

2026 IL App (4th) 241597

NO. 4-24-1597

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 16, 2026

Carla Bender

4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Winnebago County
PRESTON V. SCOTT,	)	No. 20CF1536
Defendant-Appellant.	)	
	)	Honorable
	)	Ronald J. White,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Presiding Justice Steigmann and Justice DeArmond concurred in the judgment
and opinion.
Presiding Justice Steigmann also specially concurred, with opinion.

OPINION

¶ 1 Following a jury trial, defendant, Preston V. Scott, was found guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 2020)) and unlawful possession of a weapon by a felon (*id.* § 24-1.1(a)). The trial court sentenced him to concurrent sentences of 80 years and 14 years in prison, respectively. Defendant appeals, arguing (1) his trial counsel provided ineffective assistance, (2) his posttrial counsel was ineffective for failing to raise or properly present his claims of his trial counsel's ineffectiveness, (3) the court erred in admitting prior bad act evidence, and (4) the court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). We reverse and remand for a new trial.

¶ 2 I. BACKGROUND

¶ 3 In August 2020, a grand jury indicted defendant on multiple counts of first degree

murder (720 ILCS 5/9-1(a)(1), (2) (West 2020)) (counts I through XII), one count of aggravated battery with a firearm (*id.* § 12-3.05(e)(1)) (count XIII), and one count of unlawful possession of a weapon by a felon (*id.* § 24-1.1(a)) (count XIV) in connection with the April 2020 shooting death of David Foley. The State’s theory of the case was that defendant sold drugs and shot Foley as an act of revenge because Foley acted as a confidential informant for the police during controlled drug buys that involved defendant. Prior to trial, the State elected to proceed on only one first degree murder count (*id.* § 9-1(a)(2)) and the unlawful possession of a weapon by a felon count (*id.* § 24-1.1(a)). The trial court dismissed the remaining counts on the State’s motion.

¶ 4 In September 2022, defendant’s jury trial was conducted. The States evidence showed that on the morning of April 2, 2020, Foley was shot and killed on a residential street in Rockford, Illinois. Ryan Mattingly testified that he resided at 2111 Oregon Avenue in Rockford, where the shooting occurred. Around 10:25 a.m., he looked out his front window and observed two vehicles stopped in front of his house and one person exiting a vehicle. Mattingly stated he heard approximately 10 gunshots and retreated to his basement. After returning to the window, he observed only one vehicle and a man, who was later identified as Foley, lying in the street.

¶ 5 Exterior surveillance cameras at Mattingly’s home captured the shooting at 10:26 a.m. Brandon Bradley, a police officer for the City of Rockford, reviewed recordings from those cameras at the scene. He testified that they showed a black Impala traveling westbound on Oregon Avenue followed closely by a gray SUV. Bradley described the black Impala as an “older model,” with silver trim around the exterior and a silver gas cap. He testified that the recordings showed both vehicles stopping in the street and the driver of the gray SUV exiting his vehicle and walking toward the driver’s side of the black Impala. The driver of the black Impala then quickly exited his vehicle and began shooting at the driver of the gray SUV. Bradley described the shooter

as “a thinner male wearing a dark colored hoodie, dark pants, [a] face mask, [and having] lettering down the leg of the pants.”

¶ 6 The surveillance camera recordings from Mattingly’s residence were admitted into evidence and published to the jury. They captured the incident from three separate angles and depicted events that were consistent with Bradley’s descriptions of what had occurred. None of the recordings provided a close-up view of the shooter’s face.

¶ 7 Robert Mohlman testified he also resided near the scene of the shooting. He recalled being in his back yard and hearing “[a]bout half a dozen” gunshots. He then walked between his house and his garage and saw a Black male “jump in a black car and drive off.” Mohlman testified the male was “maybe” five feet and nine inches tall to six feet tall. He also saw another car and a man lying in the street. On cross-examination, Mohlman testified he did not remember what the Black male was wearing and that he did not think the male wore a mask.

¶ 8 Matthew Gibbons testified that he was a member of the Rockford Police Department’s crime scene unit. On April 2, 2020, he was dispatched to the scene of the shooting. Gibbons identified several photographs he took at the scene, including several depicting Foley’s vehicle, which he described as a Chevy Equinox.

¶ 9 Dr. Mark Peters, an expert in forensic pathology, testified he performed Foley’s autopsy. His testimony showed Foley was shot seven times, with two of the shots resulting in fatal wounds. During Dr. Peters’s testimony, 28 autopsy photos that depicted Foley’s body and his injuries were admitted into evidence and published to the jury.

¶ 10 The State called Barbara Mitchell, defendant’s grandmother, as a witness. She testified that in April 2020, she was residing at an apartment complex in Rockford called Sun Valley Terrace. Defendant did not live with her at that time but did visit.

¶ 11 The State's evidence further showed that the police discovered a cell phone in the front passenger area of Foley's gray SUV. Officer Scott St. Vincent testified he located the cell phone and noticed that it was not "locked," was "still illuminated," and "had the recent calls listed." The last call on the phone was made to a contact named "James" and occurred within 10 minutes of the time that the police arrived at the scene.

¶ 12 Michelle Bootz testified that in April 2020, she worked as a violent crime detective for the Rockford Police Department and had a "background in phone extraction." She received Foley's cell phone in connection with the underlying case and completed an extraction, which involved using computer programs to extract data from the phone and putting the data into a readable report. Bootz testified the phone number associated with Foley's phone was 224-***-0549 (phone number 0549).

¶ 13 Michael Fitzgerald, a detective with the Rockford Police Department, testified that he received a description of a vehicle that left the scene of the shooting, a black Chevy Impala with tinted windows, chrome trim, and a chrome gas cap. Fitzgerald also received information that Foley's cell phone indicated he met with someone at a Mobil gas station prior to the shooting. Fitzgerald checked surveillance video at the Mobil gas station and found video relevant to the investigation. Recordings of the Mobil surveillance videos were admitted into evidence and published to the jury. They showed both a black Impala with chrome trim and a chrome gas cap and a gray SUV that matched the description of Foley's vehicle in the vicinity of the gas station. At approximately 10:19 a.m., the gray SUV pulled into a side parking lot at the gas station before leaving a short time later.

¶ 14 Dalton Blair testified that in April 2020, he worked for Walmart as an asset protection assistant store manager. His duties included maintaining Walmart's camera system. On

April 9, 2020, he was contacted by the police about obtaining store surveillance video of the purchase of a cell phone associated with the phone number 708-***-6501 (phone number 6501). Blair was provided with the universal product code number of the cell phone and located surveillance video for the requested purchase, which he provided to the police. Evidence showed two males purchased the phone on February 23, 2020. The surveillance video was admitted into evidence, and excerpts were published to the jury. The State later argued that one of the males was defendant.

¶ 15 Blair testified that he later received a second request from the police for surveillance video of the purchase of a cell phone associated with the phone number 779-***-0237 (phone number 0237). He was able to determine that the purchase of the second phone was made on March 19, 2020. He also obtained surveillance video of the purchase, which was admitted into evidence and published to the jury.

¶ 16 The State's evidence showed that a woman named Corionna Bell purchased the phone associated with phone number 0237. Bell testified and acknowledged purchasing the cell phone from Walmart on March 19, 2020. She later spoke with the police about the purchase. According to Bell, an individual named "Marty" asked her to "get him a phone," and she agreed. Bell then drove to Walmart with Marty and "Prada," the latter of whom she identified as defendant. Marty was driving the vehicle, defendant was the front seat passenger, and Bell rode in the back seat. Bell went inside Walmart alone and bought a pay-as-you-go phone. Bell identified still images of herself taken from the Walmart surveillance video.

¶ 17 Bell testified that when she returned to the car, she left the phone in the back seat. She denied giving the phone to defendant and stated she did not remember handing him the phone. The State played a portion of Bell's recorded interview with the police, during which Bell reported

that defendant “grabbed” the phone and kept it while she was in the car. Bell then acknowledged telling the police that defendant “grabbed” the phone and “hung onto” it.

¶ 18 Bell also acknowledged that at the time of trial, she had pending criminal charges and a pending bench warrant for her arrest. In exchange for providing truthful testimony at defendant’s trial, the State had agreed to dismiss the charges against her and quash the bench warrant.

¶ 19 The record shows that, without objection, the cell phone records associated with Foley’s phone, phone number 0549, and the phones purchased from Walmart, phone numbers 6501 and 0237, were admitted into evidence.

¶ 20 Adam Cox testified he was a detective with the Rockford Police Department and involved in the underlying investigation. He had received training on a software program called GeoTime, which was a law enforcement tool used to analyze large amounts of data, including cell phone records. Cox testified that the location of a cell phone could be determined relative to a cell tower or cell site location through cell phone activity.

