2017 IL App (1st) 141039-U

FIRST DIVISION
February 14, 2017

No. 1-14-1039

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 5797
	)	
DWAYNE HILL,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

ORDER

Held: We affirm defendant's conviction for attempt first degree murder and aggravated battery with a firearm. The court did not err in admitting the prior inconsistent statement of the victim. The defendant has waived review of his *Brady* claim. The trial court did not err in limiting cross examination of the victim. Finally, defendant was not denied effective assistance of counsel.

¶ 1 The victim, Demetrius Harris (hereinafter Harris), was driving down Kolmar Avenue in Chicago when he came to a stop sign at the intersection of Kolmar and Van Buren Boulevard.

Upon stopping his van, Harris noticed a black Grand Marquis pull up along his driver side window. He recognized defendant, Dwayne Hill (hereinafter Hill), as the passenger and the codefendant, Ricky Fountain (hereinafter Fountain), as the driver. Harris then saw Hill pull out a gun and fire multiple rounds at him. Harris sped away from the intersection but realized he had been shot in the back. Harris came upon a friend a few blocks away who drove him to the hospital. While in the hospital Harris spoke with a Chicago Police detective and named Hill as the shooter and Fountain as the driver. At a later date, while still in the hospital, Harris provided a statement to a different Chicago detective and an assistant state's attorney. The statement also identified Hill as the shooter and Fountain as the driver. Steven McKinnie (hereinafter McKinnie), a witness, also provided a statement to authorities which mirrored Harris's account and also identified Hill as the shooter and Fountain as the driver.

¶ 2 On the first day of trial, Harris denied seeing who shot him and denied making any statements to the authorities. The court then heard testimony from the assistant state's attorney and the detective who interviewed Harris and took his statement. The State moved to admit the statement Harris had previously provided as a prior inconsistent statement. This was granted by the trial court without objection. On the second day of trial, McKinnie also denied identifying either defendant and testified that the statement he gave was the result of police coercion. After hearing from the assistant state's attorney and detective who were present when McKinnie gave his statement, the trial court also admitted McKinnie's previous statement as a prior inconsistent statement.

¶ 3 Based on the details found in the inconsistent statements of both Harris and McKinnie, the trial court found Hill guilty of attempted first degree murder and aggravated battery with a firearm. He timely filed his notice of appeal.

¶ 4 Hill raises several arguments before this court: (i) the trial court erred in admitting the prior inconsistent statement of Harris; (ii) the State failed to prove him guilty beyond a reasonable doubt of attempt first degree murder and aggravated battery with a firearm; (iii) the State violated *Brady v. Maryland* in failing to disclose certain parts of Harris's criminal history; (iv) the trial court erred in limiting cross examination of Harris; and (v) he was denied effective assistance of counsel. Based on the record before this court, we find no errors with the trial below and affirm defendant's convictions.

¶ 5 JURISDICTION

¶ 6 The trial court found Hill guilty of attempt murder and aggravated battery with a firearm on January 31, 2013. On March 14, 2014, the trial court sentenced Hill to a total of twenty-six years in the Illinois Department of Corrections. A motion to reconsider sentence was filed on March 18, 2014, but was denied. A notice of appeal was filed on March 25, 2014. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013).

¶ 7 BACKGROUND

¶ 8 We have already reviewed and affirmed Hill's codefendant's conviction and the facts below are taken from that Rule 23 Order. *People v. Fountain*, 2016 IL App (1st) 141006-U.

¶ 9 The victim, Demetrius Harris, testified that on the afternoon of July 15, 2009, he was driving his green van on Kolmar Avenue in Chicago, Illinois. He slowed his vehicle as he approached the stop sign at the intersection of Kolmar and Van Buren. At the same time, he noticed a black car pull up along side of him. Harris observed a gun sticking out of the passenger

side window. Shots rang out as Harris attempted to pull away from the other car but he was struck in the back by one round. After being struck, Harris drove toward Jackson Boulevard where he encountered his friend, Howard Williams (hereinafter Williams). Harris informed Williams he had been shot. Williams got in the car and drove Harris to Mt. Sinai Hospital. While at the hospital, Harris underwent several surgeries to repair his wound.

¶ 10 On the first day of trial, Harris denied seeing what kind of gun was pointed out the window, who was in the car, or the type of car. He denied the car was a black Grand Marquis. Harris denied that Fountain was driving and Hill was sitting in the passenger seat. He denied it was Hill who shot him.

