

2018 IL App (1st) 143713-U

No. 1-14-3713

March 21, 2018

Third Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 691
)	
MICHAEL MOORE,)	Honorable
)	Carol M. Howard,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant cannot establish prejudice, we reject his claims that (1) trial counsel was ineffective for failing to object to the hearsay testimony of a detective that an eyewitness said he saw defendant shoot the victim, and (2) the trial court's substantive use of the detective's testimony was plain error. The fines, fees, and costs order is corrected.

¶ 2 Following a bench trial, defendant Michael Moore was convicted of first degree murder and sentenced to 45 years in prison. On appeal, defendant contends that where the evidence did not overwhelmingly establish the shooter's identity, the hearsay testimony of a detective that one

particular eyewitness said he saw defendant commit the shooting should not have been admitted or relied upon by the trial court. Defendant argues that trial counsel was ineffective for not objecting to the detective's testimony and that the trial court's substantive use of the detective's testimony was plain error. Defendant further challenges the amount of imposed fines and fees.

¶ 3 For the reasons that follow, we affirm and order correction of the fines, fees, and costs order.

¶ 4 Defendant's conviction arose from the July 16, 2009, shooting death of Damion Roy. At trial, the State presented the eyewitness testimony of seven people: Dominique Brown, Deshon Roy, Terrell Rollins, Christopher Smith, Ivan Smith, Nathan Crockett, and Orlando Hampton. The State also presented testimony from several police officers and detectives and three assistant state's attorneys. The testimony of particular interest in the instant appeal is that of Ivan Smith and Chicago police detective Roberto Garcia. However, due to defendant's position that the evidence of the shooter's identity was not overwhelming, we will set forth the trial evidence in detail.

¶ 5 Damion Roy's mother, Lisa McGee, testified that in 2008, the year before her son was shot to death, he was shot in the left arm, and the bullet was not removed.

¶ 6 Dominique Brown testified that on the date in question, she lived in a house at the intersection of 21st Street and Karlov Avenue. About 5 a.m., she heard a commotion outside. Brown went to her bedroom window and then to her front door. From there, she could see a maroon van and Damion Roy and defendant, whom she identified in court, arguing. Nothing obstructed Brown's view and the area was lit by a street lamp. Brown saw Damion Roy's brother, Deshon Roy, pulling Damion Roy "back from the commotion," and then saw defendant

pull out a gun and start shooting in Damion Roy's direction. Brown stated that she heard about six gunshots, saw flashes, and saw Damion Roy get shot. Brown testified that she then saw Damion Roy lying on the ground in his brother's arms, and said she thought defendant left. Brown also stated that she saw defendant's black baseball hat in the middle of the street.

¶ 7 Brown testified that five days after the shooting, detectives came to her home and had her look at a "photo lineup." Brown told the detectives that she recognized defendant's picture and that he was the shooter. Four months later, she went to the police station and identified defendant in a lineup and again told the police that he was the shooter.

¶ 8 On cross-examination, Brown explained that she knew defendant, Damion Roy, and Deshon Roy from the neighborhood. She reiterated that when she heard the commotion outside her house, she looked out her bedroom window and then looked out the front door. She agreed that from her front door, she saw defendant pull out a gun and shoot Damion Roy about six times. When asked, "You viewed that from about how far away?" she answered, "Less than five feet away." Brown agreed that during the commotion, about 30 or 40 people were "milling about" in the general area of the intersection of 21st Street and Karlov Avenue. She also agreed that defendant was wearing a dark blue-black New York Yankees baseball cap, that she "saw it fall to the street from the shooter's head," and that at some point after the shooting began, she ran into her house. Brown testified that she saw one gun flash before running inside. Brown admitted that she did not speak with any police officers at the scene, and denied that she spoke with anyone about the shooting between the time of its occurrence and her conversation with the detectives five days later. Brown answered, "No" when defense counsel asked, "When you spoke

to Detective Jones [at your home], you never told him [defendant] was the guy who did the shooting did you?"

¶ 9 On redirect, Brown explained that when the detectives came to her house and showed her pictures, she identified defendant's photograph but did not provide the detectives with his name. She stated that she did not give his name at that time because she was scared.

¶ 10 Deshon Roy testified that on the morning in question, he and his brother, Damion Roy, were at the intersection of 21st Street and Karlov Avenue with a "bunch" of people, including Mikey Johnson, Christopher Smith, Nathan Crockett, Ivan Smith, and Marcus Green. While the group was standing around, talking, a maroon van pulled up. There was a streetlight on the corner and the sky was starting to lighten, so Deshon Roy was able to see that there were two women and three men inside the van. One of the men was defendant, whom Deshon Roy identified in court. Marcus Green and Damion Roy walked up to the van and started talking to the people inside. When Damion Roy began arguing with someone in the van, Deshon Roy pulled him away and told the driver to leave.

