



No. 99-2849

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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<b>PEOPLE OF THE STATE OF ILLINOIS,</b>	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
Plaintiff-Appellee,	)	
	)	
-vs-	)	Indictment No. 96 CR 15923(02).
	)	
<b>ROBERT GRAFF,</b>	)	Honorable
	)	Joseph Macellaio,
Defendant-Appellant.	)	Judge Presiding.

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**BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT**

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## **NATURE OF THE CASE**

Robert Graff was convicted of first degree murder and armed robbery after a jury trial and was sentenced to 45 years in prison.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

## **ISSUES PRESENTED FOR REVIEW**

1. Whether Graff was denied his statutory right to a speedy trial where the State failed to bring Graff to trial within 120 days from the date he was taken into custody.
2. Whether the trial court erred when, over defense counsel's objection, it permitted the State to introduce as substantive evidence Tom Kroll's prior inconsistent statement in which Kroll claimed that Graff admitted to shooting Monaco.
3. Whether Graff was denied a fair trial when the trial court permitted the State to introduce Ronnie Bustos' prior consistent statement to the jury even though defense counsel never charged Bustos with recent fabrication.
4. Whether Graff was denied a fair trial and his right to confrontation when, over defense counsel's objections, the court allowed the State to introduce Eleanor Graff's hearsay statements identifying Graff as the shooter under the spontaneous declaration exception to the hearsay rule without first requiring the State to establish Eleanor's basis for believing that the shooter was her son and without requiring the State to show that Eleanor was unavailable as a witness.
5. Whether Graff was denied a fair trial when, during closing arguments, the prosecutors: (1) fabricated evidence that Eleanor Graff exclaimed that she knew the shooter was

her son because she recognized his voice; (2) misrepresented the role of the jury by asking the jury to speak for the victim; and (3) inflamed the passion and prejudices of the jury by referring to Graff as the “devil” and by commenting on his appearance at trial.

6. Whether Graff is entitled to a new trial where the cumulative effect of the court’s evidentiary error and the improper argument by the prosecution denied Graff a fair trial.

7. Whether the judge’s consideration of aggravating evidence beyond that permitted by statute requires a new sentencing hearing.

### **JURISDICTION**

Robert Graff appeals from a final judgment of conviction in a criminal case. He was sentenced on August 11, 1999. (C.L. 67) Notice of appeal was timely filed on August 11, 1999. (C.L. 71) 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**

The State charged Robert Graff and Ronnie Bustos with first degree murder and armed robbery stemming from the shooting death of Ronald Monaco. (C.L. 16-18) Bustos pled guilty to the charges, and in exchange for his testimony against Graff, Bustos received a sentence of 23 years imprisonment. (R. 409) After a jury trial, Graff was convicted of first degree murder and armed robbery. (C.L. 65-66) The court sentenced Graff to 45 years imprisonment. (C.L. 67) The appeal pertains to Robert Graff.

### **Motion to Dismiss Charges for Violation of the Speedy Trial Act**

Robert Graff was arrested on May 29, 1996, for the shooting death of Monaco and remained in custody until his trial on May 3, 1999. (R. 360; C.L. 22-25) On the day of trial,

defense counsel made a motion to dismiss for violation of the speedy trial act. (R. 45) The motion was denied and the parties proceeded to trial. (R. 45) The facts related to the defense motion to dismiss on speedy trial grounds are contained in the argument portion of the brief.

### **Shooting and Hearsay Statements of Eleanor Graff**

Eleanor Graff, Robert Graff's mother, resided at 12446 S. Maple in Blue Island. (C.L. 3) On May 27, 1996, at roughly 11:15 p.m., Timothy Driscoll, a resident of Eleanor's building, was walking home from a local bar carrying a 12-pack of beer. (R. 252-253) Driscoll was walking toward his building when he saw a man and a woman pull up in front of the building. (R. 253) Due to the poor lighting conditions, he could not recognize the people who exited the car. (R. 265) Driscoll then heard a woman screaming and saw two men running around the corner of the building. (R. 254) Driscoll saw two flashes and heard four successive gun shots. (R. 254) Driscoll saw one of the masked individuals holding a gun. (R. 267)

Driscoll ducked into a doorway and retrieved two beer bottles from his twelve pack. (R. 255) Driscoll observed one of the offenders who was wearing a red mask, kneeling over the victim who was laying on the ground. (R. 269) Driscoll yelled "Hey, M.F." and threw a beer bottle at the offender. (R. 255) The bottle hit the offender in the stomach and the offender said "Ugh," and stood up staggering and then ran away. (R. 256) A physical examination of Graff, conducted at Cook County Jail after his arrest, failed to reveal any bruising or cuts to Graff's body. (R. 512)

Driscoll knelt over the victim and realized that it was Eleanor Graff's boyfriend, Ronald Monaco. (R. 257) Driscoll heard Eleanor who was in the gangway, screaming, "That was my son. That was my son." (R. 257) Driscoll ran back to the bar and yelled inside the bar for someone to call 911. (R. 258) When he returned to the body, he saw Laurie Labriola, a neighbor

girl tending to the victim. (R. 258)

Laurie Labriola called 911 after hearing the gunshots. She did not hear any yelling prior to the gunshots. (R. 218; 227) She did hear yelling after the gunshots were fired. After calling 911, Labriola went downstairs and heard Eleanor yelling, "I know who did this. It was my son." (R. 216; 221) Labriola admitted that she never told the police that she heard Eleanor say this. (R. 233)

Sergeant Gary Johnston arrived at the scene in less than five minutes. (R. 270; 279) Johnston asked Graff what happened and she stated, "My son just shot my boyfriend." (R. 276) Eleanor told the officer that her son's name was Robert Graff. (R. 276) Detective Douglas Hoglund arrived at the scene at approximately 11:45. (R. 290) Eleanor told Hoglund, "It was Bobby. He shot him. It was Bobby, my son." (R. 295) Eleanor told the officer that she thought Graff might be in Lynwood at his girlfriend's house. (R. 296) The court had denied Graff's pre-trial Motion in Limine to preclude the State from introducing Eleanor Graff's hearsay statements. (C.L. 47; R. 2199-220; Supp. R 27-44)

### **Investigation and Recovery of Physical Evidence**

The officers drove to Graff's girlfriend's house, but Graff was not there. (R. 296) Over defense counsel's objection, Hoglund testified that he learned the name of a second suspect named Ronnie Bustos from information provided by Graff's girlfriend. (R. 297)

The officers searched for Ronnie Bustos and eventually arrested him. (R. 298) After Bustos' arrest, the officers learned where the weapon and the ski mask could be found. (R. 298) Sergeant Johnston recovered the ski mask a couple of blocks from the scene of shooting. (R. 277-278) Human hairs were recovered from the ski mask but neither the police department nor the State's attorney's office ever requested that the hairs be analyzed for comparison against

either Bustos or Graff. (R. 303)

Ronnie Bustos told officers that he gave the gun to John Thorski after the shooting. (R. 310) The police recovered the gun from Thorski. (R. 304) The gun was a semi-automatic gun that discharged cartridge cases when fired. (R. 306) The officers never recovered any cartridge cases from the scene of the shooting. (R. 306) Neither the gun nor the magazine was ever analyzed for fingerprints. (R. 305)

A footprint recovered near the scene of the shooting was consistent with Ronnie Bustos' footwear. (R. 306-309) Bustos testified on cross-examination that the police told him that the print matched his shoes. (R. 436)

#### **Thomas Kroll's Statement**

Thomas Kroll testified that he recalled getting a phone call around May 28, 1996, learning they were looking for his nephew, Bobby Graff. (R. 323) Kroll testified that he thought that the phone call came from Graff's father but was not certain because he had been drunk for a week. (R. 323-324) Kroll had no recollection of when he received the call and could not remember what he did after getting the call. Kroll stated that he eventually ended up driving around with Graff's father looking for Bobby, but Kroll could not remember any of the places they went. (R. 324-325)

Eventually, they located Graff. Kroll testified that he could not recall having a private conversation with Bobby, or whether he talked to police officers at the Blue Island police station with his sister, Eleanor Graff. (R. 326; 328-329) Kroll identified a document that bore his signature, but testified that he could not recall signing the statement. (R. 331-332)

Officer Thomas Morley testified that he spoke with Kroll on the evening of May 31, 1996, at the Blue Island Police Department. (R. 334) Morley testified that Kroll did not appear

to be under the influence of narcotics or alcohol; however, Morely admitted that he knew that Kroll drank. (R. 335; 348) Kroll met with Morley and Assistant State's Attorney Cunningham in the Detective Division of the police department. (R. 336) Over defense counsel's objection, the court allowed Morley to testify to the statement Kroll made during this meeting pursuant to the statutory exception to the hearsay rule dealing with prior inconsistent statements. (R. 343)

Morley testified that Kroll stated that he and Graff's father went to 516 Exchange in Calumet City and saw Bobby there. (R. 344) Kroll asked Bobby, "Did you do this?" and Bobby said, "Yeah." (R. 344) Kroll then asked "Why," and Bobby stated that he "hated the mother fucker." (R. 344) Kroll then stated, "Shame on you." (R. 349)

Assistant State's Attorney Cunningham reduced the statement to writing, and the statement was signed by all the parties present. (R. 345-346)

### **Ronnie Bustos' Testimony**

Bustos entered into an agreement with the State whereby he pled guilty to murder and received 23 years imprisonment. (R. 408-409) At the time of shooting, Bustos was 16 years old and had been adjudicated delinquent in several cases. (R. 409) In 1992, Bustos was found delinquent of theft, battery, aggravated battery, and ethnic intimidation. (R. 409) In 1995, he was found delinquent of assault and criminal damage to property and received probation. (R. 410) Bustos violated that probation and served time in the juvenile Department of Corrections. Again in 1995, he was found delinquent of theft and received probation. (R. 410)

At the time of the shooting, Bustos had known Graff for two or three months. (R. 388) He had met Graff's mother Eleanor twice at Graff's apartment in Blue Island. (R. 388) On May 27, 1996, Graff contacted Bustos and told him that he wanted to rob his mother's boyfriend, Ron, and that he needed a gun. (R. 392) Bustos told Graff he would help him get a gun but that he

didn't want to kill Monaco. (R. 392) Graff told Bustos he would pick him up later that evening. (R. 393)

Bustos arrived home at around 7:00 p.m. and Graff was there waiting for him with a person named Kelly Masco. (R. 393-394) Bustos' sister was also there. (R. 393) Masco, Bustos, and Graff drove to Thorski's house in Masco's truck and picked up Bustos' gun, a .380 automatic. (R. 394-395) Bustos explained that he left his gun at Thorski's house because his house was being watched by police officers for gang activity and drugs. (R. 394) Bustos admitted that he was a member of the Spanish Gangster Disciples and dealt drugs out of his house. (R. 395; 420)

After retrieving the gun, Masco, Graff, and Bustos headed to Eleanor Graff's apartment in Blue Island. (R. 396) They parked the truck in the alley about a half block away from Eleanor's building. After waiting 25 or 30 minutes, Graff and Bustos exited the truck wearing winter ski masks and walked up to Eleanor's apartment. Graff carried the weapon and knocked on the door, but no one answered. (R. 400)

After getting no answer at the door, Bustos and Graff returned outside and waited by the door in the gangway next to the building. (R. 401) Graff then noticed Monaco's car approaching on the street and informed Bustos that he should order Monaco to give up all his loot because he could not speak aloud since his mother would recognize his voice. (R. 401) As Eleanor and Ron approached the apartment building, Bustos told Graff to take the clip out, but Graff cocked the gun. (R. 402) Graff was wearing a reddish, orange ski mask and Bustos was wearing a dark brown ski mask. (R. 403)

Bustos and Graff approached Eleanor and Ron and Eleanor began yelling, "no, no, no." (R. 403) Eleanor pushed Bustos, and Graff yelled, "give me all your loot or you're a dead

mother-fucker,” and Graff fired a shot in the air. (R. 403) Bustos ran back to the truck and heard four or five more shots as he ran. (R. 403) Graff ran behind Bustos and got into the truck and handed Bustos the gun. (R. 404) Graff admitted to Bustos that he had shot Monaco in the back and had taken about \$300 out of his pocket. (R. 404) As Masco drove the car out of the alley, Graff threw his red mask out of the window. (R. 408) Graff separated the money into three piles, but then gave it all to Bustos. (R. M 405) Bustos took the clip out of the gun and wiped down the gun and the clip and returned the gun to Thorsky’s house. (R. 405; 406) They changed their clothes and dumped them over a bridge. (R. 407-408)

After leaving Thorsky’s house, Bustos saw his brother, Chris Bustos, standing in front of a house having a party. (R. 408) Bustos told his brother Chris what happened and Chris stated that he wanted to go with them and jumped in the car. (R. 408) Masco, Chris, Bustos, and Graff drove to Hegwisch and stayed at a friend’s house named Cindy. Masco left about an hour later but Bustos, Graff, and Chris spent the night at Cindy’s house. (R. 407)

Cindy Sobieraj testified for the defense that in the early morning hours of May 28, 1996, Ronnie Bustos, his brother Chris, and two men that she did not know came to her house. (R. 278-479) Cindy let the four men spend the night and they were gone before she woke up the next morning. (R. 480-481) Bobby Graff was not one of the men who came to her house. (R. 481)

Bustos testified that in the morning Thorsky and two friends picked up Cindy to go to 26<sup>th</sup> and California. They all drove to Calumet City to drop Chris and Graff off at Bustos’ house and Bustos went with Thorsky to 26<sup>th</sup> street. (R. 407) Later that day, Bustos went to Calumet City and bought a quarter pound of marijuana with the \$300 from the robbery. (R. 431-432) Bustos was arrested at about 6:00 p.m. at a fellow gang member’s house in Dolton. (R. 432)

Bustos was interrogated at the police station and read his Miranda rights at roughly 7:15

p.m. (R. 433-434; 455) Bustos was not informed that he could be tried as an adult, even though he was only 16 years old. (R. 434) At roughly midnight, six hours after his arrest, Bustos gave a statement to Detectives Morely and Hoglund. (R. 437; 441-442) A State's attorney later reduced Bustos' statement to writing. (R. 455-456)

In his statement, Bustos never mentioned that his brother Chris was with him on the night of shooting. (R. 435) Bustos testified that he lied to the police because he didn't want to get his brother into trouble. (R. 428; 435) Chris Bustos was on intensive probation for aggravated discharge of a firearm and was also a member of the Spanish Disciples street gang. (R. 422) Bustos admitted that as part of the gang creed, gang members will do anything to protect a fellow gang member include lying for them. (R. 430) Bustos stated that he would lie to protect his brother. (R. 431) Bustos admitted that after he was arrested, his brother Chris fled to Minnesota. (R. 436)

On rebuttal, over defense counsel's objection, the court allowed Bustos to read his entire prior written statement to the jury. (R. 447) No limiting instructions were given to the jury.