¶ 11 On the morning of July 25, Harris spoke with a Detective Roberto Garcia (hereinafter Detective Garcia) of the Chicago Police Department and provided him details about the shooting. Harris informed Detective Garcia that Fountain and Hill pulled up alongside of him and Hill started shooting immediately. Harris told Detective Garcia there was bad blood between himself and the defendants whom he knew from Maywood. He identified both defendants from a photo array. On the first day of trial, Harris denied this conversation took place.

¶ 12 Also on the first day of trial, Harris similarly denied speaking with Detective Jose Gomez (hereinafter Detective Gomez) and Assistant State's Attorney Nyshana Sumner (hereinafter ASA Sumner) at the hospital on September 2, 2009. He denied telling ASA Sumner the events surrounding the shooting, or signing a statement memorializing the events. He denied telling ASA Sumner that he and Hill looked at each other before the shooting started. He further denied reviewing the written statement prepared by ASA Sumner, making corrections or initialing it. While he did acknowledge his name appeared on each page of the statement, he stated it did not look like his signature. He did acknowledge his signature did appear on a photo of Hill.

¶ 13 On cross examination Harris stated that he was hospitalized for a little more than three months, underwent several surgeries, and was given medication for pain while there. Harris testified that a couple of weeks before trial he went to defendant's attorney's office and signed an affidavit which stated: he did not see who was driving; the windows of the vehicle were tinted; the window was cracked and not all the way down; he was heavily medicated in the hospital; he did not remember making either statements to the police or the state's attorney; and the statement from September 2, 2009 was erroneous. The affidavit also stated that he never saw Hill on the day he was shot. He did admit on the cross-examination that he knew both defendants.

¶ 14 On redirect, Harris agreed that the photo attached to the September 2 statement showed him alert and awake. He agreed that the statement correctly identified his date of birth, address, family members, high school, and that he graduated from high school. He further acknowledged he did not have a copy of his written statement at the time he signed the recantation affidavit.

¶ 15 Detective Garcia of the Chicago Police testified that on the day of the shooting, he and his partner went to the hospital to investigate the shooting of Harris. He examined the van Harris had been driving in and found multiple holes in the driver side door. He talked with another officer at the hospital and Howard Williams. He also spoke with medical personnel and learned Harris's medical condition. Detective Garcia testified that he and his partner then relocated to the intersection of Kolmar and Van Buren. He observed shell casings scattered on the street from 419 S. Kolmar all the way through the intersection. He testified that he canvassed the area but found no eye witnesses. He also searched 911 calls and video from local pod cameras, but found no useful information regarding the shooting.

¶ 16 He continued the investigation and on the morning of July 25, 2009 he went to interview Harris at the hospital. The hospital personnel indicated that Harris was okay to talk. Detective

Garcia testified that Harris did not appear to be under the influence of medication and did not have any difficulties answer questions.

¶ 17 According to Detective Garcia, Harris informed him that on July 15, 2009, he was driving northbound on Kolmar toward Van Buren when the Fountain and Hill drove up next to him in a black Grand Marquis. Fountain was driving and Hill was in the passenger seat. After pulling up alongside of him, Hill stuck a gun out the window and fired. Harris stated that he believed he was struck by the first shot, and began to speed away from the intersection while Hill continued to fire. He drove to Jackson and turned eastbound where he encountered his friend, Williams. Harris informed the detective he had known Fountain for many years and Hill for at least three or four years. He acknowledged bad blood between them. Detective Garcia left the hospital and compiled a photo array with photos of Fountain and Hill. He went back to the hospital and Harris identified Fountain as the driver. He also identified Hill as the shooter. Harris signed both photographs.

¶ 18 On September 2, 2009, Detective Garcia learned that Hill was in custody. He updated Detective Jose Gomez who took over the investigation. Detective Gomez contacted the Felony Review division of the State's Attorney office and was met by ASA Sumner. Both of them went to the hospital around 9:30 p.m. to interview Harris.

¶ 19 At the hospital they checked on Harris's condition and were permitted to meet with him. The detective introduced himself, and in the presence of ASA Sumner, asked Harris to review the photo array they had brought. Harris again identified Hill as the shooter. Harris also talked with ASA Sumner about the shooting. She asked if she could memorialize his statement in writing and he agreed. Harris was cooperative, appeared to understand what was being asked of

him, and asked appropriate questions. He never indicated that he did not understand what was occurring. Harris reviewed the statement and was allowed to make corrections.

¶ 20 At trial, Detective Gomez identified the written statement Harris gave ASA Sumner at about 10:40 p.m. on September 2, 2009. He identified both ASA Sumner's and Harris's signature. Officer Gomez identified the photo taken of Harris after the statement had been written and showed how he appeared on that day in the hospital.

