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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE	)	Appeal from the Circuit Court
STATE OF ILLINOIS,	)	of Boone County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13-CF-87
	)	
MARCO A. HERNANDEZ,	)	Honorable
	)	C. Robert Tobin, III,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices Zenoff and Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's counsel provided ineffective assistance to defendant during his trial where counsel's performance was deficient because he did not object to the admission as substantive evidence of the written statement of defendant's girlfriend recounting defendant's confession because the girlfriend had not been an eyewitness to the events recounted and the use of the written statement as substantive evidence prejudiced defendant.

¶ 2 Following a jury trial, defendant, Marco A. Hernandez, was convicted of the offenses of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2012)) and unlawful possession of a firearm by a street gang member (720 ILCS 5/24-1.8(a)(1) (West 2012)) stemming from the April 21, 2013, shooting of Richard Herman. In addition, the jury made the factual finding that defendant

personally discharged the firearm used to kill the victim. Defendant was sentenced to a 55-year term of imprisonment for the murder conviction consecutive with a 5-year term of imprisonment for the firearm possession conviction. On appeal, defendant argues that he received ineffective assistance of counsel because his attorney failed to challenge the substantive use of the written statement of defendant's girlfriend recounting defendant's admission that he shot and killed the victim; defendant also contends that his sentence was excessive in light of his age and lack of criminal history. We agree with the ineffective-assistance contention and reverse defendant's convictions and remand this matter for a new trial.

¶ 3

### I. BACKGROUND

¶ 4 We begin by summarizing the facts adduced at trial necessary for an understanding of defendant's contentions on appeal. At about 6:30 p.m. on April 21, 2013, near the pumps of the Shell gas station on State Street in Belvidere, Herman was shot once in the chest. The bullet entered his left chest puncturing the lung and causing massive internal bleeding. The bullet, following a slightly downward trajectory, passed through Herman's body nearly severing his spinal cord before exiting the right side of his back. Little blood was observed from the wound and efforts to save Herman's life were unsuccessful.

¶ 5 Four eyewitnesses to the shooting were produced at trial. All four agreed that defendant and Deontae Murray got into a confrontation with Max Cox and Herman. Daniel Arevalo, an attendant at the gas station, testified that defendant and Murray had first entered the store area of the gas station and purchased beer. Next, Cox and Herman also purchased a case of beer, and Cox prepaid to pump some gas for his car. Arevalo rang up the purchases and did not notice that the two groups interacted while inside the store area.

¶ 6 Once outside of the store area, Cox and Herman returned to Cox's car, where Cox began

to pump gas. They were approached by defendant and Murray, and the confrontation ensued. Arevalo testified that he was aware of the confrontation, but his attention was divided because he was serving other customers. Arevalo testified that he looked out of the window, saw defendant run up to Herman, pull a gun from behind his back, and shoot at Herman. Arevalo was sure of his identification of defendant as the shooter because Murray was an African American male, and Arevalo observed that the shooter was not African American.

¶ 7 Cox testified that, once he returned to his car, he and Herman were approached by defendant and Murray. Defendant confronted Cox, accusing him of chasing him in an earlier incident. Cox denied to defendant that it was he, but Cox admitted while testifying that he had been present at that incident. Cox also recognized Murray, because Cox had sold Murray illegal drugs in the past. Cox testified that he was a “former” member of the Surenos 13 street gang in Belvidere (a police witness opined that Cox was still an active associate of the gang because he kept company with other known members). Cox testified that he tried to go about his business, but Murray accused Cox of gang banging and displayed a handgun tucked into the waist of his pants. Cox testified that, as the confrontation continued, defendant took the weapon from Murray and placed it behind his back in order to conceal it from view. Herman claimed to be a member of the Joliet Latin Kings and disparaged Murray. As Murray and Herman argued, defendant advanced, pulled the handgun from behind him, and shot Herman once in the chest. As Herman fell to the ground, Cox ran into the store area and instructed the attendant to call 911.

¶ 8 In contrast to the accounts of Arevalo and Cox, Gerald Keeney, a customer, testified that he had purchased scratch-off lottery tickets and was sitting in his car, which was parked in front of the store, scratching his tickets. Keeney became aware of an argument near his car, but he ignored it because he was intent on his lottery tickets. Keeney testified that he heard a gunshot

and immediately looked up. As Keeney looked up, he observed the African American male holding a gun. Keeney testified that he ducked down and called 911. Keeney also testified he observed defendant and Murray run away.

