No. 120649

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- BLACKIE VEACH Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-13-0888. There on appeal from the Circuit Court of the Fifth Judicial District, Coles County, Illinois, No. 12 CF 479. Honorable Mitchell K. Schick, Judge Presiding.

BRIEF AND ARGUMENT FORDEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

POINT AND AUTHORITIES

Page

NATURE OF THE CASE

Blackie Veach was convicted of two counts of attempt first degree murder after a jury trial and received two consecutive 16-year sentences.

This is an appeal from the judgment of the Appellate Court, Fourth Judicial District, affirming his convictions and sentences. *People v. Veach*, 2016 IL App (4th) 130888 (Appleton, J., dissenting).

No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether trial counsel provided ineffective assistance by failing to object to the admission of recorded interviews of the State's key witnesses which contained prior consistent statements repeating their direct testimony and bad character evidence of defendant.

STATUTES AND RULES INVOLVED

Illinois Rules of Evidence 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

* * *

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided by sections 115-7.3, 115-7.4, and 115-20 of the Code of Criminal Procedure (725 ILCS 5/115-7.3, 725 ILCS 5/115-7.4, and 725 ILCS 5/115-20). Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....

Illinois Rules of Evidence 613 (effective January 6, 2015). **Prior Statements of Witnesses**

* * *

(c) **Evidence of Prior Consistent Statement of Witness.** A prior statement that is consistent with the declarant-witness's testimony is admissible, for rehabilitation purposes only and not substantively as a hearsay exception or exclusion, when the declarant testifies at the trial or hearing and is available to the opposing party for examination concerning the statement, and the statement is offered to rebut an express or implied charge that:

> (i) the witness acted from an improper influence or motive to testify falsely, if that influence or motive did not exist when the statement was made; or
>
> (ii) the witness's testimony was recently fabricated, if the statement was made before the alleged fabrication occurred.

STATEMENT OF FACTS

Defendant, Blackie Veach, was charged with the attempt murders of Matthew Price and Renee Strohl. (C. 215-16) He was also charged with the lesser-included offenses of aggravated battery. (C. 12, 14) All the charges arose from a single incident which occurred on December 12, 2012, at 24 West Locust Street in Charleston, the home of Matthew and Renee, wherein defendant, who had been a longtime friend of Matthew and Renee, allegedly cut their necks with a knife.

At the July 2013 jury trial, Johnny Price testified that he was 18 years old. (R.XV 37) On December 12, 2012, he went to Matthew and Renee's house. (R.XV 40) Matthew is his cousin. (R.XV 37) Johnny went to visit because Matthew was going to be sentenced to prison soon. (R.XV 138) Defendant also spent several hours at the house that evening visiting with Matthew and Renee. Defendant sat in a black chair and talked with Matthew. (R.XV 40, 46-47) Johnny sat on the couch, drank beer, and smoked cannabis and synthetic marijuana, also known as "K2." (R.XV 50-51) Matthew was smoking K2. (R.XV 43) Renee was drinking beer. (R.XV 49)

Matthew and Renee went into the bathroom for about 30 minutes. (R.XV 60) When they came back out, they sat on the loveseat. (R.XV 61) Defendant was behind the loveseat. (R.XV 61) Defendant then cut Matthew's throat. (R.XV 62) Renee got on her phone and defendant "cut her." (R.XV 64) Matthew pushed Blackie onto a mattress that was behind the loveseat. (R.XV 65) Johnny ran out the back door. (R.XV 66) Johnny

saw defendant chasing him so he ran to the Dairy Queen and called his grandmother. (R.XV 66-67) Johnny did not call the police because he was scared. (R.XV 68) Johnny told the manager at the Dairy Queen that his cousin's neck had been cut. While at the Dairy Queen he was crying, not laughing. (R.XV 68, 145) The police came to the Dairy Queen and took him to the station where he gave a videotaped statement. (R.XV 67-68) Johnny was impeached with a prior conviction for retail theft. (R.XV 76)

After Johnny's direct examination was completed, his videotaped interview, People's Exhibit 24, was admitted by stipulation of the parties. (R.XV 33-34, 69-70) The State offered no reason why it wanted to admit the videotape. Defense counsel wanted to use portions of the videotape for impeachment, and stated that by using the videotape for impeachment, he understood he was "going to open the door" to admitting the "whole video." (R.XV 33-34) When the State moved to publish the entire recording, defense counsel responded, "The entire interview?" The State responded, "I believe under the doctrine of completeness the – everything needs to be seen." (R.XV 70) Defense counsel responded that he had no objection to admitting the videotape in its entirety as long as the defense would be permitted "to call rebuttal." (R.XV 70) The videotape was published to the jury in its entirety. (R.XV 70-71)

In the videotape, Johnny described the attack six different times. (People's Exhibit 24: 09:30 - 11:05, 17:00-33, 20:20-42, 22:10-59, 27:50 - 30:15, 37:55 - 42:20) Johnny also stated that on the night of the attack: (1) defendant claimed to be a Latin King, made gang signs, and wanted Johnny

to make them (19:40 - 20:10); (2) defendant forced Johnny to smoke drugs (07:05-10, 07:55 - 08:40; 15:40 - 16:20; 19:40 - 20:10); (3) defendant had "problems" with Johnny, and Matthew told defendant that if he wanted to beat up Johnny he would have to go through Matthew, "that's what I'm guessing they said" (16:22-47, 20:18-40); (4) after Matthew stated that defendant would have to go through Matthew, defendant cut Matthew's throat (16:50 - 17:20, 20:35-40); and (5) the reason why defendant cut Renee and chased Johnny was because defendant wanted to kill all the witnesses (23:00-30).

Gayla Jenkins testified that she was the manager of the Dairy Queen in Charlestown. On December 12, 2012, at about 9:00 p.m., Johnny Price came into the shop and appeared upset. (R.XIX 971-72, 974) Jenkins asked him if he wanted her to call the police. Johnny said, "no," and informed her that he had called his father or grandmother. (R. XIX 973, 981) Jenkins gave Johnny some food, then she called 911. (R. XIX 975) A recording of her 911 telephone call (People's Exhibit 20, Tracks 2 and 3) was played for the jury. (R.XIX 977) On the 911 recording, Jenkins stated that Johnny told her that he had witnessed "someone slitting someone else's throat," and that Johnny was "sitting in the dining room right now talking on the phone but he is laughing, and, I don't know, it just strikes me as really odd." (Track 2 at 00:49-56; Track 3 at 00:35-40)

Matthew Price testified that he was 22 years old. (R.XV 191) He had been in a relationship with Renee Strohl from April 2011 to April 2013. (R.XV 190) He and Renee lived together at 24 West Locust. Defendant, who

had been Matthew's best friend, often stayed at 24 West Locust with him and Renee. (R.XV 192-93) In the summer of 2012, Matthew accused Renee of having an affair with James Davis. (R. XVI 363) James Davis "was blaming it" on Derrall Enlow. Matthew disliked Enlow and Enlow's step-brother Robert Jones. (R. XVI 364) In the early fall of 2012, Enlow and Jones attacked Matthew and defendant while they were playing pool at the Friends & Company bar in Charleston. (R. XVI 423-27) Matthew often saw Enlow and Jones visiting the home of Lacei Oliver, who lived across the street from Matthew and Renee. (R. XVI 422-23) During the summer of 2012, Andrea Newell told Matthew that defendant was having an affair with Renee, but Matthew did not believe defendant "would do that." (R. XVI 364, 366, 370) In November of 2012, Matthew did not hold a knife to the throat of Renee or of Davis, nor did he point a gun at Renee, Davis or Ashley Miller. (R. XVI 374-78)

Matthew testified that on December 12, 2012, he and Renee were at their home with Johnny and defendant. They were drinking alcohol and smoking K2. (R.XV 195-96, 206-11) Matthew and Renee were sitting next to each other on a "loveseat" in the "front" room. (R.XV 207) Defendant was sitting in front of them in a black chair. Johnny was sitting on an adjacent couch. Matthew could see both Johnny and defendant. (R.XV 207, 210-12) Matthew and Renee went into the bathroom for 20 minutes and had sex. (R.XV 212, 215) When they came out of the bathroom, defendant was standing at the bathroom door. (R.XV 215) Defendant complained, saying that was "bogus." (R.XV 216) Matthew and Renee sat back down on the

loveseat. (R.XV 216) Defendant asked Matthew to speak with him on the back porch. (R.XV 217) On the back porch, defendant said that defendant had to put a "hit" on Renee because she had beaten up defendant's friend, Debbie Davis. (R.XV 217-18) Matthew testified that the first time he had told anyone about defendant saying that he wanted to retaliate against Renee was two days prior to trial, when he spoke to the prosecutor about his anticipated testimony. (R.XV 252)

Matthew testified that while he was on the back porch with defendant talking about Renee and Debbie, he told defendant to "just let it go," because Renee had been charged with an aggravated battery and because it was "just a female fight." (R.XV 218) Defendant agreed to drop the issue. (R.XV 218; R. XVI 490) Matthew and defendant went back to the front room. Matthew sat next to Renee on the loveseat. Defendant sat on the black chair for a few moments, then sat on a folding chair behind the loveseat and began talking to Matthew. (R.XV 218, 223) Defendant said: "You're not my brother. You never had been." (R.XV 223) Matthew then felt "warmness running down his neck." (R.XV 223) Matthew put his hand up to his neck and felt his hand being cut. (R.XV 223-24) Matthew yelled, "call 911." (R.XV 224) Matthew stood up and saw defendant cutting Renee's neck with the knife pictured in People's Exhibit 12. (R.XV 224-25) Matthew "swung over" the loveseat and punched defendant in the face. (R.XV 224, 226) Defendant dropped the knife. (R.XV 224, 226) Defendant fell back onto a bed that was behind the loveseat. (R.XV 227) Matthew was going to start hitting defendant, but Johnny ran between them and knocked Matthew off balance. Johnny ran out

the back door. Defendant then ran out the back door. (R.XV 227-28) Renee went into the bedroom and called 911. (R.XV 230)

Matthew testified that on December 12, 2012, he was aware he was possibly going to be sentenced to prison on December 17, 2012. (R.XVI 359) Matthew also testified that on December 23, 2012, Renee accused him of "cheating," and she "put her hands on me [and] got me locked up for domestic." (R.XV 242; R.XVI 362) On December 23, Matthew did not hold a knife to Renee's throat. (R.XVI 375) On January 12, 2013, Matthew did not threaten Renee or Amber Daniels with a knife. (R.XVI 375, 389-90) Matthew had never threatened to kill himself over Renee using a knife, but he had threatened to kill himself over Renee by "[h]anging himself," "[o]ne or two other times." (R.XVI 389-90, 466) Matthew testified that he did not tell Tina Broom, Adriana Pedigo or Alvina Wright that it was Johnny Price who had cut him and Renee . (R.XX 1090-94) Matthew was impeached with three prior felony convictions. (R.XV 187)

Matthew testified that he gave an audio-recorded statement to Detective West at the Charleston Police Department on December 13, 2012. The parties stipulated to the admission of Matthew's audio-recorded statement and to its publication to the jury. The recording was played to the jury before the start of cross-examination. (R.XV 237-41; People's Exhibit 28 Track 1) In the recording, Matthew repeated the details of defendant's alleged knife attack four separate times. (01:40 - 02:22, 04:25-35, 05:45 - 06:30, 07:03-50) Matthew stated three times that defendant's motive was retaliation for the fight Renee had with Debbie Davis. (02:40-58, 05:50-59,

13:45 - 14:10) Matthew commented on the recording that defendant "was a real big alcoholic, and that's all he does now is drink." (15:37-44) Matthew also stated that there had been no conflict between defendant and Johnny on December 12. (14:02-55)

Renee Strohl testified she was 24 years old. (R.XVI 486) She had been in a relationship with Matthew from March 2011 to February 2013. (R.XVI 487) She and Matthew lived together at 24 West Locust. (R.XVI 488) In the summer of 2012, Matthew began repeatedly accusing her of having an affair with defendant, with James Davis, and with Darrell Enlow. (R.XVI 558-59) On several occasions prior to November 5, 2012, Matthew held a knife on Renee and threatened to cut himself. (R.XVI 568)

On November 5, 2012, Renee was at Friends and Company with defendant and Matthew when Robert Jones and Darrell Enlow attempted to "smack Blackie in the head" with a beer mug, and "started going after Matt." (R.XVI 555-56) On that same day, she and Matthew were at home with defendant, Ashley Miller, James and Sarah Hickman, and Debbie Davis and her son James Davis. A gun was pointed at Renee and she was told to "beat the crap out of Debbie Davis," because Debbie had broken a window in the house. (R.XVI 561, 563) Matthew held a knife to the throat of James Davis to prevent him from interfering with the fight. (R.XVI 565-66) Defendant attempted to "calm everybody down." (R.XVI 585) A gun and knife were "pulled" on Ashley Miller. (R.XVI 567) Renee fought with Debbie. (R.XVI 563) After the fight, Renee and defendant attempted to leave the house but Matthew told them if they left or contacted the police Matthew would shoot

both of them. (R.XVI 564) Renee testified that she was afraid of Matthew, and when she was questioned about the fight by the police on November 9, 2012, she told Detective West she was afraid of Matthew. (R.XVI 567)

On December 12, 2012, Renee and Matthew were at home with Johnny and defendant. (R.XVI 488, 495) Renee began drinking Admiral Nelson's Cherry Rum. Defendant was drinking beer that he had brought with him. (R.XVI 497-98, 511) Matthew was smoking cannabis and K2. (R.XVI 511) Several other people visited them during the evening and eventually left. (R.XVI 501-03) Renee was sitting with Matthew on the loveseat. Johnny sat on the couch and defendant sat on the black chair. (R.XVI 507) She and Matthew went into the bathroom for six or seven minutes and had sex. (R.XVI 512) When they came out of the bathroom, defendant was standing in front of the door. Defendant complained about them being in the bathroom. (R.XVI 512-13) She and Matthew sat back down on the loveseat. She was "fairly impaired" at the time, but was wide awake "[f]or a few seconds, not long." (R.XVI 513-15) Defendant sat in a folding chair behind the loveseat.