¶ 21 ASA Sumner testified that on September 2, 2009, she was assigned to the Felony Review Unit and went with Detective Gomez to Mt. Sinai Hospital to interview Harris. She testified that she introduced herself and Harris agreed to discuss the July 15 incident. She found Harris to be alert and awake. After their conversation, ASA Sumner testified that she asked Harris if she could memorialize his statement in writing. She testified that she sat next to Harris, and used the tray table next to the bed to write out the statement. As she wrote out the statement, she would ask questions and he provided answers. He did not appear hesitant or confused, and relayed that he was not under the influence of drugs or alcohol. She testified that she inquired how the police had treated him and he answered "fine."

¶ 22 The pair then reviewed the statement together with ASA Sumner first reading a portion of the statement herself and then having Harris read the remainder. Harris made several corrections, and then Harris, ASA Sumner, and Detective Gomez initialed them. She testified that Harris had not been threatened or promised anything in exchange for the statement. During her testimony, the State moved to admit Harris's written statement and the trial court did so without objection. The statement further acknowledged he had been treated well and not threatened by police. The statement concluded it had been given freely and voluntarily.

¶ 23 On the second day of trial the State recalled Harris without objection from either defendant. Upon direct examination by the State, Harris acknowledged he talked with the prosecutor after the first day of testimony. He acknowledged that he discussed his pending criminal cases with her and she informed him she could not help him with those cases. He further testified that he was not being promised or threatened for testifying a second time. He testified the events of July 15, 2009 occurred as he described them in his statement to ASA Sumner. He acknowledged that on July 15, 2009, he was driving his van down Kolmar Avenue around 1:00 p.m. As he approached the intersection of Kolmar and Van Buren, a black Grand Marquis pulled up alongside his driver's side window. Harris recognized "Pig," as he knew the Fountain, driving the Grand Marquis. He then identified Fountain in court. He also recognized "Weasy," as he knew Hill, in the passenger seat and also identified him in court. Harris then testified the passenger side window on the Grand Marquis was down and Hill was pointing a gun at him. Hill fired multiple shots with one hitting Harris in the back.

¶ 24 Harris also testified concerning his relationship with the defendants. He stated that he knew Fountain for a long time because Fountain was his brother-in-law and had a child with his sister. He acknowledged that on the date of the shooting he knew Fountain for at least ten years. He also stated that at the time of the shooting he had known Hill for 3 to 4 years but had not known his last name.

¶ 25 He also testified that despite his previous testimony denying it, he did speak with Detective Garcia on July 25, 2009 and did relay the events surrounding the shooting to him. He also acknowledged speaking with Detective Gomez and ASA Sumner on September 2. He testified that despite his denial the previous day, he had provided a statement to ASA Sumner and that her testimony accurately reflected his interactions with the pair. He testified that he was

on medication in the hospital but that it did not impair his ability to recall what happened when he was shot on July 15, 2009.

¶ 26 Harris testified that he lied on the first day of trial because he was scared that something might happen to him. He testified that "they" tried to bribe him and threatened that if he did not do as they wanted, there would be consequences for his family.

¶ 27 On cross examination, Harris acknowledged that he lied under oath the previous day. He had received an anonymous phone call after he testified and then reported it to prosecutors the morning of the second day. He testified that Fountain had promised to pay him and "all types of stuff" if he signed the recantation affidavit. Harris stated that on the first day of trial there were "guys in the audience" who threatened him. He recognized their faces but did not know their names. Harris acknowledged that he went to Fountain's attorney's office, spoke to an associate attorney, and signed the affidavit, but the affidavit was a lie. He also testified that when he spoke with the prosecutor on the second day, she informed him that if he made contrary statements under oath he could be charged with perjury, but did not tell him he would be charged with perjury.

¶ 28 On redirect examination he acknowledged he had provided the recantation affidavit because he had felt intimidated and that his sister asked him not to testify.

¶ 29 The State also called Steven McKinnie (hereinafter McKinnie) to testify. He testified that he was currently in the custody of the Illinois Department of Corrections, had prior convictions for driving on a suspended license, possession of a controlled substance, manufacture and delivery of a controlled substance, and had a pending case for possession of a controlled substance with intent to deliver. He testified that in 2009 he was living at 4531 West Jackson

Boulevard in Chicago. He also stated that he did not know Hill in 2009, but did know Fountain from the neighborhood.