¶ 11 Deshon Roy testified that the van moved across the corner and pulled over. Defendant and two or three other men jumped out of the van and started to fight with Deshon Roy, Damion Roy, and Christopher Smith. After a few minutes, the fight stopped and Deshon Roy tried to pull Damion Roy away. Defendant ran down 21st Street and Deshon Roy lost sight of him. At some point, Deshon Roy saw defendant walking back toward them on 21st Street. When defendant got to the corner of 21st Street and Karlov Avenue, he started shooting. Deshon Roy testified that defendant fired five or six shots, and that Damion Roy was hit.

¶ 12 Eventually, police arrived on the scene and Damion Roy was taken to the hospital in an ambulance. Deshon Roy testified that he spoke with detectives at the hospital and told them that defendant, whom he knew as “Lil Mikey,” was the shooter. Four days later, Deshon Roy went to the police station and identified defendant in a photo array.

¶ 13 On cross-examination, Deshon Roy testified that he knew defendant from the neighborhood. He stated that he did not remember talking to police officers on the scene, telling them his name was LAVOR Roy, or telling them an “unknown male black” was the shooter. Deshon Roy stated that about 15 people were milling about in the intersection at the time of the shooting. He denied speaking with any of his friends or acquaintances about the shooting in the days following the incident, as he “was just trying to forget about it.” Deshon Roy acknowledged that he had been convicted of aggravated driving under the influence in 2008, and that he had another felony case pending.

¶ 14 On redirect, Deshon Roy testified that his middle name is LAVOR. On re-cross, he stated that he did not recall speaking with uniformed officers at the hospital.

¶ 15 Terrell Rollins testified that early in the morning of the date in question, he was on his aunt’s porch, four houses from the intersection of 21st Street and Karlov Avenue, watching a dice game. He saw defendant, whom he knew from the neighborhood, pull up in a black van, and Damion Roy, whom he knew as “Slug,” pull up behind him. Rollins saw Marcus Green walk up to the van and have a conversation with the people inside it. Damion Roy then walked up to the van and said something, after which the van pulled over and “they” got out. Rollins stated, “It was an argument, then a fight.” According to Rollins, seven or eight people were fighting, including Deshon Roy, Damion Roy, Ivan Smith, a man named Brian, and a man he knew as

“Shit.” After eight or nine minutes, the fight ended, and defendant left down the street. When asked what happened next, Rollins answered, “He came back down, they was arguing, everybody was outside. Then there was gunshots.” Rollins clarified that he heard gunshots, that he saw a gun in defendant’s hand, and that defendant’s gun was pointed at Damion Roy. Rollins also stated that he saw a gun in Marcus Green’s hand. However, defendant was the only person he saw fire a gun, and after the shots were fired, Damion Roy hit the ground. Rollins further testified that defendant had a “357 or something” revolver.

¶ 16 Rollins testified that on March 27, 2014, a date almost five years after the shooting, he spoke with detectives about what he saw and identified a photograph of defendant as the shooter. Rollins acknowledged that he was currently in custody for his third drug offense, but stated that when he spoke with the detectives, they told him he would get no consideration with respect to his current drug case.

¶ 17 On cross-examination, Rollins testified that about 19 or 20 people were “out there” in the intersection of 21st Street and Karlov Avenue on the morning in question. He stated that Marcus Green was pointing his gun at defendant. Rollins heard seven or eight shots, but reiterated that he only saw defendant shoot a gun. When asked whether Marcus Green shot his gun, Rollins answered, “I ran.” Rollins agreed that Marcus Green’s gun was a revolver, that he heard two groups of shots with a pause between them, and that he did not know whether Marcus Green discharged a weapon.

¶ 18 On redirect, Rollins acknowledged that he gave a statement to an assistant state’s attorney on March 28, 2014, and identified that written and signed statement in court. Rollins testified that he told the assistant state’s attorney that he never saw a weapon in Damion Roy’s hand, but

that he did see a weapon in Marcus Green's hand. Rollins also acknowledged that his cousin has a child with defendant.

¶ 19 Christopher Smith testified that on the morning in question, he was "kicking it" at the intersection of 21st Street and Karlov Avenue with a group of people that included Damion Roy, Deshon Roy, Ivan Smith, Nathan Crockett, and Marcus Green. A van pulled up, and its occupants started arguing with someone in Christopher Smith's group. Next, four or five people, including defendant, got out of the van and began fighting with Damion Roy. Christopher Smith testified that he ran over and joined in the fight. Shortly after the fight began, defendant took off running. Christopher Smith testified that somehow the situation "came to a seize" and he saw Deshon Roy trying to get Damion Roy to "walk off and everything." At this point, defendant came from the front of the van with a gun. Christopher Smith explained, "He had his gun, you know what I'm saying, he was hesitant, he was like it, was like he was hesitant at first, you know what I mean." Christopher Smith ducked and heard gunshots. When he got up, the van took off and Damion Roy was lying on the ground.