The next thing Renee remembered was feeling a sharp pain. (R.XVI 515) She did not see who had cut her throat. (R.XVI 588, 591) She stood up and saw defendant lying on the bed behind the loveseat with Matthew standing over him. Matthew hit defendant in the face. Johnny was not in the room. (R.XVI 516-17) She went to the bedroom and called 911. (R.XVI 518) The 911 call (People's Exhibit 20) was played for the jury. (R.XVI 353-54, 523, 525) Renee testified that she did not know who had cut her throat in that defendant and Matthew were "both there, but Blackie has never tried to

hurt me." (R.XVI 587, 591)

Renee testified that the following day, December 13, she spoke with Matthew for about two and a half hours before going to the police station and giving an audio-recorded statement. (R.XVI 530, 551-52) By agreement, Renee's audio-recorded statement (People's Exhibit 28, Track 2) was admitted into evidence. Defense counsel asserted he had no objection to publishing the recording to the jury. (R.XVI 530-31) Renee's recorded statement (People's Exhibit 28 Track 2) was played for the jury before the start of cross-examination. (R.XVI 530-31)

In the recorded statement, Renee recounted the December 12 assault and stated: (1) "I don't like Blackie coming to my house whenever he's intoxicated because he gets violent [and defendant's mother] told me, I've never experienced anything up until today, heard stories of other people that had been hurt by him when he drinks hard alcohol" (1:11-30); (2) shortly before the incident occurred, defendant's "mother had called and asked me to tell Blackie that he had court at nine o'clock in the morning and if he was going to be home [and, I said], Blackie you have court at nine [and defendant responded], I'm gonna be home by 10" (2:03-15); (3) during the evening hours, defendant asked Renee to invite Lizzie Gazianni over because defendant wanted to have sex with her (9:55 - 10:50); (4) the "only thing that [defendant] said to me that made me angry was he told me that that Lizzie girl had given him [oral sex] on my daughter's bed, and ... he was like give me a high five ... and I just said look ... I told you I did not want anybody doing anything on that bed" (14:00-20); (5) defendant "talked about if Darrell Enlow

... would come to the house ... [defendant] would for certain kill him and he wouldn't clean up any of the blood" (15:44 -16:00); and (6) Matthew had said that defendant may have cut their throats because of the fight between Renee and Debbie Davis (16:20-34). Renee also said in the statement that defendant had not said anything about wanting to fight Johnny, and Matthew had not said anything about defendant having to go through Matthew if he wanted to fight Johnny. (15:25-40)

Renee testified that on December 23, 2012, Matthew was arrested after he pulled a knife on her and threatened to kill her by slitting her throat "again." (R.XVI 568, 576-77) Actually, Matthew "did not say, 'I will slit your throat again. He said, I'm going to slit your throat.' " (R.XVI 568, 577; see C. 303) On January 12, 2013, Matthew had a knife and he threatened to kill himself. During that episode, Matthew also threatened Renee, Amber Daniels, and Christopher Lewis with the knife. (R.XVI 578-80) Renee also testified that defendant had never threatened her with a knife or a gun and had never caused any harm to her. (R.XVI 581) Renee was impeached with two felony convictions. (R.XVI 532)

Dr. Henry Moore testified that he treated Renee's neck laceration. She was not bleeding from the laceration on her neck when he treated her, and the laceration was not life threatening. (R.XVI 304-305) Dr. Joseph Burton testified that he treated Matthew's neck laceration. The laceration did not cause significant blood loss. (R.XVI 337-38)

Detective Anthony West testified that he had investigated the November 5, 2012, incident. In that incident, a knife had been used, and

Matthew Price was the alleged perpetrator. (R. XIX 873) A few days after the November 5 incident, Renee told West she was afraid of Matthew and asked West to drop the charges against Matthew. (R. XIX 907-08) West testified that on December 12, 2012, he processed the crime scene at 24 West Locust. (R. XIX 820-21) He found a black-handled Farberware kitchen knife on top of the TV tray pictured in People's Exhibit 32. (R. XIX 824, 830)

Charleston police officer Justin Carder testified that defendant was taken into custody a few minutes after the incident. (R.XVII 673-74) He transported defendant to the Charleston Police Department. (R.XVII 676) Carder learned that other people had run out of the house at 24 West Locust and he asked defendant about the identities of those other people. Defendant said "it was" Robert Jones and Darrell Enlow. (R.XVII 677) Carder identified People's Exhibit 74 as the knife that had been collected from 24 West Locust. People's Exhibit 12 is a picture of the same knife. (R.XVII 693)

DNA expert Kelly Biggs testified by way of video deposition. (See transcript with exhibits) She testified she had tested swabs from the knife (People's Exhibits 12, 74; R.XVII 687-89, 693; R.XVIII 738, 760, 767), and from defendant's hands, face, pants and shoes. (Trans. 12) She tested the samples to determine if they contained DNA matching the DNA of either Matthew Price or Renee Strohl. (Trans. 26-27) The swabs from the knife had two DNA profiles which were not suitable for comparison. (Trans. 17, 19, 48-49) The swab from defendant's left hand contained two DNA profiles. The major profile was of an unknown person. The minor profile was consistent with the DNA of Matthew Price. (Trans. 21) The swab from defendant's

right hand contained two DNA profiles. The major profile was of an unknown male person. The minor DNA profile was unsuitable for comparison. (Trans. 23) The swab from defendant's face had DNA which matched the DNA of Matthew Price. (Trans. 25-26) Defendant's pants had DNA matching the DNA of Renee Strohl. (Trans. 28-30) Defendant's left shoe had DNA matching the DNA of Matthew Price. (Trans. 31-34)

Detective Stuart Myers testified that he interviewed defendant on December 12, 2012, at the Charleston Police Department. (R. XIX 927) People's Exhibit 25 was an accurate video recording of that interview. (R.XIX 927-28) People's Exhibit 25 was published to the jury. (R.XIX 928-29) In the recording, defendant claimed that it was Robert Jones and Darrell Enlow who had committed the offenses against Renee and Matthew. (4:05-25, 1:19:35 - 1:20:35)

Robert Jones testified that on December 12, 2012, he had no contact with defendant, Matthew or Renee, and that he did not go to 24 West Locust that day. Jones did not cut Matthew's or Renee's throat. (R.XIX 958-59)

Amber Daniels testified that she was 17 years old. (R.XIX 984) Matthew was a family friend for about eight years. (R.XIX 985) Daniels was at 24 West Locust on December 12, 2012, for about 15 minutes and then left. While she was there, she saw Renee and Matthew using hydrocodone. (R.XIX 986-87) Christopher Lewis came over to Renee's house at about 7:30 p.m. (R.XIX 988)

Daniels testified that on January 12, 2013, she was living with Renee and Matthew at 24 West Locust. On that day, she was at the house with

Renee, Matthew and Lewis. (R.XIX 988) Matthew was smoking K2 and drinking alcohol. (R.XIX 991) Matthew took off his shirt and strangled Daniels with it. Matthew also threatened Daniels with a knife. Daniels could not believe Matthew would harm her like that. (R. XIX 990) Matthew also threatened Renee and Lewis with the knife. Matthew then turned the knife onto himself. (R.XIX 989-90) Two other people came over to the house to pick up Matthew, and Matthew told the other people "that if they didn't get him out of there quick enough that they were going to get killed, too." (R.XIX 989)

Ashley Miller testified she was 21 years old. She lived with Renee at 24 West Locust for a few days in November 2012. (R.XIX 995-96) Miller moved to a shelter because she woke up in the middle of the night to find Matthew pointing a gun at her head and telling her she had to leave. (R.XIX 996) Matthew told her that if she went to the police he would kill her. (R.XIX 998)

Christopher Lewis testified that on December 12, 2012, he went to 24 West Locust at about 8:30 p.m. (R.XIX 1002-03) Defendant answered the door holding a bottle of Admiral Nelson's Cherry Rum. Lewis only stayed for a minute. Just prior to December 12, Lewis had been at 24 West Locust when Matthew forced Lewis to stay in the house and forced Amber Daniels to sit on Lewis's lap. (R.XIX 1006) Matthew put a knife up to Lewis and Daniels, and told Lewis he "needed to shut that bitch up before he killed me." (R.XIX 1007) Renee telephoned some members of Matthew's family who came over and calmed Matthew down and got him to leave the residence.

(R.XIX 1007)

Randall Strohl testified he was Renee's father and that he knew Matthew. (R.XX 1046) On December 12, 2012, he called 911. (R.XX 1046) A recording of the phone call (People's Exhibit 20, Track 1) was played for the jury. (R.XX 1048) On the recording, Randall stated he "just received a phone call from [Renee] and also to the paramedics that have responded to a call saying she had her throat slashed," and "as far as I know the individual who did this to her was Matthew Price ... I'm telling you that as far as I know that is who has done this." (00:10-27; 00:50 - 01:08) The operator asked Randall how he knew it was Matthew Price, and Randall responded, "from her calling me and telling me ... that he did this and again this is second hand testimony so obviously you've got to go to the source, I know that I spoke with the paramedics [who were] treating her on her way to Carle Hospital." (01:40 - 02:03) Randall testified that he did not speak directly with Renee on December 12, but had assumed it was Matthew based on Matthew's past behavior. (R.XX 1056)

Randall testified that on December 23, 2012, he received a phone call from Renee, and he could hear Matthew in the background yelling at her and making threats. (R.XX 1049, 1051-52) Randall drove to Renee's house and noticed Renee "was very upset and had a swollen spot on the left side of her forehead." (R.XX 1054) Randall took Renee to the police station. (R.XX 1054)

Michael Ramsey testified that he went to 24 West Locust on December 12, 2012. He arrived at about 6:30 p.m. and left at 8:00 p.m. Ramsey, Renee

and defendant were drinking alcohol. Matthew was smoking K2. (R.XX 1061-63)

Alvina Wright testified that she knew Matthew, and a few days after the incident she asked Matthew how his throat had been cut. Matthew told her that Johnny Price had cut his throat. (R.XX 1098-99) The court admonished the jury that the testimony about Matthew saying Johnny had cut his throat could be considered only for impeachment. (R.XX 1098) Wright further testified that Matthew had told her that Johnny had given Matthew money to buy drugs for Johnny, but Matthew, after buying the drugs, had used the drugs with Renee instead of giving the drugs to Johnny, "and Johnny got upset with him." (R.XX 1100)

Tina Broom testified that Matthew was a family friend for the past 15 years. She had a conversation with Matthew in the early morning hours of December 13, 2012. (R.XX 1104-05) Matthew told her that defendant and Johnny had been standing behind him. (R.XX 1105-06) The court admonished the jury that the testimony about Matthew saying Johnny and defendant were standing behind him could be considered only for impeachment. (R.XX 1106) Broom testified further that Matthew had told her that he did not think Johnny would have cut him because Johnny "was family, and family don't do that to family." (R.XX 1105-07)

Adrianna Pedigo testified she was 15 years old, and that Matthew was like a brother to her. (R.XX 1109) She learned that he had his throat cut, and she asked about the incident. (R.XX 1109-10) Matthew told her that Johnny Price had cut his throat. (R.XX 1111) The court admonished the jury

that the testimony about Matthew saying Johnny had cut his throat could be considered only for impeachment. (R.XX 1111-12) Pedigo testified that the next day she had another conversation with Matthew over the phone and Matthew said, "just remember Adrianna, snitches get stitches." (R.XX 1113-14)

Defendant testified that he had known Robert Jones and Darrell Enlow since they were all children. Jones began acting aggressive towards defendant. A few weeks before this incident, Jones and Enlow attacked him at Friends & Company. Jones threw a billiard ball at him and Enlow hit him in the face with a beer glass. (R.XX 1130) During this incident Jones punched Matthew in the face. (R.XX 1165) Defendant testified he did not see Jones or Enlow at 24 West Locust on December 12 (R.XX 1164, 1181, 1187, 1199), but he told the police that Jones and Enlow were responsible for cutting Matthew and Renee because he thought they were "the only ones that could have done it." (R.XX 1166; People's Exhibit 25, 2:10 - 3:00, 4:05-20; 1:15:50 - 1:16:15, 1:19:30-45, 1:20:10-40, 1:29:40-55)

Defendant testified that he had known Matthew since the age of nine. On November 5, 2012, he was at 24 West Locust with Matthew, Renee, James Davis, Debbie Davis, and Ashley Miller. (R.XX 1146) Matthew pointed "a gun at Renee's head and made her beat" Debbie. (R.XX 1151) Matthew held a knife to the throat of James and told him he had to watch his mother get beat up. (R.XX 1152) Defendant's Exhibit 12 is a picture of Debbie after she was beat by Renee. (R.XX 1150) Defendant did not report the incident to the police because Matthew said he would kill anyone who

talked to the police. (R.XX 1152) Sometime after the November 5 incident, Matthew told Renee that "he was going to kill her for telling." (R.XX 1176-77)

Defendant testified that he went to 24 West Locust on December 12, 2012. Matthew, Renee, and Johnny were present. Defendant drank alcohol. 1156) Renee drank alcohol and snorted hydrocodone. (R.XX 1158) Matthew smoked cannabis and K2, drank alcohol, and snorted hydrocodone. (R.XX 1156, 1159) Johnny smoked cannabis and K2, and drank alcohol. (R.XX 1159) Defendant is not in a gang, and he did not flash gang signs at Johnny or pressure Johnny to smoke drugs. (R.XX 1156-57, 1169) Matthew and Renee went into the bathroom for 20 minutes. Defendant had to use the bathroom, so he knocked on the door. (R.XX 1161) When Matthew and Renee came out, defendant said, "that's bogus, why didn't you guys go to the bedroom." (R.XX 1161) Matthew then "pulled me to the back room" and began talking about the November 5 incident. (R.XX 1161-62) Defendant did not tell Matthew that he "had a hit out" on Renee to get even for the Debbie Davis fight. (R.XX 1205) After the conversation, defendant used the bathroom. (R.XX 1162)

After defendant came out of the bathroom, Matthew pushed him onto the bed in the front room, got on top of him, and hit him in the nose. (R.XX 1163, 1166, 1173, 1186, 1192) Defendant did not see Johnny. (R.XX 1191) Matthew's neck was bleeding. Renee pushed Matthew and yelled at him to get off of defendant. (R.XX 1163, 1174, 1194) Renee ran to the bedroom and defendant ran out the door. (R.XX 1163, 1195-96) Defendant saw the back of

someone running out the back door ahead of him. (R.XX 1182-83, 1198-99, 1208-09) After defendant ran from the house, he did not see anyone in front of or behind him. (R.XX 1196) Defendant did not see what happened to Matthew and Renee, and he did not cut them. (R.XX 1163, 1168-69, 1171)

In closing argument, defense counsel argued that Matthew had a hair-trigger temper, was using drugs, was facing an upcoming prison sentence, and believed defendant had an affair with Renee. (R.XX 1253, 1269) Matthew could have cut Renee's throat, and after realizing the criminal consequences of his conduct, turned the knife on himself so he could claim they both were attacked. (R.XX 1269-70)

The jury began deliberating at 3:45 p.m. (R.XX 1314) At 6:45 p.m. the jury requested to hear the 911 telephone call made by Renee, and it was played for the jury. (R.XX 1297) At 7:45 p.m. the jury sent a note stating: "Very hung with no end in sight, members are tired and frustrated. May we go home and resume tomorrow?" (Jury instructions envelope; R.XX 1308) The court gave the jury a *Prim* instruction at 8:02 p.m. (Jury instructions envelope; R.XX 1316) At 10:40 p.m. the jury returned guilty verdicts on each count. (R.XX 1317-18)

Defendant filed a motion for new trial. (C. 479) An affidavit from Julia Ferguson attached to the petition states that in August 2013 Renee told Ferguson that she saw Matthew cut his own throat after her throat had been cut. (C. 493) At the hearing on the motion, Renee testified that after the December 12 incident, she told Ferguson that Matthew had told her he cut his own throat. (R.XXI 37-38) Renee also testified that she had told Jacyie

Ferguson that before she gave her statement to the police on December 13, 2012, "Matt had told me the events had happened and what times it happened, and exactly what happened and what I should say to Tony West whenever I went and talked to him. Otherwise, if I didn't say what he said, that he would be facing up to 35 years in prison for slitting my throat." (R.XXI 38-39) Renee testified that Matthew had not really been her boyfriend. Matthew had abused her and she did not want him around, but he would not leave. (R.XXI 39) The motion for new trial was denied. (R.XXI 91)

At the sentencing hearing, Renee asked the court for leniency as she believed "they have the wrong person." Renee testified that she believed the December 12 incident occurred because of Matthew's "pathological jealousy" of the relationship between Renee and defendant. (R.XXI 112) Matthew "knew he was going to prison. And he was scared that Blackie would take his girlfriend away." (R.XXI 112-13) Renee testified she believed defendant did not commit the offenses:

> [B]efore I called 911, I called my father and I told him. ... I told him my throat was cut, and that my dad told me that I told him that Matt did it. I don't remember this conversation. I guess I told him I was dying. And he said I needed to call 911. ... I feel that my friend Blackie has been wrongly accused. ... I feel like Matt only got three years in prison. He is going to be out. And I still, even to this day, get threatening messages from his friends about if Blackie were to get out or, you know, what they would do to him or what they would do to me if they found me. I feel like I am running, because I am scared." [R.XXI 113-14]

Defendant received consecutive sentences of 16 years for each of the two convictions for attempt murder. (R.XXI 141)

On direct appeal, defendant claimed that trial counsel provided

ineffective assistance by not objecting to the inadmissible evidence contained in the recorded statements of Johnny, Matthew, and Renee. The appellate court declined to address defendant's claim, finding that the record on appeal was not adequate for the court to resolve the issue. *People v. Veach*, 2016 IL App (4th) 130888, ¶¶ 92, 95. Justice Appleton, dissenting, would have granted defendant a new trial because trial counsel's stipulation to the admission of the prior consistent statements and prior bad acts, which was "memorialized in the record on direct appeal," was "objectively unreasonable" and "likely ... altered the outcome" of the trial. *Veach*, 2016 IL App (4th) 130888, ¶¶ 107, 144, 147.

