SECOND DIVISION
June 20, 2017

No. 1-14-1036



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| PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County |
| | ) | |
| v. | ) | No. 09 CR 16847 (02) |
| | ) | |
| KEVIN WALKER, | ) | The Honorable |
| | ) | Jorge Luis Alonso, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court did not abuse its discretion in permitting the State's firearms expert to offer his opinions, as there was an adequate foundation for their admissibility. Defendant's ineffective assistance of counsel claim fails where he suffered no prejudice from his counsel's failure to seek redaction of defendant's videotaped statements in which defendant revealed that his nickname was "Killer Kev."

¶ 2 Following a jury trial, defendant was found guilty of first degree murder in the shooting death of Chicago police officer Alejandro Valadez and attempted first degree murder of Kelvin Thomas. Defendant was sentenced to 125 years' imprisonment. In this direct appeal, defendant argues that (1) his trial counsel was ineffective for failing to file a pretrial motion to redact defendant's use of his prejudicial nickname from his videotaped statement and the transcript of that statement, and (2) the circuit court should have excluded the State's firearms expert's

testimony because his opinions lacked an adequate foundation. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On October 16, 2009, the State charged defendant and his co-defendants Shawn Gaston and Christopher Harris[1] with the first degree murder of Chicago police officer Alejandro Valadez and the attempted murder of Kelvin Thomas.

¶ 5 Prior to trial, defense counsel filed motions to quash defendant's arrest and to suppress his videotaped statement, arguing that his arrest was made without probable cause and that his statement was the product of physical coercion. Following a suppression hearing, the circuit court denied the motions to quash arrest and to suppress the videotaped statement.[2]

¶ 6 Also prior to trial, defendant moved *in limine* to bar Justin Barr, the State's firearms expert, from testifying that the bullets recovered from the body of Officer Valadez were fired from a weapon recovered from the trunk of the car that defendant had been driving. Defendant argued that Barr would not be able to lay an adequate foundation for his opinions. The State responded that Barr had testified in Gaston's jury trial and had fully explained his methodology and the basis for his opinions, and further stated that defense counsel could interview Barr. The circuit court denied defendant's motion *in limine*, finding that Barr's testimony was admissible.

¶ 7 Before opening statements, the circuit court instructed the jury that opening statements are not evidence. Early in the State's opening argument, the prosecutor made the following statement:

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[1]Shawn Gaston and Christopher Harris are not parties to this appeal. After a separate jury trial, Gaston was convicted of the first degree murder of Officer Valadez and the attempted murder of Thomas, and was sentenced to 125 years' imprisonment. We affirmed Gaston's convictions and sentence on direct appeal. *People v. Gaston*, 2015 IL App (1st) 113460-U. A jury also found Harris guilty of first degree murder and attempted murder, and his direct appeal remains pending.

[2]On appeal, defendant does not challenge the circuit court's ruling on the motion to quash arrest and suppress evidence.

> "But in order to understand [Officer Valadez's] murder you have to go back. You have to go back a few weeks, if not a few months, before his murder. And when you do that, you are going to learn that Killer Kev, Kevin Walker, hung out a block, the 62nd block of [S]outh Paulina. He hung out on that block with his friends, his best friend Sean [*sic*] Gaston and another friend Christopher Harris. Those guys *** were *** feuding with the guys that lived over on the 6000-block of South Hermitage. Those guys on South Hermitage and Killer Kev and his friends on Paulina were fighting and feuding and it was escalating. Guns were involved."

The prosecutor referred to defendant as "Killer Kev" three more times before defense counsel objected. The circuit court overruled the objection. The prosecutor referred to defendant two more times as "Killer Kev" before defense counsel made a standing objection, which the circuit court also overruled. The prosecutor then explained: "You are going to hear [defendant's] confession. He is going to tell you what his nickname is. It's coming out of his own mouth. They call me Killer Kev." The prosecutor referred to defendant as "Killer Kev" three more times during the remainder of his opening statement. After the State's opening argument, defendant moved for a mistrial, which the circuit court denied.[3]

¶ 8 The State's evidence was that on May 31, 2009, at around 3:30 p.m., Gaston was stopped by Illinois State Police while driving a grey 2009 Pontiac G6 registered to Gaston's mother, Uvonne Gaston. Defendant was a passenger in the car when it was stopped. Gaston was issued a ticket for a seat-belt violation, and defendant was issued a verbal warning.

¶ 9 Chicago police officers Thomas Vargas and Alejandro Valadez began their shift around 11 p.m. on May 31. They were each wearing jeans, a bullet proof vest, a duty belt, and a police badge over the vest. Not long after starting their patrol in an unmarked police vehicle, Officers

[3]On appeal, defendant does not challenge the circuit court's denial of his motion for a mistrial.

