IN THE SUPREME COURT OF IOWA
Supreme Court No. 18–2197

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DERRIS L. SWIFT,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HON. HENRY W. LATHAM II, JUDGE

APPELLEE'S BRIEF

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I. Did the court err in permitting the State to impeach the recanting witnesses with extrinsic evidence of their prior inconsistent statements on the critical issue of the identity of the shooter?

Authorities

State v. Plaster, 424 N.W.2d 226 (Iowa 1988)
State v. Putman, 848 N.W.2d 1 (Iowa 2014)
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State v. Turecek, 456 N.W.2d 219 (Iowa 1990)
State v. Valdez, No. 10–0183, 2014 WL 1495485 (Iowa Ct. App. Apr. 16, 2014)
State v. Ware, 338 N.W.2d 707 (Iowa 1983)
State v. Wolfe, 316 N.W.2d 420 (Iowa 1981)
Fed.R.Evid. 607
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Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive* Evidence, 11 Colum. J. Gender & L. 1 (2002)
Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.612:1
Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.613:1
Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. Rev. L. & Soc. Change 191 (2008)
1 John W. Strong, *McCormick on Evidence* § 34 (5th ed.1999)
IIIA Wigmore, *Evidence* §§ 1036–37 at 1041–46 (Chadbourn rev. ed. 1970)

ROUTING STATEMENT

Swift seeks retention on his argument that "provisions of Senate File 589 do not apply to criminal appeals that were commenced prior to July 1, 2019." *See* Def's Br. at 17. That claim was recently resolved. *See State v. Macke*, No. 18–0839, 2019 WL 4382985, at *3–8 (Iowa Sept. 13, 2019). Swift's ineffective-assistance claims may be reached if the record is sufficient to resolve them, because notice of appeal was filed before July 1, 2019. *See* Notice of Appeal (12/21/18); App. 48. All of the remaining challenges in Swift's appeal may be routed to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Derris L. Swift appeals from his convictions for intimidation with a dangerous weapon, a Class C felony, in violation of Iowa Code section 708.6(1) (2018); willful injury causing serious injury, a Class C felony, in violation of Iowa Code section 708.4(1); possession of marijuana, a serious misdemeanor, in violation of Iowa Code section 124.401(5); and attempted murder, a Class B felony, in violation of Iowa Code section 707.11. Swift was sentenced to concurrent terms of incarceration, producing a 25-year prison term with a 70% minimum before parole eligibility. *See* Sentencing Order (12/20/18); App. 45.

Swift's sole challenge in this appeal is that the trial court erred by admitting out-of-court statements (or that counsel was ineffective for failing to preserve error on challenges to those statements). Each of the challenged statements was made by a witness who testified at his trial during the State's case-in-chief, but whose testimony varied from their prior statements. Swift argues that those prior statements were not admissible through any hearsay exception, and that offering them to impeach recanting witnesses was improper under *Turecek*.

Course of Proceedings

The State generally accepts Swift's description of the relevant course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 18–27.

Facts

On January 24, 2018, Ashanti Dixon was shot multiple times by a man who approached her car on foot, fired at close range, and fled. Ashanti was struck and injured, but she managed to drive away and seek medical attention. She told multiple people that Swift shot her. Officers who responded to the area surrounding the shooting found Swift fleeing through a nearby cornfield. At trial, both Ashanti and her mother (Ameshia Dixon) recanted their previous statements about the identity of the shooter and events related to the shooting.

At the time, Eziah Dixon lived with Ashanti and Ameshia at Ameshia's apartment, at 3410 Heatherton. *See* TrialTr. 79:17–81:5. On the morning of the shooting, Eziah saw Ashanti and Swift arrive at Ameshia's apartment in Ashanti's car, and he saw them "arguing." *See* TrialTr. 82:8–84:3. Eziah could hear them yelling and he could tell it was an argument. *See* TrialTr. 85:20–25; TrialTr. 96:7–97:7. Ashanti came into the apartment by herself, then left again, got in her vehicle, and drove away alone. *See* TrialTr. 84:4–85:10. Eziah could see that Swift had exited the vehicle, and Eziah saw Swift walking away from where Ashanti's vehicle had just been parked. *See* TrialTr. 85:11–19. About 15 to 20 minutes later, Ameshia got a call notifying her that Ashanti had been shot. *See* TrialTr. 86:4–88:5. Ameshia reacted with visible emotion and left the apartment immediately. Ten minutes later, police arrived at the apartment. Eziah gave them a fake name. At trial, he said he did that because he "was nervous." *See* TrialTr. 87:10–90:7. Eziah had always known Swift as "Debo." *See* TrialTr. 95:15–96:3.

Ityleonia Watson was Eziah's girlfriend, and she was with him in Ameshia's apartment. *See* TrialTr. 101:17–102:22. Ityleonia heard Ashanti and Swift arguing. *See* TrialTr. 102:23–104:24. Ityleonia also described Ameshia's emotions when she learned Ashanti was shot—

"[i]t was just a whole bunch of emotions in one," and it included "anger, sad, hurt." *See* TrialTr. 105:8–106:4. The prosecutor asked Ityleonia about a variety of statements that she made to police, but she stated that she did not remember making most of them. *See* TrialTr. 106:15–110:20. Swift's counsel objected to leading questions and objected to the prosecutor impeaching her own witness, but did not object based on hearsay rules or improper impeachment content. *See* TrialTr. 107:6–109:18. On cross-examination, Swift's counsel had Ityleonia clarify that, if those statements had been true, she would have remembered those facts—and she did not. *See* TrialTr. 111:4–115:12.

Ashanti Dixon testified that when she and Swift arrived at Ameshia's apartment building that morning, they were arguing about "[l]ying, cheating, trust issues." *See* TrialTr. 327:24–328:11. Ashanti and Swift argued as Ameshia came outside, got Ashanti's daughter, and brought her inside. *See* TrialTr. 328:12–329:19. Swift came into the apartment building and stood by the back door to the apartment as they continued to argue, and Ashanti did not see Swift when she exited, via the front door. *See* TrialTr. 329:24–330:24. Ashanti said that she was driving around, looking for Swift, "[b]ecause [she] had his cell phone" and had to give it back. *See* TrialTr. 330:25–332:16.

Ashanti said she was driving towards the gas station when she realized that she was being shot at, and "[her] fight or flight instinct kicked in and it told [her] to fly," so Ashanti sped away. *See* TrialTr. 324:12–326:6; TrialTr. 333:19–334:13. When asked to describe the shooter, she said: "He had on all black. Black shoes, black pants and black hood," which came down to "[r]ight above the lips," covering most of his face. *See* TrialTr. 334:14–335:3. Here was her testimony:

> **STATE**: Who shot you?
>
> **ASHANTI**: I don't know.
>
> **STATE**: Have you ever told anyone that Debo shot you?
>
> **ASHANTI**: No.
>
> **STATE**: Have you ever told anyone that Derris Swift shot you?
>
> **ASHANTI**: No.
>
> **STATE**: Have you told — did you tell your mother that Debo shot you?
>
> **ASHANTI**: No. I called her and told her that I was shot.

See TrialTr. 335:4–336:11. As to her emotional condition after she was shot and after the incident where she feared she would be killed, Ashanti said she "was a little distraught." *See* TrialTr. 335:18–336:8.

Ashanti was asked about a recorded phone call between herself and Calvin Davis, which she had listened to before she took the stand. Ashanti confirmed it was her voice on the call, and she confirmed that they were talking about Swift. *See* TrialTr. 336:12–338:7.

STATE: What did you say to Calvin Davis about that?

ASHANTI: I don't recall.

STATE: Didn't you tell Calvin Davis "Had he not shot me, he could have had me"?

ASHANTI: No, I don't recall saying that.

STATE: You heard yourself say that less than —

ASHANTI: They may have me saying that, but I don't recall myself saying that.

STATE: You listened to this recording less than an hour ago, correct?

ASHANTI: Yes, I did.

STATE: And you heard yourself say "Had he not shot me, he could have had me." Do you recall that?

ASHANTI: No, I do not.

STATE: Well, you just heard it an hour ago. Less than an hour ago.

ASHANTI: Like I said, they may have me saying that, but I don't recall saying that.

STATE: Okay. But it's your voice?

ASHANTI: Okay.

STATE: Yes?

ASHANTI: Yes.

STATE: And did you also say, quote, "Who the fuck tries to kill your girlfriend over some dumb shit?" Did you say that to Calvin Davis as well?

ASHANTI: I don't recall saying that.

STATE: Did you hear yourself, your own voice say that within the last hour?

ASHANTI: I don't recall.

STATE: Did you listen to the recording between you and Calvin Davis and hear yourself say to Calvin Davis within the last hour on a recording "Who the fuck tries to kill your girlfriend over some dumb shit"?

> **DEFENSE**: Objection, Your Honor. The question has been asked already and answered. She doesn't recall.
>
> **STATE**: I'm not clear on whether you don't recall saying it or you don't recall hearing it within the last hour.
>
> **THE COURT**: Overruled.
>
> **ASHANTI**: Like I said, I heard it, but I don't recall saying it.