¶ 21 Cox testified that he was asked to “plot” or “track” the activities of the cell phones with phone numbers 6501 and 0237 with GeoTime. That process involved uploading records received from a cell phone provider into the GeoTime software, which “takes that information and then presents it on a 2D map” that can be used to “view the activity of that device.” Cox identified an exhibit containing screen recordings of the information he obtained through GeoTime for the cell phone activity associated with phone numbers 6501 and 0237. The exhibit was admitted into evidence and published to the jury.

¶ 22 Cox testified the GeoTime information showed that at the time of the murder, the last activity associated with phone number 0237 “appear[ed] to be in the vicinity of the homicide.”

He stated that when phone numbers 0237 and 6501 were tracked together, there was no activity from phone number 6501 until 10:26 a.m. The State's location evidence showed that activity also occurred in the vicinity of the shooting and identified the activity as an outgoing phone call to Jadale Lamon.

¶ 23 On cross-examination, Cox acknowledged that through his analysis, he could not identify who was in possession of the phones associated with phone numbers 6501 and 0237. He also confirmed that in addition to the outgoing call at 10:26:58 a.m. to Lamon from phone number 6501, the GeoTime analysis showed activity from phone number 0237, including an incoming call at 10:23 a.m., an incoming text at 10:24 a.m., and an outgoing text at 10:25 a.m. The State's GeoTime location evidence showed the incoming call and the text messages were exchanged between phone number 0237 and Foley's cell phone. That evidence also showed a series of communications between phone number 0237 and Foley's cell phone in the minutes before the murder. Those communications occurred in the general area of Rockford where the shooting occurred. As Cox testified, the GeoTime location evidence demonstrated that the last activity from phone number 0237 occurred at 10:25 a.m. near the location of the shooting.

¶ 24 The State further called Jacob Vereecken as a witness. Vereecken acknowledged that he was serving a 15-year prison sentence in the Illinois Department of Corrections for two counts of aggravated robbery. His criminal history also included convictions for unlawful restraint in 2019, aggravated fleeing from the police in 2016, and aggravated robbery in 2010.

¶ 25 The State questioned Vereecken regarding whether he spoke to the police about defendant on June 18, 2020, and reported that "Prada" was the last person he saw with a car that belonged to an individual named Sabrina Layman. Initially, Vereecken stated he did not recall talking to the police or providing such information, asserting that, at that time, he was "probably"

under the influence and “on drugs.” After the State showed Vereecken an exhibit containing a recording of his police interview and asked whether a person depicted on the screen was him, Vereecken indicated that he remembered being at the interview but did not remember what he said.

¶ 26 Vereecken agreed that the interview occurred on the same date he was arrested for his two aggravated robbery charges. Again, however, he asserted that he did not recall what he said during the interview, being asked about Foley’s murder, or telling the police that “Prada was the last person [he] saw with the car.” The State then moved to play a portion of Vereecken’s recorded interview. Defendant’s attorney, Elder Granger II, raised no objection, stating, “If [the prosecutor] is going to impeach his own witness, I have no objection.” The trial court allowed the State to play the recording, which showed Vereecken telling the police that Prada was the last person he saw with a black Impala that was owned by a woman named Sabrina. Vereecken later testified that Layman drove a black Impala, but he could not remember whether the vehicle had “a lot of chrome.”

¶ 27 When asked by the State who Prada was, Vereecken stated he could not recall. However, upon further questioning, he acknowledged that he had heard people calling defendant by that nickname. Vereecken made an in-court identification of defendant and stated that he knew defendant from “just being around Rockford.” Vereecken testified that he also knew an individual named Jadale Lamon, who went by the nickname “Ice-o.” He stated that defendant and Ice-o were acquainted and that he had seen them together “[h]ere and there.”

¶ 28 The State continued to question Vereecken regarding whether he made various specific statements to the police about Foley’s murder and defendant’s involvement in the crime. Vereecken repeatedly testified that he did not recall making the statements and, each time he answered, the State was permitted to publish a portion of his recorded interview.

¶ 29 Specifically, in response to Vereecken's assertion that he could not recall telling the police what Prada wore on the day of the shooting, the State played an excerpt of Vereecken's recorded interview, in which he described someone as wearing a hoodie with a black or gray hood and a skull cap and having a pair of gloves. The recordings played by the State further showed that, during his recorded interview, Vereecken (1) indicated that Prada "set up" a new phone number because someone had "set him up" with "a controlled buy," (2) indicated that he learned information about the shooting from being around Prada and Ice-o while they were talking, (3) indicated that Prada told him the night before the shooting that he was going "duck hunting," (4) stated that he heard "Prada say he killed that person" and that he heard Prada tell Ice-o that he shot the victim "when [the victim] came up to the window to buy," (5) stated that Ice-o gave defendant \$1,000 for a bus ticket to go to Texas, (6) stated that he heard Prada tell Ice-o that he "smoked that dude," (7) stated that he heard Prada tell Ice-o that he got "a new line" and "tricked" a person into "letting [Prada] serve him again" and then shot the person when he "walked up," (8) indicated that Prada "tried to get [him] to set dude up" and "tried to get [him] to shoot dude," (9) stated that Foley "was the dude from the hotel" that "Prada killed" and that Foley had been "doing maintenance crew," and (10) stated that two weeks before the murder, Prada stated he wanted Vereecken "to take care of this guy, [who] did a controlled buy on him," and offering to make sure Vereecken was "straight" and offering him "cars."

¶ 30 On cross-examination, Vereecken testified that his recorded statements to the police on June 18, 2020, were not true and that he told the police "untruths to help [himself] out." He maintained that the information he learned about Foley's murder came from Ice-o and that he never overheard a conversation between Ice-o and defendant. Vereecken asserted that he had no personal relationship with defendant and estimated that they had spoken less than five times. He

also denied ever seeing defendant with a firearm and stated he did not recall defendant ever selling him “any form of drugs.”

¶ 31 Detective William Donato testified that in April 2020, he was a detective with the violent crimes unit of the Rockford Police Department and was assigned to investigate Foley’s death. At the scene, he collected Foley’s cell phone, associated with phone number 0549, and later reviewed a “logical report” produced from an extraction performed on the phone. The report showed text messages “of interest” from phone number 0237, in which Foley discussed meeting with the person in possession of that phone and was directed to “[g]o to the Mobil” gas station. Donato testified that when he initially collected the phone, it was “giving [him] step-by-step directions to the *** Mobil.” In Foley’s phone, the contact for phone number 0237 was identified as “James.” The “James” in Foley’s phone was also associated with a second phone number.

¶ 32 Donato testified that during his investigation, he learned the phone associated with phone number 0237 was purchased on March 19, 2020. A search warrant was issued for the phone records associated with that phone. Donato testified those records showed that, from the date it was purchased on March 19, 2020, until the date of the shooting, the phone was only used to call or text Foley. The first phone call made from the phone associated with phone number 0237 was made 18 minutes after the phone was purchased from Walmart.

¶ 33 Donato further testified that he was one of the officers who interviewed Vereecken. He stated he had been a police officer for 17 years, and on “[c]ountless” occasions, he had observed people who were under the influence of drugs or alcohol. At the time of the interview with Vereecken, Donato did not notice anything unusual about Vereecken and “perceived him to be sober.”

¶ 34 On cross-examination, Donato testified that the second number associated with the

“James” contact in Foley’s phone was phone number 815-***-4311 (phone number 4311). According to Donato, phone number 4311 was connected to an individual named Cortez Houston. Additionally, he testified that during his investigation, he received information that defendant’s telephone number was 815-***-2415 (phone number 2415). Donato stated that his investigation indicated the phone associated with phone number 2415 was not “present at the murder.”

¶ 35 Donato also testified that the phone associated with phone number 6501, which was purchased from Walmart on February 23, 2020, by two males, had a different phone number, phone number 779-***-1004, at the time it was activated. However, a few weeks after it was purchased, the phone number was “changed over the phone through Verizon customer service” to phone number 6501.

¶ 36 Mike Jury testified that in October 2019, he worked for the Rockford Police Department in its narcotics unit. At the time, he was engaged in a narcotics investigation that targeted defendant and involved Foley as a confidential informant. Jury described Foley as being 50 to 55 years old and having a “very raspy, deep voice.” He also stated Foley had worked as a maintenance man or janitor and that he had heard people refer to Foley by the nickname “the maintenance man.” On October 24, 2019, a controlled drug buy was conducted, during which Foley entered a silver Chevy Impala and purchased a substance that field tested positive for probable cocaine from an individual that Foley identified as defendant. Foley referred to defendant as “Prada” or “Ghost.” Photographs were taken of the controlled buy, and it was also audio and video recorded. Jury identified photographs from the controlled buy, including still photographs of defendant.

