No. 1-15-2040

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>KEITH MIDDLETON<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Cook County, Illinois<br><br><br>2012-CR-12617<br><br>Honorable Charles P. Burns, Judge Presiding. |

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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## NATURE OF THE CASE

After a jury trial, Keith Middleton was convicted of first degree murder. (R. IV, 89). On March 18, 2015, he was sentenced to serve 53 years in the Illinois Department of Corrections for the offense of first degree murder. (R. C276).

This is a direct appeal from the judgment of the court below. No issue is raised regarding the pleadings.

## ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether Keith Middleton was proved guilty beyond a reasonable doubt.

   On appeal, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Woods*, 214 Ill.2d 455, 470 (2005). Under this standard, all reasonable inferences from the record in favor of the prosecution. *People v. Bush*, 214 Ill.2d 318, 326 (2005). However, a court will will overturn the fact finder's verdict if "the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Schott*, 145 Ill.2d 188, 202-03 (1991).

2. Whether the trial court erred by denying the defense motion for a mistrial after the prosecution used an undisclosed demonstrative "exhibit" during closing argument.

   Where a trial court's ruling on a motion for mistrial depends upon a purely legal

issue, the proper standard of review is *de novo*. *People v. Longoria,* 375 Ill.App.3d 346, 350 (2007). While "ordinarily," *People v. Aguilar,* 265 Ill.App.3d 105, 109, (3d Dist. 1994), or "generally," *Jackson v. Graham,* 323 Ill. App. 3d 766, 773, 753 (4th Dist. 2001) a trial court's evidentiary rulings are reviewed under an abuse of discretion standard, an appellate court should review *de novo* where the trial judge's decision "involves a legal issue and did not require the trial court to use its discretion regarding fact-finding or assessing the credibility of witnesses." *Aguilar*, 265 Ill. App. 3d at 109. Since the trial court's mistaken ruling denying the defense motion for a mistrial and instructing the jury that they could consider the exhibit as demonstrative evidence involved a legal issue and did not require the court to use its discretion regarding fact-finding or assessing the credibility of witnesses, the standard of review should be *de novo*.

3. Whether the prosecution engaged in misconduct by repeatedly attempting to elicit from various witnesses hearsay testimony suggesting that Ricky Brown feared Keith Middleton and/or was being stalked by Keith Middleton, even after objections to these questions were sustained, thereby making the defense look as though it was attempting to hide evidence from the jury, as well as by arguing to the jury that Brown "knew" Middleton was stalking him.

While "ordinarily," *People v. Aguilar*, 265 Ill.App.3d 105, 109, (3d Dist. 1994), or "generally," *Jackson v. Graham*, 323 Ill. App. 3d 766, 773, 753 (4th Dist. 2001) a trial court's evidentiary rulings are reviewed under an abuse of discretion standard, an appellate court should review *de novo* where the trial judge's decision

"involves a legal issue and did not require the trial court to use its discretion regarding fact-finding or assessing the credibility of witnesses." *Aguilar*, 265 Ill. App. 3d at 109. Where there are no factual issues, as here, the standard of review for assessing prosecutorial misconduct is *de novo*. *People v. Wheeler*, 226 Ill.2d 92, 121 (2007). Since the trial court's mistaken ruling denying the defense motion for a mistrial and instructing the jury that they could consider the exhibit as demonstrative evidence involved a legal issue and did not require the court to use its discretion regarding fact-finding or assessing the credibility of witnesses, the standard of review should be *de novo*.

4. Whether the trial court erred by overruling objections to questions and argument regarding Ricky Brown's state of mind, where Ricky Brown's state of mind was not relevant, and where his beliefs about or relationship with Keith Middleton were not admissible as an exception to hearsay.

While "ordinarily," *People v. Aguilar*, 265 Ill.App.3d 105, 109, (3d Dist. 1994), or "generally," *Jackson v. Graham*, 323 Ill. App. 3d 766, 773, 753 (4th Dist. 2001) a trial court's evidentiary rulings are reviewed under an abuse of discretion standard, an appellate court should review *de novo* where the trial judge's decision "involves a legal issue and did not require the trial court to use its discretion regarding fact-finding or assessing the credibility of witnesses." *Aguilar*, 265 Ill. App. 3d at 109. Since the trial court's mistaken ruling denying the defense motion for a mistrial and instructing the jury that they could consider the exhibit as demonstrative evidence involved a legal issue and did not require the court to

use its discretion regarding fact-finding or assessing the credibility of witnesses, the standard of review should be *de novo*.

5. Whether the trial court erred by admitting a video from 6630 south Yale without proper foundation for "silent witness" authentication and whether defendant was deprived of effective assistance of counsel by his counsel's failure to view the video prior to trial or object to the admission of the video.

   Where the facts surrounding a claim of ineffective assistance of counsel are undisputed, the standard of review is *de novo*. See *People v. Nowicki,* 385 Ill.App.3d 53, 81 (2008).

6. The prosecutor erred by arguing in closing, without evidence, that Keith Middleton knew things about Brown and lay in wait for him because Middleton was dating Brown's sister, that Middleton killed Brown so that Brown could not come to court and tell what Middleton did to Brown and by arguing that the video shows a brown van pulling off, and the trial court erred by overruling objections to these comments.

   Where there are no factual issues, as here, the standard of review for assessing prosecutorial misconduct is *de novo*. *People v. Wheeler*, 226 Ill.2d 92, 121 (2007).

7. Whether the trial judge erred by sustaining objections to defense counsel's arguments as to the lack of production of any report on Buie's conversation with

Conner, that the jury could consider the lack of a flash message or filed charges with respect to the credibility of Damien Parker's testimony, and that the jury could use their own common sense and consider whether they would have called the police or filed charges.

Where there are no factual issues, as here, the standard of review for assessing closing argument issues is *de novo*. *People v. Land*, 2011 IL App (1st) 101048, ¶ 149 (2011)

## JURISDICTION

Keith Middleton appeals from a final judgment of conviction in a criminal case. He was sentenced on March 18, 2015. (R. C276). Notice of appeal was timely filed on April 13, 2015. (R. C277). Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rules 603 and 606.

## STATEMENT OF FACTS

Toryon Conner testified. At the time he testified, he was 15 years old. (R. II, 22). On March 21, 2012, he was living at 739 west 61st street. (R. II, 23). At about 8:30 a.m. on the morning of March 21, he was standing on his porch, waiting for his grandmother to pick up him and take him to school. (R. II, 24).

As Conner was standing on the porch, a white car rolled up. (R. II, 24). Conner saw a person get out of the white car. The person was wearing black jogging pants, a gray hoodie with black writing on it, pinned up hair, and dreadlocks half way down. (R. II, 25).

Conner said that he had never seen this person before. The person was wearing a

hoodie, but the hoodie was down. The person was a dark skinned African American. (R. II, 26). He was wearing a ski mask that covered half of his face (R. II, 26), up to his nose. (R. II, 27).

The man who got out of the car had a gun, a silver revolver. (R. II, 28). The man "rammed up on the guy," and started shooting. The person who was shot said: "Please don't shoot me." The man shot the person in the chest, and the person fell to the ground. (R. II, 29). The shooter was "fitting" to run back to his car (R. II, 29), made it to the front bumper, but then turned around to shoot the person some more. (R. II, 30). The shooter then jumped in his car and pulled off. (R. II, 31).

When Conner saw the shooter get in his car, Conner was no longer on the porch and was standing in the outer hallway of his house, watching through a window. (R. II, 31). Conner saw the shooter in his car riding past and turning through an alley. He glanced at the shooter again. The shooter was still wearing the face mask over the lower part of his face, to his nose. (R. II, 32). Conner could see the shooter's eyes, nose, and hair, but not the lower part of the shooter's face. (R. II, 33).

