2013 IL App (4th) 110342-U

NO. 4-11-0342

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 11, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
HARRY L. MOORE,	)	No. 06CF403
Defendant-Appellant.	)	
	)	Honorable
	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant was not denied the effective assistance of counsel when defense counsel failed to object at trial to a statement that had been suppressed. Defense counsel's decision to permit the statement was strategic, as it allowed defense counsel to argue defendant cooperated with police and was consistent in his statements to the police regarding what happened to his handgun.

(2) Defendant was not denied the effective assistance of counsel when defense counsel failed to renew the motion to suppress evidence at trial when witness testimony established a fact, which the trial court found key in denying the motion, untrue. Defendant cannot establish he was prejudiced by this failure, as the warrant affidavit, even without the untrue allegation, contained sufficient facts to support the issuance of the warrant.

(3) Defendant was not denied the effective assistance of counsel when defense counsel failed to impeach a witness with a previous felony conviction for unlawful use of a weapon, because that witness's credibility had already been impeached.

(4) Defendant was not denied the effective assistance of counsel when defense counsel failed to seek an instruction limiting the jury's consideration of defen-

dant's methamphetamine use, when the record shows defense counsel's strategy was to point to others involved in methamphetamine manufacturing as the victim's killer and defendant was not prejudiced by the lack of the instruction.

(5) Defendant is not entitled to day-for-day good-conduct credit against the 25-year portion of his sentence imposed as a mandatory sentencing enhancement.

¶ 2 In January 2011, a jury found defendant, Harry L. Moore, guilty of the August 2003 first degree murder (720 ILCS 5/9-1 (West 2002)) of his girlfriend, Kimberly Kendall. In March 2011, the trial court sentenced defendant to 55 years' imprisonment, which includes a 25-year sentence enhancement because the murder was found to have been committed with a firearm. Defendant appeals his conviction, arguing he was denied the effective assistance of counsel when counsel failed to (1) object when a police officer testified regarding a statement made by defendant that had been suppressed by the trial court; (2) renew a motion to suppress evidence after a witness testified a fact key to the issuance of the search warrant was untrue; (3) impeach a witness, who had been overheard confessing to Kimberly's murder, with evidence that witness had been convicted of a felony for unlawful use of a weapon; and (4) seek an instruction limiting the jury's consideration of defendant's methamphetamine use. Defendant also appeals his sentence, arguing his sentence order must be amended to show he is entitled to day-for-day good-conduct credit against the 25-year sentence enhancement. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 7, 2003, at approximately 10:15 a.m., Kimberly Kendall's body was found in a ditch near Auburn, Illinois. The body was facedown and had signs of blunt-force trauma to the face. Police concluded evidence from the scene indicated the trauma

occurred at a location other than the one where the body was found. An autopsy established Kimberly died from a gunshot wound to the back of her neck.

¶ 5 Over 2 1/2 years later, in April 2006, the State charged defendant, Kimberly's boyfriend, with first degree murder. The State alleged defendant shot Kimberly in the head with a .22-caliber handgun.

¶ 6 A. Defendant's Motions To Suppress Statements and Evidence

¶ 7 In June 2007, defendant moved to quash his arrest and suppress physical evidence and statements. He also sought a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). Defendant asked the court to suppress "all statements purportedly made by the defendant to police on August 7, 2003[,] through August 8, 2003," including statements made at the Staunton and Auburn police departments and those made at defendant's apartment, an apartment he shared with Kimberly. Defendant also asked the trial court to suppress the physical evidence found during the search of the apartment. This evidence included an "empty Smith & Wesson cardboard gun box for a Model 422 semi auto pistol," a pair of men's jean shorts, defendant's tennis shoes, and a notebook containing a note to Kimberly. Attached to this motion was an affidavit, which contained a number of statements challenged by defendant. The affidavit, authored by Detective Rodney Vose, states the following, in part:

> "On 8/7/03, at approximately 10:15 a.m., a body of a white female was discovered in the 4300 block of Hambuch Road, Auburn, Sangamon County, Illinois. The body was on the north side of the road, laying face down [*sic*] in a ditch. The victim

sustained blunt force trauma to the facial region. The body was positively identified by tattoos. The deceased is Kimberly J. Kendall, female, white, date of birth 12-31-73. The deceased's address is 418 South 5th Street, Apartment 13, Auburn, Illinois. The victim was last seen on August 6, 2003 at approximately 3:30 p.m., by her sister, Jacqueline Clark, who dropped her off at the victim's residence, 418 South 5th Street, Apartment 13, Auburn, Illinois. The victim resides with her boyfriend, [defendant], male, white, date of birth 09-10-74, at 418 South 5th Street, apartment 13, Auburn, Illinois. According to the landlord, Larry McClelland, both subjects are listed on the lease agreement. [Defendant] contacted Kimberly Kendall's parents this morning, and indicated that they should contact the police and make a missing persons report regarding [Kimberly] with no further explanation. At approximately 2:00 this afternoon, [defendant] entered the Staunton Police Department, in Macoupin County, and said words to the effect 'Something's happened to my girlfriend, and I don't know anything about it.' It should be noted that positive identification of the body was not made until after 11:15 a.m. Further [defendant] had no contact with police personnel until this appearance at the Staunton Police Department.

Evidence at the scene, where the body was located[,] indi-

cates that the beating occurred at another location. [Defendant] drives a 1994 GMC extended cab, 4X4, step-side pickup truck ***. The last place [Kimberly] was seen alive was at 418 South 5th Street, Apartment 13, Auburn, Illinois, that she shared with [defendant]. Therefore, it is believed that the above[-]mentioned apartment and vehicle may contain evidence involved in the death and disappearance of [Kimberly]."

¶ 8 The trial court consolidated the *Franks* hearing with hearings on the motions to quash arrest and suppress evidence. At the consolidated August 2007 hearing, defendant's friend, George Tabor, testified he was riding in defendant's truck on August 7, 2003, when Tabor received a text message from Tabor's mother telling him the police discovered Kimberly's body. Tabor did not tell defendant about the text. Defendant, however, during this time, made multiple telephone calls regarding Kimberly, including one to defendant's friend Jo Ann Adcock. Adcock told defendant the police wanted to question him regarding Kimberly's death.

¶ 9 Tabor further testified defendant drove to the Staunton Dairy Queen. Defendant debated whether he should turn himself in or wait for the police to find him. Defendant contacted Robyn Baggerly, formerly defendant's father-in-law, who told defendant to turn himself in. Defendant agreed. Baggerly contacted Baggerly's wife, a police dispatcher, to arrange for the police to pick up defendant.

¶ 10 An Illinois State Police officer, sergeant Ben Savage, was dispatched to the Dairy Queen to meet defendant. According to Sergeant Savage, dispatch informed him

defendant was seen carrying a rifle. The police also observed knives and a hatchet in defendant's truck. The police set a perimeter around defendant's truck. Defendant exited his vehicle, identified himself, and raised his arms into the air. Sergeant Savage spotted items in defendant's hands. Sergeant Savage removed his firearm from its holster, but kept his arm and the weapon at his side. He instructed defendant to drop the items in his hands. Sergeant Savage identified the items as keys, and holstered his firearm. Defendant was handcuffed and placed in the front passenger seat of Sergeant Savage's vehicle, which lacked a transport cage. Sergeant Savage considered defendant to be under arrest.

¶ 11 Defendant's truck was impounded. Sergeant Savage turned defendant over to Illinois State Police agent Harold Crull. Agent Crull took defendant into an interview room. Defendant remained handcuffed until he signed a form waiving his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Agent Crull did not tell defendant he was free to leave.

¶ 12 After defendant waived his *Miranda* rights, Captain Tom Hendrickson and Sergeant Bob Vose interviewed defendant at the Staunton police station for approximately 5 1/2 hours. Defendant was not told he was free to leave or that he was not under arrest. During the interview, defendant signed forms permitting the police to search his pickup truck, the apartment he shared with Kimberly, a residence he co-owed with his ex-wife, and his storage unit. Defendant also made a number of statements and agreed to accompany the officers to his apartment.

¶ 13 After Captain Hendrickson and Sergeant Vose concluded the interview at the Staunton police station, they headed toward the apartment. En route, they stopped to

insure defendant's truck was secured. They stopped at the Auburn police department, where the officers interviewed defendant a second time, beginning at 10:33 p.m. At the Auburn police station, defendant was not handcuffed. He was allowed to use the restroom, smoke a cigarette, and have a drink. Captain Hendrickson reiterated defendant's *Miranda* rights and told defendant he was not under arrest and free to leave. Defendant replied, "I kind of thought, but I didn't know for sure."