¶ 30 McKinnie denied that on July 15, 2009, he was in a lot at the corner of Van Buren and Kolmar. He denied seeing Harris's green van turn right from Congress on to Kolmar or that a black Grand Marquis made the same turn behind the van, eventually pulling up alongside. He denied seeing Fountain driving the car or Hill sitting in the passenger seat. He denied he saw Hill with a gun or fire at Harris multiple times. He denied running towards Jackson to escape the gunfire. He similarly denied flagging down a police officer to inform the officer that his buddy had just been shot by "Weasy" and "Pig." He further denied accompanying those same officers to Area 4 police headquarters to talk with a detective.

¶ 31 McKinnie did admit at trial that on September 3, 2009, Detectives Wayne Raschke (hereinafter Raschke) and Crane came to his home, he agreed to speak with them, and they all went to Area 4 together. McKinnie testified that he told the detectives he was not present for the shooting and denied giving any details of the shooting. He acknowledged that he signed a lineup advisory form and looked at some photos, but denied that he identified Fountain. He testified that he only signed the form because the detectives forced him to. He stated that he did not remember signing a physical line up advisory form but admitted he did view a lineup. He denied identifying defendant Hill.

¶ 32 McKinnie admitted that he met with an ASA after viewing the physical lineup but denied he told her anything or gave a written statement. At trial, he did review the written statement and the photograph of himself attached to it, but did not recall having his photo taken. He further testified that a detective typed up the written statement and told him to sign and initial it. McKinnie acknowledged that his signature and writing appeared on the photograph identifying

Fountain. He admitted the written statement contained details of the shooting and his identifications, but again denied seeing any of the shooting. He stated that the reason he signed the statement and photos because the detectives threatened him with a drug or gun case.

¶ 33 On cross examination by Fountain's counsel, McKinnie testified that his written statement was not made under oath. He testified that when he spoke to the ASA at Area 4, the detectives never left the room, and so he never had an opportunity to tell the ASA he had been intimidated by them and forced to sign the statement. He claimed he did not accompany the detectives voluntarily to the police station, and that they put him in a locked room at the station. He reiterated that he told the detectives he did not see anything but they would not let him leave. McKinnie said he kicked the door to the room because he wanted to leave, but the detectives told him they could keep him for 48 hours. He further claimed they handcuffed him to the bench in the room and after a few hours, the detectives told him he would be charged "with some guns" if he did not cooperate and sign a statement. He stated the detectives told him where to sign.

¶ 34 Officer Jonathan Apacible (hereinafter Officer Apacible) testified he was working with his partner at 1:00 p.m. on July 15, 2009, when he received a flash massage of Harris's shooting. Minutes later in the area of 400 South Kolmar, McKinnie flagged down the officers and told them he saw "Pig" and "Weasy" shoot "Meechie."[1] Officer Apacible had no idea who these people were, and McKinnie agreed to go with them to the police station to talk to detectives. Officer Apacible testified that McKinnie wanted to get into their squad car so quickly that it startled his partner. After patting down McKinnie, they all drove to the police station.

¶ 35 The State then called Detective Adamik who met McKinnie at the police station. He testified that McKinnie was not handcuffed when they spoke. Detective Adamik testified that at

[1] Harris had previously testified that his nickname is Meechie.

the police station, McKinnie informed him that he was in a lot at Van Buren and Kolmar when he saw "Meechie" driving a green van. A black car driven by "Pig" pulled up alongside the van with "Weasy" or "Wayne" sitting in the passenger seat. Detective Adamik testified McKinnie claimed "Weasy" pulled out a gun and started firing at the van. The black vehicle drove down Van Buren and McKinnie ran away.

¶ 36 On cross examination, the detective testified his interview with McKinnie was brief because McKinnie wanted to leave. He stated that he did not take a sworn, written, or videotaped statement from McKinnie. He included McKinnie's statement in a written report he made later in the evening, though he admitted this report was not filed until months later.

¶ 37 Detective Raschke was called to testify about the interview he and his partner conducted with McKinnie on September 3, 2009. The detective testified that they arrived at McKinnie's residence, introduced themselves, and told him they were investigating the shooting at Kolmar and Van Buren. He stated that McKinnie agreed to accompany them to Area 4. He stated that McKinnie never told them he wanted to be interviewed at his house nor was McKinnie ever handcuffed. They drove to Area 4 and McKinnie was placed in the roll call/conference room. McKinnie was not handcuffed to a bench or placed into a locked room he could not exit. He denied ever threatening McKinnie.