### **Charles Schultz's Testimony**

Schultz testified that he was 22 years old and employed by HMS Services as a hydroblaster. (R. 486-487) Schultz was a member of the Spanish Gangster Disciples on May 27, 1996. (R. 487) Schultz admitted that he had some criminal history as a juvenile, but never served time in the penitentiary. (R. 489; 496) At the time of trial, Schultz had left the gang and was trying to be a responsible individual. (R. 488)

Schultz testified that Ronnie Bustos and Chris Bustos were also members of the Spanish Gangsters back on that date. (R. 488) Chris Bustos' gang name was "Shadow" and Ronnie Bustos' gang name was "Little Shadow." (R. 488) Schultz stated that he did not know Graff and

didn't recognize him as someone who hung out with their gang. (R. 490)

Schultz recalled that on May 27, 1996, the night of the shooting, he was at his home at roughly 8:30 p.m. when Chris Bustos came over. (R. 491) Chris Bustos picked up a .380 automatic pistol from Schultz's house and then left. (R. 491) Schultz identified the gun used in the shooting as the one that Chris Bustos picked up from his house. (R. 492) Schultz testified that he recognized the gun as Chris Bustos' gun because it had an unusual length and he had never seen another gun like it. (R. 498-499)

### **Jury Deliberations and Verdict**

The court allowed the State to send back to the jury room Tom Kroll's prior written statement. (R. 525; 580-581) During deliberations, the jury requested the testimony of Ronnie Bustos and Tom Driscoll. (R. 583). The court denied the request. (R. 583)

The jury indicated that it was deadlocked. The court then read a Prim instruction to the jury. (R. 582-583) At 10:30 p.m. the jury was sequestered until the following morning. (R. 584) The jury convicted Graff of first degree murder and armed robbery. (C.L. 65-66; R. 587)

### **Sentencing**

The prosecutor presented two victim impact statements from Ronald Monaco's wife and son. The court sentenced Graff to 45 years imprisonment. (R. 642; C.L. 67)

## **ARGUMENT**

**I. ROBERT GRAFF WAS DENIED HIS STATUTORY RIGHT TO A SPEEDY TRIAL WHERE THE STATE FAILED TO BRING GRAFF TO TRIAL WITHIN 120 DAYS FROM THE DATE HE WAS TAKEN INTO CUSTODY.**

In Illinois, an accused has a statutory right to a speedy trial pursuant to section 103-5 of the Illinois Criminal Code of Procedure. 725 ILCS 5/103-5 (West 1996). See also People v. Gooden, 189 Ill.2d 209, 725 N.E.2d 1248, 1252 (2000). Section 103-5(a) provides that an accused in custody must be brought to trial within 120 days from the date he was taken into custody, unless delay is occasioned by the defendant. 725 ILCS 5/103-5(a) (West 1996). See also People v. Kliner, 185 Ill.2d 1, 705 N.E.2d 850, 868 (1999). The 120-day speedy trial term begins to run automatically, without a formal demand for trial, from the day the defendant is taken into custody. See People v. Cooskey, 309 Ill. App. 3d 839, 723 N.E.2d 784, 788 (1<sup>st</sup> Dist. 1999). However, any period of delay occasioned by the defendant temporarily tolls the running of the speedy-trial period until the expiration of the delay, at which point the period recommences. See id.

Whether delay should be attributed to the defense depends on whether the defendant's actions in fact caused or contributed to the delay. See id. An express agreement to, or acquiescence in, a continuance is an affirmative act attributable to the defendant for purposes of determining whether or not he was denied his right to a speedy trial. See id. The speedy trial act is to be construed liberally so as to give effect to the constitutional right to a speedy trial and each case must be decided on its own facts. See People v. Hawkins, 212 Ill. App. 3d 973, 571 N.E.2d 1049, 1053 (1<sup>st</sup> Dist. 1991).

The appropriate remedy for a violation of the speedy-trial provision of section 103-5(a) is dismissal of the charges. See 725 ILCS 5/103-5(d) (West 1996). See also People v. Ladd, 185 Ill.2d 602, 708 N.E.2d 359, 361 (1999). On a motion to dismiss for violation of the right to a

speedy trial, the defendant has the burden of affirmatively establishing the violation. See People v. Bowman, 138 Ill.2d 131, 561 N.E.2d 633, 636 (1990). The trial court's determination as to who is responsible for the delay of trial is entitled to much deference and should be sustained in the absence of a clear showing of the trial court's abuse of discretion. See id. However, when the speedy trial period has been exceeded and the delay is not attributable to the defendant, dismissal is mandatory, not discretionary. See People v. Schmidt, 233 Ill. App. 3d 512, 599 N.E.2d 201, 204 (3d Dist. 1992).

In the instant case, the trial court erred by failing to grant Graff's motion to dismiss the charges against him prior to trial for a violation of his right to a speedy trial where the State failed to bring him to trial within 120 days from the time he was taken into custody. There are four specific periods of delay that must be attributed to the State: (1) from May 29, 1996 until July 8, 1996 (40 days); (2) from December 2, 1998 until February 8, 1999 (68 days); (3) from February 16, 1999 until April 19, 1999 (61 days); and (4) from April 20, 1999 until May 3, 1999 (13 days).

**May 29, 1996 until July 8, 1996 (40 days)**

Graff's speedy trial term began to run on the date he was arrested, May 29, 1996. Graff was not required to make a formal demand for a speedy trial and the term ran until July 8, 1996, when Graff was arraigned on the charges against him and counsel was appointed to represent him. (R. 15-19) See Cooskey, 723 N.E.2d at 788. The State conceded that the period of time between Graff's arrest, May 29, 1996, and his arraignment on the charges ran against the State.<sup>1</sup>

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<sup>1</sup> The State computed this time as 41 days of delay; however, the actual period of delay is 40 days. (C.L. 51; R. 51-52) The Illinois Supreme Court has held that for the purposes of calculating the speedy trial term, the first day is to be excluded while the last day of the relevant period is included. 5 ILCS 70/1.11 (West 1996). See also People v. Ladd, 185 Ill.2d 602, 708 N.E.2d 359, 361 (1999).

(Supp. R. 51-52; C.L. 51)

**December 2, 1998 until February 8, 1999 (68 days)**

The second period of delay occasioned by the State began on December 2, 1998, when defense counsel answered ready for trial and filed a written demand for trial. (C.L. 43; Supp. R. 9) That demand remained in tact until February 8, 1999, when defense counsel was forced to break the term due to a conflict in another courtroom. (Supp. R. 17) Again, the State conceded that this period of delay ran against the State. (C.L. 51)

**February 16, 1999 until April 19, 1999 (61days)**

The third period of delay that should be attributed to the State began on February 16, 1999, and continued until April 19, 1999. On February 16, 1999, the case was set for trial with only 12 days left on the speedy-trial term. Defense counsel was prepared to proceed and re-enter his demand for trial when the State filed an amended Supplemental Answer to Discovery in which it listed Ronnie Bustos and Debra Lovejoy as potential witnesses. (Supp. R. 21) The State also tendered a written agreement between Bustos and the State indicating that Bustos would be testifying against Graff. (Supp. R. 21) Although defense counsel agreed to continue the matter until April 19, 1999, so that he could modify Graff's defense in light of the State's amended Answer, defense counsel's concession to a by-agreement date should not have tolled the speedy-trial term since the State occasioned the delay.

Whether delay should be attributed to the defense depends on whether the defendant's actions in fact caused or contributed to the delay. See People v. Vasquez, 311 Ill. App. 3d 291, 724 N.E.2d 984, 987 (2d Dist. 2000). As a rule, any delay caused by the filing of a defense motion is ordinarily charged to a defendant. See id. Moreover, a defendant is charged with the time naturally associated with processing the motion, including the time necessary for the State

to respond. See id.

In fairness, these principles should equally apply to the State where the State amends its Answer to Discovery on the day of trial thereby causing the delay. In this case, on the day of trial, with only 12 days left on the speedy trial term, the State amended its Answer to include two new witnesses, one of whom was the co-offender in the shooting. Graff had no control over the State's surprise filing of an amended Answer and would have proceeded to trial but for the State's untimely disclosure of these two new witnesses. In fact, defense counsel stated, "This matter comes up today set for trial. It is my understanding the State is filing an amended answer to discovery that we have just received receipt of today." Defense counsel then stated, "In light of this, these supplemental answers and amendments, Judge, we obviously need some time. We're not ready." (Supp. R. 21-22) The State was not asked to make any showing that it had diligently sought these witnesses, nor did the State explain why it failed to disclose these witnesses prior to the day of trial. In fact, the State provided no information explaining what efforts it had taken to secure the testimony of these witnesses previous to that date.

In Sharos, an instructive case, the defendant made an immediate demand for trial after being released on bond. See People v. Sharos, 24 Ill. App. 3d 265, 320 N.E.2d 351, 352 (5<sup>th</sup> Dist. 1974). The defendant also made a prompt motion for discovery. See id. On the next two court dates, the defense was forced to seek a continuance because the State had failed to comply with the discovery motion. See id. Although the time associated with processing defense motions is normally charged to the defense, the court charged the State with the delay. See id. 353. The court observed that since a motion for a continuance is a logical consequence of the State's failure to comply with discovery and the State failed to demonstrate why it could not comply with the defendant's motion, the delay was fairly charged to the State. See id. But See

People v. Sojak, 273 Ill. App. 3d 579, 652 N.E.2d 1061 (1<sup>st</sup> Dist. 1995); People v. Lendabarker, 215 Ill. App. 3d 540, 575 N.E.2d 568 (2d Dist. 1991).

Also helpful in resolving this issue is People v. Williams, 94 Ill. App. 3d 241, 418 N.E.2d 840 (1<sup>st</sup> Dist. 1981) rev'd on other grounds. In Williams, the defendant was charged with rape and deviate sexual assault. See id. at 843. The defendant demanded trial and on the 120<sup>th</sup> day of the speedy trial term, the State filed new and additional charges stemming from the same facts as the original charges. See id. at 846. As a result of the State's filing of new charges, the defense was forced to seek a continuance in order to investigate possible defenses to these charges. See id. The defense argued and the court agreed that the defendant should not have been charged with the delay resulting from that continuance. See id. The court observed that the State had a continuing burden to take the necessary steps to bring about a prompt trial in conformance with the provisions of the speedy trial act. See id. To charge the defense with the delay caused by the State's late filing of new and additional charges would be to circumvent the very protection the statute aimed to provide. See id. at 847.

Although neither Sharos nor Williams are precisely on point with the instant facts, their teachings are useful for resolving this issue. On the day of trial, with only 12 days left on the term, the State disclosed additional witnesses, one of whom was a key witness against Graff. Nothing in the record suggests that these witnesses were newly discovered; rather, the record suggests that the State was aware of these witnesses since the time of Graff's arrest. Ronnie Bustos was the co-offender and Debra Lovejoy was present at the police station when Tom Kroll gave a written statement only a couple days after the shooting. (R. 335-336) Prior to the day the matter was set for trial, the State never indicated that it planned to present the testimony of either of these witnesses and made no showing that they had exercised due diligence to secure their

testimony.

When the State files a pleading on the day of trial that serves to delay the trial and the defendant has actively pursued his right to a speedy trial, it is illogical and unfair to charge the defense with that delay. Once the State amended its Answer, Graff had no choice but to seek a continuance in order to investigate the new evidence and consider new tactics. Since a motion for continuance is a logical consequence of the State's eleventh-hour filing of an amended answer, the State should have been charged with the time naturally associated with responding to the pleading. This is particularly true since the State failed to tender a full explanation of each and every step it had taken to secure the new evidence. Had defense counsel amended its answer or filed a motion on the day of trial that necessitated a response from the State, that delay would run against the defense. It is only fair that these principles apply when the State makes an untimely disclosure of evidence.

While it is true that defense counsel did not object to the State's motion to supplement its amended answer to discovery and indicated that it had worked out a by-agreement date with the State, this continuance should nonetheless have been attributed to the State. Defense counsel was ineffective for agreeing to a continuance where the State should have been fairly charged with the delay.

To sustain a claim of ineffective assistance of counsel a showing must be made that (1) counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the sixth amendment and (2) defendant was prejudiced. See People v. Huff, 308 Ill. App. 3d 1046, 721 N.E.2d 1219, 1222 (4<sup>th</sup> Dist. 1999). When defense counsel failed to object to the State's motion to amend its Answer to Discovery and failed to argue that the delay should be charged to the State, he failed to function as counsel as contemplated by the sixth amendment. Defendant

was prejudiced by defense counsel's error since only 12 days remained on the speedy trial term.

Had defense counsel either objected to the State's motion to supplement the Answer or argued that the time required to investigate the new evidence and develop new defense strategies should run against the State, there is a reasonable probability that either the State would have been prohibited from presenting the testimony of Bustos, or alternatively, the court would have granted the defense motion to dismiss. Thus, Graff was denied effective assistance of counsel, and despite defense counsel's failure to object to the continuance, this period of delay should run against the State.

**April 20, 1999 until May 3, 1999 (13 days)**

Even if this court determines that the period of delay between February 16, 1999, and April 19, 1999, should run against the defendant, Graff's speedy trial rights were violated where the court abused its discretion by granting the State's motion for an extension of the speedy trial term on April 26, 1999. Accordingly, the period of delay between April 20, 1999 and May 3, 1999, should be attributed to the State, and the trial court should have granted Graff's motion to dismiss the charges against him for a violation of the speedy trial act.