¶ 9 Linda Gomez, another customer, testified that she was outside next to another pump washing the windows of her car. She became aware that two white men and an African American male were in an argument. One of the white men tried to defuse the situation while the African American male seemed to be agitated. Gomez testified that she saw the African American man shoot one of the white men. She did not see who was with Murray. Gomez also told the police what she had observed, and she insisted that she saw the gun fired while the African American man was holding it.

¶ 10 Fatima Camargo, defendant's girlfriend, testified that, at around 9 a.m. on April 22, 2013, defendant knocked on her bedroom window, and she let him into her bedroom. Camargo testified that defendant told her that he got "into it" with Max (Cox) and Ricky (Herman) at the Shell station. Camargo testified that defendant told her that "somebody killed someone." Camargo continued to be somewhat evasive when asked to clarify her testimony. She stated that defendant "just told me that somebody got killed when he was right there with the black dude."

¶ 11 The State confronted Camargo with her written statement, which was admitted into evidence as substantive evidence. Defendant did not object to the admission as substantive evidence either during or after the trial. The prosecutor would read a portion of the statement and ask Camargo if she remembered giving that portion to the police, and Camargo would respond that she did recall giving that portion.

¶ 12 In the written statement, Camargo told police that defendant told her that Cox and Herman tried to start something with him because they were from a different gang. According to

Camargo's written statement, defendant struck Cox (which Cox denied in his testimony) and then he shot Herman when Herman started to attack him. Camargo's written statement further noted that defendant told her that he intended to shoot Cox, but Cox avoided it by running inside the store area of the gas station. Camargo's written statement further provided that defendant told her that he ran away, abandoning a case of beer (fingerprints from defendant were found on a case of beer by the gas station) and later stashing the murder weapon he had been given by other Latin King gang members (the murder weapon was discovered in a closet at the home of another Latin King, Anthony Perez). Finally, according to Camargo's written statement, defendant was a member of the Latin Kings, and defendant's nickname was "Wacko."

¶ 13 In rebuttal closing argument, the State hammered on the substance of Camargo's written statement. The State first argued: "This is evidence in this case. This written statement. This is evidence of the defendant's admissions, his confession." The State then recounted how the statements defendant related to Camargo lined up with the actual evidence adduced at trial, finding that there was a substantial match so the jury could trust the written statement as defendant's own words. The State summed up: "What do you know about Fatima Camargo's written statement with the defendant's words? Fatima described details that only the shooter would know. Pure and simple. And the fact is, the defendant confessed to his girlfriend." Defendant did not object to any of the argument involving Camargo's written statement.

¶ 14 Additionally, the trial court instructed the jury that it could consider the written statement "as evidence without \*\*\* limitation" on its use. In other words, the jury was instructed that the evidence was admitted as substantive evidence of defendant's confession. Defendant did not object to the instruction.

¶ 15 Defendant was found guilty of first-degree murder and the unlawful possession of a

firearm by a street gang member. The jury also determined that defendant had personally discharged the firearm resulting in Herman's death. Defendant made an oral posttrial motion, arguing that the evidence was insufficient to prove his guilt beyond a reasonable doubt. The trial court denied the motion.

¶ 16 Defendant was sentenced to a 55-year term of imprisonment for the murder consecutive with a 5-year term of imprisonment for the unlawful firearm possession. Defendant's motion to reconsider his sentence was denied. Defendant timely appeals.

¶ 17

## II. ANALYSIS

¶ 18 On appeal, defendant argues that his trial counsel provided ineffective assistance and that his sentence was excessive. Because we determine the ineffective-assistance claim to be dispositive, we address it first.

¶ 19 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficient performance resulted in prejudice. *People v. Valdez*, 2016 IL 119860, ¶ 14 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Under the *Strickland* analysis, an attorney's performance is deficient where the defendant demonstrates that it fell below an objective standard of reasonableness. *Id.* In order to show prejudice, the defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* If the defendant is unable to establish either deficient performance or prejudice, the ineffective-assistance claim will fail. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 20 Defendant argues that his trial counsel's performance fell below an objective standard of reasonableness when he failed to object to the admission as substantive evidence of Camargo's written statement. In order to prevail on the deficient-performance element of our analysis, the

defendant must overcome the strong presumption that counsel's action or inaction was sound trial strategy. *People v. Jones*, 2012 IL App (2d) 110346, ¶ 82. The defendant can overcome the presumption that counsel's action or inaction was sound trial strategy if he or she can show that counsel's decision appears so irrational and unreasonable that no reasonably effective defense counsel facing like circumstances would adopt such a strategy. *Id.* Here, that means defendant must show that no reasonably effective defense counsel would have allowed the State to admit as substantive evidence Camargo's written statement without objection.