¶ 20 Christopher Smith testified that about three months later, the police brought him to the station. While there, he identified photographs of defendant.

¶ 21 On cross-examination, Christopher Smith agreed that he did not speak with the police about the shooting until they brought him to the station. He also agreed that on various occasions, he discussed the shooting with Deshon Roy, Michael Johnson, Nathan Crockett, and Marcus Green. Finally, he acknowledged that on the morning in question, "everybody" was drinking.

¶ 22 Ivan Smith, a cousin to Damion Roy and Deshon Roy, testified that on the morning in question, he was near the intersection of 21st Street and Karlov Avenue when a maroon van pulled up and a fight ensued. Specifically, Ivan Smith saw defendant fighting with Damion Roy and saw Christopher Smith helping Damion Roy fight. He also saw Deshon Roy “out there.” When the fight ended, defendant ran off and Ivan Smith left the area. Ivan Smith testified that he was a block away when he heard about six gunshots. He testified that he did not see anyone walking toward the intersection before the shooting and did not see anyone shoot Damion Roy.

¶ 23 Ivan Smith testified that five days after the shooting, he went to the police station and talked to detectives. When asked what he told the detectives about the shooting and the identity of the shooter, Ivan Smith answered as follows:

“I told them like this, I say like what everybody else said. I did not see the shooter I’m saying like everybody else says who saw -- I did not actually see the shooting that went on until everybody else say who shot my cousin.

They asked me after ’cause I said, they me did I they asked me I, would I be able to pick him out, I say yeah, but I actually did not see. Like everybody else told me who killed my cousin, that’s all I can tell you all. I didn’t actually see the shootings that went on, I wasn’t around.”

¶ 24 Ivan Smith testified that the detectives showed him some pictures, and that when he signed two of them, he told a detective, “I tell you all who they say who shot my cousin but I did not actually see the shooting go on.” The prosecutor and Ivan Smith engaged in the following exchange:

“Q. Did you tell Detectives [sic] Jones and Detective Garcia that [defendant] is the person you saw shoot and kill Damion Roy?

A. Yes.

Q. You told detectives that?

A. Yes.

Q. You told detectives that’s the person you saw shoot Damion Roy?

A. I say that’s the person they say shoot my cousin.

Q. Just so my question is clear to you. Your statement to Detectives Garcia and Jones was [defendant] is the person you saw shoot and kill Damion Roy, you saw, right?

A. Right. But I did not see. They asked me, they asked me, man, I show you a picture would you be able to point him out, I say yeah.

Q. You told detectives the person you signed the picture of, that was the shooter, right?

A. Yeah.”

¶ 25 On cross-examination, defense counsel asked, “Again when you looked at the photos you told the detectives that it was just what you heard *** of who did the shooting, correct?” Ivan Smith answered, “Yes.”

¶ 26 Nathan Crockett testified that in the early morning hours of the date in question, he was at the intersection of 21st Street and Karlov Avenue with Damion Roy, Deshon Roy, and Marcus Green. While Crockett was “up the street” talking with a woman, a maroon van pulled up to the corner. Crockett saw Damion Roy and Deshon Roy walk up to the van and heard loud talking.

When the loud talking stopped, the van moved to the other side of the street. It stopped, and about three men got out of it. The men walked up to Damion Roy, Deshon Roy, and Christopher Smith, and started fighting with them. After a few minutes, the fighting stopped and the van drove away. Shortly thereafter, two men came back wearing black hoodies “and got to shooting.” Crockett, who was about six or seven houses down the street, clarified that he saw “like the fire from the gun, that’s about it, I didn’t see, like, no faces.” Crockett fled to a nearby house. When he came back outside, he heard people crying and hollering, and saw Damion Roy lying on the ground.

¶ 27 Crockett testified that six days after the shooting, he spoke with detectives at the police station. He acknowledged that he told the detectives he was out on the street with Damion Roy, Deshon Roy, Marcus Green, Christopher Smith, Michael Johnson, and Ivan Smith, but stated in court that he did not remember all those men being present. Crockett testified that he knew defendant from the neighborhood and identified him in court, but stated that he did not remember telling the detectives that defendant was one of the van’s occupants, that defendant said he would “be back” after the fight, or that he saw defendant fire at Damion Roy. Crockett insisted that he was scared and pressured and told the detectives “whatever would, you know.”