¶ 14 In October 2007, the trial court entered a written order that concluded the search warrant for defendant's apartment was proper, but granted defendant's motion to quash his arrest. Regarding the motion to suppress evidence found in defendant's apartment, the court found the warrant was properly issued. The court found the following:

> "[T]he bare-bones allegation, that the beating occurred elsewhere, suffices under the circumstances of this case. This 'bare-bones' allegation is not information gained from an informant but this information was the considered judgment, although apparently wrong, of the trained police personnel performing the investigation. The affidavit also included the fact that the victim was last seen at her residence on the afternoon prior to the time her parents received a call from her live-in boyfriend, [defendant,] 'That they should call in a missing person report without other explanation.' The [d]efendant's call to decedent's parents, and that call's failure to include the [d]efendant's basis of knowledge would pique the interest of any investigator. *** Furthermore, the apartment for

which one of the warrants was issued was not lived in by just the [d]efendant. The apartment was rented to both [Kimberly] and the [d]efendant and [Kimberly] was last seen at the location less than 24 hours before being found beaten and dead. Considering the totality of the circumstances and especially considering [d]efendant's unusual call to [Kimberly's] parents, I believe the issuance of the warrant for [Kimberly's] apartment was proper."

¶ 15 Regarding the defendant's arrest, the court found, despite the State's argument to the contrary, defendant was arrested on August 7, 2003, before he went to the Staunton police department and the State conceded no probable cause supported the arrest at that time. The court concluded the statements made to police officers, including those made "along the way" en route "to a couple of locations" were not attenuated from the illegal arrest. The court suppressed the statements and consents to search the defendant made to police on August 7 to August 8, 2003.

¶ 16 The State filed an interlocutory appeal, challenging the trial court's orders. The State maintained (1) the trial court erroneously quashed defendant's arrest, as the actions of the Illinois State Police and the Staunton police department did not amount to an arrest; and (2) even if the conduct did constitute an unlawful arrest, the trial court erroneously suppressed defendant's Auburn statement because attenuating circumstances redeemed the statement in Auburn.

¶ 17 On appeal, this court found defendant was unlawfully arrested, but determined intervening circumstances attenuated defendant's statements to police during the second

interview in Auburn from his unlawful arrest in Staunton. We did not reverse the trial court's suppression order but remanded for a determination of whether the statements and evidence should be barred under the fruit-of-the-poisonous-tree doctrine. This court could not make such a finding because the substance of the statements was not introduced by either party.

¶ 18 On remand, defendant noted this court "affirmed suppression of [his] first statement in Staunton but remanded to this Court for an 'attenuation hearing' as to the second statement in Auburn." Defendant did not mention the statement made at his apartment. The trial court concluded the entire Auburn statement was fruit of the poisonous tree and was inadmissible at trial.

¶ 19 B. Defendant's Trial

¶ 20 A jury trial was held in January 2011. Hubert Kendall, Kimberly's father, testified Kimberly and defendant began dating in 2002. They resided together in an apartment on South Fifth Street in Auburn. Hubert testified he talked to Kimberly by telephone on Saturday, August 2, 2003, about her relationship with defendant. Hubert told Kimberly she should move home. Kimberly said she intended to do so.

¶ 21 According to Hubert, during the night of August 6, 2003, he was home with his wife Norma Kendall, Kimberly's mother. Around 10:30 p.m., the two "had a gut feeling" that prompted them to drive by her apartment and other locations to look for Kimberly. They returned home after approximately half an hour and went to bed after deciding they were overreacting. Hubert testified defendant did not call either him or his wife that evening.

¶ 22 Hubert testified he was awakened the following morning by a telephone call. He was informed Kimberly did not show up for work. At approximately 8:30 a.m., Hubert drove to Kimberly's and defendant's apartment. Hubert entered the apartment and saw "a lot of boxes and things piled up, like she was leavin[g]." Boxes were in the kitchen and bedroom. There were also laundry baskets containing personal effects. Before Kimberly's funeral, Hubert returned to the apartment to retrieve Kimberly's personal effects. They were packed in the boxes he had seen earlier in the week.

¶ 23 On cross-examination, Hubert testified he observed sores on Kimberly's arms. The sores looked like cigarette burns that scabbed over. He did not know the cause of the sores. On redirect examination, Hubert testified Kimberly's suspected methamphetamine use began after she started dating defendant.

¶ 24 Jacqueline Tracey Clark, Kimberly's half-sister, testified she resided in Auburn, approximately four miles from Kimberly's apartment. According to Clark, Kimberly and defendant probably began dating in the fall of 2002. On Saturday, August 2, 2003, Clark and Kimberly had gone shopping with their mother. Kimberly said she planned to move home the following weekend.

¶ 25 Clark testified she last saw Kimberly alive around 3:30 p.m. on August 6, 2003. Kimberly was talking on a pay phone. Clark offered her a ride home. Kimberly was wearing a t-shirt and denim shorts. That night or the following morning, Clark did not receive a telephone call from defendant. He did not stop by her house looking for Kimberly.

¶ 26 According to Clark, at some point near Kimberly's funeral, she went with Hubert

and her brother to retrieve Kimberly's person items. The outfit Kimberly was wearing on August 6, 2003, was on the bedroom floor.

¶ 27 On cross-examination, Clark testified Kimberly did not stay at her residence. Kimberly lost her job in Springfield because she missed too much work. Kimberly had financial problems. Clark did not have firsthand knowledge of Kimberly's drug use, but had suspicions because Kimberly "had some really bad breaking out on her face and some sores on her arms." Clark testified she believed defendant and Kimberly would lose their apartment. Clark had loaned Kimberly money, defendant was not working, and Kimberly worked at the café. Clark knew defendant was not monogamous.

¶ 28 On redirect examination, Clark testified Kimberly got from place to place by walking or getting a ride from someone. She had never seen Kimberly in public in sleep wear.

¶ 29 Sarah Groeteke, a long-time friend of Kimberly, testified she resided in the same apartment complex as Kimberly and defendant. In the early evening hours of August 5, 2003, Kimberly told Groeteke she was moving out of the apartment the following Saturday. Kimberly said her relationship was not going well and they had financial problems.

¶ 30 On cross-examination, Groeteke testified she had been trained in her profession as a probation officer to be aware of how drugs were used and signs indicating individuals were using. About one month before Kimberly's death, Groeteke began observing signs of drug use by Kimberly. Sometimes Kimberly would have a vacant stare. Groeteke observed the marks on Kimberly's arms. Groeteke believed Kimberly implied to her that

defendant saw other women.

¶ 31 On redirect examination, Groeteke testified she also observed some indications of methamphetamine use in defendant. He suffered paranoia and lost weight. Defendant was also missing some teeth and seemed "a little bit erratic" when they spoke.

¶ 32 Mandy Victoria Aldridge testified she had known Kimberly five or six years and Kimberly was one of her best friends. Aldridge had known defendant her entire life. Approximately 2 1/2 weeks before Kimberly's death, Aldridge was riding in defendant's pickup with defendant and Kimberly. Kimberly and defendant were engaged, at first, in "a normal conversation." The conversation became argumentative. At some point in the conversation, defendant pulled off to the side, put the truck in park, and pulled a gun from between his leg and under the console. Kimberly was in the passenger seat. Defendant pulled out his weapon and began "rubbing it with this cloth." They both stopped arguing. Defendant put the gun back and pulled away.

¶ 33 On cross-examination, Aldridge testified she spoke to detective Rodney Vose about this incident. She stated she may have told him the incident occurred two-and-a-half months before Kimberly's death. Aldridge verified she believed it was two-and-a-half weeks. Aldridge did not know who started the argument. They were arguing over defendant's decision not to fight for custody of his daughter. On August 6, 2003, Aldridge observed bullets in defendant's truck. She did not see a gun.

¶ 34 Anthony J. Williams, Jr., aged 45, also testified. This witness has a son also named Anthony J. Williams, Jr., who was 26 at the time and who also testified in defendant's trial. To avoid confusion, we shall refer to the 45-year-old Anthony J.

Williams, Jr., as Anthony and his son as Anthony Jr.

¶ 35 According to Anthony, during the summer of 2003, he was using marijuana and methamphetamine. He met defendant through Tom Dibler. On August 6, 2003, several individuals were at Anthony's farm. Dibler and Bernie Barker were there in the afternoon. About "an hour or so before dark," defendant and Kimberly arrived. Barker left shortly after their arrival. During the evening, Anthony overheard an argument between defendant and Kimberly, who were in defendant's pickup. Junior Tabor was in the truck as well. The argument lasted 20-30 minutes. After they stopped arguing, the three left around 10:30 p.m.