TrialTr. 338:10–339:24. On cross-examination, defense counsel tried to frame this as an assumption that Ashanti made, based on reports that Swift had been arrested and charged. *See* TrialTr. 340:7–341:19; TrialTr. 349:4–350:4. But she also stated that she would have known if it was Swift who had shot her, since she was very familiar with what he looked like—and she testified that she was now certain that Swift was *not* the shooter. *See* TrialTr. 342:13–343:14. Ashanti admitted she and Ameshia met with Detective Aric Robinson on January 29; she remembered "saying the person who shot [her] was in all black." But she testified that she did not remember telling Detective Robinson that she had no doubt in her mind that it was Swift who shot her. *See* TrialTr. 347:12–348:25; *but see* State's Ex. 88, at 11:59–12:35. After the State confronted Ashanti with statements that she made during the interview with Detective Robinson, Swift cross-examined Ashanti and elicited testimony that she identified Swift during that interview because she was "being pressured" to do so. *See* TrialTr. 347:12–350:4.

Ameshia saw Swift and Ashanti before the shooting, and said they were having a "domestic dispute." *See* TrialTr. 302:20–304:19. She believed she may have told Swift that she was going to call the police if he did not leave. *See* TrialTr. 305:3–306:11. Ashanti left through the front door. When Ameshia told Swift that Ashanti left, Swift left through the back door. *See* TrialTr. 306:12–307:15. A few minutes later, Ashanti called Ameshia and said she had been shot. *See* TrialTr. 307:16–309:24. Ameshia had told police that Ashanti had said that Swift shot her. *See* State's Ex. 85. Ameshia did not recall telling police that, but she admitted that she had viewed footage of a conversation in which she had said that. *See* TrialTr. 308:7–311:12. She told the jury that, despite what she said in the recorded body cam footage that she just watched, she had not heard Ashanti say that Swift had shot her. *See* TrialTr. 312:15–314:16; *accord* TrialTr. 315:15–317:3.

Ashanti had called Ameshia *before* the police or the ambulance arrived and before she received any treatment. *See* TrialTr. 347:7–11. Just before surgery, Detective Robinson spoke with Ashanti and told her that Swift was in custody. *See* TrialTr. 469:3–473:2. In response, Ashanti told him that "she never told her mother that [Swift] was the person responsible for shooting her." *See* TrialTr. 473:3–20.

Christine Baehre was a letter carrier whose route included residential neighborhoods in Davenport. *See* TrialTr. 53:22–57:12. She heard the shots, turned to look, and saw a man firing multiple shots at a vehicle, "on foot running towards the vehicle shooting," moving at "a full run with a gun extended." *See* TrialTr. 57:13–59:9. She looked at his face and saw an expression of "[c]omplete madness" that "really horrified [her]." *See* TrialTr. 59:10–19; TrialTr. 64:20–65:7. Baehre hid inside a nearby apartment building and shut the door. *See* TrialTr. 59:20–60:6. She described him as an African-American man with "dreads," "cornrows," or "braids." *See* TrialTr. 61:2–15.

Crystal Moore also witnessed the shooting. *See* TrialTr. 364:18–368:4. The most vivid detail about the shooter, to her, were his pants: "I remember his blue jean pants and the way the rips and the way the design was on his pants." *See* TrialTr. 368:5–12. She identified the jeans that Swift was wearing when he was apprehended as the pants that the shooter wore. TrialTr. 368:13–24; State's Ex. 81; ExApp. 8.

Julia Lovel heard the shots, looked outside, and saw a person in a "black hoodie," and "blue jeans and a pair of white sneakers"—that person was running with their hand extended and "shooting towards a white vehicle." *See* TrialTr. 68:7–23. Lovel could see their hand and

could tell the person was African-American. *See* TrialTr. 68:18–69:4. Later, Lovel saw "a black male with a red hoodie and dreads running through the woods." She could not tell whether it was the same person whom she saw earlier, during the shooting. *See* TrialTr. 72:12–74:22.

Davenport Police Department Lieutenant Kevin Smull went to that general area after hearing reports of a shooting. An officer saw Swift running through a cornfield. Swift matched the description of the shooter that police had received, so Lieutenant Smull chased him. Two other officers also chased Swift. *See* TrialTr. 118:9–124:1. They yelled at Swift to come out; Swift initially resisted, but he eventually submitted and was taken into custody. *See* TrialTr. 124:2–128:6. Officers took a photo of Swift, who was lying down because he was "wore out." *See* TrialTr. 132:20–133:15; State's Ex. 81; ExApp. 8. Swift said that he had been cutting through the cornfield on his way to Mother Hubbard's Cupboard, but Lieutenant Smull noted that "it just makes no sense" based on local geography "why somebody would go that way" to get there. *See* TrialTr. 128:16–130:10; TrialTr. 160:7–161:20; State's Ex. 76; ExApp. 5. Police looked for the gun, but could not find it; Lieutenant Smull remarked that "[i]t's such a huge area," and the gun "could have been anywhere." *See* TrialTr. 134:11–135:15;

accord TrialTr. 153:21–154:7 ("It was a vast huge area to search. Could there have been a weapon there and we missed it, yes."). Lieutenant Smull also noted that Swift was not wearing a black hooded sweatshirt—but he could have discarded it somewhere, just like the gun. *See* TrialTr. 144:12–148:12; TrialTr. 167:14–169:13. Lieutenant Smull got Swift's name, and provided it to other officers over the radio. Other officers informed Lieutenant Smull that Swift was already their primary suspect. *See* TrialTr. 169:17–172:5.

Detective Aric Robinson determined that it was "14 minutes from the time we received the 911 call until our officers see [Swift] running" through the field. *See* TrialTr. 436:3–438:4. That would have been enough time for Swift to stash his outer layer of clothing somewhere, along with the gun. *See* TrialTr. 456:14–457:13.

At trial, Ashanti's treating physician testified that "[i]t looks like a bomb went off in the center of her forearm," and her muscles were "completely torn apart." *See* TrialTr. 273:17–274:14. He testified that some of the nerve damage will be permanent and Ashanti's arm will never regain 100% functionality. *See* TrialTr. 274:15–276:22.

Additional facts will be discussed when relevant.

ARGUMENT

I. No inadmissible evidence was admitted, and Swift cannot establish reversible error.

Preservation of Error

Swift challenges an assortment of prior statements that were introduced into evidence. For each item, any claim of error "is waived unless a timely objection is made when the evidence is offered at trial." *State v. Tangie*, 616 N.W.2d 564, 568 (Iowa 2000); *cf.* TrialTr. 15:21–18:11 ("I will reserve any ruling on any type of hearsay or statements made to the police until they are presented to the Court during the time of the trial and then make the appropriate ruling."). Each claim of error in admitting specific evidence requires a separate analysis of error preservation, which will be addressed in each section.

Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *See State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003). Rulings on the admissibility of hearsay evidence are reviewed for errors at law. *See Tangie*, 616 N.W.2d at 568.

Merits

Before discussing individual pieces of evidence, predicate issues surrounding the alleged *Turecek* violations must be addressed.

A. The State did not know with any certainty that Ashanti, Ameshia, or Itzleonia would provide testimony that diverged from prior statements. Error is not preserved for claims that it did.

Swift's argument begins by alleging a *Turecek* violation. *See* Def's Br. at 51–55. *Turecek* held that the State's right to impeach its own witnesses "is to be used as a shield and not as a sword," and not as a subterfuge to admit "evidence which is otherwise inadmissible." *See State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990). But that only applies to evidence that is otherwise inadmissible, and it prevents the State from calling the witness as subterfuge to sustain the admission of substantive evidence that masquerades as impeachment. *See id.* "The *Turecek* rule is a shield designed to prevent the introduction of otherwise inadmissible evidence, but it cannot be used to prevent the State from using admissible evidence to impeach a witness." *State v. Russell*, 893 N.W.2d 307, 316 (Iowa 2017); *accord State v. Tompkins*, 859 N.W.2d 631, 639 (Iowa 2015). Nor would *Turecek* prevent the State from impeaching witnesses who it *hoped* would testify truthfully. Even an awareness that the witness's testimony "may be inconsistent in some respects with [their] prior statements" is not, in itself, enough to "require the exclusion of the impeachment evidence." *See State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995).

Before going further, the State must point out that admission of *any* testimonial hearsay from a recanting witness would require the State to call that witness—or else the Confrontation Clause would render those statements inadmissible. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004); *accord Tompkins*, 859 N.W.2d at 639–42. So Swift's suggestion that the State violated *Turecek* by *calling* witnesses would be incorrect, even if the State had expected full recantations.

Swift argues that, before trial, the State "was alerted to the fact that Ityleonia Watson, Ameshia Dixon, and Ashanti Dixon would not testify consistently with the minutes of testimony." *See* Def's Br. at 53. Certainly, the State encountered difficulties in communicating with Ashanti in advance of trial, as Swift urged her not to cooperate and to aid in his defense. *See* Motion for Forfeiture by Wrongdoing (7/19/18) at 2; App. 17; *see also* Motion to Continue (7/19/18) at 1; App. 19. But the prosecutor met with Ashanti and Ameshia before they testified and reviewed evidence of their prior statements. *See* TrialTr. 308:17–310:2; TrialTr. 338:8–339:25. After that, the State had little reason to expect that either witness would deny making those prior statements or recant those statements, under penalty of perjury. The State tried to get truthful testimony, and *Turecek* permits those good-faith attempts.

