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2021 IL App (3d) 180119

Order filed February 2, 2021

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2021

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-18-0119
	)	Circuit No. 15-CF-644
YOLANDUIS LYNN McDUFFIE,	)	Honorable
Defendant-Appellant.	)	Frank R. Fuhr, Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices O'Brien and Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) Evidence was sufficient to prove defendant guilty beyond a reasonable doubt of first degree murder based on a theory of accountability.  
(2) Trial court's rulings and prosecutor's conduct regarding eye-witness's testimony did not deny defendant a fair trial.  
(3) Admission of handgun that was not the murder weapon was harmless error.  
(4) Trial court did not err in omitting an alternative verdict instruction where the necessary instruction was given after the jury asked for clarification or in giving an instruction limiting the use of other offenses.

¶ 2 After a jury trial, defendant Yolanduis Lynn McDuffie was convicted of first degree felony murder (720 ILCS 5/9-1(a)(3) (West 2012)) under an accountability theory and sentenced to 55

years in prison. On appeal, he argues that (1) the State failed to prove beyond a reasonable doubt that he was legally accountable for the crime, (2) trial court error and prosecutorial misconduct surrounding a witness's testimony deprived him of a fair trial, (3) the trial court erred in allowing the State to introduce as evidence a Smith & Wesson handgun that was not the murder weapon, and (4) the trial court erred in instructing the jury. We affirm.

¶ 3

## I. BACKGROUND

¶ 4

Shortly before noon on December 18, 2013, Derek Jackson was shot and killed in his home in Rock Island. Jackson's girlfriend called 9-1-1 and reported the shooting. She told the operator that she heard a shot and saw Aaron Henderson and Kamren Bolden running down the street. Later that day, police questioned Bolden. He denied that he was in Jackson's house and was released. Investigators then reviewed surveillance camera videos in the area and recognized Bolden and Henderson on the footage. They brought Bolden back in for questioning and charged him with obstruction of justice. Bolden then stated that he went to Jackson's house with Henderson and defendant, defendant pulled out a black handgun, and he ducked and ran away.

¶ 5

Officers arrested defendant and charged him with first degree murder and attempted armed robbery under a theory of accountability. The charges were later dismissed based on the State's motion.

¶ 6

Henderson was also arrested and charged with felony murder predicated on robbery under an accountability theory and attempted armed robbery. Before trial, the State amended his charges to include a count of first degree murder with a firearm, alleging that he personally discharged the gun that caused Jackson's death.

¶ 7

Henderson's jury trial began in March 2015. Bolden testified that once he, Henderson, and defendant McDuffie were inside Jackson's house, defendant pulled out a black gun and told

everyone to get down. Bolden dropped to the ground and heard shots. He then ran out of the house. Bolden admitted that he lied to investigators the first time he talked to them. He also admitted that he pleaded guilty to lying to police and served a term in prison. On rebuttal, Detective Chad Sowards testified that Bolden denied any knowledge of the shooting the first time he interviewed him, but during the second interview, he explained the events that resulted in Jackson's death. Sowards stated that Bolden's description during the second interview was substantially the same as his trial testimony. The jury found Henderson guilty of first degree felony murder under an accountability theory and not guilty of first degree murder as the principal.

¶ 8            Shortly after Henderson's trial, Rock Island County detectives received information that a black 40-caliber Glock handgun had been found in a hotel room in Davenport, Iowa. Forensic testing confirmed that the shell casings recovered from Jackson's residence were all fired from the same type of gun, a Glock handgun.

¶ 9            Three months later, the State charged defendant with first degree murder for personally discharging the firearm that killed Jackson (720 ILCS 5/9-1(a)(2) (West 2012), 730 ILCS 5/5-8-1(a)(1)(b) (West 2012)) and first degree murder predicated on attempted robbery under a theory of accountability (720 ICLS 5/9-1(a)(3) (West 2012)). Prior to trial, the defense filed a motion *in limine* to prevent the State from presenting Bolden as a witness. Defendant argued that the State should be barred from using Bolden to support its theory that defendant was the shooter because he argued that Bolden was lying at Henderson's trial and that his statement that defendant was the shooter was only an attempt to help his friend. The defense attached a transcript from closing arguments at Henderson's trial in which the State argued that Bolden was lying. The trial court denied defendant's motion.