¶ 38 Detective Raschke testified that McKinnie told them that on July 15, 2009, he was at the corner of Van Buren and Kolmar when he saw Harris driving his van northbound on Kolmar. He saw a black Grand Marquis being driven by Fountain with the Hill sitting in the passenger seat. McKinnie relayed that he watched Hill point a black gun at Harris and fire approximately ten times into the driver's side of the van. The detective asked McKinnie to view a photo array and McKinnie agreed. McKinnie viewed the photo array and identified "Pig" as the person driving

the black Grand Marquis. He circled the picture and signed his name next to it. McKinnie also agreed to view a physical lineup. Upon viewing the physical lineup, McKinnie identified Hill as the shooter.

¶ 39 Detective Raschke testified that ASA Aileen Bhandari (hereinafter ASA Bhandari) arrived at Area 4 around 5:30 p.m., introduced herself and spoke to McKinnie in an interview room. He testified that McKinnie was in an office chair, was not handcuffed and the door was not locked. He stated that he was present for ASA Bhandari's interview and denied that he or any other officer stood over McKinnie during the interview. He left the interview briefly when ASA Bhandari asked him. He testified that he was present when ASA Bhandari took a type written statement in a larger room with computers. He saw McKinnie review the statement and make corrections to it. He testified McKinnie was given food and drink and was driven home following the interview.

¶ 40 The State also called ASA Bhandari to testify regarding the interview she conducted with McKinnie on September 3, 2009 at Area 4. She testified that she did speak with McKinnie in an interview room in the presence of Detective Raschke. She testified the door was never locked and McKinnie was never handcuffed. After talking with McKinnie for 15 to 20 minutes she asked if he would be willing to reduce his statement to writing and he agreed. The pair went to the computer room and ASA Bhandari asked Detective Raschke to wait outside. She testified that while she was alone with McKinnie she inquired as to how he was being treated. McKinnie informed her that he had been treated fine and had no complaints. He had been given some pop and candy during the interview. She testified that she included this information in the written statement.

¶ 41 After confirming that McKinnie had been treated well, she asked Detective Raschke back into the room while she typed up McKinnie's statement. When she finished typing the statement, she reviewed it with McKinnie. After reviewing the statement with ASA Bhandari, McKinnie made some edits, which he initialed, and then signed each page of his statement. ASA Bhandari and Detective Raschke also signed each page.

¶ 42 At trial, ASA Bhandari identified McKinnie's statement and the photograph taken of him the day he gave his statement. She testified that she personally typed up the statement. She identified the two exhibits attached to the statement, which were photographs of Hill and Fountain identified by McKinnie. The type written statement was admitted into evidence as a prior inconsistent statement and published without objection.

¶ 43 The events described in McKinnie's statement are almost identical to the events described by the victim. McKinnie stated that he was 21 years old and lived in the area of Jackson and Kolmar. On July 15, 2009, he was in a lot at Van Buren and Kolmar, walking toward the corner. He saw a green Chevy van turning right from Congress onto Kolmar and saw a black Mercury Grand Marquis make the same turn behind the van. The black Grand Marquis then pulled up alongside the van at the stop sign. McKinnie was across the street on Van Buren facing the van and noticed the driver was Demetrius Harris, a man he had known his whole life. McKinnie also noticed the driver of the Grand Marquis was a man he knew as "Pig" and the passenger was a man he knew as "Wayne" or "Weazy." McKinnie witnessed the passenger pull a gun out and start shooting at the driver side of the van. The Grand Marquis swerved off onto Van Buren as McKinnie ran for cover.

¶ 44 The statement also relayed the events that took place while McKinnie was at the police station. He acknowledged he came to the station because he wanted to help. He stated that he

viewed a lineup and no one told him who to identify. He stated that the subject identified in the lineup was the same person identified in a photo included with his written statement. He further stated that he had been treated well by both the police and the ASA, had been given food and drink, and allowed to use the restroom. He had never been handcuffed and was not threatened into making the statement. He gave the statement freely and voluntarily because he wanted to help.

¶ 45 After ASA Bhandari's testimony, the parties stipulated to the testimony of Harris's doctor and two forensic scientists. The State then rested. Fountain then moved for the admission of Harris's recantation affidavit, which was granted without objection. Defendants moved for a directed finding, which was denied.

¶ 46 After considering the evidence, the trial court, sitting as the finder of fact, found the defendants guilty of attempt murder and aggravated battery with a firearm. In making his ruling, the trial court found the recantation affidavits and trial testimony of Harris and McKinnie to not be credible. The court found the eyewitness statements encapsulated into the written documentation and submitted into evidence identified Fountain as the driver of the Grand Marquis and Hill as the passenger who shot Harris. The court found these statements corroborated by credible witnesses. The court specifically noted that despite being given at different times, the two statements had almost identical facts about what occurred and who was involved.