Vargas and Valadez met with Officers Larsen and Pienta at 60th Street and Ashland Avenue to discuss a report of possible gunfire. The officers drove to the vicinity of the report, and shortly thereafter, a radio dispatcher reported that there were calls of shots fired in the area of 60th Street to 61st Street and Hermitage Avenue and Paulina Street. Around the same time, another radio report informed officers of a garage on Hermitage Avenue used by gang members to store weapons. Officers Vargas, Valadez, Larsen, and Pienta, along with another officer, Officer Lopez, drove down the alley east of Hermitage Avenue to investigate the garage. While there, Officers Valadez, Vargas, Larson, Pienta, and Lopez approached a man they saw from across a vacant lot, with Officer Valadez reaching him first. The man was identified as Kelvin Thomas. Officer Valadez asked Thomas whether he had heard any gunshots. Thomas stated that he and his sister Jolaine had heard several gunshots approximately 15 minutes earlier while they were at Jolaine's house at 60th Street and Hermitage Avenue.

¶ 10 While Thomas was telling Officer Valadez where the earlier gunshots came from, witnesses heard another set of five or six gunshots. Witnesses testified that the shots came from the street and were fired in slow succession, as if they were fired from a revolver. As Officers Vargas and Larson fell to the ground, they saw Officers Valadez and Thomas fall to the ground as well. Officers Vargas, Larson, Lopez, and Pienta saw a blue or grey four-door vehicle. Officer Lopez observed that the passenger side of the car was scratched or damaged. Officers Vargas and Larson saw the car stop and a black male in a white t-shirt emerge from the front passenger window and begin firing in quick succession, as if from a semi-automatic pistol. Thomas saw a white sleeve on the passenger side of the car, and his sister Jolaine saw an arm extended from the back passenger side of the car. When the shooting stopped, the car drove north on Hermitage Avenue and turned a corner. Officer Vargas saw a Pontiac symbol on the back of the car. Officer

Larson pursued the car on foot while Officer Vargas checked on Officer Valadez.

¶ 11 Officer Valadez had been shot in the head and left thigh. He was taken to the hospital, where he died on June 1, 2009. The medical examiner recovered two fragments of a copper-jacketed bullet from the left side of Officer Valadez's head along with a deformed medium caliber copper-jacketed bullet from the right side of his brain. Another medium caliber copper-jacketed bullet was recovered from Officer Valadez's thigh. His death was ruled a homicide.

¶ 12 Meanwhile, at 1:10 a.m. on June 1, Officer Ruzak located a grey Pontiac G6 that matched the description of the car provided by Officer Lopez in the area of 6147 South Paulina Street. Officer Ruzak put his hand on the hood of the car, which was warm. He observed a .40-caliber shell casing wedged between the rear window and the trunk. Officers Larson, Pienta, and Lopez arrived, and identified it as the car in which the shooters were driving, noting that it had the same scratches or damage on the passenger side that officers observed on the shooters' car. Thomas viewed the car and stated that it looked similar to the car he saw during the shooting on Hermitage Avenue. Thomas told officers that one of his daughters also had a Pontiac G6 in the same color. The officers learned that another of Thomas's daughters was dating Gaston, that Thomas knew defendant, and that Thomas knew that defendant and Gaston were friends. The car was towed to a police facility where it was determined that the car was registered to Gaston's mother, Uvonne Gaston.

¶ 13 Uvonne told police that she permitted Gaston to drive the car, and that he still had possession of the car on May 31 when she went to bed around 9:00 p.m. She consented to a search of Gaston's room, where police found a box of .357-caliber ammunition, a box of .44 Magnum ammunition, and three loose .38-caliber rounds. When the investigators left the Gaston residence in the early morning hours of June 1, there was a group of people across the street,

including Gaston and defendant. Police then placed Gaston and defendant under arrest.

¶ 14 Police searched the impounded Pontiac G6 and recovered a fired .40-caliber CBC-brand bullet casing wedged between the back window and trunk of the car. In the trunk, police recovered a .357 Colt revolver with one live round and five fired cartridge casings, a .40-caliber semiautomatic handgun with an empty clip, and a .9mm rifle with eight bullets in its magazine and two jammed cartridges—one of which was live—inside the chamber. From the scene of the shooting, eight unweathered CBC-brand .40-caliber cartridge casings, one weathered Winchester-brand .40-caliber cartridge casing, and six .38 special cartridge casings were recovered.

¶ 15 Forensic analysis of the firearms revealed a latent fingerprint that belonged to defendant under the trigger guard of the .40-caliber semiautomatic pistol, and a fingerprint that belonged to Gaston on the .9mm rifle. DNA analysis revealed that defendant could not be excluded as the person whose DNA was on the .40-caliber semiautomatic pistol. Defendant was excluded as a contributor to the DNA found on the .357 Colt revolver and the .9mm rifle. A gunshot residue test for defendant taken in the morning of June 1 was negative.

