

¶ 4

A. The Charges in This Case

¶ 5

In November 2008, the State charged defendant with (1) unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)), in that defendant, a felon, knowingly possessed a firearm, and (2) reckless discharge of a firearm (720 ILCS 5/24-1.5 (West 2010)), in that defendant discharged that firearm in a residential area.

¶ 6

B. Defendant's March 2010 Bench Trial

¶ 7

Because defendant is not challenging the sufficiency of the evidence to sustain his conviction, the facts relevant to the issue on appeal are as follows.

¶ 8

1. *The State's Evidence*

¶ 9

Dortha Wilson testified that defendant was her neighbor and lived in the house across the street. Dortha testified that on the night of November 23, 2008, she was awakened by her daughter and looked out her window. She observed someone in defendant's front yard. The prosecutor probed further:

"Q. When you observed that person, did you observe them shoot a gun or do anything?

A. I seen a[n] arm went up in the air. I don't know if he was shooting off a bottle rocket or shooting off a gun. I really couldn't tell you, because I really don't remember that far back.

Q. At that point in time, when you saw an arm go up in the air, did you hear anything?

A. I heard a pop sound.

Q. Do you know how many pop sounds you heard?

A. Like four.

Q. But you weren't able to tell from your distance who that was?

A. Mm-mm.

THE COURT: You need to say yes or no.

WITNESS: A. No.

[PROSECUTOR]: Q. Do you know what police officer you talked to?

A. Nope, I don't remember their names. I do remember faces.

Q. *If a police officer wrote down that you testified that it was Sykes [(who is the defendant in this case)] raising his arms and firing four shots into the air, would that be inaccurate?*

A. *No, that wouldn't be inaccurate.*

Q. *So that would be what you told that officer?*

A. *Probably. I don't remember what happened that night."*

(Emphases added.)

On cross-examination, Dortha testified that she could not be sure who she saw in defendant's front yard or whether that person was shooting a gun or setting off fireworks. She said that because the incident took place so long ago and she was not wearing her eyeglasses, she could not "really remember" exactly what happened that night.

¶ 10 Alisa Bowden, Dortha's 17-year-old daughter, testified that she was aroused from

sleep when she heard "a gunshot or a firecracker." In response, she woke Dortha. Alisa explained that when she heard the noise again, she looked out her window. The prosecutor then inquired about the specifics of what Alisa observed from the window:

"Q. And when you looked out the window, you saw somebody?

A. Yes.

* * *

Q. What was that person wearing?

A. Like a black hoodie or something.

Q. Did you see anything in their hands?

A. I seen something in their hands up in the air, but I'm not for sure what it was.

Q. [S]o their hand was up in the air?

* * *

A. Yes.

Q. When their hand was up in the air, did you hear anything?

A. I heard a few, like, shots, but I don't know if it was a bottle rocket or what.

Q. Okay. Do you know how many shots you heard?

A. Like three—two or three, probably four. I don't know.

Q. Did you hear or see anything else?

A. No.

* * *

Q. On that morning, then, did you have an opportunity to talk to some police officers?

A. Yeah.

Q. How long after the incident was it when you talked to the police officers?

A. Uh, I don't remember.

Q. Was it within an hour?

A. I think so.

Q. *Did you tell the police officers what you saw and heard on that early morning?*

A. *Yeah—yes, I did.*

Q. *If a police officer put in his report that you witnessed Sykes [(who is the defendant in this case)] raise one of his arms and fire approximately four shots, would that be true?*

A. *Yes.*

Q. *So that's what you told the officer?*

A. *I didn't say it was Perry [(who is the defendant in this case)], though, but I did say that I did see someone holding it up.*

Q. But you did—what if you told—the officer put down that you couldn't describe the weapon but you believed it was a

gun?

[DEFENSE COUNSEL]: Wait, I'm going to—it's leading.

I think he's telling her what was said and asking her—

THE COURT: Okay, sustained.

