FOURTH DIVISION
October 18, 2018

No. 1-15-3210



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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Cook County |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 11 CR 4960 |
| SERGIO RODRIGUEZ, | ) | |
| Defendant-Appellant. | ) | Honorable Thomas V. Gainer, Jr., Judge Presiding. |

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JUSTICE REYES delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Gordon dissented.

**ORDER**

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where the trial court properly limited the scope of cross-examination of the State's witness and defense counsel was not ineffective for abandoning a defense used at defendant's previous trial or failing to impeach a witness regarding a prior inconsistent statement. Defendant's mittimus is corrected to reflect seven days of additional presentence custody.

¶ 2 Following a jury trial, defendant Sergio Rodriguez was found guilty of aggravated battery

with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)). The trial court merged the counts and sentenced defendant to seven years' imprisonment in the Illinois Department of Corrections with 354 days of presentence credit. On appeal, defendant contends 1) the trial court erred when it prohibited him from cross-examining the State's key witness regarding her bias against him, 2) his counsel was ineffective for abandoning certain defenses on retrial and failing to impeach a witness regarding a prior inconsistent statement, and 3) he is entitled to seven days of additional presentence credit for time spent in jail prior to being released on bail. For the reasons that follow, we affirm and correct the mittimus to reflect seven days of additional presentence credit.

¶ 3 BACKGROUND

¶ 4 On February 11, 2011, defendant was arrested in connection with a shooting that occurred in front of his home. Defendant was charged by information with six counts of attempted murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), three counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)), two counts of aggravated battery for great bodily harm and aggravated battery in a public place (720 ILCS 5/12-4(a), 12-4(b)(8) (West 2010)), and one count of possessing cannabis with the intent to deliver (720 ILCS 550/5(c) (West 2010)).

¶ 5 On July 29, 2013, a jury trial commenced solely on four charges: two counts of attempted murder, one count of aggravated battery with a firearm, and one count of aggravated discharge of a firearm. The jury, however, could not reach a verdict and the trial court declared a mistrial.[1] On October 16, 2014, the case was retried before another jury on the same four counts.

¶ 6 Prior to the second trial, the State requested a motion *in limine* prohibiting defense

[1] For the sake of brevity, the facts of the first trial will be recounted where relevant in the analysis section of this order.

counsel from eliciting any testimony relating to a shooting incident that occurred on May 25, 2014, at the residence of Sherese Holland (Holland), the State's key witness and defendant's next-door neighbor. The State explained that defendant was the victim in that case of an attempted murder allegedly committed by Holland's son. In response, defense counsel argued that the May 25, 2014, attempted murder of defendant was evidence of Holland's bias and motivation to lie and was particularly relevant where she was the sole eye witness. In reply, the State argued that defendant's bias evidence was too remote and speculative as the attempted murder of defendant occurred three years after the incident for which he was currently being charged. The State also represented that Holland testified in the first trial and that her testimony would be the same as it was at the first trial.

¶ 7 In ruling on the motion *in limine*, the trial court focused on the fact that Holland had previously testified. With that in mind, the trial court initially determined that so long as Holland's testimony was identical to her testimony in the first trial, defense counsel was prohibited from cross-examining her regarding the attempted murder of defendant by her son.

¶ 8 Defense counsel requested the trial court reconsider this ruling and suggested to the trial court that had the attempted murder of defendant occurred before the first trial, that the trial court would likely have allowed him to cross-examine Holland to that effect. While the trial court agreed with defense counsel's statement, the court observed that that was merely a hypothetical and the fact of the matter was that Holland had previously testified in this matter.

¶ 9 Ultimately, however, the trial court did reconsider its ruling and allowed defense counsel to cross-examine Holland regarding the attempted murder of defendant, but indicated that if counsel did so, the State would be permitted to "walk her through her entire previous testimony showing that it's consistent with her testimony today[.]" The matter then proceeded to trial

where the following evidence was adduced.

¶ 10 Salvador Lagunas, one of the victims, testified as follows. On the evening February 10, 2011, he was at his home when Everardo Vera came over to visit. They left Lagunas' home together to visit Lagunas' cousin, Junior, in Vera's blue Astro van. The two stayed at Junior's house for two hours and then drove to a gas station located at 83rd and Cicero. As they were about to enter the gas station, he noticed two men inside another van making insulting comments towards them. Lagunas and Vera decided to follow the other van to determine why they were so angry. The van went east towards Pulaski and then made a left on Kilpatrick. The van was driving fast and swerving. During their pursuit, Vera hit the rear end of the other van two or three times. Vera continued to follow the van to South Scottsdale Avenue when they came upon a traffic circle in the middle of a neighborhood. The van they were following pulled over half way through the traffic circle. Vera drove past and went around the circle. As they passed the 8200 block of South Scottsdale Avenue, he noticed two individuals coming out of a driveway with handguns. They were situated on the left side of the street, wearing all black. Lagunas noticed they were young, short, and male. As Vera drove past, the two individuals in the driveway commenced shooting at the van. Lagunas knew both individuals each had a handgun because he could see flashes of light coming from the tip of both handguns. Lagunas ducked down in the vehicle and heard six to eight gunshots. As Vera drove away, he informed Lagunas that his foot was hurting and he asked Lagunas to drive. Vera pulled over and Lagunas drove Vera to Holy Cross Hospital.