ARGUMENT

The appellate court declined to address defendant's claim of ineffective assistance of counsel because it erroneously believed the issue required consideration of matters outside the record on appeal. The record fully supports the claim as it shows that trial counsel allowed the admission of recorded interviews of key State witnesses which contained objectionable prior consistent statements and bad character evidence of defendant. Because trial counsel failed to use the rules of evidence to shield defendant from the admission of this inadmissible prejudicial evidence, this Court should find that trial counsel was ineffective, and grant defendant a new trial.

STANDARD OF REVIEW: To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Since the trial court did not make any findings of fact in regards to this issue, review is *de novo*. *People v. Davis*, 353 Ill.App.3d 790, 794 (2d Dist. 2004).

INTRODUCTION: "The general rule is that prior consistent statements of a witness are inadmissible for the purpose of corroborating the trial testimony of the witness, because they serve to unfairly enhance the credibility of the witness." *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 60; see Ill. R. Evid. 613(c) effective January 6, 2015. In addition, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith," because such evidence might

influence a jury to convict a defendant merely because it feels he is a bad person who deserves punishment. *People v. McGee*, 2015 IL App (1st) 122000, ¶ 25; Ill. R. Evid. 404. And, where inadmissible evidence "is contained in an otherwise competent statement or confession, it must be deleted before the statement or confession is read to the jury"; the completeness doctrine "does not give the party an automatic right to introduce material which is otherwise inadmissible." *People v. Moore*, 2012 IL App (1st) 100857, ¶ 48.

In this case, defense counsel stipulated to the admission of the recorded interviews of Matthew Price, Renee Strohl, and Johnny Price which contained both prior consistent statements repeating their direct testimony about the offenses, and bad character evidence of defendant. Trial counsel wanted to use parts of the recorded statements for impeachment, but did not move to redact the unfairly prejudicial inadmissible portions. Trial counsel mistakenly believed that the State had the right to play the entire recordings for the jury because he had opened the door by using portions of the statements for impeachment, and because of the completeness doctrine. (R.XV 33-34, 69-70) Because counsel's failure to seek to redact the inadmissible evidence from the recorded statements was unreasonable, and because the admission of the inadmissible evidence undermined confidence in the verdict rendered, defendant received the ineffective assistance of counsel. *Strickland*, 466 U.S. at 687-88, 694.

ARGUMENT: Johnny Price testified in detail about what had occurred on December 12, 2012, from the time he arrived at 24 West Locust

until he gave his videotaped statement after being picked up by the police at the Dairy Queen. (R.XV 36-167) He testified that defendant cut the necks of Matthew Price and Renee Strohl. (R.XV 62, 64)

After Johnny's direct examination was completed, his videotaped interview, People's Exhibit 24, was admitted by stipulation of the parties. (R.XV 33-34, 69-70) The State offered no reason why it wanted to admit the videotape. Defense counsel wanted to use portions of the videotape for impeachment, and stated that by using the videotape for impeachment, he understood he was "going to open the door" to admitting the "whole video." (R.XV 33-34) When the State moved to publish the entire recording, defense counsel replied, "The entire interview?" The State responded, "I believe under the doctrine of completeness the – everything needs to be seen." (R.XV 70) Defense counsel replied that he had no objection to admitting the videotape in its entirety as long as the defense would be permitted "to call rebuttal." (R.XV 70) The videotape was published to the jury in its entirety. (R.XV 70-71)

On the videotape, Johnny recounted the entire event to which he had just testified to on direct examination. People's Exhibit 24, 05:20 - 42:20. Johnny repeated details of the defendant's alleged knife attack on Matthew and Renee six separate times. (09:30 - 11:05; 17:00-33; 20:20-42; 22:10-59; 27:50 - 30:15; 37:55 - 42:20) Johnny also repeated unfairly inflammatory statements about how defendant claimed to be a member of the Latin Kings street gang, and how defendant had forced Johnny to consume drugs just prior to the assault. (07:05-10; 07:55 - 08:40; 15:40 - 16:20; 19:40 - 20:10)

Johnny made unfairly prejudicial claims that defendant's motive for cutting Matthew's throat was Matthew's warning to defendant that he would have to answer to Matthew if he beat up Johnny (16:22 - 17:25; 20:18-40), and that the motive for cutting Renee and for chasing Johnny was defendant's desire to kill all the witnesses. (23:00-30)

Johnny's videotaped statement was inadmissible because it repeated his direct testimony which unfairly enhanced the credibility of his testimony. *Johnson*, 2012 IL App (1st) 091730, ¶ 60; *People v. Wiggins*, 2015 IL App (1st) 133033, ¶¶ 36, 65. "The danger in prior consistent statements is that a jury is likely to attach disproportionate significance to them. People tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve." *People v. Smith*, 139 Ill.App.3d 21, 33 (1st Dist. 1985).

Johnny's videotaped statement was also inadmissible because it contained bad character evidence. *McGee*, 2015 IL App (1st) 122000, ¶ 25; Ill. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith...."). "The rule that evidence of the commission of other crimes, wrongs, or acts by the accused is inadmissible for the purpose of showing a propensity to commit crimes is an aspect of the rule that the prosecution may not introduce evidence of a character trait of the accused." *People v. Pikes*, 2013 IL 115171, ¶ 16. A defendant's bad character is not wholly irrelevant to the charges he or she faces in court, but because of the nature of this evidence, our courts have limited the admissibility of other

crimes and prior bad acts because such evidence can overpersuade a jury to convict a defendant merely because it feels he is a bad person who deserves punishment. *People v. Thingvold*, 145 Ill.2d 441, 452-53 (1991); *Pikes*, 2013 IL 115171, ¶ 16.

Matthew Price testified in detail about what had occurred at his house on December 12 (R.XV 192-252; R.XVI 356-483), and how defendant cut his and Renee's necks. (R.XV 223-24) He further testified that the following day he gave an audio-recorded statement to Detective West at the Charleston Police Department. (R.XV 237) The parties stipulated to the admission of Matthew's audio-recorded statement and to its publication to the jury. (R.XV 237-41; People's Exhibit 28, Track 1) The recording was played to the jury before the start of cross-examination. (R.XV 237-41)

In the recorded statement, Matthew recounted the entire event to which he had just testified on direct examination. (People's Exhibit 28, Track 1, 01:40 - 16:25) Matthew repeated the details of the defendant's alleged knife attack on Matthew and Renee four separate times. (01:40 - 02:22, 04:25-35, 05:45 - 06:30, 07:03-50) Matthew stated three times that defendant's motive was retaliation for the fight Renee had with Debbie Davis. (02:40-58; 05:50-59; 13:45 - 14:10) Matthew made the unfairly prejudicial comment that defendant "was a real big alcoholic, and that's all he does now is drink." (15:37-44) Matthew's recorded statement was inadmissible because it contained prior consistent statements and bad character evidence. Ill. R. Evid. 404; *McGee*, 2015 IL App (1st) 122000, ¶ 25; *Johnson*, 2012 IL App (1st) 091730, ¶ 60.

Renee Strohl testified in detail about what had occurred at her house on December 12. (R.XVI 485-593) Renee testified that the following day, December 13, she spoke with Matthew for about two and a half hours before going to the police station and giving an audio-recorded statement. (R.XVI 530, 551-52) By agreement, Renee's audio-recorded statement (People's Exhibit 28, Track 2) was admitted into evidence and played for the jury. (R.XVI 530-31)

In the recorded statement (People's Exhibit 28, Track 2), Renee made the following unfairly prejudicial statements about defendant's character: (1) "I don't like Blackie coming to my house whenever he's intoxicated because he gets violent [and defendant's mother] told me, I've never experienced anything up until today, heard stories of other people that had been hurt by him when he drinks hard alcohol" (1:11-30); (2) shortly before the incident occurred, defendant's "mother had called and asked me to tell Blackie that he had court at nine o'clock in the morning and if he was going to be home [and, I said], Blackie you have court at nine [and defendant responded], I'm gonna be home by 10" (2:03-15); (3) during the evening hours, defendant asked Renee to invite "Lizzie" over because defendant wanted to have sex with her (9:55 - 10:50); (4) the "only thing that [defendant] said to me that made me angry was he told me that that Lizzie girl had given him [oral sex] on my daughter's bed, and ... he was like give me a high five ... and I just said look ... I told you I did not want anybody doing anything on that bed" (14:00-20); (5) defendant "talked about if Darrell Enlow ... would come to the house ... [defendant] would for certain kill him and he wouldn't clean up any of the

blood" (15:44 -16:00); and (6) Matthew had said that defendant may have cut their throats because of the fight between Renee and Debbie Davis (16:20-34). Renee's recorded statement was inadmissible because it contained bad character evidence of defendant as well as hearsay. Ill. R. Evid. 404, 802; *McGee*, 2015 IL App (1st) 122000, ¶ 25.

In this case, trial counsel's failure to object to the bad character evidence and prior consistent statements in the recordings shows that he was unaware that such evidence was inadmissible. While other crimes and bad acts may be admitted if relevant to establish any material question other than the propensity to commit a crime (*Thingvold*, 145 Ill.2d at 452), the State made no claim that the bad acts evidence in the recordings was necessary to prove a material question and the record reveals no legitimate reason for the admission such evidence other than to prove propensity. Trial counsel did not even ask for an explanation from the State why it wanted to admit the recordings nor why it believed such evidence was admissible.

And, even if this evidence had been admissible for some legitimate purpose, then trial counsel had a duty to at least ask for a limiting instruction. When a prior consistent statement or bad character evidence is admitted for proper purposes, trial judges should instruct the jury on the limited use of the evidence orally from the bench at the time the evidence is first presented to the jury and again at the close of the case. *People v. Harris*, 288 Ill.App.3d 597, 606 (1st Dist. 1997); *People v. McWhite*, 399 Ill.App.3d 637, 641 (1st Dist. 2010) ("Even where admissible, prior consistent statements may only be used for rehabilitative purposes; they are not

admissible as substantive evidence."). Here, trial counsel neither made a proper objection to the inadmissible evidence, nor moved to redact, nor asked for a limiting instruction.

If defense counsel had wanted to use portions of the recorded statements for impeachment (as he said he did), the record clearly shows that counsel did not know he could have redacted the prior consistent statements and bad character evidence from the recordings. In other words, counsel did not "open the door" to admitting the "whole video" by using the portions of the recorded statements for impeachment. R.XV 33-34; *Moore*, 2012 IL App (1st) 100857, ¶ 48 (inadmissible evidence must be deleted before a statement or confession is read to the jury); *Wiggins*, 2015 IL App (1st) 133033, ¶¶ 36, 65 (reversible error in allowing State to read entire contents of written statement to jury where it repeated witness's trial testimony). And, counsel was further mistaken that the completeness doctrine permitted the State to publish the entire recordings. R.XV 70; *People v. Craigen*, 2013 IL App (2d) 111300, ¶ 46 (under completeness doctrine, remainder of a writing, recording, or oral statement is admissible only if required to prevent jury from being misled); Ill. R. Evid. 106.

The recorded statements of Johnny and Matthew repeated their trial testimony of the alleged attack on Matthew and Renee 10 different times. And, the recorded statements of Johnny, Matthew, and Renee contained numerous highly inflammatory and disparaging statements about defendant's character. Because of the abundance of highly inflammatory and objectionable evidence in the recorded statements, defendant's trial counsel's

failure to object clearly indicates that he was unfamiliar with the applicable rules of evidence.

The appellate court majority refused to address the above claim of ineffective assistance of counsel because the court believed the record was not adequate to resolve the claim. *People v. Veach*, 2016 IL App (4th) 130888, ¶ 92. Specifically, the court held that the record contained "no indication whatsoever why defense counsel agreed to the admission of the video recordings in question." *Veach*, 2016 IL App (4th) 130888, ¶ 92. However, the record does contain defense counsel's reason for agreeing to the admission. More importantly, it is irrelevant whether there was any indication in the record as to why counsel may have stipulated to the admission of the recordings.

Counsel's reason for stipulating to the admission of the recordings is completely irrelevant to defendant's claim of ineffective assistance of counsel. The only relevant question was whether defense counsel properly objected to the inadmissible evidence contained in the recordings. Because there was no legally acceptable reason for admitting the inadmissible prejudicial evidence, counsel was ineffective for not objecting to it regardless of any reason he may have had for the stipulation. *People v. Moore*, 279 Ill.App.3d 152, 157 (5th Dist. 1996) (absence of challenge to objectionable prejudicial evidence "speaks of particularly egregious lawyering" and will support a claim of ineffective assistance of counsel as reviewing courts will not "construe the unobjected-to admission of this testimony as strategy rather than mistake"); *People v. Fletcher*, 335 Ill.App.3d 447, 453-54 (5th Dist. 2002) (reviewing court will not

presume sound trial strategy where counsel allowed the admission of prejudicial evidence without objection where such evidence could have been excluded by the rules of evidence).

And, as noted above, contrary to the appellate court's finding, the record does indicate why counsel agreed to the admission of the recordings. Trial counsel indicated on the record that he wanted to use parts of the recordings for impeachment purposes. (R.XV 33-34) Trial counsel further aired his erroneous belief that use of the recordings for impeachment opened the door for the State to admit the bad character evidence and prior consistent statements. (R.XV 33-34) And, when trial counsel questioned why the "whole video" needed to be published to the jury, counsel acquiesced to the State's legally indefensible response that "under the doctrine of completeness the – everything needs to be seen." (R.XV 70) As noted in the dissent: "Considering the nature of his claim of ineffective assistance, I cannot imagine what evidence defendant would need to attach to his postconviction petition beyond that which already is in the transcript of the trial." *Veach*, 2016 IL App (4th) 130888, ¶ 104.

The appellate court majority cited two cases which the court believed represented good examples of cases where it was appropriate for the reviewing court on direct appeal to address a claim of ineffective assistance of trial counsel: *People v. Simpson*, 2015 IL 116512; and *People v. Fillyaw*, 409 Ill.App.3d 302 (2d Dist. 2011). *Veach*, 2016 IL App (4th) 130888, ¶¶ 89-90. However, *Simpson* and *Fillyaw* are no different than this case.

In *Simpson*, the defendant contended in the appellate court that his

trial attorney provided ineffective assistance for failing to use the rules of evidence to shield him from the admission of prejudicial inadmissible evidence. *People v. Simpson*, 2013 IL App (1st) 111914, ¶¶ 11, 16-18. At the trial, a witness, Franklin, testified he did not recall giving the police a recorded statement that Simpson had told Franklin he committed the charged crime. *Simpson*, 2013 IL App (1st) 111914, ¶ 11. The State then presented to the jury, without objection, Franklin's recorded statement. *Id.* Because Franklin had no *personal knowledge* concerning the substance of Simpson's statement, the appellate court found that the trial court would not have admitted the recording had defense counsel objected on the basis that, under 725 ILCS 5/115-10.1(c)(2) (2010), the admission of such a statement requires that the declarant have personal knowledge of the substance of the statement. *Id.* at ¶ 18. This Court agreed, and held that the first prong of *Strickland* had been met because "if defense counsel would have objected to Franklin's videotaped statement, he could have precluded it from being introduced into evidence." *Simpson*, 2015 IL 116512, ¶ 34.

In *Fillyaw*, the defendant contended on direct appeal that his trial attorney provided ineffective assistance for failing to use the rules of evidence to shield him from the admission of inadmissible evidence. *Fillyaw,* 409 Ill.App.3d at 311-12. At Fillyaw's trial, a witness, Powell, testified that a handwritten statement he had made claiming that Fillyaw had confessed to him was false. *Id.* at 308. The State sought under 725 ILCS 5/115-10.1(c)(2) (2008) to admit Powell's handwritten statement. *Id.* at 308-09. Fillyaw's trial counsel objected to the admission of the written statement on the basis

of hearsay. *Id.* at 314. "Fillyaw's counsel made no argument that Fillyaw's alleged admission to these crimes was inadmissible under the personal-knowledge limitation of section 115–10.1(c)(2)." *Id.* at 313. *Fillyaw* ruled that the written statement was inadmissible under 115-10.1 "because it was not based on Powell's personal knowledge." *Id.* at 312. *Fillyaw* held that counsel rendered ineffective assistance by not making the personal-knowledge objection, noting that counsel's failure to make such objection revealed that counsel did not understand the law. *Id.* at 314.