¶ 16 The State called Justin Barr, a forensic scientist, to testify as an expert in the field of firearms identification. Defendant expressly accepted Barr as an expert in that field. Barr explained that the basis for a positive firearm identification is substantial agreement of class characteristics and individual characteristics. Firearm class characteristics are those that are included or excluded from a particular group or class of firearms, and are determined prior to and reflected in the manufacture of the firearm. Cartridge casing class characteristics include the

caliber, breech face marks,[4] and firing pin impressions. Class characteristics of a firearm include the caliber, number of lands and grooves, and the direction of twist. Lands and grooves are the raised and recessed portions, respectively, inside the barrel of a firearm, also known as rifling. Lands and grooves have a particular direction that cause a bullet to spin, and the spin provides stability as the bullet exits the barrel. Barr explained that, in firearms identification, individual characteristics are the irregularities or imperfections and markings left during the manufacturing process or due to wear and tear or abuse. He explained that when a gun is fired, the firing pin strikes the primer area of a cartridge, causing the primer to ignite and forcing the bullet down the barrel of the firearm. The expansion of gasses cause the breach face to leave impressions on the cartridge, while the firing pin leaves an indentation on the primer area of the cartridge.

¶ 17 Barr explained that performing a firearm forensic identification involves the use of a comparison microscope, which allows two pieces of evidence to be viewed at the same time. Using the comparison microscope, a forensic scientist can, for example, look for class characteristics and individual characteristics in the firing pin impressions between two pieces of evidence. Furthermore, Barr explained that testing a firearm involves firing the gun into a water recovery tank, which allows for recovery of both a test-fired bullet and its cartridge casing if the casing is ejected from the weapon during firing.

¶ 18 Barr testified that he examined and test-fired the revolver recovered from the trunk of Gaston's car using both .38 Special ammunition and .357 Magnum ammunition. He used the comparison microscope to compare the test-fired bullets from the .357 Colt revolver to the bullets recovered from Officer Valadez. Barr testified that he used all proper procedures and protocols in performing his tests and in using the comparison microscope, and that the tests he

[4]The breech face is the front part of a gun's breechblock, which makes contact with the cartridge while a bullet is in the chamber, holding the cartridge in place during firing, and absorbing part of the recoil after firing.

employed are commonly accepted in forensic firearm identification for determining whether spent firearms evidence was fired from a particular weapon. He stated that the class characteristics of a .357 Colt revolver reflected on the test-fired bullets and the recovered bullets consisted of matching calibers and six lands and grooves with a left-hand twist. He concluded that there was substantial agreement of class and individual characteristics between the test-fired bullets and the recovered bullets. Over defendant's objection, Barr opined that the bullets recovered from Officer Valadez's body were fired from the .357 Colt revolver recovered from the trunk of Gaston's car. Furthermore, following all proper procedures and protocols that are commonly accepted in his field, Barr compared the five cartridge casings recovered from the .357 Colt revolver to the cartridge casings from the test-fired shots using the comparison microscope to compare. Over defendant's objection, Barr opined that based on his training and individual examination of the class and individual characteristics, the five fired cartridge casings recovered from the .357 Colt revolver had been fired by that weapon.

¶ 19 Barr also examined and tested the .40-caliber semiautomatic pistol and the empty clip recovered from the trunk of Gaston's car. He test-fired the pistol into the water tank using the recovered empty clip. Using the comparison microscope, he compared the test-fired bullets and cartridge casings to .40-caliber cartridge casings recovered from the scene of the shooting and the single cartridge casing recovered from Gaston's car. Barr testified that he followed all proper procedures and protocols that are commonly accepted in his field, and over defendant's objection, testified that he found substantial similarities between the test-fired .40-caliber cartridge casings and the eight .40-caliber cartridge casings recovered from the scene of the shooting and the single .40-caliber cartridge casing recovered from Gaston's car. He opined that the eight cartridge casings recovered from the scene of the shooting and the single .40-caliber

cartridge casing recovered from Gaston's car were fired from the .40-caliber semiautomatic pistol recovered from the trunk of Gaston's car.

¶ 20 After Barr's direct examination, defendant moved to strike Barr's opinion for lack of an adequate foundation, which the circuit court denied. Defendant then cross-examined Barr regarding his methodology and opinions. Barr stated that his opinion that there was substantial agreement of the individual characteristics between (1) the bullets recovered from Officer Valadez and the test-fired bullets from the .357 Colt revolver recovered from trunk of Gaston's car, (2) the cartridge casings recovered from the .357 Colt revolver and the test-fired cartridge casings fired from .357 Colt revolver, and (3) the .40-caliber cartridge casings recovered from scene and the .40-caliber cartridge casings from the test-fired .40-caliber pistol recovered from the trunk of Gaston's car, was based on his training and expertise. He admitted that he did not take any notes about his observations while making his comparisons, and acknowledged that he did not "count items," such as the striations on the bullets, which are individual markings left on a bullet from the lands and grooves in the barrel of a firearm. He testified that there "is no minimum standard at the lab in the amount of similarities that you have to have before you can make any sort of identification."