¶ 10 Defendant filed another motion *in limine* seeking to bar the State from introducing a Smith & Wesson handgun that had been recovered in January 2014 during the initial investigation. Defendant maintained that the weapon was not relevant because it had been subsequently eliminated as the murder weapon by forensic testing. The State argued that because defendant's girlfriend mentioned that the weapon was seized in a recorded phone call that would be published to jury, the Smith & Wesson was admissible to eliminate any confusion. The trial court agreed and denied defendant's motion.

¶ 11 In opening statements, defense counsel told the jury that Bolden was a registered sex offender and had been convicted of obstruction of justice in this case. The State objected, and the trial court instructed defense counsel to file a motion. In his subsequent motion, defendant argued that Bolden was a sex offender and that his pending charge for failing to register as a sex offender was an impeachable offense that should be revealed to the jury. The State responded by claiming that because the charge stemmed from a juvenile offense, Bolden's status as a sex offender could not be disclosed. The State suggested that during his testimony Bolden simply state that he was in custody on a pending charge, facing possible prison time, without naming the offense. The trial court ruled that only the class of the pending offense would be disclosed but that Bolden's obstruction of justice offense would be admissible for purposes of impeachment.

¶ 12 At trial, Jackson's girlfriend, Alyson Schippers, testified that Jackson and Henderson were friends and that Henderson was around "a lot." The day before the shooting, Schippers picked up Jackson, Henderson, and Bolden during her lunch break. While she was driving, she overheard them talking about Jackson purchasing a gun from one of Henderson's friends. The next morning, Jackson and Schippers woke up around 10:30 or 11 a.m. and started getting dressed for the day. Jackson laid \$200 on the dresser, which Schippers assumed was for the purchase of the gun.

Jackson then answered a call on his cellphone and told her that Henderson was outside. Jackson told her to turn the music on and went downstairs. Shortly after he left the room, Schippers heard a beep from the house alarm system as he opened the back door. About five minutes later, she heard a gunshot. She ran downstairs and found Jackson lying on the floor; he was not moving. Henderson was standing over him, going through his pockets. She did not see Henderson with a gun.

¶ 13 Schippers was scared so she ran back upstairs. When she looked out the bedroom window, she saw two people running down the street but she testified that she “couldn’t really tell” who they were. She immediately called 9-1-1, and the recorded call was published to the jury. On the call, Schippers reports that Jackson has been shot and tells dispatch that “they robbed him.” She identifies “Dewey” (Henderson) and “Kam” (Bolden) as the two men on the street but says she did not see the shooter.

¶ 14 Bolden testified that he is Henderson’s younger cousin and was living with him at the time of the shooting. The day before, on December 17, 2013, he was hanging out with Henderson and Jackson at the mall. The next morning, he went with Henderson to Jackson’s house to get some “weed.” While they were walking down 11th Street, they met up with defendant, and all three continued walking to Jackson’s house together. When they arrived at Jackson’s house, Jackson opened the back door and let them inside. Moments after entering, defendant pulled out a black gun and Bolden heard someone say “get down.” Bolden ducked and ran. As he ran to the door, he heard gunshots. About a block away, he heard Henderson calling his name. He stopped, and Henderson caught up with him. Bolden testified that “[Henderson] walked up and he was just like, damn, and then we kept walking.”

¶ 15           Bolden assumed they were at Jackson’s house to buy marijuana. He testified that he did not know about the robbery. He did not see a gun until they were inside Jackson’s house and defendant pulled out a handgun. He did not bring a gun, and Henderson did not have a gun. Bolden testified that he did not see defendant after he left Jackson’s house and he was not with defendant after the shooting.

¶ 16           Bolden said he was 16 years old when the shooting happened. He spoke with officers a few times during the investigation. The first time he talked to them, he did not tell them the truth. He was convicted of obstruction of justice because he lied. Bolden stated that he remembered testifying at Henderson’s trial that defendant had a gun.

¶ 17           Bolden acknowledged that he was facing a Class 3 felony charge in an unrelated matter. He had been in jail for nine months awaiting trial. He did not have a plea agreement, but he hoped to “get out when this is over with.” Bolden’s attorney also testified. He confirmed that Bolden had not been offered a deal in his pending case but that probation was likely.

¶ 18           Bolden was then asked to review surveillance videos from the area. He identified himself and Henderson walking a few blocks away from Jackson’s house after the shooting. He was also asked to identify a third person running through an alley, which he was unable to do. The prosecutor then asked him who was wearing a black pea coat, like the one depicted in the videos, and Bolden answered, “Yolanduis.”