In this case, like in *Simpson* and *Fillyaw*, defendant asserts that his trial attorney provided ineffective assistance for failing to use the rules of evidence to shield him from the admission of prejudicial inadmissible evidence. In this case, like in *Simpson* and *Fillyaw*, had trial counsel made a proper objection to the inadmissible evidence, the trial court would have precluded its admission. In this case, like in *Fillyaw*, trial counsel's failure to make a proper objection on the record revealed that counsel did not understand the law. Accord, *Moore*, 279 Ill.App.3d at 157; and *Fletcher*, 335 Ill.App.3d at 453-54.

Because the record is adequate for a reviewing court to address defendant's ineffective assistance of counsel claim, the appellate court could have addressed it. The appellate court's "note" that defendant was free to raise his claim pursuant to the Post-Conviction Hearing Act did nothing more than delay justice and deny defendant his constitutional right to a direct appeal on this issue. *Veach*, 2016 IL App (4th) 130888, ¶ 95; Ill. Const. art. VI, § 6. By suggesting that defendant file a post-conviction petition, the

appellate court forced defendant to pursue his claim without the benefit of appointed counsel and by way of a highly technical and restrictive process which often proves too overwhelming for vulnerable defendants attempting to pursue such relief from a jail cell in the IDOC.

In this case, trial counsel's "unfamiliarity with the law and failure to object on the proper grounds to the improper admission of [evidence] was unprofessional [citation omitted] and his performance thus meets the first prong of the *Strickland* standard." *Fillyaw*, 409 Ill.App.3d at 315. "The constitutional guarantee of effective assistance of counsel requires a criminal defense attorney to use the applicable rules of evidence to shield his client from a trial based upon unreliable evidence." *Fillyaw*, 409 Ill.App.3d at 315. Here, the record clearly shows that trial counsel was unfamiliar with the law in that he failed to use the rules of evidence to shield defendant from the admission of inadmissible prior consistent statements and bad acts evidence. Therefore, the first prong of *Strickland* has been met.

As to Strickland's second prong, counsel's ineffective representation in this case caused prejudice. To show prejudice under *Strickland*, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Jackson*, 205 Ill.2d 247, 259 (2001). The prejudice prong of *Strickland* "may be satisfied if defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Jackson*, 205 Ill.2d at 259. To make this showing, the defendant needs only to show "that it is plausible that the result of the trial would have

been different absent counsel's errors." *Fillyaw*, 409 Ill.App.3d at 312.

In this case, defendant was found guilty based principally on the testimony of Johnny, Matthew, and Renee. Because Johnny and Matthew were the only two people who claimed to have seen defendant commit the offenses, their testimony was crucial as it formed the basis of the State's case against defendant. However, the credibility of Johnny and Matthew was improperly bolstered through the unfair admission of their prior consistent statements. Even where there is competent evidence to prove a defendant's guilt beyond a reasonable doubt, the improper bolstering of a witness's credibility is reversible error when the trial testimony of that witness is crucial. *People v. Dupree*, 2014 IL App (1st) 111872, ¶ 53. The unfair bolstering of the testimony of Johnny and Matthew was exacerbated by the simultaneous admission of the bad character evidence (through the recorded statements of Johnny, Matthew and Renee) which unfairly impugned the credibility of defendant. *People v. Luczak*, 306 Ill.App.3d 319, 327 (1st Dist. 1999) (where testimony of victim and defendant conflicts, jury is faced with credibility dispute and improper bad character evidence "may impact the jury's decision on this issue").

The evidence also shows that Johnny Price had a motive to hurt both Matthew and Renee. Wright testified that Matthew had told her that Johnny had given Matthew money to buy drugs for Johnny on December 12, but Matthew, after buying the drugs, used the drugs with Renee instead of giving the drugs to Johnny, "and Johnny got upset with him." (R.XX 1100) This claim was consistent with Amber Daniels's testimony that she was at 24

West Locust on December 12, 2012, and saw Renee and Matthew using hydrocodone. (R.XIX 986-87) And, if Johnny had cut Matthew and Renee, it would have been to his advantage to provide statements to the police incriminating defendant, which he did. Johnny claimed that defendant committed the offense because Matthew had challenged defendant when defendant expressed his desire to assault Johnny. (People's Exhibit 24, 16:22 - 17:20, 20:18-40, 20:35-40) But Johnny's claims were contradicted by Matthew and Renee who revealed in their recorded statements that there had been no conflict between defendant and Johnny. (People's Exhibit 28 Track 1, 14:02-55; Track 2, 15:25-40)

Johnny not only had a motive to hurt both Renee and Matthew, his behavior on the night of the incident evidences a guilty mind. Johnny testified that he ran out of the house and went to the Dairy Queen after he saw defendant cut Matthew and Renee. (R.XV 62-67) Johnny testified that when he arrived at the Dairy Queen he called his grandmother. He claimed he did not call the police because he was scared. (R.XV 66-68) However, why would Johnny be scared of calling the police when he knew that Matthew and Renee were in immediate need of medical attention? Johnny's claim of being scared is also inconsistent with his decision to decline the offer of Gayla Jenkins, the manager of the Dairy Queen, to call 911 for him. (R. XIX 973, 981) Johnny's claim of being scared is also inconsistent with his behavior of laughing while on the phone at the Dairy Queen. (People's Exhibit 20, Track 2 at 00:49-56; Track 3 at 00:35-40) Johnny's conduct of calling his grandmother instead of 911, knowing his cousin and Renee had sustained

potentially life-threatening injuries, evidences a guilty mind. And, that Johnny was laughing on the phone at the Dairy Queen, moments after the attack, is powerful evidence of a guilty mind.

Further, testimony was presented that Matthew may not have known who had committed the offenses. Tina Broom testified that Matthew told her he did not think Johnny would have done this to him because Johnny "was family, and family don't do that to family." (R.XX 1105-07) If Matthew and Renee had been in a passed-out condition due to the drugs and alcohol (see R.XVI 515), and if Johnny had cut them while defendant was in the bathroom and then run out the door to the Dairy Queen, Matthew may not have known who had committed the offenses. Therefore, Matthew could have decided to accuse defendant rather than Johnny because Johnny was a family member. (R.XV 37, 193) This version would have been consistent with defendant's claim that Johnny was not present after defendant came out of the bathroom, with Renee's testimony that Johnny was not in the room when she saw Matthew hit defendant, and with Gayla Jenkins's claim that Johnny was laughing on the phone at the Dairy Queen. (R.XVI 516-17; R.XX 1191; People's Exhibit 20,Track 3 at 00:35-40) Moreover, if Matthew had cut Renee and himself, or if he knew that Johnny had cut them both, he would have had an incentive to blame defendant rather than Johnny because of the familial relationship.

Matthew's testimony was also seriously flawed. At trial, the defense claimed Matthew had been insecure about his relationship with Renee and had a violent temper, and while he was under the influence of synthetic

cannabis and alcohol he began contemplating his upcoming prison sentence and separation from Renee and then exploded with violence, cutting Renee's neck, and after realizing he would suffer an extensive prison sentence for his action, cut his own neck and blamed defendant. (R. 1253, 1269-70) This theory also finds support in the evidence.

Notably, Renee testified that Matthew had repeatedly accused her of having an affair with defendant, and that before and after December 12 Matthew had threatened her with a knife and had threatened to cut himself. (R.XVI 558-59, 568, 578-80) Detective West confirmed that Renee had claimed she was afraid of Matthew prior to December 12. (R.XVI 567; R. XIX 907-08) And, defendant testified that shortly after the November 5 incident when Matthew forced Renee at gunpoint to fight Debbie Davis, Matthew threatened to murder Renee. (R.XX 1176-77) Also, Renee testified that on December 23, 2012, Matthew pulled a knife on her and threatened to slit her throat. (R.XVI 568, 576-77) Renee's father testified that after hearing Matthew threatening Renee over the phone on December 23, he went to her house and saw an injury on her face. (R.XX 1054) Renee further testified that on January 12, 2013, Matthew again threatened Renee with a knife and then threatened to kill himself. (R.XVI 578-80) And, according to Renee, defendant, unlike Matthew, had never threatened Renee or caused her any harm. (R.XVI 581)

In addition to Matthew's history of drug abuse and of making threats of extreme violence against others (R.XV 43, 138, 195-96, 206-11; R.XVI 258-59, 363-70, 466, 511, 558-68, 578-80; R.XIX 989, 996-98, 1007; R.XX 1049,

1051-52, 1061-63), Matthew himself acknowledged that he had thought about killing himself over the thought of losing Renee to another man. (R.XVI 389-90, 466) Matthew also testified that on December 12, 2012, he knew he was possibly going to be sentenced to prison on December 17, 2012. (R.XVI 359; and see R.XV 138, Johnny testified he went to visit Matthew because Matthew was going to be sentenced to prison)

Also, Matthew's claim that defendant dropped the knife on the floor behind the loveseat (R.XV 224, 226), was contradicted by evidence that the knife Matthew claimed had been used in committing the offenses was found on a TV tray in the front room. (R.XV 224-25; R.XVII 693; R. XIX 824, 830) No knife was found on the floor behind the loveseat as Matthew testified. It is also suspect that no DNA suitable for comparison was found on the knife that Matthew claimed defendant had used to cut his and Renee's neck. (Trans. 17, 19, 48-49) And, Matthew's claim that Johnny had run in between Matthew and defendant as Matthew was about to start hitting defendant (R.XV 227-28), was contradicted by Renee's testimony that when she saw Matthew hit defendant as Matthew stood over him, Johnny was not in the room. (R.XVI 516-17)

Moreover, if Matthew had cut Renee and himself and then blamed defendant, it would have been to his advantage to provide the police with a motive for defendant's alleged conduct, which he did. Matthew told the police and instructed Renee that defendant's motive for the attack was to avenge the beating Renee had given to Debbie Davis. ((R.XVI 530, 551-52; People's Exhibit 28 Track 1, 02:40-58, 05:50-59, 13:45 - 14:10; Track 2, 16:20-34)

Matthew further claimed that just before the attack, defendant told him he wanted to retaliate against Renee - "put a hit out for Renee" - for beating Davis. (R.XV 217-18; People's Exhibit 28 Track 1, 02:40-58, 05:50-59, 13:45 - 14:10) However, Matthew's motive claims were contradicted by Renee. Renee testified that Matthew had held a gun to her head and had forced her to fight Davis, that defendant was present during this event, and that when Renee and defendant attempted to leave the house after the fight, Matthew threatened to kill both Renee and defendant if they provided information to the police. (R.XVI 561, 563; see R.XX 1151) If Matthew had forced Renee at gunpoint to fight Davis, there would have been no reason for defendant to be angry with Renee about that event.

And, evidence was presented by several neutral witnesses that Matthew had made statements that Johnny had cut his and Renee's throat. Matthew's credibility was impeached by the testimony of Tina Broom, Alvina Wright, and Adrianna Pedigo. Broom testified that Matthew had told her that both defendant and Johnny had been standing behind him at the time of the assault. (R.XX 1105-06) Wright and Pedigo both testified that Matthew had told them it was Johnny Price who had cut his throat. (R.XX 1098-99, 1111)

Based on the record in this case, it is evident the jury had to weigh the credibility of the witnesses, and that it had considerable concerns whether the evidence proved defendant's guilt beyond a reasonable doubt. After four hours of deliberation, the jury notified the court that it was: "Very hung with no end in sight...." (Jury instructions envelope; (R.XX 1308)) A case is closely

balanced where there are a number of factual issues to be resolved and where testimony was presented in support of both the State's and defendant's version of events. *People v. Virgin*, 302 Ill.App.3d 438, 445 (1st Dist. 1998); see also *People v. Lindgren*, 79 Ill.2d 129, 142 (1980) (State's case not overwhelming where there is "evidence to be weighed and witness credibility to be judged").

Because of the nature of the prior consistent statements and bad character evidence, and because the jury was at one time "[v]ery hung," it is evident that the admission of this highly inflammatory and inadmissible evidence was a significant factor in the rendering of the guilty verdicts. If counsel had properly kept this evidence from the jury, there is a reasonable probability the trial would have resulted in acquittals or a hung jury. Therefore, defendant was denied the effective assistance of counsel and must be granted a new trial.

CONCLUSION

For the foregoing reasons, Blackie Veach, defendant-appellant, respectfully requests that this Court reverse the judgments of the appellate and circuit courts, and remand this cause to the circuit court for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jack Hildebrand, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 43 pages.

/s/Jack Hildebrand
JACK HILDEBRAND
Assistant Appellate Defender

No. 120649

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- BLACKIE VEACH Defendant-Appellant	)	Appeal from the Appellate Court of Illinois, No. 4-13-0888. There on appeal from the Circuit Court of the Fifth Judicial District, Coles County, Illinois, No. 12 CF 479. Honorable Mitchell K. Schick, Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;

David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62705;

Brian L. Bower, Coles County State's Attorney, 651 Jackson Ave., Room 330, Charleston, IL 61920-0330;

Mr. Blackie Veach, Register No. S14810, Pontiac Correctional Center, P.O. Box 99, Pontiac, IL 61764

The undersigned certifies that an electronic copy of the Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on October 26, 2016. On that same date, we mailed three copies to the Attorney General of Illinois, three copies to the Appellate Prosecutor, one copy to the Coles County State's Attorney Office and one copy to the defendant-appellant in envelopes deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. The original and twelve copies of the Brief and Argument will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.

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APPENDIX TO THE BRIEF

Blackie Veach No. 120649

RECORD ON APPEAL

APPEAL TO THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT
FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
COLES COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

VS

Blackie Veach 2012 CF 479
GENERAL NO.
04-13-0888

RECORD ON APPEAL

THE PEOPLE OF THE STATE OF ILLINOIS

VS
BLACKIE VEACH
2012 CF 479

GENERAL NO. 4-13-0888

RECORD ON APPEAL

THE PEOPLE OF THE STATE OF ILLINOIS

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RECORD ON APPEAL

THE PEOPLE OF THE STATE OF ILLINOIS

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INDEX TO THE RECORD

People v. Blackie Veach,
Coles County Case No.: 12 CF 479
Fourth Judicial District Appellate Court No.: 4-13-0888
Illinois Supreme Court No.: 120649

Report of Proceedings ("R")

2016 IL App (4th) 130888

NO. 4-13-0888

FILED
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Carla Bender
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IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BLACKIE VEACH, Defendant-Appellant.	)	Appeal from Circuit Court of Coles County No. 12CF479 Honorable Mitchell K. Shick, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.
Justice Holder White concurred in the judgment and opinion.
Justice Appleton dissented, with opinion.

OPINION

¶ 1 Following a July 2013 trial, a jury convicted defendant, Blackie Veach, of two counts each of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a) (West 2010)) and aggravated battery (720 ILCS 5/12-3.05(a)(1), (f)(1) (West 2010)). The trial court later imposed consecutive prison sentences of 16 years on defendant's attempt convictions. (Defendant's aggravated battery convictions were lesser-included offenses on which the court imposed no sentences.)

¶ 2 Defendant appeals, arguing only that he was denied the effective assistance of trial counsel when his counsel stipulated to the admission, during his trial, of video recordings containing prior consistent statements and bad character evidence. Because we conclude that we may be required to consider matters outside the record to adjudicate defendant's claim on direct appeal, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The State's Charges

¶ 5 In December 2012, the State charged defendant with the aforementioned offenses. Pertinent to this appeal are the State's attempt (first degree murder) charges, which were amended in July 2013. Specifically, the State alleged that on December 12, 2012, defendant "performed an act which constituted a substantial step toward the killing of *** individual[s] in that [defendant] cut the throat of" Matthew Price and Renee Strohl.

¶ 6 B. The Pertinent Evidence Presented at Defendant's Trial

¶ 7 Because defendant challenges only his trial counsel's effectiveness, we limit the following discussion to those facts that place defendant's claim in its proper context.