¶ 28 Crockett testified that about a month after the shooting, he went back to the police station and met with a detective who showed him photographs. At that time, Crockett identified defendant’s picture and told the detective that defendant was the shooter. In court, Crockett explained that he was pressured to make that statement, and was scared and said “anything they, you know, told me.”

¶ 29 Crockett further testified that he returned to the police station about four months after the shooting. He acknowledged that on that visit, he told a detective and an assistant state's attorney that he saw defendant in the van and that he heard defendant and Marcus Green talking about a stolen car radio while defendant was in the van. He denied telling them that he heard someone yell, "He's got a gun," that he heard around five gunshots coming from where defendant was walking toward Damion Roy, that he saw defendant's arm pointed toward Damion Roy, or that he saw flashes coming from the end of defendant's hand. Crockett acknowledged seeing and signing a written statement on that day.

¶ 30 Crockett testified that five months after the shooting, he appeared before the grand jury. However, he could not remember what the substance of his grand jury testimony was, and stated that he told the grand jury "whatever came to my head." Finally, Crockett acknowledged that he has prior convictions for possession of a controlled substance and manufacture or delivery of a controlled substance.

¶ 31 On cross-examination, Crockett reiterated that he saw defendant "out there" on the morning in question, but insisted that he could not see who shot Damion Roy. Crockett explained that when he met with detectives a few days after the shooting, he talked and a detective took notes. He agreed that at that meeting, he related the rumors he had heard on the street identifying defendant as the shooter, and explained that he passed along the rumors because he was scared and just wanted to leave the police station. Later, when an assistant state's attorney presented him with a typed statement, he signed it without reading it or having anyone read it to him. Crockett further stated that when he testified before the grand jury, he was just "going with the program."

¶ 32 On redirect, Crockett agreed that the assistant state's attorney read the typed statement to him and allowed him to make changes to it. In court, Crockett reviewed the changes on the typed statement and acknowledged that he initialed them.

¶ 33 Orlando Hampton testified that he is defendant's step-brother and that he also has a brother named Marlando. He denied giving statements about the shooting to detectives or assistant state's attorneys. When shown a written statement, Hampton acknowledged that he signed his first name on every page of it, but denied that he was the person who signed his last name on the pages. However, Hampton acknowledged being shown photos by a detective and an assistant state's attorney, and in court, identified the photos he signed as being pictures of defendant and a man he knows as "Arsenio." On cross-examination, Hampton testified that he was not allowed to read the preprinted statement and it was not read to him before he signed it. He also testified that he was afraid he was going to be charged in the shooting and was willing to do whatever the police wanted him to do so long as he could leave the police station.

¶ 34 Chicago police officer Louis Boone, an evidence technician, testified that in the course of processing the crime scene, he photographed and collected several items, including a fired bullet, three bottles, a black White Sox baseball cap, a dark blue New York baseball cap, and two white t-shirts.

¶ 35 Chicago police officer Jennifer Oswald testified that about 5:10 a.m. on the day in question, she and her partner responded to a call of a person shot at the intersection of 21st Street and Karlov Avenue. When they arrived, other police officers were already on the scene, and the victim was unresponsive on the sidewalk. Shortly thereafter, the victim was taken from the scene in an ambulance. Oswald and her partner followed the ambulance to the hospital, where Oswald

was assigned to do the case report. At the hospital, she spoke with the victim's brother, a man she referred to in court as "I believe it was LAVOR ROY." She also spoke with a man whose name she listed on the case report as "Damion Smith."

¶ 36 On cross-examination, Oswald testified that when she spoke with "LAVOR ROY" at the hospital, he provided the victim's name and date of birth, related that the victim got into a physical altercation with four unknown black men in a burgundy minivan, that a man got out of the van and shot the victim numerous times, and that the shooter's name was unknown.

¶ 37 Chicago police detective Roberto Garcia testified that five days after the shooting, he was canvassing the area for witnesses when he spoke with Dominique Brown at her home. Garcia showed Brown a photo array. From that array, Brown immediately identified defendant as the person she saw shoot Damion Roy.

¶ 38 On that same day, Garcia spoke with Ivan Smith at the police station and showed him a photo array. In court, Garcia was shown an exhibit by the prosecutor and the following testimony ensued:

"Q. What do you recognize that exhibit to be?

A. This is the photo spread viewed by Ivan Smith on July 21, 2009, at 1743 hours in which he made a positive identification of [defendant] as the person who he saw shoot and killed Damion Roy on 16th of July, 2009.

Q. Let me make certain that I'm clear about this, this is the person -- Ivan Smith told you this is the person he saw shoot Damien Roy?

