SECOND DIVISION
December 5, 2017

No. 1-14-3719

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 12 CR 16245
	)	
QUINTON BROWN,	)	Honorable
	)	Joseph G. Kazmierski Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Neville and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for first-degree murder affirmed where (i) the evidence was sufficient to convict in light of multiple witnesses' positive identification of defendant as the shooter; (ii) a pretrial lineup was not overly suggestive; and (iii) the trial court properly instructed the jury regarding the witnesses' prior inconsistent statements.

¶ 2 Following a jury trial, defendant Quinton Brown was convicted of two counts of first-degree murder and sentenced to a term of natural life. On appeal, Brown contends that: (1) he was not proven guilty beyond a reasonable doubt because the witnesses against him at trial were impeached and the witnesses' testimony was inconsistent; (2) the trial court erred in not

suppressing evidence from a pretrial lineup because the lineup was unduly suggestive; and (3) trial counsel was ineffective for not requesting a contemporaneous limiting instruction regarding a witness's prior inconsistent statements, a failure compounded by the prosecutor's comments in closing argument. We disagree and affirm.

¶ 3 BACKGROUND

¶ 4 On June 8, 2010, Patrick Evans and Jeffrey Pinkerton were shot and killed at the M & K grocery on Ohio and Monticello Avenue in Chicago. There were two eyewitnesses to the shooting, Sedrick Hawkins and Kevin White, the clerk and the owner of M & K, respectively, as well as a number of witnesses who had information about the shooting. At approximately 6:30 p.m., Hawkins was playing a video game in the store and White was inside a plexiglass-enclosed booth, working. Jeffrey Pinkerton was sitting on a pool table in the middle of the store and Patrick Evans was putting money into a jukebox. Hawkins heard gunshots, saw Pinkerton fall over, and jumped into the booth with White. Hawkins was able to identify the shooter as wearing blue jeans, a black hoodie, and a mask that covered his face with the exception of his eyes. Hawkins stated that the shooter fired more than ten rounds into the store, fatally wounding Pinkerton and Evans.

¶ 5 After the shooter exited the store, Hawkins observed him running across the street and noted that he had a "real bad limp." Hawkins called the police, who arrived shortly after his call. At the scene, Hawkins described the suspect as a black male who was tall, skinny, had braided hair, and walked with a limp.

¶ 6 Around 3:30 a.m. on June 9, 2010, Hawkins viewed a photo array that was put together by Chicago Police Department Detective Michael Pietryla. Hawkins identified Quinton Brown, whom he knew by his street name "Buck Naked," as the person he thought was the shooter from

M & K. Hawkins recognized Brown as a regular customer at M & K from the past few months. On August 2, 2011, after Brown was arrested, Hawkins also viewed a physical lineup. The lineup consisted of five black males, all of whom sat in chairs to minimize any height discrepancies. Brown was the only individual with braided hair. The police gave all lineup participants hats to disguise their hairstyles, but Brown's braids partially protruded from his hat. Hawkins again identified Brown as the person he thought was the shooter.

¶ 7 The police located three additional witnesses with information on the shooting. On December 23, 2010, Detective Hammond interviewed Eric Oliver, a resident of the neighborhood, while he was in custody for an unrelated case. According to Hammond, Oliver stated that he saw Brown run into M & K, heard gunshots coming from inside the store, witnessed another man, Darryl Strickland, run out, and later saw Brown run out of the store. Oliver told Hammond that he was friends with one of the victims and wanted to tell the truth about what he had seen, but he was also "very afraid" of Brown and believed that he would be in danger if Brown knew that he was cooperating with police. Oliver refused to memorialize his statement in writing or testify before the grand jury.

¶ 8 At trial, Oliver denied that he witnessed the shooting or identified Brown. The State impeached Oliver with his previous statement.