[PROSECUTOR]: Q. Did you tell the officer whether or not you believe they had a gun or a weapon?

[DEFENSE COUNSEL]: I'm going to object to that. I think that's leading too.

[PROSECUTOR]: Your Honor, I think at this point in—

THE COURT: Overruled. You may answer the question.

[A]. No.

[PROSECUTOR]: Q. And I don't know if I asked this, but did you give a description of what the individual was wearing?

A. Yes.

Q. What did you—what was the individual wearing?

A. A black hoodie or something. I know it was black."

(Emphases added.)

¶ 11 Richard Howard, a police officer at the time of the incident, testified that he conducted the initial investigation and spoke to Alisa and Dortha. In response to the prosecutor's questions, he testified as follows:

"Q. Was anyone able to give you a narration or explanation of the events as they occurred on that morning?

A. Yes. I spoke with Alisa Bowden and her mother,
[Dortha] ***.

* * *

Q. Were they able to give any information as to any
observations they made?

A. Yes. I spoke with Alisa Bowden first. She said—

[DEFENSE COUNSEL]: Excuse me. I'm going to object
as to the hearsay. Unless this is offered for the purposes of
impeachment of his own witness, I don't know why it's coming in.

[PROSECUTOR]: Well, Your Honor, it's coming in under
725 ILCS 5/115-10.1, [which] specifically allows for substantive
evidence of prior inconsistent statements. I believe the foundation
has been laid. I directed the witnesses' attention to the statements.
They indicated they did give these statements to the officer. They
are statements that narrate, describe, or explain the event or
condition, and I believe based upon [the] statute they then should
come in as prior inconsistent statements.

THE COURT: Okay. I will permit the questioning.

[PROSECUTOR]: Q. What, if anything, did Dortha tell
you?

A. Dortha said she was awoken [*sic*] by her daughter Alisa
because Alisa had heard gunshots across the street. Dortha said

she heard four shots after she was awoken [*sic*], and when she looked outside she recognized the person across the street as Mr. Sykes [(who is the defendant in this case)] walking into the residence at 814 North Church, wearing a dark colored sweatshirt, holding something in his hand she believed was a weapon.

Q. What, if anything, did Alisa Bowden tell you?

A. Alisa said she was awoken [*sic*] by one gunshot and—what she believed was a gunshot—and she woke her mother, Dortha, up, and at that time she looked out the window while her mom was waking up, saw Mr. Sykes, who[m] she was familiar with, walking from the red van that was parked in the driveway to the front door of 814 North Church with his arm raised in the air. She said she saw him fire approximately four shots from a small—or handgun. She couldn't really see the size or shape. [Alisa s]aid he walked into the door of the residence."

¶ 12 Police officer Brian Baptist testified that he assisted in the search of defendant's residence at 814 North Church and found a silver handgun "upstairs in a crawl space off of the bedroom."

¶ 13 Beth Patty, a forensic scientist with the Illinois State Police, testified that she analyzed the gun found at 814 North Church and determined that the shell casings recovered from the yard of that residence had been fired from the gun she analyzed.

¶ 14 Detective Andy Coop testified that he also searched defendant's residence at 814

North Church. He said that he found a letter addressed to defendant at "814 North Church" on a bedside table in the bedroom off of the crawlspace where Baptist found the gun.

¶ 15

2. The Defense Evidence

¶ 16 Defendant testified that he did not fire the gun. Philip Desilva, Dortha's boyfriend, testified that Dortha's vision was very poor. Desilva explained that Dortha and Alisa had learning disabilities. He said that he had been awakened the night of the incident by what he thought was a "firecracker or M-80 going off." Desilva further testified that he walked out onto the porch and noticed some teenage kids in the alley next to his house, one of whom was wearing a "red hoodie."

¶ 17

C. The Verdict and Sentence

¶ 18 On this evidence, the trial court convicted defendant of unlawful possession of a weapon by a felon and reckless discharge of a firearm. In May 2010, the court sentenced him to prison as earlier stated.