¶ 47 Hill challenged both his conviction and his sentence in post-trial motions, which the trial court denied. He timely filed his notice of appeal.

¶ 48 ANALYSIS

¶ 49 Hill raises several issues on appeal: (i) the trial court erred in admitting the inconsistent statement of Harris; (ii) the State failed to prove him guilty beyond a reasonable doubt of attempt murder and aggravated battery with a firearm; (iii) the State violated *Brady v. Maryland* when it failed to provide the entire criminal history of Harris; (iv) the trial court erred in limiting the cross examination of Harris; and (v) he was denied effective assistance of counsel.

¶ 50 In his first issue, Hill argues the trial court erred in admitting the prior inconsistent statement of Harris. Hill argues that the "record reflects no formal request by the State for the admission of any prior statement to be introduced under 725 ILCS 5/115-10.1. The Defendants were provided with no opportunity to object to or contest the admissibility of the statements under 115-10.1."

¶ 51 The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion. *People v. Hall*, 195 Ill. 2d 1, 20-21 (2000). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would agree with the position adopted by the trial court. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 52 A review of the record shows the State did move to admit both inconsistent statements into evidence. The inconsistent statement of Harris was moved into evidence by the State during the direct examination of ASA Sumner. Likewise, the inconsistent statement of McKinnie was moved into evidence during the direct examination of ASA Bhandari. Defendants did not object during either of these events and Hill does not argue before this court the requirements of 725 ILCS 5/115-10.1 were not met when the trial court did admit them. Hill's reliance on *People v.*

McWhite, in support of this argument is also misplaced as the issue in that case was a prior consistent statement, not a prior inconsistent statement. 399 Ill. App. 3d 637, 641-42 (2010).

¶ 53 Hill further argues that trial court committed reversible error by relying on Harris inconsistent statement because once Harris testified on the second day, the prior statement was no longer inconsistent. As we explained in rejecting this same argument raised by his codefendant, when the inconsistent statement was admitted during the direct examination of ASA Sumner, Harris had testified inconsistently with that statement. *People v. Fountain*, 2016 IL App (1st) 141006-U, ¶ 53-54. When the State sought to have Harris testify again on the second day of trial neither defendant objected nor did either defendant seek to have the court reexamine the admission of the prior inconsistent statement following the Day 2 testimony. Accordingly, we reject Hill's argument that the trial court committed reversible error by relying on the prior inconsistent statement of Harris.

¶ 54 Next, Hill argues the State failed to prove him guilty beyond a reasonable doubt of attempt murder and aggravated battery with a firearm. Where a defendant challenges the sufficiency of the evidence used to convict him or her, a reviewing court must determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). It is the jury's responsibility to determine the witnesses' credibility and the weight to be given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Evans*, 209 Ill. 2d 194, 211 (2004). Accordingly, a reviewing court may not disturb the jury's finding unless "the evidence is so palpably contrary to the verdict or so unreasonable, improbable or unsatisfactory as to create a reasonable doubt as to guilt." *People v. Sanchez*, 37 Ill. App. 3d 299, 301 (2007). Under this standard, a reviewing court

must make all reasonable inference from the record in favor of the State. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009).

¶ 55 "A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2014). Section 9-1(a)(1) of the criminal code provides, in relevant part, as follows:

> "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death . . . he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another . . ." 720 ILCS 5/9-1(a)(1) (West 2014).

Therefore, in order to prove Hill guilty of the attempt first degree murder of Harris, the State was required to prove, beyond a reasonable doubt that Hill acted with the specific intent to kill Harris. *People v. Green*, 339 Ill. App. 3d 443, 451 (2003). Intent is a state of mind that can be established by of the surrounding circumstances, including the character of the assault, the use of a deadly weapon, and other matters from which an intent to kill may be inferred. *Green*, 339 Ill. App. 3d at 451. It is the trier of facts responsibility to determine the requisite intent, and a reviewing court should not disturb the finding unless it clearly appears there is reasonable doubt on the issue. *Id.*

¶ 56 "A person commits aggravated battery when, in committing a battery, he or she knowingly does any of the following: (1) [d]ischarges a firearm, other than a machine gun or a firearm equipped with a silencer, and causes any injury to another person." 760 ILCS 5/12-3.05(e)(1) (West 2014). "A person is considered to act intentionally to accomplish a result or engage in conduct when his conscious objective or purpose is to accomplish that result or engage in that conduct." *People v. Green*, 2016 IL App (1st) 134011, ¶ 32.