A. Yes.

Q. Did Ivan Smith tell you this is the person he heard from the neighborhood that shot Damion Roy, did he say that?

A. No, he did not.

Q. Did Ivan Smith tell you this is the person he heard from other people was the one who shot Damion Roy, did he tell you that?

[DEFENSE COUNSEL]: Objection, asked and answered.

THE COURT: Overruled.

A. No.

Q. Is that what he told you?

A. No, he said he was the shooter.

Q. Ivan Smith told you that he made these personal observations?

A. Yes.”

¶ 39 On cross-examination, Garcia explained that he searched out Ivan Smith to interview because Damion Roy’s mother had called the police, said Ivan Smith was her nephew, and indicated he had witnessed the murder of her son. Garcia went to the address she provided, located Ivan Smith, and then drove him to the police station after he agreed to go there for an interview.

¶ 40 Chicago police detective Kevin Bor testified that while he was at the hospital on the morning in question, Deshon Roy gave him the name of the perpetrator in the shooting. Four days later, he showed Deshon Roy some photographs. At that time, Deshon Roy identified defendant as the person who shot and killed Damion Roy.

¶ 41 Detective Bor testified that six days after the shooting, he interviewed Nathan Crockett at the police station. During the interview, Crockett said that he saw defendant inside the van. About three weeks later, Bor showed Crockett a photo array, and Crockett identified defendant as the person who shot and killed Damion Roy.

¶ 42 Detective Bor testified that about four months after the shooting, he met with Orlando Hampton at the police station. At that time, Hampton told Bor that on the day of the shooting, he was driving a red van with defendant, Arsenio Harden, and three women as the occupants; that at defendant's direction, he stopped at the intersection of 21st Street and Karlov Avenue; that defendant opened the van door and had an argument with Marcus Green regarding a stolen car radio; that when he parked nearby, Damion Roy approached and punched defendant, who was still in the van; that he, defendant, and Harden had a physical altercation with Damion Roy, Christopher Smith, and Nathan Crockett; that Harden removed his shirt and hat before the fight; that it appeared to him that both defendant and Harden were going to retrieve firearms; that defendant returned with a handgun and fired it six times at Damion Roy; that Damion Roy fell to the pavement; that Hampton drove away; and that when he later met up with defendant and asked him why he shot Damion Roy, defendant responded "it was either him or me."

¶ 43 Detective Bor testified that on November 29, 2009, Dominique Brown viewed a lineup and identified defendant as the person who shot and killed Damion Roy. He further testified that on March 27, 2014, Terrell Rollins viewed a photo array and identified defendant as the person who shot and killed Damion Roy. Rollins did not tell Bor that anyone other than defendant was armed with a firearm.

¶ 44 Finally, Bor testified that from the time he was assigned to the case until the present, he had never “threatened or promised or pressured or been aggressive with any of the witnesses in the case.”

¶ 45 On cross-examination, Bor acknowledged that Rollins ended up speaking with him about the shooting in 2014 because he had been arrested on a narcotics case and indicated he had information about the 2009 shooting. Bor also acknowledged that according to his report, Rollins identified defendant before Rollins was told he would not receive any promises for his statement.

¶ 46 Assistant State’s Attorney Jennifer Bagby testified that on November 29, 2009, she spoke with Orlando Hampton in the presence of Chicago police detective Kevin Bor. At that time, Hampton told her about Damion Roy’s shooting. Bagby reduced Hampton’s statement to writing in Hampton’s presence, read the statement to him, allowed him to make additions or corrections, and had him sign each page. The trial court admitted the statement into evidence. In the statement, Hampton related that in the early morning hours of the day of the shooting, he was driving around Chicago with defendant, a man Hampton knew as “Arsenio,” and three women in a red van that belonged to Hampton’s brother Marlando. Near the corner of 21st Street and Karlov Avenue, Hampton stopped the van at defendant’s direction. Defendant opened his door and engaged in an argument about a stolen car radio with a man Hampton knew as “Marty.” A man Hampton later learned was named Damion walked up to the van and swung at defendant. Defendant, Hampton, and Arsenio got out of the van and a fight ensued during which Arsenio took off his hat and shirt. The fight lasted less than five minutes. Defendant ran from the scene and a man Hampton later learned was Damion’s brother, Deshon, tried to get Damion to walk away from the intersection. At this point, defendant ran back toward the intersection carrying a

gun. Defendant pointed the gun at Damion and fired six shots. Hampton saw Damion fall down. Hampton then got in the van and drove off. Later, when he saw defendant, Hampton asked him why he retrieved the gun. Defendant answered, "It was either him or me." After that day, Hampton saw defendant three or four more times, and when they talked about "what happened," defendant "always said that he never should have done it."