Conner's mother was home that day. (R. II, 33). Conner ran inside the house and got his mother. Conner's grandmother picked him up. As he was being driven to school by his grandmother, he saw the white car again. (R. II, 34).

After Conner went to school, he spoke with his teacher. (R. II, 34-35). After he spoke with his teacher, police came to his school and spoke with him. (R. II, 35). Conner identified Keith Middleton as the shooter in open court. (R. II, 39).

On May 2, 2012, Conner met with Chicago police officers in a Walgreen's parking lot on 47$^{th}$ and Halsted. (R. II, 40). Conner picked Keith Middleton out of a photoarray. (R. II, 41-43). On June 7, 2012, Conner picked Keith Middleton out of a lineup. .(R.

II, 43-46).

On cross-examination, Conner admitted that the shooting occurred on the other side of the street from his house and several houses down, near a park. . (R. II, 46-52).

Conner admitting speaking to his teacher about the shooting on March 21, 2012, but denied telling his teacher that the shooter wore a hoodie, a ski mask, and black jogging pants. (R. II, 53). He admitted that he did not tell his teacher that he could see half or part of the shooter's face. (R. II, 53-54). He admitted that he did not tell his teacher that he could see any part of the shooter's face. He did not tell his teacher that he could see the shooter's face. (R. II, 54). He claimed that all he said to his teacher was that he witnessed a murder. (R. II, 54-55). He denied speaking with a security guard named Julia Glitton. (R. II, 55-56).

Conner admitted speaking to police officers at the school on March 21, 2012 . (R. II, 56-57). He admitted telling them about the shooting, but denied that he gave a description of the shooter. In particular, he denied telling the officers that the person who did the shooting wore a full ski mask. (R. II, 57). He also denied telling the police officers that the shooter there was Velcro on the full ski mask . (R. II, 57-58). He further denied telling the police officers that the shooter wore a hoodie. (R. II, 58).

Rodger Brown testified as a life and death witness. He identified his son, Ricky Brown, as the person who was murdered on March 21, 2012. (R. II, 60-62).

Marquea Ambrose testified. (R. II, 65). She testified she first met Keith Middleton in high school, when he began dating Ricky Brown's sister, Rachel Brown. (R. II, 67).

Ambrose dated Ricky Brown for eight years. (R. II, 67-68). On March 21, 2012, Ricky Brown was living with his aunt. He worked at the post office. He started work at 9:00 a.m. and usually left for work around 8:00 a.m. (R. II, 68).

Ricky Brown owned a new white Chevy on March 21, 2012. At night, he parked the car about two blocks away. Ambrose testified that Brown parked the car two blocks away because he was did not want anything happening to it. The prosecutor attempted to elicit from Ambrose what was concerning Ricky Brown, but an objection to this question was sustained. (R. II, 69). Over overruled objection, Ambrose testified that Ricky Brown had "concerns," but the judge sustained objections to questions as to whether Ricky Brown had concerns with a particular person or many persons, and whether he had concerns with a person or a thing. (R. II, 70).

Ambrose also testified that she knew Damien Parker, who had the nickname, "D-Low." On March 20, 2012, at around 3:30 p.m. she saw Ricky Brown in front of her house. She and her sister hung out with Ricky Brown. Ricky Brown and Ambrose went to the store. (R. II, 71). They also went to Ricky's uncle's house. They were drinking. Ricky Brown drove Ambrose to his house, in his car, and she spent the night there. (R. II, 72).

On the morning of March 21, 2012, Ricky Brown got ready for work and said goodbye to Ambrose. She heard him going down the stairs. (R. II, 73). After he left, she heard gunshots. She went to Ricky's aunt's room, looked out the window, and saw Ricky's car driving past. (R. II, 74). She never saw the face of the driver of the car. (R. II, 75).

Ambrose left the house and found Ricky Brown lying on the ground with blood on his shirt. (R. II, 75).

Chicago police officer Harold Fiene, an evidence technician, testified. (R. II, 81-82). He processed the crime scene. (R. II, 83-86). Ricky Brown's white car was found a short distance away from the crime scene. (R. II, 86-87). It was swabbed for biological evidence. The car was shut off, the keys were in the ignition, and the doors were unlocked.

(R. II, 87).

Inside the car, Fiene's partner, officer Huels recovered a wallet in the driver's side door, a bottle of water, two cellular phones, and some fingerprints. (R. II, 89).

Stipulations were entered into evidence concerning: (1) a buccal swab taken from Keith Middleton (R. II, 107), (2) the chain of custody for the buccal swab (R. II, 108-09), and (3) the blood standard for Ricky Brown's DNA (R. II, 110-112).

There was a stipulation that Katrina Gomez, a DNA analyst, would testify. (R. II, 112-16). Ricky Brown's DNA profile was identified in the swab taken from the ignition keys of the white Chevrolet. DNA was identified in some other swabs taken, but there was an insufficient amount of DNA to create a profile. (R. II, 114).

Gomez found that the DNA found on the driver's door latch and handle contained a mixture of human DNA profiles. The major human DNA profile matched Ricky Brown. A minor DNA profile was identified, from which both Ricky Brown and Keith Middleton were excluded. (R. II, 115).

Gomez found a mixture of three DNA profiles in the swabs taken from the steering wheel and the gearshift. (R. II, 115-16). The major DNA profile belonged to Ricky Brown. Keith Middleton could be excluded as a contributor to the mixture of DNA profiles. (R. II, 116).

It was stipulated that Mandi Hornickel would testify as a fingerprint examiner. (R. II, 116-20). Keith Middleton could not be identified as leaving the latent print found in the car. (R. II, 119). Ricky Brown could have possibly have left the print, but it was not possible to be certain because his palm prints were not taken at the morgue. (R. II, 119-20).

Agent Michael Bilbo, an agent with Homeland Security, testified. (R. II, 121). He

testified that on June 6, 2012, he went to a factory on Central and Fillmore, looking for Keith Middleton. (R. II, 123). The Chicago police had an "investigative alert" for Middleton. (R. II, 124). Bilbo testified that he encountered Middleton at a loading dock. After Bilbo identified himself, Middleton turned around and ran. Middleton jumped into a dumpster, (R. II, 126) and then over a fence. (R. II, 126-27). Bilbo chased Middleton, caught him, and took him into custody. (R. II, 127-28).

Damien Parker testified. (R. II, 138). He was a friend of Ricky Brown. (R. II, 139). He also knew Ricky Brown's sister, Rachel Brown. (R. II, 140-41). In March of 2012, Rachel drove a brown mini-van. (R. II, 141).

Parker also knew Marquea Ambrose. (R. II, 141). Marquea Ambrose was Ricky's girlfriend. (R. II, 141-42). In March of 2012, Marquea lived on 79th and Sangamon. (R. II, 142).

On March 9, 2012, Parker saw Ricky Brown at around 5:00 or 6:00 p.m. at Parker's home on 78th and Ada. (R. II, 143). Brown got to Parker's house by driving Brown's car, a white Impala. Brown parked the car at a nearby Laundromat. After talking for a few minutes, Parker and Brown left. (R. II, 143).

The prosecutor attempted to elicit evidence that as Parker and Brown left, Brown made a gesture with his hands to draw Parker's attention. An objection to the question which elicited the drawing attention answer was overruled. (R. II, 144-45). After a sidebar, an objection to further questions along this line was sustained. (R. II, 145-47).