¶ 19

This appeal followed.

¶ 20

II. ANALYSIS

¶ 21 Defendant argues only that the trial court erred by admitting the prior inconsistent statements of Dortha and Alisa as substantive evidence under section 115-10.1 of the Code (725 ILCS 5/115-10.1 (West 2010)). Specifically, defendant contends that the court erred by admitting evidence of the statements that Dortha and Alisa made to Officer Howard that defendant fired a gun into the air from his front yard. In response, the State concedes that the court erred by admitting these prior inconsistent statements but asserts that (1) defendant forfeited any challenge to the admission of those statements and (2) the court's error did not

(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.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein." 725 ILCS 5/115-10.1 (West 2010).

¶ 26 At defendant's trial, both Dortha and Alisa testified inconsistently with the statements they made to Officer Howard on the night in question. Because their statements were

neither "proved to have been written or signed by the witness" (see 725 ILCS 115-10.1(c)(2)(A) (West 2010)) nor "proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording" (see 725 ILCS 115-10.1(c)(2)(C) (West 2010)), their prior inconsistent statements to Officer Howard could be admissible under section 115-10.1 only under subsection (c)(2)(B) (725 ILCS 5/115-10.1(c)(2)(B) (West 2010))), which provides for the admission of such a statement if "the witness acknowledged under oath the making of the statement *** in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought." Accordingly, our focus will be on whether the statements of Dortha and Alisa meet the statutory requirements of section 115-10.1(c)(2)(B) of the Code.

¶ 27

2. Dortha's Testimony and Statement

¶ 28

On direct examination, Dortha testified that she looked out her window and observed someone in defendant's front yard. The prosecutor then inquired as follows:

"Q. When you observed that person, did you observe them shoot a gun or do anything?

A. I seen a[n] arm went up in the air. I don't know if he was shooting off a bottle rocket or shooting off a gun. I really couldn't tell you, because I really don't remember that far back.

Q. At that point in time, when you saw an arm go up in the air, did you hear anything?

A. I heard a pop sound.

Q. Do you know how many pop sounds you heard?

A. Like four.

Q. But you weren't able to tell from your distance who that was?

A. Mm-mm.

THE COURT: You need to say yes or no.

A. No."

Because Dortha's testimony was not consistent with her previous statement to Officer Howard, the prosecutor sought to have her acknowledge (while she was still under oath) that she made that statement. However, in doing so, he did not approach the matter directly. Instead of asking Dortha whether she told Officer Howard that she saw defendant raising his arms and firing four shots into the air, the prosecutor approached the matter obliquely, as follows:

"Q. Do you know what police officer you talked to?

A. Nope, I don't remember their names. I do remember faces.

Q. If a police officer wrote down that you testified that it was Sykes [(who is the defendant in this case)] raising his arms and firing four shots into the air, would that be inaccurate?

A. No, that wouldn't be inaccurate.

Q. So that would be what you told that officer?

A. Probably. I don't remember what happened that night."

(Emphases added.)

On direct examination, Alisa testified that she looked out her window. The prosecutor then inquired about the specifics of what Alisa observed from the window.

"Q. And when you looked out the window, you saw somebody?

A. Yes.

* * *

Q. What was that person wearing?

A. Like a black hoodie or something.

Q. Did you see anything in their hands?

A. I seen something in their hands up in the air, but I'm not for sure what it was.

Q. [S]o their hand was up in the air?

* * *

A. Yes.

Q. When the hand was up in the air, did you hear anything?

A. I heard a few, like, shots, but I don't know if it was a bottle rocket or what.

Q. Okay. Do you know how many shots you heard?

A. Like three—two or three, probably four. I don't know.

Q. Did you hear or see anything else?

A. No."

Then, again, because Alisa's testimony was not consistent with her previous statement to Officer

Howard, the prosecutor once more sought to have her acknowledge that statement while she was still under oath. In doing so, he once more approached the matter obliquely, as follows:

"Q. On that morning, then, did you have an opportunity to talk to some police officers?