¶ 21 Defendant observes that Camargo did not claim to witness the shooting of Herman; likewise the State does not contend that Camargo was an eyewitness to the shooting. Defendant argues that Camargo did not have personal knowledge of the events defendant related to her, which renders the written statement hearsay. Defendant argues that, because the written statement is hearsay, it should be inadmissible absent an applicable exception. Defendant notes that, because the written statement was admitted as substantive evidence, and referring to the jury instructions, the written statement appears to have been admitted pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2012)). Defendant argues that section 115-10.1 does not apply because Camargo did not have the requisite personal knowledge of the event described in the written statement. Defendant concludes that, therefore, had his trial counsel objected, the objection would have been sustained and the written statement could not have come in as substantive evidence.

¶ 22 Section 115-10.1 provides:

“In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial,  
and

(b) the witness is subject to cross-examination concerning the statement,  
and

(c) the statement—

(1) was made under oath at a trial, hearing or other proceeding, or

(2) narrates, describes or explains an event or condition of which  
the witness had personal knowledge, and

(A) the statement is proved to have been written or signed  
by the witness, or

(B) the witness acknowledged under oath the making of the  
statement either in his testimony at the hearing or trial in which the  
admission into evidence of the prior statement is being sought, or  
at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately  
recorded by a tape recorder, videotape recording or any other  
similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.” 725 ILCS 5/115-10.1 (West 2012).

¶ 23 Illinois courts have long interpreted the requirement of the witness’s personal knowledge to mean that the witness has personal knowledge about the events that are the subject of the statement offered under section 115-10.1. *People v. Simpson*, 2015 IL 116512, ¶¶ 32-33. Here,



it is clear that Camargo did not witness the shooting of Herman. Accordingly, she did not have the requisite personal knowledge for her written statement to be admissible under section 115-10.1. Because her statement did not qualify for the exception offered by section 115-10.1, it was not admissible as substantive evidence. An objection, therefore, would have precluded the use of the written statement as substantive evidence. The State concedes this point, acknowledging that Camargo's "written statement did not meet the definition of personal knowledge under section 115-10.1." The State further concedes that it "should not have treated the written statement as substantive evidence throughout \*\*\* closing argument."

¶ 24 We now turn to whether trial counsel's failure to object to the written statement can be deemed to have been sound trial strategy. Defendant argues that there was no legitimate strategy that would allow him to be subject to the admission of an incriminating statement. This argument is further bolstered by noting that " 'a confession is the most powerful piece of evidence the State can offer, and its effect on a jury is incalculable.' " *Id.* ¶ 36 (quoting *People v. R.C.*, 108 Ill. 2d 349, 356 (1985)). We agree.

¶ 25 We note that *Simpson* presents an extremely congruent factual situation to that presented here. In *Simpson*, the defendant's trial counsel failed to object to a video recording of a witness who did not observe or participate in the offense. *Id.* ¶ 16. In the video, the witness recounted a conversation in which the defendant admitted his participation in the offense, and in which the defendant claimed that he took the lead in brutally beating the victim to death. *Id.* During the closing argument, the State emphasized the video, noting that the defendant made the admissions and that it corroborated numerous aspects of the offense presented through other witnesses. *Id.* ¶ 23.