Parker testified that as he and Brown were pulling off, he saw a brown van, which he identified as Rachel Brown's van. Over an overruled objection, Parker described Brown's demeanor as "panicky, nervous." (R. II, 147).

After speaking with Brown, Parker decided the follow the can to see if "Thomas,"

or Keith Middleton was in the van. (R. II, 148). Eventually, the van slowed down by Marquea's house. Over overruled objection, Parker was allowed to testify that Brown became "really agitated." (R. II, 149). Over a second overruled objection, Parker was allowed to testify that he told Brown that he needed to know if the "guy" in the van was the "guy" they had been discussing. (R. II, 150).

Parker continued to chase the van. Both cars were going at a high rate of speed. . (R. II, 150-52). When Parker caught up with the van, he testified that Brown leaned back in the passenger seat. He began to testify about something he had "seen" in Brown's eyes, but an objection to this statement was sustained. (R. II, 152).

Parker saw the driver, whom he identified in open court as Keith Middleton. (R. II, 153). Parker had never met Middleton before. After catching up with the van, Parker did not try to follow it any further, but went to pick up some DVDs (R. II, 154). Parker testified that after he had conversation with Brown, Brown appeared to show "nervousness." (R. II, 155).

After Parker picked up the DVDs, he drove back in the direction of Ada. (R. II, 156). Parker testified that as he turned into an alley, the brown van reappeared and turned in front of him. Keith Middleton got out of the van and told Parker and Brown to get out of the car. (R. II, 157-58). Middleton approached with a gun in his left hand, which he switched to his right hand. (R. II, 158, 159).

Middleton put the gun in his right pocket and told Parker and Brown to get the fuck out of the car. (R. II, 159). Parker told Brown that Parker was going to "hit his ass" with the car, but Brown told Parker to back up because Middleton might start shooting. (R. II, 159-60).

After Parker started backing up, Middleton said: "I got your ass," and got back in

the van. . (R. II, 160). Parker backed up his car, flagged down a police officer and reported the incident. He never heard anything more from the police and never filled out a formal report. . (R. II, 162). After Brown's death, Parker picked Middleton out of a lineup. (R. II, 169-171).

Dr. Mitra Kalekar, a forensic pathologist, testified. (R. III, 5). In her opinion, Ricky Brown died of multiple gunshot wounds. (R. III, 25). There was a stipulation that the fired bullets found on the scene were all fired from the same gun. (R. III, 25-33).

Detective Gregory Buie testified. (R. III, 34). On March 21, 2012, he was called to the scene of the murder. (R. III, 34-36). Buie then went to the Walter Reed Elementary School, where he interviewed Toryion Conner. (R. III, 36-37).

Buie testified that Conner described the shooter as a male black with long dreadlocks, wearing a gray hooded sweatshirt with black pants, and a half black ski mask over his face. Conner described the shooter as dark complected. He described the weapon as a silver revolver. (R. III, 39).

Buie also went to 6630 south Yale, a building with multiple cameras, to try and locate a video. (R. III, 40-41). Buie spoke with an unnamed manager of the building, who showed him a video. The video was recovered. (R. III, 42-44). He testified, without explanation, that the video he viewed had a timestamp which was off by 46 minutes. (R. III, 43). Although the video recorded events which Buie had not witnessed, Buie testified, without objection, that the video admitted into evidence truly and accurately portrayed the hours of early morning March 21, 2012 until he arrived there. (R. III, 43).

The defense had no foundational objection to the admission of the video, but claimed that they had not seen the specific clips used. (R. III, 45). The defense was given

an opportunity to view the clips. (R. III, 45-48).

The video timestamped 4:32 a.m. depicts a man walking out of a building with dark pants and a hooded sweatshirt on. The video also depicts some lights from a vehicle pulling away from the scene. (R. III, 48). A second video, time stamped at 7:58 a.m. depicts a man with long, dreaded hairstyle, gray sweatshirt, and dark colored pants. (R. III, 49). Buie testified that the real time of the first clip was 5:18 a.m., and the real time of the second clip was 8:44 a.m. (R. III, 50-51).

Buie admitted that the person in the video was wearing a light colored T-shirt (R. III, 72) and that the vehicle he is going to does not appear to be a white Impala. (R. III, 73). On March 21, 2012, he had a conversation with detectives Arthur Davis and Keith Allen. He told them that Conner had said that the shooter wore a black ski mask and claimed that he told them it was described it as a half mask (R. III, 76).

Detective Arthur Davis testified. (R. III, 88). He testified that he interviewed Rachel Brown, Keith Middleton's girlfriend, at 6630 south Yale. (R. III, 98). He also testified to the photoarray where Toryion Conner identified Keith Middleton (R. III, 104), as well as the line-up. (R. III, 106-08). He admitted that after speaking with officer Buie about his conversation with Toryion Conner (R. III, 117-20), he issued a report describing the offender as wearing a full face mask with Velcro straps, and wearing a gray hoodie with black trim and black color in the rear and with black lettering in front. (R. III, 121).

The defense called Tonya Woods. (R. III, 148). On March 21, 2012, she was working at Hyde Park Self Storage on 51$^{st}$ and Cottage Grove. (R. III, 148). As she was driving to work (R. III, 149), on 61$^{st}$ and Halsted (R. III, 149), something caught her eye. (R. III, 150). She noticed a young man coming out of a lot to her left side. The person was

dressed in a black hoodie, with the hoodie on his head. He had black gloves and a gun in his hand. He was wearing a full black ski mask. (R. III, 151).

As Woods went over the speed bump, the man in the ski mask went behind her car. (R. III, 152-53). She looked in her rear view mirror and saw the masked man shoot at a man in a white shirt, emptying his gun. The man in the white shirt fell to the ground. The shooter ran towards Union and got in a car. (R. III, 153).

Woods stopped a crossing guard and asked for a cellphone. (R. III, 154). She called 911 and gave a description of the shooter to the operator. (R. III, 155).

Betty Strong testified for the defense. She worked at Walter Reed Elementary School as a special education teacher. She testified that she spoke to Toryion Conner on March 21, 2012 (R. III, 165). Toryion told her that he did not see the shooter's face because the shooter had a mask on. He also said that the person was wearing a black hoodie. (R. III, 169).

In rebuttal, it was stipulated that Cook County States Attorney Finn interviewed Tonya Woods and that she never told him that the shooter was wearing black gloves. (R. III, 182).

## ARGUMENT

## I:

## KEITH MIDDLETON WAS NOT PROVED GUILTY OF FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT

At his trial, Keith Middleton was not proved guilty beyond a reasonable doubt. Because he was not, he must be granted a judgment of acquittal n.o.v.

It is true that when a court considers a challenge to a criminal conviction based on the sufficiency of the evidence, its function is not to retry the defendant. *People v. Milka,* 211 Ill.2d 150, 178 (2004). The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Woods*, 214 Ill.2d 455, 470 2005). Under this standard, all reasonable inferences from the record in favor of the prosecution. *People v. Bush*, 214 Ill.2d 318, 326 (2005). However, a court will will overturn the fact finder's verdict if "the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Schott*, 145 Ill.2d 188, 202-03 (1991).

An identification will not be deemed sufficient to support a conviction if it is vague or doubtful. *People v. Ash*, 102 Ill. 2d 485, 494 (1984). Where proof rests on the identification testimony of a witness, the facts and circumstances which can be considered include, but are not limited to, the following: (1) The opportunity the witness had to view the offender at the time of the offense; (2) The witness' degree of attention at the time of the offense; (3) The witness' earlier description of the offender; (4) The level of certainty shown by the witness when confronting the defendant; (5) The length of time between the

offense and the identification. *People v. Lewis*, 165 Ill.2d 305, 352-353 (1995). In this case, the majority of these circumstances, and others, compel the conclusion that the identification testimony of officers Toryon Conner was so vague and doubtful that there is a reasonable doubt of Robert Anderson's guilt.