¶ 37 Jury testified that on February 24, 2020, a second controlled drug buy occurred with Foley, who indicated that he could, again, purchase drugs from defendant. After Foley was

transported to the meeting location for the controlled buy and surveillance was set up, Foley called Jury and reported that defendant's "brother" would be "making the delivery" for defendant. Jury testified that eventually, "[a] silver Pontiac G6 pulled up" and parked next to Foley. Foley briefly entered the vehicle, and "the G6 left the parking lot." Jury testified that Foley then met with police and handed over "11 individually wrapped baggies." Narcotics detectives also stopped the driver of the G6, who was identified as Robert Jarrett. Jarrett was taken into custody.

¶ 38 Jury testified that as a narcotics officer, he was familiar with the term "serve." He stated that if someone was "out doing serves," that meant that they were "doing drug deals." He also testified that after Foley was killed, he provided the investigating officers with a list of names, showing who "Foley had conducted controlled purchases from." Defendant's name was on the list that Jury provided. According to Jury, the February 24, 2020, controlled buy that involved Jarrett was the last controlled buy that Foley participated in as a confidential informant. Jury was not aware that Foley was in Rockford attempting to obtain drugs on the date of his murder. Finally, he stated that on the date of the second controlled buy, he obtained a warrant for defendant's arrest based on the October 24, 2019, controlled buy. On cross-examination, Jury testified that Foley had identified defendant's phone number as 779-***-2400.

¶ 39 Robby Hatfield testified that in April 2020, he worked as a detective assigned to the Rockford Police Department's narcotics unit. After Foley's murder, he began listening to the jail phone calls from defendant's "known associates," who were in the Winnebago County jail, specifically, Jarrett and an individual named Edmond Lilly. Hatfield testified he was familiar "with the Winnebago County inmate jail system" and had been trained on how to utilize that system. He was also familiar with obtaining recordings from the system. According to Hatfield, once jail calls were recorded, law enforcement personnel could retrieve the calls from the system and were

allowed to make copies. Copies were made by finding a call in the system and downloading it to a disk. Once a call was downloaded, it could not be altered. Hatfield testified he could identify a particular inmate making a call because “[t]ypically they put in their MID ID number and make that call.” He described an “MID ID number” as a number assigned to each inmate. Hatfield asserted that he was also familiar with Lilly’s and Jarrett’s voices.

¶ 40 Hatfield next identified an exhibit that he stated contained recordings of two calls from Jarrett to defendant in February 2020. The recordings were admitted into evidence and played for the jury. Hatfield testified Jarrett placed the first call at 4:44 p.m. on February 24, 2020, to phone number 2415. He stated that he was familiar with defendant’s voice, having listened to drug buy recordings several times, and identified defendant as the recipient of the call. On the recording, the voice identified as defendant’s voice asked what happened. Jarrett stated he “went in there to hit” and suggested his recent arrest was caused by “the mountain man” or another individual. The person identified as defendant then referenced the “maintenance man,” to which Jarrett responded, “[Y]eah, it was either him or somebody else.”

¶ 41 The State’s evidence showed that at 5:04 p.m. on February 24, 2020, Jarrett placed a second phone call to phone number 2415. Again, Hatfield testified that defendant was the recipient of the call. During the second call, Jarrett asked what the maintenance man looked like. The individual identified as defendant described the maintenance man as having an Equinox and a “raspy” voice. Jarret asked if the man was “going bald on top,” and the person identified as defendant responded, “[A] little bit.” That person also stated that he was “trying to figure out [his] next move.”

¶ 42 Hatfield testified that around 4:30 p.m. on the day of the murder, Lilly made a three-way call to defendant. He stated Lilly first called an unknown female and then “ha[d] her three-

way call a number to [defendant].” A recording of Lilly’s call was admitted into evidence and published to the jury. On the call, the voice identified as Lilly’s stated, “I’m trying to make sure you cool.” The call recipient, identified as defendant, responded, “My s*** been hot, boy.” Lilly then stated that he heard someone “got put together earlier” and that he wanted to make sure “everybody cool.” The voice identified as defendant’s voice then responded, “[T]hat’s why I didn’t answer nothing from the county, my s*** hot.”

¶ 43 On cross-examination, Hatfield testified that he had not had any formal training in voice recognition. Also, he had never been certified as an expert.

¶ 44 Harley Wessner testified he was a detective for the Rockford Police Department. On July 27, 2020, he “was a member of the SCOPE Team,” which he described as “a street team” that focused on violent offenders and people with warrants. On that date, he and other officers were looking for defendant and visited Sun Valley Terrace. Wessner stated that while driving a squad car, he entered a cul-de-sac and noticed a car. He and the driver of the car looked at one another, and Wessner recognized the driver as defendant.

¶ 45 Wessner further testified that when he “attempted to turn around to stop” the car, defendant “[t]ook off driving” and “fled the scene.” Granger objected and, during a discussion outside the jury’s presence, argued that the State was impermissibly attempting to show that defendant had fled from the police when defendant had previously been found not guilty of that offense in other proceedings. The State maintained Wessner’s testimony was relevant to show that defendant knew he had an outstanding warrant for his arrest, stemming from the circumstances of the first controlled drug buy. The trial court found Wessner’s testimony was relevant to determining whether defendant knew that he had an outstanding warrant. However, the court also ruled that Wessner could not testify “about the charge of fleeing.”

¶ 46 On further direct examination, Wessner testified that defendant drove his vehicle from the area of Sun Valley Terrace to a particular street intersection located approximately 1.5 miles away. He followed defendant with his lights activated, and defendant was taken into custody at the intersection.

¶ 47 Finally, the record shows that during the State's case, the parties stipulated that defendant had a prior felony conviction for residential burglary.

¶ 48 During defendant's case-in-chief, Granger called Mitchell, defendant's grandmother, as a witness. Mitchell testified she resided at 3311 Sun Valley Terrace. On April 8, 2020, police officers came to her residence to ask about defendant's whereabouts on April 2, 2020. Mitchell stated she told the police that defendant arrived at her house between 9 and 9:30 a.m. She asserted that defendant remained at her residence until approximately 10:30 or 10:35 a.m.

¶ 49 On cross-examination, Mitchell testified that she had a doctor's appointment on the morning of April 2, 2020. She maintained that she was at her appointment at about 8:30 a.m. and that she returned home at around 10 a.m. Mitchell denied telling the police that she came home from her doctor's appointment at around 10:30 a.m. However, she acknowledged telling them that defendant came to her residence "a little while" after she returned home. At trial, she estimated defendant's arrival to be at about 10 a.m. or 10:05 a.m. Mitchell also testified that a neighbor told her defendant had come to her house earlier on April 2, 2020, when she was not home. She acknowledged that she did not tell the police about what her neighbor told her. Mitchell also acknowledged that she had been in the courtroom during defendant's trial. When asked whether she realized that saying she arrived home at 10 a.m. gave defendant an alibi, she responded, "I don't know."

¶ 50 The State recalled Detective Donato as a rebuttal witness. He testified that on April

8, 2020, he spoke with Mitchell about defendant. According to Donato, Mitchell reported that she last saw defendant on April 2, 2020. She stated she went to a doctor's appointment at 9 a.m. that morning and returned home at 10:30 a.m. Mitchell recalled that defendant "arrived a short time after she arrived back home."

¶ 51 During deliberations, the jury asked to view some of the evidence in the case, including Vereecken's recorded interview with the police. By agreement of the parties, the jury was allowed access to the same excerpts of Vereecken's recorded interview that were admitted into evidence and published during the trial. Ultimately, the jury found defendant guilty of first degree murder and unlawful possession of a weapon by felon. It also found proven the allegation that defendant personally discharged a firearm that proximately caused the death of another person.

¶ 52 Following his trial, defendant submitted *pro se* filings alleging Granger provided ineffective assistance during the various stages of his trial. He asked the trial court to conduct a *Krankel* inquiry (see *People v. Krankel*, 102 Ill. 2d 181 (1984)) into his *pro se* claims.

¶ 53 In October 2022, Granger filed a posttrial motion on defendant's behalf, seeking a judgment notwithstanding the verdict or a new trial. In November 2022, defendant retained new counsel, attorney Glenn Jazwiec, who entered his appearance on defendant's behalf. Jazwiec represented to the trial court that he intended to represent defendant in connection with his ineffective-assistance claims against Granger and, over several dates in 2023 and 2024, hearings were held on those claims. The court characterized the hearings as *Krankel* proceedings, and although the State was present for the hearings, the court did not allow it to participate.