¶ 26 Our supreme court concluded that there was “no strategic reason for defense counsel’s failure to object to [the witness’s] videotaped statement to police.” *Id.* ¶ 36. It noted the power of a confession on a jury, particularly since the confession highlighted the defendant’s brutality and his role as the leader in committing the offense. *Id.* The impact of the improperly admitted statement was further compounded when the State was allowed to argue the confession as substantive evidence during closing argument. *Id.* The court concluded that, for those reasons, defendant’s counsel’s representation fell below an objective standard of reasonableness. *Id.*

¶ 27 In this case, the same factors are in play as in *Simpson*. Here, the occurrence witnesses were evenly split in their assessments of who possessed and fired the murder weapon. The State used defendant’s confession to Camargo as substantive evidence both to break the tie by noting that defendant admitted to her that he was the shooter, and by contending that defendant’s account of the offense corroborated the two witnesses who testified that they saw defendant shoot Herman and controverted the accounts of the two witnesses who testified that they saw Murray with the gun immediately after hearing the gunshot. Because an objection would have prevented the use of the written statement as substantive evidence, we cannot say that there was any strategic purpose behind defense counsel’s failure to object. Therefore, we conclude that defense counsel’s representation fell below an objective standard of reasonableness.

¶ 28 The State argues that defense counsel pursued the reasonable strategy of attempting to undermine the credibility of the written statement as a whole by eliciting testimony that Camargo signed a written statement that the police had created and fed to her. We disagree. When an objection would have precluded the use of the confession contained in the written statement as substantive evidence, it was manifestly unreasonable to allow the statement to be used as

substantive evidence in the first place because there is no conceivable strategic benefit accruing from placing defendant's confession in front of the jury.

¶ 29 We next consider whether defendant was prejudiced by his counsel's failure to object. In order to establish that he or she was prejudiced, a defendant must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 29. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding. *Id.*

¶ 30 Defendant argues that he made the necessary showing of prejudice. Defendant contends that the evidence was closely balanced because the two sets of eyewitnesses placed the murder weapon in either his hand or in Murray's hand. Defendant notes that there was no physical evidence adduced that tied him to the murder weapon, and the State's witnesses were flawed due to Arevalo's difficulty in observing the offense, and in Cox's lack of credibility as a criminal who had already made a deal to testify against his confederates. In that context, Camargo's written statement becomes incredibly prejudicial because defendant admitted his role as the shooter, and he stated that he stashed the weapon with another Latin King gang member (the murder weapon was recovered from an individual who was a member of the Latin Kings). Defendant further notes that Camargo's written statement breaks the tie between the two sets of witnesses. We agree.

¶ 31 The State extensively discussed the written statement in its closing argument. The State used the statement to corroborate much of the evidence it had adduced during the trial. Most importantly, the State emphasized that the written statement represented defendant's confession, and it asked the jury to consider that confession during its deliberations.

¶ 32 Additionally, we agree that all of the witnesses had various flaws that undermined their credibility. Keeley and Gomez were both terrified when the shot was fired, and their credibility was impacted when their testimony about their actions immediately following the gunshot was controverted by some of the gas station's video surveillance evidence. For example, Keeley testified that he did not move his car, but the gas station's video surveillance evidence showed that he did drive his car forward. Likewise, Gomez testified that, when Herman was shot, she insisted that she saw a fountain of blood spew from the wound. The evidence, however, showed that there was little external blood associated with Herman's gunshot wound. Similarly, Arevalo could have had a difficult time in seeing around the obstacles in the cashier station inside of the store area of the gas station. Cox's testimony seems problematic because of his criminal history, his agreement as a cooperating witness in an unrelated case, and the fact that he maintained that he was trying to ignore defendant and Murray despite the fact that he testified that Murray displayed the handgun so Cox was aware of its presence. Thus, all of the witnesses had issues that impacted their credibility. Based on this, the substantive admission of Camargo's written statement could well have tipped the jury's consideration.

¶ 33 Based on these considerations, we hold that defendant has demonstrated that he was prejudiced as a result of his counsel's failure to object to the substantive use of Camargo's written statement. Accordingly, defendant has successfully made out his ineffective-assistance claim, and, as a result, we must reverse his conviction.<sup>1</sup>

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<sup>1</sup> We note that the State did not charge defendant under an accountability theory. Moreover, the State did not develop or argue an accountability theory during the trial. Instead, the State consistently maintained that defendant was the principal in the offense. Because there