First and foremost, Conner's opportunity to view the face of the shooter was extremely limited. When considering whether a witness had an opportunity to view the offender at the time of the offense, courts look at "whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation." *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 40. Conner's opportunity to view the shooter's face was extremely limited.

First, even Conner admitted that the shooter wore a face mask over the lower part of his face, so that, at best, Conner could only see the shooter's eyes, nose and hair. R. II, 32, 33). Moreover, Conner's testimony that the upper part of the shooter's face was uncovered was rebutted by the testimony of Tonya Woods, an independent eyewitness, who testified that the shooter wore a full black ski mask. (R. III, 3/25/2014, 151). And whereas Woods testified without impeachment, Conner was severely impeached by the testimony of Betty Strong, a special education teacher, who stated that Conner told her that he did not see the shooter's face because the shooter had a mask on. (R. III, 3/25/2014, 169). Indeed, Conner admitted that he did not tell Betty Strong that he could see any part of the shooter's face. (R. II, 54).

Second, although Conner did not state the number of seconds he had to view the shooter, the viewing could only have been very brief. Conner had never seen the person before. He saw the person drive up in a car, get out of the car, shoot Ricky Brown and then drive off immediately. (R. II, 29, 30, 31). Sometime during the shooting, but before

the shooter re-entered his car, Conner left the front porch and stood in the hallway of his house, watching through a window. It was through the window that he had a second "glance" at the face of the masked shooter. (R. II, 32). There was no testimony as to the distance between Conner and the shooter.

In similar cases, Illinois courts have found that such a limited opportunity to view an offender could not support proof beyond a reasonable doubt that the defendant was correctly identified. See, e.g. *People v. Gaines*, 235 Ill.App.3d 239, 250 (1st Dist. 1992)(witness only had one second to see triggerman fire a shot); *People v. Cullotta* 32 Ill.2d 502, 505 (1965)(testimony of police officers in moving police vehicle during a snow storm who had but a "fleeting view" of the offenders in profile could not support proof beyond a reasonable doubt). On the other hand, in cases where courts have found proof beyond a reasonable doubt as to identification, the opportunity to view the offender was much better. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 22; (victim met offender at front counter, agreed to swipe his link card to enter his personal identification before defendant drew weapon and placed it in victim's mouth); *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 34 (victim had four distinct opportunities to view and hear the men: when they first approached the car; when they opened the trunk and told him to stop making noise; when they gave him food; and when they put him in the outhouse); *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 25 (witnesses were within eight feet of the offender and the encounter went on for some time; witnesses engaged offender in a brief conversation); *People v. Malone*, 2012 IL App (1st) 110517, ¶ 28 (offender approached victim at the front cash register, stood a short distance away and directly in front of her across the counter, and engaged her in conversation regarding the purchase of some lighters); *People v. Herron*, 2012 IL App (1st) 090663, ¶ 16; *People v. Gabriel*, 398 Ill.

App. 3d 332, 342 (1st Dist. 2010); *People v. Aguilar*, 396 Ill. App. 3d 43, 48 (1st Dist. 2009) (witness observed defendant ride up on a bike, stop 20 feet away, converse with them about what gang they were in and then pull a gun from his waistband); *People v. Adams*, 394 Ill.App.3d 217, 233 (1st Dist. 2009) (witnesses had a clear view of offender as he removed his hood and began firing; both had known him for many years); *People v. Battle*, 393 Ill.App.3d 302, 309 (1st Dist. 2009)(offender walked right past witness and made eye contact with her; she saw him go behind counter, run away from store, drop jewelry in the lawn, pick up what he could, and then flee in his car); *People v. Slim*, 127 Ill. 2d 302, 306, 311 (1989)(victim was able to observe offender from one to two feet away as offender held a gun on him and asked him for money and then as the offender backed away 10 to 15 feet to the victim's car); *People v. Bias*, 131 Ill. App. 3d 98, 100, (1985)(victim was approached by offender who asked him for a date and then demanded money; victim was about one two feet away from offender during initial encounter and then chased offender for 30 to 40 minutes).

The second factor, the witness's degree of attention at the time of the offense, also renders the identification suspect. Toryon was watching an extremely shocking event, and it is fair to assume that his attention was focused on the silver gun in the shooter's hand. Multiple studies have shown that the presence of a weapon impairs eyewitness memory and identification accuracy. Many courts have accepted "weapons focus" as a valid scientific principle, including, *Commonwealth v. Walker*, 625 Pa. 450 (2014), *People v. Cornwell*, 37 Cal.4th 50, 33 Cal.Rptr.3d 1, 117 P.3d 622 (Cal.2005), *Campbell v. State*, 814 P.2d 1 (Colo.1991), *Garden v. State*, 815 A.2d 327 (Del.2003), *United States v. Brownlee*, 454 F.3d 131 (3d Cir.2006); and *United States v. Mathis*, 264 F.3d 321 (3d Cir .2001).

The third factor, the witness's earlier description of the offender, also renders the identification suspect. Conner's description of the offender included no height, no weight, and no age. The description was essentially a description of clothing --- a gray hooded sweatshirt with black pants, a half ski mask, and dreadlocks. (R. III, 3/25/2014, 39). Moreover, after speaking with officer Buie, detective Davis issued a report which described the offender as wearing a full face mask with Velcro straps, and wearing a gray hoodie with black trim and black color in the rear and with black lettering in front. (R. III, 3/25/2014, 121).

Only the last two factors, the witnesses' degree of certainty at the time of the confrontation and the length of time between the incident and the confrontation support the reliability of the identifications, and both of these factors are far from dispositive in this incident.

First, as two justices of this court have recently recognized, there is a "scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification." *See People v. Starks*, 2014 IL App (1st) 121169, ¶ 87 (Hyman, J., with Pucinski, J., specially concurring), citing *Brodes v. State*, 614 S.E.2d 766, 771 (Ga.2005) (holding juries cannot be instructed to consider a witness's level of certainty when assessing the reliability of an identification). Therefore any "certainty" shown by Conner should not be considered a strong factor weighing in favor of the reliability of the identifications. Only the time which elapsed between the murder and the photoarray and lineup weigh in favor of the reliability of the identifications.

Apart from the identification by a single witness, the only remaining evidence against Keith Middleton was extremely weak. No statements or physical evidence linked

him to the shooting, and, in fact, the DNA and fingerprint evidence taken from the car was exculpatory. No motive for the killing was introduced at trial

Keith Middleton's conviction must therefore be reversed.

II:

## THE TRIAL JUDGE ERRED BY DENYING THE DEFENSE'S MOTION FOR MISTRIAL AFTER THE PROSECUTION USED AN UNDISCLOSED DEMONSTRATIVE "EXHIBIT" IN CLOSING ARGUMENT

During closing argument, the prosecution used a previously undisclosed display, a photograph of Keith Middleton's face with representation of a half mask superimposed on it, next to the same photograph of Keith Middleton without the half mask. (See Appendix, 64). After closing arguments, defense counsel asked for a mistrial based upon the fact that no witness had testified that this display truly and accurately depicted the face mask worn by the shooter or that it depicted how Keith Middleton allegedly appeared during the shooting. The trial judge denied the motion. (R. IV, 3/26/2014, 66). This was error.