¶ 54 The record shows Jazwiec presented testimony from both Granger and defendant, and the trial court also questioned the witnesses. In presenting argument to the court, Jazwiec asserted that Granger was ineffective on four specific bases: (1) failing to properly prepare the case

for trial with defendant, (2) failing to question potential jurors during jury selection, (3) failing to file a motion to dismiss defendant's case on speedy trial grounds, and (4) calling Mitchell as a witness. In May 2024, the court entered a written order, denying defendant's "motion for ineffective assistance of counsel," finding that "trial counsel was not ineffective."

¶ 55 In August 2024, Jazwiec filed an amended posttrial motion on defendant's behalf, alleging defendant's right to a speedy trial had been violated. In October 2024, the trial court entered a written order denying defendant's amended posttrial motion. In December 2024, it sentenced him to concurrent sentences of 80 years in prison for first degree murder and 14 years in prison for unlawful possession of a weapon by a felon.

¶ 56 This appeal followed.

¶ 57 II. ANALYSIS

¶ 58 A. Ineffective Assistance of Trial Counsel

¶ 59 On appeal, defendant first argues that Granger provided ineffective assistance at his trial. He asserts multiple bases of deficient performance by Granger and contends that such deficiencies, either alone or cumulatively, affected the jury's verdict and denied him his right to a fair trial.

¶ 60 Ineffective-assistance-of-counsel claims are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that a defendant show both that (1) his counsel's actions fell below an objective standard of reasonableness and (2) counsel's deficient performance caused him prejudice. *People v. Yankaway*, 2025 IL 130207, ¶ 61. Under the first prong, counsel's performance is "measured against prevailing professional norms." *Id.* ¶ 62. "Under the second prong, the defendant must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would

have been different.” *Id.* To prevail, the defendant must satisfy both *Strickland* prongs. *Id.* “The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel.” *Id.*

¶ 61

1. Admission of Cell Phone Records

¶ 62

Defendant’s initial ineffective assistance claim concerns Granger’s failure to object to the admission of the cell phone records associated with Foley’s phone—phone number 0549—and the two cell phones alleged to have been in defendant’s possession at the time of the murder—phone numbers 0237 and 6501. He asserts that the cell phone records were not properly authenticated in that the certifications accompanying them failed to comply with Illinois Rule of Evidence 902(11) (eff. Sept. 28, 2018). Defendant maintains Granger should have objected to the authenticity of the records in response to the motions *in limine* the State filed seeking their admission and that he performed deficiently in failing to do so. He also contends that Granger’s failure to object was highly prejudicial because the State’s case heavily relied on the records and the evidence obtained therefrom. According to defendant, none of the testimony and evidence derived from the cell phone records would have been admitted had Granger objected based on the deficiencies in the certifications, making it “plausible that the result of trial would have been different absent counsel’s error.”

¶ 63

The record shows that, prior to trial, the State filed motions *in limine*, asking the trial court to allow the admission of cell phone records relevant to the case from Verizon and T-Mobile. Citing Illinois Rule of Evidence 803(6) (eff. Mar. 24, 2022) and Rule 902(11) (eff. Sept. 28, 2018), the State alleged that the custodians of the records had provided “certification as to the accuracy” of the records and that the records were self-authenticating. The State submitted purported certifications that pertained to the cell phone records it sought to have admitted.

¶ 64 At hearings on the State’s motions, Granger offered no objection to the admission of the records. Specifically, he denied having any objection to the records based on foundational issues, indicated he would have no problem with the records being presented at trial through stipulation, and commented that the records were business records and self-authenticating. The trial court granted the State’s motions to admit the records.

¶ 65 In responding to defendant’s argument on appeal, the State argues that Granger did not perform deficiently by electing to stipulate to the admissibility of the phone records. It asserts that even assuming bases existed for challenging the certifications submitted with the records, defendant cannot show that the State would have been unable to cure the defects and provide proper certifications. The State posits that Granger likely “knew that establishing a proper foundation would have been very easy for the State and also knew the documents were accurate.”

¶ 66 Illinois Rule of Evidence 803(6) (eff. Mar. 24, 2022) sets forth a hearsay exception for records that are “kept in the course of a regularly conducted business activity.” Under the rule, the records must be supported “by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11).” *Id.*

¶ 67 In turn, Rule 902(11) provides that a proper certification must be in writing and made by the custodian of the record or other qualified person. Ill. R. Evid. 902(11) (eff. Sept. 28, 2018). The custodian must certify the record:

- “(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.” *Id.*

The rule further states that “[t]he word ‘certification’ *** means *** a written declaration under oath subject to the penalty of perjury.” *Id.*

¶ 68 Here, defendant argues that Granger should have objected to the State’s motions to admit the cell phone records because (1) none of the certifications submitted with the records “mention any oath at all” and (2) two of the certifications failed to state that they were made “ ‘under the penalty of perjury.’ ” As defendant points out, this court has held that “[t]he language of Rule 902(11) could not be more clear: a ‘certification’ that passes muster under the rule is ‘a written declaration under oath subject to the penalty of perjury.’ [Citation.] The rule requires a certification be made under oath.” *People v. Fox*, 2022 IL App (4th) 210262, ¶ 81. In *Fox*, we found that there was nothing on the face of the challenged certifications “to indicate they were made under oath” and, as a result, the trial court had erred in finding the certifications complied with Rule 902(11). *Id.* ¶¶ 81-82.

¶ 69 In this case, there appears to be no dispute by the State that the certifications at issue suffer from similar defects. As defendant argues, only one certification states it was attested to under the “penalty of perjury,” and nothing on the face of any of the certifications indicates that they were made “under oath.” Ill. R. Evid. 902(11) (eff. Sept. 28, 2018); see *People v. Hauck*, 2022 IL App (2d) 191111, ¶ 49 (finding noncompliance with Rule 902(11) where a certification did “not contain any indication that an oath was sworn or to whom it was sworn”).

¶ 70 However, while we agree that the certifications in this case failed to comply with Rule 902(11), we cannot agree that defendant can establish that he received ineffective assistance based on Granger’s failure to object to the certifications and the records they accompanied. In particular, defendant cannot establish the prejudice prong of the *Strickland* test. We find this court’s recent decision in *People v. Jones*, 2023 IL App (4th) 220721-U, is both instructive and

persuasive as to this issue.

¶ 71 In *Jones*, the defendant argued on appeal that his defense counsel was ineffective for failing to object to the admission of phone records on the basis that the certification that accompanied the records “did not meet the requirements for self-authentication under Rule 902(11).” *Id.* ¶ 155. We rejected the defendant’s claim, in part, due to a lack of prejudice. *Id.* ¶¶ 169-171. Relevant to this appeal, we found that nothing in the record suggested “that if defense counsel had objected to the admission of the records on the basis that they were not properly certified, the State would not have been able to lay the proper foundation, either by obtaining new certifications or calling a witness who could authenticate the records.” *Id.* ¶ 171. In so holding, we cited *People v. Aquisto*, 2022 IL App (4th) 200081, ¶ 64, which held similarly in the context of a failure to raise a chain-of-custody objection. *Jones*, 2023 IL App (4th) 220721-U, ¶ 170. Notably, we cited that case for the following discussion:

“ ‘Let us assume, for the sake of argument, that the omission of a chain-of-custody objection was deficient performance. Even so, to find prejudice from the omission of such an objection, we would have to find a reasonable probability that, if defense counsel had made such a chain-of-custody objection, the State would have been unable to cure the objection (and, consequently, the circuit court would have refused to admit People’s exhibit No. 1 and would have acquitted defendant of count IV). In the record before us, we find no basis for asserting a reasonable probability that the State would have been incapable of curing any chain-of-custody objection.’ ” *Id.* (quoting *Aquisto*, 2022 IL App (4th) 200081, ¶ 64).

¶ 72 The same is true in the present case. To show prejudice, defendant had to establish a reasonable probability that if Granger objected to the phone records because they were not

properly certified, the State would have been unable to cure the defect in the certifications. The only defects in the certifications that defendant points to on appeal are that the certifications were not made “under oath subject to the penalty of perjury.” Ill. R. Evid. 902(11) (eff. Sept. 28, 2018). Nothing in the appellate record suggests that the State could not have provided new and proper certifications or presented witness testimony to authenticate the cell phone records had the deficiencies in the certificates been brought to its attention.

¶ 73 In his reply brief, defendant points out that each certification for cell phone records that the State presented was deficient in the same manner (including certifications for records associated with two cell phone numbers that he does not challenge on appeal). He contends “[t]he State’s repeated submission of facially deficient certifications supports the inference that it either did not have the ability to exert control over the contents [of] certifications presented by the record keepers[] or did not have a procedure in place to effectuate changes.” We disagree. Each of the certifications referenced by defendant involved a different set of phone records (associated with different and distinct phone numbers) that the State was seeking to have admitted for the first time. This is not a case where the State repeatedly failed to cure defects in the certifications after the errors were brought to its attention.