¶ 11 While at the hospital, Lagunas spoke with Sergeant Brian Spreyne (Spreyne) and informed him what he had observed. He accompanied Sergeant Spreyne back to the scene of the shooting in Sergeant Spreyne's police vehicle.

¶ 12 On cross-examination, Lagunas testified that the men shooting at the van were wearing black hoodies and had the hoods up over their heads. Lagunas did not remember informing a detective that he observed three male Hispanics in the driveway, two of whom had weapons and were shooting live rounds at him. Lagunas also clarified that he viewed the individuals for less than two seconds. Lagnuas did not identify defendant as one of the shooters.

¶ 13 Vera testified as follows. Just before 11:30 p.m. on February 10, 2011, he and Lagunas went to the gas station. As they approached the gas station, a minivan pulled up next to them. The windows of the minivan were up, but the two people inside were yelling at them. Vera was offended and decided to follow them through the neighborhood. As he pursued the minivan, he struck the minivan one time. As the two vans approached a traffic circle near West 82nd Street and South Scottsdale Avenue, Vera lost sight of the minivan. Vera then passed the minivan and continued back around the traffic circle. As he went through the circle he observed two men standing in a driveway outside of a house. When Vera drove past the two men, they began shooting from the sidewalk into the left side of the vehicle. Vera heard seven or eight shots but did not observe the shooting because he was ducking. Vera drove away, but eventually came to a stop because he felt a pain in his foot. Vera then requested Lagunas drive him to the hospital.

¶ 14 While he was at the hospital Vera was questioned by a detective. He was scared due to his immigration status and provided the detective with a fake name.

¶ 15 On cross-examination, Vera testified that the individuals who shot at him were two male Hispanics wearing black hoodies with the hoods up over their heads. He further testified that he did not view their faces. Vera also testified that he did not remember informing the detective that he observed three male Hispanics in the driveway.

¶ 16 Sergeant Spreyne testified that on February 11, 2011, at 12:30 a.m. he was assigned to

investigate a person who was being treated at Holy Cross Hospital for a gunshot wound. He arrived shortly thereafter and spoke to Vera, who provided him with a different name at that time. According to Sergeant Spreyne, Vera was not particularly cooperative. Sergeant Spreyne then spoke to Lagunas in the waiting room. Lagunas could not provide an address where the shooting occurred, but agreed to direct him to the location where it occurred. When he arrived at the 8200 block of South Scottsdale Avenue, some officers were already on the scene. Sergeant Spreyne observed five shell casings on the ground at the end of the driveway in close proximity to one another. Some of those casings extended out onto the sidewalk.

¶ 17 Sergeant Spreyne then spoke with Holland, the individual who had called 911 regarding the shooting. Sergeant Spreyne knew Holland as a fellow police officer. Holland described what she had observed and demonstrated where she was when she looked out the window towards the driveway. Sergeant Spreyne testified that when he looked out the window there was a white fence running between the two homes. It extended from the edge of the sidewalk up towards the house. From that vantage point he was able to see the officers who were investigating the area where the shooting occurred, but he could not view the ground. According to Sergeant Spreyne, individuals standing at the edge of the driveway could be viewed from the waist up from the front window of Holland's house.

¶ 18 Sergeant Spreyne then went next door to speak with defendant, a potential suspect. Family members of defendant informed Sergeant Spreyne that defendant was not home. The family members agreed to call defendant and Sergeant Spreyne spoke with him and defendant agreed to come back to the residence. When defendant arrived home he was wearing a dark jacket and dark-colored jeans. Sergeant Spreyne then placed defendant into custody.

¶ 19 Outside the presence of the jury, and before Holland was to testify, the parties again

addressed the State's motion *in limine* seeking to prohibit defense counsel from questioning Holland about the attempted murder of defendant during cross-examination. The trial court ruled as follows:

> "So to the extent this is consistent with my earlier ruling, here is where I finally come down. You may cross-examine Officer Holland about whether or not there is a case pending against her son that's being prosecuted by the Cook County State's Attorney's Office. You may not cross-examine her concerning the fact that this defendant is the alleged victim in that crime. And if she says, yes, that's the case and you stop there, they can then inquire of her as to whether or not any promises have been made of leniency, any dispositions have been promised to her son in return for her testimony in this case. And they may also to a very limited degree—not every word in question that was used in the trial—rehabilitate her by asking her isn't it a fact that you testified in a prior proceeding consistent with your testimony today assuming she does, of course. All right. So that's how we are going to handle this."

¶ 20 At defense counsel's request, the trial court clarified its ruling:

> "All right. So you have an absolute right to establish that there is a case pending and that it's being prosecuted by these people, okay, but you don't have a right to mislead the jury into thinking that she, implying, even though they say there are no promises, that she doesn't have some expectation of leniency by her cooperation here. By them establishing that she testified absolutely consistent with what she testified here today in a prior proceeding that occurred three years before the case that was pending, and the fact that the shooting is alleged to have been Holland versus Sergio Rodriguez is of no moment to what is in her mind. What is the implication, that her son was trying to kill

Sergio Rodriguez to keep Officer Holland from having to testify again in this case? There's no connection. It's remote, it's uncertain, and I'm not going to allow it."