¶ 19           Shane DeCoster owns a rental house on 14th Avenue in Rock Island. On December 18, 2013, he was in the back yard working because it was unseasonably warm. He heard a commotion and saw two young men walking up the street and a third cut through his yard. The two young men in the street were walking normally, but the man in the yard seemed “panicked a little bit.”

¶ 20 Detective Chad Sowards testified that he first interviewed Bolden on December 18, 2013, the day of the shooting. In that interview, Bolden claimed that he was not at Jackson's house and did not know anything about the incident. On January 8, 2014, Sowards brought Bolden back to the station for a second interview, at which time Bolden admitted that he was at Jackson's house with Henderson and defendant. Bolden told Sowards that defendant had a black gun and fired several shots. Bolden also identified defendant in a photo lineup.

¶ 21 Sowards spoke with Bolden a third time shortly before Henderson's trial. He showed Bolden a form that depicted several handguns and semiautomatic weapons. Bolden picked two pictures of a black Glock semi-automatic handgun, similar to the Glock handgun recovered in the Davenport hotel room. Sowards also noted that Bolden testified as a witness for the defense at Henderson's trial and was no longer in custody. He stated that Bolden had served his time for the obstruction of justice conviction when he testified on Henderson's behalf.

¶ 22 Malikah Daggett testified that she was dating defendant in December 2013. Defendant spent the night with her on December 17, 2013. He left the next morning and did not return until later that afternoon. When he left, defendant had a gun on his waistband, which was not unusual because "he always had one." She believed defendant was with Henderson and Bolden. Defendant "always" hung out with them. Sometime that afternoon, they returned. Henderson and Bolden "rolled some weed," and defendant grabbed his ID and went to the jail to visit his best friend, Kendrick. Kendrick's father is Cliff Farmer. Defendant returned that night without the gun. Daggett did not know where it went. Daggett and defendant watched a movie together and defendant told her "this might be the last time I watch a movie with you again."

¶ 23 Defendant was arrested a few weeks later. He called Daggett from jail the day after his arrest. The phone call was recorded and played for the jury. During the conversation, Daggett tells

defendant that officers searched Cliff Farmer's house and found a "thing." Defendant tells her that the thing police found is not his but expresses concern that his prints might be on it. Daggett asks, "Is that the one?" Defendant later comments, "Don't worry, that's not the one."

¶ 24 Stipulated evidence was presented to the jury showing that Henderson called Jackson four times between 11:19 a.m. and 11:55 a.m. on December 18, 2013. The parties also stipulated that defendant's phone records showed that he exchanged 11 text messages with Henderson between 8:11 a.m. and 8:26 a.m. on the morning of December 18, 2013. Records also showed that defendant spoke with Henderson twice on the phone between 11:42 a.m. and 11:46 a.m. that same day.

¶ 25 On recall, Sowards testified that Schippers's 9-1-1 call came in at 11:57 a.m. He also testified that he assisted in the execution of several search warrants on January 10, 2014. Officers searched the residence of Henderson's girlfriend and found \$227 in cash, but they did not find a firearm. One of the bills that they recovered appeared to have a spot of blood on it. Officers also arrested defendant that same day. His cellphone and the black pea coat he was wearing were both seized and processed as evidence. A search warrant was also executed at Cliff Farmer's house. Two shotguns and a Smith & Wesson handgun were found. Farmer said the shotguns were his but did not claim ownership of the Smith & Wesson. The Smith & Wesson was the only handgun recovered that day.

¶ 26 Criminalist Garrett Alderson tested the Smith & Wesson handgun found at Farmer's house. Alderson analyzed a partial print on the magazine and eliminated defendant as the source. Alderson also identified several photos he took of prints in the snow in a vacant lot between Jackson's house and DeCoster's back yard. Alderson testified that the photos depicted several shoe prints and the print of a straight barrel with a "knuckle." The photos were admitted and published to the jury.



Detective Sowards later testified that the “knuckle” print looked to him like the barrel or slide of a firearm.

¶ 27 Special Agent Daniel Stafford testified that on February 3, 2015, he received a call from security at a Davenport hotel, reporting that a firearm had been found in one of the rooms. Stafford drove to the hotel and found a 40-caliber Glock on the floor next to the headboard. A single print found on the slide belonged to Kenneth Russell, a felon, and one of the room’s occupants. After tracing the serial number on the firearm, investigators learned that the Glock was registered to Martin Guzman, that Guzman’s wife was Henderson’s cousin, and that she claimed the Glock had been stolen in December 2013. Detective Sowards told Stafford that investigators had been looking for a 40-caliber Glock handgun in connection with Jackson’s death and asked to test it. Stafford then delivered the Glock to the Rock Island Police Department for testing.