On April 19, 1999, the case was set for trial but a defense witness failed to appear pursuant to subpoena and defense counsel requested that the cause be held on call to the following day. (R. 38) The following day, defense counsel indicated that the defense was prepared to proceed; however, the State requested a continuance. The State explained that it was not prepared to proceed because a State's witness was in Springfield and unavailable to testify. (Supp. R. 27) The record does not make clear why the State could not proceed with jury selection notwithstanding the absence of this witness, and the court failed to ask the State to explain exactly why it could not bring Mr. Graff to trial despite Graff's ongoing jury demand. In fact, the

State's explanation that it could not proceed because a witness was in Springfield is questionable, since the day before, April 19, 1999, the State represented to the court that it was ready to proceed. The State never explained how it was that they were prepared to proceed on April 19, 1999, when defense counsel indicated that a defense witness had failed to appear, but were not prepared to proceed on April 20, 1999. (Supp. R. 27)

On April 26, 1999, the next court date, the State filed a written motion for an extension of the speedy-trial term based on section 103-5(f) of the Speedy Trial statute and a continuance because State's Attorney Clark's mother died on April 24, 1999. (C.L. 51; Supp. R. 50) The court granted the State's motion over defense counsel's objection and the matter was continued until May 3, 1999. (Supp. R. 55)

#### **State's Motion for a Continuance**

Even if the trial court was within its discretion to grant a continuance due to the death of Assistant State's Attorney Clarke's mother, the 13 day continuance should have been charged against the State. Section 114-4(a) provides that: "The defendant or the State may move for a continuance. If the motion is made more than 30 days after arraignment the court shall require that it be in writing and supported by affidavit." 725 ILCS 5/114-4(a) (West 1996). Although a family death is not an enumerated basis for a continuance under the statute, the court may in its discretion grant a continuance to either party if the interests of justice so require. 725 ILCS 5/114-4(d) (West 1996). Nothing in section 114-4 indicates that when the court grants a party's motion for a continuance, the period of delay does not run against that party for the purposes of the speedy trial term.

Furthermore, in People v. McDuffee, the Illinois Supreme Court agreed that the delay caused by defense counsel's request for a continuance due to medical emergency in defendant

counsel's family was appropriately charged to the defendant. See People v. McDuffee, 187 Ill.2d 481, 719 N.E.2d 732, 738 (1999). Likewise, even if this court determines that the State was entitled to a continuance based on the death of Prosecutor Clarke's mother, this delay should nevertheless have been attributed to the State. As such, Graff was not brought to trial within 120 days from the time he was brought into custody and Graff's speedy trial rights were violated.

### **Invocation of Section 103-5(f) of the Speedy Trial Act**

The trial court abused its discretion by extending the speedy trial term where the State unfairly invoked section 103-5(f) as a basis for extending the term. Section 103-5(f) provides in pertinent part:

Delay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried as prescribed by subsections (a), (b), or (e) of this Section and on the day of expiration of the delay the said period shall continue at the point at which it was suspended. Where such delay occurs within 21 days of the end of the period within which a person shall be tried as prescribed by subsections (a), (b), or (e) of this Section, the court may continue the cause on application of the State for not more than an additional 21 days beyond the period prescribed by subsection (a), (b), or (e). . . 725 ILCS 5/103-5(f) (West 1996).

In its motion and orally, the State invoked section 103-5(f) as a basis for extending the term. (C.L. 51-52; Supp. R. 50-53) The State argued that on February 8, 1999, February 16, 1999, and April 19, 1999, Graff caused delay. (Supp. R. 50-53) According to the State, because the delays were within 21 days of the end of the speedy trial term, the State was entitled to an extension of the term pursuant to section 103-5(f) of the speedy trial statute.

Although the speedy-trial statute grants a trial court the authority to extend the speedy-trial term when the defendant causes delay within 21 days of the end of the term, the court must be careful to exercise its discretion liberally in favor of the defendant and his constitutional right to a speedy trial. See People v. Battles, 311 Ill. App. 3d 991, 997, 724 N.E.2d 997, 1001 (5<sup>th</sup>

Dist. 2000) (observing that the speedy trial statute enforces a constitutional right; therefore the statute and all of its provisions must be liberally construed in the defendant's favor). See also People v. Brown, 92 Ill.2d 248, 258, 448 N.E.2d 136 (1981). The language of the statute does not entitle the State to an additional 21 days, it simply allows the State to request the extension, and the trial court may consider the State's request always bearing in mind the defendant's speedy trial rights. See id. 725 ILCS 5/103-5(f) (West 1996).

First, the State erroneously argued that defense counsel caused delay on February 16, 1999, and therefore, the trial court had the discretion to extend the term pursuant to section 103-5(f). Contrary to the prosecutor's argument, the defense did not occasion the delay on February 16, 1999. Rather, defense counsel simply agreed to a by-agreement date as a result of the State's untimely filing of an amended Answer naming two new witnesses.

To allow the State to invoke this provision when the State was responsible for causing the delay would unfairly force defendants to forego their constitutional right to effective assistance of counsel in order to preserve their speedy trial guarantees. Such an outcome would also discourage prosecutors from making timely disclosures of discovery. If the State can force a defendant to break a speedy trial term by making last minute disclosures of evidence and then invoke section 103-5(f) as a basis for extending the term, section 103-5 ceases to be a statute designed to protect a defendant's speedy trial rights and becomes a mechanism by which the State can defeat the defendant's speedy trial rights. Accordingly, the defendant's request for a continuance on February 16, 1999, should not have triggered provision 103-5(f).

Furthermore, the defense's request for a continuance on February 8, 1999 should not have served to extend the speedy trial term under section 103-5(f). On February 8, 1999, the defense was prepared to proceed but was forced to request a continuance because defense counsel had a

conflict in another courtroom. (Supp. R. 17) Although defense counsel tried to request a continuance in the other matter, that judge denied his request and defense counsel had no choice but to break the demand in Graff's case. (Supp. R. 17) Defense counsel asked that the matter be continued until February 16, 1999. (Supp. R. 18) The State never indicated that it was prepared to proceed and had not even disclosed its plans to call Bustos as a witness.

To allow the State to take refuge from the expiration of the speedy trial term by employing section 103-5(f) of the speedy trial act based on Graff's request to continue the matter for a short period because of a conflict in another courtroom would result in a 'mockery of justice' that our Illinois Supreme Court has warned against. See People v. Ladd, 185 Ill.2d 602, 609, 708 N.E.2d 259 (1999). Arguably, section 103-5(f) may be fairly invoked in situations where, for example, the State answers ready and the defendant asserts an affirmative defense within 21 days of the expiration of the term or takes some other action that would necessitate preparation on the part of the State.

Here, the defendant's request for a continuance on February 8, 1999, did not alter the State's trial strategy nor did it actually delay the trial since the State was not prepared to proceed. In fact, the State benefitted greatly from this defense continuance since Graff would have demanded trial if defense counsel received a continuance in his conflicting case. This circumstance allowed the prosecution additional time to reach a plea agreement with Ronnie Bustos, which was signed on February 16. The State should not have been allowed to invoke section 103-5(f) as a basis for extending the term when they were clearly not prepared to proceed to trial on that date.

Similarly, the defendant's the request to hold the case over one day on April 19, 1999, so as to locate a missing defense witness should not have triggered section 103-5(f). On April 19,

1999, defense counsel informed the court that a defense witness, Cindy Sobieraj, had failed to appear pursuant to a subpoena and asked that the case be held over. (R. 38) This was not a newly discovered defense witness, but rather, a known witness who had appeared on previous court dates, but who had failed to respond to the subpoena on April 19, 1999. (R. 38) The State did not object but stated that it was ready to proceed. (R. 38) However, the following day, April 20, 1999, the defense answered ready but the State confessed that it was not ready to proceed because a witness was in Springfield. (Supp. R. 27) The State never explained why it had represented that it was prepared to proceed the previous day.

Defense counsel's request to hold the matter over did not alter the State's strategy and actually served to expedite the trial. To allow the State to invoke this provision where Graff merely asked that the matter be held over for a single day so as to locate a witness who had not complied with a subpoena would serve to circumvent the very protection the statute aims to provide.

In sum, the State's invocation of 103-5(f) to extend the speedy trial term was a transparent effort to deprive Graff of his right to a speedy trial through a hyper-technical reading of the statute. There was no evidence that Graff's agreement to continuances on both February 8 and April 20 were dilatory tactics, and the record plainly demonstrates that Graff was diligently and actively pursuing his right to a speedy trial since December 2, 1998. Critically, at no point between December 2, 1999 and April 19, 1999 did the State indicate that it was prepared to proceed to trial, and even the State's representation that it was ready for trial on April 19 is suspect since the following day, it sought a continuance due to the absence of a witness. Accordingly, the trial court should not have allowed the State to extend the speedy trial term under section 103-5(f) of the speedy trial statute.

### **Defense Counsel's Failure To File a Written Motion to Dismiss.**

Pursuant to section 114-1(a)(1) of the Code of Criminal Procedure, an accused claiming a violation of his right to a speedy trial is required to file a written motion seeking discharge prior to conviction. 725 ILCS 5/114-1(a)(1). Although in the this case, defense counsel made an oral motion to dismiss based on a speedy trial violation, defense counsel failed to file a written motion.

This court should nonetheless consider the merits of Graff's speedy trial argument since trial counsel's failure to properly preserve the issue constitutes ineffective assistance of counsel. This court recently held that a defense counsel's failure to move for discharge of his client on the grounds of a speedy-trial violation constitutes ineffective assistance of counsel where there is at least the reasonable probability that the defendant would have been discharged had a timely motion been filed and no justification exists for defense counsel's decision not file a motion. See People v. Cooskey, 309 Ill. App. 3d 839, 723 N.E.2d 784, 788 (1<sup>st</sup> Dist. 1999).

In the instant case, defense counsel orally made a motion to dismiss on speedy-trial grounds. No justification exists for defense counsel's failure to file a written motion as required by the statute. Because there was at least the reasonable probability that the defendant would have been dismissed had defense counsel filed a proper written motion, defense counsel was ineffective for failing to properly preserve this issue. Accordingly, this court should review this issue on its merits.

**II. BECAUSE TOM KROLL DID NOT PERSONALLY OBSERVE THE SHOOTING, THE TRIAL COURT ERRED WHEN, OVER DEFENSE COUNSEL'S OBJECTION, IT PERMITTED THE STATE TO INTRODUCE AS SUBSTANTIVE EVIDENCE TOM KROLL'S PRIOR INCONSISTENT STATEMENT IN WHICH KROLL CLAIMED THAT GRAFF ADMITTED TO SHOOTING MONACO.**

Graff was deprived of his right to a fair trial when the trial court erroneously permitted the State to introduce as substantive evidence Tom Kroll's prior statement alleging that Graff admitted to shooting Monaco. U.S. Const. amend. XIV; Ill. Const. 1970, art I, § 2. Because Kroll did not witness the shooting and Kroll's prior statement merely recounted what Graff allegedly told him, the statement was not admissible pursuant to 725 ILCS 5/115-10.1 (West 1996). Introduction of Kroll's prior statement was prejudicial and contributed largely to the jury's finding of guilt. Therefore, Graff's conviction must be reversed and the matter remanded for a new trial where Kroll's prior statement is barred from evidence.

This error should be reviewed de novo since the court had no discretion to allow for the substantive admission of Kroll's prior statement. Discretion permits a judge to review facts, if any are submitted, as well as the law, and to make one of two choices. If the facts and the law permit only one conclusion, there is no discretion. See Gilbert Bros., Inc. v. Gilbert, 258 Ill. App. 3d 395, 630 N.E.2d 189, 191 (4th Dist. 1994).

Tom Kroll, Bobby Graff's uncle, testified for the State that on May 28, 1996, he received a phone call and learned that someone was looking for his nephew, Bobby Graff. (R. 323) Kroll explained that he had been drunk for a week and could not recall the specifics of the conversation but thought that Bobby's father, Bill, had called him. (R. 324) Kroll testified that he recalled driving around with Bill looking for Bobby but could not recall who was driving. (R. 324) Kroll recalled that they eventually located Bobby, but he could not remember having a private conversation with Bobby before Bobby entered the car. (R. 325-326) Kroll testified that he

could not remember going to the police station or talking with police officers. (R. 328-329)

Kroll identified a document that contained his signature, but testified that he did not remember signing the paper. (R. 331)

The State called Detective Thomas Morley, who testified that he interviewed Tom Kroll on May 30<sup>th</sup> or May 31<sup>st</sup> at the Blue Island Police Department (R. 333) According to Morley, Kroll did not appear to be intoxicated; however, Morely admitted that he knew Kroll was a drinker. (R. 336) Morely also admitted that he did not know Kroll's condition on May 28, 1996. (R. 348) Over defense counsel's objection, Morley testified that Kroll told him that on May 28, 1996, he and Bobby Graff's father, Billy, went to 516 Exchange in Calumet City because they knew Bobby Graff was there. (R. 344) Kroll further stated that Bob was in the garage and Kroll entered the garage and asked Bobby, "Did you do this?" Bobby said "yeah." Kroll then asked Bobby "why?" Bobby stated, "Because I hated the mother fucker," to which Kroll responded, "Shame on you." (R. 344; 349) Morely reduced the statement to writing and Kroll signed the statement. (R. 345) The statement contained no date and no corrections were made to the statement indicating that Kroll had reviewed it. (R. 351)

Because Kroll had no personal knowledge of the shooting, the trial court erred when it permitted the State to introduce Kroll's statement as substantive evidence. Section 115-10.1 of the Code of Criminal Procedure provides for the substantive admissibility of prior inconsistent statements in criminal cases. 725 ILCS 5/115-10.1 (West 1996). See also People v. Morales, 281 Ill. App. 3d 695, 666 N.E.2d 839, 843 (1<sup>st</sup> Dist. 1996). A prior inconsistent statement may be used as substantive evidence if: (1) it is inconsistent with the witness's trial testimony; (2) the witness is subject to cross-examination at trial; (3) the statement explains an event within the personal knowledge of the witness; and (4) the witness acknowledged at trial that he had made

the prior inconsistent statement. See People v. Saunders, 220 Ill. App. 3d 647, 580 N.E.2d 1246, 1254 (1<sup>st</sup> Dist. 1991).

“Personal knowledge” as used in this section refers to that which has been seen or heard by the witness, and does not include knowledge which the witness gained by being told something. See, e.g., People v. Morales, 666 N.E.2d at 843; People v. Wilson, 302 Ill. App. 3d 499, 706 N.E.2d 1026, 1032 (1<sup>st</sup> Dist. 1998); Saunders, 580 N.E.2d at 1254; People v. Cooper, 188 Ill. App. 3d 971, 544 N.E.2d 1273 (1<sup>st</sup> Dist. 1989); People v. Morgason, 311 Ill. App. 3d 1005, 726 N.E.2d 749, 753 (5<sup>th</sup> Dist. 2000). Rather, the witness must have personally observed the events which are the subject matter of the other’s comments before they can be admitted. See Morales, 666 N.E.2d at 843. This includes a statement made to a witness by a third party that is an admission; for so long as the witness lacks “personal knowledge” of the subject of the statement, the statement is not admissible under this exception to section 115-10.1. See Wilson, 706 N.E.2d at 1032. See also Morgason, 726 N.E.2d at 753.