¶ 21 Holland, an officer for the City of Chicago Police Department, testified that on February 11, 2011, she was defendant's next-door neighbor. Their houses were separated by a six-foot tall white fence that extended from Holland's house to the sidewalk. Holland testified that on February 11, 2011, at 12:30 a.m. she was in her computer room when she heard gunshots. Holland jumped up, grabbed her phone, and dialed 911. While on the phone, Holland then went to her front living room window and peered out. According to Holland, her living room window consists of three panes of glass. The first floor of her home is also elevated, and consequently is not at ground level. Holland looked in the direction of defendant's house. Holland testified that she "was seeing [defendant] running down the driveway with his arm extended and I can see the flash from the gun." Holland further testified she could observe defendant's head and shoulders from her vantage point when he started running down the driveway. After defendant ran to the front of the driveway, Holland could view him from the "chest on up." Holland testified that as defendant ran down the driveway with the handgun he fired "anywhere from 10 to 12" shots. When 911 picked up, the shooting had ceased and defendant was "running back" in between the automobiles parked in his driveway.

¶ 22 Holland also testified that there was a second shooter who was already standing at the end of the driveway when she came to the window. According to Holland, the second individual was also shooting a weapon because she was able to view flashes coming from the muzzle. Holland observed that the two shooters were aiming at a dark-colored van that was heading southbound on South Scottsdale Avenue.

¶ 23 Holland further testified that the shooting ended after three or five seconds. When the

second shooter finished firing his weapon, he entered a small SUV and drove away. Defendant ran back towards his home with his weapon. Holland did not view defendant enter his home, but did hear the door opening. According to Holland, defendant "came right back out" running, and "ducking down by the car that was parked." When asked if defendant had anything in his hand at that point, Holland responded, "Yes. He was putting it in the car that was parked in the driveway." Holland ceased looking out of her window after that because she knew the police were on their way.

¶ 24 Holland's conversation with the 911 dispatcher was then published to the jury without objection, and was as follows:

"Dispatcher: Chicago emergency ***.

Holland: 8201 South Scottsdale is outside shooting ma'am. I'm a Chicago...

Dispatcher: How many shots did you hear?

Holland: Uh 10 of them, I'm a Chicago police officer. Yep.

Dispatcher: What's your star number?

Holland: My star number is *** they're getting away, it's a gray look like a oh my god its gray I can't see it.

Dispatcher: Is it a two or four door car?

Holland: It's a like a uh Blazer thing. The neighbor is running in the house right. . .

Dispatcher: (Inaudible)

Holland: It's a gray, silver. The neighbor is running in the house with his gun right now. 8201 South Scottsdale.

Dispatcher: Alright, I'll send (inaudible, dogs barking).

Holland: Thank you."

¶ 25 On cross-examination, Holland testified that she first heard the gunshots when she was in her computer room, and that the shots rang out within a matter of seconds. She immediately picked up the phone to call 911 and as she did she walked through a hallway, her kitchen, and into the living room. According to Holland, at the point she approached the living room window, the gunshots had ceased. Holland then pushed aside her vertical blinds to see out of the living room window. Holland testified that she has been a police officer for 16 years and was experienced with calling dispatch. She further testified that she was trained to provide as much detail as possible when relaying information to dispatch. Holland admitted she did not inform dispatch of defendant's name or say that she observed him firing a weapon. She also acknowledged that she did not inform the 911 dispatcher that there were two shooters.

¶ 26 Holland further testified on cross-examination that the shooters' backs were facing her as she looked out the window and that the shooters were in black clothing, but their hoods were down. While it was dark outside, there was a streetlight located north of the driveway in question which illuminated the area, but that it was located behind where the shooters were located. Holland also testified that she observed defendant run back into his house with a handgun, but did not see him with a handgun when he exited his house. While she testified that she did not view a weapon when he was riffling around in one of the vehicles in his driveway, she insisted that he "put something in that vehicle." Although, after additional questioning, Holland testified she did not view an object in defendant's hands when he came out of the house and stated, "I don't know if he put it in the car or (Inaudible). I don't know." Holland also clarified that she did not observe defendant leave his residence after the shooting.

¶ 27 Further on cross-examination, Holland testified that this was not the first time she has

been in court with defendant. In December 2009, she testified in a matter against defendant wherein she was the complaining witness and defendant was charged with battery against her. According to Holland, she testified in the 2009 case, and at the close of trial, defendant was found not guilty.

¶ 28 On redirect, Holland testified that the 2009 battery case arose out of an incident wherein defendant "crossed my yard to fight my son and I broke the fight up and [defendant] sucker punched me in the face. That's why I put the fence up there." When asked by the State's attorney whether she was motivated to testify in this case based on her anger from the 2009 case, Holland replied in the negative and stated she was not angry.