¶ 34 The State argues that the jury would not have substantively considered the written statement because it was instructed to “consider a witness’s earlier inconsistent statement as evidence without \*\*\* limitation when the statement narrates, describes, or explains an event or condition the witness had personal knowledge of and the statement was accurately recorded by a tape recorder, videotape, [*sic*] recording, or similar electronic means of sound recording.” The State contends that, because the written statement was not electronically recorded, the jury would not have considered it as substantive evidence because the jury would be presumed to have followed the instructions. We disagree. First, the State extensively argued, without objection or corrective instruction, that the written statement was substantive evidence of defendant’s guilt. Second, the instruction represents a rather fine point of law that untrained individuals on a jury would be unlikely to appreciate, especially where the State had repeatedly and extensively urged the jury to consider the evidence as substantive evidence. Third, the State ignores that Camargo did not have personal knowledge of the events, and its argument that the written statement was substantive evidence would have undermined the jury’s supposed realization that it could have considered the written statement only as impeachment evidence and not substantive evidence. Finally, the instruction is actually erroneous and the jury should have been instructed in conformity with section 115-10.1(c)(2)(A) or (B). See 725 ILCS 5/115-10.1(c)(2)(A), (B) (West 2012) (a statement is admissible as substantive evidence where it is “proved to have been written or signed by the witness,” or where the statement was “acknowledged under oath” by the witness). The State cannot successfully maintain that the erroneous jury instruction actually cured the prejudice accruing to the erroneous introduction of the written statement as substantive

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is no theory before us that might otherwise preserve defendant’s conviction, we must reverse.

evidence. While three lefts may make a right, we cannot countenance the State's argument that two wrongs will make a right.

¶ 35 The State argues that the eyewitnesses' flaws do not result in a tossup requiring that we deem Camargo's written statement to be the tiebreaker. The State contends that Cox was the closest eyewitness to the incident, so his testimony ought to be deemed weightier than Keeley's and Gomez's testimony. Similarly, Arevalo was closer than Keeley and Gomez, and he was on a raised platform in the cashier's station, and this gave him a better vantage point to view the incident. The State argues that, in contrast, Keeley and Gomez testified that they heard the gunshot and only thereafter did they observe the African American male holding the gun.

¶ 36 While we agree that the State's characterization is not implausible, we note that, ultimately, it remains a characterization. Thus, in a very significant sense, it is supposition. The jury could just as easily decide to disbelieve Cox due to his criminal background, the fact that he was already a "snitch," and his likely axe to grind having witnessed the murder of his cousin's boyfriend and, presumably, his personal friend. Likewise, the jury could decide to discount Arevalo's testimony because he was busy running his cash register and assisting other patrons as the incident unfolded. While this, too, is supposition, we cannot endorse one strand of supposition over another. Rather, we believe that, because either version could be reasonably chosen, defendant has successfully demonstrated the existence of a probability sufficient to undermine confidence in the outcome of the proceeding. See *Lucious*, 2016 IL App (1st) 141127, ¶ 29.

¶ 37 The State further contends that the physical evidence also supported the testimony of Arevalo and Cox, so that the jury would have likely accepted it over that of Keeley and Gomez, even in the absence of Camargo's written statement. In particular, the State points to the fact

that an unexpended cartridge was found on the scene, and this was explained to be the result of pulling back the slide of the firearm to ensure that a round was chambered. The State supposes that, because defendant took the gun from Murray, only he would have pulled back the slide to make sure a round was chambered because he did not know the status of the gun, whereas Murray would have known whether a round was already chambered because he carried the gun to the gas station. We find this to be wholly speculative because, in the excitement of the confrontation, Murray could well have decided to make sure a round was chambered even though he was carrying the weapon. In our view, the jury could equally decide that defendant or Murray was the shooter based on the presence of the unfired cartridge found at the scene. Thus, we reject the State's physical evidence argument.

¶ 38 Summing up, we hold that defendant demonstrated that his trial counsel's performance was objectively unreasonable. Defendant also demonstrated prejudice because of the overwhelmingly prejudicial use of Camargo's statement as substantive evidence, which undermined our confidence in the result below. Accordingly, defendant successfully demonstrated that his trial counsel provided ineffective assistance. As a result, we reverse defendant's conviction and remand this cause for a new trial. In light of our reversal, we need not address defendant's excessive-sentencing contention.

¶ 39 Finally, we hold that, based on our review of the record, the evidence is sufficient to sustain both convictions. Accordingly, a remand for a new trial will not violate defendant's right to avoid double jeopardy. See *People v. Wheeler*, 226 Ill. 2d 92, 134 (2007).

¶ 40

### III. CONCLUSION

¶ 41 For the foregoing reasons, the judgment of the circuit court of Boone County is reversed and the cause remanded.

¶ 42 Reversed and remanded.