Some *Turecek* cases examined the State's "primary purpose" in calling a witness to testify, instead of its "primary purpose" in offering each piece of impeachment evidence. *See Russell*, 893 N.W.2d at 316. That approach would require a contemporaneous objection to the State's attempt to *call* the witness, in order to build a record on what the State knew or expected before it called each witness to the stand and to enable the court to grant timely relief—which never happened. *See State v. Krogmann*, 804 N.W.2d 518, 523 (Iowa 2011). And in this case, regardless of whether the State could expect recantations, it still needed to call these witnesses. Evidence of Swift's presence in the area near the shooting during the moments that directly preceded it was critical on the contested issue of identity, and all three witnesses were known to have seen Swift just before the shooting. *See* Minutes (3/8/18) at 1, 9, 22; CApp. 4, 12, 25. All three witnesses testified to those facts. *See* TrialTr. 102:23–104:24; TrialTr. 302:20–309:24; TrialTr. 324:12–332:16. Moreover, Ashanti testified about the extent and source of her injuries, which the State was obligated to prove. *See* TrialTr. 318:25–326:6. Ameshia testified that she notified Swift that Ashanti had left the apartment, and that Swift did not leave until he was told that Ashanti left. *See* TrialTr. 305:20–307:19. And Ityleonia

provided foundation for admission of Ameshia's statements about Ashanti's phone call, which sparked "a whole bunch of emotions." *See* TrialTr. 105:8–106:4. This approach would find no *Turecek* violation because these witnesses were "called to provide testimony favorable to the State that no other witness could offer." *See State v. Valdez*, No. 10–0183, 2014 WL 1495485, at *6 (Iowa Ct. App. Apr. 16, 2014).

Swift also failed to preserve error for claims that questioning witnesses about their prior statements was improper under *Turecek*. During Ameshia's testimony, Swift's relevant objection was only that "[t]he prosecutor is trying to impeach her own witness." *See* TrialTr. 309:25–310:14. During Ityleonia's testimony, Swift's substantive objection was similar: "[s]he is trying to impeach her own witness." *See* TrialTr. 107:1–25. And Swift raised no such objection during Ashanti's testimony. *See* TrialTr. 318:7–350:25. Swift's counsel never cited *Turecek* at any point, and the court's ruling on his motion for new trial indicated that Swift had never raised any argument that required the court to consider anything beyond Rule 5.607:

> The State correctly points out that they may impeach their own witness, and the fact is that evidence was admitted to clearly allow the jury to make credibility determinations as to the testimony of the witnesses during the trial.

See Sent.Tr. 12:10–13:17; *see also* Motion for New Trial (12/13/18); App. 39. This is different from cases where error was preserved by objections that *specific* impeachment evidence was improper—Swift objected that the State could not impeach its own witnesses *at all*. On these facts, there is no indication that the trial court considered and rejected any claim under *Turecek*, so error cannot be preserved. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). And indeed, if such an objection had been raised, the State could have made a record on its reasons for expecting these witnesses to testify truthfully (even if it expected that their truthful testimony would be given reluctantly).

To summarize this introduction: the record does not support Swift's assertion that the State *knew* that any witness would recant and provide testimony that contradicted their prior statements, and reviewing their prior statements with them before they took the stand is consistent with a good-faith belief that they would testify truthfully. And even if it had reason to believe these witnesses would recant, the State needed to call these witnesses for legitimate purposes, including the need to vindicate Swift's rights under the Confrontation Clause. Finally, error is not preserved for claims alleging a *Turecek* violation from calling witnesses or questioning them about prior statements.

B. *Turecek* does not bar impeachment by evidence of prior inconsistent statements on material issues. The State may still introduce extrinsic evidence of prior inconsistent statements under Rule 5.613(b).

Turecek is sometimes misread as creating a bar to impeaching a party's own witness through the use of contradictory prior statements on material issues with proof by extrinsic evidence. *See*, *e.g.*, *State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992). That reading is incorrect. The proper reading of *Turecek*, supported by *Gilmore* and *Blackford*, is that impeachment is improper whenever it is used as a subterfuge to admit "substantive evidence which is not otherwise admissible"—like prior statements about irrelevant matters that could never have been proper subjects of direct examination of a cooperating witness. *See Turecek*, 456 N.W.2d at 225 (quoting *United States v. Miller*, 664 F.2d 94, 97 (5th Cir. 1981)). But the State may offer extrinsic evidence of prior inconsistent statements under Rule 5.613(b) when "the fact, as to which error is predicated, [could] have been shown in evidence for any purpose independently of the contradiction." *See State v. Blackford*, 335 N.W.2d 173, 175–76 (Iowa 1983) (quoting *State v. Gilmore*, 259 N.W.2d 846, 857 (Iowa 1977)). This is a fine distinction that requires precise explanation—but such an explanation is worth it, because it will establish that Swift's challenges are meritless.

Under *Gilmore*, a witness's prior inconsistent statement may be introduced "where a witness makes a testimonial statement and then does not remember a prior inconsistent statement he made dealing with the same facts or is evasive as to that statement"—but that may only be done when "the fact, as to which error is predicated, [could] have been shown in evidence for any purpose independently of the contradiction." *See Gilmore*, 259 N.W.2d at 853, 857. In *Turecek*, the Iowa Supreme Court held onto its recognition that extrinsic evidence is admissible for impeachment purposes if that evidence would have been relevant to begin with, "independent of the contradiction":

> To be admissible, impeachment evidence must have been admissible for some proper purpose independent of the contradiction. Otherwise the impeachment evidence goes only to a collateral issue and is inadmissible. Evidence of two types is admissible independent of contradiction. First, the evidence may be admitted if relevant to some legitimate issue in the case. Second, the evidence is admissible if it is relevant to establishing or undermining the general credibility of the witness being impeached.

See Turecek, 456 N.W.2d at 224 (quoting *State v. Roth*, 403 N.W.2d 762, 767 (Iowa 1987)); *accord Blackford*, 335 N.W.2d at 176 (applying *Gilmore* and prohibiting impeachment by extrinsic evidence of facts that were "clearly not relevant to any issue involving the merits of the criminal charge against the defendant"); *see also State v. Neiderbach*,

837 N.W.2d 180, 207 (Iowa 2013) (quoting *State v. Hill*, 243 N.W.2d 567, 571 (Iowa 1976)) ("It is well settled . . . the right to impeach by prior inconsistent statements is not without limit. The subject of the inconsistent statement, if it is to be admissible, must be material and not collateral to the facts of the case."). Thus, underlying relevance is the primary limitation on use of extrinsic impeachment evidence.

Turecek is not about prohibiting impeachment evidence that is inadmissible for reasons relating to hearsay rules; instead, it prohibits impeachment through *irrelevant* extrinsic evidence that "pertained to matters collateral to the issues." *See Turecek*, 456 N.W.2d at 224–25. But when impeachment by prior inconsistent statements *does* involve statements that are relevant on material factual disputes, *Turecek* will not prohibit admission of that evidence. Confusion sometimes arises because *Turecek* used some generalizing language when it prohibited "substantive evidence which is not otherwise admissible." *Id.* at 225 (quoting *Miller*, 664 F.2d at 97). But *Miller*, which *Turecek* quoted, involved a situation like this case: the subject matter of the statement would have been relevant and admissible on direct examination, if the witness had not recanted—so the prior inconsistent statement *was not* substantively inadmissible and *was* usable for impeachment.

> Miller alleges that the impeachment by the Government of Crawford, a Government witness, through the use of his prior statement was improper. Miller admits the statement could be used to impeach Crawford's credibility, but argues the Government's use of the statement for impeachment was a guise to get the statement, inadmissible as hearsay, before the jury as positive evidence. The Government argues it used the statement for impeachment purposes only and impeachment was proper since Crawford was a hostile witness whose testimony differed from his prior statement on relevant issues.
>
> [. . .]
>
> . . . Under the Government's theory of the case, Crawford was the hub of a stolen truck ring in which Miller was involved. In his prior statement, Crawford had detailed Miller's involvement with the stolen trucks and identified him as the trucks' seller. . . .
>
> On direct examination during Miller's trial, Crawford said he did not know that Miller had anything to do with the stolen trucks. He identified someone other than Miller as the seller of the stolen trucks. . . . His prior statement was used only to indicate those areas where Crawford's present testimony contradicted his earlier statement.

Miller, 664 F.2d at 97. Because the contents of the prior statement were substantively admissible—that is, the testimony described in that prior statement would have been admissible over any objection about relevance or hearsay if Crawford had testified accordingly—the prosecution was permitted to impeach any inconsistent testimony on those material issues with extrinsic evidence of his prior statement. *Id.* Moreover, both *Turecek* and *Miller* relied on *United States v. DeLillo*:

> . . . Gorman's testimony included a statement by Vincent DeLillo that DeLillo did not care what had to be done to stop the pipes to be tested from leaking. Monahan's testimony about the conversation tracked Gorman's account but he denied that DeLillo said that he did not care what had to be done to achieve the desired result. The government then sought to introduce a tape recording of a conversation between Monahan and Gorman in which Monahan confirmed Gorman's version of DeLillo's statement. . . .
>
> Appellants argue that the judge's ruling contradicts the purported rule that the government may not knowingly elicit testimony from a witness in order to impeach him with otherwise inadmissible testimony. As stated in *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975) "[i]mpeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible." . . .
>
> Beyond doubt, Monahan was not called to the stand by the government as a subterfuge with the primary aim of getting to the jury a statement impeaching him. Monahan's corroborating testimony was essential in many areas of the government's case. Once there, the government had the right to question him, and to attempt to impeach him, about those aspects of his testimony which conflicted with Gorman's account of the same events. *Morlang* itself explicitly recognizes the propriety of impeachment where it is "necessary to alleviate the harshness of subjecting a party to the mercy of a witness who is recalcitrant or may have been unscrupulously tampered with." 531 F.2d at 190. To the extent that defendants rely on *Morlang* for the principle that a witness cannot be put on the stand if the side calling him knows that he will give testimony that it will have to impeach, it seems clear to us that the effect of Fed.R.Evid. 607, codifying the right to impeach one's own witnesses without special restriction, is to nullify the plausibility of such a reading.