¶ 36 Anthony testified Dibler left his home around 10 p.m. Dibler was "annihilated" or "falling down drunk." Dibler left with Anthony Jr. Carl Fugate remained at Anthony's farm until 3 a.m. the next day.

¶ 37 On cross-examination, Anthony testified Dibler was involved in cooking and distributing methamphetamine. During the summer of 2003, methamphetamine was frequently used at Anthony's farm. Individuals bought the ingredients and delivered them to Dibler, who would cook methamphetamine at his mother's house in Virden. Dibler distributed the methamphetamine to Anthony and others. On August 6, 2003, Anthony was intoxicated. He had been drinking alcohol and ingesting liquid Vicodin. Anthony first told police he did not recall seeing Kimberly at his farm that night.

¶ 38 Anthony testified defendant and Kimberly left his farm around 10 or 10:30 p.m. Anthony, during another interview with police, testified he did not recall the police confronting him regarding Richie Robinson's report. Robinson reported Anthony told

him Kimberly was beaten at Dibler's mother's house and shot. Anthony agreed it was possible he did not remember. Anthony also did not remember stating to them Kimberly may have taken a ride in an R.V. with Barker and Dibler that evening. He testified he did not believe Kimberly ever got out of the pickup truck. Anthony testified he had drywall hammers and rubber mallets at his farm.

¶ 39 On redirect examination, Anthony testified Barker and Dibler left in the R.V. early afternoon., but returned. Anthony testified he was not present when Kimberly was shot and Kimberly was not beaten at his farm.

¶ 40 Larry McClelland, defendant's and Kimberly's landlord, testified, as of August 2003, Kimberly and defendant were two months behind in their rent. On August 6, 2003, McClelland went to the apartment around 9:30 p.m. and they were not home. McClelland waited for them to return, which they did around 10 p.m. McClelland believed Kimberly and defendant were the only two in the truck. Defendant approached McClelland. McClelland asked defendant if he had the rent money. Defendant said he did not. Defendant told McClelland he had given the money to Kimberly who was supposed to have given it to McClelland. At most, the conversation lasted approximately 15-20 minutes.

¶ 41 According to McClelland, he saw no injuries on Kimberly when she entered the apartment. She did not talk to him. McClelland believed defendant entered the apartment around 10:30 p.m. Around this time, McClelland's brother pulled up. McClelland and his brother talked for 10-15 minutes. During this time, McClelland saw no one else enter or leave defendant's and Kimberly's apartment.

¶ 42 On cross-examination, McClelland testified defendant moved into the apartment about three to four months before Kimberly's death. He paid two months' rent on time. Defendant appeared surprised to hear McClelland had not received the rent payments. Defendant stated he had given both months' rent payments to Kimberly to pay to McClelland. McClelland agreed he told police defendant entered the apartment around 11 p.m. McClelland testified the latest he would have left the apartment building was 11:30 p.m.

¶ 43 Dr. Travis Lee Hindman, a retired forensic pathologist, testified he performed an autopsy on Kimberly on August 8, 2003. Kimberly was found wearing a red tank top with a short-sleeve gray t-shirt over it. Kimberly also had on a pair of black-and-white checkered shorts with no pockets. She was not wearing a bra, underpants, shoes, or socks. Kimberly had "brush burn abrasions" on the left side of her forehead and around the left eye. These were abrasions from "a sliding type of injury," like when one skins a knee on a concrete surface. These markings were consistent with an individual's having been dragged. Kimberly had a gunshot wound "just below the level of the occipital protuberance, the bump in the back of the head." She had self-inflicted scratch marks on her hands, forearms, chest, breasts, and abdomen. Kimberly had no wounds or marks characteristic of defensive wounds.

¶ 44 Dr. Hindman testified an x-ray of Kimberly's head revealed two radio opaque objects he determined to be bullet fragments. Dr. Hindman found no indications Kimberly had been in a struggle before her death.

¶ 45 On cross-examination, Dr. Hindman testified the abrasions on Kimberly's face

may have occurred either before or after her death. The following question and answer occurred:

> "Q. If someone is being drug and then they die immediately after a gunshot wound, after being beaten, are they necessarily going to manifest all of these signs and symptoms of that trauma?
>
> A. If death comes immediately following, the receipt of an otherwise unaffected individual, there may not be time for blood to accumulate in and – or under the skin, following receipt of a significant blunt force or sharp force injury, there may not be. If death occurs immediately following the receipt of such an injury, there may not be a bruise."

Dr. Hindman observed no debris in the abrasion wounds, such as rocks or vegetation.

¶ 46 On redirect examination, Dr. Hindman, when asked if there was any physical evidence to indicate a violent struggle occurred before Kimberly's death, responded as follows: "Not with certainty. The contusions we talked about, and say the possibility of some sort of blunt force trauma, minor almost certainly, but I couldn't tell you how that occurred." According to Dr. Hindman, Kimberly was not wearing her contacts. Kimberly's blood-alcohol test was .012.

¶ 47 On recross examination, Dr. Hindman agreed a reasonable possibility existed someone could be severely beaten and murdered contemporaneously or shortly after and the body would not manifest symptoms of the beating.

¶ 48 Brian Sommer testified he sold a .22-caliber handgun to defendant in May 2003.

Defendant responded to an ad Sommer had placed in the "Springfield Shopper." Sommer identified the handgun (People's exhibit No. 64) as the gun he sold to defendant.

¶ 49 Anthony Jr. testified. He admitted to convictions for a felony cannabis charge and for manufacture and delivery of a controlled substance. According to Anthony Jr. he went to his family's farm about 10:30 p.m. on August 6, 2003. He stayed about 30 minutes. When he arrived, approximately 8 to 12 people were there, including Tom Dibler, defendant, and Kimberly. Anthony Jr. interacted with Dibler and saw "he was flat-out wasted." Dibler was drinking liquid Vicodin and Seagrams Seven. He was "drunk, stumbling around, falling down." Anthony Jr., at his father's request, gave Dibler a ride home. Anthony Jr. "had to almost carry [Dibler] to the car" and then from the car into his house in Virden, approximately 5 miles from the farm and 10 miles from Auburn. Anthony Jr. attempted to wake Dibler. As he was carrying Dibler into his house, Anthony Jr. tripped over the dog causing both to fall. Anthony Jr. picked up Dibler, put him on the couch, and left by 11:15 p.m. Dibler did not awaken when they fell or when defendant left him on the couch.

¶ 50 On cross-examination, Anthony Jr. testified he did not see Dibler again the rest of the night. When asked if he had any idea where Dibler would have gone after he left, Anthony Jr. replied "[i]f he could make it anywhere, yes." According to Anthony Jr., Dibler's mother lived on a farm near the Virden mine. Kimberly and defendant left the farm before Anthony Jr. did.

¶ 51 Chad Bunton testified, during the early evening hours of August 6, 2003, he was with Garrett Helton, Tom Walker, and Reba Holloway at Paul Gould's house. They

arrived around 8:30 or 9 p.m. While there, they worked on Holloway's mother's car. Around 10 p.m., they left and took Helton to a residence where he was staying and returned around 10:30 p.m. The group continued to work on the car. Some time after midnight, August 7, 2003, defendant arrived. Bunton saw defendant exit his truck and walk up the driveway. Defendant pulled Helton to the side away from everyone. Defendant "seemed nervous and kind of schizzy [*sic*]." Defendant stayed "[m]aybe ten minutes." While there, defendant repeatedly looked in the direction of his truck. Defendant left by himself.

¶ 52 On cross-examination, Bunton stated he could not be more specific on the time because he was working on a vehicle when defendant arrived. Bunton knew it was after midnight, and he believed before 1 a.m. Other individuals were also there. In addition to working on the car, they "were partying." Bunton agreed Helton was "pretty prominent in methamphetamine manufacturing" in 2003. Bunton was convicted in December 2003 of methamphetamine possession.

¶ 53 Bunton testified Tabor arrived at Gould's house on August 6, 2003. Tabor "was there for a little while." Bunton did not know the time, but testified it was in the evening. Bunton was outside when defendant walked up and asked to speak to Helton. Bunton did not see defendant walk into the garage.