¶ 74 Under the circumstances presented, we find defendant cannot show *Strickland* prejudice. Accordingly, he cannot establish that Granger was ineffective for failing to object to the admission of the cell phone records associated with phone numbers 0549, 6501, and 0237.

¶ 75 *2. The State’s Direct Examination of Vereecken*

¶ 76 On appeal, defendant next argues that Granger was ineffective for failing to object to the admission of some of Vereecken’s recorded statements to the police. Specifically, he challenges the admission of evidence that Vereecken told the police that he heard (1) “Prada say

he killed that person” and that he heard Prada tell Ice-o that he shot the victim “when [the victim] came up to the window to buy,” (2) Prada tell Ice-o that he “smoked that dude” after getting the person to buy from him again and (3) Prada tell Ice-o that he got “a new line” and “tricked” a person into “letting [Prada] serve him again.” According to defendant, the challenged statements—admitted through the State’s leading questions to Vereecken and its publishing of excerpts of Vereecken’s recorded police interview—were inadmissible as substantive evidence because they concerned matters outside of Vereecken’s own personal knowledge. He also asserts that the challenged statements were inadmissible as impeachment because Vereecken had not first testified “in a manner that affirmatively damaged the State’s case.”

¶ 77 For the reasons that follow, we agree with defendant that Vereecken’s challenged statements were inadmissible. We also find that Granger performed deficiently by failing to object to the admission of the challenged statements and that defendant suffered prejudice as a result.

¶ 78 a. Substantive Evidence

¶ 79 Generally, a witness’s out-of-court statements are considered hearsay and are “incompetent as substantive evidence.” *People v. Simpson*, 2015 IL 116512, ¶ 27. However, section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2022)), titled “Admissibility of Prior Inconsistent Statements,” permits the use of a witness’s prior inconsistent statements as substantive evidence under certain specified circumstances. Section 115-10.1 states as follows:

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

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

and

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

(c) the statement—

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

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

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

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

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

¶ 80 In this instance, Vereecken’s challenged prior inconsistent statements were made during an interview with the police and not “under oath at a trial, hearing, or other proceeding.” *Id.* § 115-10.1(c)(1). Thus, to be admissible as substantive evidence, the statements had to “narrate[], describe[], or explain[] an event or condition of which [Vereecken] had *personal knowledge*.” (Emphasis added.) *Id.* § 115-10.1(c)(2).

¶ 81 The “personal knowledge” requirement was designed to “ensure that out-of-court statements are trustworthy.” *Simpson*, 2015 IL 116512, ¶ 32. As used in section 115-10.1(c)(2), having “personal knowledge” of an event or condition means that “the witness must have actually

perceived the events that are the subject of the statement, not merely the statement of those events made by the defendant.” *Id.* ¶ 41. “In other words, the witness must have observed the events being spoken of, rather than simply hearing about them afterwards.” (Internal quotation marks omitted.) *People v. Thornton*, 2024 IL App (4th) 220798, ¶ 61.

¶ 82 In *Simpson*, 2015 IL 116512, ¶¶ 31-34, the supreme court determined that a witness’s videotaped statement was not admissible as substantive evidence under section 115-10.1(c)(2) where the witness only had personal knowledge of the defendant’s admission to the crime and not personal knowledge of the crime itself. This case presents the same circumstances. Vereecken’s challenged statements clearly do not describe an event of which he had personal knowledge. Rather, the statements show only that Vereecken heard defendant make statements indicating that he shot and killed Foley. Vereecken, though, did not witness the shooting. Accordingly, the statements that defendant challenges on appeal were not admissible as substantive evidence under section 115-10.1.

¶ 83 In so holding, we find it important to note that *Simpson* contains an incorrect statement of law with respect to the definition of hearsay. In that case, the supreme court wrote the following: “It is a well settled general rule that what a witness states out of court *and out of the presence of the defendant* is pure hearsay and is incompetent as substantive evidence.” (Emphasis added.) *Id.* ¶ 27. The above statement is only partially correct because although “what a witness states out of court *** is pure hearsay and is incompetent as substantive evidence,” whether that statement occurred “out of the presence of the defendant” is irrelevant. While this court has no authority to overrule a decision of our supreme court (see *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28), we find it appropriate to point out the inaccuracy of the above statement and that it is inconsistent with what the supreme court has otherwise written regarding hearsay.

¶ 84 In *People v. Carpenter*, 28 Ill. 2d 116, 120 (1963), the supreme court discussed a case in which it was claimed that the defendant's presence was a factor in determining whether a statement was hearsay. The supreme court wrote the following:

“Defendant contends the receipt by the court of testimony concerning a conversation between the agent Jackson and Parson outside the defendant's presence was error. Jackson related that in this conversation the co-defendant, Parson, told him he had pure heroin for sale at a certain price, that Jackson paid him the required amount of money and was told by Parson to wait in the tavern and someone would get in touch with him in about an hour. The only basis assigned by counsel in his objection to this testimony on the trial was that the conversation occurred ‘outside the presence of defendant[.]’ Seemingly, this type of objection, frequently appearing in the trial records before this court, arises from a misconception of the rules of evidence, and a belief that any statement or conversation occurring in the absence of defendant is inadmissible. Such is not the law.

While we are not clear as to the origin of this notion, it apparently is connected in some way with the hearsay rule. An examination of the basis for this rule will clarify the situation. ‘Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.’ [Citations.] The fundamental purpose of the hearsay rule was and is to test the real value of testimony by exposing the source of the assertion to cross-examination by the party against whom it is

offered. While the administration of an oath and the right of confrontation are also spoken of as necessary elements, the essential feature, without which testimonial offerings must be rejected, is the opportunity for cross-examination of the party whose assertions are offered to prove the truth of the act asserted. [Citations.] If this requirement is met, with the exception of instances such as those where the silence of the defendant is claimed to constitute an implied admission, *the presence or absence of the defendant is immaterial.*” (Emphasis added.) *Id.* at 120-21.

See Michael H. Graham, Cleary and Graham’s Handbook of Illinois Evidence § 801.7 (2022 ed.) (stating “[t]he frequently heard objection in criminal cases that the statement was made outside the presence of the defendant has now been put firmly to rest” and “the presence or absence of the defendant, except where an admission by silence is asserted, is irrelevant to a determination of hearsay”); 2 McCormick’s Handbook of the Law of Evidence § 246 (Robert P. Mosteller ed., 9th ed. Feb. 2025 Update) (stating “[a] remarkably persistent bit of courthouse folklore is that statements are inadmissible if not made in the presence of the party against whom they are offered” and that such an “objection is not related to the basic concept of hearsay”).

¶ 85 The supreme court’s own rules of evidence further indicate that the question of whether a defendant was present for an out-of-court statement is generally immaterial when defining what constitutes hearsay. Specifically, Illinois Rule of Evidence 801(c) (eff. Oct. 15, 2015), contains the following definition: “ ‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” This is the standard definition of hearsay with which lawyers and judges have been long familiar and it is noteworthy that this definition makes no reference at all to “the presence of the

defendant.”

¶ 86 Hearsay is similarly defined under the Federal Rules of Evidence, which provide as follows: “ ‘Hearsay’ means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c). Again, the federal rule includes no reference to “the presence of the defendant” when determining whether a statement is hearsay.

¶ 87 This court knows from its experience that lawyers and judges frequently have difficulty applying the rules of evidence pertaining to hearsay, particularly given the many exceptions under which that evidence may be admissible. Accordingly, it is important that Illinois courts not contribute to confusion concerning hearsay evidence by incorrectly stating that a factor, such as whether the defendant was present when the out-of-court statement was made, has any relevance to determining whether a statement is, in fact, hearsay.

¶ 88 b. Impeachment

¶ 89 Next, when a prior inconsistent statement is not admissible as substantive evidence, it may still be used for impeachment if “the testimony of that witness does ‘affirmative damage’ to the party’s case.” *People v. Sangster*, 2014 IL App (1st) 113457, ¶ 62. As to this issue, the Illinois Rules of Evidence state as follows:

“The credibility of a witness may be attacked by any party, including the party calling the witness, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of affirmative damage.” Ill. R. Evid. 607 (eff. Jan. 1, 2011).

¶ 90 “Impeachment is intended as a means to cancel out damaging testimony.” *People v. Cruz*, 162 Ill. 2d 314, 363 (1994). “Affirmative damage results only from testimony that gives

positive aid to an adversary's case." (Internal quotation marks omitted.) *Id.* at 360. "It is only when the witness' testimony is more damaging than his [or her] complete failure to testify would have been that impeachment is useful." (Internal quotation marks omitted.) *Sangster*, 2014 IL App (1st) 113457, ¶ 62. Evidence that neither contradicts any of the State's evidence nor provides "aid to defendant's body of evidence" is neutral and not damaging to the State. *Cruz*, 162 Ill. 2d at 362. Also, "a witness's professed lack of memory, standing alone, does not 'affirmatively damage' a party's case for the purpose of impeaching one's own witness." *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 45.