¶ 9 On March 24, 2012, Paris Jackson, who was in custody for an unrelated charge, was interviewed by Pietryla and Detective Esparza. According to Pietryla, this interview occurred when Jackson asked to speak with a detective regarding the murders of Evans and Pinkerton. Jackson said he did not previously come forward because he feared for the safety of his family. Jackson told Pietryla that he saw a man in a dark hooded sweatshirt carrying a rifle and walking

into M & K. As the man neared the door, his hood fell back, and Jackson could clearly identify the man as "Buck Naked."

¶ 10 On May 8, 2012, Jackson appeared before a grand jury and testified that he saw a tall, slim black male with braids in a hooded sweatshirt coming from an alley with a rifle under his arm, that the person had a limp, and that he recognized the man as Brown. From his vantage point outside the store, Jackson saw Brown walk into M & K, raise the rifle, and fire around 10 shots. At trial, Jackson testified that "[n]othing happened" at the store and that he did not see anything. Jackson further denied giving the detectives any information about the murders or the individual involved. Jackson was impeached at trial with his grand jury testimony. He did not deny giving the substance of his testimony, but he claimed police forced him to testify by threatening to "put a case" on him and provided him the details of his testimony, which he memorized.

¶ 11 On May 16, 2012, the police arrested Laterence Mitchell, another witness to the shooting, on unrelated charges. Hammond spoke with Mitchell at the police station. Mitchell told Hammond that while he was outside M & K, he saw an individual running from the store with a distinctive limp. Mitchell also told Hammond that the man was tall, slim, and had on a black hoodie, and Mitchell recognized him as "Buck Naked." On August 27, 2012, Mitchell testified before the grand jury and recounted the foregoing evidence.

¶ 12 At trial, Mitchell stated that he was friends with Brown, whom he had known since elementary school. Mitchell admitted being near the scene of the crime and seeing an individual run from M & K after the shooting, but he denied that he identified the individual as Brown, and he also denied that the individual was limping, saying instead that he moved in "a fast skip run." Mitchell said that an officer named Cinco urged him to falsely identify Brown before the grand

jury, but Mitchell refused to do so; instead, Mitchell told the grand jury that he "didn't see nothing" and "wasn't there when it happened." He was impeached by assistant State's Attorney Jamie Santini, who was present during Mitchell's grand jury testimony and recounted that testimony for the jury.

¶ 13 Brown was arrested on July 31, 2012, and charged with twelve counts of first degree murder. Before trial, Brown's counsel filed a motion to suppress evidence of the lineup during which Brown was identified by Hawkins on the ground that the lineup was unduly suggestive. The trial court denied Brown's motion, finding that any deficiencies in the lineup procedure went to the weight of the evidence, not its admissibility.

¶ 14 At the close of trial, the court gave the jury a modified version of Illinois Pattern Criminal Jury Instruction 3.11, which explains the circumstances under which a witness's prior inconsistent statement may be considered as substantive evidence. Brown's objection to the modified jury instruction was overruled. The jury convicted Brown of the first-degree murder of Evans and Pinkerton and the trial court later sentenced him to a term of natural life. Brown timely appealed.

¶ 15 ANALYSIS

¶ 16 Brown contends that he was not proven guilty beyond a reasonable doubt as Oliver, Jackson, and Mitchell all recanted at trial. Brown bolsters his argument by pointing to inconsistencies in Mitchell and Jackson's testimony before the grand jury and inconsistencies in Oliver's statements to police. Additionally, Brown argues, the trial court erred in not suppressing Hawkins' pretrial lineup since Hawkins believed the person he saw had braids and Brown was the only participant in the lineup who had braids. Finally, Brown argues that the trial court erred

by failing to give contemporaneous limiting instructions regarding Oliver, Jackson, and Mitchell's prior inconsistent statements.

¶ 17 Sufficiency of the Evidence

¶ 18 Brown contends that the State failed to prove his guilt beyond a reasonable doubt. When reviewing a challenge to the sufficiency of the evidence, a reviewing court must determine "whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Internal quotation marks omitted.) *People v. Austin M.*, 2012 IL 111194, ¶ 107. Under this standard, a reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of the witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Id.* A criminal conviction will not be overturned unless the proof is so improbable or unsatisfactory that a reasonable doubt as to the defendant's guilt exists. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002).