¶ 54 Bob Willrett testified he worked with defendant from spring 2002 to spring 2003. Willrett knew defendant socially and he became acquainted with Kimberly. On August 6, 2003, Kimberly and defendant stopped by Willrett's house around 7 p.m. Kimberly was upset with defendant because he did not pick her up from work and she had to walk

home. Defendant was upset Kimberly called his ex-wife to complain. They left his residence around 8 p.m. Willrett saw them again around 9 or 9:15 p.m. They were at a gas station.

¶ 55 According to Willrett, defendant called him at 7 a.m. on August 7, 2003. Defendant asked him if he knew where Kimberly was or had heard from her. Defendant told Willrett he took her home and then left, but when he returned, Kimberly was gone. Willrett found this conversation unusual, because defendant "never looked for Kim too much." Willrett stated, "Kim looked for [defendant], [defendant] didn't look for Kim." Around 1 p.m., defendant called Willrett again and told him Kimberly was dead.

¶ 56 Willrett testified he again spoke with defendant on August 8, 2003. On that date or the next night, defendant told Willrett his .22 handgun was missing. On later dates, defendant would talk about the gun, wondering why the police could not find it and how it went missing. Once, defendant said, "if it is on dry land, I feel sorry for them."

¶ 57 On cross-examination, Willrett testified when defendant and Kimberly were at his residence on August 6, 2003, they were complaining. They were not in a heated argument. Willrett stated, when defendant mentioned his gun was missing, he thought defendant said he had it in his home and was looking for it. When defendant made the "dry land" statement, he stated the following, "Whoever shot her, if the gun's still on dry land right now, I feel sorry for 'em, you know what I'm saying?" Defendant also contemplated Kimberly gave the gun to someone. He did not admit killing Kimberly.

¶ 58 Bruce Centko, the Auburn chief of police, testified he learned in November 2003 Casey Norris found a handgun. Spent ammunition was found jammed inside the gun.

¶ 59 Paul Gould, defendant's and Kimberly's friend, testified, in 2002 and 2003, he used methamphetamine daily and he saw defendant almost every day. On August 6, 2003, Gould had been in his garage approximately 4 to 5 hours. Around 11 or 11:30 p.m., defendant arrived. He was jittery and acted nervously. Gould had seen defendant under the influence of methamphetamine, but his demeanor was different on this day. Defendant walked to a specific area to let it be known he was there. He then went outside after 2:30 or 2:45 a.m. This was the last time Gould saw him that night.

¶ 60 According to Gould, he and defendant had a conversation about Kimberly's murder approximately a week and a half after Kimberly's death. Defendant repeatedly questioned Gould about what he told detectives regarding when defendant was at Gould's house. Defendant also said if no one talked "they don't have anything on him." At one point, defendant said Kimberly "shouldn't have been there" and "shouldn't have made the call."

¶ 61 Gould admitted, during his August 2003 interview with police, he did not provide the information provided in his testimony. He was afraid and did not realize the information was relevant.

¶ 62 On cross-examination, Gould testified he was working on his car that evening. In that time of his life, Gould was either high on methamphetamine or sleeping. He continued this lifestyle until 2005. Gould admitted his methamphetamine use at times affected his ability to perceive and remember events. Kimberly used methamphetamine, but was not part of the "circle" Gould, Tabor, and defendant were in. Tabor was, at that time, the methamphetamine manufacturer. Gould described, in a methamphetamine

operation, the cook or manufacturer controlled the amount and distribution of the product. Barker was not part of this circle of methamphetamine users. When asked if Dibler was part of the same methamphetamine circle, Gould stated "[j]ust outside of it, yes."

¶ 63 Gould stated he looked at a clock in his garage shortly after defendant arrived and it said 11:25 p.m. Tabor was at the garage as well. Defendant, usually when entering a room, would be very friendly and say hello to everyone. On this night, defendant walked straight to Tabor. Approximately 15 to 20 minutes after arriving, defendant asked the individuals there if they had seen Kimberly.

¶ 64 On redirect examination, Gould testified, when defendant asked if anyone had seen Kimberly, Gould responded he had not and suggested defendant look for her at her apartment or at her mother's house.

¶ 65 George Tabor testified he was in the penitentiary on a methamphetamine-related charge. He had also been convicted for another methamphetamine-related offense and for unlawful restraint. According to Tabor, as of 2003, he had known defendant and Kimberly for years. In the time before Kimberly's death, Tabor and defendant saw each other almost every day. They were associated through drugs. Tabor supplied defendant with methamphetamine. After Kimberly's death, defendant's and Tabor's relationship ended immediately. Defendant no longer contacted Tabor.

¶ 66 Tabor testified, on August 6, 2003, he called defendant around 8 or 9 p.m. and told him to meet him at Anthony's farm. Tabor wanted defendant to pick up a tow trailer from the farm and help Tabor pick up a truck he was interested in buying from another location. When Tabor arrived at the farm, he saw Anthony, someone named Carl, and

Barker. Later, defendant and Kimberly arrived. Tabor talked to Kimberly after she called him to defendant's truck. Kimberly was angry with defendant because he did not pick her up from work again. Kimberly repeatedly told Tabor to "come by tonight." She asked him to "[p]lease come by" because she needed to talk to him. Dibler arrived shortly after Tabor talked to Kimberly, around "9:30-ish, give or take." Dibler "was falling down drunk." Tabor decided not to do anything with the trailer because it had been getting dark, the trailer lacked lights, and Dibler was too drunk to take him to the truck. Defendant and Kimberly left around 10 p.m. Tabor left at 10:15 or 10:30 p.m. and went to his brother's house, where he stayed until about 11:30 p.m. From there, Tabor went to Gould's house in Auburn.

¶ 67 According to Tabor, when he pulled up to Gould's house around 11:45 p.m., he saw someone named Chad and Helton working on the headlight of a car. Tabor walked past them. He saw Dibler lying passed out in the back of the car. Tabor entered the garage. Only Gould was in the garage. Tabor had done mechanical work for Gould and they also had an association related to drugs. While there, Tabor smoked some methamphetamine. Tabor stayed until around 2 a.m.

¶ 68 Tabor testified defendant entered the garage between 11:45 and midnight. Tabor had only been there a few minutes. Defendant "was in overdrive." Tabor thought defendant looked like he was on the verge of overdosing. Defendant was hyperventilating and panting. Tabor had not seen defendant in such a state before. Defendant asked if they had seen Kimberly. Tabor responded he had seen her with defendant at Anthony's farm and asked defendant, "What's the deal?" Defendant stated

the two had argued about rent and bills, and Kimberly took off walking. Tabor told defendant there were only a few places she would go. He mentioned her parents' house, Tabor's mother's house, or to see Cheryl Hoheimer. Defendant stated he checked with Hoheimer, but he was not going to wake Kimberly's parents and he did not check with Tabor's mother.

¶ 69 According to Tabor, he went to his mother's house around 2 a.m. At 5 a.m., he arrived at Kimberly's and defendant's apartment. Defendant and Kimberly were supposed to drive him to St. Louis for dental work. As Tabor pulled up, defendant exited the apartment and headed toward his truck. Defendant said he was removing guns from his truck. Defendant appeared hyperactive and nervous to Tabor. Tabor then entered the apartment. A blond woman Tabor had not seen before was sitting at the kitchen table. Tabor's first thought was that Kimberly would walk into her apartment and find this woman sitting at the kitchen table. Defendant then entered the apartment. He was carrying an empty pistol case, and he said his pistol had been stolen. Later, defendant said Helton stole the pistol.

¶ 70 Tabor testified defendant stated he did not know where Kimberly was. Defendant said he was still driving Tabor to St. Louis, but he needed to drive the woman home first. Defendant was not intending to check with Kimberly's parents, "not before a decent hour anyway." Defendant drove Tabor to St. Louis. After Tabor's dental appointment, on the ride back to Auburn, Tabor received a text around 10 to 10:30 a.m. from his mother indicating Kimberly's body had been found in a ditch outside of town. Tabor did not say anything to defendant about the message. Defendant used Tabor's telephone. Defendant

stated to Tabor that Kimberly's parents were blaming him. Tabor told defendant to turn himself in. Defendant exited the interstate and drove to the Dairy Queen in Staunton. They stayed there for a short time. Tabor called Gould to ask him to pick him up. Defendant and Tabor entered Dairy Queen and ate.