¶ 91 In this case, Vereecken testified at trial that he did not recall making the challenged statements during his recorded interview with the police. His professed lack of memory of the specific statements at issue did not give positive aid to defendant's case. Although disappointing to the State, Vereecken's inability to remember was neutral and not affirmatively damaging to the State. As a result, we also agree that the challenged statements were not admissible as impeachment.

¶ 92 c. Present Recollection Refreshed and
Past Recollection Recorded

¶ 93 On appeal, the State does not dispute that Vereecken's challenged statements were inadmissible as either substantive evidence under section 115-10.1 or as impeachment. Instead, it submits that Granger cannot be deemed ineffective because the statements were admissible under the past recollection recorded exception to the hearsay rule following the State's attempt to refresh Vereecken's recollection. The State asserts that once Vereecken testified that he did not recall making the challenged statements to the police, the prosecutor was entitled to attempt to refresh Vereecken's recollection and that he "could have used the recordings to do so." According to the

State, if Vereecken’s recollection was refreshed, “he could have testified regarding those statements.” If his recollection was not refreshed, “the statements could have been admitted as past[]recollections recorded.”

¶ 94 In this case, the State did not follow the proper procedure for attempting to refresh Vereecken’s recollection. Also, it cannot satisfy all the necessary requirements for admission of the challenged statements under the past recollection recorded exception to the hearsay rule.

¶ 95 A witness may only testify “to facts within his knowledge and recollection.” *People v. Griswold*, 405 Ill. 533, 541 (1950). However, if a witness “has no memory concerning the facts in question,” his memory may be refreshed. *People v. Shatner*, 174 Ill. 2d 133, 153 (1996). “[T]he manner and mode of refreshing a witness’[s] memory rests within the discretion of the trial court.” *Id.* A court has wide discretion to allow a witness’s recollection to be refreshed “from virtually any source.” *People v. Pappas*, 66 Ill. App. 3d 360, 374 (1978).

¶ 96 When the witness’s memory is refreshed, the witness must testify from his own independent recollection. *People v. Cantlin*, 348 Ill. App. 3d 998, 1003 (2004) (citing *Griswold*, 405 Ill. at 541-42). Additionally, it is improper for the content of the material used to refresh the witness’s memory to be “merely read into evidence.” *In re Estate of Frakes*, 2020 IL App (3d) 180649, ¶ 38 (stating a police report may be used to refresh a witness’s recollection so long as the report was not “merely read into evidence”). Notably, in *Graham’s Handbook of Illinois Evidence*, Professor Michael H. Graham wrote the following regarding refreshing a witness’s recollection:

“The process of refreshing recollection must be conducted so as to prevent inadmissible evidence from being suggested to the jury by any means. ***

When refreshing recollection is by means of leading question, counsel may not employ a leading question incorporating the content of the anticipated

testimony before the trier of fact if the matter under consideration is of significance in the litigation. For example, when the prosecution seeks to refresh the recollection of a witness it has called regarding a statement bearing directly on the guilt of the defendant, the prosecutor may not use the substance of the statement in her question. Accordingly, a question such as ‘Didn’t the defendant tell you, on July 4 at the Ace Bar and Grill, that he shot Mary Jane?’ propounded in open court to refresh recollection is objectionable.” Michael H. Graham, *Clearly and Graham’s Handbook of Illinois Evidence* § 611.9 (2022 ed.).

See *Reed v. Northwestern Publishing Co.*, 124 Ill. 2d 495, 529-30 (1988) (declining to find an abuse of discretion where prior testimony was quoted as a means of refreshing a witness’s recollection but stating that a “better practice” was “to have the prior testimony recounted outside the jury’s presence”).

¶ 97 “If a witness lacks independent recollection of the occurrence about which he is testifying and a record or memorandum fails to refresh his current recollection, the [record or memorandum] itself may be admissible as a recorded recollection if certain foundational requirements are met.” *Cantlin*, 348 Ill. App. 3d at 1003. The Illinois Rules of Evidence set forth the exception to the hearsay rule for recorded recollections, stating as follows:

“Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly.” Ill. R. Evid. R. 803(5) (eff. Mar. 24, 2022).

For evidence to be admissible under the exception, the proponent of the evidence must establish

four prerequisites:

“(1) the witness had firsthand knowledge of the recorded event; (2) the written [or recorded] statement was made at or near the time of the event and while the witness had a clear and accurate memory of it; (3) the witness lacks present recollection of the event; and (4) the witness can vouch for the accuracy of the written [or recorded] statement.” *People v. Speed*, 315 Ill. App. 3d 511, 515 (2000).

¶ 98 Here, the procedure the State employed during its direct examination of Vereecken in no way resembled the appropriate procedure for refreshing a witness’s recollection. The State asked leading questions that incorporated the content of Vereecken’s anticipated testimony and which contained statements bearing directly on defendant’s guilt. The State then played excerpts of Vereecken’s recorded statements to the police, publishing the recordings on the record and in the presence of the jury. The State also largely failed to determine whether Vereecken’s recollection had actually been refreshed by any of the recordings it published. Moreover, the statements from Vereecken that defendant challenges on appeal were not admissible, even under the past recollection recorded exception to the hearsay rule.

¶ 99 The State’s argument on appeal depends upon a finding that all the requirements for the past recollection recorded exception were met. However, as defendant contends, the State clearly cannot establish the fourth prerequisite for application of the exception because Vereecken did not vouch for the accuracy of the challenged statements. Instead, on direct examination, he testified he did not recall making the statements and that he was under the influence at the time of his police interview. Additionally, on cross-examination, Vereecken testified that his recorded statements to the police were not true, he told the police “untruths to help [himself] out,” and he never overheard any conversation between defendant and Ice-o.

¶ 100 The State describes the fourth prerequisite as “irrelevant” in this case because “the camera certainly recorded [Vereecken’s] statements accurately.” However, we agree with defendant that the witness must acknowledge the accuracy of the substance of the recorded recollection when made, not simply the accuracy of the recording that captured it. See *id.* (finding a witness did not vouch for the accuracy of her written statement because she “did not testify that the statement was accurate when written”). Even the case authority that the State relies upon to support its argument recognizes this proposition. See *People v. Jackson*, 2023 IL App (2d) 210658-U, ¶ 44 (finding the fourth prerequisite was established where the witness “testified that he recognized his voice on the tape, those were his words on the tape, and he was being truthful when he made his statement”). Accordingly, the State cannot establish the admissibility of Vereecken’s challenged statements under the past recollection recorded exception to the hearsay rule.

¶ 101 d. Deficient Performance and Prejudice

¶ 102 As stated, defendant argues Granger’s performance was deficient because he failed to object to the challenged statements from Vereecken at trial. We agree. The statements at issue contained evidence that defendant had confessed to Foley’s murder. As noted by our supreme court, “a confession is the most powerful piece of evidence the State can offer, and its effect on a jury is incalculable.” (Internal quotation marks omitted.) *Simpson*, 2015 IL 116512, ¶ 36. Additionally, as discussed, the challenged statements were not admissible as substantive evidence, impeachment, or under the past recollection recorded exception to the hearsay rule. Despite the inadmissibility of the challenged statements and the fact that they contained “powerful” evidence of defendant’s confession to the charged offenses, Granger did not object to their admission. An objection by Granger should have resulted in the challenged statements being excluded from the evidence, and we agree that Granger’s performance in failing to object fell below an objective

standard of reasonableness under the first *Strickland* prong.

¶ 103 Defendant argues he was prejudiced by Granger’s deficient performance because the challenged statements contained prejudicial details of how the shooting occurred and amounted to evidence that he confessed to Foley’s murder. He also contends that, aside from Vereecken’s improperly admitted statements, no direct evidence connected him to the shooting, and the State’s case was otherwise “entirely circumstantial.”

¶ 104 Again, a confession is a “powerful piece of evidence *** and its effect on a jury is incalculable.” (Internal quotation marks omitted.) *Id.* In *Simpson*, the supreme court found that the recorded prior inconsistent statement of a witness was erroneously admitted as substantive evidence at the defendant’s murder trial. *Id.* ¶ 34. In the recorded statement, the witness “basically told [the] police that [the] defendant confessed to beating the victim to death.” *Id.* ¶ 36. The court held that the defendant’s trial counsel performed deficiently by failing to object to the admission of the evidence. *Id.* The court also determined that although there had been sufficient evidence presented to support a finding of guilt absent the improperly admitted evidence, the defendant was prejudiced by his counsel’s error. *Id.* ¶¶ 37-39.