¶ 8 On the third day of defendant's July 2013 trial and outside the jury's presence, the State and defense counsel stipulated to the admission of People's exhibit No. 24, a compact disc (CD) containing a video recording of the December 12, 2012, interview between Johnny Price, who was present during the events at issue, and a police detective. The trial court then addressed defendant directly and determined that (1) he had spoken with his counsel about the stipulation and (2) by stipulating, he waived any foundational objections to the recording. After defendant agreed to the CD's admission, the court confirmed that the content therein was being offered as substantive evidence. After reconvening the jury, the State called Johnny to the stand.

¶ 9 1. *Johnny's Testimony*

¶ 10 a. Direct Examination

¶ 11 On December 12, 2012, Johnny—who was 18 years old and lived in Toledo, Illinois—rode with his grandmother to Charleston, Illinois, to visit his cousin, Matthew, at the home Matthew shared with his girlfriend, Renee. Throughout that day, visitors came and went, but

that evening, only Matthew, Renee, Johnny, and defendant remained in the front room of the house. Matthew was smoking "fake marijuana," otherwise known as K2, Renee was drinking beer, and Johnny was drinking beer and smoking cannabis. Defendant was "drinking and smoking fake marijuana" while talking with Matthew.

¶ 12 Sometime thereafter, Johnny was seated on a sofa, facing a "loveseat," where Matthew and Renee were seated. Defendant was sitting behind Matthew. Johnny momentarily looked away, but when he looked back, he saw defendant—who was now standing behind the loveseat—cut Matthew's neck. Matthew jumped up, holding his neck, and told defendant to "back the fuck up." As Renee picked up her telephone, defendant "cut" her as well. Matthew then pushed defendant down onto a mattress, which was against the wall. During that time, Johnny made his way to the kitchen and exited through the back door of the house. When Johnny looked back, he saw defendant "chasing after [him]."

¶ 13 Johnny ran to the local restaurant and called his grandmother. He was "shaking and crying," and too "scared" to dial 9-1-1. Johnny told the restaurant employees that his cousin's neck had "been sliced." Sometime later, police arrived and transported Johnny to the police station for an interview.

¶ 14 b. Johnny's Recorded Interview

¶ 15 Thereafter, the State moved to admit into evidence exhibit No. 24, which was the CD containing Johnny's interview with the police. After the trial court confirmed that defense counsel had no objection, the court admitted exhibit No. 24 into evidence, and at the State's request, it published the recording for the jury's consideration.

¶ 16 During his interview with the police, Johnny recounted the entire incident (to which he had testified during his direct examination), describing the knife attack six times.

Johnny also stated that (1) on the evening at issue, defendant claimed to be a member of a street gang; (2) defendant was making gang signs and wanted Johnny to mimic his gestures; (3) defendant compelled Johnny to smoke drugs that night; (4) defendant began having "problems" with Johnny; (5) Matthew warned defendant that if he wanted to confront Johnny, defendant would have to go through Matthew—or "that's what [Johnny was] guessing they said"; (6) after Matthew told defendant he would have to go through him, defendant cut Matthew's throat; and (7) defendant cut Renee and chased Johnny because defendant wanted to kill all the witnesses.

¶ 17 After playing Johnny's recorded interview with police, the trial court instructed the jury that Johnny had been convicted of retail theft, and the jury could consider that conviction only as it might affect his believability.

¶ 18 c. Cross Examination

¶ 19 Johnny admitted that during his police interview, he "probably" told the police that he did not know if defendant had been smoking anything in Matthew's house. But he was "confused" at the time, and now, in retrospect, Johnny knew defendant had been smoking. Johnny also explained that during his interview, he was "confused," "scared," "high," and "drunk" when he told the detective that he had jumped over the couch in the front room. Actually, he "didn't jump over nothing." Johnny first tried to escape through the front door but could not get it open, and so he headed for the back door.

¶ 20 2. *Matthew's Testimony*

¶ 21 a. Direct Examination

¶ 22 Prior to Matthew's direct testimony, the trial court informed the jury that (1) Matthew had been convicted of three felonies and (2) the jury could consider his convictions only as they might affect his believability.

¶ 23 Matthew, who was 22 years old, testified that in December 2012, he lived with his then fiancée, Renee, in a home located in Charleston. Defendant, Matthew's longtime "best friend," whom he had "always called [his] brother," "stay[ed] with [them] quite often."

¶ 24 On December 12, 2012, around 8:30 or 9 p.m., defendant visited Matthew's home, bringing with him two 40-ounce containers of malt liquor as well as "the baseball bat he always carried," which Matthew described as a small Louisville Slugger, a little longer than Matthew's forearm. Defendant "[s]tarted talking and playing music." In addition to drinking alcohol, defendant was smoking K2 with Matthew. Matthew remembered that he had earlier cut some speaker wires with a kitchen knife that remained in the front room of the home. Later that evening, Matthew saw defendant pick up the knife as defendant was going to the back door to answer the knock of some visitors.

¶ 25 Eventually, the visitors left except for defendant and Johnny. Matthew and Renee were sitting on the loveseat, Johnny was sitting on a sofa, and defendant was sitting on a black chair. Sometime thereafter, Matthew and Renee got up from the loveseat and went into the bathroom, where they had sexual intercourse. About 20 minutes later, they left the bathroom. As they did so, defendant, who was standing outside the bathroom door, said, " 'What the hell' " and " 'that's bogus.' " Unable to comprehend what defendant was complaining about, Matthew returned to the loveseat with Renee. Johnny remained on the sofa. Defendant sat back down on the black chair and resumed playing with the stereo radio.

¶ 26 After a while, defendant asked Matthew to meet him at the back porch, where no one was located. After doing so, defendant told Matthew that "he had to put a hit out for Renee [for] beating up his aunt [Debbie Davis,] who isn't actually his aunt." Matthew told defendant that "it was just a female fight," and although Davis "got her ass whooped," Renee was charged

with aggravated battery. Matthew urged defendant to "let it go." Eventually, defendant stated, "[a]ll right, all right bro, I got you." Thereafter, they returned to the front room of the house.

¶ 27 Upon their return, Matthew sat down on the loveseat, beside Renee, and defendant "walked around [as if] he was going to sit in the black chair again," but after a couple of seconds, he "went behind the loveseat to a black foldout chair." With defendant sitting behind him, Matthew and defendant had a conversation about two street gangs. Defendant then told Matthew, " 'You're not my brother. You never have been.' " Matthew did not get a chance to respond, because, the next thing he knew, there was a "warmness running down [his] neck."

¶ 28 Matthew flung up his hand and "realized [he] was cut," and now his hand "started to get cut," too. As Matthew "ducked down and spun around *** to the left," he saw defendant "scooting over and cutting Renee." Defendant had in his hand the kitchen knife that Matthew had earlier used. Matthew yelled, "[N]o[!]' " and "swung over the couch." Matthew believed that he had grazed defendant somewhere in the face, causing him to drop the knife and fall backward on a guest bed they had in their front room. Defendant said "not to call 9-1-1." As Matthew walked toward defendant, Johnny ran between them, en route to the back door (the front door was nailed shut). The resulting collision staggered Matthew back, giving defendant an opportunity to "take off after [Johnny] and get out himself."

¶ 29 Renee was on the telephone, but because she was not coherent, Matthew took the telephone from her and told the 9-1-1 operator on the other end to hurry up because their throats had been slit and they were "bleeding out." The police and an ambulance arrived, and they were transported to the hospital, where Matthew received stitches and was released that night. The next day, December 13, 2012, Matthew went to the Charleston police department and provided a statement, which the police recorded.

¶ 30 b. Matthew's Recorded Interview

¶ 31 The State then moved to admit into evidence the first track of People's exhibit No. 28, a CD containing two separate audio recordings, the first of which was Matthew's interview with the police. After the trial court confirmed that defense counsel and defendant had stipulated to the admission of that audio recording, the court admitted that portion of exhibit No. 28 into evidence, and, thereafter, published the recording for the jury's consideration.

¶ 32 In his statement to the police, Matthew repeated the details of defendant's knife attack four times, and he stated three times that defendant's motive was to retaliate for the beating Renee inflicted on Davis. Matthew also stated that defendant "was a real big alcoholic, and that's all he does now is drink." Matthew denied that on the night of the stabbing, any conflict existed between defendant and Johnny.

¶ 33 c. Cross-Examination

¶ 34 Matthew admitted that, once or twice, he had threatened to kill himself over Renee—not by using a knife but, rather, by hanging himself. He denied, however, that he ever threatened Renee with a knife. He also denied telling other people that it was Johnny who had cut him and Renee.

¶ 35 3. *Renee's Testimony*

¶ 36 a. Direct Examination

¶ 37 Renee, who was 24 years old, testified that she had a "rocky relationship" with Matthew from March 2011 to February 2013. In December 2012, they lived together in a two-bedroom house in Charleston. Renee noted that defendant (1) was at their home almost every day and (2) stopped by around 5 p.m. on December 12, 2012. Thereafter, Renee testified con-

sistently with the accounts provided by Johnny and Matthew regarding the circumstances preceding defendant's actions.

¶ 38 Renee noted that after exiting the bathroom with Matthew, they both sat on a loveseat located in their front room. Defendant used the bathroom and returned to where he had been seated. After a while, defendant stood up, took a folding chair that was leaning against a wall, unfolded it, set it behind the loveseat, and sat down. Renee, then stated that "[t]he next thing I remember was something along the lines of [']brother,[] something to do with [']brother,[] and then I felt a sharp pain." Renee then stood up from the loveseat. Defendant was sprawled sideways on a bed, on his back, and Matthew was standing over him, telling her, " 'Call 9-1-1. We need an ambulance. We've both been cut.' " Defendant said, " 'Don't call 9-1-1. It's not that bad, and I'll help.' " Renee told defendant, " [']I'm sorry, I have to call 9-1-1. I think I'm going to need stitches.[] " Matthew continued to say, " 'Call them, call them,' " and he struck defendant. Renee did not see Johnny during this encounter and acknowledged that she did not see who had cut her throat.

¶ 39 b. Renee's Recorded Interview

¶ 40 The following day, December 13, 2012, Renee provided a statement to the police, which was recorded. The State moved to admit into evidence the second audio track of exhibit No. 28—which contained Renee's statement—and publish it to the jury. After confirming with defense counsel, as well as defendant, that they were stipulating to both the admission and publication of the second audio track of exhibit No. 28, the trial court granted the State's oral motion.

¶ 41 In her recorded statement, Renee recounted the events of December 12, 2012. Renee also stated the following: (1) when defendant is intoxicated, he gets violent; (2) defendant's mother told Renee that she had " 'heard stories of other people that had been hurt by [de-

fendant] when he drinks hard alcohol' "; (3) defendant threatened to kill someone if he ever encountered that person; and (4) Matthew told Renee that defendant may have cut their throats because of the fight between Renee and Davis. Renee denied that any controversy existed between defendant and Johnny. Renee also disputed that Matthew told defendant he would have to confront him first if defendant wanted to fight Johnny.

¶ 42 c. Cross-Examination

¶ 43 On cross-examination, Renee noted that in the summer of 2012, Matthew began accusing her of having a physical relationship with defendant. Despite this claim, Renee stated that Matthew never confronted defendant about his suspicions.

¶ 44 4. *The Remaining Evidence Presented by the State*

¶ 45 Justin Carder, a Charleston police officer, testified that defendant was arrested a few minutes after the knife attack. Defendant had a smudge of blood on the left side of his face and on both of his hands. Carder learned that other people had run out of the Charleston home. Defendant identified those other people as Robert Jones and Darrell Enlow. As testified to by another Charleston police officer, defendant claimed that Jones and Enlow had slashed the necks of Matthew and Renee.

¶ 46 Forensic deoxyribonucleic acid (DNA) testing revealed that (1) Matthew's DNA was on defendant's face, left hand, and left shoe and (2) Renee's DNA was on defendant's pants. Other DNA samples, including the one from the knife, were unsuitable for comparison.

¶ 47 Alvina Wright testified that she had known Matthew for many years. Two days after the stabbing, she saw Matthew at a local gas station and she asked him what had happened. (The State objected on the ground of hearsay, and the trial court "sustain[ed] the objection for the purpose of showing who cut Matthew's throat," but the court allowed the testimony for the lim-

ited purpose of impeaching Matthew's testimony.) Wright stated that Matthew told her that Johnny had cut his throat. (Previously, on cross-examination by defense counsel, Matthew denied telling Wright that Johnny had cut his throat, adding that he did not even know Wright.)

¶ 48 5. *Defendant's Testimony*

¶ 49 At approximately 5:30 or 6 p.m. on December 12, 2012, defendant stopped by the Charleston home occupied by Matthew and Renee. Observing that a social gathering was occurring, defendant decided to stay. Defendant noted that along with Matthew and Renee, Johnny was at the home as well as others who visited throughout the evening. At one point, defendant answered a knock at the door. As he did so, defendant took the miniature baseball bat that he customarily carried around with him, instead of the knife in the living room. Apparently, one of the guests brought hydrocodone pills, which were being pulverized in the kitchen. Defendant observed (1) Matthew and Renee snorting the hydrocodone powder and drinking alcohol; (2) Matthew smoking cannabis and K2; and (3) Johnny drinking alcohol and smoking cannabis and K2. Defendant stated that he was merely drinking alcohol.

¶ 50 Defendant denied forcing Johnny to smoke K2. Previously, on the one and only occasion when defendant tried K2, he almost died, and he would not have forced anyone to smoke something that had almost killed him. Defendant denied that he (1) was a member of any gang, (2) told Johnny he was a member of a gang, and (3) flashed gang symbols at Johnny. Defendant asserted, instead, that Matthew and Johnny were the ones making gang symbols and claiming to be members of a street gang. Defendant also denied threatening Johnny.

¶ 51 Later that evening, all the guests had left except Johnny and himself. Eventually, Matthew and Renee left the loveseat where they were seated and went into the bathroom together, where they stayed for 20 minutes. This inconvenienced defendant because he had to go to the

bathroom. When Matthew and Renee finally reemerged from the bathroom, defendant mentioned that it was bogus to use the bathroom for that purpose when the bedroom was right down the hall. Defendant then used the bathroom, but when he came out, Matthew pulled him to the back room and had a talk with him.

¶ 52 After the talk in the back room, defendant had to use the bathroom again. The radio was on in the living room, and he heard no screaming or nothing unusual. When he came out of the bathroom and returned to the living room, Johnny was nowhere to be seen, and Matthew was bleeding from the neck. Matthew pushed defendant down onto a bed, grazing and bloodying defendant's nose. Renee was screaming at Matthew to get off defendant. She gave Matthew a shove and then ran to a bedroom. This gave defendant the opportunity to run out the back door of the house. Defendant did not see Johnny, although someone (he could not tell who) was running about 10 feet ahead of him.

¶ 53 Defendant admitted telling the police, falsely, that Jones and Enlow had kicked in the door of the house and entered with guns and that he, defendant, had chased them out of the house. Actually, he never saw either of them in the house, and the last time he saw Jones was earlier that afternoon.

¶ 54 C. The Jury's Verdict and the Trial Court's Sentence

¶ 55 Following argument, the jury convicted defendant of all four counts alleged—that is, two counts each of attempt (first degree murder) and aggravated battery. The trial court later imposed consecutive prison sentences of 16 years on defendant's attempt convictions but did not impose a sentence on defendant's aggravated battery convictions because the court determined that these two counts were lesser-included offenses.

¶ 56 This appeal followed.

¶ 57 II. ANALYSIS

¶ 58 As noted earlier, defendant's only argument on appeal is that he was denied the effective assistance of counsel. Specifically, defendant alleges his counsel's decision to stipulate to the admission of prior consistent statements and bad character evidence during his trial was reversible error.

¶ 59 A. Defendant's Right to the Effective Assistance of Counsel

¶ 60 In *Maryland v. Kulbicki*, ___ U.S. ___, ___, 136 S. Ct. 2, 2-3 (2015), the United States Supreme Court discussed the sixth amendment right to the effective assistance of counsel, as follows:

> "A criminal defendant 'shall enjoy the right *** to have the Assistance of Counsel for his defence.' U.S. Const., [amend. VI]. We have held that this right requires effective counsel in both state and federal prosecutions, even if the defendant is unable to afford counsel. *Gideon v. Wainwright*, 372 U. S. 335, 344 (1963). Counsel is unconstitutionally *in*effective if his performance is both deficient, meaning his errors are 'so serious' that he no longer functions as 'counsel,' and prejudicial, meaning his errors deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984)."