¶ 71 On cross-examination, Tabor testified he would share his methamphetamine with Kimberly by getting high with her, but he did not sell or give methamphetamine to her. He sold methamphetamine to defendant. Tabor believed Kimberly, when she asked him to come by her apartment on August 6, 2003, was wanting methamphetamine. Kimberly was angry with defendant who took "her good stuff and" gave "her the gunk." Her main complaint, however, was that defendant forgot to pick her up and she had to walk home in the rain. Tabor did not remember receiving a telephone call from a payphone outside the Korner Kafe, where Kimberly worked, at 11:39 p.m.

¶ 72 Tabor stated when he testified regarding the timing of his mother's text, he used his best guess. On August 7, 2003, defendant called the police from a payphone at the Staunton Dairy Queen. The police arrived while Tabor was still there.

¶ 73 According to Tabor, defendant did not say he was not going to Kimberly's parents until a decent hour. Tabor testified he assumed the "decent hour" part. Defendant simply said he had not checked with Kimberly's parents.

¶ 74 James Russell Bryan, a police officer with the Auburn police department from June 2001 to July 2006, testified he was dispatched at 10:14 a.m. on August 7, 2003, to a location where men found shoes in a roadway and Kimberly's body in a ditch. Bryan was the first officer on the scene. Kimberly was wearing a t-shirt and a pair of men's boxer

shorts. The clothing was dry.

¶ 75 According to Bryan, on August 11, 2003, defendant entered the Auburn police department. Defendant stated his gun was stolen from his truck and he needed to make a report. Defendant told Bryan county detectives had been talking to him. Defendant was trying to show the detectives the weapon he owned and he realized the gun had been stolen from his truck some time on Thursday. Bryan asked defendant if he knew the last time he saw his gun, and defendant responded noon on Thursday. Defendant said he removed the clip then, as he had been shooting the day before. Defendant stated he did not know when the weapon disappeared. It was under the driver's seat of his truck when he saw it the last time.

¶ 76 Bryan testified he asked defendant if he would provide a written statement. He agreed to do so. In the statement, defendant said the following, in relevant part:

> "I had switched the case that I kept the gun in, a Smith & Wesson 422, .22 caliber automatic. I had been shooting the gun on the 5th of August and put it back in the case. Then on Wednesday the 6th, I checked to make sure the clip had been removed and where I had put it. That was at 12:00 p.m. My daughter likes to get into my gun cases, and I wanted to make sure the clip was out. No one else was in my vehicle that I was aware of during the time period that early Friday morning that the gun was missing. The gun was put in my apartment at 12:00 Wednesday because I wouldn't be shooting it with my daughter around."

¶ 77 According to Bryan, after he read the statement to defendant, defendant told him the weapon was missing when the detectives were at his apartment questioning about it.

¶ 78 On cross-examination, Bryan agreed, in his experience, it was "sometimes common for people to get dates mixed up" especially by just one day. Bryan agreed defendant changed the statement when he realized what he previously said was inaccurate. Defendant, in his written statement, said he realized the handgun was missing during the early morning hours on Friday, August 8, 2003, when he was with the deputies.

¶ 79 Kenneth Karhliker, a deputy with the Sangamon County sheriff's department, testified, on February 3, 2005, he had a conversation with defendant regarding the handgun. Defendant stated the last time he saw the pistol was when Kimberly gave the gun to Gould. No time frame was provided.

¶ 80 On cross-examination, Deputy Karhliker testified he was in the narcotics unit when Kimberly's death was being investigated. When defendant made the above statement, it was after Deputy Karhliker asked him if he heard any new information about Kimberly's homicide. Deputy Karhliker asked the question because he was familiar with Kimberly and her family as they all resided in the same town. Deputy Karhliker admitted he did not ask follow-up questions that would pinpoint the timing or context of the statement defendant made and he did not record the conversation.

¶ 81 Dana Pitchford, a forensic scientist with the Illinois State Police Crime Laboratory, testified she tested the handgun (People's exhibit No. 64) for the existence of blood and found blood. The testing, however, could not determine whether the blood originated

from a human or an animal. She also tested for deoxyribonucleic acid (DNA), but no results were obtained.

¶ 82 Pitchford testified she tested the pair of blue-jean cutoffs presented to her for blood. Two "pinpoint drop[s]" on the shorts indicated blood. Pitchford extracted DNA from those areas and determined it was human DNA. She then created a DNA profile. One stain had an insufficient amount of DNA to generate a profile. The other stain "identified a mixture of DNA profiles of which [defendant] could not be excluded or Kimberly *** could not be excluded from this DNA profile." Pitchford gave statistical weight to the probability of this profile appearing in the general public. She stated because the profile was a partial profile, it would expected to occur in "approximately 1 out of 46 black, 1 in 15 white, or 1 in 22 Hispanic unrelated individuals." The test could not exclude Kimberly.

¶ 83 According to Pitchford, she tested the right shoe and "one very small area tested positive for blood." From this area, Pitchford generated a DNA profile that was a mixture of two individuals. Defendant could not be excluded as a major profile and Kimberly could not be excluded as having contributed to the mixture. The profile generated would be expected to occur in "1 in 980 whites, 1 in 1,800 Hispanic individuals, and 1 in – out of 3,200 black individuals."

¶ 84 On cross-examination, Pitchford testified the shorts she tested were defendant's shorts. Pitchford did not test the items for saliva or semen. She agreed the DNA came from a bodily fluid, meaning it was possible the DNA came from saliva or semen or blood. Pitchford did not believe it was possible semen was present. The shorts were

"very dirty." The blood found on the right shoe was not determined to be human or animal blood, but she found DNA that was human profile. The source of the DNA could have been another bodily fluid, such as semen or saliva.

¶ 85 Lathricia Hoots testified she had known defendant for approximately three months as of August 2003. According to Hoots, at around midnight August 7, 2003, she was sleeping in her home. She awoke to defendant's knocking on her door. Defendant asked Hoots if she had seen Kimberly. Hoots had only seen Kimberly "a couple of times." She did not really know her. Hoots found it "[k]ind of" unusual defendant was looking for Kimberly there. Defendant entered Hoots's apartment. Defendant told Hoots he and Kimberly argued over rent. Defendant said he went to another residence, while Kimberly remained in a vehicle, and Kimberly was gone when he returned. Defendant stayed at her apartment for 10 to 15 minutes. Hoots left her apartment with defendant. As she did, she noticed a clock said 12:06. The two drove around town looking for Kimberly for about 20 to 25 minutes. They made no stops during this search. Defendant said Kimberly "more than likely" went to her parents' house or to a friend's place. Hoots and defendant then went to defendant's apartment. Hoots had not been there before. While in the apartment, they watched a movie, smoked methamphetamine, and took a shower together. The two then were intimate in the bedroom.

¶ 86 Hoots testified she remained at defendant's apartment at 5 a.m., when Tabor arrived. At that time, defendant was outside. Hoots said nothing to Tabor. When defendant returned, he had a case. Defendant said his gun was missing from the case. Defendant said only one other person, Helton, knew where the gun was. Defendant and

Tabor stayed in the apartment for approximately 45 minutes. Defendant left a note.

¶ 87 The State entered the note into evidence. Defendant wrote the following, in part:

"Went to St. Louis with [*sic*] as planned. Jr. has both his phones[.]

Call me when you get to pay phone. Last seen [*sic*] you at 11:30

last night. Sorry for being so hard on you about the rent."

¶ 88 Terry Painter testified, on August 6, 2003, he was living with his wife, children, and Helton. That evening, Helton was at the apartment the entire evening. He was there, watching television, when Painter went to bed. Painter did not know the time he went to bed, but assumed it was near midnight. When Painter awoke at 11 a.m., Helton was there. According to Painter, defendant, on an unspecified date at an unspecified location, told him he believed Helton took his gun.

¶ 89 Casey Norris, a farmer, testified, on November 28, 2003, he found a gun on his property. It was deer season, and Norris was checking his land for disposed deer carcasses. While walking back to his truck from an area near a creek, Norris spotted what he thought was a toy gun in the weeds. He picked it up. Norris, being familiar with guns, slid the action on it and realized it was loaded. Bullets were in the magazine and there was a casing. He did not know if the shell in the chamber had been fired, but the gun was jammed. Norris identified People's exhibit No. 64 as the .22-caliber pistol he found that day.

¶ 90 Tom Hendrickson, a retired Sangamon County deputy sheriff, testified, in August 2003, he was a captain in the investigations division of the sheriff's department. Captain Hendrickson testified, sometime after 1 a.m. on August 8, 2003, he and other detectives

performed a search of defendant's and Kimberly's apartment. According to Captain Hendrickson, defendant "said the firearm that [they] were looking for was in his apartment, that he was sharing at the time with [Kimberly]." Captain Hendrickson testified defendant cooperated with the officers and told him where to find the gun. Defendant directed Captain Hendrickson to a dresser in the bedroom. Defendant said they could find the gun in a black gun case in the dresser. Captain Hendrickson found a black gun case, but it was empty. Captain Hendrickson told defendant to file a report on his missing gun with the Auburn police department.