¶ 105 Here, like in *Simpson*, there clearly was sufficient evidence presented by the State to support a finding of defendant’s guilt beyond a reasonable doubt. Specifically, the State presented evidence that defendant had a motive for the killing, given Foley’s participation as a confidential informant in a drug investigation that targeted him. Admissible statements from Vereecken, admitted as substantive evidence, connected defendant to a black Impala, the same type of car used by the shooter, and indicated defendant tried to enlist Vereecken to shoot Foley. Additionally, evidence linked defendant to two cell phones that records showed were in the vicinity of the shooting at the time that it occurred. Nevertheless, the evidence of defendant’s guilt was not

overwhelming, and the error in the admission of Vereecken’s challenged statements was significant. The jury heard the inadmissible statements through the questions posed to Vereecken by the State and then through the State’s publishing of excerpts of Vereecken’s recorded police interview. The jury also requested and was given permission to view Vereecken’s recorded statements during its deliberations, suggesting the challenged statements were a significant piece of evidence at trial.

¶ 106 During his rebuttal closing argument, the prosecutor generally argued that Vereecken had been “truthful” during his interview with the police and was “telling everything that he knew.” Such circumstances create a risk that the jury treated the inadmissible statements containing defendant’s alleged confession as substantive evidence.

¶ 107 To establish prejudice under the second *Strickland* prong, defendant was required to “show that, but for counsel’s deficient performance, there is a reasonable probability that the result of the proceeding would have been different.” *Yankaway*, 2025 IL 130207, ¶ 62. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *People v. Lewis*, 2022 IL 126705, ¶ 46. Defendant has met this burden in the present case. The serious error involving the improper admission of Vereecken’s challenged statements undermines our confidence in the outcome of defendant’s trial.

¶ 108 Defendant has established both that Granger’s performance fell below an objective standard of reasonableness and that he was prejudiced as a result. Accordingly, we reverse defendant’s convictions and remand his case for a new trial.

¶ 109 3. *Remaining Ineffective Assistance of Counsel Claims*

¶ 110 On appeal, defendant raises several additional ineffective-assistance claims against Granger. Given our holding that defendant has established Granger’s ineffectiveness with respect

to the improper admission of Vereecken’s challenged statements, we need not address these additional claims. We find these additional errors alleged by defendant are unlikely to recur on remand.

¶ 111 B. Ineffective Assistance of Posttrial Counsel

¶ 112 On appeal, defendant also argues that Jazwiec, his posttrial counsel, provided ineffective assistance. Specifically, he contends that Jazwiec was ineffective because he failed to raise or to properly present claims that Granger was ineffective. We note that posttrial counsel provides ineffective assistance by failing to raise meritorious claims of trial counsel’s ineffectiveness. *People v. Moore*, 307 Ill. App. 3d 107, 114 (1999); see *People v. Jones*, 2026 IL App (4th) 250581, ¶ 51. In this instance, because we find defendant successfully established Granger’s ineffectiveness in failing to object to the admission of some of Vereecken’s prior inconsistent statements, we also find that Jazwiec was ineffective for failing to raise that claim during posttrial proceedings.

¶ 113 Additionally, we are compelled to comment on the posttrial procedures followed below. The record shows that, after his trial, defendant raised *pro se* claims of ineffective assistance of counsel, which the trial court correctly recognized triggered a *Krankel* inquiry to investigate his claims. We note the “ ‘purpose of the preliminary [*Krankel*] inquiry is to give the defendant an opportunity to flesh out his claim of ineffective assistance so the court can determine whether appointment of new counsel is necessary.’ ” *People v. Harkey*, 2025 IL App (4th) 230523, ¶ 69 (quoting *People v. Ayres*, 2017 IL 120071, ¶ 20). In conducting a *Krankel* inquiry, the trial court may ask the defendant about his claims and ask trial counsel to comment. *Id.* However, “the State is not permitted to participate.” *Id.*

“Because the *only* issue to be decided at a *Krankel* inquiry is whether new

counsel should be appointed, there are only two possible outcomes when a trial court conducts a *Krankel* inquiry: (1) the court appoints new counsel who should then conduct an independent evaluation of the defendant's ineffective assistance claims and take whatever action counsel thinks would be appropriate or (2) the court does not appoint new counsel and posttrial matters proceed as in any other case." (Emphasis in original.) *Id.* ¶ 72.

¶ 114 Here, before the trial court could conduct the *Krankel* inquiry into defendant's *pro se* claims, defendant obtained new counsel to represent him in connection with those claims. Where a defendant has retained a new attorney "to independently evaluate and pursue" his ineffective-assistance claims, a *Krankel* hearing is no longer necessary, and "the question of whether the court need appoint counsel to pursue those claims simply does not exist." *Id.* ¶ 75. If the defendant's new counsel determines the defendant's ineffective-assistance claims have merit, "then new counsel should file a motion for a new trial *** alleging [the] defendant's trial counsel's ineffectiveness." *Id.* ¶ 79.

¶ 115 Here, despite defendant having obtained new counsel to independently investigate and present his ineffective assistance of trial counsel claims, the trial court characterized the proceedings on those claims as *Krankel* proceedings. Moreover, it did not allow the State to participate in the hearings. What should have occurred, was for defendant's new counsel, Jazwiec, to file a motion for a new trial raising all the ineffective assistance of trial counsel claims that in his professional judgment had merit and for the State to then be permitted to participate in the hearing on that motion.

¶ 116 C. Defendant's Remaining Claims of Error

¶ 117 On appeal, defendant also raises contentions that the trial court (1) erred in

admitting prior bad act evidence related to the second controlled drug buy involving Foley and (2) violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) with respect to its questioning of a juror. Because we find defendant established the ineffective assistance of his trial and posttrial counsel and remand for a new trial, we find it unnecessary to address these remaining claims.

¶ 118

III. CONCLUSION

¶ 119 For the reasons stated, we reverse the trial court's judgment and remand for a new trial.

¶ 120 Reversed and remanded.

¶ 121 JUSTICE STEIGMANN, specially concurring:

¶ 122 Although I am in complete agreement with my distinguished colleagues and join the opinion in full, I write this special concurrence because this case contains some additional, important evidentiary issues.

¶ 123 I. THE STATE'S REQUEST TO INTRODUCE VARIOUS PORTIONS OF
VERECKEN'S VIDEOTAPED INTERVIEW UNDER THE GUISE OF
REFRESHING HIS RECOLLECTION WAS COMPLETELY IMPROPER,
AND THE TRIAL COURT COMMITTED MANIFEST ERROR BY
GRANTING IT

¶ 124 This court's opinion correctly rejects the State's efforts to justify the admission of the videotape of Vereecken's interview with the police under the doctrines of either present recollection refreshed or past recollection recorded, but I suggest that this court's rejection could have been even stronger.

¶ 125 In my opinion, the most serious problem with the State's arguments is that they overlook the threshold question when determining whether the trial court's admission of the

evidence in question was proper—namely, is that evidence even admissible?

¶ 126 In other words, unless the evidence at issue is otherwise admissible, the trial court need not concern itself with whether a witness’s present recollection is refreshed or his past recollection is recorded. And in this case, it was not.

¶ 127 When Vereecken testified at defendant’s trial inconsistently with his videotaped statements to the police—that is, when Vereecken testified that he did not remember any conversations with defendant—then, as my distinguished colleagues have explained, Vereecken’s prior inconsistent statements to the police were admissible only if the State could lay a proper foundation for their admissibility under section 115-10.1(c)(2) of the Code. See 725 ILCS 5/115-10.1(c)(2) (West 2022). However, Vereecken’s testimony was not admissible under that subsection because he had no “personal knowledge” of defendant’s murder of Foley; all Vereecken knew about the murder was what defendant *told* him or *said* in his presence.

¶ 128 Because Vereecken’s prior inconsistent statements were not admissible, the State improperly attempted to get those statements before the jury as either a present recollection refreshed or past recollection recorded.

¶ 129 As this court’s opinion correctly notes, the State argues that “if Vereecken’s recollection was refreshed, ‘he could have testified regarding those statements.’ If his recollection was not refreshed, ‘the statements could have been admitted as past[]recollections recorded.’ ” *Supra* ¶ 93. However, the State’s argument is totally wrong on both counts.

¶ 130 Vereecken’s recorded statements were not admissible under the guise of refreshing his recollection for two independent reasons: (1) the recording ostensibly used to refresh his recollection was not itself admissible and therefore should not have been shown to the jury and (2) the recording amounted to prior inconsistent statements that did not meet the criteria of section

115-10.1(c)(2) for admissibility as substantive evidence. See *id.* Additionally, the State failed to lay a proper foundation for a past recollection recorded statement. The State’s using either of these doctrines—present recollection refreshed or past recollection recorded—could not somehow “cleanse” the statements of the infirmities that rendered them inadmissible.