¶ 29 The State rested and defendant did not put on any evidence. After closing arguments and jury instructions, the jury deliberated and ultimately found defendant not guilty of both counts of attempted murder, but found defendant guilty of aggravated battery with a firearm and aggravated discharge of a firearm. Defendant filed a motion for a new trial arguing that the trial court erred in prohibiting him from cross-examining Holland about her son's pending attempted murder case. The trial court denied the motion. Thereafter, the matter proceeded to a sentencing hearing where the trial court merged the two counts and sentenced defendant to seven years' imprisonment in the Illinois Department of Corrections with 354 days of presentence credit. This appeal follows.

¶ 30 ANALYSIS

¶ 31 On appeal, defendant contends (1) the trial court erred in prohibiting him from cross-examining Holland regarding her son's pending attempted murder case, (2) defense counsel was ineffective for abandoning a theory of defense on retrial and for failing to impeach a witness regarding a prior inconsistent statement, and (3) he is entitled to seven days of additional

presentence credit for time spent in jail prior to being released on bail. We address each issue in turn.

¶ 32 Cross-Examination

¶ 33 Defendant argues that he was denied his constitutional right to cross-examine a witness when the trial judge prevented him from eliciting evidence of Holland's bias or motive. Defendant maintains that Holland was biased and had a motive to lie because her son had been charged with attempted first degree murder for trying to kill him. Defendant maintains that had the jury known of this fact, it would have undermined Holland's credibility and the jury may have come to a different conclusion regarding her motivation to testify.

¶ 34 A defendant has a federal and state constitutional right to confront witnesses against him. U.S. Const., amends. VI, XIV; Ill. Const.1970, art I, § 8. This right includes cross-examining witnesses to demonstrate any interest, bias, prejudice or motive to testify falsely. *People v. Klepper*, 234 Ill. 2d 337, 355 (2009). It is well established that cross-examination to demonstrate that a witness might be vulnerable to pressure, whether real or imagined, from the State regarding a pending charge is a matter of right. *People v. Nutall*, 312 Ill. App. 3d 620, 627 (2000). In addition, the exposure of hostile motivation of a witness in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Such cross-examination may concern any matter that goes to explain, modify, discredit or destroy the testimony of the witness. *People v. Aughinbaugh*, 36 Ill. 2d 320, 325-26 (1967). The jury is entitled to the details of the theory of defense so it can make an informed judgment, and thus the right to cross-examine is satisfied when counsel is permitted to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318.

"[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis in original.) *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

¶ 35 While the right to cross-examination is not subject to the court's discretion, the scope of such an examination does rest within the discretion of the trial court. *Nutall*, 312 Ill. App. 3d at 627. The trial court's discretion to restrict the scope of cross-examination only comes into play, however, after the court has permitted, as a matter of right, sufficient cross-examination to satisfy the constitutional guarantee. *People v. Edwards*, 218 Ill. App. 3d 184, 194 (1991). Discretion to impose reasonable limits on cross-examination assuages concerns about harassment, prejudice, jury confusion, witness safety or repetitive and irrelevant questioning, but this discretionary authority arises only after the court has permitted sufficient cross-examination to satisfy the Confrontation Clause. *People v. Blue*, 205 Ill. 2d 1, 13 (2001); see *People v. Averhart*, 311 Ill. App. 3d 492, 499 (1999) ("We need not review the discretionary authority of the trial court to restrict cross-examination, [where] defendant's constitutional right to witness confrontation has not been satisfied.").

¶ 36 To determine the constitutional sufficiency of cross-examination, this court should look to not what a defendant had been prohibited from doing, but to what he had been allowed to do. *Edwards*, 218 Ill. App. 3d at 194; *Averhart*, 311 Ill. App. 3d at 499. "If the entire record indicates that the jury was made aware of adequate factors concerning relevant areas of impeachment of a witness, then no constitutional question arises merely because defendant was prohibited from pursuing another line of questioning." *Edwards*, 218 Ill. App. 3d at 194. Where there is no constitutional question, the trial court's limitation of cross-examination as it relates to bias is subject to review under the abuse of discretion standard. *People v. Wilson*, 2012 IL App

(1st) 092910, ¶¶ 23-24.

¶ 37 We first address the parties' differing interpretations of the trial court's ruling on this issue. The State maintains that the trial court "conditionally denied" defendant's request to cross-examine Holland regarding her son's case. According to the State, the trial court held that if Holland's testimony was embellished or enhanced from the first trial to the second trial, it would allow the defense to cross-examine her regarding the charges against her son to demonstrate possible bias. In contrast, defendant argues that, after considering this issue multiple times, the trial court ultimately ruled that defense counsel was allowed to question Holland about the pending criminal case against her son, but that he was prohibited from introducing the fact that defendant was the victim in that case.