A. Yeah.

Q. How long after the incident was it when you talked to the police officers?

A. Uh, I don't remember.

Q. Was it within an hour?

A. I think so.

Q. Did you tell the police officers what you saw and heard on that early morning?

A. Yeah—yes, I did.

Q. If a police officer put in his report that you witnessed Sykes [(who is the defendant in this case)] raise one of his arms and fire approximately four shots, would that be true?

A. Yes.

Q. So that's what you told the officer?

A. I didn't say it was Perry [(who is the defendant in this case)], though, but I did say that I did see someone holding it up."
(Emphases added.)

¶ 31

B. The Prior Inconsistent Statements in This Case Were Properly

Admitted Under Section 115-10.1(c)(2)(B)

¶ 32 The testimony of Dortha and Alisa was inconsistent with the statements they gave on the night in question to Officer Howard. As earlier explained, the only way that those prior inconsistent statements could be admissible at defendant's trial is if Dortha and Alisa "acknowledged under oath the making" of those statements. 725 ILCS 5/115-10.1(c)(2)(B) (West 2010). Thus, the foundational issue this case presents is whether their testimony about speaking to a police officer constituted a sufficient "acknowledgement" under section 115-10.1(c)(2)(B).

¶ 33 1. *Whether a Witness "Acknowledges" a Prior Statement Is a Matter Within the Trial Court's Discretion*

¶ 34 The record makes clear that the trial court exercised its discretion in determining that the prior inconsistent statements of both Dortha and Alisa were admissible as substantive evidence under section 115-10.1(c)(2)(B) because their testimony at trial constituted "acknowledgements" of their having made those statements. We so conclude even though the trial court did not articulate its ruling in that fashion nor did the parties argue the matter as one addressed to the trial court's discretion. That the court and counsel did not do so may simply be a reflection that they understood that most trial court rulings regarding the admissibility of evidence are addressed to the trial court's discretion, and this was simply one more of them. If that was their thinking, they were correct.

¶ 35 Section 115-10.1(c)(2)(B) requires that the prior inconsistent statement of a witness may be admissible as substantive evidence if "the witness acknowledged under oath the making of the statement." 725 ILCS 5/115-10.1(c)(2)(B) (West 2010). The term

"acknowledged" in that statute is not a term of art, having only one precise meaning. Instead, whether a witness's testimony constitutes an acknowledgement within the meaning of section 115-10.1(c)(2)(B) is a matter left to the trial court's sound discretion, just as is the question of whether a witness's prior statement is "inconsistent with his testimony at the hearing or trial" under section 115-10.1(a) (725 ILCS 5/115-10.1(a) (West 2010)). Over 20 years ago, in *People v. Salazar*, 126 Ill. 2d 424, 457, 535 N.E.2d 766, 780 (1988), the Supreme Court of Illinois held that section 115-10.1 did not require "a certain minimal amount of inconsistencies" between a witness's testimony and the witness's prior inconsistent statement for the latter to be deemed "inconsistent" with the trial testimony. One year later, in *People v. Flores*, 128 Ill. 2d 66, 87-88, 538 N.E.2d 481, 489 (1989), the Supreme Court of Illinois wrote that "[t]he determination of whether a witness' prior testimony is inconsistent with his present testimony is left to the sound discretion of the trial court." We conclude that a trial court possesses the same discretion regarding whether a witness has acknowledged making a prior inconsistent statement as it possesses regarding whether a prior statement is inconsistent with that witness's trial testimony.