¶ 47 Bagby further testified that on November 16, 2009, she interviewed Nathan Crockett in the presence of Detective Bor. Crockett told her about the shooting, and then Bagby reduced Crockett's statement to writing in his presence. Bagby printed out the statement, read it to Crockett, allowed him to make additions or corrections, which he initialed, and had Crockett sign each page. The trial court admitted the statement for impeachment purposes. In the statement, Crockett related, in relevant part, that he heard someone yell, "He's got a gun"; that he heard shots coming from where defendant was walking toward Damion Roy; and that he saw defendant's arm pointed out at Damion Roy and could see flashes coming from the end of defendant's hand.

¶ 48 Assistant State's Attorney Joseph Lattanzio testified that on December 18, 2009, he questioned Nathan Crockett before a grand jury. In court, Lattanzio identified the transcript of those grand jury proceedings, and the trial court admitted into evidence the portions that impeached Crockett's trial testimony. Lattanzio thereafter related that at the grand jury proceedings, Crockett testified to the following, among other things: that he overheard defendant and Marcus Green talking about a car radio; that defendant "came back" and started shooting Damion Roy; that he saw sparks coming from the gun; and that he voluntarily spoke with Detective Bor and was treated "good" by him.

¶ 49 Assistant State's Attorney John Henning testified that on March 14, 2014, he had a conversation with Terrell Rollins during which Rollins stated that he never saw any weapons in Damion Roy's or Marcus Green's hands.

¶ 50 The parties entered into a number of stipulations. They stipulated that (1) the medical examiner who conducted Damion Roy's autopsy would have testified that he recovered three new bullets from Damion Roy's body (from his right forearm, his abdomen, and his anterior left chest wall) and one old bullet from his left upper arm; that Damion Roy died of multiple gunshot wounds; and that the manner of death was homicide; (2) that an expert in firearms identification would have testified that the bullet recovered from the scene and the three new bullets recovered from Damion Roy's body were fired from the same firearm; that the old bullet recovered from Damion Roy's left arm was fired from a different firearm; and that all five bullets were "38 357-caliber"; (3) that an expert in forensic DNA analysis would have testified that defendant was excluded as the contributor of both DNA profiles extracted from the recovered White Sox hat, the mixture of DNA profiles extracted from the recovered Yankees hat, and the DNA profiles extracted from both recovered white t-shirts; (4) that a different expert in forensic DNA analysis would have testified that Marcus Green could not be excluded as a donor of DNA extracted from the recovered White Sox hat; that Arsenio Harden could not be excluded as a donor of the DNA extracted from one of the recovered white t-shirts; and that Ivan Smith could not be excluded as a donor of the DNA extracted from the other recovered white t-shirt; and (5) that an expert in fingerprint analysis would have testified that she found no fingerprints suitable for comparison on the three recovered bottles.

¶ 51 Defendant made a motion for a directed finding, which the trial court denied. Defendant did not testify or present any witnesses.

¶ 52 Following closing arguments, the trial court found defendant guilty on all counts. The court stated that it found Dominique Brown to be a credible and convincing witness, noting that photographs introduced at trial showed that her bedroom window and her front door provided good views of the spot where the shooting occurred. The court further observed that Brown's testimony was corroborated by Terrell Rollins. While acknowledging that Rollins did not come forward until four and a half years after the shooting, the court nevertheless found him credible. Next, the court noted that while Christopher Smith said he did not see the shooting, he saw defendant with a gun in his hand immediately before hearing shots being fired and ducking. The trial court then made the following statement:

“Orlando Hampton, Ivan Smith, and Nathan Crockett all or at some point gave statements indicating that the defendant was the shooter, but when they testified here in court, they all backed away from those statements in some way. If the State's case consisted solely of their statements, the Court would be less inclined to find that the State has met its burden beyond a reasonable doubt, but their statements, coupled with the statements of Ms. Dominique Brown, who the Court found very credible is enough, I believe, to establish proof beyond a reasonable doubt; and so because of that, I am finding the defendant guilty of all counts beyond a reasonable doubt.”

¶ 53 Defendant filed an initial and an amended motion for a new trial. Following argument, the trial court denied the posttrial motion, stating, “And my finding of guilty was based on Ms.

Brown’s testimony, Terrell Rollins’s testimony, and all the other evidence in the record that led this Court to render a finding of guilty.” The trial court subsequently merged the guilty findings into the count charging that defendant intentionally or knowingly shot and killed Damion Roy and personally discharged a firearm that proximately caused death, and sentenced defendant to 20 years for murder, with a firearm enhancement of 25 years, for a total sentence of 45 years in prison.

¶ 54 This appeal followed.