During opening closing argument, the prosecutor began in this manner:

"This is the man who shot and killed Ricky Brown. This is the man who shot and killed Ricky Brown. This is the man who shot and killed Ricky Brown. This is absolutely a case about identification and the defendant has been identified and identified.

"Ricky wasn't paranoid. He knew someone was after him and he knew who it was and now you know as well. It's the defendant, Keith Middleton. He was the one that was stalking Ricky Brown."

(R. IV, 3/26/2014, 17).

After a defense objection was overruled, the prosecutor went on to say that Keith Middleton was the "one" following Ricky Brown, driving by Ricky Brown's girlfriend's house, waving a gun at Ricky, and threatening Ricky." (R. IV, 3/26/2014, 17).

After closing arguments, but before the jury was instructed, defense counsel asked for a sidebar, objected to part of the prosecution's argument, and moved for a mistrial. (R. IV, 3/26/2014, 66). Defense counsel made the following statement for the record:

"Just moments ago when counsel was arguing, they put a photograph of Mr. Keith Middleton on the screen in front of the jury with just Keith Middleton's face and head. Then they put a photograph on the screen with some contrapted mask that, first of all, was never introduced into evidence in this case and it was never any description given to match whatever the mask was that was portrayed to the jury in the closing argument by the State."

(R. IV, 3/26/2014, 66).

In response, the prosecutor argued that there had been extensive testimony about the mask, that witnesses had demonstrated which portions of the killer's face were covered by the mask, and that the photograph used was the C.B. photograph of Keith Middleton which had been admitted into evidence. (R. IV, 3/26/2014, 66).

The trial judge denied the motion for mistrial but stated that he would instruct the jury that the picture of the defendant was "just a demonstration," that there was no evidence with regard to the particular picture and the particular mask being placed over the defendant and that they were free to disregard any argument with regard to the mask.

Defense counsel responded that the defense would like to be able to show a photograph with a full mask. (R. IV, 3/26/2014, 69-70).

The judge rejected the request on the ground that: "Where is a photograph of a full mask?" (R. IV, 3/26/2014, 69). Defense counsel responded:

"Judge, where is testimony photograph of a half mask? It's one thing to say to the jury to disregard what you have heard, but now you disregard what they have seen does far beyond what they have heard because that has different impression on consciousness of people and there is no evidence to support what they just showed the jury."

(R. IV, 3/26/2014, 70).

The judge did not respond to a question from the state as to whether he was going to instruct the jury to disregard the argument.

The judge then instructed the jury as follows:

"Ladies and gentleman, I said several times during the arguments that what the attorneys say during argument is not evidence and any argument made by the attorneys which is not based on the evidence should be disregarded.

"I just want to make clear that the demonstration that was put up in the last argument by State, that is merely a demonstration. That is not an actual photograph that was taken. It was just a demonstration of the State during their closing argument. Ladies and gentlemen, if you don't believe that demonstration is supported by the evidence, you are free to disregard that line of argument in that demonstration."

(R. IV, 3/26/2014, 71).

The judge did not instruct the jury to disregard the demonstration and the State's argument.

The prosecutor's display, and the trial judge's rejection of the motion for mistrial based upon the display, were both wrong, and they were wrong for at least three separate reasons: (1) the altered CB photograph was not admissible, even as a demonstrative exhibit, and it was error to show it to the jury, (2) even assuming that the photograph could have been admitted as a demonstrative exhibit, the prosecution violated all procedural rules for introducing demonstrative exhibits by failing to tender the exhibit prior to trial and by failing to lay a foundation for its admission, and (3) the trial's judge's denial of a motion for mistrial and his instruction to the jury that they could consider the display as demonstrative was legally erroneous and did not cure the error occasioned by the prosecutor's argument.

The Illinois Supreme Court has held that it is error to introduce photographic evidence taken for the purpose of supporting one person's theory and not to show the physical facts as they actually existed at the time of the crime. See *People v. Crowe*, 390 Ill. 294, 303-04 (1945)(proper for court to exclude photograph of defendant posed standing alongside a trunk to show where the top of the trunk was located with reference to defendant's knees). The same principle has been applied to exclude videotape, *French v. City of Springfield*, 65 Ill.2d 74 (1976); *Glusaskas v. Hutchinson,* 148 A.D.2d 203, 544 N.Y.S.2d 323 (1989), and animation evidence. *Spyrka v. County of Cook*, 366 Ill. App. 3d 156, 165-69 (1st Dist. 2006).

Here, the prosecution's use of computer technology to superimpose a representation of a half ski mask over Keith Middleton's C.B. photograph did not show the physical facts as they actually existed at the time of the crime. Instead, it merely preconditioned the jury to accept the prosecution's theory that a person might still recognize Keith Middleton even if he wore a half ski mask. Therefore, the use of the display violated Illinois rules of evidence, and the trial judge should have granted the mistrial or at least instructed the jury to disregard the display.

Second, even assuming the display could have been properly introduced, the prosecution blatantly violated the procedure for admitting such evidence. The general rule is that before such demonstrative evidence can be introduced at trial there must be: (1) a foundation laid, by someone having personal knowledge of the subject, that the demonstrative evidence is an accurate portrayal of what it purports to show; and (2) a showing that the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. In addition, the evidence must be disclosed prior to trial. 366 Ill. App. 3d at 166. Such evidence should be excluded where there is no evidence that it is an accurate portrayal of what it intends to show and merely preconditions the minds of the jurors to accept a party's theory. 366 Ill. App. 3d at 169.

Here, the demonstrative display was not timely disclosed. Instead, it was sprung on the defense during closing argument, depriving the defense of the opportunity to object to it, to move in limine against it, or to prepare a counter display showing how Keith Middleton would look wearing a full ski mask. Toryion Conner never testified that the display was an accurate portrayal of how the shooter's face appeared in the half ski mask.

And the prejudice was extreme – the prosecution used the display to argue that Keith Middleton would have been identifiable in a half ski mask.

Moreover, the trial court erred by denying the motion for mistrial. Moreover, even assuming that the display would have been admissible, and the prosecution merely violated discovery by failing to disclose it sooner, the trial court erred by failing to grant the motion for a mistrial. A trial court should grant a motion for mistrial if there is no other way to eliminate prejudice. *People v. Weaver*, 92 Ill.2d 545, 560, (1982). Factors to be considered in determining the extent of prejudice are the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that prior notice could have helped the defense discredit the evidence, the feasibility of continuance rather than a more drastic sanction, and the willfulness of the State in failing to disclose. *Weaver*, 92 Ill.2d at 560; *People v. Eliason*, 117 Ill. App. 3d 683, 693–94 (2d Dist. 1983).

Here, all of the factors militated in favor of the grant of the motion for a mistrial. The case was closely balanced (See Point I, above), the demonstrative display went to the heart of the state's theory, prior notice would have enabled the defense to object to and possibly exclude the display, a continuance was obviously unfeasible after both sides had rested, and the trial court denied defense counsel's motion for time to prepare its own display. Moreover, the prosecution's failure to disclose was wholly willful, and no excuse was offered.

Therefore, Keith Middleton's conviction must be reversed and the cause remanded for a new trial.