¶ 57 When viewing the evidence in a light most favorable to the State, the evidence proved every element of both charged offenses beyond a reasonable doubt. Hill attacks the trial court's reliance on the testimony of the victim, Demetrius Harris. Hill argues Harris is a perjurer and his testimony was inherently unreliable. This argument essentially asks us to reweigh the evidence and disregard the testimony of Harris, something we cannot do on review. See *People v. Curtis*, 262 Ill. App. 3d 876, 881 (1994) (noting the credibility of identification witnesses and the weight accorded their testimony lie within the province of the trier of fact). Moreover, this argument completely ignores the testimony and evidence the State introduced through McKinnie.

¶ 58 Even without the statements of Harris, the evidence introduced during the testimony of McKinnie would be sufficient to convict Hill. "Where the identification of a defendant constitutes the central question in a criminal prosecution, the testimony of even a single witness is sufficient to convict where the witness is credible and viewed the accused under conditions permitting a positive identification to be made." *Id.* While McKinnie denied being present the day of the shooting when he testified in court, Officer Apacible testified he met McKinnie at the scene of the shooting shortly after it occurred and McKinnie relayed to him that "Pig" and "Weasy" shot "Meechie." McKinnie then recounted the events to Detective Adamik who memorialized them in a written report. Moreover, on September 3, 2009, McKinnie provided another statement to the Chicago police and the State's Attorney. This statement mirrored what he had first described on the day of the shooting, specifically that Hill had shot Harris from a car driven by Fountain at the corner of Van Buren and Kolmar. While McKinnie contradicted these statements at trial, they were admitted as prior inconsistent statements and relied upon by the trial court in finding Hill guilty.

¶ 59 In *People v. Morrow*, this court held that the witness's previous inconsistent statement alone are sufficient to prove defendant's guilt beyond a reasonable doubt. 303 Ill. App. 3d 671, 677 (1999). In affirming the conviction in *Morrow*, this court recognized that if a prior inconsistent statement is properly admitted, "a finding of reliability and voluntariness is automatically made. * * * Accordingly, no additional analysis is needed. * * * [I]t is the jury's decision to assign weight to the statement and to decide if the statement was indeed voluntary, after hearing the declarant's inconsistent testimony." (Internal quotation omitted.) *Id.* at 677 (citing *People v. Pursley*, 284 Ill. App. 3d 597, 609 (1996)). Continuing on, the *Morrow* court concluded that a reviewing court cannot engage in any analysis to determine if the declarant's testimony was "substantially corroborated" or "clear and convincing." *Id.* at 677. Accordingly, McKinnie's statement, by itself, represents a sufficient basis for a finder of fact to conclude all elements of the charged offenses were proven beyond a reasonable doubt.

¶ 60 In arguing for reversal, Hill relies on *People v. Parker*, 234 Ill. App. 3d 273 (1992), and *People v. Arcos*, 282 Ill. App. 3d 870 (1996) for the proposition that "when the only evidence that inculpated the defendant are prior inconsistent statements which are directly contradicted by the alleged declarant's at trial, the credibility of this evidence is greatly reduced." *Arcos*, 282 Ill. App. 3d at 875 citing *Parker*, 234 Ill. App. 3d at 280. While this is true, the *Arcos* court also noted that disavowed statements are not rejected as a matter of law, and "it is for the trier of fact to weigh the statement, weigh the disavowal, and determine which is to be believed." *Arcos*, 282 Ill. App. 3d at 875 citing *People v. McBounds*, 182 Ill. App. 3d 1002 (1989). That is what happened here – the trial court, sitting as the finder of fact, was confronted with the inconsistent statements and the disavowal. After weighing each, it chose to believe the inconsistent

statements gave the correct version of events. Accordingly, both of Hill's convictions are affirmed.

¶ 61 Next, Hill argues that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to provide an accurate criminal history of Harris. In making his *Brady* claim, Hill argues that while Harris was on bond for the offense of Armed Habitual Criminal Harris was arrested and these "arrests never triggered the filing of a Violation of Bail Bond by the State nor were some even disclosed to Defense counsel." He then lists several cases he alleges are Harris's criminal cases. Finally, he alleges that during the pendency of this matter, Harris was charged with various drug offenses in federal court for the Northern District of Illinois.

¶ 62 A defendant waives an issue on appeal if he fails to give factual support for his position by citation to the record (*People v. Trimble*, 181 Ill. App. 3d 355, 356 (1989)), or fails to cite authority in support of his argument (*People v. Ramirez*, 98 Ill. 2d 439, 472 (1983)). Hill's brief fails to provide any citation to the record in support of his claims regarding Harris's criminal history. A review of the record shows that the Armed Habitual Criminal charge was disclosed and Harris was questioned about it during the trial. Hill fails to provide any citation to the record to support his claim concerning the other crimes he lists and alleges Harris committed, but were not disclosed. Moreover, Hill also made no attempt to supplement the record with information which would support his claims.