¶ 38 The record demonstrates that the trial court did ultimately rule as defendant argues. The State obtained the facts it argues from the trial court's pronouncements during the hearing on defendant's motion for a new trial. In ruling on the motion for a new trial, the trial court stated its ruling on the motion *in limine* was that defendant was "not allowed to elicit testimony that there was a pending case against Holland's son for shooting the defendant in the vicinity where the case occurred" and that he "held out the possibility that if she changed her testimony or tried to embellish or tried to do something more than what was done at the time of the first trial I would reconsider and I may allow [defense counsel] to cross-examine her about the case that was pending against her son." The record, however, demonstrates that prior to Holland taking the stand, the trial court ruled that it would allow defendant to cross-examine Holland about the fact of her son's pending case, but it would not allow defendant to elicit the identity of the victim in that case.

¶ 39 Having established the trial court's ruling, we now turn to consider defendant's argument

on appeal that the scope of his cross-examination of Holland was improperly limited. Defendant's theory of defense in this case was that the State failed to prove him guilty beyond a reasonable doubt where the only direct evidence was Holland's alleged eyewitness testimony and the 911 tape. Defendant's theory included that Holland was biased and lacked credibility due to a feud between her and defendant and that, as a result of that feud, Holland fabricated her identification of defendant as one of the shooters. Defendant argues that the trial court's failure to allow him to cross-examine Holland regarding her son's attempted murder of him violated his constitutional right to confront the witnesses against him.

¶ 40 Defendant was not denied his right to confront the witness regarding his theory of defense for the case, which was that Holland fabricated her testimony due to a feud between her family and defendant. Defendant was allowed ample opportunity to confront, cross-examine, and test the truth of Holland's testimony, which included her testimony regarding her contentious history with defendant. The record thus indicates that the jury had sufficient information to determine whether Holland's testimony was worthy of belief, and defendant was not denied his right of confrontation. See *Klepper*, 234 Ill. 2d at 357. Thus, the trial court's limit of the cross-examination of Holland failed to raise any constitutional issues. *People v. Green*, 339 Ill. App. 3d 443, 456 (2003). Accordingly, as the trial court permitted sufficient cross-examination to satisfy the Confrontation Clause, we review the court's limitations on cross-examination of Holland for abuse discretion. *Blue*, 205 Ill. 2d at 13.

¶ 41 To reiterate, the trial court has "wide latitude to impose reasonable limits" on a defense counsel's inquiry into the potential bias of a witness. *Klepper*, 234 Ill. 2d at 355. The scope of cross-examination is within the sound discretion of the trial court, and we will only disturb its ruling where there has been a clear abuse of discretion resulting in manifest prejudice to the

defendant. *People v. Velez*, 2012 IL App (1st) 101325, ¶ 62. Although a defendant is afforded wide latitude when conducting cross-examination, "this important principle is subject to limitations where the evidence sought provides an insufficient nexus to the proposition it supposedly supports." *Nutall*, 312 Ill. App. 3d at 628. It thus follows that evidence of bias, interest or motive to testify falsely must not be remote or uncertain because the evidence must potentially give rise to the inference that the witness has something to gain or lose by his testimony. *People v. Triplett*, 108 Ill. 2d 463, 475-76 (1985). The defendant need not establish that a promise of a special favor has been made to the witness or even that an expectation of a special favor exists in the mind of the witness. *People v. Boand*, 362 Ill. App. 3d 106, 127-28 (2005). Rather, the evidence need only give rise to the inference that the witness has something to gain or lose by testifying. *Id.* Because the scope of cross-examination is within the sound discretion of the trial court, we will only disturb its ruling where there has been a clear abuse of discretion resulting in manifest prejudice to the defendant. *People v. Kliner*, 185 Ill. 2d 81, 130 (1998).

¶ 42 Here, defendant sought to introduce testimony regarding Holland's son's pending attempted murder charge, based on an incident involving defendant which occurred almost three years after the shooting at issue in this case. The trial court allowed defendant to question Holland regarding this pending case, but found defendant could not elicit the fact that defendant was the alleged victim in the pending case. The trial court found these facts to be too remote and uncertain and denied defendant leave to so cross-examine. We agree with the trial court's ruling and find that its decision to prohibit counsel from examining Holland regarding her son's pending case was not an abuse of discretion as the case was too remote and uncertain to give rise to the inference that Holland had something to gain or lose by testifying falsely for the State in

defendant's case. See *People v. Bull*, 185 Ill. 2d 179, 206 (1998) (citing *Triplett*, 108 Ill. 2d at 475-76). Nothing in the record gives rise to any inference that Holland's testimony was affected by her son's pending case.