¶ 21 While in custody, and after receiving his *Miranda* warnings, defendant spoke to Assistant State's Attorney Fabio Valentini. Defendant initially denied any involvement in the shooting, but then he was shown Gaston's videotaped statement. A videotaped interview of defendant watching Gaston's statement, defendant's own videotaped statement, and the transcript of defendant's videotaped statement were admitted into evidence without objection. While defendant was watching Gaston's videotaped statement, defendant asked to have it replayed so that he could "hear what [Gaston] exactly what [*sic*] he said." Defendant watched the replay and

stated "I can respect that though." When asked to clarify, defendant stated that Gaston "wasn't, know what I'm saying, throwing no extra shit in there like okay well was did [*sic*] I have a gun or was I shooting and all that shit I wasn't doing all that." He then added that "I'm the driver, I was driving ***."

¶ 22 Defendant stated that he and Gaston were best friends. He stated that Gaston drove them to get tattoos at 62nd Street and Wolcott Avenue between 9:30 p.m. and 10:30 p.m. They were driving Gaston's mother's four-dour grey Pontiac G6. Defendant stated that they had been pulled over by the Illinois State Police on May 31. Gaston then drove down Hermitage Avenue where they were fired on by a group of people near 63rd Street as part of an ongoing dispute. Gaston drove to his house and retrieved a gun. When he returned to the car with the gun, Gaston referred to defendant as "Killer Kev." Gaston said to defendant "Killer Kev get in the driver's seat." Defendant said he knew Gaston would "probably shoot but he probably wouldn't try to hit nobody ***." Defendant then drove back to 63rd Street, driving between 10 to 20 miles per hour, at which point Gaston stuck his arm out of the passenger side window and fired between five and six shots. Defendant told ASA Valentini that "I might've been driving but at the same time I ain't shoot," explaining "I never had a banger on me," and "[n]ow if [Gaston] had the gun on him he had the gun on him, know what I'm saying, but at the same time I didn't shoot, you know what I'm saying?" Defendant denied knowing what type of gun Gaston had. Defendant stated that he then drove Gaston down an alley on Paulina Avenue to get rid of the gun. Defendant parked the car at 61st Street and Paulina Avenue, and he and Gaston separately walked toward the porch of the house where they were later arrested.

¶ 23 Lucious Gibbons testified that on May 31, 2009, defendant and Gaston came over to his house around 10 p.m. and got matching tattoos on their arms from a tattoo artist working at

Gibbons's house.

¶ 24 Between June 3, 2009, and November 5, 2011, defendant made more than 600 phone calls from jail. Recordings of two of those calls were entered into evidence by stipulation. In a July 31, 2009, call, defendant stated "[c]ause I'm like—then I'm like, man, they gotta get (inaudible) gotta get my fingerprints of [*sic*] this motherfucker, (inaudible) they gotta get it off this motherfucker. They gotta get it off this motherfucking steering wheel, gotta get it off this here gun that they say that killed this ***." During a November 5, 2011, phone call to his mother, defendant was recorded as saying "they might do it to me cause I'm just the driver ***."

¶ 25 Defendant did not testify on his own behalf. The only evidence defendant offered was a stipulation that Uvonne Gaston would testify that when she last saw Shawn Gaston, he was with his brother Antoine and Christopher Harris.

¶ 26 After eight hours of deliberation, the jury found defendant guilty of the first degree murder of Officer Valadez and the attempted first degree murder of Thomas. The jury also found that the State did not prove that defendant knew or should have known that the murdered victim was a peace officer.

¶ 27 Defendant's motion for a new trial argued in relevant part that the circuit court committed reversible error by overruling defendant's objections to the State's use of "Killer Kev" in its opening statement, and that the circuit court erred in allowing Barr to testify as an expert without laying an adequate foundation for his opinions. The circuit court denied defendant's motion for a new trial. Defendant was sentenced to 60 years' imprisonment for first degree murder plus a 15-year firearm enhancement, along with a consecutive 30-year sentence for the attempted first degree murder of Thomas plus a 15-year firearm enhancement, for a total of 120 years in prison. The circuit court denied defendant's motion to reconsider the sentence, and this timely appeal

follows.

¶ 28 ANALYSIS

¶ 29 On appeal, defendant argues that (1) his trial counsel was ineffective for failing to file a pretrial motion to redact defendant's use of his prejudicial nickname from his videotaped statement and the transcript of that statement, and (2) the circuit court should have excluded Barr's opinion testimony because he did not lay an adequate foundation for his opinions.