¶ 131 Although I fully agree with this court’s opinion that the State failed to satisfy all of the necessary requirements for admission of the challenged statements as present recollection refreshed or past recollection recorded (see *supra* ¶¶ 94-100), the initial and bigger problem with the State’s efforts is that had the State properly relied upon either of these doctrines, Vereecken’s prior inconsistent statements would still have been inadmissible.

¶ 132 Because the law in Illinois has been well settled for decades regarding the foundation the State must lay to admit a witness’s prior inconsistent statement under section 115-10.1(c)(2) of the Code, the State’s failure to properly lay such a foundation and to instead seek the admission of Vereecken’s prior inconsistent statements pursuant to a claim of “refreshing his recollection” borders on the bizarre.

¶ 133 II. THE TERM “EVENT” UNDER SECTION 115-10.1(c)(2) INCLUDES
DEFENDANT’S STATEMENTS REGARDING HIS CURRENT THOUGHTS
ABOUT FUTURE ACTS OR PRESENT INTENT TO COMMIT A FUTURE
ACT, INCLUDING A CRIME

¶ 134 In *People v. Simpson*, 2015 IL 116512, ¶ 1, the defendant was charged with first degree murder in connection with the beating death of Phillip Thomas. At the defendant’s jury trial, Vonzell Franklin testified that he was near the crime scene on the day of the murder but did not recall what the defendant said to him or what Franklin told the police that night. *Id.*

¶ 135 At the State’s request, the trial court admitted a video containing statements that

Franklin made to the police in which Franklin stated that the defendant told Franklin that the defendant had hit Thomas 30 times with a bat. *Id.*

¶ 136 The appellate court reversed the defendant’s conviction and remanded for a new trial, concluding that defense counsel was ineffective for failing to object to the introduction of Franklin’s statement to the police because the “personal knowledge” requirement for the admission of a prior inconsistent statement under section 115-10.1(c)(2) was not satisfied. *Id.*

¶ 137 The Illinois Supreme Court affirmed. *Id.*

¶ 138 At issue before the supreme court was the meaning of the phrase “event or condition of which the witness had personal knowledge” as used in section 115-10.1(c)(2). (Internal quotation marks omitted.) *Id.* ¶¶ 27-28. The State argued that because the “event” in question was the defendant’s verbal admission to Franklin, he needed to have personal knowledge only of that conversation. *Id.* ¶ 28. The defendant challenged that interpretation and argued that (1) the “event” referred to in the statute was the crime the defendant allegedly committed and (2) Franklin had no personal knowledge of that crime. *Id.*

¶ 139 The supreme court rejected the State’s argument and agreed with the defendant, explaining, in part, as follows:

“The problem with the State’s reasoning is that it could just as easily be said that the crime itself is an ‘event’ because it is something notable that happened, and therefore when a witness makes a prior inconsistent statement describing an admission to a crime, the crime is the ‘event’ subject to the personal knowledge requirement. *** Furthermore, under the State’s interpretation, the ‘personal knowledge’ requirement appears to serve no purpose because, even without subsection (c)(2), witnesses could not testify to any out-of-court statements if they

did not hear or otherwise witness the speaker making the statements. *People v. Hobson*, 2014 IL App (1st) 110585, ¶ 24; *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 41 (“[T]he State’s interpretation of the statute would essentially render the personal knowledge language superfluous, as “[p]ersonal knowledge of the existence of the statement is already required under the rubric of authentication.” Michael H. Graham, *Graham’s Handbook of Illinois Evidence* § 801.11 (10th ed. 2010).’). Under these circumstances, then, we reject the State’s argument that the statutory language is plain and clear in favor of the interpretation it proposes.” *Id.* ¶ 31.

¶ 140 In support of its conclusion, the supreme court wrote that “[n]umerous decisions of our appellate court have rejected the precise argument the State makes here and have instead concluded that the prior inconsistent statement is not admissible unless the witness actually perceived the events that are the subject of the statement or admission.” *Id.* ¶ 32. The supreme court then listed over 20 appellate court opinions spanning 26 years that had reached that conclusion. *Id.*

¶ 141 The supreme court ultimately concluded as follows:

“In the present case, the State used Franklin’s videotaped statement as substantive evidence that defendant struck Thomas numerous times with a bat. Given that Franklin had no personal knowledge of the beating allegedly delivered by defendant, Franklin’s out-of-court videotaped statement was not given the imprimatur of admissibility by section 115-10.1. Accordingly, we conclude that if defense counsel would have objected to Franklin’s videotaped statement, he could have precluded it from being introduced into evidence.” *Id.* ¶ 34.

¶ 142 As a result of the supreme court’s decision in *Simpson*, it is now well settled that Vereecken’s prior inconsistent statements in this case, in which he told the police what defendant said to him about having killed Foley, were inadmissible as substantive evidence under section 115-10.1(c)(2) because Vereecken was not present when defendant killed Foley. Accordingly, the State should not have offered that evidence, and the trial court should not have admitted it.

¶ 143 However, Vereecken also told the police about conversations he had with defendant *before* Foley was killed, during which defendant spoke of his future plans to kill Foley.

¶ 144 For example, the prosecutor asked Vereecken the following question at trial:

“Q. The night before David Foley was murdered, did you tell the detectives that the defendant told you he was going duck hunting the next day?

A. I don’t recall saying that either.”

¶ 145 The State then asked to publish exhibit 155M, which was a video recording of a portion of Vereecken’s police interview. In that recording, he told the police that the night before Foley was murdered, defendant told Vereecken that defendant was going “duck hunting” the next day. Vereecken also explained to the police that the phrase “duck hunting” meant that defendant was going to shoot somebody.

¶ 146 Later, during Vereecken’s testimony, he was asked, “Did you tell Detective Donato that two weeks before the murder of David Foley, [defendant] said, ‘I need you to take care of someone who did a controlled buy.’ [Defendant] said he would make sure that you were straight and offered you cars?”

¶ 147 Vereecken responded, “I don’t recall.”

¶ 148 The State then asked the trial court to play video recording exhibit 155L, which the court granted. In that video recording, Vereecken told the police essentially the information in the

prosecutor's question.

¶ 149 Recall that, in *Simpson*, the crime *had already been committed*, and the State's witness (Franklin) had no personal knowledge of what had happened. That is, when the defendant in *Simpson* used a baseball bat to beat Thomas to death, Franklin was not present; he knew of that incident only because of what the defendant had told him.

¶ 150 By contrast, in the present case, in the two instances of defendant's statements to Vereecken noted above, *no crime had yet been committed*. That is, defendant had not yet shot Foley to death. That distinction makes all the difference. The "event" of which Vereecken needed "personal knowledge" within the meaning of section 115-10.1(c)(2) could only have been defendant's speaking about his future plans to kill Foley.

¶ 151 Accordingly, I conclude that a defendant's statements regarding his current thoughts about committing a *future act* or his present intent to commit a *future act*, including his intent to commit some crime *in the future*, are the "event," within the meaning of section 115-10.1(c)(2), about which someone hearing those statements (like Vereecken in this case) has "personal knowledge" so as to be admissible as a prior inconsistent statement under section 115-10.1(c)(2).

¶ 152 In so concluding, I acknowledge the many appellate court decisions that the supreme court cited in *Simpson* regarding the meaning of "personal knowledge" of "an event" under section 115-10.1(c)(2). However, all of those decisions, like *Simpson* itself, involved circumstances in which the crime *had already occurred*. None of those cases address the situation here—namely, a defendant's statements about his current plans or present intent to commit a *future act*, including his intent to commit some crime *in the future*, as opposed to a defendant's commenting upon acts that he committed in the past. Thus, a defendant's musings about future

conduct he is considering, if otherwise relevant, are admissible under section 115-10.1(c)(2) to the same extent that a witness could testify from the witness stand about those musings.

¶ 153 This is an important distinction and is consistent with the purpose of section 115-10.1, which was designed, in part, to (1) protect against turncoat witnesses and thereby (2) strengthen the truth-seeking process of trial court proceedings. Because Vereecken's testimony about defendant's future plans would clearly have been admissible had Vereecken so testified from the witness stand, no reason exists why his prior inconsistent statement regarding defendant's discussion of those plans should not be admissible under the statute.

¶ 154 *Simpson* and similar cases apply only to circumstances in which the prior inconsistent statement concerns crimes that have already been committed and would not have barred admitting the prior inconsistent statements in this case contained in exhibits 155L and 155M.

People v. Scott, 2026 IL App (4th) 241597

Decision Under Review: Appeal from the Circuit Court of Winnebago County, No. 20-CF-1536; the Hon. Ronald J. White, Judge, presiding.

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