¶ 28 Forensic scientist Dustin Johnson compared the bullets and casing recovered from the crime scene. He testified that the bullets were fired from a handgun with an elliptical shaped firing pin, typically associated with a Glock handgun. He explained that Smith & Wesson also manufactures handguns with an elliptical firing pin but that a Smith & Wesson has other class characteristics that did not match the casings recovered from the crime scene. He concluded that all four casing recovered from Jackson’s residence were fired from the Glock semi-automatic pistol found in the Davenport hotel room and not a Smith & Wesson handgun.

¶ 29 Stipulated evidence revealed that police recovered \$227 in cash from Henderson’s girlfriend’s house and that there was a red stain on one of the bills. The stain tested positive for blood and the DNA test showed that it matched Jackson’s blood.

¶ 30 The State rested, and then the defense rested.

¶ 31 During deliberations, the jury sent the following note: “Is there any way to see the Smith & Wesson gun or at least the length of the barrel?” The court surmised that the jury wanted to see the gun to compare the barrel length to the snow print in the photograph but noted that the Smith & Wesson was the “wrong gun.” After taking the Smith & Wesson to the jury room, the bailiff returned and reported that the jurors wanted to see both guns “side-by-side,” which the trial court allowed.

¶ 32 Approximately 30 minutes later, the jury sent another question: “Please explain how to answer two counts? Are they separate, Count I and IA, then Count II? This implies that we have two different verdicts.” The trial court and the parties agreed that count IA referred to the firearm enhancement on the first degree murder charge of count I. The court also acknowledged that the alternative verdict jury instruction, Illinois Pattern Jury Instruction, Criminal 26.01 (IPI 26.01), had not been given and that providing a modified version of the instruction would most likely answer the question. The parties agreed to a modified version of IPI 26.01, which was read to the jury.

¶ 33 The jury returned a verdict of not guilty on count I, first degree murder as the principal, and guilty on count II, first degree murder based on accountability.

¶ 34 II. ANALYSIS

¶ 35 A. Sufficiency of the Evidence

¶ 36 Defendant first argues that his conviction must be reversed because the State failed to prove beyond a reasonable doubt that he was legally accountable for Jackson’s death.

¶ 37 A sufficiency of the evidence argument requires us to consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272

(2008). Under the reasonable doubt standard, it is not the function of this court to retry the defendant, reweigh trial evidence, or otherwise undermine the fact finder's judgment. *People v. Radford*, 2018 IL App (3d) 140404, ¶ 30. A criminal conviction will stand unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt as to the defendant's guilt. *Ross*, 229 Ill. 2d at 272.

¶ 38 Defendant was found guilty of felony murder under a theory of accountability as alleged in count II. That count charged defendant with first degree murder in that, while acting with another for whose conduct he was legally responsible, and while attempting to commit a robbery, defendant shot Jackson with a firearm, causing his death. See 720 ILCS 5/9-1(a)(3) (West 2012).

¶ 39 To prove accountability, the State must demonstrate that (1) the defendant solicited, ordered, abetted, agreed, or attempted to aid another in the planning or commission of the crime, (2) the defendant's participation took place before or during the commission of the crime, and (3) the defendant had the intent to promote or facilitate the commission of the crime. 720 ILCS 5/5-2(c) (West 2012); see also *People v. Perez*, 189 Ill. 2d 254, 266 (2000). Although mere presence at the scene of a crime is insufficient by itself to sustain an accountability conviction, the defendant may be accountable for another person's acts if they are performed pursuant to a common plan or design. *People v. Cooper*, 194 Ill. 2d 419, 434 (2000).

¶ 40 The common design rule provides that if "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." *In re W.C.*, 167 Ill. 2d 307, 337-38 (1995). "Words of agreement are not required to prove a common design or purpose between co-defendants." *People v. Willis*, 2013 IL App (1st) 110233, ¶ 79. A common design or plan may be

inferred from circumstances surrounding the crime. *People v. Ramos*, 2020 IL App (1st) 170929, ¶ 56. “Evidence that a defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another.” *W.C.*, 167 Ill. at 338.