¶ 30 We first address whether there was an adequate foundation for Barr's opinion testimony that the bullets recovered from Officer Valadez and the cartridge casings recovered from the scene of the shooting were fired from the weapons recovered from Gaston's car. Defendant argues that Barr did not provide a basis for his opinion that there was substantial agreement of individual characteristics between the bullets recovered from Officer Valadez's body and the bullets test-fired from the revolver. On cross-examination, Barr stated that his opinion that the recovered bullets were fired from the recovered weapons was based on his training and experience, and he did not take any notes as to the type of individual characteristics he observed or count the number of individual markings on the bullets recovered from Officer Valadez's body and the test-fired bullets while making his comparison. Instead, Barr based his opinion on the overall pattern he observed, and he testified that there was no minimum standard for the number of similarities that must be observed before he could render an opinion. Defendant contends that Barr's testimony demonstrates that there was an inadequate foundation for his opinions.[5]

[5]Defendant's appellant's brief relies in part on this court's decision in *People v. Jones*, 2015 IL App (1st) 121016, *judgment vacated*, No. 119826 (Oct. 26, 2015) (unpublished supervisory order), a case in which Barr also testified as a firearms identification expert and gave substantially similar testimony to the testimony he gave in this case. After the opinion in *Jones* was filed, the defendant passed away. Our supreme court, in an exercise of its supervisory authority, instructed us to vacate our judgment, and also instructed the circuit court to vacate its judgment. In his reply brief, defendant acknowledges that *Jones*

¶ 31 The parties disagree as to the standard of review. Defendant relies on *People v. Safford*, 392 Ill. App. 3d 212, 221-22 (2009) to argue that whether a party has laid an adequate foundation for an expert's opinion is a question of law reviewed *de novo*. The State, however, relies on our recent opinion in *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 108, in which we disagreed with *Safford* and its progeny. In *Simmons*, we found that our supreme court has consistently articulated that an abuse of discretion standard applies when considering whether a party has laid an adequate foundation for an expert's testimony, (*Simmons*, 2016 IL App (1st) 131300, ¶ 109 (collecting cases)), and that the cases on which *Safford* relied did not support its conclusion that review of whether an adequate foundation exists is a question of law (*id.* ¶¶ 110-14). In our view, *Simmons* is the better reasoned decision with respect to the standard of review. We will therefore review the circuit court's decision to admit Barr's opinions over defendant's foundation objections for an abuse of discretion.

¶ 32 The admission of a qualified expert's opinion testimony requires the proponent to lay an adequate foundation to establish that the information relied on by the expert in forming the opinion is reliable. *Id.* ¶ 115 (citing *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 565 (2008)). "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Ill. R. Evid. 703 (eff. Jan. 1, 2011). "An expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Ill.

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was vacated after he filed his opening brief. Because the judgment in Jones was vacated, it is void and of no precedential value. *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 116.

R. Evid. 705 (eff. Jan. 1, 2011). "Rule 705 permits an expert to give an opinion without divulging the basis for it and shifts the burden to the opposing party to elicit and to explore the underlying facts or data on cross-examination." *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 37. The basis for an expert's opinion generally does not affect his standing as an expert, but instead goes to the weight of the evidence, which is for the jury to determine in light of the expert's credentials and the factual basis for his opinion. *Simmons*, 2016 IL App (1st) 131300, ¶ 121; *Snelson v. Kamm*, 204 Ill. 2d 1, 26-27 (2003).

¶ 33 Here, defendant had no objections to Barr's qualifications as an expert in the field of firearms identification. On direct examination, Barr explained what firearm class characteristics and individual characteristics are relative to cartridge casings and bullets, how marks are created and left on cartridge casings and bullets, and the methods used by forensic scientists to compare a test-fired bullet to a sample bullet. He testified that he test-fired the guns recovered from the trunk of Gaston's car, compared the test-fired bullets to those recovered from Officer Valadez's body and he compared the test-fired cartridge casings to the cartridge casings recovered from the scene of the shooting and from Gaston's car, and that he followed all proper procedures and protocols commonly used in the firearms identification field in conducting his examination. Based on his experience, examination, and unchallenged expertise, he opined that the .357 Colt revolver recovered from Gaston's vehicle fired the bullets that were recovered from Officer Valadez's body. On cross-examination, defense counsel's extensive questioning focused on whether Barr counted the number of striations on the bullets or took any notes regarding his observations while making his comparisons. Barr acknowledged that he had not counted the number of similarities observed and that he did not take any notes documenting his observations.

¶ 34 Barr provided detailed testimony about the basis for his opinions and explained that he

followed all of the procedures and protocols commonly used in science of firearms identification. Under Illinois Rule of Evidence 705, Barr could render his opinions without first testifying to the underlying facts or data he relied on in formulating his opinions. Therefore, Barr's testimony was admissible. Defendant had the opportunity to interview Barr prior to trial and was allowed to thoroughly cross-examine Barr at trial regarding his opinions and how he reached them, and it was for the jury to weigh his testimony. *Simmons*, 2016 IL App (1st) 131300, ¶ 131; *Negron*, 2012 IL App (1st) 101194, ¶ 40. We find that the circuit court did not abuse its discretion in permitting Barr to offer his opinions.