In People v. Morales, a witness made a written statement in which he claimed that the defendant admitted to killing the victim in retaliation for a friend’s death. See Morales, 666 N.E.2d at 842. At trial, the witness changed his testimony, claiming that his statement had been coerced by the police. Over defense counsel’s objection, the trial court permitted the State to publish to the jury, as substantive evidence, the witness’s written statement. This court concluded that the trial court erred by admitting that prior statement since the witness did not witness the events which the defendant described in the conversation. See id. at 843. See also People v. Cooper, 188 Ill. App. 3d 971, 544 N.E.2d 1273 (1<sup>st</sup> Dist. 1989) (holding that the witness’ statement that “Craig Cooper and Walter Eden told me that they had just robbed Travis Vaughn” was not admissible as substantive evidence because it was based on knowledge gained

by being told about the robbery, and not from his perception of the robbery itself). See also, Morgason, 726 N.E.2d at 753 (defendant’s conviction reversed because the trial court erroneously permitted the State to introduce a witness’s prior tape-recorded statement in which she claimed that the defendant had told her who was involved in the murder and the State presented no evidence that the witness had any first-hand knowledge of the events which transpired at the murder scene).

Similarly, in People v. Wilson, two witnesses provided statements detailing certain admissions made by the defendant and the co-defendant. At trial, both witnesses changed their testimony claiming that their statements were untrue. See id. at 1029. This court concluded that the trial court erred by admitting the prior inconsistent statements as substantive evidence since the witnesses did not possess personal knowledge of the facts underlying the alleged admissions. See id. at 1032. This court observed that “This type of statement—the ‘double hearsay’ statement, typified by the admission-confession of the criminal defendant—is the kind of evidence that has most concerned the judicial system, for it raises the greatest danger of misapplication by the jury and the greatest risk of fabrication by the witness.” See id. at 1032-33 quoting M Graham, Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of the Federal Rules of Evidence 801(d)(1)(a), 613 and 617, 75 Mich. L. Rev. 1565 , 1586 (1977).

In this case, the trial court erred when it permitted the State to introduce as substantive evidence the prior inconsistent statement of Tom Kroll. Because no evidence suggested that Kroll had any personal knowledge of the facts underlying Graff’s alleged admission, his prior statements were not admissible pursuant to section 115-10.1. In fact, Graff’s purported admission is precisely the type of statement that the personal knowledge requirement was

designed to exclude from substantive evidence. As this court has acknowledged, admission–confessions are the least reliable and most damaging evidence to the criminal defendant and should not be admitted as substantive evidence even if the alleged admission is contained in a signed statement of the in-court witness, unless the declarant also has personal knowledge of the underlying event. See Wilson, 706 N.E.2d at 1032.

This error was exacerbated when the prosecution argued the substantive value of Kroll’s prior statement in an effort to urge the jury to reject Graff’s defense. Prosecutor Walsh argued in rebuttal:

Something else he can’t make go away is his confession to his Uncle Tom, who was in the Land of Nod, he says, for a week. But told Detective Morley and Mr. Cunningham of the State’s Attorney’s office. Did you do this, Bob? Yeah, because I hated the M.F.er. You can’t make that go away either. So all of this Chris-Bustos-this and Chris-Bustos-that and Chris-Bustos-this doesn’t make his voice go away and doesn’t make his confession to his uncle go away. (R. 571)

Finally, the trial court compounded the error of admitting Kroll’s prior inconsistent statement when it granted the State’s request to send Kroll’s handwritten statement back to the jury room during deliberations. (R. 525-528) By permitting the jury to review this handwritten statement during deliberations, the trial court highlighted the improper evidence. The trial court further encouraged the jury to place increased emphasis on Kroll’s prior statement when it refused the jury’s request for the testimony of two other witnesses, Timothy Driscoll and Ronnie Bustos. (R. 583-584)

In People v. Carr, a similar case, the appellate court reversed the defendant’s conviction finding that the trial court erroneously permitted the jury to review the prior statements of three State’s witnesses. People v. Carr, 53 Ill. App. 3d 492, 368 N.E.2d 128, 131 (2d Dist. 1977). The record was unclear whether the prior statements were admitted into evidence substantively or whether they were admitted for impeachment purposes only. See id. The appellate court

concluded that regardless of whether the statements were admitted into evidence by the trial judge, they should not have accompanied the jurors back to the jury room during deliberations. Allowing the statements back to the jury room prejudiced the defendant since it overemphasized the witness's in-court testimony by providing the jury with a tangible form of testimony that it could consult at their leisure during deliberations. See id. at 132. The court also recognized that the jury may have used the prior inconsistent portions of the statement for substantive purposes since the trial court failed to specifically instruct the jury that it could only consider the prior inconsistent statements for impeachment purposes. See id. at 133.

This case presents a more persuasive argument for reversal than Carr. In Carr, the record was unclear whether the jury considered the prior inconsistent statements substantively while here the record plainly shows that the jury was instructed to receive Kroll's prior statement for substantive purposes. (Supp. R. 11) The court expressly admitted Kroll's prior inconsistent statement into evidence for substantive purposes, and then instructed the jury both orally and in writing that it was permitted to consider Kroll's prior statement for substantive purposes. (R. 343; R. 576; Supp. R. 11) Moreover, the prosecution argued the substantive value of Kroll's prior inconsistent statement. (R. 541; 571) Lastly, by sending Kroll's prior statement back to the jury room and then later refusing the jury's request for other State's witness's testimony, the court overemphasized Kroll's prior statement providing the jury with a tangible form of this testimony to which it could refer to over and over at its leisure.

Accordingly, the trial court committed reversible error when it permitted the State to introduce as substantive evidence Kroll's prior statement that recounted something Graff allegedly told him, but of which he had no personal knowledge. The court committed further error when it allowed the prior statement back to the jury room.

**The Erroneous Admission of Kroll's Prior Inconsistent Statement Was Not Harmless Error.**

The admission of Kroll's prior statement was prejudicial to Graff and cannot be harmless error where the evidence of Graff's guilt was far from overwhelming. The standard for determining whether the error is harmless or reversible is whether it is harmless beyond a reasonable doubt. See People v. Saunders, 580 N.E.2d 1246, 1255 (1<sup>st</sup> Dist. 1991). See also Chapman v. California, 386 U.S. 18 (1967). Because the State cannot demonstrate that the admission of Kroll's prior statement detailing Graff's alleged confession was harmless beyond a reasonable doubt, Graff's conviction must be reversed and the matter remanded for a new trial.

Double hearsay statements of the sort at issue here, that is admission-confessions of the defendant, are the most damaging and least reliable evidence available. See People v. Wilson, 302 Ill. App. 3d 499, 706 N.E.2d 1026, 1033 (1<sup>st</sup> Dist. 1998). They also raise the greatest danger of misapplication by the jury and the greatest risk of total fabrication by the witness. See id. In this case, the evidence of guilt was marginal and the prejudice suffered by Graff high, particularly since the court highlighted Kroll's statement by allowing it to go back to the jury room during deliberations.

The only other evidence connecting Graff to the shooting was the unreliable hearsay statements of Eleanor Graff and the unconvincing and largely impeached testimony of the co-offender, Ronnie Bustos. Although substantial physical evidence was compiled in this case, none of it implicated Graff. Moreover, the defense presented significant evidence that Ronnie Bustos' brother, Chris Bustos was the other masked offender, not Bobby Graff.

Eleanor Graff's hearsay statements identifying her son as the shooter were inherently unreliable where the shooters were wearing masks and Eleanor never explained why she thought the shooter was her son. See Argument IV. Arguably, Eleanor's statements were inadmissible in

the first instance, but notwithstanding their inadmissibility, this evidence was not particularly valuable for determining Graff's guilt. The jury never learned why Eleanor thought the shooter was her son and the evidence at trial suggested that Eleanor's perceptions were impaired due to her drug use. The evidence suggested that Eleanor dealt in drugs and the autopsy report indicated that Ron Monaco had used cocaine near the time of the shooting. (R. 380; 396) Based on this uncontested evidence, there is a strong probability that Eleanor may have been under the influence of drugs at the time of the shooting which further calls into question the reliability of her declarations. Although the admission of Eleanor's hearsay exclamations was exceptionally prejudicial to Graff, it was not strong evidence of guilt.

Ronnie Bustos' testimony was severely impeached and actually suggested that his brother was the co-offender and not Bobby Graff. Bustos' testimony should have received extra scrutiny where Bustos negotiated a deal with the State whereby he would testify against Graff in exchange for receiving a 23 year sentence of imprisonment for murder, only 3 years above the minimum. (R. 408) The evidence against Bustos was overwhelming and would have undoubtedly resulted in his conviction had he proceeded to trial. Bustos was arrested with the entire proceeds from the murder-armed robbery, confessed to the crime, directed the police to the murder weapon, and a footprint found at the scene of the crime was consistent with Bustos' footwear. (R. 431-433; 435; 298; 309) In short, Bustos had every incentive to implicate a co-offender and negotiate a deal for himself since his chances of winning at trial were negligible.

Bustos' testimony was suspect where he admitted that he had lied to the police about his brother's involvement because he did not want to implicate his brother. (R428; 435) Bustos testified that immediately after the shooting, his brother joined up with him and drove to Hegewisch. (R. 408) In his written statement, Bustos did not mention his brother. (R. 435)

Bustos admitted on the witness stand that he lied to the police to protect his brother and would still lie to protect his brother. (R. 428; 431) Bustos also confessed that he and his brother were in the same gang, the Spanish Disciples, and that he would lie to protect fellow members of the gang. (R. 430)

Because the defense presented ample evidence that Chris Bustos may have been the second offender in the shooting and Bustos admitted in no uncertain terms that he would lie to protect his brother, a fellow gang member, Bustos' testimony did not provide overwhelming evidence of Graff's guilt. Bustos testified that immediately after the shooting, he drove to Hegewish accompanied by Graff, Chris Bustos, and Kelly Masco and spent the night at a woman's house named Cindy Sobieraj. (R. 408) Ms. Sobieraj confirmed that Ronnie and Chris Bustos arrived at her house with two other men but testified that she did not recognize Robert Graff as one of those men. (R. 481)

Bustos' testimony was discredited by Ms. Sobieraj's testimony on another point. Ms. Sobieraj testified that the men left her apartment before she woke up the following day, while Bustos testified that Thorsky picked them up with Cindy the following morning. (R. 407) Ms. Sobieraj was unimpeached, and the State made no suggestions that Ms. Sobieraj had any reason to fabricate her testimony. In fact, according to her own testimony, Ms. Sobieraj was a friend to the Bustos family and had never seen Bobby Graff before. (R. 479) Thus, if any motive existed for her to lie, it would have been to lie for Ronnie Bustos.

Perhaps the most persuasive evidence that Bustos perjured himself and lied on the stand to protect his brother came from defense witness Charles Schultz. Schultz testified that he was a former member of the Spanish Gangster Disciples and knew Ronnie and Chris Bustos back in 1996. (R. 488) Schultz testified that he did not recognize Graff and never knew Graff to hang

around with the Bustos brothers. (R. 490) Schultz testified that on May 27, 1996, Chris Bustos picked up a .380 automatic pistol from his house. (R. 491) Schultz identified the murder weapon as the gun that Chris Bustos obtained from his home. (R. 492) Although on cross examination Schultz admitted that he did not have an independent recollection of the exact date that Bustos picked up the gun, Schultz confirmed that shortly after that incident, he learned that Bustos had been arrested for the shooting death of Monaco. (R. 501) Schultz explained that he recognized the murder weapon as the same gun that Chris retrieved from his house, because it was an unusual .380 automatic pistol and the only one of its kind that he had ever seen. (R. 498)

Charles Schultz's testimony directly contradicted Bustos' testimony that he retrieved the weapon from another gang member, John Thorski. Schultz's testimony provided further proof that Bustos' testimony was completely unreliable and largely fabricated to protect his brother. Schultz's testimony was unimpeached and the State provided no motive for Schultz to lie. In fact, Schultz testified that he had never seen Graff before. Notably, the State tried to prevent Schultz's testimony by suggesting that his testimony could subject him to criminal charges. (R. 473) In spite of this threat, Schultz testified to his knowledge that Chris Bustos obtained the murder weapon from his home that evening.

Additionally, the defense presented evidence that Chris Bustos had a previous weapons conviction and had fled the state shortly after Ronnie Bustos' arrest. (R. 422; 436) Both of these facts are strong indicators that Chris Bustos had a more pivotal role in the murder of Ron Monaco than suggested by the State and serves to further discredit Ronnie Bustos' testimony.

Finally, the physical evidence in this case failed to implicate Bobby Graff. First, the murder weapon was recovered and Bustos admitted that the weapon belonged to him. (R. 418) Despite the State's assertion that Graff fired the weapon, neither the gun nor its components were

ever analyzed for fingerprints. (R. 305) Similarly, the ski mask purportedly worn by Graff was recovered from near the crime scene and even though a human hair was recovered from the mask, neither the State nor the police ordered that the hair be analyzed for comparison against Graff's hair. (R. 303)

Moreover, a footprint was recovered from the scene that was consistent with Bustos' footwear, and Bustos testified that the police told him that the print matched his footwear. (R. 308; 436) Also, the proceeds from the robbery were recovered from Bustos. Bustos testified that after the shooting, Graff separated the money into three piles, but then admitted that he took the entire amount of money and purchased marijuana with it. (R. 431-432) When Bustos was arrested, he was carrying the marijuana he had purchased with the \$300 from the robbery.

Lastly, Timothy Driscoll, the State's eye-witness to the offense testified that he threw a beer bottle at the shooter hitting him in the chest with such force that the shooter let out a moan and stumbled before running from the scene of the shooting. (R. 256) However, a physical examination of Graff during intake at Cook County Jail failed to reveal any markings suggesting that he had been hit in the chest with a beer bottle. (R. 512) If Driscoll's testimony is credited and Driscoll hit the shooter with a beer bottle with such force that it caused the shooter to moan and stagger, one would expect that person to have a physical mark indicating such an injury.

In sum, not a single piece of physical evidence attached Bobby Graff to the shooting of Ronald Monaco. Furthermore, the testimony of Ronnie Bustos was of marginal value where Bustos was repeatedly impeached, admitted that he would lie to protect his brother, and had every incentive to implicate Graff so as to secure a minimum prison sentence for himself. The only remaining piece of evidence against Graff was the unreliable hearsay declarations of his mother which arguably should not have been admitted into evidence in the first instance. See

Argument IV. Since this evidence is far from overwhelming, the State cannot show that the erroneous admission of Tom Kroll's prior statement was harmless beyond a reasonable doubt and Graff's conviction for first degree murder must be reversed and the matter remanded for a new trial.