¶ 55 On appeal, defendant contends that the hearsay testimony of Detective Garcia that Ivan Smith said he saw defendant commit the shooting should not have been admitted or relied upon by the trial court, as it does not fit the statutory exception to the hearsay rule for prior inconsistent statements set forth in section 115-10.1 of the Code of Criminal Procedure (Code). 725 ILCS 5/115-10.1 (West 2014). Defendant acknowledges that he did not object to the testimony at trial or to the trial court’s reference to Ivan Smith’s statement when it pronounced its guilty finding. Nevertheless, defendant argues that we may reach the issue on appeal because his trial counsel was ineffective for not objecting to the detective’s testimony and because the trial court’s substantive use of the detective’s testimony was first-prong plain error. He asserts that where the evidence at trial did not overwhelmingly establish the shooter’s identity, the errors made by trial counsel and the trial court prejudiced him, as Ivan Smith’s hearsay statement “added critical heft to the State’s case.”

¶ 56 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In addition, a defendant must establish prejudice by

showing “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. *Id.* If a case may be disposed of on one *Strickland* prong, this court need not review the other. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008). The plain error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005). A defendant alleging first prong plain error must show that he was prejudiced; that is, that the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him, or that the guilty finding may have resulted from the error and not the evidence properly adduced at trial. *People v. White*, 2011 IL 109689, ¶ 133.

¶ 57 In the instant case, we need not determine whether Detective Garcia’s testimony constitutes admissible hearsay under section 115-10.1(c)(2)(B) of the Code, whether counsel’s failure to object to the testimony was unreasonable, or whether the trial court committed a clear or obvious error in mentioning Ivan Smith’s statement. This is because defendant cannot establish prejudice. See *Strickland*, 466 U.S. at 697; *White*, 2011 IL 109689, ¶ 133. Even without Detective Garcia’s testimony that Ivan Smith identified defendant as the shooter, or indeed, even without any testimony or statements from Ivan Smith, the evidence against defendant was overwhelming.

¶ 58 At trial, Dominique Brown testified that she saw defendant pull out a gun and shoot Damion Roy about six times. Deshon Roy testified that he saw defendant fire five or six shots, and that Damion Roy was hit. Terrell Rollins testified that he saw a gun in defendant’s hand, that

defendant pointed the gun at Damion Roy, that he heard gunshots, and that after the shots were fired, Damion Roy fell to the ground. Christopher Smith testified that he saw defendant with a gun and ducked down, and that after he heard gunshots, he got up and saw Damion Roy lying on the ground. Nathan Crockett acknowledged telling a detective a month after the incident that defendant was the shooter. And finally, Orlando Hampton acknowledged signing a written statement in which he said he saw defendant shoot at Damion Roy six times. Having carefully reviewed all the evidence presented at trial, we find that the evidence of defendant's guilt -- even absent Ivan Smith's statement -- was overwhelming.

¶ 59 A defendant claiming ineffective assistance of counsel based on his trial counsel's failure to object to hearsay testimony cannot establish the prejudice prong of the *Strickland* test if the admissible evidence against the defendant is overwhelming or the inadmissible hearsay evidence is cumulative of admissible evidence. See, e.g., *People v. Theis*, 2011 IL App (2d) 091080, ¶¶ 41, 44; *People v. Alexander*, 354 Ill.App.3d 832, 846-47 (2004). Similarly, if hearsay identification testimony is cumulative or is supported by a positive identification and other corroborating circumstances, it constitutes harmless error, not plain error. See, e.g., *People v. Johnson*, 199 Ill. App. 3d 577, 583-84 (1990). Here, where overwhelming admissible evidence established defendant's identity as Damion Roy's shooter, and where Ivan Smith's identification of him as the shooter was cumulative, we cannot find defendant was prejudiced by his trial counsel's failure to object to Detective Garcia's hearsay testimony regarding Ivan Smith's statement, or by the trial court's reference to that statement when announcing its finding of guilt.

¶ 60 We are well aware of the imperfections in the State's case that defendant has identified on appeal, including: that no forensic evidence linked defendant to the scene of the shooting; that

defendant's DNA was not found on the Yankees baseball hat Dominique Brown said she saw fall from the shooter's head; that Brown estimated the shooting occurred less than five feet from her front door, when other evidence indicated it took place across the street from her residence; that Brown did not initially give the police defendant's name, even though she knew it; that Rollins only "came forward" because he had picked up a drug case and was the only witness to testify that Damion Roy pulled up behind the van at the start of the incident; that Christopher Smith did not see the shooting itself; that Nathan Crockett testified he identified defendant as the shooter because he was pressured to do so; that Orlando Hampton testified he signed a written statement identifying defendant as the shooter because he was afraid and wanted to leave the police station; and that Deshon Roy gave his middle name, rather than his first name, to an officer he spoke with at the hospital. However, we disagree with defendant's conclusion that these imperfections are "glaring deficiencies" that prevent a finding that the evidence of defendant's guilt was overwhelming, or that absent Ivan Smith's hearsay statement, the evidentiary balance would have shifted in favor of innocence. Evidence may be deemed overwhelming even in the absence of physical evidence or a confession, or where a defendant questions the credibility of witnesses. See *People v. Weston*, 2011 IL App (1st) 092432, ¶¶ 38, 42. Defendant's argument fails.