¶ 41 Here, the evidence was sufficient to support the jury’s finding of guilt. The evidence showed that Henderson arranged to have Jackson buy a gun from a friend on December 17. The next morning, Henderson and defendant exchanged text messages and agreed to meet on the way to Jackson’s house. Phone records showed that Henderson called defendant twice within minutes of meeting him on the street. Defendant’s girlfriend testified that he was carrying a gun that day. Henderson made several phone calls to Jackson 45 minutes before the shooting. Schippers testified that Jackson had \$200 in cash on him that she assumed was for the gun purchase. Bolden testified that Jackson let them in the back door and that, within seconds of entering, defendant pulled out his gun. After hearing a gun shot, Schippers went downstairs and witnessed Henderson going through Jackson’s pockets. She did not see a gun in Henderson’s possession. When Henderson was arrested later that day, officers recovered \$227 in cash and one of the bills had Jackson’s blood on it. Surveillance video and witness testimony further established that Henderson, Bolden, and defendant were together before and after the shooting and that defendant left his house with a handgun and returned later in the day without it. The overwhelming weight of this circumstantial evidence supports the inference that Henderson and defendant were involved in a common plan to rob Jackson. At the very least, the jury could have inferred that defendant attached himself to Henderson and Bolden with the knowledge that Henderson intended to steal Jackson’s money before he purchased the gun and that defendant pulled his gun out during the robbery. Regardless of whether he actually fired the shots that struck and killed Jackson, the evidence indicates that

defendant was involved in the common purpose and plan to rob Jackson and is therefore legally responsible for the consequences of that decision.

¶ 42 Viewing the evidence in a light most favorable to the prosecution, the State proved beyond a reasonable doubt that defendant voluntarily joined the group with a common plan of robbing Jackson, that defendant actively participated in the commission of that crime, and that Jackson died as a result of shots fired during the commission of the crime. Thus, the evidence was sufficient to sustain defendant's conviction for felony murder based on an accountability theory as charged in count II.

¶ 43 B. Bolden's Testimony

¶ 44 Next, defendant contends that several aspects of Bolden's testimony denied him a fair trial. He argues reversible error occurred where: (1) the trial court barred defendant from cross-examining Bolden regarding his pending charge for failure to register as a sex offender; (2) the State bolstered Bolden's credibility by eliciting that he testified consistently at Henderson's trial and made consistent statements to police; and (3) the State adopted inconsistent positions as to Bolden's credibility between Henderson's trial and defendant's trial.

¶ 45 1. *Failure to Register as a Sex Offender*

¶ 46 Defendant contends that his cross-examination of Bolden regarding his pending charge of failing to register as a sex offender was improperly limited and resulted in reversible error. Defendant moved *in limine* to allow such evidence, which the trial court denied.

¶ 47 “[B]ecause the right to confront one's accusers and cross-examine a witness regarding pending charges is a constitutional right, there is a two-step standard of review.” *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 99. We must examine the constitutional right of

confrontation first before we examine the trial court's exercise of discretion to restrict the scope of cross-examination. *Id.*

¶ 48 In all criminal prosecutions, a defendant has the right to be confronted with the witnesses against him. U.S. Const., amend VI; Ill. Const. 1970, art. I, § 8. A proper function of the constitutionally protected right of cross-examination is the exposure of a witness's bias, interest, or motive to testify falsely. *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974); *People v. Triplett*, 108 Ill. 2d 463, 474-75 (1985). Where a witness has charges pending against him and is in a position to consider the possibility of leniency, the defendant should be allowed to question the witness regarding such matters. *Harmon*, 2015 IL App (1st) 122345, ¶ 98.

¶ 49 Generally, motions *in limine* are directed to the trial court's discretion and reviewing courts will not overturn a trial court's ruling on an evidentiary issue absent an abuse of discretion. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). "A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or possibly unfair prejudicial nature." *Id.*

¶ 50 Here, the record is clear that the trial court allowed questioning of Bolden regarding potential bias stemming from any possible deal with the State for his pending charges. During cross-examination, Bolden acknowledged that he was in jail awaiting trial on pending charges and that he hoped to get out of jail when this trial was over. His attorney also testified that he believed Bolden would receive probation for his Class 3 felony charge. Thus, defendant was not prevented from engaging in effective cross-examination designed to show a bias or motive to testify falsely on the part of a witness. In other words, he was not denied a fair trial. See *People v. Blue*, 205 Ill. 2d 1, 14 (2001) (defendant states a confrontation clause violation by showing that he was prohibited from engaging in appropriate cross-examination to reveal a witness's bias).