**III. GRAFF WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT PERMITTED THE STATE TO INTRODUCE RONNIE BUSTOS' PRIOR CONSISTENT STATEMENT TO THE JURY EVEN THOUGH DEFENSE COUNSEL NEVER CHARGED BUSTOS WITH RECENT FABRICATION.**

The trial court erroneously permitted the State to introduce Bustos' prior handwritten statement to the jury. Because the defense did not charge Bustos with recent fabrication, but rather, contended that Bustos had an incentive to testify falsely even before he provided the State with a handwritten statement, Bustos' prior statement was inadmissible and served only to unfairly enhance Bustos' sagging credibility. Accordingly, Graff was deprived of his right to a fair trial and his conviction must be reversed and the matter remanded for a new trial. U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2.

This court should review this matter de novo since the trial court had no discretion to allow the introduction of Bustos' prior statement. Discretion permits a judge to review facts, if any are submitted, as well as the law, and to make one of two choices. If the facts and the law permit only one conclusion, there is no discretion. See Gilbert Bros., Inc. v. Gilbert, 258 Ill. App. 3d 395, 630 N.E.2d 189, 191 (4th Dist. 1994).

Consistent statements made by a witness prior to trial may not be introduced at trial for the purpose of corroborating that witness's testimony. See People v. Terry, 312 Ill. App. 3d 984, 728 N.E.2d 669, 678 (1<sup>st</sup> Dist. 2000). See also People v. Emerson, 97 Ill.2d 487, 500, 455 N.E.2d 41, 47 (1983). Prior consistent statements are inadmissible because they unfairly bolster the witness's credibility since a trier of fact is more likely to believe something that is repeated.

See id. See also People v. Montgomery, 254 Ill. App. 3d 782, 626 N.E.2d 1254 (1st Dist. 1993). However, the law recognizes an exception to this rule of admissibility where a charge is made that the testimony of the witness is a recent fabrication or that the witness had a motive to commit perjury, provided that the prior consistent statement was made before the motive to fabricate arose. See People v. Grisset, 288 Ill. App. 3d 610, 627, 681 N.E.2d 1010 (1st Dist. 1997). See also Moore v. Anchor Org. for Health Maintenance, 284 Ill. App. 3d 874, 672 N.E.2d 826, 833 (1<sup>st</sup> Dist. 1996). Proof that a witness gave a similar account of the occurrence, when the motive to lie was nonexistent, or before the effect of the account could be foreseen, makes the prior consistent statement admissible. See Moore, 672 N.E.2d at 834.

In this case, Bustos' prior consistent statement was inadmissible, because defense counsel never implied that Bustos recently developed a motive to falsify his testimony, but rather, consistently maintained that Bustos lied from the very beginning in order to protect his brother, Chris Bustos. The police arrested Ronnie Bustos the day after the shooting at roughly 6:15 p.m. (R. 432-433) Bustos was interrogated at the Blue Island Police Department and eventually gave a statement to police officers naming Graff as the shooter of Ronald Monaco. (R. 433-434) Bustos also implicated himself as an accomplice to the crime.

At trial, on direct examination, Bustos testified that Graff enlisted Bustos to participate in the murder and armed robbery of his mother's boyfriend, Ronald Monaco. (R. 392) Bustos obtained a .380 automatic weapon for Graff and Graff devised a plan to shoot Monaco. (R. 394) In short, Bustos testified that he and Graff ambushed Eleanor Graff and Monaco as they entered Eleanor's apartment building. (R. 402-403) Bustos testified that they wore ski masks concealing their identity, and Graff shot Monaco four or five times and robbed him of \$300. (R. 402; 404) Bustos explained that they fled the scene and returned the gun to its original hiding place. (R.

406) Bustos, Masco, and Graff then met up with Bustos' brother, Chris, and drove to Hegewisch. (R. 406) The four men stayed at a friend's house named Cindy Sobieraj. (R. 407)

At the close the State's direct examination of Bustos, the prosecutor asked Bustos whether he was testifying as a result of a plea agreement with the State's Attorney's office. (R. 408) Bustos confirmed that he pled guilty to first degree murder in exchange for 23 years in the Illinois Department of Corrections. (R. 408-409)

On cross examination, defense counsel questioned Bustos further about the plea agreement. (R. 412-414) Specifically, defense counsel clarified the State's misleading direct examination regarding the actual amount of time Bustos will be incarcerated. (R. 414) Although on direct examination, Bustos stated that he was testifying against Graff in exchange for a 23 year term of imprisonment, on cross examination, defense counsel clarified that Bustos would only spend half that amount of time in the penitentiary. (R. 409; 414)

Defense counsel also impeached Bustos with a statement he made to the police shortly after the shooting. In the statement, Bustos never mentioned his brother Chris. (R. 428) Bustos admitted that he lied to the police about meeting up with his brother, Chris, after the shooting because he wanted to protect his brother. (R. 428) Bustos also testified that he would lie to protect his brother. (R. 430-431) Additionally, defense counsel established that when Bustos made his statement to the police, he had not been informed that he could be tried as an adult. (R. 434-435) Bustos admitted that at the time he first made his statement to the police, he believed that he would be tried as a juvenile. (R. 455-456)

On re-direct, the State requested that Bustos' entire prior statement to the police be introduced to the jury. (R. 444) The State argued that by questioning Bustos about his plea agreement with the State, defense counsel impliedly charged Bustos with recently fabricating his

testimony (R. 445-446) Defense counsel objected, arguing that they had never accused Bustos of recently falsifying his testimony, but rather, contended that Bustos lied from the start because he wanted to protect his brother. (R. 446-447) The trial court overruled defense counsel's objection and permitted Bustos to read his entire prior written statement to the jury. (R. 447-451)

Bustos' statement mirrored his in-court testimony regarding the shooting. (R. 477-451) After asking Bustos to read his prior statement to the jury, Prosecutor Clarke again asked Bustos whether he told the police what he had testified to that day. (R. 452) Clarke elicited for the third time that shortly after the shooting, Bustos told the State's Attorney the same story he told in-court. (R. 453)

The trial court erred when it permitted Bustos to read his prior written statement to the jury and allowed the State to repeatedly inform the jury that Bustos had made the prior consistent statement to both police detectives and a State's attorney the day after the shooting. The trial court further erred by failing to instruct the jury that Bustos' prior consistent statement could not be considered for substantive purposes.

Although defense counsel questioned Bustos about his plea agreement with the State, this colloquy did not open the door to the introduction of Bustos' prior consistent statement. The State first apprized the jury of the plea agreement during its direct examination of Bustos. In fact, on direct examination, the State attempted to bolster Bustos' credibility by impressing upon the jury that he would be incarcerated for 23 years as a result of his guilty plea. (R. 409) Defense counsel only questioned Bustos further about the agreement so as to clarify the terms of the agreement and to undercut the State's efforts at unfairly enhancing Bustos' credibility.

Furthermore, defense counsel never implied that Bustos had recently developed a motive to falsify his testimony in order to obtain a deal with the State. Rather, defense counsel

charged that at the time Bustos was arrested, he recognized that he was the prime suspect in the case and therefore already possessed a motive to minimize his own culpability while incriminating Graff. Defense counsel also theorized that Bustos made this statement believing that if charged with the offense, he could only be tried as a juvenile. However, defense counsel's primary assertion was that Bustos committed the shooting with his brother Chris and only implicated Graff so as to protect his brother. Each of these motives as suggested by the defense existed prior to the time that Bustos made his statement to the police officers.

In fact, defense counsel's closing argument makes clear that the defense never charged Bustos with recently falsifying his testimony but contended that his motive to lie existed from the very beginning. The defense theory of the case was that Bustos committed the shooting with his brother Chris Bustos and Bustos implicated Graff to protect his brother. Defense counsel's closing argument centered around this theory. Urging the jury to discredit Bustos' testimony, defense counsel argued:

He's got two motives. One, hey, he thought it's been clear, folks. You look at it. He didn't know he was going to be tried as an adult. It's 7:00 o'clock when he talked to the police. There was nothing in that Miranda warning that said I'm going to be tried as an adult. He thinks he's going to get another – that it's juvenile court, he'll get another two months for a murder, he's back on the street . . . (R. 553)

What's the second motive that we know about? To take his brother out of this case. Of course. He lied to the police. There's no reason why he lied. It doesn't make sense. Why would somebody lie and say my brother, I saw him afterwards, had nothing to do with this case? Why would he lie about that? And intentionally lie about that in his statement? Because his brother wasn't there after the case. He was there before, just like Chucky told you. Him and his brother were the two that went out and did this. (R. 554)

What else do we know? His deal. This was where he's playing these guys like a fiddle. Who is fooling who here? Natural life. Okay. Murder, 20 years the minimum to natural life. Rest of your life behind bars . . . (R. 557)

That's what's he's looking at here, folks. What do you think he's going to do? *He had his story ready to go. Right when the police brought him in, he was ready to go.* Wasn't like he was caught in the scene. He knew what he wanted to

say, and he's selling us a bit of goods, 23 years. (R. 557) (emphasis added)

In People v. Henderson, a factually similar case, the defendant along with three co-defendants, Croft, Alonzo, and Campbell, faced charges for sexual assault, kidnapping and murder. People v. Henderson, 142 Ill. 2d 258, 568 N.E.2d 1234, 1258 (1990). Anthony, a State's witness and the brother of Alonzo, testified that the only reason his brother Alonzo and Campbell sexually assaulted the victim and the only reason Anthony did nothing to prevent the assault, was that the defendant and Croft had held knives on them. See id. On Anthony's cross examination, defense counsel impeached Anthony by revealing that Anthony wanted to help his brother, whom he loved, and Campbell, who was like a cousin to him. See id. On re-direct, the prosecution elicited testimony from Anthony that he had told police officers essentially the same story that he testified to. See id.

The Illinois Supreme Court rejected the State's argument that the prosecutor properly elicited testimony that Anthony had made a consistent statement on a prior occasion. See id. at 1259. The court observed that Anthony's motive to lie to protect his brother and Campbell existed when he talked to the police. See id. Thus, Anthony's prior consistent statement was not admissible to rebut a charge of recent fabrication. See id. The court also noted that defense counsel's suggestion that Anthony might have lied in order to protect himself from criminal prosecution did not open the door to the prosecution eliciting testimony that Anthony had previously made a statement consistent with his testimony since that motive to lie would also have existed at the time he made the statement to the police. See id.

In this case, defense counsel implied that Bustos lied to police officers in order to protect his brother Chris, and Bustos admitted that he had lied to protect his brother. Because this motive existed at the time officers questioned Bustos, his prior statement was not admissible to

refute a charge of recent fabrication. Similarly, defense counsel's suggestion that Bustos was attempting to avoid prosecution by implicating Graff did not open the door to the admission of his prior statement since that motive to lie existed at the time he was questioned by the police. In fact, defense counsel theorized that Bustos freely gave a statement because he thought that even if he could not avoid prosecution, he could only be tried as a juvenile.

Simply because defense counsel clarified the terms of the plea agreement after the State fronted the issue on direct examination, it does not necessarily follow that defense counsel charged Bustos with recent fabrication. Defense counsel should be permitted to question an accomplice witness about the terms of a negotiated plea agreement without opening the door to the admission of a prior consistent statement so long as defense counsel does not otherwise imply that the witness recently fabricated his testimony. To hold otherwise would unfairly limit defense counsel's cross-examination of a witness, since even in instances where defense counsel is not charging the witness with recent fabrication, defense counsel would have to forego any questioning about a negotiated plea agreement if he wanted to avoid the admission of the witness's prior consistent statement.

In sum, defense counsel never accused Bustos of recently falsifying his testimony. Rather, the defense consistently maintained that Bustos lied to the police the day after the shooting because he wanted to protect his brother Chris who was the true co-offender in this case. This motive to lie existed from the beginning and the trial court erred by admitting Bustos' prior consistent statement to the jury.

The trial court further erred by failing to give the jury a cautionary instruction explaining for what purpose it could consider the statement. Prior consistent statements may only be admitted for rehabilitative purposes and not as substantive evidence. See People v. Lambert, 288

Ill. App. 3d 450, 681 N.E.2d 675, 680 (1<sup>st</sup> Dist. 1997). As stated earlier, the rationale for this rule is that corroboration by repetition “preys on the human failing of placing belief in that which is most often repeated.” See id. In Lambert, this court reversed the defendant’s conviction finding that the trial court should have given the jury a limiting instruction and erred by allowing the State to introduce the witness’s prior consistent statement to the jury for substantive purposes.

Similarly in this case, the jury was never told that it could only consider Bustos’ prior statement for rehabilitative purposes. Without this cautionary instruction, the jury likely considered the statement for substantive purposes. Thus, the trial court compounded the error of admitting Bustos’ prior statement by failing to properly instruct the jury on its permitted use.

### **The Error Requires Reversal**

The admission of Bustos’ prior consistent handwritten statement cannot be harmless error. The erroneous admission of prior consistent statements constitutes reversible error if there is a reasonable probability that the erroneously admitted testimony contributed to the conviction. See People v. Lambert, 288 Ill. App. 3d 450, 460, 681 N.E.2d 675, 682 (2d Dist. 1997). Furthermore, the admission of prior consistent statements used to bolster the sagging credibility of a witness is reversible error when the witness’s in-court testimony is crucial. See id. Even if sufficient competent evidence was introduced to establish a defendant’s guilt beyond a reasonable doubt, there is still reversible error when the improper admission clouds the evidence to such a degree that it is impossible to determine whether the trier of fact relied on it. See id.

There can be no doubt that the State’s case against Graff hinged on the testimony of Ronnie Bustos. If the jury chose to discredit Bustos’ testimony, it would most assuredly have acquitted Graff. It is an understatement to characterize Bustos as a crucial State’s witness.

Bustos’ credibility was severely undermined on cross examination since defense counsel

revealed Bustos' prior criminal history and his numerous motives to lie to the police and to the jury. Incredibly, Bustos himself testified that he lied to the police in order to protect his brother and would continue to lie to protect his brother and fellow gang members. In response to defense counsel's effective and fair cross-examination of Bustos, the State sought to introduce Bustos' prior statement for the purpose of boosting his sagging credibility. In fact, the State not only directed Bustos to read his prior statement verbatim to the jury, it then elicited affirmative responses from Bustos that he had told the police the same story he testified to. Thus, the jury heard Bustos' testimony twice and was reminded a third time that Bustos told the police and the State's Attorney the day after the shooting the same story he testified to in-court.