¶ 43 In so holding, we find defendant's reliance on *Averhart* to be misplaced. In that case, the trial court barred the defendant from eliciting testimony that he and the arresting officer had been involved in a prior altercation from which the defendant lodged a complaint against the officer. *Averhart*, 311 Ill. App. 3d at 494. In concluding the trial court erred in barring such testimony, this court determined such a limitation denied the defendant his right to test the truth of the police officer's testimony. *Id*. at 504. By barring defendant from questioning the officer about their first encounter, the defendant was prohibited from demonstrating the reasons why the officer would have a motive to testify falsely and provide a factual basis for defendant's theory of defense that defendant's complaint following the first encounter motivated the officer to frame defendant. *Id.*

¶ 44 We find the facts of *Averhart* readily distinguishable. In *Averhart*, the incident at issue occurred prior to the defendant's arrest and conviction that was the subject of the appeal, whereas here Holland's son was charged with attempted murder almost three years after the occurrence in this case. Furthermore, in *Averhart*, the defendant's theory of the case was that the testifying police officer was attempting to frame him for the crime in retaliation for the defendant filing a complaint against the police officer. *Id.* at 501. The *Averhart* court found the testimony which would have been elicited would have been relevant to the defendant's theory of the case and the trial court's prohibition "prevented defendant from demonstrating that what [the police officer] had to gain from framing defendant was to discredit defendant with the second arrest and foreclose any further investigation of the abuse alleged" in the defendant's complaint against the

police officer following the first encounter. *Id.* at 504. Accordingly, the testimony the *Averhart* defendant sought to be elicited was directly related to his theory of the case, but was prohibited from being presented to the jury. Here, as previously discussed, defendant was provided with the opportunity to cross-examine Holland regarding her bias toward defendant and elicited such testimony. See *Wilson*, 2012 IL App (1st) 092910, ¶ 24. Accordingly, we conclude the trial court did not abuse its discretion when it utilized its wide latitude to determine the scope of defense counsel's cross-examination of Holland. See *Kliner*, 185 Ill. 2d at 134.

¶ 45 Ineffective Assistance of Counsel

¶ 46 Defendant next contends that his counsel was ineffective in two ways. First, defense counsel was ineffective when he abandoned a viable defense that was successful at defendant's first trial, namely the theory that defendant was a third-party bystander. Second, defendant argues that defense counsel was ineffective for failing to impeach Holland with her prior inconsistent statement regarding defendant's conduct after the shooting occurred. Specifically, defendant maintains that his counsel did not impeach Holland with her statement at the first trial that defendant was "messing around" with the cars in his driveway immediately after the shooting as opposed to the testimony at the second trial that he "was putting [something] in the car." Defendant asserts that, individually and collectively, these errors are so prejudicial they warrant a new trial.

¶ 47 In response, the State argues that defense counsel was not ineffective where (1) the decision not to pursue the third-party bystander theory was a matter of sound trial strategy; and (2) Holland's testimony was not inconsistent or impeachable as she testified at both trials that she did not view defendant with any object in his hand when he came outside after the shooting.

¶ 48 Both the United States and Illinois Constitutions guarantee criminal defendants the right

to the effective assistance of counsel. *People v. Hale*, 2013 IL 113140, ¶ 15 (citing U.S. Const., amends. VI, XIV, and Ill. Const. 1970, art. I, § 8). In general, the standard of review for determining whether an individual's sixth amendment right to effective counsel has been violated is *de novo*. *Hale*, 2013 IL 113140, ¶ 15. A *de novo* review entails performing the same analysis a trial court would perform. *People v. Robinson*, 2017 IL App (1st) 161595, ¶ 88.

¶ 49 In determining whether defendant was denied effective assistance of counsel, we apply the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *People v. Cherry*, 2016 IL 118728, ¶ 24. Under the *Strickland* test, a defendant must demonstrate both that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Downs*, 2015 IL 117934, ¶ 13. Since a defendant must satisfy both prongs of the *Strickland* test, the failure to establish either prong bars his claim. *Cherry*, 2016 IL 118728, ¶ 24. As for the first prong in a claim of ineffectiveness, counsel's performance "must be evaluated based on the entire record." (Internal quotation marks omitted.) *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 114; *People v. Flores*, 128 Ill. 2d 66, 107 (1989) ("[C]ounsel's performance must be evaluated [based on] the entire record and not on isolated instances of alleged incompetence called into question by defendant.").

¶ 50 We first turn to consider defendant's argument that counsel was ineffective for abandoning the "unarmed third-party bystander defense." To establish that defense counsel's performance was deficient, a defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). A reviewing court is highly deferential to defense counsel on matters of trial strategy

and must make every effort to consider counsel's performance from his perspective at the time, rather than in hindsight. *People v. Perry*, 224 Ill. 2d 312, 344 (2007). This general rule is predicated upon our recognition that the right to effective assistance of counsel refers to "competent, not perfect representation." *People v. Stewart*, 104 Ill. 2d 463, 492 (1984). Hence, " '[m]istakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent.' " *People v. Hillenbrand*, 121 Ill. 2d 537, 548 (1988). " '[T]he choice of defense theory is ordinarily a matter of trial strategy,' and since counsel 'has the ultimate authority to decide' that strategy, an ineffective-assistance claim cannot be based on counsel's choice of an allegedly 'inadequate' strategy." *People v. James*, 2017 IL App (1st) 143391, ¶ 154 (quoting *People v. Guest*, 166 Ill. 2d 381, 394 (1995)). We "will generally not review a claim of ineffectiveness of counsel based on inadequate trial strategy," except where counsel has entirely failed to conduct any meaningful adversarial testing. *People v. West*, 187 Ill. 2d 418, 432-33 (1999).