¶ 35 Defendant argues that *Safford* supports his argument that Barr's failure to take notes or enumerate the number of similarities he observed shows that there was no adequate factual basis for his opinions and therefore rendered them inadmissible. We disagree. In *Safford*, a police officer was shot after stopping two men. A fingerprint was recovered from the hood of the officer's patrol car. At the defendant's jury trial, the defendant objected to the State's fingerprint expert's testimony on the ground that the expert had not listed any points of comparison to support his conclusion that the fingerprint recovered from the hood of the patrol car matched defendant's fingerprint. *Safford*, 392 Ill. App. 3d at 216. The expert, a forensic scientist and latent fingerprint examiner, was qualified as an expert, and testified that he looked at three levels of detail for each fingerprint he analyzed. *Id.* at 220. He testified that he followed that procedure in comparing the fingerprint recovered from the patrol car to the defendant's fingerprint, and concluded based on his training and experience that it was a match. *Id.* On cross-examination, he acknowledged that he did not take any notes during his comparison, and did not record how or why he arrived at his conclusions. *Id.* The jury found the defendant guilty.

¶ 36 On appeal, the defendant argued that the expert never provided an evidentiary basis for

his opinion, and that "the circuit court erred in not requiring the State to offer an adequate foundation in the form of the expert's underlying reasoning to explain the expert's ultimate conclusion presented to the jury." *Id.* The *Safford* court reversed, finding that the circuit court erred in admitting the expert's testimony without an adequate foundation. *Id.* at 223. The majority found that despite the defendant's opportunity to cross-examine the expert, the expert based his opinions on facts personally known to him, but he was unable to testify to those facts. *Id.* at 227.

¶ 37 *Safford* has been described as an outlier among cases on the issue of whether an expert's testimony is admissible. See *People v. Negron*, 2012 IL App (1st) 101194, ¶ 40 ("We underscore the fact that *Safford* is an outlier case and no reported case since then has held that there must be a minimum number of points of fingerprint comparison or a disclosure of a specific number of points of similarity found by the expert."). Furthermore, this court in *Simmons* found that the analysis in *Safford* was flawed, since the question of whether an expert sufficiently detailed the reasons for his opinion is different from whether the expert relied on information of a type reasonably relied on by experts in the same field. *Simmons*, 2016 IL App (1st) 131300, ¶ 124. And while the majority in *Safford* was concerned that the expert's failure to provide the reasons for his opinions affected the defendant's ability to cross-examine him on his opinions (*Safford*, 392 Ill. App. 3d at 227-28), the dissenting justice observed that the defendant's cross-examination of the expert as to the reasons for his opinions was "vigorous," and any "factual deficiency" was "a matter for the jury to decide and that is what it did[,]" (*id.* at 232 (Wolfson, J., dissenting)). We agree that *Safford* is an outlier that does not set forth the proper analysis for determining the admissibility of an expert's opinion. For the reasons set forth above, the circuit court did not abuse its discretion in permitting Barr to offer his opinions to the jury.

¶ 38 Next, defendant argues that his trial counsel provided ineffective assistance by failing to file a pretrial motion to redact portions of defendant's videotaped statement and the transcript of that statement in which he refers to himself as "Killer Kev." He contends that his nickname was not relevant to any issue in the case and that the State capitalized on defense counsel's mistake by repeatedly using the nickname in its opening argument. Defendant claims that his counsel's failure to seek redaction was objectively unreasonable, was not a matter of trial strategy, and that a motion to redact would have been granted. He asserts that his counsel's error was prejudicial because the State was able to refer to defendant by the nickname in front of the jury, and the evidence against defendant was closely balanced as evidenced by the fact that the jury deliberated for eight hours and needed to be sequestered for a night before finding him guilty.

¶ 39 A criminal defendant is guaranteed the right to effective assistance of counsel under both the federal and Illinois constitutions. U.S. Const. amends. VI, XIV; Ill Const. 1970, art. I, § 8. The United States Supreme Court has explained that a defendant is denied effective assistance of counsel when counsel's performance falls below an objective standard of reasonableness, and when the deficiencies in counsel's performance undermine our confidence in the outcome of the proceeding or deprived the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under this two-prong test, the defendant must show that his counsel's performance was deficient, and that he suffered prejudice as a result of the deficient performance. *Id.* at 687. A defendant establishes prejudice by showing that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). In order to establish prejudice under *Strickland* resulting from counsel's failure to file a pretrial motion, the defendant must show that the unargued motion is meritorious and that the trial outcome would have been different if the evidence had

been suppressed. See *People v. Henderson*, 2013 IL 114040, ¶ 15; see also *People v. Macias*, 2015 IL App (1st) 132039, ¶ 94.