United States v. DeLillo, 620 F.2d 939, 946–47 (2d Cir. 1080).

Here is the key point: a "*Turecek* violation" requires something beyond the fact that transcripts or video of the prior statement would have been hearsay. That is true of almost every prior statement, and it bears no relationship to the *Turecek* inquiry about the *content* of the inconsistent statement, nor to its concerns about circumventing rules about the *content* of evidence presented in the State's case-in-chief. *See Turecek*, 456 N.W.2d at 224–25. This reading of *Turecek* makes sense because it allows the State to respond to blatant recantations by undermining the credibility of any recanting witnesses on issues that are material to the charges—but not on immaterial/collateral issues, and not in ways that would let the State present *more* evidence than it would have been able to present through a cooperative witness. If the State is vexed by recantations, it should be able to use prior statements to impeach the recanted testimony. *See Gilmore*, 259 N.W.2d at 857. While prior out-of-court statements are usually hearsay if offered for a non-impeachment purpose, the subject matter of those statements is not always substantively inadmissible—and when it provides content that would have been admissible on direct examination in the absence of a recantation, no substantive unfairness can result from its use. In that situation, *Turecek* is inapplicable. *See Russell*, 893 N.W.2d at 316.

This case shows why this rule makes sense. If Ashanti testified in accordance with prior statements (as one would normally expect), her testimony that she identified Swift as the shooter would have been substantively admissible—it was relevant to material factual disputes, and it was not otherwise barred by rules about relevance or hearsay. Ashanti's recantation cannot override the State's power to call her as a witness—and if she is determined to give false testimony, the State must be able to impeach material falsehoods through extrinsic proof.

Indeed, when resisting the motion for forfeiture by wrongdoing based on a series of recorded phone calls between Swift and Ashanti, Swift argued that "[i]f the State has evidence suitable for impeaching the testimony of the Defendant or any other witness, the proper remedy is to seek to present such evidence at trial." *See* Resistance (10/9/18) at 1; App. 28. That is exactly what the State did. While the motion for forfeiture by wrongdoing was mooted when the witnesses appeared for trial, Swift should not receive a windfall as a result of his wrongful conduct that pressured critical witnesses to partially recant.

> These calls also include conversations on April 6, 2018 wherein the defendant is pressuring Ashanti Dixon, emphasizing her crucial role as a witness in his case, trying to influence her with statements such as "my case revolves around you," "you have the power to bring me home," and requests that she sign an "affidavit."

See Notice of Add'l Minutes (7/13/18); App. 99; *accord* Motion for Forfeiture by Wrongdoing (7/19/18) at 2; App. 17. When a witness recants under pressure, the State must be able to offer evidence of what the witness said *before* such pressure was applied. "Without such a rule, outside pressures could convince the witness that it would be to his advantage to conveniently forget the facts and, thus, the truth would be lost." *See Gilmore*, 259 N.W.2d at 857. This still functions as a shield, not a sword. *See Turecek*, 456 N.W.2d at 225.

In *Tracy*, the majority concluded: "we must assume the State orchestrated this series of events merely to place before the trier of fact various items of evidence that would otherwise be inadmissible." *See Tracy*, 482 N.W.2d at 679. But surely prosecutors did not engineer this crime, the original statement that supported its theory of the case, or the recantations that created potential *Turecek* problems. Instead, prosecutors were tasked with picking up the pieces and ensuring that jurors would still hear a complete version of the relevant facts that would enable them to find the truth and do justice, even after those key witnesses recanted their original statements. *Gilmore* affirmed that prior inconsistent statements from recanting witnesses should be admissible, because any other approach would incentivize misconduct:

> Without [this rule] a witness whose bias, prejudice, corruption, etc., is not apparent on direct or cross-examination can give facts only favorable to the defense (or defendant) or prosecution (or plaintiff) and totally avoid confrontation by his prior statement favorable to the other side. Without such a rule outside pressures could convince the witness that it would be to his advantage to conveniently forget the facts and, thus, the truth would be lost. With such a rule justice will be served where it might otherwise be thwarted.

See Gilmore, 259 N.W.2d at 857. It would be especially jarring for Swift to win total exclusion of Ashanti's prior statements, where the motion for forfeiture by wrongdoing was abandoned as moot because Ashanti appeared. Inducing a witness to recant is just as wrongful as inducing a witness to disappear; if Swift does *anything* to derail the State's case against him, justice demands that the State be allowed to present the evidence that exposes the artifice (even if that is limited to impeaching the witnesses whose testimony Swift was able to change).

The upshot is that *Turecek* cannot bar the State from impeaching witnesses with extrinsic evidence of any prior inconsistent statements on material issues, where the subject matter of those prior statements would not have been substantively inadmissible or otherwise off-limits. Here, each of the challenged exhibits was properly used to impeach recanting witnesses by evidence of their prior inconsistent statements. Certain exhibits were admissible as substantive evidence, as well.

C. Exhibit 85 was admissible to impeach testimony from Ashanti and Ameshia that Ashanti had never identified Swift as the shooter. That video was also substantively admissible as double hearsay, through the exception for excited utterances.

Exhibit 85 was body-cam video footage where Ameshia relayed Ashanti's statement to police: Ameshia said that Ashanti was "crying hysterically and said 'Debo shot me.'" *See* State's Ex. 85, at 1:35. Swift argues that Exhibit 85 was improper impeachment under *Turecek* and was substantively inadmissible. *See* Def's Br. at 56–60. He is wrong.

Ashanti testified that she never told anyone that Swift shot her. *See* TrialTr. 335:7–336:11. That was false. The State was entitled to expect that Ashanti would testify truthfully, and to impeach any parts of her testimony on material factual issues that could be proven false by evidence of her prior statements. *See Nance*, 533 N.W.2d at 561–62. The same principle applies to Ameshia's testimony that Ashanti only said "she got shot," in those specific words. *See* TrialTr. 309:16–24. When asked about the video, Ameshia claimed that she had supplied the assumption that it was Swift—and that Ashanti never said that. *See* TrialTr. 309:25–311:8; TrialTr. 312:15–314:16; TrialTr. 315:15–317:18. The State needed to show the video to impeach testimony from both of those witnesses with the truth about what occurred. *See* State's Ex. 85.

Swift raised a timely hearsay objection to Ameshia's testimony about Ashanti's statement, which was overruled. TrialTr. 309:16–22. For the video, the State urged its admission as substantive evidence, as Ameshia's excited utterance describing Ashanti's excited utterance. It also argued that it was needed to impeach and refute testimony that Ameshia was speculating, rather than repeating Ashanti's declaration. *See* TrialTr. 353:14–360:6. The court agreed with the State:

> [D]uring her testimony she stated that she received a phone call and that she simply was told by Ashanti that she was shot and it was her own assumption that it was Debo. She also stated — she did not recall, but she stated that she may have said that, and on cross-examination she stated as a response to the defense that it was a mistake on her part. I believe that this evidence is proper for an inconsistent statement.
>
> The statement from [Ashanti] is clearly an exception to the hearsay rule as an excited utterance. That has all been — the foundation for that statement has been provided by much of the evidence in this case. It was moments after she had been shot. It was prior to any intervention by any medical personnel responding to the scene, clearly before she received any type of narcotic medication for pain that she was suffering as a result of being shot. . . .
>
> [. . .]
>
> [Ameshia] did testify that she was distraught. And it's clear from the video that this was moments after police responded to the scene. I determine that she was still a distraught mother and that would be an excited utterance on her part also. But I believe also that the foundation is appropriate for impeachment as to what was actually said.

See TrialTr. 360:14–362:14; *accord* TrialTr. 429:3–12. The court was correct on both grounds for admission. Swift characterizes Ameshia's demeanor on the video as "rather calm." *See* Def's Br. at 57. But in her trial testimony, Ameshia specifically references the fact that she was a "distraught parent" to explain her statement. *See* TrialTr. 310:16–311:5 ("I was very distraught. I was an upset parent at the time."). The fact that Ameshia could carry a conversation and respond to questioning does not foreclose admission. Even when the declarant is responding to questioning, Iowa courts still hold that "statements made under the stress of excitement are less likely to involve deception than if made upon reflection or deliberation." *See State v. Harper*, 770 N.W.2d 316, 319 (Iowa 2009) (quoting *State v. Tejeda*, 677 N.W.2d 744, 753 (Iowa 2004)). Iowa courts analyze five pertinent factors:

> (1) the time lapse between the event and the statement,
> (2) the extent to which questioning elicited the statements that otherwise would not have been volunteered,
> (3) the age and condition of the declarant,
> (4) the characteristics of the event being described, and
> (5) the subject matter of the statement.