¶ 19 We start with the initial proposition that a positive identification by one credible witness is normally sufficient to sustain a conviction. *People v. Molstad*, 101 Ill. 2d 128, 133 (1984) (quoting *People v. Boney*, 28 Ill. 2d 505, 509 (1963)). In assessing identification testimony, Illinois courts rely on the factors set out by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1973). *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). Those factors are: (1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Biggers*, 409 U.S. 188 at 199-200.

¶ 20 In considering the *Biggers* factors in relation to Hawkins' identification of Brown, which he never recanted, we conclude that the factors, viewed as a whole, weigh in the State's favor. As the shooting began, Hawkins saw the shooter at the front of the store wearing blue jeans, a black hoodie, and a mask, and carrying a large gun. After the shooting, Hawkins looked out the window and saw the shooter running across the street and through a nearby alley. Hawkins observed that the shooter had a noticeable limp, just like Brown, who was a regular customer at M & K. Hawkins' testimony supports the conclusion that he had both the opportunity to view Brown and the attention to remember his clothing and distinct limp.

¶ 21 Moreover, Hawkins identified Brown in a photo array the day after the shooting. While Hawkins' second identification of Brown was at a physical lineup conducted more than a year later following Brown's arrest, we find that delay is of little, if any, significance given Hawkins' prompt identification of Brown in the photo array. See *People v. Simpson*, 172 Ill. 2d 117, 141 (1996) (concluding that an identification less than six days after the crime occurred weighed in favor of the State).

¶ 22 Although Hawkins at trial only "thought" that Brown was the shooter, and thus his level of certainty was less than 100%, his identification was independently corroborated by both Mitchell and Jackson in their grand jury testimony, which was admitted as substantive evidence (see 725 ILCS 5/115-10.1 (West 2010)). Both Mitchell and Jackson were outside M & K when the shooting occurred and had sufficient opportunity to observe the shooter. Jackson testified that he saw Brown, wearing a hooded sweatshirt and carrying a rifle, enter M & K and fire around 10 shots. From Jackson's position outside the store, he was able to "see everything" that happened, and he expressed no doubt before the grand jury as to his identification of Brown. Likewise, Mitchell testified that after the shooting, he saw Brown, whom he had known since elementary

school, running from the M & K while carrying a metallic object that looked like a rifle. All three identifying witnesses consistently described Brown as tall and slim, with braided hair and a distinctive limp, wearing a black hoodie and armed with a large gun or rifle.

¶ 23 Mitchell and Jackson's recantations at trial do not undermine the sufficiency of the evidence. As noted, it is the province of the jury to assess the credibility of witnesses. *Austin M.*, 2012 IL 111194, ¶ 107; see also *People v. Williams*, 332 Ill. App. 3d 693, 696-97 (2002) (prior inconsistent statements, if admitted as substantive evidence, may be sufficient by themselves to support a conviction; the jury must weigh the conflicting statements and determine which is more credible). The jury chose to believe the trial testimony of Hawkins and the grand jury testimony of Mitchell and Jackson rather than the recantations of the latter two witnesses, and it is not our role to second-guess that determination. Thus, we find the evidence was sufficient for a rational jury to find Brown guilty of the murders of Evans and Pinkerton.

¶ 24 Motion to Suppress

¶ 25 Brown also appeals the trial court's order denying his pretrial motion to suppress Hawkins' lineup identification. Brown argues that the lineup procedure was unduly suggestive as he was the only suspect with a braided hairstyle, which was visible underneath the cap he was wearing. Brown alleges that since Hawkins believed he saw a person with braided hair commit the shooting and Brown was the only individual with visible braided hair in the lineup, Hawkins' identification was the product of an unduly suggestive lineup.