As stated above, the admission of prior consistent statements for the purpose of boosting a witness's sagging credibility is reversible error if that witness's testimony is crucial. Because Bustos' testimony was crucial to the State's case and the State unfairly buttressed Bustos' in-court testimony with his prior handwritten statement, the error cannot be harmless. Moreover, the improper admission of his prior statements clouded the evidence to such a degree that it is impossible to determine whether the jury relied on these improper statements. Because the court failed to give a limiting instruction, there is no way to determine whether the jury used Bustos' prior statement for substantive purposes. Accordingly, the erroneous admission of Bustos' prior consistent statement constitutes reversible error since there is a reasonable probability that it contributed to Graff's conviction.

**IV. ROBERT GRAFF WAS DENIED A FAIR TRIAL AND HIS RIGHT TO CONFRONTATION WHEN, OVER DEFENSE COUNSEL'S OBJECTIONS, THE COURT ALLOWED THE STATE TO INTRODUCE ELEANOR GRAFF'S HEARSAY STATEMENTS IDENTIFYING GRAFF AS THE SHOOTER UNDER THE SPONTANEOUS DECLARATION EXCEPTION TO THE HEARSAY RULE WITHOUT FIRST REQUIRING THE STATE TO ESTABLISH ELEANOR'S BASIS FOR BELIEVING THAT THE SHOOTER WAS HER SON AND WITHOUT REQUIRING THE STATE TO SHOW THAT ELEANOR WAS UNAVAILABLE AS A WITNESS.**

Graff was denied his right to a fair trial and his right to be confronted by witnesses against him when the trial court permitted the State to introduce Eleanor Graff's hearsay statements identifying the shooter as her son. Eleanor's Graff's hearsay remarks were inadmissible under the spontaneous declaration exception to the hearsay rule, because the State failed to demonstrate that Eleanor had personal knowledge that the shooter was her son. Although Eleanor witnessed the shooting, the offenders wore ski masks concealing their identity. As a result, the State was required to establish Eleanor's basis for believing that the shooter was her son. Because the State failed to meet this foundational requirement, Eleanor's exclamations were inadmissible and Graff was denied his constitutional guarantees when the court allowed the jury to hear this damaging testimony over defense counsel's repeated objections. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8.

Additionally, Graff was denied his right to confront witnesses against him where the trial court did not require the State to demonstrate Eleanor's unavailability as a witness before admitting her hearsay statements. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8. Because White v. Illinois, 502 U.S. 346 (1992), is distinguishable from the instant facts and cross-examination of Eleanor would have furthered the truth-seeking function, the unavailability rule was applicable here.

**Motion in Limine**

Prior to trial, Graff filed a motion in limine to prevent the State from introducing Eleanor Graff's hearsay statements identifying her son as the shooter. (C.L. 47-48) In a pre-trial hearing, the State represented that the evidence would show that the offender wearing the red mask pushed Eleanor Graff aside and said, "You're a dead mother fucker," and then shot Monaco three times. (Supp. R. 33) The State argued that four separate witnesses would testify that immediately after the shooting, Eleanor Graff exclaimed, "I know who shot my boyfriend. It was my son Robert. I recognized his voice," that being the person who said, "You're a dead mother fucker." (Supp. R. 33-34) The State contended that Eleanor Graff's hearsay statements were admissible under the spontaneous declaration exception to the hearsay rule. (Supp. R. 34-41)

In response, the defense argued that Eleanor Graff's statement was not based on a personal identification of the offender and that the defense would show that at the time Eleanor made the statement she was intoxicated and under the influence of drugs. (Supp. R. 43) The defense urged the court to grant its motion arguing that Eleanor's statements were unreliable and severely prejudicial to Graff. (Supp. R. 43) The court denied the motion in limine and stated that it would make further rulings when the witnesses hit the stand if their testimony differed from what was heard in the proffer. (Supp. R. 46)

### **Trial Testimony**

At trial, the State presented the testimony of Laurene Labriola who testified that she called 911 after hearing the gunshots. (R. 216) Labriola went downstairs to the scene of the shooting. (R. 216) The police arrived within 90 seconds of her call and Labriola then observed Eleanor Graff in a hysterical state. (R. 218) Labriola heard Eleanor exclaim once, "I know who did this. It was my son." (R. 221)

Timothy Driscoll testified that minutes after the shooting, he observed Eleanor Graff in

the gangway yelling, “That was my son.” (R. 257) Sergeant Gary Johnston arrived at the scene within minutes and asked a hysterical Eleanor Graff what had happened and she exclaimed, “My son just shot my boyfriend.” (R. 276) Within 15 minutes of the shooting, Detective Hoglund arrived at the scene and also questioned Eleanor, who was still in a hysterical state. (R. 291; 295) According to Hoglund, Eleanor kept repeating, “It was Bobby. He shot him. It was Bobby, my son.” (R. 295)

**The Trial Court Erred by Allowing the State to Introduce Eleanor Graff’s Hearsay Statements as Spontaneous Declarations Where the State Failed to Establish That Eleanor Graff Had Personal Knowledge That the Shooter Was Her Son.**

Spontaneous declarations are a well-recognized exception to the rule prohibiting the admission of hearsay evidence. See White v. Illinois, 502 U.S. 346, 355 (1992). See also People v. Poland, 22 Ill.2d 175, 180 174 N.E.2d 804 (1961). Three factors are necessary to bring a statement within the spontaneous declaration exception to the hearsay rule: (1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) the statement must relate to the circumstances of the occurrence. See Poland, 22 Ill.2d at 181. See also People v. House, 141 Ill.2d 323, 381, 566 N.E.2d 259 (1990).

The spontaneity of a statement is to be judged from the totality of circumstances surrounding the event. See People v. Walker, 262 Ill. App. 3d 796, 801, 635 N.E.2d 684 (1<sup>st</sup> Dist. 1994). See also People v. Alvarez, 186 Ill. App. 3d 541, 546 542 N.E.2d 737 (1<sup>st</sup> Dist. 1989). The admissibility of such statements should be determined on a case-by-case basis, after considering all the relevant facts. See In re Marriage of L.R., 202 Ill. App. 3d 69, 81, 559 N.E.2d 779 (1<sup>st</sup> Dist. 1990). When determining whether a statement made after a startling event is a spontaneous declaration, courts will consider:

“the nature of the event, the mental and physical condition of the declarant, the distance traveled from the scene before making the declaration, the presence or

absence of self-interest, the influences of intervening occurrences, and the nature of the circumstances of the statement itself.” People v. Fomond, 273 Ill. App. 3d 1053, 1060, 652 N.E.2d 1322 (1<sup>st</sup> Dist. 1995) quoting M. Graham, Cleary and Graham’s Handbook of Illinois Evidence § 803.3 at 704 (6<sup>th</sup> ed. 1994).

Critically, the evidence must establish that the declarant personally observed the matters which are the subject of the spontaneous declaration. See In re Marriage of L.R., 202 Ill. App. 3d at 81. See also Alvarez, 186 Ill. App. 3d at 546. As Wigmore points out, “Upon the ordinary principle applicable to all testimonial evidence, and therefore to hearsay statements offered under these exceptions, the declarant must appear to have had an *opportunity to observe personally* the matter of which he speaks.” (emphasis in the original) John Henry Wigmore, Wigmore on Evidence, § 1751 at 155 (3d ed. 1940).

In this case, the court erred by allowing the State to elicit Eleanor’s hearsay statement from four separate witnesses where the State failed to establish that Eleanor possessed personal knowledge that the shooter was her son. Although under certain circumstances, the declarant’s statement itself gives rise to the inference that the declarant possessed personal knowledge about the matter of which she speaks, no such inference can be drawn here where the shooter wore a mask, and Eleanor never indicated why she believed that the shooter was her son. See Poland, 22 Ill. 2d at 183.

Although the State represented in the pre-trial motion that Eleanor exclaimed that she knew the shooter was her son because she recognized his voice, the State’s evidence failed to substantiate this assertion. None of the State’s witnesses testified that they heard Eleanor exclaim that she heard her son say, “You’re a dead motherfucker,” or that she recognized his voice. In fact, all four witnesses established that Eleanor made a blanket assertion that the shooter was her son and provided no explanation for why she believed that to be true.

In People v. Poland, a case relied on by the prosecution, the defendant was convicted of

the murder of his wife. Poland, 22 Ill.2d at 175. Mrs. Hansen, a neighbor of the defendant and his wife lived in an apartment directly below the Poland's apartment. See id. at 179. Hansen testified that she heard the defendant and his wife arguing and then heard the defendant's wife running down the front stairs yelling, "No, Buster, don't." Hansen then heard three shots. See id. Several minutes later, an elderly woman, the defendant's mother, appeared at Hansen's door wearing her nightdress and housecoat and said, "Oh, my God, Pat, Buster just shot Maria, and he is going up to school to kill the kids and himself." See id.

On appeal, the defendant argued that the proper foundation had not been laid for the admission of this statement since there was nothing to show that the declarant was present when the shooting occurred. See id. at 180. The Illinois Supreme Court rejected the defendant's argument noting that there was a strong inference from the declaration itself and the surrounding circumstances that the defendant's mother had seen the killing. See id. at 183. The court observed that testimony revealed the defendant's mother lived with the defendant and his wife. The defendant's mother had been seen in the apartment only an hour before the shooting and appeared at Hanson's door, minutes after the shooting, clad only in a nightdress and house coat and wearing slippers. See id. at 182. The court concluded that a fair inference could be drawn from these circumstances that the defendant's mother had come directly from the upstairs apartment and had been present for the commotion. See id.

In contrast, the unique circumstances here fail to give rise to the inference that Eleanor Graff had personal knowledge that the shooter was her son. This court instructed in Fomand, that when determining whether a statement produced from a startling event qualifies as a spontaneous declaration, courts must review the nature and circumstances of the event and consider whether any intervening occurrences transpired during the course of the incident. See

People v. Fomond, 273 Ill. App. 3d 1053, 1060, 652 N.E.2d 1322 (1<sup>st</sup> Dist. 1995).

Eleanor undisputably observed the shooting; however, because the shooter was wearing a mask, Eleanor's declaration that the shooter was her son fails to adequately show that Eleanor possessed personal knowledge of the matter of which she spoke. Under normal circumstances, a declarant's statement identifying someone known to him as an offender would in and of itself suggest that the declarant possessed personal knowledge of the matter of which she spoke. This was the case in Poland. However, because of the unique nature of this incident and the intervening occurrence that the offenders wore ski masks concealing their identity, the State was obligated to present evidence establishing Eleanor's basis of belief that the shooter was Graff.

The prosecution apparently understood that it was required to demonstrate Eleanor's basis for believing that the shooter was her son as evidenced by Prosecutor Walsh's proffer at the pre-trial hearing on Graff's motion in limine. Walsh represented to the court that the evidence would demonstrate that Eleanor exclaimed, "I know who shot my boyfriend, it was my son Robert. I recognized his voice," that person who said, "You're a dead mother fucker." (Supp. R. 33-34) However, the State's evidence never established that Eleanor heard her son's voice during the shooting or told anyone after the shooting that she recognized her son's voice.

Laurene Labriola and Timothy Driscoll, an eye-witness to the shooting, never testified that they heard either of the offenders say, "You're a dead motherfucker," prior to hearing the shots fired. (R. 227; 254; 266) Labriola admitted that she heard no voices prior to the gunshots and Driscoll testified that the only voice he heard immediately before the gunshots was the voice of a woman screaming. (R. 227; 254; 266)

Although Ronnie Bustos testified that Graff yelled, "Give me all your loot or you're a dead mother fucker," before shooting the weapon in the air, Bustos' testimony was unreliable,

contradicted by other State's witnesses, and inherently suspect. (R. 403) The entirety of Bustos' testimony must be viewed with skepticism as he was an accomplice to this offense, negotiated a deal with the State in exchange for his testimony against Graff, and admitted on the witness stand that he would lie to protect his brother and any fellow gang members. (R. 430-431)

Specifically on this point, Bustos' testimony that Graff yelled, "You're a dead mother fucker," before shooting Monaco was thoroughly discredited. First, as evidenced by Bustos' prior written statement, he never told the police that Graff yelled, "You're a dead mother fucker." (R. 450) Second, Bustos' testimony on this matter was contradicted by two of the State's witnesses, including an eye-witness to the offense. (R. 227; 254; 266) Moreover, at the pre-trial hearing on the hearsay statements, the prosecution represented that the offender who shot Monaco was wearing a red ski mask and was armed with a handgun. (R. 33) That individual "pushed past Eleanor Graff, and he was heard to say, "You're a dead mother fucker," at which time he shot Ronald Monaco three times in the back as Mr. Monaco attempted to flee." (R. 33) Notably, Bustos admitted in his written statement and on direct examination that he was the offender who pushed past Eleanor. (R. 403; 450) Arguably, the evidence suggests that if either of the offenders made any statements to Monaco, Bustos was the source of those statements.

Statements made in response to a startling event are presumed reliable if they pass the foundational requirements set out above. Reliability can not be presumed where the State fails to prove that the declarant had personal knowledge of the matter of which he speaks. "Excitement alone, without the opportunity to observe, cannot meet the essential test of reliability." State v. Dame, 488 A.2d 418, 425 (R.I. 1985). Because the State failed to establish Eleanor Graff's opportunity to observe the identity of the shooter, the reliability of her statements identifying Bobby Graff as the shooter cannot be presumed.

Furthermore, the reliability of Eleanor's statements are suspect in light of her mental condition at the time the statements were made. As this court pointed out in Fomond, the mental and physical condition of the declarant is a consideration for determining whether a hearsay statement comes within the spontaneous declaration exception to the hearsay rule. See People v. Fomond, 273 Ill. App. 3d 1053, 1060, 652 N.E.2d 1322 (1<sup>st</sup> Dist. 1995) quoting M. Graham, Cleary and Graham's Handbook of Illinois Evidence, § 803.3 at 704 (6<sup>th</sup> ed. 1994).

Because the evidence suggested that Eleanor was under the influence of alcohol and drugs during the shooting and suffered from a drug and alcohol dependency illness which may have distorted her ability to perceive the events, the reliability of her statements are further called into question. (R. 380; 396) Eleanor's exclamations identifying her son as the shooter could easily have been a product of drug induced paranoia and the State failed to suggest otherwise. Without adequate evidence establishing Eleanor's basis for believing that the shooter was her son, her hearsay exclamations simply do not carry the presumption of reliability that is associated with properly admitted spontaneous declarations.