III:

THE PROSECUTION ENGAGED IN MISCONDUCT BY REPEATEDLY ATTEMPTING TO ELICIT FROM VARIOUS WITNESSES HEARSAY TESTIMONY SUGGESTING THAT RICKY BROWN FEARED KEITH MIDDLETON AND/OR WAS BEING STALKED BY KEITH MIDDLETON, EVEN AFTER OBJECTIONS TO THESE QUESTIONS WERE SUSTAINED, THEREBY MAKING THE DEFENSE LOOK AS THOUGH IT WAS ATTEMPTING TO HIDE EVIDENCE FROM THE JURY, AS WELL AS BY ARGUING TO THE JURY THAT BROWN "KNEW" MIDDLETON WAS STALKING HIM

Throughout the trial, the prosecutor attempted to introduce hearsay evidence that Ricky Brown feared Keith Middleton, and/or that Keith Middleton was "stalking" Ricky Brown. For example, after Marquea Ambrose, Brown's girlfriend, testified that Brown parked his car two blocks away from from his home because he did not want anything happening to it, the prosecutor asked "what" was concerning Brown. Although an objection to this question was sustained, the prosecutor then asked whether Ricky Brown had concerns with a particular person or many persons. A timely objection was sustained. Not to be stopped, the prosecutor then asked whether Ricky Brown had concerns with a person or thing. An objection to this question was sustained. (R. II, 70). Similarly, during the testimony of Damien Parker, the prosecutor attempted to elicit that Brown had made a gesture to Parker and an objection to this question was ultimately sustained. (R. II, 144-47). Despite the sustaining of this objection, the prosecutor elicited testimony that Parker had "seen" something in Brown's eyes, and an objection to this statement was sustained. (R. II, 152). In closing argument, the prosecutor argued as follows: "Ricky wasn't paranoid. He knew someone was after him and he knew who it was as well. It's the defendant, Keith Middleton. He was the one that was stalking Ricky Brown." (R. IV, 3/26/2014, 17).

The prosecutor's repeated attempts to introduce the hearsay statements of Ricky Brown constituted error, and this error was compounded by the prosecutor's repeated attempts to elicit these statements despite sustained objections.

There can be no question that the prosecutor was attempting to introduce hearsay. Hearsay is defined as "testimony of an out-of-court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of-court asserter." *People v. Rogers*, 81 Ill.2d 571, 577 (1980); Ill. Evid. Rule 801(c). Assertive conduct, as well as actual statements, may constitute hearsay. *People v. Orr*, 149 Ill.App.3d 348, 362 (1st Dist. 1986) (conduct of unnamed persons who chased the defendant was tantamount to a verbal declaration that defendant had committed the crime, and should not have been admitted into evidence); Accord, *People v. Higgs*, 11 Ill.App.3d 1032 (1973). Attempting to elicit what was "concerning" Ricky Brown was obviously an attempt to suggest to the jury that Ricky Brown had expressed "concerns" and made out of court statements about Keith Middleton. If these "concerns" were based upon acts or statements of Keith Middleton, the testimony of Ambrose and Parker was rank hearsay. The prosecutor was attempting to suggest to the jury through the out of court statements of Ricky Brown the truth of the assertion that Keith Middleton was stalking Ricky Brown, an assertion which rested on the credibility of Ricky Brown.

That this was in fact what the prosecution intended to suggest is demonstrated by the closing argument where the prosecutor stated explicitly that Ricky Brown "knew" who was "after him" or "stalking him" and that person was Keith Middleton. And if the prosecution was intending merely to suggest that, for unknown reasons, Brown was afraid of Middleton, this testimony was equally objectionable – Brown's statement of mind was not probative on the question as to whether Middleton killed Brown and the testimony of

other witnesses as to the contents of Brown's thoughts was inadmissible speculation and improper opinion testimony. See, e.g. *People v. Pertz*, 42 Ill.App.3d 864, 904 (2d Dist. 1993); *Agins v. Schonberg*, 397 Ill.App.3d 127, 136 (1st Dist. 2009).

Moreover, even apart from the admissibility of the testimony the prosecution sought to elicit, the prosecution's attempts to evade the trial judge's rulings was extremely prejudicial. The prosecutor ignored at least three sustained objections, forcing defense counsel to make multiple objections in front of the jury. As the appellate court noted in *People v. Larry*, 218 Ill. App. 3d 658, 662-63 (1991):

"If counsel timely objects at trial to improper interrogation or to an improper remark by counsel to the jury, the court can usually correct the error by sustaining the objection or instructing the jury to disregard the answer or remark. (*People v. Carlson* (1980), 79 Ill.2d 564, 38 Ill.Dec. 809, 404 N.E.2d 233.) It is, however, improper for a prosecutor to persist in asking the same question after receiving an adverse ruling on the question by the trial court. ( *People v. Hovanec* (1976), 40 Ill.App.3d 15, 351 N.E.2d 402.) Where, as here, prosecutors defy the trial court's rulings by repeating the same questions after objections have been sustained, the court's rulings can have no salutary effect. ( *People v. Weinstein* (1966), 35 Ill.2d 467, 220 N.E.2d 432.) "Driving a nail into a board and then pulling the nail out does not remove the hole." ( *People v. Cepek* (1934), 357 Ill. 560, 192 N.E. 573.) In fact, the prosecutor's repetition of objectionable questions served to increase the prejudice to [defendant] by suggesting to the jury that defense counsel was attempting to prevent them from hearing pertinent evidence."

The court went on to note that the prosecutor's questions implied that an out of court declarant had denied ownership of the gun which defendant was accused of possessing, and that this insinuation was extremely prejudicial.

Here, similarly, the prosecutor's attempts to suggest to the jury through Ricky Brown's hearsay statements that Keith Middleton was "stalking" Ricky Brown were similarly prejudicial. In a case where no evidence was introduced as to Keith Middleton's motive for allegedly killing Brown and where the identification evidence as to the identity of the killer was extremely weak, the jury could easily have been swayed by this implication. (See Point I, above). And, as in *Larry*, the prosecutor's repeated attempts to introduce this evidence, despite sustained objections, made the defense counsel look like an obstructionist and stripped the court's rulings of any curative effect.

Therefore, Keith Middleton's conviction should be reversed, and the cause remanded for a new trial.

IV:

THE TRIAL COURT ERRED BY OVERRULING OBJECTIONS TO QUESTIONS AND ARGUMENT REGARDING RICKY BROWN'S STATE OF MIND, WHERE RICKY BROWN'S STATE OF MIND WAS NOT RELEVANT, AND WHERE HIS BELIEFS ABOUT OR RELATIONSHIP WITH KEITH MIDDLETON WERE NOT ADMISSIBLE AS AN EXCEPTION TO HEARSAY

Throughout the trial, the trial judge overruled objections to evidence and argument that Ricky Brown was afraid of Keith Middleton. For example, the trial judge overruled an objection to evidence from Marquea Ambrose that Ricky Brown had "concerns." (R. II, 70). Later, the trial judge overruled an objection to evidence from Damien Parker that Ricky Brown had a "panicky, nervous" demeanor. (R. II, 147). Later, the jury overruled an objection and allowed Parker to testify that Brown became "really agitated" when a brown van slowed down in front of Marquea Ambrose's house. (R. II, 149). A short time later, the trial judge overruled an objection to testimony from Parker that Parker told Brown that the "guy" in the van was the "guy" the two had been discussing. (R. II, 150). Parker then testified that after he spoke with Brown, Brown appeared to show "nervousness." (R. II, 155). Next, over overruled defense objection, Parker was allowed to testify that Brown was "paranoid" about Keith Middleton. (R. II, 197). During closing argument, trial judge overruled objections to statements by the prosecutor that Brown was not "paranoid" about Middleton, that Brown knew Middleton was stalking Brown (3/26/2014, 17) and that Brown was afraid of Middleton. (3/26/2014, 30). These rulings were in error.

As detailed in Point III, above, to the extent that this testimony was intended to suggest that Brown had made hearsay statements that Middleton was stalking him, this testimony was hearsay. Moreover, these statements were not admissible as an exception

to hearsay to show Brown's state of mind. And Brown's state of mind was not, in any event, relevant to any issue in the case.