¶ 51 In this case, counsel did conduct meaningful adversarial testing of the State's case. As noted, counsel presented a theory of defense that required the State to prove its case beyond a reasonable doubt. Defense counsel focused on the lack of physical evidence tying defendant to the offenses and the lack of credibility of the witnesses. Regarding the lack of physical evidence, defense counsel argued that the State failed to introduce any photographs from Holland's point of view of the crime scene, that there were no fingerprints on the shell casings, that there was no gunshot residue test performed on defendant or his clothing, and that no weapon was recovered. Defense counsel also attacked the credibility not only of Holland, but the other witnesses as well, in particular Vera and Lagunas' inaccurate statements to the police. As for Holland, defense counsel emphasized Holland's training as a police officer and how she failed to utilize her

training when speaking to the 911 dispatcher. Specifically, defense counsel argued in closing that Holland did not state the number of shooters and failed to provide a physical description of them and the clothing they were wearing. Defense counsel also explored Holland's bias through the 2009 battery charge and the building of the fence separating her property from defendant's property thereafter. This theory of defense was pursued by defense counsel during trial and during opening and closing arguments. Defense counsel also cross-examined the State's witnesses in a manner consistent with this theory. It is defense counsel who "has the ultimate authority to decide" the strategy to pursue, and an ineffective assistance claim cannot be based on counsel's chose of an allegedly "inadequate" strategy. See *James*, 2017 IL App (1st) 143391, ¶ 154; *Guest*, 166 Ill. 2d at 394. It is apparent here that, utilizing this theory, defense counsel conducted a meaningful adversarial testing of the State's case. See *Guest*, 166 Ill. 2d at 394; *West*, 187 Ill. 2d at 432-33.

¶ 52 Defendant also argues that defense counsel was ineffective for failing to impeach Holland with her prior testimony that defendant was merely "messing around" in the automobiles after the shooting occurred, not that he was carrying "something" out to the vehicles as she testified in the second trial.

¶ 53 Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court. *Id.* at 326-27. A defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable. *Id.*

¶ 54 We conclude that defendant's claim of deficient cross-examination of Holland during the

second trial is meritless. First, as a general matter, the examination or impeachment of a witness is considered to be trial strategy, which does not support a claim of ineffective assistance of counsel. See *People v. Lacy*, 407 Ill. App. 3d 442, 461 (2011). Second, effective assistance of counsel is competent, not perfect, representation. *People v. Vega*, 408 Ill. App. 3d 887, 889 (2011). Neither mistakes in strategy, nor the fact that another attorney with the benefit of hindsight would have handle a case differently, indicates that trial counsel was incompetent. *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010).

¶ 55 We recognize, however, that "the *complete failure* to impeach the sole eyewitness when significant impeachment is available is not trial strategy and, thus, may support an ineffective assistance claim." (Emphasis added.) *People v. Salgado*, 263 Ill. App. 3d 238, 246-47 (1994). This is not the case here. On direct examination Holland testified that when defendant exited his residence after the shooting occurred she observed him "ducking down by the car that was parked" and when asked if she viewed anything in defendant's hand Holland responded, "Yes. He was putting it in the car that was parked in the driveway." No testimony was elicited about what "it" was. Then, on cross-examination, defense counsel vigorously questioned Holland as follows:

"Q. *** You didn't see any gun in his hand when he came back out of the house; did you?

A. No.

Q. You didn't see any gun in his hand when he went and riffled around in his vehicle; did you?

A. No. But he put something in that vehicle.

Q. Okay. But you didn't see any object in his hands at all; did you?

A. No. Not when he came back out. I don't know if he put it in the car or (Inaudible). I don't know."

Defendant maintains that counsel was ineffective for failing to impeach Holland with her prior testimony because in her testimony at the second trial she was "steadfast in her belief that [defendant] put something into one of his cars." Holland's testimony, however, contradicts defendant's assertion. The testimony demonstrates that Holland did not know if defendant put anything in the vehicle and she affirmed that defendant did not have any object in his hands when he came out of the house after the shooting. Although Holland initially testified on direct that she viewed defendant walking to the vehicles with something in his hand, on cross she admitted that she never viewed defendant with anything in his hands. Defense counsel was able to obtain an admission in contradiction to her testimony on direct and thus aptly challenged the veracity of Holland's testimony. Defense counsel is hardly ineffective where he was able to elicit contradictory testimony from Holland on cross-examination regarding what she viewed when defendant exited his home after the shooting occurred. We cannot say that defense counsel's approach fell outside the wide range of reasonable professional assistance.

¶ 56 Credit for Presentencing Detention

¶ 57 Lastly, defendant contends, and the State agrees, that his mittimus must be corrected to properly reflect credit for his presentencing detention. We agree with the parties. The record reflects that defendant was arrested on February 11, 2011, and released on bond on February 17, 2011. Thereafter, he was placed in custody following his conviction on October 14, 2016, and sentenced almost a year later on October 5, 2015. He was therefore in custody a total of 361 days. The mittimus, however, reflects a credit of only 354 days. Accordingly, we direct the clerk of the circuit court to correct the mittimus to reflect 361 days of presentencing detention

credit. See *People v. Perez*, 2018 IL App (1st) 153629, ¶ 49; *People v. Hernandez*, 345 Ill. App. 3d 163, 171 (2004).