See id. (quoting *State v. Atwood*, 602 N.W.2d 775, 782 (Iowa 1999)). It is true that Ameshia was an adult who was answering questions when she made these statements. But the specific statement at issue—

that Ashanti identified Swift as the shooter—came after a question interrupted her description of the call. Absent those interruptions, Ameshia built frantic momentum as she spoke, picking up speed and amplifying her volume—which illustrated heightened emotions. *See* State's Ex. 85. Also, Ameshia's statement came just minutes after she heard Ashanti's report that she had been shot, which made Ameshia yell into the phone to try to locate her. State's Ex. 85, at 0:40–0:48; State's Ex. 85, at 1:35–1:42; *accord* TrialTr. 105:8–106:4. The event being described was shocking and stressful: Ameshia was talking about learning that her daughter had just been ambushed, shot, and injured. Ameshia even ended her story with "and I never talked to her again"—which suggests that she thought that Ashanti might die, which would be immensely stressful for any parent. In this situation, "the officer's questions merely anticipated excited descriptions of the incident which [Ameshia was] bound to volunteer to the officer in any event." *See State v. Mateer*, 383 N.W.2d 533, 535 (Iowa 1986). Swift cannot show any reversible error in the trial court's ruling that the State met the foundational requirements on that layer of this double-hearsay issue.

Swift's argument that Ashanti's statement to Ameshia is not an excited utterance should be soundly rejected. *See* Def's Br. at 59–60.

Ameshia specifically reported that Ashanti was "crying hysterically" when she said "Debo shot me." *See* State's Ex. 85, at 1:34–1:40. Even Swift's argument that Ashanti was only "crying from the physical pain of her injury" provides the foundation for this hearsay exception. *See* Def's Br. at 60; *Harper*, 770 N.W.2d at 320 (victim's statement was an excited utterance because "the pain of the event was still continuing").

Even if this Court agrees with Swift on either layer of that double-hearsay issue, it does not matter. This out-of-court statement was within the scope of the cautionary jury instruction that directed the jury to consider such evidence for impeachment purposes only. *See* Jury Instr. 15; App. 31 ("Because the witness did not make the earlier statements under oath, you may use them only to help you decide if you believe the witnesses."). Even if this statement was not admissible as substantive evidence, error would be harmless because the jury was specifically directed only to consider it for impeachment, and "[w]e presume juries follow the court's instructions." *See State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010). And if this statement *was* substantively admissible, that eliminates any potential *Turecek* issue. *See Russell*, 893 N.W.2d at 317–18. Either rationale for admission of this video is independently sufficient to foreclose Swift's challenge.

D. Exhibit 87 was admissible to impeach Ashanti's testimony that she had never identified Swift as the shooter. It retained impeachment value after Ashanti was asked about these prior statements because she tried to disavow them, and because she still testified that her observations had made her certain that Swift was *not* the shooter.

Exhibit 87 contained a recording of a call between Ashanti and Calvin Davis, where Ashanti implied that she believed that Swift had shot her. *See* State's Ex. 87. Swift argues "the purportedly impeaching prior inconsistent statements were already acknowledged" by Ashanti during her testimony, so the extrinsic evidence of those statements was rendered inadmissible. *See* Def's Br. at 72–74. Swift made the same argument below. *See* TrialTr. 385:1–386:16 (arguing that it did not "impeach any of [Ashanti's] testimony," because "eventually [Ashanti] acknowledged having made that statement in the phone call"). But the State explained that Ashanti's "wishy-washy" admission to saying these words was qualitatively different from hearing this statement in its proper context—and when heard, the statement was clearly at odds with the thrust of Ashanti's testimony. *See* TrialTr. 386:18–388:22.

Swift cites *State v. Wolfe* for the proposition that "once the witness 'admits making the prior inconsistent statement, then that prior statement is not admissible." *See* Def's Br. at 73 (quoting *State*

v. Wolfe, 316 N.W.2d 420, 422 (Iowa 1981)). *Wolfe* was specifically and expressly disavowed by *State v. Ware*, which noted that *Wolfe* was abrogated by Iowa Rule of Evidence 5.613(b)—and even without codified rules of evidence, *Wolfe* would still be wrong anyway:

> *State v. Wolfe* does indicate that an impeaching written statement ought not itself be admitted in evidence if the witness admits making the statement. We believe, however, that the better rule is that found in Federal Rule of Evidence 613(b) which now has been adopted as Iowa Rule of Evidence 613(b), . . .
>
> [. . .]
>
> [T]he trial court would not have erred in overruling a specific objection based on *State v. Wolfe* and allowing the jury to read and hear exactly what Cady had previously written which at trial she attempted to explain away. We think this Iowa Rule of Evidence to be the sounder approach, for it provides to the witness and opposing counsel full opportunity to explain the inconsistency in previous out-of-court statements while allowing the finder of fact to have the exact words of the prior statement for purposes of comparison with in-court inconsistent testimony. We agree with Wigmore who advocated the expanded use of out-of-court statements to assure impeachment with reliable, complete and accurate sources of information—the original written statement if possible. See IIIA Wigmore, *Evidence* §§ 1036–37 at 1041–46 (Chadbourn rev. ed. 1970).

State v. Ware, 338 N.W.2d 707, 712–13 (Iowa 1983). Just like in *Ware*, the recordings were the best evidence to show that Ashanti's testimony on this key point—that she was certain that Swift was not the shooter—was unambiguously false. *See* State's Ex. 87, at 0:30–0:53.

It was important for jurors to hear what Ashanti said, in context that showed how and why she said it, to understand how her testimony about those prior remarks had contradicted objectively knowable facts. Ashanti testified that she would have known Swift was the shooter if it had been him—and because she could not positively identify him, she *knew* that Swift was not the shooter. *See* TrialTr. 341:20–343:14. The State was entitled to impeach Ashanti's testimony on that critical issue by extrinsic evidence of her prior inconsistent statements, where she expressed certainty that Swift *was* the shooter by stating: "Had he not shot me, he could've had me." *See* State's Ex. 87, at 0:30–0:46; *accord* TrialTr. 386:18–387:15 ("In [Ashanti's] testimony she said she knows it wasn't him . . . . That's inconsistent with what she told Calvin Davis."). Swift argues that impeachment was complete and that admission of the recording became unnecessary because Ashanti "acknowledged making these prior inconsistent statements." *See* Def's Br. at 73–74. But the "sounder approach" is "allowing the finder of fact to have the exact words of the prior statement for purposes of comparison with in-court inconsistent testimony." *See Ware*, 338 N.W.2d at 712. And Ashanti never really admitted to making this statement—she agreed that it was her voice, but went no further. *See* TrialTr. 336:12–339:24.

Under *Gilmore*, where "a witness makes a testimonial statement and then does not remember a prior inconsistent statement . . . or is evasive as to that statement," a party may "introduce the prior inconsistent statement into evidence" if it pertains to a material factual issue. *See Gilmore*, 259 N.W.2d at 857. Indeed, *Gilmore* supplied this example:

> If she had been asked [at trial] if Howard had pulled out his gun while lying on the ground and had answered, "No," the answer "No" would have been a testimonial statement with which her prior statement [that she saw Howard do that] could have been found inconsistent and thus admissible.

See id. at 858. The critical fact that forecloses Swift's challenge is that Ashanti testified that she saw the shooter and knew, with certainty, that it was not Swift. *See* TrialTr. 341:20–343:14. Extrinsic evidence of her prior inconsistent statements on that issue became admissible as impeachment evidence—not to prove that Swift *was* the shooter, but to undermine Ashanti's testimony that she was certain that he *wasn't*.

> The attack by prior inconsistent statement is not based on the theory that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, raising a doubt as to the truthfulness of both statements.

Brooks v. Holtz, 661 N.W.2d 526, 530 (Iowa 2003) (quoting 1 John W. Strong, *McCormick on Evidence* § 34, at 126 (5th ed.1999)). Thus, this was proper impeachment, presented in a permissible form.

> In the past, Iowa has supported introduction of extrinsic evidence of the inconsistent statements even where the witness *admits* making an inconsistent statement. The purpose is to give the factfinder access to the exact words of the witness for purposes of comparison with the witness' testimony. Access is particularly valuable to the credibility assessment where the witness attempts to explain the inconsistency.

See Doré, *Iowa Practice Series: Evidence* § 5.613:1 (citing *Ware*, 338 N.W.2d at 711–13). That approach is sensible, and this Court should retain it—especially for recantations in domestic abuse prosecutions. "[P]ressures brought to bear on a victim of domestic violence make it highly probable that a recanting domestic violence victim will be lying under oath"—and when those recantations evade meaningful scrutiny, "the truth will never be presented to the jury." *See* Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 6 (2002); *accord State v. Smith*, 876 N.W.2d 180, 187–88 (Iowa 2016) (citing Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 200–06 (2008)) (recognizing the "complex dynamics" of domestic abuse that causes "the recantation of statements of identity prior to trial"). In this context, impeachment by extrinsic evidence is indispensable.

E. Exhibit 88 was admissible to impeach Ashanti's testimony that she had not truly identified Swift. That video was also responsively admissible to refute claims that police had browbeat Ashanti into identifying Swift during that interview.