As to relevance, it should be noted that this was a simple case of identification. No evidence was introduced as to Keith Middleton's motive for killing Ricky Brown, or, for that matter, a motive to "stalk" Ricky Brown. Whether Brown was or was not afraid of Keith Middleton had no bearing on the issue of who killed Brown. Brown could have feared anyone or anything; but without knowing the basis for his fear, Brown's fear has no tendency to prove that Keith Middleton was, indeed, his killer. See Illinois Rules of Evidence 401, 403.

Moreover, Brown's state of mind was not admissible as an exception to the hearsay rule Under Illinois Rule of Evidence, Rule 803(3), an exception to hearsay exists for:

"A statement of the declarant's then existing state of mind , emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:

(A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will; or

(B) a statement of declarant's then existing state of mind , emotion, sensation, or physical condition to prove the state of mind , emotion, sensation, or physical condition of another declarant at that time or at any other time when such state of the other declarant is an issue in the action."

Illinois Rule of Evidence, Rule 803(3).

Obviously, Rule 803(3) does not apply. To the extent that the testimony implied that Brown remembered or believed that Middleton was stalking him, this testimony would have been excluded by Rule 803(3)A). And to the extent that it was introduced in

order to prove that Middleton had murderous intentions towards Brown, it was excluded by Rule 803(3)(B).

The case of *People v. Munoz*, 398 Ill. App. 3d 455 (1st Dist. 2010) is dispositive. In *Munoz*, a murder case, testimony was introduced, over objection, that the deceased victim said that she was tired of her relationship with the defendant, that she was unhappy with him, that he was jealous of her and that he wanted to know where she was and what she was doing all of the time. At the time of the introduction, the prosecutor claimed that the testimony was only being introduced to show the victim's "state of mind" and the "state of the relationship." 398 Ill. App. 3d at 480.

The court ruled that this evidence was both irrelevant and inadmissible hearsay: "Under these well-settled principles, the victim's hearsay statements that the defendant "was jealous of her" and "wanted to know where she was and what she was doing all of the time" would not be admissible for the truth of their content. If anything, their admissibility would have to be premised upon each statement's revelation of the victim's state of mind, namely, the disclosure of her subjective impression that she considered her husband to be jealous of her. In no event, however, would the statements be admissible as evidence that the defendant was in fact jealous of her or that he wanted to know where she was all of the time, since that would be an admission of the statement for the truth of its content and, therefore, fully subject to the hearsay exclusion. [Citations omitted].

"In order to justify such limited admissibility, the purpose for which the statements are admitted, namely, the victim's subjective impression that the defendant was jealous of her, would have to be relevant. Obviously, the risk that the trier of fact would not be able to make the substantive distinction between the victim's state of mind, *i.e.*, her subjective impression, and the actual fact described in her statements, could only be

justified if the victim's state of mind would have fully independent relevancy to the issues in the case. Thus, we must confront the question to determine to what extent, if any, the victim's impression that her husband was jealous of her is probative of any material issues in this case. As shall be discussed below, we fail to find that any such relevancy exists.

***

"[W]e find nothing in the victim's proffered hearsay statements regarding her impression that the defendant was "jealous of her" and "wanted to know where she was all the time" that would have any independent relevance to the issues in this case. There is no basis upon which to presume that the victim's state of awareness of the defendant's jealousy would cause or discourage any suicidal inclinations. The only possible relevancy would be to establish motive on part of the defendant to kill her. As such, the sole function in admitting those hearsay statements would be to use the state-of-mind hearsay exception as a back door to convey the hearsay of the out-of-court declarant (the victim) to the jury for the truth of their patent content rather than as the basis of their latent content in establishing the victim's own state of mind. However, that is precisely why those statements are not admissible since any use of them to establish the defendant's motive would be a use to establish the truth of their content, which is exactly what the hearsay rules of exclusion are designed to avert."

398 Ill.App.3d at 482.

This case is on all fours with *Munoz*. As in *Munoz*, Brown's state of mind had no independent relevance and could only be probative if it was used to suggest "latent content," such as stalking by Keith Middleton, which would tend to establish Keith Middleton's guilt. But the use of such "facts" would be hearsay, with no applicable exception.

Moreover, as in *Munoz*, the prosecution made clear that it was using the declarant's out of court statements for a hearsay purpose. In *Munoz*, the prosecution stated in opening that the defendant's "nature" was one of "control," "jealousy" and "rage," and that his "nature" put the deceased in danger. 398 Ill. App. 3d at 482. Here, similarly, the prosecution used the hearsay evidence to argue, over an overruled objection, that Brown "knew" Middleton was stalking him.

Apart from *Munoz*, similar results have been reached in other cases. See, e.g., *People v. Lawler*, 142 Ill.2d 548, 559 (1991) (holding that a telephone conversation between the alleged victim of an aggravated criminal sexual assault and her father, which took place while the defendant was nearby could not be admitted under the exception to the hearsay rule for statements indicating declarant's state of mind to show that the defendant had a gun and that the victim could not get away); *People v. Cloutier*, 178 Ill.2d 141, 154–55 (1997) (holding that a detective's testimony about conversations in which several victims described how they were attacked by the defendant was not admissible in a death-penalty-eligibility phase of capital sentencing hearing under the state-of-mind hearsay exception because the declarants' states of mind when they spoke with the detective had no bearing on the defendant's state of mind when he killed the victim); *People v. Davis*, 254 Ill.App.3d 651 (1993) (holding that state-of-mind hearsay exception did not apply to hearsay testimony of the defendant's mother, who stated that the defendant told her that he carried a gun for protection because he was previously struck on the head and severely injured, since this statement was clearly irrelevant to any material issue at trial, the dominant one of which was whether the defendant was responsible for the victim's death).

Therefore, Keith Middleton's conviction should be reversed, and the cause

remanded for a new trial.

V:

THE COURT ERRED BY ADMITTING A VIDEO FROM 6630 SOUTH YALE WITHOUT PROPER FOUNDATION FOR "SILENT WITNESS" AUTHENTIFICATION AND DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY HIS COUNSEL'S FAILURE TO VIEW THE VIDEO PRIOR TO TRIAL OR OBJECT TO THE ADMISSION OF THE VIDEO

At trial, clips from a video camera at 6630 south Yale were admitted. Before the clips were admitted officer Buie testified as follows. Buie also went to 6630 south Yale, a building with multiple cameras, to try and locate a video. (R. III, 40-41). Buie spoke with an unnamed manager of the building, who showed him a video. The video was recovered. (R. III, 42-44). He testified, without explanation, that the video he viewed had a timestamp which was off by 46 minutes. (R. III, 43). Although the video recorded events which Buie had not witnessed, Buie testified, without objection, that the video admitted into evidence truly and accurately portrayed the hours of early morning March 21, 2012 until he arrived there. (R. III, 43).

The defense had no foundational objection to the admission of the video, but claimed that they had not seen the specific clips used. (R. III, 45). The defense was given an opportunity to view the clips. (R. III, 45-48).

No proper foundation for the admission of the videotape was laid, and Keith Middleton was deprived of effective assistance of counsel by his counsel's failure to object to the admission of the tape, as well as by his counsel's failure to view the clips taken from the tape before trial.