¶ 51 Further, we disagree with any contention defendant makes that the trial court abused its discretion in limiting his use of Bolden’s pending charge. The underlying nature of the charge was highly prejudicial. Failing to register as a sex offender was not relevant to the witness’s testimony and would have tainted the jury’s impression. Thus, the trial court did not err in ruling that the parties could discuss that Bolden had been charged with a Class 3 felony but could not reveal that he had been charged with failing to register as a sex offender.

¶ 52 *2. Use of Bolden’s Prior Consistent Statements*

¶ 53 Next, defendant asserts he was denied a fair trial where the State bolstered Bolden’s credibility by eliciting that he testified consistently at Henderson’s trial and made consistent statements to police identifying defendant as the person holding the gun. Defendant admits that he did not preserve this issue for appeal and asks us to review it under the closely-balanced prong of plain error. The first step in considering plain error is to determine whether an error occurred. *People v. Nesbit*, 398 Ill. App. 3d 200, 212 (2010). An unpreserved error will not be noticed under Rule 615(a) unless it is “clear or obvious.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 54 Here, we find no error. In most circumstances, a witness’s prior consistent statements are inadmissible to corroborate the witness’s trial testimony because they serve to unfairly enhance the credibility of the witness. *People v. Holliday*, 2020 IL App (5th) 160547, ¶ 62. However, this rule does not apply to statements regarding identification. See *id.* (witness’s prior consistent statements to police that he recognized subject in photographs as defendant and recognized the gun in photographs as the one he was shot with were statement of identification, admissible under section 115-12 of the Code of Criminal Procedure (725 ILCS 5/115-12 (West 2018))). Moreover, where a defendant claims that a witness’s testimony is recently fabricated or that the witness has a motive to testify falsely, a prior consistent statement may be offered to rebut the charge if the

statement was made before the motive to fabricate arose. *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005); *People v. Heard*, 187 Ill. 2d 36, 70 (1999).

¶ 55 Under the circumstances in this case, Bolden's prior consistent statements were admissible for two reasons. First, Bolden's prior consistent statements to police and his testimony were statements of identification that placed defendant with Henderson and Bolden in Jackson's house holding a gun. The State argued in closing and rebuttal closing arguments that Bolden's consistent statements were statements of identification. Second, the statements were offered to rebut defendant's charge that Bolden had motive to fabricate his testimony because he had been convicted of obstruction of justice in this case and he was awaiting trial on unrelated charges. Specifically, defendant's cross-examination of Bolden suggested that he might receive a more lenient sentence in the unrelated case based on his testimony in this case. Thus, the State properly elicited Bolden's prior consistent statements, made before he was charged in the unrelated case, to rebut the allegation of fabrication.

¶ 56 Defendant's claim that counsel was ineffective for failing to object to the prior consistent statements also fails. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy both prongs of the *Strickland* test. *People v. Lobdell*, 2019 IL App (3d) 180385, ¶ 11 (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The defendant must show that (1) counsel's performance was objectively unreasonable, and (2) there is a reasonable probability that but for counsel's unreasonable performance the result of the proceeding would have been different. *Id.*

¶ 57 Defendant here fails to establish the first prong. As discussed, it was not improper for the State to elicit prior consistent statements showing identity, nor was it improper to use them to rebut defendant's claims of fabrication. Thus, counsel's failure to object does not rise to the level of



deficient performance required to prevail under the *Strickland* test. We therefore reject defendant’s claim of ineffective assistance of counsel.

¶ 58 *3. The State’s inconsistent positions as to Bolden’s testimony*

¶ 59 Defendant argues that the State offered contradictory theories as to Bolden’s testimony at this trial and at Henderson’s prior trial and that those inconsistent positions violated his due process rights.

¶ 60 “Judicial estoppel is an equitable doctrine that was established to protect the integrity of the judicial process by prohibiting parties from changing their positions in accordance with the exigencies of the moment.” *McIntyre v. Balagani*, 2019 IL App (3d) 140543, ¶ 63. Generally, the doctrine applies when a party takes two positions that are factually inconsistent in separate judicial proceedings, intending for the trier of fact to accept the truth of the facts alleged, and the party has succeeded in the first proceeding, receiving some benefit from it. *Id.* The primary concern in establishing judicial estoppel is “ ‘that a party takes *factually* inconsistent positions, in separate proceedings, intending that the trier of fact accept the truth of the facts alleged.’ ” *People v. Hernandez*, 2016 IL 118672, ¶ 18 (quoting *Seymour v. Collins*, 2015 IL 118432, ¶ 38). Judicial estoppel does not apply to inconsistent legal positions taken by a party (*People v. Wakenight*, 374 Ill. App. 3d 1089, 1097 (2007)) or the use of alternative legal theories (*Construction Systems, Inc. v. FagelHaber, LLC*, 2015 IL App (1st) 141700, ¶¶ 45-46).