¶ 40 "Generally, there is no impropriety in referring to a defendant by his or her nickname." *People v. Murillo*, 225 Ill. App. 3d 286, 294 (1992). However, "ordinary considerations of fair play would dictate that use of a nickname which has a pejorative connotation should be permitted sparingly, only if there is a showing of necessity for its use." *Id.* Even if a pejorative connotation exists, a defendant may be referred to by his nickname for identification purposes, or if witnesses knew and identified the defendant by that name. *People v. Salgado*, 287 Ill. App. 3d 432, 445 (1997).

¶ 41 Here, defense counsel moved to quash defendant's arrest and to suppress his videotaped statement based on alleged police misconduct, which, after a hearing, the circuit court denied. Defense counsel did not move to redact the statement in any way to remove defendant's own statements to ASA Valentini in which defendant explained that during the events leading up to the shooting, Gaston referred to him as "Killer Kev." During its opening argument, the State referred to defendant as "Killer Kev" 11 times and explained that defendant himself told police that that was his nickname. The videotaped statement along with the transcript of that statement containing the nickname "Killer Kev" were admitted into evidence and provided to the jury.

¶ 42 The State argues that a motion to redact would have been futile because it is proper to refer to a defendant by his nickname. The cases relied on by the State involve situations where either witnesses referred to the defendants by their known nicknames (see, *e.g.*, *Salgado*, 287 Ill. App. 3d at 445; see also *People v. Campbell*, 309 Ill. App. 3d 423, 428 (1999) *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004)), or the prosecution used a known nickname for identification purposes (*Murillo*, 225 Ill. App. 3d at 287-88). Here, defendant

correctly observes that no witness testified that defendant was known as "Killer Kev," that the State did not elicit testimony from any witness regarding defendant's nickname for identification purposes, and that the jury first heard the nickname from the State during its opening argument. But it was undisputed that defendant referred to himself by that nickname in his videotaped statement. The jury saw his videotaped statement and was provided a transcript of that statement. The State did not gratuitously interject the nickname "Killer Kev" into the trial—it was the defendant himself who told ASA Valentini that "Killer Kev" was his nickname, and defendant's statement was important evidence at trial. Furthermore, defendant's statement as a whole was a crucial piece of evidence in this case, and his own use of his nickname came at a crucial time in his statement to ASA Valentini: Gaston had just returned to the car with a gun, and as defendant described it, "[a]ll I know we pulled back in the block he motherfucking like uh—Killer Kev hop in the uh— *** that's like my nickname. *** I'm still in the car he coming in he like Killer Kev get in the driver's seat." The importance of defendant's own statement and recitation of the sequence of events cannot be overstated, and it cannot be minimized or ignored that defendant's own words injected the nickname "Killer Kev" into the evidence. This nickname was not the product of a gratuitous statement from an overzealous prosecutor. Defendant has neither cited any authority nor advanced any persuasive argument to support his position that a motion to redact his statement under these circumstances would have been successful.

¶ 43 Defendant relies on *Murillo* to support his argument that his trial counsel's failure to seek redaction of his nickname from his videotaped statement and the transcript of that statement amounts to deficient performance. *Murillo* generally supports defendant's argument that the use of a nickname may be prejudicial, but it does not control the outcome here. There, the defendant claimed that he was prejudiced by the prosecutor's use of the name "Dillinger" to identify him as

the assailant in a voluntary manslaughter trial. *Id.* at 294. As noted above, we found that generally, "there is no impropriety in referring to a defendant by his or her nickname." *Id.* We observed, however, that "ordinary considerations of fair play would dictate that use of a nickname which has a pejorative connotation should be permitted sparingly, only if there is a showing of necessity for its use." *Id.* Ultimately, we disagreed with the defendant that he was prejudiced in any way, finding that the name "Dillinger" did not have such a pejorative connotation that it invoked an association with crime and violence. *Id.* We further found that the circuit court did not abuse its discretion in denying defendant's motion to bar reference to the nickname where the record showed that some of the witnesses at trial knew defendant only by that nickname. *Id.* Although *Murillo* acknowledges a general principle that using a known nickname could be prejudicial if it is unconnected to the evidence at trial, it did not establish any framework or bright-line rule as to when the use of known nickname becomes prejudicial.