¶ 26 In reviewing a trial court's ruling on a motion to suppress, the court's findings of fact are given great deference and this court will reverse those findings only if they are against the manifest weight of the evidence. *People v. Cregan*, 2014 IL 113600, ¶ 22. A decision is against the manifest weight of the evidence "only when an opposite conclusion is apparent or when the

findings appear to be unreasonable, arbitrary, or not based on the evidence. *People v. Clark*, 2014 IL App (1st) 130222, ¶ 26. We review *de novo* the trial court's legal ruling as to whether suppression is warranted. *Cregan*, 2014 IL 113600, ¶ 22.

¶ 27 As an initial matter, exclusion of evidence of pretrial identifications of an accused by a witness is warranted only where (i) the procedure was unnecessarily suggestive and (ii) there was a substantial likelihood of misidentification. *People v. Lawson*, 2015 IL App (1st) 120751, ¶ 39 (quoting *People v. Hartzol*, 222 Ill. App. 3d 631, 642 (1991)). The court employs a two-prong test to determine whether a witness's identification was so tainted by suggestive identification procedures that its admission at the defendant's trial violates due process. *People v. McTush*, 81 Ill. 2d 513, 520-21 (1980). First, the court must determine whether the pretrial identification procedures were suggestive; if so, then the court must determine whether the identification testimony was so tainted as to make it unreliable. *Id.* at 520-21. The defendant has the burden of proving that the identification procedures were so unnecessarily suggestive as to give rise to a substantial likelihood of misidentification. *People v. Prince*, 362 Ill. App. 3d 762, 711 (2005).

¶ 28 Our analysis begins and ends with the first prong of the *McTush* test. "Illinois courts have consistently held that a lineup is not impermissibly suggestive simply because the defendant was the only person in the lineup with braided hair." *People v. Love*, 377 Ill. App. 3d 306, 311 (2007); see also, *e.g.*, *People v. Washington*, 182 Ill. App. 3d 168, 175 (1989) (fact that the defendant was the only participant in the lineup with a braided hair style did not render the procedure unconstitutionally suggestive); *People v. Hartzol*, 222 Ill. App. 3d 631, 643-44 (1991) (same; collecting cases). Thus, as the trial court held, the fact that Brown was the only individual with braided hair went to the weight of the evidence, not its admissibility. Indeed, defense

counsel vigorously cross-examined Hawkins and Pietryla on the potential suggestiveness of the lineup and also vigorously argued the same during his closing argument.

¶ 29 Brown points to two cases that he claims support his proposition, but we find neither on point. The first case, *People v. Maloney*, involved five participants, four of whom wore clean, pressed shirts, pressed slacks or jeans and socks. *Maloney*, 201 Ill. App. 3d 599, 606-7 (1990). In contrast to the other participants, defendant wore "a wrinkled, dark brown and/or extremely soiled shirt which appear[ed] to be a night shirt or woolen undershirt *** [and was] not wearing socks." *Id.* The court concluded that the lineup procedure did "all but hang a sign saying 'pick me' around defendant's neck." *Id.* at 1282. The level of suggestiveness in *Maloney* is not comparable to the circumstances here where all lineup participants wore hats and the only potentially suggestive fact was that the cap did not cover Brown's braids entirely.

¶ 30 Brown also relies on *People v. Trass*, 136 Ill. App. 3d 445 (1985), representing that *Trass* held that "a lineup with only the defendant having braids was also impermissible." On the contrary, *Trass* explicitly held that "the fact that Trass was the only man in the lineup with braided hair does not establish that the lineup was impermissibly suggestive and that all identifications would be fatally tainted." *Id.* at 463. Thus, *Trass* does not help Brown.