¶ 61 In *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), the State relied on two contradictory accounts by the same witness in two separate trials. *Smith*, 205 F.3d 1047-48. In the trial against defendant Jon Smith, a witness testified that the victims had already been stabbed to death by co-defendant Michael Cunningham when defendant Smith and his friends arrived. The State then used a prior inconsistent statement by the witness—that the victims were assaulted and died after

Smith's group arrived—to argue that the witness “made-up” his trial testimony. In the second trial against co-defendant Cunningham, the State did not use the witness's prior inconsistent statement and instead relied on the witness's testimony that the murders occurred before Smith's group arrived. *Id.* at 1050. In reversing Smith's conviction, the reviewing court held that the State violated his due process rights when it relied on two contradictory accounts by the same witness, emphasizing that the “use of inherently factually contradictory theories violated the principles of due process.” *Id.* at 1052

¶ 62 Here, unlike *Smith*, the State did not rely on a contradictory account of the facts by the same witness in two separate trials. To the contrary, Bolden's testimony remained the same. The State did not change its factual theory; it changed its legal theory. After the jury found Henderson not guilty of first degree murder as the principal, the State presented an alternative legal theory at defendant's trial. The record is clear that the State proceeded to trial in defendant's case under the theory that defendant personally discharged the firearm only after the jury in Henderson's trial found Bolden's testimony that defendant had the gun to be credible. Since the State advanced an alternative legal theory in this trial, not an “inherently factually contradictory” one, judicial estoppel does not apply. See *id.* Thus, the State's position that Bolden testified truthfully in this case is not reversible error.

¶ 63 Moreover, the prosecution's strategy that Bolden was telling the truth about defendant's identity as the person who was holding the gun was based on the evidence before the jury: the text messages, the surveillance videos, Daggett's testimony, and the jail call between Daggett and defendant. All this evidence suggested that defendant accompanied Henderson and Bolden to Jackson's house and that he was the one in possession of a gun—facts that were not clear at

Henderson’s trial. Thus, the State’s position that Bolden’s testimony was credible in this trial did not violate defendant’s due process rights.

¶ 64 C. Admission of the Smith & Wesson Handgun

¶ 65 Defendant also argues that the trial court erred in admitting the Smith & Wesson handgun as evidence. Defendant asserts that the Smith & Wesson was irrelevant because it was eliminated as the murder weapon and did not tie defendant to the charged offense.

¶ 66 Evidentiary rulings are within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *People v. Larke*, 2018 IL App (3d) 160253, ¶ 18. An abuse of discretion occurs where the trial court’s ruling is “arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.” *People v. Lerma*, 2016 IL 118496, ¶ 23.

¶ 67 Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ill. R. Evid. 401 (eff. Jan. 1, 2011). Relevant evidence is generally admissible; however, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v. Sardin*, 2019 IL App (1st) 170544, ¶ 100. The improper introduction of evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based on its admission. See *People v. Johnson*, 406 Ill. App. 3d 805, 818-19 (2010) (improper admission of other-crimes evidence was harmless error where it had no prejudicial effect on jury’s verdict); see generally *Lerma*, 2016 IL 118496, ¶ 33 (noting that one approach for measuring harmless error is “whether the error contributed to the defendant’s conviction”).

¶ 68 The Smith & Wesson handgun did not have a tendency to make the existence of any fact that was consequential to the murder charges more or less probable. It did not fit the description of the gun that Bolden described in his statement to police or at trial, and it was not identified as

the murder weapon. It was not found on defendant or in defendant's home during any lawful search. It was recovered from Cliff Farmer's house, a family friend, following the execution of multiple search warrants. The handgun was not relevant evidence in this case. We therefore conclude that trial court's decision to admit it was not justified.

¶ 69 Nonetheless, we find that any error in introducing the handgun was harmless. The jury found defendant "not guilty" of count 1, first degree murder as the principal. Thus, the admission of the Smith & Wesson did not contribute to defendant's conviction. Given the jury's decision to acquit defendant of first degree murder for personally discharging the firearm that caused Jackson's death, we cannot say that the improper admission of the evidence resulted in prejudice.

¶ 70 D. Jury Instructions

¶ 71 Last, defendant argues that a new trial is warranted because the trial court violated its duty to give essential jury instructions.