¶ 61 In *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601, the Supreme Court of Illinois recently discussed the defendant's burden when raising an ineffective-assistance-of-counsel claim, writing as follows:

> "To show ineffective assistance of counsel, a defendant must demonstrate that 'his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.' *People v. Patterson*, 192 Ill. 2d 93, 107, 735 N.E.2d 616 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), for this test). A 'reasonable probability' is defined as 'a probability sufficient to undermine confidence in the outcome.' *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052. A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness. *Patterson*, 192 Ill. 2d at 107, 735 N.E.2d 616."

¶ 62 The United States Supreme Court has also cautioned that when reviewing an ineffective-assistance-of-counsel claim, " 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *Woods v. Donald*, ___ U.S. ___, 135 S. Ct. 1372, 1375 (2015) (quoting *Strickland*, 466 U.S. at 689). In *Kulbicki*, the Court criticized a federal court of appeals for having "indulged in the 'natural tendency to speculate as to whether a different trial strategy might have been more successful.' " *Kulbicki*, __ U. S. at ___, 136 S. Ct. at 4 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)).

¶ 63 The Supreme Court of Illinois has also addressed this subject, writing as follows: "We have also made it clear that a reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspec-

tive at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007). The Supreme Court of Illinois has also provided the following guidance: "[I]n order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. [Citations.] Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *People v. Manning*, 241 Ill. 2d 319, 327, 948 N.E.2d 542, 547 (2011).

¶ 64 B. Concerns That Arise in Direct Appeals in Which Defendants Argue They Received Ineffective Assistance of Counsel

¶ 65 1. *The* Kunze *Doctrine*

¶ 66 Twenty-six years ago, in *People v. Kunze*, 193 Ill. App. 3d 708, 550 N.E.2d 284 (1990), the defendant argued to this court on direct appeal, in part, that he was deprived of his right to the effective assistance of trial counsel because of his counsel's (1) failure to investigate his prior criminal history and (2) incompetence in advising him to exercise his right to testify. After this court noted that the record before it contained no evidence that either addressed these issues or pertained to conversations between the defendant and his trial counsel, the court wrote the following:

> "Where, as here, consideration of matters outside of the record is required in order to adjudicate the issues presented for review, the defendant's contentions are more appropriately addressed in proceedings on a petition for post-conviction relief. (Ill. Rev. Stat. 1987, ch. 38, pars. 122-1 through 122-8.) We therefore decline to adjudicate in this direct appeal [defendant's] contentions concerning the alleged incompetence of [defendant's] trial counsel.

> An adjudication of a claim of ineffective assistance of counsel is better made in proceedings on a petition for post-conviction relief, when a complete record can be made and the attorney-client privilege no longer applies." *Kunze*, 193 Ill. App. 3d at 725-26, 550 N.E.2d at 296.

¶ 67 2. *Cases Following* Kunze

¶ 68 The Illinois Appellate Courts have widely followed the *Kunze* doctrine. See, *e.g.*, *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 127, 29 N.E.3d 481 ("[a] collateral proceeding is generally a better forum for adjudication of ineffective assistance claims"); *People v. Clark*, 406 Ill. App. 3d 622, 640, 940 N.E.2d 755, 772 (2010) (Second District: "claims of ineffective assistance of trial counsel are preferably brought on collateral review rather than direct appeal"); *People v. Pelo*, 404 Ill. App. 3d 839, 870-71, 942 N.E.2d 463, 490 (2010) (Fourth District: because the record before the appellate court contained nothing to review regarding defense counsel's trial strategy relating to an instruction limiting other-crimes evidence, the appellate court was unwilling to deem counsel's failure to submit a limiting instruction ineffective assistance and instead would await the defendant's pursuit of such a claim under the Post-Conviction Hearing Act (Act)); *People v. Richardson*, 401 Ill. App. 3d 45, 48, 929 N.E.2d 44, 47 (2010) (First District: "Where information not of record is critical to a defendant's claim [of ineffective assistance of trial counsel], it must be raised in a collateral proceeding"); *People v. Parker*, 344 Ill. App. 3d 728, 737, 801 N.E.2d 162, 169 (2003) (Third District: " 'Where disposition of a defendant's ineffective[-]assistance[-]of[-]counsel claim requires consideration of matters beyond the record on direct appeal, it is more appropriate that the defendant's contentions be addressed in a proceeding for postconviction relief, and the appellate court may properly decline to adjudicate the defend-

ant's claim in his direct appeal from his criminal conviction, (quoting *People v. Burns*, 304 Ill. App. 3d 1, 11, 709 N.E.2d 672, 680 (1999))"); *People v. Calvert*, 326 Ill. App. 3d 414, 421-22, 760 N.E.2d 1024, 1030 (2001) (Fourth District: because the record before the appellate court contained nothing to review with respect to why defense counsel stipulated to the State's use of the defendant's prior aggravated battery conviction for impeachment purposes, the appellate court declined to consider the defendant's ineffective-assistance-of-counsel claim on direct appeal and instead invited the defendant to pursue his claim under the Act); *People v. Holloman*, 304 Ill. App. 3d 177, 186, 709 N.E.2d 969, 975 (1999) (Fourth District: "[B]ecause the record is devoid of factual findings on the issues pertinent to defendant's claim" of ineffective assistance of counsel, we "decline the opportunity to consider these questions. Rather, defendant may pursue his claim under the [Act]."); *People v. Flores*, 231 Ill. App 3d 813, 828, 596 N.E.2d 1204, 1214 (1992) (Fourth District: "Without any explanation from defendant's trial counsel ***, it is extraordinarily difficult [for this court] to conclude *** that *** counsel's trial level omissions do not constitute areas 'involving the exercise of judgment, discretion[,] or trial tactics' " (quoting *People v. Mitchell*, 105 Ill. 2d 1, 12, 473 N.E.2d 1270, 1275 (1984))).

¶ 69 Some decisions of the appellate court have referred to a decision of the United States Supreme Court, *Massaro v. United States*, 538 U.S. 500 (2003), in which that Court provided a thorough analysis regarding why it is almost always preferable that ineffective-assistance claims be considered on collateral review rather than on direct appeal. In *People v. Durgan*, 346 Ill. App. 3d 1121, 1141-42, 806 N.E.2d 1233, 1249 (2004), the Fourth District Appellate Court cited *Kunze* and *Massaro*, as well as *Holloman*, in declining to consider the defendant's ineffective-assistance argument on direct appeal and indicated instead that the defendant could pursue his claim under the Act. At issue in *Durgan* was defendant's claim that trial counsel was ineffec-

tive because he failed to file a motion to suppress evidence. *Id.* at 1142, 806 N.E.2d at 1250. In rejecting this argument, the appellate court noted that "the argument defendant makes is almost never appropriate on direct appeal because absent a motion to suppress, it is highly unlikely that the State would garner its resources to prove the propriety of the officers' actions." *Id.*

¶ 70 In *People v. Bew*, 228 Ill. 2d 122, 886 N.E.2d 1002 (2008), the Illinois Supreme Court addressed the defendant's claim that her counsel was ineffective for failing to file a motion to suppress evidence. The Third District Appellate Court in *Bew*, in an order (*People v. Bew*, No. 3-03-0779 (Dec. 21, 2006) (unpublished order under Illinois Supreme Court Rule 23)), had agreed with that claim, reversed the defendant's conviction, and remanded for a new trial. *Bew*, 228 Ill. 2d at 124, 886 N.E.2d at 1004. The supreme court reversed the Third District and, citing *Massaro*, held that the record on direct appeal was insufficient to address the argument for suppression of evidence. *Id.* at 135, 886 N.E.2d at 1009. The *Bew* court concluded, as follows: "Therefore, even though we find that defendant has, on this record, failed to prove ineffective assistance of counsel, we note that defendant may raise these alternative grounds for suppression under the [Act] [citation]. This disposition allows both defendant and the State an opportunity to develop a factual record bearing precisely on the issue." (Internal quotations marks omitted.) *Id.* at 135, 886 N.E.2d at 1009-10.

¶ 71 C. Types of Cases in Which Defendants Argue That They Received Ineffective Assistance of Counsel

¶ 72 To clarify which direct appeals raising ineffective assistance of counsel may be appropriately addressed by an appellate court, we suggest that such cases be divided into three separate categories, which we describe as follows:

¶ 73 • **Category A cases:** direct appeals raising ineffective assistance of counsel that the appellate court should decline to address.

¶ 74 • **Category B cases:** direct appeals raising ineffective assistance of counsel that the appellate court may address because they are clearly groundless.

¶ 75 • **Category C cases:** direct appeals raising ineffective assistance of counsel that an appellate court may address because trial counsel's errors were so egregious.

¶ 76 1. *Category A Cases: Direct Appeals Raising Ineffective Assistance of Counsel That an Appellate Court Should Decline To Address*

¶ 77 Category A cases are direct appeals in cases like *Kunze* and its progeny, in which, for various reasons, the appellate court concludes that the record on appeal is not adequate to resolve the defendant's contention. Experience shows that Category A cases comprise a very large percentage of the direct appeals raising ineffective assistance of counsel, which should come as no surprise. After all, most such claims raise (at least implicitly) the following questions regarding what defense counsel allegedly did wrong: (1) What did defense counsel tell the defendant and what specific suggestions or questions did counsel raise?; (2) What concerns did the defendant express to his counsel?; (3) If the defendant made specific requests of his counsel regarding the handling of the case, such as witnesses who could be contacted and called, how specific was defendant and what information in support of these suggestions did he provide to counsel?; (4) How did counsel respond to any of the suggestions he received from his client?; (5) If counsel took no action in response to such suggestions, why not?; and (6) What overall strategy did defense counsel have for the case, and what tactics did he employ (and why) pursuant to that strategy?

¶ 78 Given the privileged nature of the matters described in the preceding paragraph, it would be most extraordinary for the trial court record on direct appeal to contain *any* information pertinent to any of these questions. This absence explains why the prudent and judicious course for an appellate court dealing with a defendant's claim of ineffective assistance of counsel on di-

rect appeal is almost always to (1) decline to address the issue (while explaining its reason for doing so), (2) affirm the trial court's judgment, and (3) indicate that the defendant may raise the ineffective-assistance-of-counsel claim in a postconviction petition. We note again that this action is what the Supreme Court of Illinois took in *Bew*, cited above.

¶ 79 Instead of taking this prudent and judicious course of action, some appellate courts have elected in Category A cases to address the defendant's argument on the merits. The problem with this course of action is that an appellate court is essentially just guessing at the answers to the many questions that the record does not contain. Taking this course of action is a disservice to all parties concerned. Claims of ineffective assistance of counsel are usually raised only in the most serious cases, and given the high stakes, the parties deserve an adjudication based on a record that is complete and adequate, not on judicial speculation.

¶ 80 We find further support for the *Kunze* approach of not addressing claims of ineffective assistance of counsel on direct appeal in the recent decision of the Seventh Circuit Court of Appeals in *United States v. Flores*, 739 F.3d 337, 340 (7th Cir. 2014), in which that court wrote about the difficulty an appellate court confronts when the trial court record is not adequate for the appellate court to address a defendant's claim that he received ineffective assistance of trial counsel. The Seventh Circuit also noted decisions of the United States Supreme Court that hold that "counsel's strategic choices are presumed to be competent. As a practical matter[,] that presumption cannot be overcome without an evidentiary hearing at which the defendant explains his view of what went wrong and counsel can justify his choices." *Id.*

¶ 81 Unfortunately, the sound policy the Fourth District first applied in *Kunze* has not always been followed. An example is *People v. Campbell*, 332 Ill. App. 3d 721, 773 N.E.2d 776 (2002), in which the defendant, convicted of first degree murder, raised ineffective assistance of

his trial counsel in his direct appeal. Specifically, the defendant argued that his trial counsel was ineffective because, among other reasons, he failed to call two disinterested eyewitnesses. *Id.* at 731-32, 773 N.E.2d at 784. The record contained no information (as would almost always be the case) regarding either what defense counsel was told about these witnesses or why he did not call them to testify. *Id.* Nevertheless, the Fourth District Appellate Court erroneously treated this case as a Category B appeal and rejected the defendant's argument on the merits. The court concluded that "none of the testimony which defendant claims [these two witnesses] would have given would have exonerated defendant," and the failure to call them was a matter of trial strategy. *Id.* at 732, 773 N.E.2d at 785.

¶ 82 Campbell then sought *habeas corpus* relief, which the federal district court denied. However, the Seventh Circuit Court of Appeals granted, in part, *habeas corpus* relief. The Seventh Circuit ruled that Campbell presented a reasonable claim in the federal *habeas corpus* proceeding for ineffective assistance of counsel and that the decision of the Fourth District holding otherwise was an unreasonable application of clearly established federal law as determined by Supreme Court precedent. *Campbell v. Reardon*, 780 F. 3d 752, 762-772 (7th Cir. 2015). The Seventh Circuit remanded for an evidentiary hearing to be conducted by the federal district court, noting that a hearing was "needed to develop the record on (1) the extent of counsel's actual pretrial investigation and (2) what these witnesses would have said if called to testify at trial." *Id.* at 772. Of course, had the Fourth District in *Campbell* declined to address defendant's ineffective-assistance claim on direct appeal and awaited his filing a postconviction petition, what the Seventh Circuit ordered on remand is precisely the record that a circuit court hearing on a postconviction petition could have developed.

¶ 83 Further, had the Fourth District treated Campbell's appeal as a Category A case (as it should have), then (1) it could have avoided the embarrassment of having the Seventh Circuit deem its decision "an unreasonable application of clearly established federal law as determined by Supreme Court precedent" and (2) the hearing needed to develop an appropriate record to address Campbell's claims would have occurred much earlier, benefitting everyone.

¶ 84 *2. Category B Cases: Direct Appeals Raising Ineffective Assistance of Counsel That the Appellate Court May Address Because They Are Clearly Groundless*

¶ 85 On rare occasions, an appellate court may appropriately address a defendant's argument on direct appeal raising ineffective assistance of counsel because the claim is groundless. In such a case, answers to the questions mentioned earlier, that the trial court record typically would not address, would not matter because the defendant's claim has no merit.

¶ 86 Some examples of category B cases are the following: *People v. Davis*, 2014 IL App (4th) 121040, ¶ 24, 22 N.E.3d 1167 (to accept the defendant's argument, the trial court would have to conclude that counsel was ineffective for failing to predict the future and to anticipate a United States Supreme Court decision); *People v. Rodriguez*, 2014 IL App (2d) 130148, ¶ 88, 21 N.E.3d 466 (defense counsel's decision not to challenge an alleged discrepancy between Illinois pattern jury instructions (IPI) instructions and a section of the criminal code did not constitute deficient performance because the IPI instructions accurately stated the law and an objection to the instructions would have lacked merit); and *People v. Shelton*, 401 Ill. App. 3d 564, 584, 929 N.E.2d 144, 163 (1st Dist. 2010) (defendant's ineffective-assistance claim based upon defense counsel's alleged failure to call witnesses and introduce certain evidence was rejected on direct appeal where the record showed that defense counsel had in fact done just that).

¶ 87 *3. Category C Cases: Direct Appeals Raising Ineffective Assistance of Counsel That an Appellate Court May Address Because Trial Counsel's Errors Were So Egregious*

¶ 88 On rare occasions, an appellate court can determine that trial counsel's errors were so egregious that the appellate court can determine trial counsel was constitutionally ineffective without requiring further evidence. Such a case arises when answers to the questions discussed earlier in this opinion simply would not matter. The appellate court can determine, based on the record before it, that defendant's trial counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Patterson*, 192 Ill. 2d 93, 107, 735 N.E.2d 616, 626 (2000). In addition, for a case to fit within Category C, the appellate court must be able to conclude that because no justifiable explanation by trial counsel for his errors could possibly exist, the court need not bother obtaining a record in which such an explanation might be forthcoming.