¶ 36 2. *The Sufficiency of the Witnesses' "Acknowledgement" in This Case*

¶ 37 Normally, when a prosecutor attempts to lay the foundation for the admissibility of a prior inconsistent statement under section 115-10.1(c)(2)(B) of the Code, the prosecutor would establish the time, place, and date of the statement and then ask the witness whether she made the statement at issue. If the witness says no, then that concludes the matter, and the prior statement may not be brought out as substantive evidence. (It likely would also be inadmissible as mere impeachment (see *People v. Fillyaw*, 409 Ill. App. 3d 302, 314 n.2, 948 N.E.2d 1116, 1129 n.2 (2011) (explaining the disappointing-damaging dichotomy)), but that issue is not before

us in this appeal.) However, the prosecutor in this case did not directly ask either Dortha or Alisa whether she made the statements to the police that the prosecutor sought to have admitted under section 115-10.1(c)(2)(B) of the Code. Instead, the prosecutor approached the subject indirectly.

¶ 38 For instance, regarding Dortha, the prosecutor asked the following questions and received the following answers:

"Q. Do you know what police officer you talked to?

A. Nope, I don't remember their names. I do remember faces.

Q. If a police officer wrote down that you testified that it was Sykes [(who is the defendant in this case)] raising his arms and firing four shots into the air, would that be inaccurate?

A. No, that wouldn't be inaccurate.

Q. So that would be what you told that officer?

A. Probably. I don't remember what happened that night."

(Emphases added.)

¶ 39 Essentially, this series of questions and answers was the same as if the prosecutor had asked the following: "You talked to a police officer about what you saw, and if he wrote down that you told him you saw defendant raising his arms and firing four shots into the air, that would be an accurate recitation of what you said to him, correct?" When viewed in that fashion, Dortha's positive response—namely, "No, that wouldn't be inaccurate"—constituted an "acknowledgement" within the meaning of section 115-10.1(c)(2)(B).

¶ 40 Although the trial court never explicitly stated that in the exercise of its discretion,

it concluded that Dortha's testimony constituted an "acknowledgement" under section 115-10.1(c)(2)(B) of the Code, the circumstances of this case show that is how the court ruled. For instance, when defense counsel objected to Officer Howard's testimony about what Alisa and Dortha told him, the prosecutor specifically cited section 115-10.1 of the Code in arguing for that testimony to be admitted as "substantive evidence of prior inconsistent statements." The court then overruled the objection, and Officer Howard essentially reiterated what Dortha and Alisa had earlier stated they told the police on the night in question. We conclude that the court did not abuse its discretion by ruling that Dortha's testimony constituted an "acknowledgement" under section 115-10.1(c)(2)(B) of the Code.

¶ 41 Regarding Alisa, the prosecutor's question about her conversation with police officers could similarly be understood as follows: "You told the police officers what you saw and heard that night, and if an officer put in his report that you witnessed defendant raise one of his arms and fire approximately four shots, would that be a correct recitation of what you told the police officer?" When Alisa responded, "Yes," that again constituted an "acknowledgement" within the meaning of section 115-10.1(c)(2)(B) of the Code, and the trial court did not err by so concluding.

¶ 42 C. Presenting Evidence Under Section 115-10.1(c)(2)(B) of the Code

¶ 43 Generally, before the State during a jury trial may seek to elicit a witness's prior inconsistent statement as substantive evidence under section 115-10.1(c)(2)(B) of the Code, the State should first inform the trial court of the State's intention and then seek leave of court to conduct a *voir dire* examination of the witness outside the jury's presence. Such an examination of the witness will allow the court to determine if the State can lay an adequate foundation for the

witness's prior inconsistent statement to be admissible under section 115-10.1(c)(2)(B) of the Code.

¶ 44 However, when, as here, the State seeks to elicit a witness's prior inconsistent statement as substantive evidence under section 115-10.1(c)(2)(B) of the Code during a bench trial, the prosecutor need not first ask for *voir dire* examination of the witness. This is so because (1) no jury is present whose judgment might be tainted if the witness denies making the earlier statement and (2) trial courts are presumed to know the law (*People v. Jordan*, 218 Ill. 2d 255, 269, 843 N.E.2d 870, 878 (2006)). Thus, in a bench trial, as here, the prosecutor may proceed directly to questioning the witness about whether she acknowledges making the prior statement. Once the witness acknowledges making the prior inconsistent statement, it becomes admissible as substantive evidence, assuming the other statutory requirements (like personal knowledge) are met. 725 ILCS 5/115-10.1(c)(2)(B) (West 2010).