¶ 61 Defendant's second contention on appeal is that the total amount of fines, fees, and costs assessed against him should be reduced by \$72. He acknowledges that he did not challenge his fines and fees in a postsentencing motion. Nevertheless, defendant argues that we may reach his arguments regarding fines and fees under the doctrine of plain error or, in the alternative, that trial counsel was ineffective for failing to preserve the issues.

¶ 62 We reject defendant’s argument that we may address his challenge to the imposition of fines and fees under the plain error doctrine. *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 15; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9; *contra People v. Cox*, 2017 IL App (1st) 151536, ¶ 102 (holding that the improper imposition of fines and fees affects “substantial rights” and, therefore, may be reviewed under the second prong of the plain error doctrine). Similarly, we reject defendant’s attempt to avoid forfeiture by alleging ineffective assistance of counsel. *People v. Rios-Salazar*, 2017 IL App (3d) 150524, ¶ 8 (an attorney’s failure to object to fines and fees is not an error of constitutional magnitude that will support a claim of ineffectiveness). However, because the State does not argue defendant’s forfeiture, we will address the merits of defendant’s challenge to the imposition of various assessments. *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. The propriety of the fines and fees imposed by the trial court is reviewed *de novo*. *People v. Green*, 2016 IL App (1st) 134011, ¶ 44.

¶ 63 First, defendant argues, and the State concedes, that he is entitled to \$5-per-day presentence custody credit against the \$50 Court System fee (55 ILCS 5/5-1101(c) (West 2014)). We accept the State’s concession and hold that this assessment is a fine against which defendant can receive \$5-per-day credit for the time he spent in presentence custody. See *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30. Defendant was in presentence custody for 1,809 days, which, in theory, entitles him to \$9,045 worth of credit to offset his fines. See 725 ILCS 5/110-14(a) (West 2014). The fines, fees, and costs order reflects that defendant has already had \$50 worth of fines offset. His remaining credit completely satisfies the \$50 Court System fee. We direct the clerk of the circuit court to correct the fines, fees, and costs order to reflect this additional \$50 credit.

¶ 64 Second, defendant argues that this court should vacate the \$15 State Police Operations Fee (705 ILCS 105/27.3a(1.5) (West 2014)), because it is a “fine” that took effect on July 13, 2010, almost a year after the date of the shooting, and fines cannot be applied retroactively under the ban on *ex post facto* legislation. The State concedes that the assessment is a fine that did not become effective until after the shooting occurred. We agree with the parties and vacate the charge. See *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 (citing *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 13). Accordingly, we direct the clerk of the circuit court to correct the fines, fees, and costs order to reflect that this assessment is vacated.

¶ 65 Third, defendant argues, and the State correctly concedes, that the \$5 Electronic Citation Fee (705 ILCS 105/27.3e (West 2014)) must be vacated. The \$5 Electronic Citation Fee does not apply to felonies. *Moore*, 2014 IL App (1st) 112592-B, ¶ 46. Here, defendant was convicted of a felony. Therefore, we vacate this assessment and direct the clerk of the circuit court to correct the fines, fees, and costs order accordingly.

¶ 66 Finally, defendant argues that the \$2 Public Defender Records Automation Fee (55 ILCS 5/3-4012 (West 2014)), must be vacated because he was represented by private counsel at trial, not the public defender. While the State maintains that the public defender did represent defendant, the record indicates otherwise. Because defendant was represented by private counsel during trial, the \$2 Public Defender Records Automation Fee is inapplicable. *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 30. We vacate this assessment and direct the clerk of the circuit court to correct the fines, fees, and costs order accordingly.

¶ 67 For the reasons explained above, we vacate the \$15 State Police Operations Fee, the \$5 Electronic Citation Fee, and the \$2 Public Defender Records Automation Fee, and direct the

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clerk of the circuit court to correct the fines, fees, and costs order to reflect that defendant is entitled to \$50 worth of \$5-per-day presentence custody credit against the \$50 Court System fee.

The total amount of fines, fees, and costs is reduced from \$679 to \$607.

¶ 68 Affirmed; fines, fees, and costs order corrected.