¶ 72 Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). Illinois Supreme Court Rule 451(a) provides that whenever the Illinois Pattern Jury Instructions, Criminal, contain an applicable jury instruction and the court determines that the jury should be instructed on the subject, "the IPI Criminal instruction shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a) (eff. April 8, 2013). When a jury is not given proper guidance through instructions, it cannot perform its constitutional function, and the defendant's right to a fair trial is violated. *People v. Pollock*, 202 Ill. 2d 189, 212 (2002).

¶ 73 Defendant contends that the court committed reversible error by: (1) initially omitting a general concluding instruction, Illinois Pattern Jury Instruction, Criminal, No. 26.01 (2020)

(hereinafter IPI Criminal No. 26.01); and (2) improperly giving a proof-of-other-offenses instruction, Illinois Pattern Jury Instruction, Criminal, No. 3.14 (approved Oct. 17, 2014) (hereinafter IPI Criminal No. 3.14). He admits that he did not object to the omission of IPI Criminal 26.01 or the use of IPI Criminal 3.14 and asks for plain-error review. Before plain error can be considered as a means of overcoming forfeiture, it must be plainly apparent that an error affecting substantial rights was committed. *People v. Herron*, 215 Ill. 2d 167, 178 (2005) (citing Illinois Supreme Court Rule 651(a) (eff. July 1, 2017)). We find no such error, and address both issues in turn.

¶ 74 First, defendant admits that the trial court corrected the omission of IPI Criminal No. 26.01 after the jury sent a note indicating some confusion as to the alternative verdict forms. The modified instruction read, in part:

“When you retire to the jury room you first will elect one of your members as your foreperson. He or she will preside during your deliberations on your verdict.

Your agreement on a verdicts [*sic*] must be unanimous. Your verdict must be in writing and signed by all of you, including your foreperson.

The defendant is charged in different ways with the offense of First Degree Murder. You will receive two forms of verdict [*sic*] pertaining to each particular way that the offense of First Degree Murder is charged. \*\*\*

If you find the defendant guilty of First Degree Murder as alleged in Count I, then you should go on to decide the additional issue of whether the State has proven that during the commission of the offense of First Degree Murder as alleged in Count I the defendant personally discharged a firearm which caused death to Derek James Jackson.”

¶ 75 Defendant does not claim that giving a modified version of IPI Criminal No. 26.01 with the enhancement language misstated the law or confused the jury. Indeed, the trial court noted that the modified instruction was necessary to explain the use of alternative verdict forms to the jury and to resolve any confusion that resulted from its initial omission. Defense counsel agreed and did not offer any alternatives or modifications beyond those suggested by the court. Thus, the omission of the general concluding instruction was cured and did not affect the outcome of the trial.

¶ 76 Turning to IPI Criminal No. 3.14, the trial court tendered the following instruction regarding other offenses to the jury:

“Evidence has been received that the defendant has been involved in an offense other than those charged in the information.

This evidence has been received on the issue of the defendant’s knowledge and may be considered by you only for that limited purpose.

It is for you to determine whether the defendant was involved in conduct and, if so, what weight should be given to this evidence on the issues [sic] of knowledge.”

¶ 77 Defendant maintains that this instruction was not warranted because defendant was not involved in any other offense. However, the trial record disputes that claim. Daggett testified that defendant called her from jail several weeks after the shooting and they discussed the police search of Clifford Farmer’s house. During her testimony, Daggett did not reveal the reason for defendant’s arrest, only that he called her while he was incarcerated. In light of the suggestion that defendant was incarcerated for an unrelated crime, the trial court properly tendered IPI Criminal No. 3.14 to the jury. The instruction reminded jurors that such evidence could not be used as proof

of another offense but only as to the issue of knowledge of the murder. The instruction accurately reflected the law and appropriately limited the use of Daggett's testimony in determining defendant's guilt. The trial court's decision to tender it to the jury did not adversely affect defendant's rights.

¶ 78 Defendant's claim that counsel was ineffective for failing to object to the court's use of IPI Criminal No. 3.14 is unavailing. A defendant must satisfy both prongs of the *Strickland* test to successfully establish a claim; the failure to establish either prong precludes a finding of ineffective assistance of counsel. See *Lobdell*, 2019 IL App (3d) 180385, ¶ 11. Here, we find no prejudice and therefore conclude that counsel was not ineffective.

¶ 79 III. CONCLUSION

¶ 80 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 81 Affirmed.