In the leading case, the Illinois Supreme Court has adopted the "silent witness" theory of authentication for the admission of videotape evidence, particularly for

automatic surveillance pictures such as those at issue here. *People v. Taylor*, 2011 IL 110,067 ¶ ¶ 33 -36. Under the "silent witness" theory surveillance tapes or other images which are admitted as substantive evidence may be admitted, in the court's discretion, if a proper foundation for admission is laid. The factors to be considered by the trial court in determining whether videotape evidence should be admitted include: (1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process. The *Taylor* court emphasized that the list of factors is "nonexclusive," and that "each case must be evaluated on its own and depending on the facts of the case." Indeed, in some cases, "some of the factors may not be relevant or additional factors may need to be considered." In every case, the "dispositive issue" is the "accuracy and reliability of the process that produced the recording." *Taylor*, 2011 IL 110,067 ¶ 35. *Accord*, *People v. Flores*, 406 Ill.App.3d at 576, quoting *People v. Whirl*, 351 Ill. App. 3d 464, 470–71, 814 N.E.2d 872 (2004).

Here, no proper foundation for the admission of the tape was laid. There was no testimony that the cameras possessed a capability for recording and general reliability, no showing that the operator was competent, no showing of a proper chain of custody, no identification of any persons, locale or objects depicted, and no explanation of any copying or duplication process. Buie's testimony that the tape truly and accurately depicted the hours of the early morning of March 21, 2012 was a total non-sequitur – since Buie was not a witness to these events he could hardly testified that they were truly and accurately depicted in the video.

Moreover, counsel's failure to object deprived Keith Middleton of the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show both a deficiency in counsel's performance and prejudice resulting from the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance may be shown by demonstrating that counsel's performance fell below an objective standard of reasonableness, and prejudice will only be found where there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Wheeler*, 401 Ill.App.3d 304, 312-313 (3d Dist. 2010). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, *People v. Mims*, 403 Ill.App.3d 884, 890 (1st Dist. 2010).

There can be no question that defense counsel's failure to object to the lack of foundation for the admission of the videotape evidence was objectively unreasonable. Officer Buie was not the proper witness to lay the foundation for the admission of the tape, and there is no indication that the prosecution was prepared to call a proper witness, such as the unnamed manager of the building. Under these circumstances, defense counsel's failure to object to the admission of this damaging evidence was objectively unreasonable.

This error was extremely prejudicial. The admission of the tape provided virtually the only link between Keith Middleton and the man who killed Ricky Brown. Had the tape not been admitted, there is a reasonable probability that Keith Middleton would have been acquitted.

Therefore, Keith Middleton's conviction should be reversed, and the cause remanded or a new trial.

VI.

THE PROSECUTOR ERRED BY ARGUING IN CLOSING, WITHOUT EVIDENCE, THAT KEITH MIDDLETON KNEW THINGS ABOUT BROWN AND LAY IN WAIT FOR HIM BECAUSE MIDDLETON WAS DATING BROWN'S SISTER, THAT MIDDLETON KILLED BROWN SO THAT BROWN COULD NOT COME TO COURT AND TELL WHAT MIDDLETON DID TO BROWN AND BY ARGUING THAT THE VIDEO SHOWS A BROWN VAN PULLING OFF, AND THE TRIAL COURT ERRED BY OVERRULING OBJECTIONS TO THESE COMMENTS

During open closing argument, the prosecution said: "He [Keith Middleton] 's the one who had the knowledge. He was dating the victim's girlfriend and he had a way of knowing things about Ricky Brown such as what type of car he drove. He hadn't had it very long. He laid in wait." (3/26/2014, 18). After an objection to this remark was overruled, the prosecutor went on to say that Keith Middleton shot Brown "repeatedly so Ricky Brown could never come into this courtroom and tell you, ladies and gentlemen, what he did to Ricky." ." (3/26/2014, 18). Later, the prosecutor argued that the 6630 south Yale video showed a brown van pulling off, and an objection to this statement was overruled. (3/26/2014, 26). These remarks were not based on any evidence in the case, and the trial court erred by overruling defense objections to them.

While courts allow prosecutors great latitude in making closing arguments, *People v. Cisewski*, 118 Ill.2d 163, 175, 514 N.E.2d 970 (1987) and the prosecutor may comment on the evidence and all reasonable inferences from the evidence, *People v. Pasch*, 152 Ill.2d 133, 184, 604 N.E.2d 294 (1992), argument that serves no purpose but to inflame the jury constitutes error. *People v. Blue*, 189 Ill.2d 99, 127-28, 724 N.E.2d 920, 93 (2000).

In this case, these remarks were entirely speculative and were not based on the evidence or reasonable inferences from the evidence. There was no evidence that Ricky Brown's sister told Keith Middleton what kind of car Brown drove or gave him any information whatsoever about Brown's new car. Nor was there any evidence that Middleton "laid in wait." And the inference that Middleton had murdered Brown to prevent Brown from testifying as to shooting was clearly improper. See, e.g. *People v. Adams*, 109 Ill. 2d 102, 126-27 (1985)(improper to argue that by murdering victim, defendant had murdered a witness to the crime). Finally, there was no evidence that the video showed a brown van pulling off.

For these reasons, Keith Middleton's conviction should be reversed, and the cause remanded for a new trial.

VII:

THE TRIAL JUDGE ERRED BY SUSTAINING OBJECTIONS TO DEFENSE COUNSEL'S ARGUMENTS AS TO THE LACK OF PRODUCTION OF ANY REPORT ON BUIE'S CONVERSATION WITH CONNER, THAT THE JURY COULD CONSIDER THE LACK OF A FLASH MESSAGE OR FILED CHARGES WITH RESPECT TO THE CREDIBILITY OF DAMIEN PARKER'S TESTIMONY, AND THAT THEY JURY COULD USE THEIR OWN COMMON SENSE AND CONSIDER WHETHER THEY WOULD HAVE CALLED THE POLICE OR FILED CHARGES.

During defense counsel's closing argument the trial court sustained objections as to the following comments: (1) that there was nothing in writing to support officer Buie's claim that Conner had described the shooter as wearing a half ski mask (3/26/2014, 42), (2) that there was no flash message or filed complaint to corroborate Damien Parker's account of his supposed encounter with Keith Middleton (3/26/2014, 46), and (3) that the jurors could use their own common sense to consider whether they would have filed a complaint under these circumstances. (3/26/2014, 47). The trial judge was wrong.

It was perfectly proper for the jury to consider the lack of a prior report by Buie or the lack of a complaint by Parker as bearing upon their credibility. See *Biermann v. Edwards*, 193 Ill. App. 3d 968, 981-82 (1st Dist 1990)(witness may be impeached with evidence that on some former occasion the witness acted in a manner inconsistent with his testimony at trial). The lack of evidence that Buie had written a report or that Damien Parker had called the police or filed charges supported a reasonable inference that they had acted in a manner inconsistent with their testimony at trial. And it was fair comment to ask the jurors to use their common sense and experiences in life to consider whether, under similar circumstances, they would have filed charges.

Therefore, the Keith Middleton's conviction should be reversed, and the cause remanded for a new trial.

## CONCLUSION

For the reasons given in Point I, this court should reverse outright. For the reasons given in Points II – VIII, this court should reverse and remand for a new trial.

Respectfully submitted,

COUNSEL FOR DEFENDANT-APPELLANT

No. 1-15-2040

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>KEITH MIDDLETON<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Cook County, Illinois<br><br><br>2012-CR-12617<br><br>Honorable Charles P. Burns, Judge Presiding. |

CERTIFICATE OF COMPLIANCE

I, Stephen L. Richards, 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 45 pages.

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APPENDIX

JUDGMENT APPEALED FROM

NOTICE OF APPEAL

TABLE OF CONTENTS OF RECORD ON APPEAL

Common Law Record

Volume I

*State Witnesses*

PROSECUTION'S DEMONSTRATIVE EXHIBIT