Of grave concern, is the State's misrepresentation of the facts with regard to this issue during the pre-trial hearing and during closing arguments. First, the State misrepresented what the evidence would show during the pre-trial hearing on Eleanor Graff's hearsay statement. As previously noted, the State represented to the court that the evidence would demonstrate that Eleanor declared, "I know who shot my boyfriend, it was my son, Robert. I recognized his voice, that person who said, 'You're a dead mother fucker.'"

A review of all four state's witnesses testimony reveals that Eleanor Graff never stated that she knew the shooter was her son because she recognized his voice. At the conclusion of the pre-trial hearing, the trial court stated that it would reconsider its ruling on the admissibility of

this hearsay evidence if the live testimony differed from the State's proffer. However, when defense counsel renewed its objection arguing that the State had failed to meet its foundational requirements, the court again denied defense counsel's motion. For the reasons stated above, the trial court erred by denying Graff's motion.

The error of admitting this evidence was exacerbated by the prosecution's misstatement of the evidence during closing arguments. A prosecutor must confine his arguments to the evidence and to "reasonable inferences" that follow from it. See People v. Linscott, 142 Ill.2d 22, 566 N.E.2d 1355, 1362 (1991). Here, the evidence merely demonstrated that immediately after the shooting, Eleanor Graff exclaimed in essence, "I know who did this, it was my son, Bobby." However, during rebuttal argument, Prosecutor Walsh stated, "She identified his voice, 'It was my son, Bobby. I recognized his voice.'" (R. 571) Although the State theorized that Eleanor identified Bobby Graff as the shooter because she recognized his voice, the evidence never established that she declared, "It was my son. I recognized his voice." It was highly improper for Prosecutor Walsh to argue to the jury that Eleanor had actually stated, "I recognized his voice," when the evidence failed to confirm this assertion. See also Argument V.

In sum, the State presented no evidence establishing Eleanor's basis for believing that the shooter was her son. None of the witnesses who testified to her hearsay remarks confirmed that she stated that she recognized her son's voice. In fact, only Ronnie Bustos, whose testimony was thoroughly discredited, even confirms that Graff spoke during the incident. Accordingly, the State failed to meet the foundational conditions necessary for admission of the Eleanor Graff's hearsay statements.

**Graff Was Denied His Confrontation Rights and His Right to a Fair Trial under Both Our Illinois and Federal Constitutions Where the State Never Established Eleanor Graff's Unavailability as a Witness.**

Even if this court determines that the State met the foundational requirements for the admission of Eleanor Graff's statements, the State should have been required to demonstrate Eleanor Graff's unavailability as a witness before the statements could be introduced to the jury. Because the accuracy of the truth seeking process would have been greatly advanced by cross-examination of Eleanor Graff, the unavailability rule should have been applied in this case. The court's failure to apply the unavailability rule in this case denied Graff his right to be confronted by witnesses against him and his right to a fair trial. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8.

In Ohio v. Roberts, the United States Supreme Court held that when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Ohio v. Roberts, 448 U.S. 56, 66 (1980). Even then, his statement is admissible only if it bears adequate "indicia of reliability." See id. Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. See id.

The Supreme Court in White v. Illinois made clear that the spontaneous declaration exception to the prohibition against hearsay is a firmly rooted hearsay exception and presumptively reliable. White v. Illinois, 502 U.S. 346, 357 (1992). White also made clear that the unavailability rule was inapplicable in that case since the rule would do little to improve the accuracy of fact finding. Id. The Court acknowledged that Roberts held that "normally" the Confrontation Clause requires a showing that the declarant is unavailable but concluded that "Roberts must be read consistently with the question it answered, the authority it cited, and its own facts." White, 502 U.S. at 353-54.

Although under the facts present in White, the Court concluded that an unavailability rule

would not facilitate the fact finding process, under the facts present in this case, application of the unavailability rule would serve to improve the fact finding process and should have been applied. Just as the Supreme Court held that Roberts must be analyzed on its own facts, likewise, White must be read consistently with the question it answered, the authority it cited, and its own facts. Accordingly, White is not dispositive of the question presented to this court and must be analyzed on its own facts and circumstances. See White, 502 U.S. 353-54.

A review of the rationale employed in White demonstrates that White is distinguishable from the case at bar and that the unavailability rule should be applied under the circumstances present here. In White, the defendant was convicted of residential burglary, unlawful restraint, and aggravated criminal sexual assault of S.G., a four year old. See White, 502 U.S. at 349. The evidence at trial established that in the early morning hours of April 16, 1988, Tony Devore, S.G.'s babysitter, was awakened by S.G.'s scream. See id. Devore went to S.G.'s bedroom and observed the defendant leaving the room. Devore knew the defendant as a friend of S.G.'s mother. See id. Devore asked S.G. what happened and S.G. stated that the defendant put his hand over S.G.'s mouth, choked her, threatened to whip her if she screamed, and "had touched her in the wrong places." See id.

S.G.'s mother, Tammy Grisby returned home roughly 30 minutes later and testified that she found her daughter "scared" and a "little hyper." Grisby asked her daughter what happened and S.G. repeated her claims that the defendant choked and threatened her, adding that he had "put his mouth on her front part." See id. Grisby called the police and approximately 45 minutes later, Officer Lewis arrived and questioned S.G. See id. S.G. essentially repeated the same story that she had first reported to Devore and then later to Grisby. See id. at 350. Roughly four hours after the incident, S.G. was taken to the hospital where she was examined by an

emergency room nurse and doctor. See id. In response to questioning by the nurse and doctor, S.G. recounted the events as she had to Devore, Grisby, and Officer Lewis. See id.

S.G. never testified at trial and the trial court neither made nor was asked to make a finding that S.G. was unavailable to testify. See id. The defendant objected to the testimony of Devore, Grisby, Officer Lewis, and the hospital personnel on hearsay grounds. The court overruled defendant's objections finding that S.G.'s statements to Devore, Grisby, and Lewis were admissible pursuant to the spontaneous declaration exception to the hearsay rule, while S.G.'s statements to the hospital personnel were admissible as statements made in the course of securing medical treatment. See id. at 350-51.

The United State's Supreme Court, relying largely on its prior decision in United States v. Inadi, 475 U.S. 387 (1986), refused to extend the unavailability rule to the facts before it. See id. at 354-55. Adopting the reasoning in Inadi, the Court noted that the evidentiary rationale for permitting spontaneous declarations is that such declarations are made in contexts that provide substantial guarantees of their trustworthiness and that the unavailability rule would do little to improve the accuracy of fact finding. See id. at 355.

The White court analogized spontaneous declarations to co-conspirator statements, which were the subject of the court's analysis in Inadi. United States v. Inadi, 475 U.S. 387 (1986). In Inadi, the Court was called upon to determine whether the Confrontation Clause requires the Government to show that a nontestifying co-conspirator is unavailable to testify, as a condition for admission of that co-conspirator's out-of-court statements. See id. at 388. The Court held that requiring the Government to first demonstrate the co-conspirator's unavailability as a pre-condition to the admission of his hearsay statements was unnecessary. See id. at 395.

The Court held that the unavailability rule developed in cases involving former testimony

because former testimony is only a weaker substitute for live testimony and former testimony does not have independent evidentiary significance. See id. at 394. In contrast, co-conspirator statements made in the course of a conspiracy provide invaluable evidence of the conspiracy's context that cannot be replicated, even if the declarant testified to the same matters in court. See id. at 395. The Court observed that conspirators are likely to speak differently when talking to each other in furtherance of the conspiracy and even if the co-conspirator takes the stand, his in-court testimony will seldom reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy. See id. In short, the admission of co-conspirators' declarations into evidence actually further the "Confrontation Clause's very mission," which is to "advance the 'accuracy of the truth-determining process in a criminal trial.'" Id. at 396 citing Tennessee v. Street, 471 U.S. 409, 415 (1985).

With this rationale in mind, the White court determined that the spontaneous declarations of S.G. had many of the same features of the co-conspirators' statement at issue in Inadi. Like statements made in the course of a conspiracy, declarations made spontaneously in response to a startling event provide invaluable evidence of the context of the incident that cannot be replicated, even if the declarant takes the stand. See id.

The principles in White and Inadi that justified abandoning the unavailability rule in those cases are simply not present under the facts presented in this case. First, unlike the co-conspirator's statements in Inadi and the spontaneous declarations in White, Eleanor Graff's conclusory exclamation that her son was the shooter does not have independent evidentiary value of the context of the shooting. Eleanor Graff's hearsay remarks did not recount the events of the shooting nor did her statement explain why she believed the shooter was her son; her declaration was merely a blanket expression of her belief that the shooter was her son.

Second, the context under which Eleanor Graff made the hearsay statements does not provide substantial guarantees of trustworthiness such that the unavailability rule would do little to improve the accuracy of fact finding. Rather, subjecting Eleanor Graff to cross-examination would have significantly advanced the accuracy of the truth-determining process and furthered the Confrontation Clause's mission.

Cross-examination would have revealed Eleanor's basis for believing that the shooter was her son. Perhaps Eleanor would have acknowledged that she recognized his voice, or maybe Eleanor would have explained that she recognized the clothing he was wearing or his gait. Or just as likely, Eleanor might have admitted that she really had no basis for believing that the shooter was her son, and that she made the accusation in a panicked and paranoid state because her son did not get along with her boyfriend. Critically, defense counsel could have inquired into whether Eleanor was under the influence of mind altering drugs and whether she suffered from a drug and alcohol dependency illness that may have affected her ability to accurately perceive the events.

In exempting the Government from demonstrating the unavailability of the witness in White, the Court focused on the inherent reliability of the statement since it was made in a moment of excitement - without the opportunity to reflect on the consequence of one's exclamation. See White, 502 U.S. at 356. However, bias and motive to fabricate are not the only concerns for determining the reliability of an out-of-court statement. See People v. House, 141 Ill.2d 323, 382, 566 N.E.2d 259 (1990). As acknowledged by our supreme court, critics point out that "[w]hile a startling event may ensure sincerity, it is likely to distort the observer's perception and memory, thus rendering the declarant's observations unreliable." See id. citing Inwinkelried, The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A

Lesson Slowly Learnt - and Quickly Forgotten, 41 U. Fla. Rec. 215, 223-27 (1989)

Unlike the situation here, no question was raised in White regarding the declarant's ability to perceive the events which were the subject of her declarations. Thus, cross-examination arguably would not have significantly furthered the truth seeking function. However, here, Eleanor Graff's ability to perceive the events and her basis for believing that the shooter was her son was the sole inquiry for determining the reliability of Eleanor's statements. As such, the unavailability rule would have advanced the truth seeking function and the trial court should have required that the State make showing of unavailability before admitting Eleanor's declarations.

**The Erroneous Admission of Eleanor's Hearsay Statements Are not Harmless Error.**

Because the evidence of guilt was not overwhelming, the State cannot demonstrate that the admission of Eleanor's hearsay exclamations was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, (1967). For the reasons adequately addressed in Argument II the evidence against Graff was marginal and Eleanor's statements identifying her son as the shooter were highly prejudicial.

**V. GRAFF WAS DENIED A FAIR TRIAL WHEN DURING CLOSING ARGUMENTS THE PROSECUTORS: (1) FABRICATED EVIDENCE THAT ELEANOR GRAFF EXCLAIMED THAT SHE KNEW THE SHOOTER WAS HER SON BECAUSE SHE RECOGNIZED HIS VOICE; (2) MISREPRESENTED THE ROLE OF THE JURY BY ASKING THE JURY TO SPEAK FOR THE VICTIM; AND (3) INFLAMED THE PASSIONS OF THE JURORS BY CALLING GRAFF THE DEVIL AND COMMENTING ON HIS APPEARANCE AT TRIAL.**

Robert Graff was denied a fair trial when the prosecutors committed numerous prejudicial errors in their closing arguments. U.S. Const., amend XIV; Ill. Const. 1970, art I, §2. Although the State has wide latitude in making a closing argument, the State also has an ethical obligation to refrain from presenting improper and prejudicial argument. See People v. Smith, 141 Ill.2d

40, 565 N.E.2d 900, 908 (1990). Improper remarks by the State will merit reversal if they result in prejudice to the defendant, considering the context of the language used and its relationship to the evidence, and its effect on the defendant's right to a fair trial. See id. Because there are no substantive issues of fact, this court should review this issue de novo. See People v. Krueger, 175 Ill.2d 60, 675 N.E.2d 604, 607 (1996). The cumulative prejudicial effect of these errors coupled with the fact that the evidence of guilt was closely balanced warrants reversal and entitles Graff to a new trial.

### **Misstatement of Evidence**

First, the prosecution repeatedly misstated the evidence by arguing to the jury that Eleanor Graff knew the shooter was her son, because she recognized his voice. Graff maintains that the trial court erred by permitted the State to introduce the hearsay statements of Eleanor Graff naming her son as the shooter. See Argument IV. However, even if this court concludes that the court did not err by admitting into evidence Eleanor Graff's statements, Graff was seriously prejudiced when, over defense counsel's objection, the court allowed the prosecution to misstate the evidence during closing arguments. During opening close and rebuttal the prosecution made the following arguments:

And there is Elinore Graff. "It was my son, Bobby." I don't care how hysterical you will get once you see your boyfriend shot, but you're going to recognize the voice of your own son. (R. 541)

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One thing that Bobby cannot make go away is the fact that a mother recognizes the voice of her children. He can't make that go away. And in his anger and hatred of Ron Monaco, he was stupid enough to speak in the presence of his mother. Because he hated Ron badly, he didn't care. And because of that, his mother identified him to Driscoll, to Labriola, to Sergeant Johnston, to Hوجلund. She identified his voice. It was my son, Bobby. I recognized his voice. (R. 570-571)

Because the State presented no testimony that Eleanor Graff exclaimed, "I know it was

my son, Bobby, I recognized his voice,” the State should not have been permitted to quote Eleanor as having made that statement. Notably, the State did not simply argue that Eleanor must have recognized her son’s voice, but rather, reiterated Eleanor’s remarks in the first person implying that she actually stated that she recognized his voice.

The State’s improper argument served to unfairly enhance the hearsay statements of Eleanor Graff since the evidence never demonstrated Eleanor’s basis for believing that the shooter was her son. Although the State theorized that Eleanor must have recognized her son’s voice, the evidence failed to substantiate this theory. To encourage the jury to accept its theory that Eleanor recognized her son’s voice, the prosecution impermissibly argued that Eleanor expressly stated that she recognized his voice. This argument served one of two impermissible purposes: (1) it distorted the jury’s recollection of the testimony received into evidence; and (2) it implied that the prosecution had knowledge that was not presented to the jury that on some previous date Eleanor told authorities that she knew the shooter was her son because she recognized his voice.