¶ 91 Beth Patty, a firearm's examiner with the Illinois State Police crime lab, testified, when the gun (People's exhibit No. 64) came into the lab, there was a fired cartridge case in the chamber. According to Patty, she could not "identify or eliminate this fired bullet as having been fired by" the gun. The fired bullet, however, came from a .22. Patty also tested the fired cartridge case found in the chamber and determined it had been fired from that gun.

¶ 92 On cross-examination, Patty testified there were several other makes and models that made the same characteristics that appeared on the bullet fragment removed from Kimberly. Patty testified it is possible defendant's gun fired the bullet in Kimberly, but it was equally possible it did not.

¶ 93 Defendant also presented testimony of a number of witnesses. Bernard Barker, who was involved in the same methamphetamine group as defendant and Kimberly, testified he was at Anthony's farm in the early evening hours of August 6, 2003. Included in this group was Dibler and Tabor, who would cook the methamphetamine, and defen-

dant and Kimberly. Barker had not used methamphetamine that day. He arrived at the farm between 7 and 8 p.m. He agreed he may have told Detective Rodney Vose and Lieutenant Joe Roesch he arrived between 8 and 10 p.m. Dibler, Anthony Jr., Anthony, defendant, and Kimberly were there. Dibler and Tabor cooked the methamphetamine. Barker purchased it from them.

¶ 94 According to Barker, that night he went to Dibler's house to pay off a debt and to purchase methamphetamine. He then went to Anthony's farm. Barker testified he did not recall talking to Larry Kemp on Thanksgiving 2003. He denied telling Larry Kemp he shot Kimberly with a .22 caliber handgun and Richie Robinson disposed of the body and gun.

¶ 95 Larry Kemp testified he spoke to Barker about the night of August 6 and 7, 2003. According to Kemp, Barker told him what happened to Kimberly. According to Barker, someone named "Junior" had "six jars of methamphetamine cooking up next to a trailer." Barker said Kimberly was shorted and returned with "Junior," seeking more methamphetamine. When she did not receive any, she threatened to call the state police. At that point, Kimberly was struck in the head with a hammer. Barker then placed a .22 caliber pistol through the hole where the hammer hit her and shot her. The hammer was tossed into a pond, and Robinson and someone else dumped the body.

¶ 96 On cross-examination, Kemp testified when Barker told him about these events, a woman named Tracy Ogle-Lyons was present as well. Ogle-Lyons acquired methamphetamine from Barker. Kemp stated "[t]hey believed that she was a plant by the State's Attorney." Kemp agreed Barker might have reason to lie to them: "if it was to petrify her

and to try to boost me, I would say he could have."

¶ 97 Dibler testified, on August 6, 2003, he was purchasing a motor home from Anthony. He went to Anthony's farm to buy the motor home. Dibler had asked Barker to go there and check the oil pressure. He remained at the farm until probably 9 or 10 p.m. Anthony Jr. and his girlfriend gave Dibler a ride home. Dibler stated his "wife said I burnt two pizzas in the oven and came in through the back door, which was sealed shut."

¶ 98 Dibler further testified he would from time to time go to the bar Maguire's in Virden. He denied telling someone at the bar that Kimberly brought methamphetamine materials to Anthony's farm. He denied going to the bar with Tabor, also known as Junior, because Tabor had never been in a bar with Dibler. Dibler denied saying he shot Kimberly in the head and dumped her body.

¶ 99 On cross-examination, Dibler testified he did not know anyone named Leigh Buhl. Dibler denied having anything to do with Kimberly's death. Dibler testified he did not know Kimberly. He did not recall telling anyone Kimberly threatened to go to the police or that he beat her with a drywall hammer. Dibler believed he was home around 11 p.m. on August 6, 2003. He testified he had been drinking "pretty heavily" and had consumed liquid Vicodin and was barely functioning.

¶ 100 Leigh Buhl testified he was interviewed by Detective Rodney Vose on August 17, 2004, regarding a conversation he overheard at Maguire's, a bar in Virden. Buhl testified he heard the conversation probably within a matter of weeks of Kimberly's death. According to Buhl, he was behind the bar when someone he did not know asked Dibler, "[W]hat the hell happened to that girl out there at Williams' farm?" Dibler told the man

she had brought ingredients for methamphetamine. After it was manufactured, the product would be divided between them. When Kimberly returned, however, Dibler told her he was going to keep it all. The woman threatened to call the police to tell them they were manufacturing methamphetamine there. Dibler said a fight occurred. Someone hit Kimberly with a drywall hammer. Buhl stated he guessed she was struck more than once, until they thought she was dead. Dibler further stated she was loaded on a pick-up truck and dumped somewhere around Glenarm. At that time, she was still moving, so he shot her.

¶ 101 Buhl testified he was less than 10 feet away from Dibler when Dibler stated the above. Buhl said Dibler only said Kimberly was struck with a drywall hammer. Dibler did not specify how many times she was struck.

¶ 102 The jury found defendant guilty.

¶ 103 In March 2011, after considering the factors in aggravation and mitigation, the court sentenced defendant to 30 years. The court then ordered defendant to serve an additional 25 years because the jury found he committed the offense with a firearm. The trial court sentenced defendant to a total of 55 years' imprisonment.

¶ 104 This appeal followed.

¶ 105 II. ANALYSIS

¶ 106 A. Assistance of Counsel

¶ 107 The constitution provides criminal defendants the right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 684, 104 S. Ct. 2052, 2063 (1984). A defendant may prove he was denied this right by proving the two factors set

forth in *Strickland*: (1) counsel's "representation fell below an objective standard of reasonableness," and (2) absent counsel's error, a reasonable probability exists the trial's outcome would have been different. *People v. Young*, 341 Ill. App. 3d 379, 383, 792 N.E.2d 468, 472 (2003) (citing *Strickland*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068). In applying the first part of the *Strickland* test, we consider whether the representation was objectively unreasonable "on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions." *People v. Fuller*, 205 Ill. 2d 308, 330-31, 793 N.E.2d 526, 541-42 (2002). We are mindful strategy decisions "are virtually unchallengeable" (*Fuller*, 205 Ill. 2d at 331, 793 N.E.2d at 542) and "a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Coleman*, 183 Ill. 2d 366, 397, 701 N.E.2d 1063, 1079 (1998).

¶ 108 Because a defendant, to prevail, must prove both prongs of the *Strickland* test, this court may resolve an ineffective-assistance-of-counsel claim upon concluding the defendant cannot prove just one of the grounds, without deciding the other. *People v. Little*, 335 Ill. App. 3d 1046, 1052, 782 N.E.2d 957, 963 (2003).

¶ 109 1. *The Failure To Object to a Suppressed Statement*

¶ 110 Defendant first argues defense counsel should have objected at trial when the State asked Captain Hendrickson about a conversation he had with defendant regarding the location of the handgun. Defendant argues this statement, which occurred in defendant's apartment, had been suppressed by the trial court, and defense counsel's failure

resulted in the jury hearing evidence it should not have heard. Defendant argues he was prejudiced by the statement, because it added another version of what happened to the handgun, leading the jury to believe defendant was lying.

¶ 111 The State, in part, argues the record supports the inference defense counsel did not object for tactical reasons. The State emphasizes the evidence shows the jury heard the same statement when Officer Bryan testified.

¶ 112 We find defendant cannot overcome the presumption defense counsel's decision was strategic and reasonable. Even if Captain Hendrickson's testimony would not have been allowed, the jury heard multiple statements regarding the handgun. Hoots and Tabor testified defendant entered his apartment just after 5 a.m. on August 7, 2003, and announced his handgun was missing from his case. Hoots also testified defendant stated only Helton knew where that gun was kept. Deputy Karhliker testified defendant told him in February 2005 the last time he saw the gun was when Kimberly gave it to Gould. Painter testified defendant said he believed Helton took the gun. Officer Bryan testified defendant initially stated he last saw the handgun on August 6, 2003, but, in his written statement, made immediately after the verbal report, defendant wrote he last saw the handgun on August 7, 2003. Defendant further reported to Officer Bryan he learned the handgun was missing when he was with police officers in his apartment early on August 8, 2003.