¶ 89 A prime example of a case in which trial counsel's error was so egregious as to constitute clear ineffective assistance based solely upon the record on direct appeal is the recent decision of the Supreme Court of Illinois in *People v. Simpson*, 2015 IL 116512, ¶ 1, 25 N.E.3d 601, in which the supreme court affirmed a decision of the First District Appellate Court that had reversed the defendant's conviction and remanded for a new trial, concluding that the defense counsel was ineffective. At the defendant's first degree murder trial, a witness testified that he was near the crime scene on the date of the murder but did not recall what the defendant said to him or what he told the police that night. *Id.* ¶ 14, 25 N.E.3d 601. "The State then admitted [the witness's] videotaped statement to police in which he stated that defendant told him that he hit the victim 30 times with a bat. The State emphasized the statement in its closing argument." *Id.*

¶ 1, 25 N.E.3d 601. The Supreme Court agreed that defense counsel was ineffective in failing to object to the introduction of the witness's statement where the "personal knowledge" requirement for admission of a prior inconsistent statement was not satisfied under section 115-10.1(c)(2) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1(c)(2) (West 2012)).

¶ 90 An earlier example of a case in which trial counsel's error was sufficiently egregious as to constitute clear ineffective assistance based solely upon the record on direct appeal is the Second District's decision in *People v. Fillyaw*, 409 Ill. App. 3d 302, 948 N.E.2d 1116 (2011). In that case, trial counsel (as in *Simpson*) obviously did not understand the admissibility of prior inconsistent statements as substantive evidence under section 115-10.1 of the Code of Criminal Procedure of 1963 and failed to object when the State confronted one of its witnesses with his signed statement (inconsistent with his trial testimony) in which the witness wrote that, among other things, defendant Fillyaw told the witness that Fillyaw went to rob some people, kicked the door down, started shooting, and shot three people. *Id.* at 308-09, 948 N.E.2d at 1125. Of course, the witness was not present to actually see any of these actions Fillyaw told him about, so he had no "personal knowledge" of these events, as required by section 115-10.1. The Second District ultimately concluded that defendant had demonstrated the ineffective assistance of his trial counsel, reversed his conviction, and remanded for a new trial. *Id.* at 317, 948 N.E.2d at 1131.

¶ 91 D. Determining Into Which Category Defendant's Ineffective-Assistance-of-Counsel Claim Should Be Placed

¶ 92 Although at first blush it is not clear why defendant's trial counsel agreed to the admission of the video recordings at issue in this case, given defendant's assertion that those recordings contained prior consistent statements and bad character evidence, we nonetheless conclude that this case is a Category A appeal. In other words, it is a direct appeal raising ineffec-

tive-assistance-of-counsel claims that this court should decline to address. That is because the record before us, like the very large percentage of other direct appeals raising this claim, is not adequate for this court to resolve it. The record contains no indication whatsoever why defense counsel agreed to the admission of the video recordings in question. To resolve defendant's claim, this court would need to guess at counsel's motivation. For reasons earlier discussed in this opinion, we decline to do so.

¶ 93 In reaching this conclusion, we are mindful of the previously mentioned decisions of the United States Supreme Court and the Supreme Court of Illinois holding that (1) matters of trial strategy are generally immune from claims of ineffective assistance of counsel and (2) a defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. See, *e.g.*, *Manning*, 241 Ill. 2d at 327, 948 N.E.2d at 267.

¶ 94 We reiterate that for a direct appeal to be deemed a Category C case, no justifiable explanation by trial counsel for his errors could possibly exist. Thus, in the present case, we would need to conclude that *any* answer to the question as to why defendant's trial counsel agreed to the admission of the video recordings simply would not matter. We cannot so conclude.

¶ 95 Accordingly, we deem the prudent and judicious course of action in this case is (1) to decline to address defendant's ineffective-assistance-of-counsel claim in this direct appeal, (2) to affirm defendant's convictions and sentences, and (3) paraphrasing the language used by the Supreme Court of Illinois in *Bew*, to note that defendant may raise his claim pursuant to the Act. If defendant were to take that course of action, then an opportunity to develop a factual record bearing precisely on the issue in question would be available.

¶ 96 III. CONCLUSION

¶ 97 For the reasons stated, we affirm the trial court's judgment.

¶ 98 Affirmed.

¶ 99 JUSTICE APPLETON, dissenting:

¶ 100 For two reasons, I respectfully dissent from the majority's decision. First, delaying the adjudication of defendant's claim of ineffective assistance of counsel until a postconviction proceeding is inconsistent with binding precedent from the supreme court. Second, the record on appeal shows ineffective assistance.

¶ 101 Allow me to explain those reasons one at a time.

¶ 102 I. BECAUSE THE CLAIM IS BASED ON WHAT TRIAL COUNSEL DID ON THE RECORD, THE TIME TO RAISE THE CLAIM IS NOW, NOT LATER

¶ 103 If a constitutional claim "could have been *** raised" in the direct appeal, the doctrine of procedural forfeiture bars the claim in a subsequent postconviction proceeding. *People v. Kokoraleis*, 159 Ill. 2d 325, 328, 637 N.E.2d 1015, 1017 (1994). "An ineffective assistance of counsel claim permits no wholesale departure from [that principle]." *Id.* If the record on appeal affords the means of raising a claim of ineffective assistance, the defendant must raise the claim on direct appeal, on pain of forfeiting the claim. *People v. Tate*, 2012 IL 112214, ¶ 14, 980 N.E.2d 1100.

¶ 104 The crucial question for our purposes is, What is a claim of ineffective assistance that "could have been *** raised" in the direct appeal? *Kokoraleis*, 159 Ill. 2d at 328, 637 N.E.2d at 1017. The supreme court has laid down the following rule. A claim of ineffective assistance "based on what the record discloses counsel did, in fact, do is subject to the usual procedural default rule." *Tate*, 2012 IL 112214, ¶ 14, 980 N.E.2d 1100. By contrast, a claim of ineffective assistance based on what counsel ought to have done, but failed to do, is not subject to the rule of procedural forfeiture if the claim "depend[s] on proof of matters which could not have

been included in the record precisely because of the allegedly deficient representation." *People v. Erickson*, 161 Ill. 2d 82, 88, 641 N.E.2d 455, 459 (1994). To quote *Erickson* more fully:

> "[T]he default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense. [Citations.] An ineffective-assistance claim based on what the record on direct appeal discloses counsel did, in fact, do is, of course subject to the usual procedural default rule. [Citation.] But a claim based on what ought to have been done may depend on proof of matters which could not have been included in the record precisely because of the allegedly deficient representation. [Citation.]" *Id.* at 88, 641 N.E.2d at 458-59.

See also *People v. West*, 187 Ill. 2d 418, 427, 719 N.E.2d 664, 670 (1999); *Kokoraleis*, 159 Ill. 2d at 328-29, 637 N.E.2d at 1017.

¶ 105 For example, in one of the cases the majority cites, *Bew*, the defendant claimed, on direct appeal, that his trial counsel had rendered ineffective assistance by *omitting to do something*, namely, file a motion for suppression of evidence. *Bew*, 228 Ill. 2d at 124, 886 N.E.2d at 1004. Because no motion for suppression ever had been filed, the supreme court found the record to be insufficient to address either party's argument on the issue of ineffective assistance. *Id.* at 134, 886 N.E.2d at 1009. The supreme court added, however, that the defendant was free to pursue his claim in a postconviction proceeding, in which an adequate factual record could be developed. *Id.* at 135, 886 N.E.2d at 1009-10; see also *People v. Henderson*, 2013 IL 114040, ¶ 22, 989 N.E.2d 192 ("*Bew* and *Massaro* demonstrate that where, as here, the defendant's claim of ineffectiveness is based on counsel's failure to file a suppression motion, the record will fre-

quently be incomplete or inadequate to evaluate that claim because the record was not created for that purpose.").

¶ 106 In another case the majority cites, *Campbell*, the Seventh Circuit remanded the case for an evidentiary hearing on an alleged *omission* by defense counsel: the failure to interview some witnesses who would have given testimony favorable to the defendant. *Campbell*, 780 F.3d at 772. The defendant's claim of ineffective assistance depended on proof of what the witnesses would have said on the stand—proof that was absent from the record precisely because of the alleged ineffective assistance, *i.e.*, the failure to interview them and call them as witnesses in the trial.

¶ 107 The present case is different from *Bew* and *Campbell* in that the ineffective assistance is something trial counsel *did*, on the record. He explicitly agreed, on the record, to the admission and publication of the CDs containing the statements that Johnny Price, Matthew Price, and Renee Strohl had made to the police. It would be untenable for defendant to say that his claim "depend[s] on proof of matters which could not have been included in the record precisely because of the allegedly deficient representation." *Erickson*, 161 Ill. 2d at 88, 641 N.E.2d at 459. Consequently, *Kokoraleis* and its progeny give him no choice but to raise the claim of ineffective assistance now, in his direct appeal. If defendant had waited until the postconviction proceeding, the State would have filed a motion for dismissal on the ground of procedural forfeiture—and rightfully so: the alleged acts of ineffective assistance were memorialized in the record on direct appeal. "Reason to relax the bar [of procedural forfeiture] occurs only when what is offered in the papers [attached to the postconviction petition] also explains why the claim it supports could not have been raised on direct appeal." *Id.* at 87-88, 641 N.E.2d at 458. Considering the nature of his claim of ineffective assistance, I cannot imagine what evidence defendant

would need to attach to his postconviction petition beyond that which already is in the transcript of the trial. See *People v. Schaff*, 281 Ill. App. 3d 290, 296, 666 N.E.2d 788, 791 (1996) (In the affidavits attached to his postconviction petition, "[the] [d]efendant presents no evidence to support the claim of ineffective assistance which is not found in the trial record."). His claim is based on agreements or stipulations that defense counsel made on the record, and thus the claim can be adjudicated now.

¶ 108 By delaying the adjudication of defendant's claim—and claims like his—until a postconviction proceeding, the majority not only prescribes a "wholesale departure from" the rule of procedural forfeiture (*Kokoraleis*, 159 Ill. 2d at 328, 637 N.E.2d at 1017) and delays the administration of justice, but the majority also puts the office of the State Appellate Defender in a dilemma. On the one hand, the supreme court tells appellate counsel: "An ineffective-assistance claim based on what the record on direct appeal discloses counsel did, in fact, do is, of course, subject to the usual procedural default rule." *Erickson*, 161 Ill. 2d at 88, 641 N.E.2d at 459. On the other hand, the majority tells appellate counsel that only "[o]n rare occasions" (slip op. at ¶ 88) may the appellate court "appropriately address a defendant's argument on direct appeal raising ineffective assistance of counsel" (slip op. at ¶ 88) and that even in cases such as this one—cases premised on what trial counsel *did*, on the record—the claim must be put off until a postconviction proceeding.

¶ 109 Buffeted by these opposing directives, what is an appellate counsel to do? Wasteful hedging: that is what an appellate counsel must do. To be safe, appellate counsel has to raise the claim on direct appeal, in obedience to *Erickson*. Then, in obedience to the *Kunze* line of cases, appellate counsel has to raise the claim again, in a postconviction proceeding. Consequently, the office of the State Appellate Defender, an already overburdened agency, has to do

double the work—which would be unnecessary if appellate counsel could count on us to follow the aforementioned cases from the supreme court.

¶ 110 II. INEFFECTIVE ASSISTANCE

¶ 111 Having explained why, in my opinion, it is a mistake to shunt off defendant's claim of ineffectiveness to a postconviction proceeding, I now will explain why I consider his claim to have merit.

¶ 112 A claim of ineffective assistance has two elements: (1) deficient performance and (2) resulting prejudice. *People v. Minneifield*, 2014 IL App (1st) 130535, ¶ 70, 25 N.E.3d 34. I will organize my discussion accordingly.

¶ 113 A. Deficient Performance

¶ 114 Defense counsel's performance was deficient if it was "objectively unreasonable under prevailing professional norms." (Internal quotation marks omitted.) *Id.* ¶ 71, 25 N.E.3d 34.

¶ 115 It *can* be objectively unreasonable of defense counsel to agree to the admission of inadmissible evidence (*People v. Fillyaw*, 409 Ill. App. 3d 302, 315, 948 N.E.2d 1116, 1130 (2011)), but it is not *always* objectively unreasonable of defense counsel to do so. It might appear, at the time, that the inadmissible evidence stands to benefit the defense more than hurt it, in which case defense counsel could legitimately make a tactical decision to refrain from objecting. *People v. Graham*, 206 Ill. 2d 465, 478-79, 795 N.E.2d 231, 240 (2003); *People v. Jackson*, 2013 IL App (3d) 120205, ¶ 29, 2 N.E.3d 374. We should allow "wide latitude" for such tactical decisions (*People v. Cunningham*, 376 Ill. App. 3d 298, 301, 875 N.E.2d 1136, 1140 (2007)), looking at all the circumstances from defense counsel's perspective at the time (*People v. Nowicki*, 385 Ill. App. 3d 53, 82, 894 N.E.2d 896, 924 (2008)).

¶ 116 While being careful to avoid the false superiority of hindsight (*People v. Mabry*, 398 Ill. App. 3d 745, 753, 926 N.E.2d 732, 739 (2010)), we should expect *something* of tactical decisions. We should not treat them as categorically sacrosanct or immune from scrutiny. Even a tactical decision, such as a decision not to object (*People v. Perry*, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 210 (2007)), has to be "objectively reasonable." (Internal quotation marks omitted.) *People v. Manning*, 241 Ill. 2d 319, 343, 948 N.E.2d 542, 556 (2011); see also *People v. Simpson*, 2013 IL App (1st) 111914, ¶ 19, 993 N.E.2d 527; *People v. Moore*, 2012 IL App (1st) 100857, ¶ 53, 964 N.E.2d 1276. A reviewing court decides *de novo* (*People v. Hale*, 2013 IL 113140, ¶ 15, 996 N.E.2d 607; *People v. Morris*, 2013 IL App (1st) 111251, ¶ 116, 997 N.E.2d 847) whether a defendant has rebutted the presumption that refraining from objecting could be considered, under the circumstances, to be a sound trial strategy (*People v. Macias*, 2015 IL App (1st) 132039, ¶ 82, 36 N.E.3d 373).

¶ 117 A logical preliminary question would be whether the statements Johnny Price, Matthew Price, and Renee Strohl made to the police were indeed objectionable under the rules of evidence, since professionally reasonable performance does not entail the making of unmeritorious objections. See *People v. Nieves*, 193 Ill. 2d 513, 527, 739 N.E.2d 1277, 1284 (2000) (no ineffective assistance if "any objection *** would rightfully have been overruled"). According to defendant, the CDs were objectionable on two grounds: (1) they consisted (for the most part) of prior consistent statements, *i.e.*, statements substantially identical to those the witnesses already had made in their testimony on direct examination; and (2) they referred to uncharged bad acts and bad character traits of defendant.

¶ 118 Both (1) and (2) would have been valid objections if defense counsel had made them in the jury trial. I will explain why.

¶ 119 1. *Prior Consistent Statements*

¶ 120 Generally, a prior consistent statement is inadmissible hearsay. *People v. House*, 377 Ill. App. 3d 9, 19, 878 N.E.2d 1171, 1179 (2007). I use the qualifier "generally" because there are two exceptions to that rule. A prior consistent statement is admissible "(1) where the prior consistent statement rebuts a charge that a witness is motivated to testify falsely, and (2) where the prior consistent statement rebuts an allegation of recent fabrication." *Id.*

¶ 121 "Under the first exception, the prior consistent statement is admissible if it was made before the motive to testify falsely came into existence." *Id.* In other words, at the time the declarant made the prior consistent statement, the declarant lacked any motive to tell a lie. The declarant developed that motive only later, after the prior consistent statement.

¶ 122 "Under the second [exception], a prior consistent statement is admissible if it was made prior to the alleged fabrication." *Id.*

¶ 123 The idea behind both exceptions is that a witness who has been accused of dishonesty can be rehabilitated by showing that the witness made the same statement earlier, when the witness lacked any motive to be dishonest. This rehabilitation would be a sham—a pretext to convince the jury by repetition—if earlier, when the witness made the prior consistent statement, the witness had the same motive to be dishonest that the witness has now. A prior consistent statement is admissible only if it was "made before the motive to fabricate arose." *People v. Harris*, 123 Ill. 2d 113, 139, 526 N.E.2d 335, 346 (1988).