¶ 58 CONCLUSION

¶ 59 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 60 Affirmed. Mittimus corrected.

¶ 61 JUSTICE GORDON, dissenting:

¶ 62 I must respectfully dissent. For the following reasons, I find that defendant was denied his right to confront Sherese Holland regarding his theory of the case, which was that Holland, the sole identifying witness, had fabricated her testimony due to a feud between her family and defendant. *Supra* ¶ 40. Since this issue was preserved for our review, the State has the burden of showing that any error was harmless beyond a reasonable doubt. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009).

¶ 63 Holland was the only witness at trial to identify defendant as the perpetrator. However, at the moment of the offense, Holland did not identify defendant to the 911 dispatcher, although Holland was a Chicago police officer and, thus, understood the importance of this information. Holland thought to provide a lot of other detail to the dispatcher, such as: (1) Holland's own badge number; (2) the color and make of the vehicle involved in the incident; and (3) the number and street address of the house into which a neighbor ran while carrying a gun. Despite providing all this identifying detail about herself and the incident, Holland chose to describe the person with the gun only as a "neighbor"—although she knew defendant's name. This begs the question: why provide each numeral of her badge number but fail to provide the name of the person toting the gun? Her credibility was the primary issue at trial, and the State failed to convince 12 jurors of it, beyond a reasonable doubt, at defendant's first trial.

¶ 64 As the majority observes, the trial court allowed the defense to question Holland about the fact that her son was a defendant in a pending criminal case, but refused to allow the defense to ask about the fact that Holland's son was accused of trying to kill defendant. *Supra* ¶ 38.[2]

¶ 65 The record before us indicates a history of escalating animosity between these two neighboring families, akin to the Hatfields and McCoys. *E.g.*, *People v. Klepper*, 234 Ill. 2d 337, 356 (2009) (during closing argument, "defense counsel highlighted the 'Hatfield and McCoy' situation, an 'ongoing, long-standing feud' "). Unfortunately, this was not the same record that the jury was permitted to view.

¶ 66 First, according to Holland, there was an incident where defendant crossed into her yard to fight with her son; Holland broke up the fight and defendant punched her in the face. This incident led to defendant being charged with battery against Holland. At the trial in December 2009 concerning this incident, Holland testified against defendant, and defendant was found not guilty. Second, there was the incident on February 10, 2011, leading to the charge in the case at bar, where Holland failed to identify defendant in her initial outcry to the 911 operator but chose to identify him later. Third, there was the shooting on May 25, 2014, in which Holland's son was charged with attempting to kill defendant.

¶ 67 Over the years, the animosity between the families escalated from a fist fight and a "sucker punch[]," as Holland described it, to a shooting. The facts were that the animosity was escalating in its level of violence, that the feud had lasted five years or more, and that the three incidents established that these were not isolated incidents but a continuing pattern of behavior. All these facts were hidden from the jury by the trial court's ruling.

[2] After defendant's second trial ended, Holland's son was convicted of aggravated discharge of a firearm, being armed as a armed habitual criminal, and unlawful possession of a firearm by a felon.

¶ 68 All of these facts were defendant's primary defense, and he was not allowed to present them. The jury heard only about the 2009 incident. It is a completely different story when one learns that the feud continues even to the present day and that the violence between the families has intensified from a punch to armed warfare. Hiding these facts from the jury, when the trial was essentially a referendum on Holland's credibility, was not harmless, and certainly not harmless beyond a reasonable doubt.

¶ 69 The contrast between the supreme court case of *People v. Klepper*, 234 Ill. 2d 337 (2009), and the case at bar supports my finding. In *Klepper*, 234 Ill. 2d at 353, 356-57, our supreme court found that the trial court did not err by limiting cross-examination into specific incidents of a feud between neighbors, where the complaining witness and the arresting officer had already testified to a long-running feud with a history of incidents, and where the evidence included a video of the entire incident, thereby eliminating the "need to assess witness credibility" during the bench trial. By contrast, in the case at bar, (1) this was a jury trial; (2) there was a need for the 12 people on the jury to assess Holland's credibility and they needed to hear the whole story, not just a part of the story; and (3) the trial court limited the record to just one prior incident—hardly evidence of a complete "history." *Klepper*, 234 Ill. 2d at 356. "[T]he limitation of cross-examination 'created a substantial danger of prejudice by denying defendant his right to test the truth' " of the one and only witness against him. *Klepper*, 234 Ill. 2d at 357 (quoting *People v. Averhart*, 311 Ill. App. 3d 492, 499 (1999)).

¶ 70 In addition, the trial court's ruling indicates that the trial court misunderstood the purpose for which the defense sought to produce this evidence. In denying the defense the ability to cross-examine Holland about the latest violent event between the two families, the trial court explained: "What is the implication, that her son was trying to kill [defendant] to keep Officer

Holland from having to testify again in this case?" The trial court's explanation missed the significance of the proposed cross-examination.

¶ 71 For all the foregoing reasons, I must respectfully dissent.