¶ 113 The admission of Captain Hendrickson's statement, which was consistent with the content of the written statement to Officer Bryan, allowed defense counsel to argue defendant was cooperative with the police and the statements he made to the police in the

days just following Kimberly's murder were consistent. The record supports the conclusion defense counsel decided to allow the statements so he could argue some consistency, when the other statements alone would have prevented such an argument.

¶ 114 Defendant contends, however, the record establishes defense counsel did not decide to not object but neglected to. Defendant emphasizes defense counsel actively sought to exclude the statement earlier in the proceedings when he filed the motion to suppress. Defendant reasons the inconsistency in defense counsel's conduct makes it illogical to conclude anything other than defense counsel's conduct was not purposeful.

¶ 115 The fact defense counsel moved to suppress the statement but later allowed it to be entered is not sufficient to overcome the presumption defense counsel's conduct was tactical. The record shows, as evident in defendant's brief, the issue of whether the apartment statements were suppressed was not raised again after the interlocutory appeal of the trial court's order. The parties instead argued over the statements made at the Auburn and Staunton police stations, with no one, including defense counsel, discussing the statements made in defendant's apartment. Defense counsel is presumed to have decided at this point, or even at trial, to allow Captain Hendrickson to testify on this matter. The record supports that presumption because defense counsel used Captain Hendrickson's statement in an attempt to show defendant's statements regarding the gun were not inconsistent.

¶ 116 2. *The Failure To Renew the Motion to Suppress Evidence*

¶ 117 Defendant next argues defense counsel was ineffective for failing to renew the motion to suppress evidence seized during the execution of a search warrant at his

apartment. Defendant emphasizes, although defense counsel successfully established some of the allegations in the challenged warrant affidavit should be stricken, the trial court denied the motion to strike the search warrant upon finding the remaining allegations in the warrant affidavit were sufficient to justify the issuance of a search warrant. According to defendant, these included the allegation defendant contacted Kimberly's parents on August 7, 2003, and, without explaining his reasons, told them to file a missing persons report. This allegation the trial court found "vital." Defendant further maintains when Kimberly's father Hubert testified at trial defendant made no such telephone call, defense counsel should have renewed his motion to suppress the evidence. Defendant contends, had counsel done so, the only remaining allegation, that evidence at the scene indicated the beating occurred at another location, would have been insufficient to support the search warrant, and evidence, including the clothing upon which blood was found and the note defendant left for Kimberly, would have been excluded.

¶ 118 The State contends the remaining allegations in the warrant affidavit, even after redacting the above allegation, support the issuance of the search warrant.

¶ 119 Even if trial counsel should have renewed the motion to suppress, we find no reversible error as defendant cannot establish the second *Strickland* factor, *i.e.*, the outcome of the hearing and trial would have been different had counsel renewed the motion. When probable cause is disputed, a court's task is "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is ' "a fair probability that contraband or evidence of a crime will be found in a particular place." ' " *People v. Petrenko*, 237 Ill. 2d 490, 500-01, 931 N.E.2d 1198, 1205 (2010) (quoting

People v. Hickey, 178 Ill. 2d 256, 285, 687 N.E.2d 910, 924 (1997), quoting *Illinois v. Gates*, 426 U.S. 213, 238-39, 103 S. Ct. 2317, 2332 (1983)).

¶ 120 The allegations in the warrant affidavit after the trial court's initial ruling and the redaction of the challenged sentence, as well as the resulting inferences that reasonably arise, establish a fair probability contraband or evidence of a crime would be found in defendant's and Kimberly's apartment. These allegations establish the following: (1) Kimberly's sister reported she last saw Kimberly alive on August 6, 2003, at approximately 3:30 p.m., at Kimberly's and defendant's apartment; (2) defendant was Kimberly's boyfriend and the two resided together in the apartment; (3) Kimberly's body was found at approximately 10:15 a.m. on August 7, 2003, face down in a ditch, allowing the inference the killer attempted to conceal the body; (4) evidence at the location where Kimberly's body was discovered indicated she was beaten in another location than where here body was found; and (5) Kimberly had sustained "blunt force trauma" to her face.

¶ 121 Because, absent the challenged language in the warrant affidavit, the allegations support a probable-cause finding, defendant cannot show he was prejudiced by defense counsel's failure to renew the motion to suppress. Defendant's ineffective-assistance claim fails on this ground.

¶ 122 3. *The Failure To Impeach a Witness With His Felony Conviction*

¶ 123 Defendant next argues defense counsel erred by failing to inform jurors Dibler had pled guilty in 2008 to aggravated unlawful use of a weapon, a Class 4 felony. Defendant contends exposing a witness's motivations and providing an accurate indication of witness credibility are critical functions of defense counsel. Defendant maintains the

testimony shows Dibler had access to drywall hammers and his story was remarkably consistent with Barker's, and defendant was prejudiced because the jury had not been informed of Dibler's felony conviction.

¶ 124 The purpose of impeachment is to destroy a witness's credibility; it is not to establish the truth of the impeaching evidence. *People v. Salgado*, 263 Ill. App. 3d 238, 247, 635 N.E.2d 1367, 1374 (1994). "Generally, any permissible kind of impeaching matter may be developed." *People v. Terrell*, 185 Ill. 2d 467, 508, 708 N.E.2d 309, 329 (1998). Either party, including the one calling the witness, may attack a witness's credibility. *People v. Woods*, 292 Ill. App. 3d 172, 181, 684 N.E.2d 1053, 1060 (1997).

¶ 125 As the State indicates in its brief, the fact that defense counsel referred to Dibler's conviction during closing argument shows counsel intended to elicit testimony regarding the offense from Dibler. This oversight, however, does not require reversal, because there is no reasonable probability the outcome of the trial would have been different had defense counsel impeached Dibler with his conviction at trial. The purpose of impeachment is to destroy a witness's credibility. *Salgado*, 263 Ill. App. 3d at 247, 635 N.E.2d at 1374. Dibler's credibility had been destroyed, as the jury heard testimony showing Dibler was not law-abiding or honest. Testimony established Dibler was involved in the methamphetamine-manufacturing process. A witness, Buhl, contradicted the statements made by Dibler at trial and showed Dibler claimed to have killed Kimberly, who threatened to call the police and report the methamphetamine ring. Further proof of Dibler's absence of credibility would have added nothing.

¶ 126 4. *The Failure To Offer a Limiting Instruction*

¶ 127 Defendant argues, despite the fact extensive evidence had been introduced showing defendant was a user of methamphetamine, defense counsel did not seek an instruction limiting the jury's consideration of this evidence. Defendant maintains the use of other-crimes evidence is so prejudicial, courts are advised to provide a limiting instruction not only at the close of the case, but also when the jury first hears such evidence. See *People v. Denny*, 241 Ill. App. 3d 345, 360-61, 608 N.E.2d 1313, 1323-24 (1993). Defendant acknowledges the methamphetamine-related evidence was necessary to explain his relationship with several witnesses, but contends the jury should have been told not to consider this as evidence defendant was a bad person deserving of punishment. Defendant concludes the evidence in the case was close, and extensive testimony showing defendant participated in a methamphetamine ring "invariably impacted the jury's deliberations" over seven days and exposed him to inferences he was more likely to have committed this crime because he committed others.

¶ 128 Evidence of other crimes is not admissible for the purpose of establishing the defendant has the propensity to commit a crime. *People v. Illgen*, 145 Ill. 2d 353, 364, 583 N.E.2d 515, 519 (1991). Evidence of prior offenses "overpersuades the jury," potentially leading to a conviction only because the jury feels the defendant is a bad person who deserves punishment. *People v. Lindgren*, 79 Ill. 2d 129, 137, 402 N.E.2d 238, 242 (1980). Other-crimes evidence, however, is admissible "if it is part of a continuing narrative of the event giving rise to the offense or, in other words, intertwined with the offense charged." *People v. Thompson*, 359 Ill. App. 3d 947, 951, 835 N.E.2d 933, 936 (2005).

¶ 129 When other-crimes evidence is introduced for a limited purpose, the trial court should give a limiting instruction to the jury both at the time the evidence is initially presented and at the end of the case. *People v. Tolbert*, 323 Ill. App. 3d 793, 800, 753 N.E.2d 1193, 1200 (2001). Illinois Pattern Jury Instruction No. 3.14 serves this purpose, informing the jury evidence of bad acts may be considered only for its limited purpose and not for the purpose of proving the defendant possesses the propensity to commit crimes. Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000). The record establishes defense counsel did not request this instruction, and it was not given to the jury.