Exhibit 88 was a recording of Detective Robinson's interview with Ashanti and Ameshia. Swift reprises the same argument that Ashanti and Ameshia's explanations of their prior statements were enough to eliminate the need for this video, and he also argues that admitting short segments of the video would have been less prejudicial than admitting the whole 30-minute video. *See* Def's Br. at 74–79.

The same argument from *Ware* applies here, with equal force. Ashanti denied identifying Swift as the shooter, and she subsequently explained away her statements that identified him as the shooter as the result of aggressive police interrogation. *See* TrialTr. 335:7–13; TrialTr. 347:12–350:21. Swift's cross-examination specifically argued that Ashanti's prior identification was the result of pressures during the interview. *See* TrialTr. 347:12–350:4; *see also* TrialTr. 394:12–22; TrialTr. 403:10–407:7. Thus, this interview video was admissible to impeach testimony that Ashanti never meaningfully identified Swift, *and* that police pressured her into identifying Swift in that interview. The video was the best evidence to disprove both false contentions.

There is a distinction between the effect of Ashanti's testimony that she was certain that Swift was not the shooter, and the effect of Ashanti's testimony (and Swift's argument) that Detective Robinson pressured Ashanti into identifying Swift. When Ashanti testified that she was certain that Swift was not the shooter, the State could present extrinsic evidence of inconsistent statements to impeach her testimony that, if believed, would be exculpatory; any statements introduced for that limited purpose would only be admissible as impeachment, not as substantive proof that Swift was the shooter. *See Ware*, 338 N.W.2d at 712–13. Swift's response to that impeachment evidence was to offer Ashanti's testimony that she was pressured into identifying Swift as the shooter during that interview. *See* TrialTr. 347:12–350:4. Swift *also* used that testimony from Ashanti to support his broader theory that police quickly jumped to the conclusion that he was the shooter, and only sought evidence to confirm that belief:

> I suggest to you the evidence will show that the police when they started this investigation started fixating on Mr. Swift and declined to consider evidence to the contrary and interpreted everything they saw as confirming their initial speculation that Mr. Swift must be guilty.
>
> [. . .]
>
> . . . [T]hey were fixated on the fact that they had solved this crime. We got the boyfriend. The boyfriend is in the area. He's the one we're going to concentrate on.

See TrialTr. 48:10–51:10; *accord* TrialTr. 528:5–25. The video was admissible both as impeachment under *Gilmore* and *Ware*, and to respond to the substantive attack on the quality of the investigation that targeted both the State's substantive evidence and this specific impeachment evidence. *See State v. Belken*, 633 N.W.2d 786, 794 (Iowa 2001) (holding Garloff's testimony was admissible on rebuttal to impeach Jennifer's testimony when "[i]n addition to contradicting Jennifer's statements on cross-examination, Garloff's testimony undermined Jennifer's credibility" as source of the defendant's alibi).

That was the basis for the trial court's ruling on this challenge:

> My understanding by the State is that this is being offered for inconsistent statements and to refute the allegation that [Swift] has made during cross-examination that somehow the investigators in this case were supplying information to Ashanti to assume that the person that shot her was the Defendant, Derris Swift. I do find that is appropriate. I think the line of questioning to Ashanti was just that, that it was not her own decision and that it was somehow implicit in the questioning made by the officers in this case. Since that issue has been raised, I think it is appropriate for those portions of the video also in respect to that, not only for the inconsistent statements that she made here during her testimony as to now stating that the Defendant was not the shooter.

See TrialTr. 403:10–407:7. The court also ordered the State to edit the video to cut portions that dealt with prior domestic incidents and commentary on the evidence in this case. *See* TrialTr. 403:17–406:12.

The State made those edits, as ordered. It also edited the tape again pursuant to the court's ruling that ordered an additional redaction, just before it was admitted. *See* TrialTr. 440:13–447:16. Exhibit 88 reflects exactly what was admitted at trial and played for the jury. *See* TrialTr. 501:11–502:2. It was necessary to show most of the interview to rebut inferences that "brow-beating" happened in some portion of the interview that was *not* shown. *See* TrialTr. 397:24–399:4. Indeed, showing the interview forced Swift back to reality in closing argument: instead of Swift's original position that Ashanti was "being pressured to name a particular person that they were suggesting," Swift's counsel switched to claiming that Detective Robinson influenced Ashanti by "[e]asing her into his theory" with "this elaborate display of sympathy and compassion and so forth." *Compare* TrialTr. 349:4–350:4, *with* TrialTr. 528:5–531:12. Raising an inference that was contradicted by objective, available evidence was an invitation for the State to present that evidence, to dispel the false inference that would otherwise linger. *See generally State v. Plaster*, 424 N.W.2d 226, 230–32 (Iowa 1988) (holding that otherwise inadmissible prior-bad-acts evidence became admissible because "[t]he challenged evidence was necessary to dispel" false or misleading inferences that Plaster raised in his defense).

Swift's arguments about extraneous material that is included in the video are not preserved. While Swift is correct that counsel lodged objections to specific parts of the video and to its overall length, all of Swift's objections to specific parts of the video were sustained, and the trial court ordered the state to edit the video to remove them. *See* TrialTr. 391:16–406:12; TrialTr. 440:13–447:16. Swift's objection to the overall length of the video interview was rejected, which preserves error for that challenge—but the trial court did not rule on any of the specific complaints presented in this section of Swift's brief. *See* Def's Br. at 76–79; *Ware*, 338 N.W.2d at 712 (finding error not preserved when the "complaint about the trial court's ruling was not adequately raised by proper specific objection" on the grounds raised on appeal).

Ashanti told Detective Robinson: "I don't have no doubt in my mind that it probably was [Swift]." *See* State's Ex. 88, at 11:59–12:35. When Ashanti was asked to explain a prior statement where she had identified Swift as the shooter, she replied: "Because the person I seen coming towards me *was* him," specifically because of the distinctive way that he walked. *See* State's Ex. 88, at 14:13–15:23. The shooter was wearing a jacket that covered everything but his eyes and nose, which Ashanti had recognized as a jacket that she knew Swift owned—

and Ashanti said that she recognized Swift's eyes. *See* State's Ex. 88, at 15:24–15:46; State's Ex. 88, at 18:42–19:23. All other parts of the interview were relevant to show that no nefarious pressure was being exerted to compel Ashanti to make those statements, contradicting her trial testimony that her observations from the day of the shooting made her sure that Swift was not the shooter and that any statements to the contrary were the result of psychological pressure. *See* TrialTr. 342:13–343:14; TrialTr. 347:7–350:21. And Swift's concerns that the jury used extraneous material from the video as substantive evidence are unable to overcome the cautionary instruction that limited the use of this evidence to "only" impeachment purposes. *See* Jury Instr. 15; App. 31. Even if Swift's unpreserved challenges had been preserved, overbroad admission of extra parts of this video would be harmless because jurors were admonished not to consider this type of evidence, except "to help [them] decide if [they] believe the witnesses." *See id.*; *see also Ware*, 338 N.W.2d at 712 (noting that admission of evidence was less problematic because "the trial court advised the jury that the out-of-court statements were only for impeachment purposes").

One additional remark must be made on Swift's argument that "[t]he video contained statements by Detective Robinson purporting

that Ashanti had earlier identified Swift as the shooter when he spoke to her at the hospital on the day of the shooting prior to the surgery." *See* Def's Br. at 76 (citing State's Ex. 88, at 14:13–14:26); *accord* State's Ex. 88 at 11:29–11:57 (referencing a prior statement when Ashanti "identified him on Wednesday"). That statement was critical, because it was part of Detective Robinson's question that sought an explanation of *why* Ashanti thought Swift was the shooter—and she answered that question in a way that undermined her trial testimony: "Because the person I seen coming towards me *was* him," based on some distinctive characteristics. *See* State's Ex. 88, at 14:13–15:23. Swift complains that "[t]he State relied on this aspect of the video, in particular, during its closing argument." *See* Def's Br. at 76. But that was in the State's rebuttal, and it was in response to Swift's insistent repetition of the demonstrably false statement that Ashanti had never identified Swift as the shooter at any point before that interview. *See* TrialTr. 527:4–531:12; TrialTr. 553:6–554:25. Swift's indignation that the State was able to refute his objectively false statements is jarring because Swift *knew* they were false, as established by other facts. *See* State's Ex. 85; *cf.* TrialTr. 258:7–271:7. Swift has no right to a version of the record that allows him to present a false view of the facts.

F. Questioning Ityleonia about her statements to investigators was not improper impeachment by extrinsic evidence. The State could ask leading questions about Ityleonia's prior statements to refresh her memory, and it took answers as given.

For Exhibits 85, 87, and 88, Swift argues that admitting them was improper because "the purportedly impeaching prior inconsistent statements were already acknowledged by Ameshia and Ashanti," on direct and cross-examination. *See* Def's Br. at 72–75. But Swift also argues that *questioning* Ityleonia about her prior statements was reversible error. *See* Def's Br. at 65–72. Swift's advocacy must envision scrutiny-free recantations, with no opportunity for the State to ask for explanations of inconsistencies, refresh memories, or confront lies.