¶ 31 The significance of the fact that Brown was the only lineup participant whose braided hair showed from under his cap is significantly diminished here given Hawkins' familiarity with Brown and his hairstyle before the crimes were committed, as well as his immediate identification of Brown less than 24 hours after the murders in a photo array of six men, three of whom had braided hair. Thus, this is not a case where a witness, having informed police of an offender's braided hairstyle, is presented with a lineup of strangers, only one of whom has braids. Under the circumstances here, there was no substantial likelihood of misidentification as

a result of the manner in which the lineup was conducted. Consequently, there was no error in the admission of Hawkins' lineup identification of Brown.

¶ 32 Jury Instruction

¶ 33 Finally, Brown claims that the trial court erred by not giving contemporaneous limiting instructions regarding the use of prior inconsistent statements by Oliver, Mitchell, and Jackson for impeachment purposes only. Brown argues that the lack of a contemporaneous limiting instruction allowed the jury to improperly consider all prior inconsistent statements as substantive evidence. Brown argues that this error was compounded when the prosecutor, during closing arguments, inaccurately defined impeachment as "basically when you say that the prior inconsistent statement means the person lied on the stand." Brown also argues that his trial counsel's decision not to tender a contemporaneous limiting instruction with the impeachment testimony compounded the error and constitutes ineffective assistance of counsel. We address these arguments in turn.

¶ 34 Generally, the hearsay rule prevents the use of out-of-court statements to prove the truth of the matter asserted, but section 115-10.1 of the Code of Criminal Procedure provides an exception for prior inconsistent statements that are subject to cross-examination and were made under oath at a prior trial, hearing, or other proceeding. *People v. Caffey*, 205 Ill. 2d 52, 88 (2001) (hearsay rule); 725 ILCS 5/115-10.1 (West 2017). Thus, when a prior inconsistent statement meets section 115-10.1's requirements, either party may introduce the statement as substantive evidence. See *People v. Santiago*, 409 Ill. App. 3d 927, 932-33 (2011); *Sangster*, 2014 IL App (1st) 113457, ¶ 61. Whether a prior statement is inconsistent under section 115-10.1, and is therefore admissible as substantive evidence, falls within the sound discretion of the trial court, and the determination will be reversed on appeal only if it constitutes an abuse of

discretion. *People v. Harvey*, 366 Ill. App. 3d 910, 922 (2006). A trial court abuses its discretion where its ruling "is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 35 We first consider the grand jury testimony of Mitchell and Jackson. Mitchell testified under oath before the grand jury that the person he saw running out of the M & K was Quinton Brown, whom he also knew as "Buck Naked." Mitchell also described the "skip-run" of the shooter and the gun that the shooter carried. But at trial Mitchell denied that he identified Brown before the grand jury. Since Mitchell made a statement inconsistent with his grand jury testimony at trial and was subject to cross-examination, his testimony was properly admitted as substantive evidence.

¶ 36 Jackson also testified before the grand jury that he recognized Brown as the M & K shooter. Jackson signed his name next to a picture of Brown during his grand jury testimony to indicate that Brown was, in fact, the person he saw on the day of the shooting. Jackson later testified at trial that "[n]othing happened" and that he did not see anything. Like Mitchell, Jackson's testimony was subject to cross-examination and inconsistent with previous testimony made under oath. Therefore, under section 115-10.1, Jackson's testimony was properly admitted as substantive evidence. Because Mitchell's and Jackson's inconsistent statements were properly considered by the jury as substantive evidence, no limiting instruction was warranted.

¶ 37 As to the statements made to police by Oliver, Mitchell, and Jackson, we agree that, generally, they were not admissible as substantive evidence because they were not made under oath. But see *People v. Miller*, 363 Ill. App. 3d 67, 72 (2005) (finding that section 115-12 provides that a witness's prior identification is substantively admissible when (i) the declarant testifies at the trial or hearing, (ii) the declarant is subject to cross-examination concerning the

statement, and (iii) the statement is one of identification of a person after perceiving him). However, Brown's argument that a lack of a contemporaneous oral jury instruction prejudiced him is not well founded. First, the Committee Comments to IPI 3.11 recommend, but do not mandate, that an oral instruction be given to the jury whenever an earlier inconsistent statement is being offered for a limited, non-substantive purpose. IPI 3.11, Committee Notes. Second, the Committee Comments also advise that, when the jury has heard inconsistent statements offered for different purposes—impeachment and substantive evidence—the trial court should give IPI 3.11 "at the close of the trial." The trial court did so, giving a modified version that stated:

> "The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.
>
> However, you may consider a witness's earlier inconsistent statement as evidence without this limitation when
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> the statement was made under oath at a proceeding;
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> or
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> the statement is one of identification of a person made after perceiving him;
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> and
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> the witness testified at trial,
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> and
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> the witness was subject to cross-examination concerning the statement.

> It is for you to determine whether the witness made the earlier statement, and, if so what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made."

This instruction properly advised the jury that prior inconsistent statements not falling within the described exceptions were not admissible as substantive evidence and should only be considered by the jury for impeachment purposes. Third, any error in regard to jury instructions was harmless in light of the overwhelming evidence against Brown. *People v. Campbell*, 275 Ill. App. 3d 993, 996-97 (1995) (holding that "where the evidence against a defendant is overwhelming, the lack of a particular jury instruction is rendered harmless in light of other instructions, arguments of counsel, and a generally fair trial."). We conclude that the trial court did not abuse its discretion in not giving a contemporaneous limiting instruction regarding Oliver's prior inconsistent statement.

¶ 38 Brown next contends that the prosecutor's closing statement—"the prior inconsistent statement means the person lied on the stand"—misstated the law and created an improper inference that if an individual makes a prior inconsistent statement then his trial testimony must be rejected. Further, Brown argues that this inference was not cured by the jury instructions. In general, prosecutors are given wide latitude in the content of their closing arguments. *People v. Evans*, 209 Ill. 2d 194, 255 (2004). In reviewing comments made during closing arguments, this court asks whether or not the comments engendered substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them. *People v. Nieves*, 193 Ill. 2d 513, 533 (2000). If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's

improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *People v. Linscott,* 142 Ill. 2d 22, 28 (1991).

¶ 39 Initially, we disagree with Brown's contention that the prosecutor's statements would have caused the jury to think that the law required them to accept the truth of any prior inconsistent statements and reject the recanting witness's trial testimony. Rather, viewed in context, the prosecutor accurately informed the jury that if it believed the witness had made the prior inconsistent statement, it would mean the witness was not truthful or lied at trial. Moreover, the prosecutor's comments cannot be said to have engendered substantial prejudice against Brown. Given the overwhelming evidence against Brown, the prosecutor's comments could not have had any influence on the jury's guilty verdict. Further, the jury was instructed properly and is presumed to follow the instructions that the court gives it. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). Accordingly, Brown's argument fails as he cannot demonstrate that the prosecutor's comments substantially prejudiced him.

¶ 40 Related to the instructional errors, Brown also claims that his trial counsel was ineffective for not offering contemporaneous limiting instructions regarding the prior inconsistent statements of Mitchell, Jackson, and Oliver. But, as noted, Mitchell and Jackson's prior sworn statements were properly admitted as substantive evidence, so requesting a limiting instruction would have been a fruitless exercise. As for the statements that Oliver, Mitchell, and Jackson made to police, we have already found that Brown was not prejudiced by the lack of a contemporaneous limiting instruction, since the jury was properly instructed at the close of trial. Accordingly, there is no reasonable probability that counsel's failure to ask for such an instruction would have changed the outcome at trial. *People v. Patterson*, 2014 IL 115102, ¶ 87 (rejecting defendant's ineffective assistance of counsel claim where no prejudice resulted from

counsel's actions). Furthermore, a reasonably competent attorney could have decided not to call attention to the jury's ability to use the grand jury testimony as substantive evidence by requesting a limiting instruction only with respect to statements made to police.

¶ 41 CONCLUSION

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

¶ 43 Affirmed.