¶ 130 We find defendant has not established he was denied the effective assistance of counsel by virtue of his counsel's failure to seek the limiting instruction. Defendant cannot overcome the presumption defense counsel made a strategic decision not to have this instruction given. See *Coleman*, 183 Ill. 2d at 397, 701 N.E.2d at 1079 (noting the strong presumption "the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence"). Defense counsel's theory at trial was the evidence showed someone involved in the methamphetamine-manufacturing process, including Tabor, Anthony, Helton, Gould, and two who confessed to the crime, Barker and Dibler, killed Kimberly because she threatened to call the police. Defense counsel may reasonably not have wanted the jury to be told the evidence of methamphetamine-related crimes should not be evidence establishing propensity. Defense counsel was relying on such crimes to have led to Kimberly's murder. Defendant also cannot establish prejudice, because nothing in the record suggests the jury considered defendant's metham-

phetamine usage to establish defendant's propensity to murder Kimberly. The other-crimes evidence more firmly establishes Dibler's and Barker's propensity to murder Kimberly, while the bulk of evidence supporting defendant's conviction was not methamphetamine-based. The evidence supporting defendant's conviction includes defendant's failing relationship with Kimberly, the landlord's testimony, the note, the drops of blood on defendant's clothes, the gun, and the stories surrounding the gun's disappearance.

¶ 131 Defendant's case, *People v. Brown*, 319 Ill. App. 3d 89, 745 N.E.2d 173 (2001), does not require a different result. *Brown* does not include other-crimes evidence that was intertwined in the narrative of the story and aided the defendant by directing blame on other suspects.

¶ 132 B. Defendant's Sentence

¶ 133 Defendant last argues his sentencing order must be amended to show he is entitled to day-for-day good-conduct credit on the 25-year sentence-enhancement portion of his sentence. In support, defendant first highlights the "imposed by the court" language from section 3-6-3(a)(2)(i), which denies good-conduct credit against "the entire sentence imposed by the court" (730 ILCS 5/3-6-3(a)(2)(i) (West 2002)), and the same language from section 5-8-1(a)(1)(d)(iii), which requires a minimum of 25 years to be added "to the term of imprisonment imposed by the court" (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2002)). Defendant concludes the legislature, by including the "imposed by the court" language, intended the conduct-credit bar to apply only to the initial sentence imposed by the court for first-degree murder (see 730 ILCS 5/5-8-1(a)(1)(a) (West 2002) (providing

for a term of not less than 20 years and not more than 60 years)).

¶ 134 The State argues defendant has forfeited this argument by not raising it before the trial court. Defendant acknowledges he did not raise this issue before the trial court, but urges this court to review the matter as plain error. Our first step in determining whether the plain-error doctrine applies is to determine whether there was error. See *People v. Staple*, 402 Ill. App. 3d 1098, 1105, 932 N.E.2d 1064, 1070 (2010). If we find the trial court did not err, defendant's argument fails and we need not decide whether the other elements of the plain-error doctrine apply.

¶ 135 "The cardinal rule of statutory interpretation is to interpret the statute as the legislature intended." *People v. Harper*, 2012 IL App (4th) 110880, ¶ 27, 969 N.E.2d 573. The plain language of the statute provides the best indication of legislative intent. *Harper*, 2012 IL App. (4th) 110880, ¶ 27, 969 N.E.2d 573. Ambiguities in criminal statutes must be resolved in the defendant's favor. *People v. Lee*, 397 Ill. App. 3d 1067, 1069, 926 N.E.2d 402, 404 (2010). Statutes that relate to the same subject should be construed together. *People ex rel. Madigan v. Leavell*, 388 Ill. App. 3d 283, 289, 905 N.E.2d 849, 855 (2009). We presume the legislature intended statutes on the same subject to be consistent and harmonious. *Lee*, 397 Ill. App. 3d at 1069, 926 N.E.2d at 405.

¶ 136 We do not find defendant's interpretation convincing. Section 3-6-3(a)(2)(i) specifically states "a prisoner who is serving a term of imprisonment for first degree murder *** shall receive no good conduct credit and shall serve the entire sentence *imposed by the court*." (Emphasis added.) 730 ILCS 5/3-6-3(a)(2)(i) (West 2002).

Defendant's argument fails to recognize a sentence under the enhancement provision is also a sentence *imposed by the court*. The enhancement provision, section 5-8-1(a)(1)(d)(iii), provides for a term of "25 years or up to a term of natural life" to "be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2002). The decision of whether to sentence a defendant to 25 years or to additional time belongs to the trial court and, thus, a sentence under section 5-8-1(a)(1)(d)(iii) is one *imposed by the court*. The "imposed by the court" language does not limit itself to a sentence imposed under section 5-8-1(a)(1)(a) and does not exclude a prison term imposed under section 5-8-1(a)(1)(d)(iii) from the provisions of section 3-6-3(a)(2)(i).

¶ 137 Defendant argues an additional reason supports his argument two separate truth-in-sentencing requirements apply. He maintains he has, in effect, been sentenced for two separate "offenses," for one of which good-conduct credit has not been prohibited by the legislature. According to defendant, the sentencing enhancement is an "offense" under section 2-12 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/2-12 (West 2002)), which defines the term "offense" as a violation of any penal statute. Defendant argues enhancement provisions are "penal statutes" and thus "offenses" and, in support, relies on the following language from *People v. McCarty*, 94 Ill. 2d 28, 34-35, 445 N.E.2d 298, 302 (1983): "[A]mbiguities in penal statutes, particularly in the case of enhancement provisions, must be resolved in favor of the defendant." Defendant further argues, because the sentencing-enhancement "offense" is not specifically excluded from the statute that offers prisoners day-for-day good-conduct credit on their sentences (see 730 ILCS 5/3-6-3(a)(2.1) (West 2002) (providing good-conduct credit for "all offenses"

not enumerated)), he is entitled to day-for-day good-conduct credit toward the 25-year portion of his sentence under the sentencing enhancement.

¶ 138 The State disagrees with the conclusion a sentencing enhancement is an offense. In support, the State relies upon *People v. White*, 2011 IL 109616, ¶ 26, 953 N.E.2d 398, in which the court found no separate offense of "enhanced murder."

¶ 139 We find the sentencing enhancement at issue is not, by itself, an "offense" as defined by the Criminal Code (720 ILCS 5/2-12 (West 2002)). Sentencing enhancements are better defined as "elements." According to the United States Supreme Court, the term " 'sentence enhancement' " falls "squarely within the usual definition of an 'element' of the offense." *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 2365 n.19 (2000). *Apprendi*'s interpretation is consistent with the language of the sentencing enhancement at issue, which indicates it should not be read alone. For one to prove section 5-8-1(a)(1)(d)(iii) applies, one must first prove the elements of the underlying "offense," which, in this case, requires proof of the elements in section 9-1 of the Criminal Code (720 ILCS 5/9-1 (West 2002)).

¶ 140 This interpretation of a "sentence enhancement" as an element of the offense, and not a separate offense, is consistent with the Illinois Supreme Court's decision in *White*, 2011 IL 109616, ¶ 26, 953 N.E.2d 398, in which the court specifically rejected the idea a separate offense for enhanced murder existed. This interpretation is also consistent with the *McCarty* reference to enhancement provisions as "penal statutes." See *McCarty*, 94 Ill. 2d at 34-35, 445 N.E.2d at 302. Just as one element in an offense is itself part of the penal statutes, it is not, by itself, an offense.

¶ 141 Section 3-6-3(a)(2)(i) mandates that any prisoner sentenced for first degree murder must serve his entire sentence. 730 ILCS 3-6-3(a)(2)(i) (West 2002). Defendant's sentence for first-degree murder contained two components, including the enhancement of section 5-8-1(a)(1)(d)(iii). See *White*, 2011 IL 109616, ¶ 26, 953 N.E.2d 398 (holding when the legislature enacted the mandatory sentencing enhancement it "took away any discretion the State and trial court had to fashion a sentence that does not include this mandatory enhancement"). Defendant's first-degree murder sentence includes both the 30 years' imprisonment the trial court imposed upon consideration of aggravating and mitigating factors (see 730 ILCS 5/5-8-1(a)(1)(a) (West 2002)) and the 25 years' imprisonment the court imposed under section 5-8-1(a)(1)(d)(iii). Under section 3-6-3(a)(2)(i), defendant must serve the entire 55-year sentence.

¶ 142 III. CONCLUSION

¶ 143 We affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 144 Affirmed.