Still, there is a kernel of merit in Swift's argument. If Ityleonia testified that she did not remember certain facts, the proper response would have been to refresh her recollection somehow, then ask again. The officer's report could be used for that purpose. *See* Iowa R. Evid. 5.612; *Carson v. Mutnix*, 263 N.W.2d 701, 708 (Iowa 1978) ("If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence but the recollection of the witness."). But there is

also the option of refreshing recollection by directly asking a witness if she recalls making the prior statement. *See State v. Reynolds*, 250 N.W.2d 434, 440 (Iowa 1977) ("Prior statements may be repeated to jog the memory of a witness who surprises a party on the stand with his unexpected response."). This is still not impeachment—without a statement that described whether something did or did not happen, there is no actual inconsistency and no opportunity for impeachment by prior inconsistent statements, unless those prior statements prove the witness *does* remember. *See Gilmore*, 259 N.W.2d at 857 (holding that, when witness testified to lack of recall of key event, "the fact to be impeached was whether or not [she] remembered the facts contained in the statement," and "[t]he only avenue of attack on [her] credibility in this situation was on her memory or ability to recollect"). As such, Swift is technically correct to argue that Ityleonia could not have been impeached during the State's direct examination—but Iowa authority would still seem to allow an attempt to refresh Ityleonia's recollection by questions that referenced her prior statements. *See* Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.612:1, n.4. This is suboptimal because jurors hear those statements. However, jurors are instructed that attorney questions are not evidence. *See* Jury Instr. 11; App. 30.

When Ityleonia testified that she could not remember exactly what happened, the State confirmed that Ityleonia's memory would have been better when she spoke with police than at the present date, and then asked Ityleonia whether she remembered telling an officer a series of specific facts about what occurred. *See* TrialTr. 104:7–110:20. Arguably, this was a permissible way to try to refresh her recollection. *See Reynolds*, 250 N.W.2d at 440. But if not, the worst that can be said is that it was *premature* impeachment. On cross-examination, Swift reviewed the State's examination about those specific statements and elicited testimony from Ityleonia that, because she vividly remembered *other* things that happened that day, the fact that Ityleonia could not remember X (and did not recall reporting X to police) was solid proof that X did not occur. *See* TrialTr. 111:4–115:18. This fills in the gap, and it would have enabled impeachment by prior inconsistent statements on redirect examination, using the same statements that were part of the State's questioning on direct examination. Once Ityleonia made a testimonial statement that certain things *did not* happen, she could be impeached with her prior inconsistent statements in which she said that those things really *did* happen (and the content of her statements could be proven by extrinsic evidence, if relevant and material). *See*

Gilmore, 259 N.W.2d at 858 (noting that, if the witness had changed her testimony from failure to recall to a definite version of events, the State could have responded by impeaching that new testimony with prior inconsistent statements that gave a different version of events). Therefore, even if trial counsel had lodged the proper objection and ended this line of questioning on direct examination, the State would have been able to ask the same questions on redirect examination, so any error is harmless. *See State v. Schneider*, No. 14–1113, 2015 WL 2394127, at *5 (Iowa Ct. App. May 20, 2015) (citing *State v. Frazer*, 267 N.W.2d 34, 37 (Iowa 1978)) (finding no prejudice from failure to object to form of questions, because if an objection were "interposed and sustained, the prosecutor would have had the opportunity to rephrase the question to obtain the same testimony"). Indeed, the State could have asked Ityleonia whether she would have remembered those specific events if they had occurred, obtained the same answers that Swift obtained on cross-examination, and impeached Ityleonia with prior inconsistent statements on direct examination—so even if the State's attempt to refresh her recollection was improper, it could have changed tack in response to a sustained objection, drawn out the definite answers that Swift received, and proceeded to impeach them.

Error is also harmless on this particular challenge because various other witnesses testified to the facts that Ityleonia denied or could not remember. *See* TrialTr. 79:7–86:3; TrialTr. 304:4–307:15; TrialTr. 327:10–330:24. Ameshia's testimony contained the same basic facts—including the dispute over the keys, the threat to call the police, and the order in which Swift and Ashanti left the apartment. *See* TrialTr. 304:4–307:15. Because this questioning was cumulative with testimony from other witnesses, any error would be harmless. *See State v. Holmes*, 325 N.W.2d 114, 116 (Iowa 1982).

Finally, note that error is harmless on this particular challenge because the State accepted Ityleonia's answers as given, and never did offer extrinsic evidence of Ityleonia's prior statements. Her statements were only present through the prosecutor's questions, and the jury was instructed that questions from the attorneys were not evidence. *See* Jury Instr. 11; App. 30. The State accepted Ityleonia's denials without introducing extrinsic evidence of her statements, nor anything jurors could use as evidence of those statements under the instructions they received. *See State v. Martin*, 877 N.W.2d 859, 869 (Iowa 2016) (quoting *United States v. Mack*, 643 F.2d 1119, 1124 (5th Cir. 1981)). Therefore, any error in questioning Ityleonia would be harmless.

G. Any error from improper impeachment was harmless. The jury was cautioned to "only" use inconsistent out-of-court statements to decide if they believed in-court testimony. Swift's guilt was affirmatively proven through other evidence.

The harmless error analysis starts with the fact that the court gave a cautionary instruction, limiting use of the challenged evidence:

> You have heard evidence claiming Ashanti Dixon, Ameshia Dixon and Eziah Dixon made statements before this trial while not under oath which were inconsistent with what the witnesses said in this trial.
>
> Because the witness did not make the earlier statements under oath, you may use them only to help you decide if you believe the witnesses.
>
> Decide if the earlier statements were made and whether they were inconsistent with testimony given at trial. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given at trial, but you are not required to do so.
>
> Do not disregard the testimony if other evidence you believe supports it, or if you believe it for any other reason.

Jury Instr. 15; App. 31. Swift argues that his counsel was ineffective for failing to object to this instruction, because "this does not convey or inform the jury that they cannot use the evidence *as substantive evidence*, or as *evidence of the truth of the matter asserted in the prior statements*." *See* Def's Br. at 83–86. But the instruction says these statements could be used "only to help [jurors] decide if [they] believe the witnesses." *See* Jury Instr. 15. The word "only" is pivotal.

"Only" is easily understood by any juror—unlike Swift's verbiage about "substantive evidence" or "the truth of the matter asserted," which are cryptic phrases that are notoriously difficult to simplify. Counsel has no duty to demand unnecessarily complex instructions. The Iowa Supreme Court has held that it is not error to accept and use a jury instruction that reduces a complex idea to its simplest form. *See*, *e.g.*, *State v. Tipton*, 897 N.W.2d 653, 696 (Iowa 2017) (holding "the jury instruction on attempt was adequate" because it expressed the concept of attempt "in plain language" with one short sentence). Moreover, Swift does not cite a single case where an Iowa court has disapproved of this model instruction. *See* Def's Br. at 82–86.

Swift's attack highlights the primary reason why the errors he alleges are harmless: the court "gave a limiting instruction informing the jury of the limited purpose for which the evidence could be used." *See State v. Putman*, 848 N.W.2d 1, 15 (Iowa 2014) (citing *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996)). "It is only in extreme cases that such an instruction is deemed insufficient to nullify the danger of unfair prejudice" that would arise from misuse of evidence admitted for limited purposes. *See id.* (quoting *Plaster*, 424 N.W.2d at 232). That, standing alone, would be enough to establish harmless error.

Harmless error can also be shown through the strength of the other evidence of the defendant's guilt. *See, e.g.*, *State v. Parker*, 747 N.W.2d 196, 210 (Iowa 2008) (citing *State v. Martin*, 704 N.W.2d 665, 673 (Iowa 2005)). Swift had both motive and opportunity to commit this crime—he had left Ameshia's apartment on foot, after an angry argument with Ashanti, and he was found running through a cornfield that was relatively close to the location of the shooting. *See* TrialTr. 85:11–25; TrialTr. 118:9–128:6. Swift gave a geographically nonsensical explanation for being there. *See* TrialTr. 128:16–130:10; TrialTr. 160:7–161:20; State's Ex. 76–77; ExApp. 5–6. Swift matched the general description of the shooter, and Crystal Moore identified the jeans that Swift was wearing when he was apprehended as the same pants that the shooter wore. TrialTr. 368:5–24; State's Ex. 81; ExApp. 8; *see also* TrialTr. 61:2–15; TrialTr. 68:12–69:4. And the minor divergences between Swift's appearance at the moment of arrest and the eyewitness descriptions were all attributes that Swift could easily change over the course of those 14 minutes between the shooting and the moment of arrest, by shedding a layer of clothing and putting his hair up. *See* TrialTr. 167:14–170:16; TrialTr. 455:25–457:13. Indeed, he must have put *on* a layer of clothing after leaving

Ameshia's apartment wearing a *white* shirt—not a red sweatshirt. *See* TrialTr. 312:1–8. That means Swift must have changed his shirt at some location within walking distance, after leaving Ameshia's place. *See* State's Ex. 81; ExApp. 8. If nothing else, that clothing swap must have happened before Lovel saw Swift run into the woods—which was "about five minutes" after the shooting, near the apartment buildings lining the street where Ashanti was shot. *See* TrialTr. 66:18–69:14; TrialTr. 73:3–21 (describing path of the "male black with a red hoodie and the medium dreads" who passed by "about five minutes later" and was "running back towards the wooded thicketed area that we have by Heatherton"); State's Ex. 77; ExApp. 6. Right away, the fact that Swift ran past the scene of the shooting *five minutes afterwards* establishes that he lied when he told officers that he heard gunshots and fled in the opposite direction. *See* State's Ex. 80 at 0:52–0:54, 10:13–10:34. Swift was likely delayed when he stashed the gun and his black jacket before he fled, in the same place where he acquired the red hoodie. Such a "stash" must exist—the hoodie had to come from somewhere.