¶ 63 Hill also fails to support his claim concerning Harris's alleged federal crimes. Hill provides no support for his claim that Chicago Police were involved in bringing the federal charges against Harris, or that anyone with the Chicago Police Department or State's Attorney knew about it. Finally, Hill fails to engage in any analysis under *Brady*. "The appellate court is not a depository in which the appellant may dump the burden of argument and research."

Trimble, 181 Ill. App. 3d at 356. Given the failure to provide any citations to the record, cite relevant authority, or engage in any analysis on the subject, Hill has waived review of the issue.

¶ 64 In his fourth issue, Hill argues the trial court erred in limiting the cross examination of Harris concerning Harris's alleged shooting of codefendant Fountain in July 2010. In his brief, Hill argues his theory of the case was that Harris told the truth when he testified during Day 1 that he did not know who the shooter was or who drove the vehicle from which shots were fired. The scope of cross examination in a criminal case rests largely within the discretion of the trial court and its decision will not be disturbed unless there has been an abuse of discretion which resulted in prejudice to the defendant. *People v. McElroy*, 81 Ill. App. 3d 1067, 1072 (1980). Irrelevant evidence may properly be excluded without violating defendant's right to confront witnesses. *Id.* at 1072.

¶ 65 Based on his argument, we conclude the trial court did not err in limiting the cross examination of Harris. We first note Harris was never charged or prosecuted for this alleged shooting. Moreover, the introduction of testimony showing that Harris shot at codefendant Fountain following his own shooting would support the conclusion that Harris did know who had previously shot him. Additionally, such testimony would only minimally affect Harris's credibility where Harris had already admitted lying under oath. In denying this line of questioning, the trial court stated the previous instances of lying obviated the need to go into any more instances that may affect his credibility. Finally, the testimony Hill seeks to introduce has no bearing on his theory of the case – that Harris does not know who shot him. Accordingly, the trial court did not abuse its discretion when it limited the cross examination of Harris.

¶ 66 Lastly, Hill argues he was denied effective assistance of counsel during his trial. Hill contends his trial counsel was ineffective for failing to investigate the nature of Harris's Day Two testimony and failed to properly investigate Harris's criminal history.

¶ 67 To prove a claim of ineffective assistance of counsel, defendant must allege facts showing counsel's representation was both objectively unreasonable and counsel's deficiency prejudice him. *Strickland v. Washington*, 466 U.S. 668 (1984). In raising a claim of ineffective assistance of counsel under the first prong of *Strickland*, defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence. *People v. Pecoraro*, 175 Ill. 2d 294, 319-20 (1997); *People v. Powell*, 355 Ill. App. 3d 124, 141 (2004). Deference is paid to defense counsel's challenged action and the reviewing court, without engaging in a hindsight analysis, must presume that counsel's performance fell within the wide range of professional assistance. *Strickland*, 466 U.S. at 689.

¶ 68 Under the second prong of *Strickland*, defendant must show that he was prejudice by counsel's deficient performance. *Strickland*, 466 U.S. at 687. Proof of prejudice requires an affirmative showing of a "reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* Notably, defendant is entitled to competent, not perfect, representation, and the fact that a tactic, in retrospect, proved unsuccessful does not demonstrate incompetence. *People v. Fountain*, 2016 IL App (1st) 131474, ¶ 44.

¶ 69 Without addressing whether defense counsel's conduct was objectively unreasonable, we reject Hill's ineffective assistance claim because he is unable to demonstrate that the allegedly unreasonable conduct prejudice him and had it not occurred would have resulted in a different

outcome. *Strickland*, 466 U.S. at 694. Harris's criminal history was explored at trial and was well known to the fact finder. He testified to various convictions and that the State did not promise or threaten him in order to secure his testimony. He also admitted to being a liar, which was acknowledged by the trial court on the record. Moreover, the prior inconsistent statement of McKinnie identified Hill as the shooter and mirrored the events described by Harris in his inconsistent statement. Accordingly, even if the conduct of Hill's trial counsel was objectively unreasonable, Hill cannot demonstrate that "absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 695. We therefore reject Hill's ineffective assistance of counsel claim.

¶ 70 CONCLUSION

¶ 71 For the foregoing reasons, we affirm the order of the trial court finding Hill guilty of attempt murder and aggravated battery with a firearm.

¶ 72 Affirmed.