The prosecution also unfairly implied that Eleanor Graff had further cooperated with the police immediately after the shooting and tried to persuade Bobby to turn himself in and confess guilt. During opening close, Prosecutor Clarke argued:

Elinore Graff initially was trying to get her son to do the right thing, which is, yes, she cooperated with the police. (R. 547)

This misstatement of the facts severely prejudiced Graff as it afforded unwarranted credibility to Eleanor’s hearsay declarations naming Graff as the shooter. The prosecutor erroneously argued that Eleanor Graff had cooperated with police and had even tried “to get her son to do the right thing.” (R. 547) However, the State presented no evidence substantiating this argument. The prejudice emanating from these comments was overwhelming since the prosecutor unfairly

assured the jury that it could rely on Eleanor's hearsay declarations naming Graff as the shooter.

### **Aligning the Jury with the Prosecution**

Prosecutor Clarke also misstated the function of the jury and diminished the presumption of innocence in her closing remarks when she characterized the jurors as advocates of the victim.

At the close of the opening argument, Prosecutor Clarke stated:

Ron Monaco is not here today. We're asking you to speak for him, find this defendant guilty. (R. 547)

In People v. Thomas, the prosecutor argued to the jury, "There's nobody here for the People, just you." In the view of the court, the prosecutor's declaration was a "perversion of the principle that a jury is composed of non-partisans who function under the presumption that a defendant is innocent until proven otherwise." People v. Thomas, 146 Ill. App. 3d 1087, 1089, 497 N.E.2d 803, 804 (5th Dist. 1986).

In the case at bar, the prosecutor's statements were even more prejudicial than those in Thomas. Here, the prosecutor asked the jurors to speak for the victim, Ron Monaco. This statement opposes the rule of law that jurors are non-partisans who operate under the presumption that a defendant is innocent until proven guilty. The prosecutor aroused the passions of the jury and distorted its role by misleading the jurors into believing that they represent the victim.

### **Prosecutor's Gratuitous Reference to Graff as the "Devil" and Impermissible Comments on Defendant's Appearance.**

Lastly, the prosecution violated Graff's right not to be convicted except upon evidence admitted at trial and his privilege against self-incrimination when Prosecutor Walsh gratuitously referred to Graff as the devil and commented on Graff's appearance at trial. U.S. Const. amends. V, XIV; Ill. Const. 1970, art. I, §§ 2, 10. In rebuttal, Prosecutor Walsh argued:

The little bits that you heard from everybody all fit together, and they point to one person. This is the person that they point to. Now he sits there with his shirt and his tie on. But on the night of the murder, he didn't look so innocent, alright? He didn't look so innocent. Because underneath the mask was the devil. And I'm reminded of something that my trial partner said one time in a murder case. He said when you're prosecuting the devil, sometimes you have to go to hell to find witnesses against him. And that's where we went. And that's where Ronny came from. But I didn't pick Ronny. He did. (R. 571-572)

Initially, the prosecutor inflamed the jury when it referred to Graff as the "devil."

Although a prosecutor may denounce the accused, reflect on the defendant's credibility, and urge the fearless administration of justice based on the facts, it may not engage in inflammatory arguments designed solely to arouse the passions of the jury. See People v. Quiroz, 257 Ill. App. 3d 576, 628 N.E.2d 542, 549 (1<sup>st</sup> Dist. 1993). In Quiroz, this court concluded that the prosecutor's references to the defendant as being a "disciple of Satan," were clearly improper since instead of drawing upon the evidence at trial, the prosecutor denounced the defendant by drawing upon religious imagery with no relevance to the facts of the case. See id.

As in Quiroz, religious imagery played no permissible role in Graff's case. Prosecutor Walsh's denouncement of Graff as the devil was a transparent attempt to inflame the passions of the jury and stir religious feeling amongst the jurors.

Moreover, it was improper for the jury to comment on Graff's appearance off the witness stand since Graff enjoyed the right to remain silent and the right not to be convicted except upon evidence admitted at trial. See People v. Foss, 210 Ill. App. 3d 91, 559 N.E.2d 254 (2d Dist. 1990) (holding that prosecutor erred when she invited the jury to consider the defendant's demeanor when the witnesses testified). See also People v. Heard, 187 Ill.2d 36, 73, 718 N.E.2d 58 (1999) (although finding any error waived, the court did not foreclose the possibility that a prosecutor's comment on the defendant's appearance off the witness stand could violate the defendant's constitutional rights). Evidence includes all the means by which an alleged matter of

fact is established or disproved. See Foss, 559 N.E.2d at 256.

Defendant's appearance and demeanor, on any respect other than when testifying, does not constitute evidence in the case. See id. In this case, the prosecutor unfairly commented on the fact that Graff was dressed in a nice shirt and tie during the trial but that his appearance at trial was only a mask and behind the mask was the devil. These comments were not based on any evidence presented at trial, but rather, were designed to distract the jury from the evidence and convict Graff based on inflamed emotions.

The prosecutor also utilized this tactic to rehabilitate the State's key witness, Ronnie Bustos. The prosecutor urged the jury to accept the testimony of Ronnie Bustos despite his serious credibility problems. The State basically argued that the jury should not punish the prosecution by discrediting his testimony since it was the defendant who "chose" the witnesses not the prosecution. This argument was highly improper as it was not based on the evidence and served to distract the jury from its proper function.

Although defense counsel objected to the prosecutor's misstatement of the evidence with regard to Eleanor Graff's hearsay statement, defense counsel failed to object to the additional complained-of arguments. This court should nonetheless decide this issue under the plain error doctrine, because the evidence in this case is closely balanced and the cumulative effect of the prosecution's remarks denied Graff a fair and impartial trial. Ill. Sup. Ct. R. 615(a). See also People v. Miller, 302 Ill. App. 3d 487, 495, 706 N.E.2d 947, 954 (1st Dist. 1998). Further, this court should consider the cumulative effect of these improper statements, rather than review each remark separately. See People v. Quiver, 205 Ill. App. 3d 1067, 1072, 563 N.E.2d 991, 995 (1st Dist. 1990).

As adequately addressed in Argument II, the evidence in this case was closely balanced

and the arguments made by the prosecution could have reasonably affected the verdict. No physical evidence tied Graff to the shooting, the hearsay remarks by Eleanor and the prior statement of Tom Kroll were arguably inadmissible, and although prejudicial to Graff, not particularly strong evidence of his guilt. Furthermore, Ronnie Bustos' testimony was thoroughly discredited, and defense counsel demonstrated that Ronnie Bustos likely committed the shooting with his brother Chris, not Graff. The cumulative effect of the prosecutor's improper remarks substantially prejudiced Graff and denied him a fair trial where the evidence of guilt was closely balanced.

Alternatively, this court should consider this issue because failure to preserve the issue for appeal constitutes ineffective assistance of counsel. U.S. Const. amend. VI, XIV; Ill. Const. 1970, art I, § 8. Courts will reach the merits of issues raised even though the issues were not properly preserved where failure to file a post-trial motion or to timely object constituted ineffective assistance of counsel. See People v. Eddmonds, 101 Ill.2d 44, 64, 461 N.E.2d 347, 357 (1984). Defense counsel's performance fell beneath professional norms when he failed to object to the prosecution's improper arguments. Because defense counsel never objected to the prosecution's efforts at distorting the function of the jury, and its blatant attempts to inflame the jury's passions, Graff was denied a fair trial and the jury's verdict is suspect since it was influenced by erroneous and inflammatory remarks. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

Finally, the prosecution's repeated errors cannot be harmless. The harmless error doctrine may only be invoked to dispose of claims of error that have a *de minimus* impact on the outcome of the case. See People v. Blue, 189 Ill.2d 99, 724 N.E.2d 920, 940 (2000) For the reasons stated in Argument II, the evidence here was closely balanced and the prosecution's

repeated prejudicial comments did not have a *de minimus* impact on the outcome of the case.

**VI. GRAFF IS ENTITLED TO A NEW TRIAL WHERE THE CUMULATIVE EFFECT OF THE COURT'S EVIDENTIARY ERRORS AND THE IMPROPER ARGUMENT BY THE PROSECUTION DENIED GRAFF A FAIR TRIAL.**

Each error addressed in Mr. Graff's brief was sufficiently prejudicial in and of itself to necessitate a new trial. However, in the event that this court reaches a different conclusion, Mr. Graff is entitled to a new trial because the cumulative impact of the trial errors and the prosecutorial misconduct severely prejudiced Graff and deprived him of a fair trial. See, e.g., People v. Blue, 189 Ill.2d 99, 724 N.E.2d 920, 940 (2000); People v. Smith, 141 Ill.2d 40, 565 N.E.2d 900, 917 (1990); People v. Singer, 256 Ill. App. 3d 258, 628 N.E.2d 592, 601 (1<sup>st</sup> Dist. 1993).

The evidence of Graff's guilt was marginal as it was based on unreliable and arguably inadmissible hearsay, an inadmissible prior statement of a witness who recanted his original statement, and the inherently suspect and wholly contradicted testimony of the co-defendant in the case. As such, the combination of the court's erroneous evidentiary rulings and the improper prosecutorial argument stripped Graff of his constitutional right to due process of law and requires that his conviction be reversed and the matter remanded for a new trial where only competent evidence is admitted against him.

**VII. THE JUDGE'S CONSIDERATION OF AGGRAVATING EVIDENCE BEYOND THAT PERMITTED BY STATUTE REQUIRES A NEW SENTENCING HEARING.**

The Illinois Supreme Court has granted a defendant's Petition for Leave to Appeal raising a claim that the State's evidence in aggravation violated the "Rights of Crime Victims and Witnesses Act" (hereafter "the Act"), and the case is currently pending before that Court. 725 ILCS 120/1 et seq (West 1996); People v. Harold Richardson, No. 88670, Petition for Leave to

Appeal allowed February 2, 2000 from Rule 23 Order issued by this Court in 1-98-1348, November 8, 1999. Although this Court rejected such a claim in People v. Benford, 295 Ill. App. 3d 695, 692 N.E.2d 1285 (1st Dist. 1998), appellant is raising this issue because of the possibility that Benford will be overruled by the Supreme Court in Richardson, and because Benford conflicts with a more recent Illinois Supreme Court case, People v. Hope, 184 Ill. 2d 39, 702 N.E.2d 1282 (1998). Because this issue is a legal one, a de novo standard applies to this issue. See People v. \$1,124,905 U.S. Currency, 177 Ill. 2d 314, 335, 685 N.E.2d 1370 (1997).

The Act was violated in this case because the Act permits victim impact statements only from “a single representative” of the family (725 ILCS 120/3(a) (West 1998)) and in this case there were two such statements. (R. 606-612)

In Benford, this Court acknowledged that the statute had been violated in that case, but held that a provision in the Act had the effect of barring defendants from raising issues based on violations of the Act. Benford, 295 Ill. App. 3d at 700, citing 725 ILCS 120/9 (West 1996), which states, “Nothing in this Act shall create a basis for vacating a conviction or a ground for appellate relief in any case.” But this conclusion in Benford is questionable in light of the Illinois Supreme Court’s subsequent decision in Hope, in which the Supreme Court relied in part on the Act to hold that victim impact statements from offenses other than the one for which the defendant was being sentenced could not be introduced at sentencing. Hope, 184 Ill. 2d at 49-50. The Hope holding, and the granting of leave to appeal in Richardson, create the possibility that the Supreme Court may view 725 ILCS 120/9, with its attendant restriction on the right of the Appellate Court to render a judgment correcting error, as violative of separation of powers, as argued by the appellant in Richardson. (See Rule 23 order in Richardson, at 2-5.) See McAlister v. Shick, 147 Ill. 2d 84, 95, 588 N.E.2d 1151 (1992); People v. Crawford Distributing Co., 53 Ill.

2d 332, 338, 291 N.E.2d 648 (1972).

It is true that the Victim's Rights Amendment of the Illinois Constitution, which became effective November 3, 1992, contains language similar to the Act, in that it states, "Nothing in this Section or in any law enacted under this Section shall be construed as creating a basis for vacating a conviction or a ground for appellate relief in any criminal case." Ill. Const., art. I, sec 8.1(d). But the Act as a whole was already in existence when this Amendment went into effect, having originally been enacted in 1984 by Public Act 83-1432. And while the specific language restricting victim impact statements to a "single representative" was inserted into the Act after the constitutional amendment went into effect, this additional language cannot logically be viewed as having been "enacted under" the constitutional provision, since it restricted the pre-existing rights of victims. Compare P.A. 88-489, effective 1994, inserting "single representative" restriction, with pre-existing statute, Ill. Rev. Stat. 1991, ch. 38, par. 1403(a)(3), containing no such restriction.

Unless it is clear to a reviewing court that the weight placed on an improper aggravating factor was insignificant, the sentence should be vacated and the cause remanded for resentencing. People v. Bourke, 96 Ill. 2d 327, 332, 449 N.E.2d 1338 (1983); People v. White, 114 Ill. 2d 61, 66-67, 499 N.E.2d 467 (1986); People v. Ross, 303 Ill. App. 3d 966, 984-985, 709 N.E.2d 621 (1st Dist. 1999). Here, the judge stated, as part of his sentencing pronouncement, that he heard "the eloquent statements of many of the parties on both sides of the case" (R. 641) The court continued, "you caused the death of a fifty-three year-old man who was a bread winner, a husband, a father and a grandfather to children. And he was a – He was a good father and a good grandfather and a good husband." (R. 641-642) These remarks by the trial judge negate any possibility that the improper impact statements were disregarded by the judge or given only

insignificant weight.

Although defense counsel did not object to the admission of the improper victim impact statements, Graff asks this Court to consider the issue under the doctrine of plain error, since the admission of the improper statements constitutes a substantial error which prejudiced his right to a fair sentencing hearing. Supreme Court Rule 615(a) (West 1996); Ross, 303 Ill. App. 3d at 984 (“an allegation that a trial court relied upon an improper factor in sentencing implicates a fundamental right; we will reach such allegations notwithstanding waiver”).

In light of the erroneous consideration of this material in aggravation, Graff asks this Court to vacate his sentence and remand the cause for a new sentencing hearing.

### **CONCLUSION**

For the foregoing reasons, Robert Graff, Defendant-Appellant, respectfully requests that this Court reverse his conviction for first degree murder and armed robbery. Alternatively, Graff respectfully requests that this Court reverse his conviction and remand for a new trial, or minimally, vacate his sentence and remand for resentencing.

Respectfully submitted,

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