limine*, it is only a preliminary decision—the court's final ruling on the admissibility of evidence takes place at trial. *People v. Drum*, 321 Ill. App. 3d 1005, 1008, 748 N.E.2d 344, 346-47 (2001). Accordingly, given that a ruling on a motion *in limine* is only a preliminary decision, we are not convinced a trial court's improper consideration of information found in an unfiled and unsigned response from another case when ruling on a motion *in limine* necessarily renders a criminal trial fundamentally unfair. After our review, we find the error is not so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. Defendant has not established plain error.

¶ 123 6. *Review for Ineffective Assistance of Counsel*

¶ 124 We turn next to defendant's request for the complained-of errors to be reviewed as a matter of ineffective assistance of counsel.

¶ 125 To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance was objectively unreasonable under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. *People v. Cherry*, 2016 IL 118728, ¶ 24, 63 N.E.3d 871. "[T]he failure to establish either precludes a finding of ineffective assistance of counsel." *Id.*

¶ 126 In this case, defendant has not established prejudice resulting from the failure to preserve the complained-of errors. As indicated above, the evidence about which defendant complains was admissible, and there is no basis to believe the trial court considered the other-crimes evidence for an impermissible purpose. With respect to the court's erroneous consideration of information from an unfiled and unsigned document in another case when ruling on the motion *in limine* in this case, there is no basis to conclude the result of the proceeding would have been different had counsel raised the issue then. The court indicated its ruling was based not only upon information from the unfiled response but also upon the "facts and circumstances" laid out during the hearing on the motion *in limine.* Defendant does not dispute those facts and circumstances would have been sufficient to grant the motion *in limine*. In addition, as indicated above, the court's final ruling on the admissibility of the evidence took place at trial. *Drum*, 321 Ill. App. 3d at 1008. After our review, we find defendant has not established ineffective assistance of counsel related to the failure to preserve the complained-of errors.

¶ 127 In sum, we conclude defendant has not established plain error or ineffective assistance of counsel related to the other-crimes evidence presented at his trial.

¶ 128 C. Challenge to Trial Counsel's Failure to Call Certain Witnesses

¶ 129 Last, defendant challenges his trial counsel's failure to call certain witnesses as part of his defense. Specifically, defendant argues his trial counsel was ineffective for failing to call Price, Haugabook, and Scott as defense witnesses, and his posttrial counsel was ineffective for failing to raise this complaint about his trial counsel's performance.

¶ 130 In response, the State argues defendant has not established his claims of ineffective assistance of counsel. Specifically, the State asserts defendant has not overcome the strong presumption that trial counsel's decision not to call the witnesses was a matter of sound trial strategy.

¶ 131 As indicated above, to prevail on a claim of ineffective assistance of counsel, a defendant must show counsel's performance was objectively unreasonable under prevailing professional norms. *Cherry*, 2016 IL 118728, ¶ 24.

¶ 132 The decision of whether to call certain witnesses is a matter of trial strategy, generally reserved to the discretion of trial counsel. *People v. Jackson*, 2020 IL 124112, ¶ 106, 162 N.E.3d 223. Thus, a defendant challenging a decision of whether to call a particular witness must overcome the strong presumption the decision was the product of sound trial strategy. *People v. Dupree*, 2018 IL 122307, ¶ 44, 124 N.E.3d 908.

¶ 133 In this case, defendant has not overcome the strong presumption trial counsel's decision not to call Price, Haugabook, and Scott was the product of sound trial strategy. Defendant, citing trial counsel's proffer during the hearing on the motion *in limine*, focuses on the proffer that Price and Scott reported defendant was not involved and that Haugabook reported being unable to identify defendant. Those proffers, however, do not overcome the strong presumption trial counsel's decision not to *call* those witnesses was the product of sound trial strategy. While both Price and Scott reported to police defendant was not involved, they also reported Sanders was not involved. Similarly, while Haugabook could not identify defendant, he also could not identify Sanders. Given that Sanders later admitted to being involved in the shooting of Lorr, the purported observations of the men would have been subject to significant attack through cross-examination. In addition, Price identified the suspect vehicle as an Intrepid, which would have provided

additional support to link defendant to the shooting. In sum, the record does not show trial counsel's failure to call Price, Haugabook, and Scott as defense witnesses amounted to constitutionally deficient performance. As a result, posttrial counsel not raising a related complaint about trial counsel's performance also does not amount to constitutionally deficient performance. After our review, we find defendant has not established ineffective assistance of counsel related to trial counsel's failure to call Price, Haugabook, and Scott as defense witnesses.

¶ 134 III. CONCLUSION

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

¶ 136 Affirmed.