¶ 124 The State does not invoke either of those exceptions to the rule against prior consistent statements. As far as I can see, there is no reason to suppose that Johnny Price, Matthew Price, and Renee Strohl had a motive to fabricate that arose *after* they made their statements to the police. If they had a motive to fabricate, they would have had that motive from the start.

The CDs, instead of being truly rehabilitative, were intended to bolster their credibility with hearsay. Because the CDs contained inadmissible hearsay in the form of prior consistent statements, they were objectionable on that ground. See Ill. R. Evid. 802 (eff. Jan. 1, 2011).

¶ 125 2. *Uncharged Bad Acts and Bad Character Traits*

¶ 126 "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except" as provided in various sections of the Code of Criminal Procedure (725 ILCS 5/115-7.3, 115-7.4, 115-20 (West 2012)), none of which are applicable here. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011).

¶ 127 Likewise, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion," except that, in a criminal case, an accused may offer evidence of his or her own "pertinent trait of character," after which the prosecution may "rebut the same." Ill. R. Evid. 404(a), (a)(1) (eff. Jan. 1, 2011); see also *People v. Pennington*, 2015 IL App (1st) 132354, ¶¶ 83-84, __ N.E.3d __; *People v. Randle*, 147 Ill. App. 3d 621, 625, 498 N.E.2d 732, 736 (1986) ("[C]haracter evidence offered by the prosecution to show the accused's propensity to violence is generally inadmissible because the danger of unfair prejudice to the defendant in being portrayed as a 'bad man' substantially outweighs the probative value of the evidence. [Citation.] Such evidence of bad character may be introduced by the prosecution only if the defendant first opens the door by introducing evidence of good character to show that he is a quiet and peaceful person.").

¶ 128 Defendant argues the CDs were inadmissible not only because they abounded in prior consistent statements but also because they accused him of uncharged bad acts and bad character traits.

¶ 129 Specifically, defendant refers to the following representations in Johnny Price's recorded statement to the police: (1) defendant claimed to be a member of the Latin Kings, a street gang, and wanted Johnny Price to make gang signs; (2) he forced Johnny Price to consume narcotics; (3) he had "problems" with Johnny Price; and (4) he cut Strohl's throat and chased after Johnny Price because he wanted to kill all the witnesses.

¶ 130 As for Matthew Price's recorded statement, defendant argues he "made the unfairly prejudicial comment that defendant 'was a real big alcoholic, and that's all he does now is drink.' "

¶ 131 Finally, defendant argues that Renee Strohl, in her recorded statement, made the following unfairly prejudicial comments about his character: (1) "I don't like [defendant] coming to my house whenever he's intoxicated because he gets violent. His mother has told me, I've never experienced anything up until today, heard stories of other people that had been hurt by him when he drinks hard alcohol"; (2) shortly before the incident, defendant's mother "called and asked me to tell [defendant] that he had court at [9 a.m.] and if he was going to be home. And[] I said, [']Blackie[,] you have court at nine.['] And he said, [']I'm gonna be home by 10['] "; (3) during the evening hours, defendant asked Strohl to invite Lizzie G. over because he wanted to have sex with her; (4) "The only thing that [defendant] said to me that made me angry was he told me that that Lizzie girl had given him [oral sex] on my daughter's bed, and he was like[,] ['G]ive me a high five,['] and I just said[,] ['L]ook, I told you I did not want anybody doing anything on that bed['] "; and (5) defendant "talked about if Derrall Enlow would come to the house[,] [defendant] would for certain kill him and he wouldn't clean up any of the blood."

¶ 132 The State argues the evidence of uncharged bad acts of which defendant complains was admissible because these bad acts were "intertwined" with the charged offenses, *i.e.*,

the cutting of Matthew Price's and Renee Strohl's throats, and "provided the background for the events immediately surrounding the charged conduct."

¶ 133 Evidence of other bad acts can be admissible if, without such evidence, things people did at the time of the offense would seem implausible or inexplicable. *People v. Rutledge*, 409 Ill. App. 3d 22, 26, 948 N.E.2d 305, 308 (2011); *People v. Carter*, 362 Ill. App. 3d 1180, 1190, 841 N.E.2d 1052, 1060 (2005); *People v. Manuel*, 294 Ill. App. 3d 113, 124, 689 N.E.2d 344, 351-52 (1997). In other words, evidence that the defendant committed uncharged wrongs can be admissible if such evidence provides a necessary background to people's behavior at the time of the charged crime—behavior that otherwise would make no sense to the jury. In that case, the evidence of other bad acts would be offered not to prove that the defendant is a wicked person who, by nature, is prone to commit crime; rather, the evidence would be offered to present a coherent, logically intelligible narrative of the charged crime. *Carter*, 362 Ill. App. 3d at 1191, 841 N.E.2d at 1060-61.

¶ 134 That does not mean the evidence is *automatically* admissible for that purpose. I have tried to be careful to say that, for the sake of presenting a coherent narrative, the evidence of other bad acts *can be* admissible, because even when evidence of other bad acts has a relevant purpose other than to show the defendant's propensity to commit crime, the trial judge must weigh the probative value of the evidence against its unfairly prejudicial effect. *People v. Illgen*, 145 Ill. 2d 353, 365, 583 N.E.2d 515, 519 (1991).

¶ 135 Weighing probative value against unfair prejudice, the trial court probably would have overruled a propensity objection to defendant's alleged remark that he would kill Derrall Enlow if he entered the house, because that remark explained why defendant allegedly picked up

the steak knife from the TV table when he went to answer the back door (apparently, he wanted to be prepared in case it was Enlow who was knocking).

¶ 136 Likewise, the trial court probably would have overruled a propensity objection to defendant's allegedly chasing Johnny Price, because chasing him arguably showed a desire to intercept or eliminate witnesses—a desire defendant would have had only if he knew he was guilty of cutting Matthew Price's and Renee Strohl's throats. In that regard, the purpose would have been to show a consciousness of guilt, not a propensity to commit crime. "Evidence of other crimes is admissible if it is relevant for *any* purpose other than to show the defendant's propensity to commit crime." (Emphasis added.) *People v. Pikes*, 2013 IL 115171, ¶ 11, 998 N.E.2d 1247.

¶ 137 I do not see, though, how defendant's alleged declaration of membership in the Latin Kings and his forcing Johnny Price to smoke K2 were probative of anything other than defendant's supposed aggressive, violent, unsavory character. It would be one thing if Johnny Price told the police, unequivocally: "Defendant wanted me to make gang signs, but I refused to do so, and he forced me to smoke K2, but one hit is all I would take. He became irate at me because of these refusals, and he threatened to beat me up. That's when Matthew Price told him, 'You'll have to go through me first.' " If Johnny Price had told the police that, one might infer that defendant "went through" Matthew Price by cutting his throat, in which case what happened before would have been necessary to a coherent narrative. See *Carter*, 362 Ill. App. 3d at 1191, 841 N.E.2d at 1060-61. But Johnny Price merely told the police that defendant had unspecified "problems" with him, and Johnny Price only speculated that defendant threatened to beat him up, and he only speculated that Matthew Price replied that defendant would have to go through him first ("that's what I'm guessing they said"). That Johnny Price could only speculate what defend-

ant and Matthew Price told one another regarding him—if indeed they had any conversation at all regarding him—made the probative value of these other bad acts low compared to the unfair prejudice to defendant.

¶ 138 That defendant had been known to hurt people when he got drunk was blatant propensity evidence, and if defense counsel had objected to it, there would have been nothing to weigh. The only possible function of this evidence was to suggest that, as someone who had a known history of hurting people when drunk, defendant was just the type of person who would cut the throats of Matthew Price and Renee Strohl in a drunken rage.

¶ 139 It is unclear that the remaining evidence of which defendant complains even qualifies as "other crimes, wrongs, or acts." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). The court date his mother called about could have been in a civil matter. And as for his eagerness to have sex with Lizzie G., it seems unlikely a jury would think, "Since he's crude and licentious, he's just the sort of person who would cut someone's throat."

¶ 140 But membership in the Latin Kings, forcing someone to smoke a dangerous narcotic, and being a violent drunk clearly were bad acts or bad character traits. See *id.*; Ill. R. Evid. 404(a)(1) (eff. Jan. 1, 2011). I can discern no strategic reason to acquiesce to the presentation of that inadmissible and unfairly prejudicial evidence.

¶ 141 Again, whether to object is a strategic decision. *Perry*, 224 Ill. 2d at 344, 864 N.E.2d at 210. Although we should give "wide latitude" to strategic decisions (*Cunningham*, 376 Ill. App. 3d at 301, 875 N.E.2d at 1140), we should expect them to be "objectively reasonable" (*Manning*, 241 Ill. 2d at 343, 948 N.E.2d at 556). I realize that just because evidence is objectionable, defense counsel does not automatically have to object to it and that, pursuant to a logical strategy, defense counsel could reasonably refrain from making what would have been a

legally meritorious objection. *Graham*, 206 Ill. 2d at 478-79, 795 N.E.2d at 240. Nevertheless, I am unable to see how it was objectively reasonable of defense counsel to agree to the *wholesale* presentation of the statements that Johnny Price, Matthew Price, and Renee Strohl had made to the police. The agreement is inexplicable; it makes no sense.

¶ 142 Defense counsel's stated reason for entering into the agreement was simply fallacious. He reasoned to the trial court that if he used the statements for impeachment, as he intended to do, he would "open the door" anyway and the statements in their entirety would "[come] in." Likewise, the prosecutor alluded to "the doctrine of completeness." Actually, as defendant explains in his brief, the doctrine of completeness makes additional parts of a statement admissible only to the extent necessary to "prevent the jury from being misled, to place the admitted portion in context so that a true meaning is conveyed, or to shed light on the meaning of the admitted portion." *People v. Craigen*, 2013 IL App (2d) 111300, ¶ 46, 997 N.E.2d 743. I do not see how the impeaching parts of the statements would have been misleading in the absence of a presentation of the statements in their entirety.

¶ 143 The all-or-nothing assumption was incorrect. See *People v. Andersch*, 107 Ill. App. 3d 810, 820, 438 N.E.2d 482, 489 (1982). If a witness has been impeached with a prior inconsistent statement, the party who called the witness may bring out additional portions of the statement "to qualify or explain the inconsistency and rehabilitate the witness." *People v. Harris*, 123 Ill. 2d 113, 142, 526 N.E.2d 335, 347 (1988). But any portion of the statement which does not qualify or explain the inconsistency is inadmissible. *Id.*; *Andersch*, 107 Ill. App. 3d at 820, 438 N.E.2d at 489. So, defense counsel was mistaken in his assumption that he would open the door to the statements in their entirety simply by using excerpts of the statements for impeachment.

¶ 144 There was no strategic reason for stipulating to the admission of the statements in their entirety. The stipulations were objectively unreasonable, and one can only assume that defendant personally consented to the stipulations only on the basis of defense counsel's mistaken understanding of the law.

¶ 145 B. Resulting Prejudice

¶ 146 A defendant suffers prejudice from the deficient performance of defense counsel if there is a "reasonable probability" that, but for the deficient performance, the outcome of the proceeding would have been more favorable to the defendant. *Minniefield*, 2014 IL App (1st) 130535, ¶ 71, 25 N.E.3d 34. To establish a "reasonable probability," a defendant has to do more than show that the deficient performance had "some conceivable effect on the outcome." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). And, yet the defendant need not go so far as to show that the deficient performance "more likely than not altered the outcome." *Id.* Rather, a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

¶ 147 The closer the case is, the more likely that defense counsel's deficient performance altered the outcome. See *People v. Butcher*, 240 Ill. App. 3d 507, 510, 608 N.E.2d 496, 498 (1992). This was a close case. Johnny Price, Matthew Price, and Renee Strohl were flawed witnesses.

¶ 148 That Johnny Price, who apparently was in possession of a cell phone, would refrain from calling 9-1-1 is somewhat troubling but perhaps is explainable in that he assumed his grandmother, whom he apparently did call, would call 9-1-1. If Johnny Price, however, declined Gayla Jenkins's offer to call 9-1-1 (as she testified he did), that is a real problem, considering that, for all Johnny Price knew, his first cousin and his first cousin's girlfriend were at that very

moment lying in their front room, bleeding to death. That Jenkins (as she also testified) saw Johnny Price laughing while talking on his cell phone, immediately after he fled the scene of the throat-cutting, could suggest he was not quite as devastated as he at first presented himself to be.

¶ 149 As for Matthew Price, he was a felon, and one can only wonder about his level of consciousness after consuming alcohol, hydrocone powder, cannabis, and K2.

¶ 150 According to Matthew Price, defendant dropped the knife onto the floor when he pushed defendant down onto the bed. Detective Anthony West testified, however, that he found the knife on top of the television table, as pictured in People's exhibit No. 32.

¶ 151 There also was the discrepancy between what Matthew Price told Wright, Tina Broom, and Adriana Pedigo and what he told the jury. It is unclear what motive those three would have had to lie. They all described themselves as Matthew Price's longtime friends, and Pedigo even testified that Matthew Price was like a brother to her. According to Wright's testimony, Matthew Price told her that *Johnny Price* had cut his and Renee Strohl's throats because Johnny Price had given them money to buy drugs for his own use and they had consumed the drugs instead of giving them to him, Johnny Price. Pedigo testified that Matthew Price had told her *three times* it was Johnny Price who had cut his throat. And Broom testified that Matthew Price had told her both defendant *and* Johnny Price were standing behind him when his throat was cut. Thus, the testimony of Matthew Price, a felon and a heavy drug user, was in direct contradiction to what he supposedly had told his friends: Wright, Broom, and Pedigo.

¶ 152 As for Renee Strohl, she admitted she had no idea who had cut her throat. Hydrocone and rum, consumed together, probably did not enhance her alertness.

¶ 153 In short, I would find a reasonable probability that the wholesale presentation of the police statements made a difference in the outcome. "The danger in prior consistent state-

ments is that a jury is likely to attach disproportionate significance to them. People tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve." *People v. Smith*, 139 Ill. App. 3d 21, 33, 486 N.E.2d 1347, 1355 (1985). In their statements to the police, Johnny Price and Matthew Price repeated their accounts again and again. In addition to being influenced by this repetition, the jury could have been inclined to think that a mean drunk who was a member of a street gang was just the sort of person who would cut someone's throat. The record shows prejudice, and I would reverse the trial court's judgment on the ground of ineffective assistance of trial counsel.

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

September 28, 2016

Mr. Jack Hildebrand
Assistant Appellate Defender
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Elgin, IL 60120

No. 120649 - People State of Illinois, respondent, v. Blackie Veach, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today ALLOWED the petition for leave to appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
COLES COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF,	)	
VS	)	2012 –CF- 479
BLACKIE VEACH, DOB 10/02/1991	)	
DEFENDANT.	)	

FILED
OCT - 8 2013
Melissa Hurst
Circuit Clerk COLES COUNTY, ILLINOIS

NOTICE OF APPEAL

An appeal is taken from the order of judgment described below:

(1) Court to which appeal is taken: Illinois Appellate Court

(2) Name of appellant and address to which notices shall be sent:
BLACKIE VEACH

(3) Name and address of appellant's attorney on appeal:
Office of the State Appellate Defender
400 W. Monroe, Suite 202
P.O. Box 5240
Springfield, IL 62705-5240

If appellant is indigent and has no attorney, does he want one appointed? Yes

(4) Date of Judgment or Order: OCTOBER 4, 2013

(5) Offenses to which convicted: ATTEMPTED FIRST DEGREE MURDER, COUNT I AND COUNT ~~II~~ III, BOTH AMENDED.

(6) Sentence: SIXTEEN YEARS AS TO COUNT I AND CONSECUTIVE 16 YEARS AS TO COUNT III WITH CREDIT FOR 295 DAYS SERVED.

If appeal is not from a conviction, nature of order appealed from:

Dated this 8 day of October, 2013.

Melissa Hurst

Melissa Hurst,

Coles County Circuit Clerk

C602