Crystal Moore's testimony establishes that Ashanti would have an ample opportunity to identify Swift as he "walk[ed] right in front" of her car and paused before opening fire. *See* TrialTr. 365:21–367:25.

By the time police had apprehended Swift, 14 minutes later, he had already become their primary suspect. *See* TrialTr. 169:17–172:5; TrialTr. 436:3–438:4. That had to come from Ashanti, either through Ameshia's account of Ashanti calling her and saying "Debo shot me" or through statements that Ashanti made to someone else. Either way, Ashanti relayed an identification immediately, and only reconsidered when police indicated that Swift would face consequences. *See* TrialTr. 469:3–473:20. Statements made in extreme pain and in the wake of startling events are deemed reliable because they "are less likely to involve deception than if made upon reflection or deliberation." *See Harper*, 770 N.W.2d at 319 (quoting *State v. Tejeda*, 677 N.W.2d 744, 753 (Iowa 2004)). This is both established law and common sense. Ashanti's identification in moments immediately after the shooting (which had to have been made, to flag Swift as the primary suspect) was unclouded by concern over consequences for Swift and was the most reliable evidence on the shooter's identity. *See* TrialTr. 347:7–11; State's Ex. 85. But then, after receiving news that Swift was arrested, Ashanti gave a false statement about what she had just told Ameshia—it was clear that police involvement meant consequences, and Ashanti wanted Swift to face none (or, at least, none that could be traced back to

her cooperation with police). *See* TrialTr. 471:22–473:20. Even without other impeachment evidence, it was obvious that Ashanti's testimony was reluctantly given and that Ashanti was opposed to the prosecution. Any juror would understand that she had taken Swift's side and would weigh her testimony accordingly. *See* TrialTr. 397:11–23; *see also* TrialTr. 323:15–324:11; TrialTr. 335:7–339:24. But at the same time, there was no other possible explanation for the fact that Swift was the primary suspect, 14 minutes after the shooting, *before* he was caught. Ashanti must have identified Swift to *someone*—and if she identified her live-in boyfriend of nine months as the shooter, it is very unlikely she was mistaken. *See* TrialTr. 332:17–333:8; TrialTr. 342:13–343:10.

If Swift was not the shooter, he would be an eyewitness. He said that he "seen a guy pull up" and start shooting, but did not know what he was shooting at and did not see him shooting at a car. *See* State's Ex. 80, at 2:24–2:39; State's Ex. 80, at 3:43–4:05. Every eyewitness who saw the shooter *also* saw the car he was shooting at, because the shooter was in such close proximity to his target. *See* TrialTr. 57:13–59:9; TrialTr. 67:5–13; TrialTr. 365:24–367:4. Swift's story changed to a version where he *heard* shots, then "crouched and walked away fast 'till [he] get away." *See* State's Ex. 80, at 4:14–4:47; State's Ex. 80,

at 10:17–10:40. But once Swift was clear of that general area in the moments after the shooting, he would have no reason to attempt to traverse the cornfield, which was strenuous for everyone who tried it. And that story was inconsistent with Lovel spotting Swift, five minutes after the shooting, in close proximity to where the shooting occurred. *See* TrialTr. 73:3–21. If Swift were telling the truth, he would have already put five minutes worth of distance between himself and the location where the shooting occurred—so Lovel's testimony proved that he was lying. *See State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982).

Swift's description of his activities that preceded the shooting included walking from the library, and visiting his mother's house before that. But he did not mention Ashanti, Ameshia's apartment, or any of the events that took place within the hour before the shooting that showed his connection to the victim—and he even claimed not to know people in the area. *See* State's Ex. 80, at 5:40–6:00; State's Ex. 80, at 9:06–10:15; State's Ex. 13:12–13:52. That omission makes no sense, unless Swift already knew that Ashanti was the victim—but he denied seeing the shooting and he was not carrying a cell phone. The logical conclusion is that Swift omitted his connection to Ashanti from his story because he knew that she was the victim, because he shot her.

The explanation Swift had initially given when asked about his timeline was that he woke up and walked towards a friend's house, but that "by the time [Swift] called [his friend] they wasn't home, so [Swift] kept walking to the store." *See* State's Ex. 80, at 6:00–6:10. However, Swift was not carrying a cell phone. *See* TrialTr. 332:6–16; TrialTr. 461:19–462:2; TrialTr. 476:4–15. Swift denied that his friend lived on Heatherton Drive or near Heatherton Drive. *See* State's Ex. 80, at 6:10–6:29. He denied that he was walking from "an apartment on Heatherton"—because Ameshia's apartment was on Heatherton Drive. *See* State's Ex. 80, at 5:55–6:02. And when asked for his friend's name, Swift paused and declined to provide it, and explained "he doesn't have nothing to do with this right now"—as though providing the name of a friend who lived nearby would somehow incriminate that person. *See* State's Ex. 80, at 6:30–6:48; *see also* State's Ex. 80, at 11:47–12:04. But simply living nearby would not have implicated anyone in a crime. What this really demonstrates is that Swift's attempts to provide an account of innocuous activity were dashed by a request for a single externally verifiable detail—which shows that he was lying. "A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt." *See Odem*, 322 N.W.2d at 47.

Swift's estimate for when he left his mother's house to walk to the library was 10:00 AM, and he gave that estimate after being told that it was currently 12:21 PM—he was purporting to give an account of the last two-and-a-half hours. *See* State's Ex. 80, at 9:10–10:06; *cf.* State's Ex. 80, at 5:40–6:48. All of the witnesses who interacted with Swift before the shooting had testified that it was less than 30 minutes between Swift's departure from Ameshia's apartment and the shooting (or the moment when Ameshia received a call about the shooting). *See* TrialTr. 84:1–88:5 (15 to 20 minutes); TrialTr. 306:12–308:25 (stating that Ashanti called "a few minutes later"); TrialTr. 330:20–333:21 (estimating 10 to 15 minutes, plus the time it would take to drive less than three blocks down Heatherton Drive). Swift deliberately omitted his interaction with Ashanti and her family when he gave a timeline of his activities over the past two hours, and he told a false story to avoid describing interactions with Ashanti before the shooting, which would have given him a motive. *See* TrialTr. 304:4–306:8; TrialTr. 327:10–330:5. Those lies are critically important; Swift could only know that a connection to Ashanti would give him a motive for the shooting if he already knew that Ashanti was the victim—and the only way he could have known *that* is by being the person who pulled the trigger.

Finally, the jury heard Swift's inculpatory statements during his phone call with Ashanti—and though he knew he was being recorded, he still tried to apologize to Ashanti. *See* State's Ex. 86, at 0:45–1:00 ("I know I ain't do shit, incidentally, 'cause, you know, the people listening, you know I ain't do shit."). Ashanti clearly implies that she believes that Swift shot her and blames him for her physical pain. *See* State's Ex. 86, at 1:57–2:19; State's Ex. 86, at 5:20–5:30. Swift was somehow aware, only two days after his arrest, that police would be unable to find a gun. *See* State's Ex. 86, at 3:51–4:07; *see also* TrialTr. 134:11–136:16 (noting that Swift would have been able to hide the gun in a nearby apartment complex, or "in an apartment for all we know"). Swift's confidence that the police had not found and could not find the gun means he was the shooter; anyone arrested by mistake would have no idea where the gun was, or whether it would ever be found. *See State v. Ayabarreno*, No. 13–0582, 2014 WL 465761, at *5 (Iowa Ct. App. Feb. 5, 2014) (noting that "knowledge of the precise location of the robbery proceeds" was "strong evidence of Ayabarreno's guilt"). And Swift's conversation with Ashanti would have been very different if he were innocent—Swift did not even attempt to convince Ashanti that he was not the shooter, nor did he offer any theory or express any

desire to know who *did* shoot her. *See* TrialTr. 551:9–552:9. This was the first time that Swift talked with Ashanti since the shooting, and neither of them needed to discuss the shooter's identity—Ashanti knew it was Swift, and Swift knew that she knew. *See* TrialTr. 412:11–413:15. They had locked eyes when Swift stood in front of her car, just before he started shooting. *See* TrialTr. 365:21–367:25. No juror could harbor any doubt that Swift was the shooter after hearing that conversation.

Even without the impeachment evidence that Swift challenges, there was no way for him to overcome the State's proof that he was the shooter. Swift's false statements to police and his phone call with Ashanti were inconsistent with any reasonable doubt as to his guilt. Crystal Moore identified the jeans that Swift wore at the moment of his arrest as the same jeans that the shooter had worn. *See* TrialTr. 368:5–24; State's Ex. 81; ExApp. 8. Lovel saw Swift in the vicinity of the apartment buildings near the shooting, five minutes afterwards—which suggested an explanation for his ability to change clothes and stash the gun, and disproved his statement that he heard gunfire and ran in the opposite direction. *See* TrialTr. 73:3–21. And the jury was given a limiting instruction on the use of impeachment evidence. *See* Jury Instr. 15; App. 31. As such, any error would be harmless.

CONCLUSION

Evidentiary rules must leave room for the State to seek justice for domestic violence victims who are cowed by fear of reprisals. The State respectfully requests that this Court affirm Swift's convictions.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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