¶ 44 Defendant also relies on *People v. Williams*, in which a State's witness referred to the defendant by the nickname "Snake" three times during defendant's trial without objection. 168 Ill. App. 3d 896, 902 (1988). Defendant did object, however, when the prosecutor referred to the defendant as "Snake" during closing arguments. *Id.* On appeal, defendant argued that the use of the nickname was highly prejudicial and required reversal. *Id.* We noted that it was uncontroverted that the defendant was known by that nickname and that the State did "not endeavor to improperly inflame or antagonistically arouse the jury's passion" by using the nickname. We observed that, "[c]onceivably, a State's witness and a prosecutor's use of a defendant's nickname may unfairly arouse a jury's sentiments against a defendant and require reversal, but such an instance is not presented in the case at bar." *Id.*

¶ 45 Here, when viewed in isolation, the nickname "Killer Kev" invokes an obvious

association with crime and violence. Defendant advances a plausible argument that the State may have used the nickname to "arouse the jury's sentiments" against him because none of the witnesses at trial identified defendant by that nickname, and none of the witnesses referred to defendant as "Killer Kev." But as we explained above, the State did not gratuitously interject the nickname "Killer Kev" into the case—the nickname was part of defendant's own narrative as to the sequence of events leading up to his knowing participation in the shooting, and was quoted directly from defendant's own statement to authorities.

¶ 46 Also, we cannot say that a motion to redact would have been successful, since defendant did not present any evidence in the circuit court, and makes no argument in this court, that his videotaped statement could have been edited to remove the nickname without altering the context, nature, or impact of his statement. Defendant's statement as a whole was a crucial piece of evidence in this case, and his use of his nickname came at a crucial time in his statement to ASA Valentini: Gaston had just returned to the car with a gun and defendant quoted Gaston as saying to him "Killer Kev get in the driver's seat." The spontaneity, context, and importance of defendant's own words and his unedited recitation of the sequence of events cannot be overstated because it demonstrates that defendant knowingly and willingly drove the car so that Gaston could shoot at people on the street. Defendant has not cited any authority, or advanced any persuasive argument, to support his argument that a motion to redact defendant's statement would have been successful.

¶ 47 And, even if a motion to redact would have been successful, we find that defendant was not prejudiced by his counsel's failure to file such a motion because defendant has not established that it would have affected the outcome of the trial. The evidence of defendant's guilt was not closely balanced. Multiple witnesses identified the car involved in the shooting as a four-

door grey or blue car, and Officer Lopez identified the make as a Pontiac. A four-door grey or blue Pontiac was found parked a few blocks away approximately an hour after the shooting and it was registered to Gaston's mother. Several witnesses to the shooting identified Gaston's car as the shooter's car. Earlier that day, Gaston and defendant were pulled over by Illinois State Police in that car, and Gaston's mother stated it was still in Gaston's possession at 9:30 p.m. on May 31. Defendant's statement put him and Gaston together getting tattoos at 10:00 p.m., which was corroborated by Gibbons, who saw them at his house around that time. Furthermore, defendant admitted in his videotaped statement that he was in Gaston's car when they were shot at, that he and Gaston went to get a gun, that when Gaston returned with a gun, Gaston told him to drive, he willingly drove Gaston back to the location of shooting, knowing that Gaston was going to shoot at someone, and he drove slowly while Gaston fired a gun from the moving car. As explained above, the State established that the bullets recovered from Officer Valadez's body and the cartridge casings recovered from the scene of the shooting and Gaston's car were fired from the guns recovered from Gaston's trunk. Defendant's fingerprint and DNA were found on the .40-caliber semi-automatic pistol recovered from the trunk of Gaston's car. Defendant made his videotaped statements to police at around 6:30 p.m. on June 1, 2009. After being Mirandized, he was shown Gaston's videotaped statement. Defendant made multiple statements in which he admitted that that he was the willing driver of the car at the time Officer Valadez was shot and killed and the attempted murder of Thomas took place. Defendant fully corroborated the State's evidence as it related to the fatal shooting of Officer Valadez. Under an accountability theory, "a person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of the offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the

planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2014). We find that the evidence of defendant's guilt was not closely balanced, it was overwhelming, and his counsel's failure to file a motion to redact defendant's nickname from his statement resulted in no prejudice to defendant.

¶ 48 Furthermore, we are not persuaded by defendant's argument that the length of the jury's deliberations suggests that the evidence was closely balanced. As the State points out, the jury sent a note asking whether the law of criminal responsibility applied to the State's allegation that defendant knew or should have known that Officer Valadez was a peace officer. The circuit court answered the note in the negative. Shortly after the circuit court's answer, the jury returned a guilty verdict, and also found that defendant did not know that Officer Valadez was a peace officer. Thus, the length of the jury's deliberation appears to be related to the issue of whether the law of criminal responsibility applied to the State's allegation that defendant knew or should have known that the murdered victim was a peace officer.

¶ 49 CONCLUSION

¶ 50 The circuit court did not abuse its discretion in admitting the opinion testimony of the State's firearms expert, as there was an adequate foundation for those opinions, and any deficiencies in the factual basis for his opinions went to the weight of the testimony rather than its admissibility. Defendant's claim of ineffective assistance of counsel fails where he has not demonstrated any prejudice in light of the overwhelming evidence of his guilt.

¶ 51 The judgment of the circuit court is affirmed.

¶ 52 Affirmed.