¶ 45 In so concluding, we note that once the statutory threshold for admissibility under section 115-10.1(c)(2)(B) of the Code was crossed in this case, everything else that followed—namely, the attempts by Dortha and Alisa to disavow their prior inconsistent statements—was merely surplusage and utterly without effect regarding the *admissibility* of those statements as substantive evidence. See *People v. Dominguez*, 382 Ill. App. 3d 757, 770, 888 N.E.2d 1205, 1214-15 (2008) (holding that a witness's efforts to explain away her prior inconsistent statement, which was otherwise admissible under section 115-10.1 of the Code, did not affect the admissibility of those statements; the inconsistencies between her testimony and the statement were for the trier of fact to resolve). Likewise, the disavowals of Dortha and Alisa simply constituted a matter for the trier of fact to consider when deciding which statements, if

any, of Dortha and Alisa were credible.

¶ 46

IV. CONCLUSION

¶ 47 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 48 Affirmed.

¶ 49 PRESIDING JUSTICE TURNER, specially concurring:

¶ 50 Although I concur in the judgment in this case, I disagree with the majority's conclusion Alisa acknowledged she told Officer Howard the person she saw was defendant. I would find the trial court erred by considering Howard's testimony as substantive evidence that Alisa made such an identification.

¶ 51 The majority sets forth Alisa's testimony, in part, as follows:

" 'Q. Did you tell the police officers what you saw and heard on that early morning?

A. Yeah—yes, I did.

Q. If a police officer put in his report that you witnessed Sykes [(who is the defendant in this case)] raise one of his arms and fire approximately four shots, would that be true?

A. Yes.' " (Emphasis omitted.) *Supra* ¶ 30.

The majority concludes the trial court did not abuse its discretion in determining Alisa's prior inconsistent statement was admissible as substantive evidence under section 115-10.1(c)(2)(B) because her trial testimony constituted an acknowledgment of her having made the statement.

¶ 52 However, the majority, for reasons that are not clear, completely ignores the very next portion of the colloquy between the prosecutor and Alisa:

" 'Q. So that's what you told the officer?

A. I didn't say it was Perry [(who is the defendant in this case)], though, but I did say that I did see someone holding it up.' "

Supra ¶ 30.

Thus, it is readily apparent that Alisa attempted to correct or clarify her previous answer. The complete context of her answers does not show an acknowledgment of making the prior statement to the officer. The majority's refusal to consider the fluid nature of a witness's testimony places a high burden on that witness to listen carefully and respond clearly and disregards any attempt at clarification for whatever reason—not hearing correctly or misunderstanding the question. The majority might have a stronger foundation on which to ignore Alisa's testimony had she attempted to clarify multiple questions thereafter, but here the clarification was as immediate as her next response. Moreover, the majority entirely omits Alisa's earlier direct testimony, to wit:

"I went back out by the window. I did see someone, but I did not tell the cops, I did not say it was Perry [(who is the defendant in this case)]. I said I didn't know who it was. I said not for sure if it was Perry or not, and then they said you know for sure it was Perry. It's like, no, I don't."

¶ 53 As Alisa did not acknowledge her identification of defendant to the officer, the statement was erroneously admitted as substantive evidence. In my view, the majority's loose interpretation of what constitutes an acknowledgment is incongruous with the reliability safeguards the statute incorporates. See *People v. Posedel*, 214 Ill. App. 3d 170, 177, 573 N.E.2d 256, 262 (1991) (finding the witness "was unable to acknowledge his prior statement because he could 'not exactly' remember what it was"). However, because the evidence in this case was not so closely balanced that the error alone threatened to tip the scales of justice against defendant, I agree defendant's conviction should be affirmed.