

Following a jury trial, Demetrius Burks was convicted of Murder,¹ a felony, and subsequently sentenced to the advisory term of fifty-five years imprisonment. Burks presents the following restated issues for review:

1. Did the trial court err in denying his claim that the State's exercise of a peremptory challenge to exclude one of two potential black jurors on the venire violated *Batson v. Kentucky*, 476 U.S. 79 (1986)?
2. Did the trial court abuse its discretion by excluding evidence that the car in which Burks was riding was suspected to have been involved in a prior drive-by shooting?
3. Did the trial court properly allow a police officer to testify in a manner that was not quite the truth in order for the officer to not violate the court's order in limine?
4. Did the trial court properly permit the State to show the victim's mother a picture of her deceased son at the crime scene for purposes of identification?
5. Did the trial court abuse its discretion in admitting a series of autopsy photographs?
6. Did the trial court properly allow the State to impeach one of its witnesses with extrinsic evidence of a prior inconsistent statement?
7. Did the trial court err in refusing to give Burks's tendered jury instructions?²

We affirm.

In June 2005, nineteen-year-old Gareth Geustyn traveled from his home in Cape Town, South Africa to the United States to work for an amusement ride company. After

¹ Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 1st Regular Sess.).

² In his Statement of Issues, Burks questions whether the trial court abused its discretion in sentencing him to the advisory sentence of fifty-five years. Burks, however, provides no argument on this issue in the Argument section of his brief. Burks's failure to set forth any argument supported by cogent reasoning and citation to authority constitutes a waiver of the issue. See Ind. Appellate Rule 46(A)(8)(a).

his arrival, Gareth was teamed with Matthew Meyer, another teenager from South Africa, to work on one of the rides for the Queen of All Saints Festival in Michigan City, Indiana. Every day during the Festival's run, Gareth and Matthew, who had become friends, would walk to a nearby gas station to buy sandwiches.

On June 19, 2005, the last day of the Festival, Gareth and Matthew finished tearing down their ride and preparing it for transport to the next location and then walked to the gas station to get something to eat. By that time of the early morning, however, the gas station had closed. In the meantime, Matthew noticed a car, with two men sitting in the front seat, waiting at a stop sign for longer than necessary. Matthew became concerned that he and Gareth were being followed.

The car was driven by David Sneed,³ and Burks was sitting low in the front passenger's seat. When they saw Gareth and Matthew walking along the street, Burks told Sneed to pull up alongside them. Burks then pulled a small handgun out of his back pocket and placed it in his lap. Someone from inside the car asked for the time, but neither Gareth nor Matthew was wearing a watch. Matthew then asked if there was some place that was open where they could find something to eat, and Sneed said something that Matthew could not hear and then pointed in the direction of the Festival. Sneed then drove away but soon stopped and backed up toward Gareth and Matthew until the car had passed behind them. Sneed then drove slowly up alongside Gareth and Matthew, and Gareth told the men inside the car to leave them alone. Burks then rose up in the

³ David Sneed was also known as David Farmer. The car he was driving was owned by his step-father, who had given Sneed the car to use on a full-time basis. For simplicity, we will refer to the car as Sneed's car.

passenger's seat and began firing at Gareth and Matthew. Burks fired several shots as the car sped away. Matthew ducked, but Gareth was hit by bullets and stumbled to the ground at a nearby house. Matthew ran to the festival area to find help, and the police were summoned. Shortly after police arrived on the scene, Gareth died from two gunshot wounds to his chest, one of which pierced his heart.

Michigan City Police Officer Allen Schutz was patrolling the area and heard the gunshots. Driving in the direction of the shots, Officer Schutz heard a transmission over his radio describing the vehicle that may have been involved in the "shots fired" situation. At the crime scene, Officer Schutz overheard Matthew provide a similar description of the car involved, so he began looking for it. A short time later, Officer Schutz discovered a vehicle matching the description and noted its hood was still warm to the touch. The police determined that Sneed was a person of interest and located him at a nearby residence. Matthew, who had been brought to the location of the car to identify it, also identified Sneed as the driver of the vehicle when Sneed came out of a nearby house. When officers spoke with Sneed, they observed that Sneed appeared nervous, his hands were trembling, he could barely light his cigarette, and he stared at his feet the entire time he was being questioned. Sneed eventually identified the passenger in the car as "Meechie." *Transcript* at 343, 369.

Upon further investigation, the police determined that Meechie was a nickname used by Burks. During a search for Burks, police questioned Burks's girlfriend, who told the police that she had not seen Burks, but that he had recently called her to say he loved her and that he would be going away for a long time. Officers also went to Burks's

mother's home where they spoke with Burks's younger brother, who informed him that Burks had called him and told him to take care of the family. Burks later learned that police were looking for him, so he went to an attorney's office and called police to surrender. Burks was taken into custody at the attorney's office.

On June 21, 2005, the State charged Burks with murder, a felony. A five-day jury trial commenced on June 26, 2006. At the conclusion of the evidence, the jury found Burks guilty as charged. At an October 12, 2006 sentencing hearing, the trial court sentenced Burks to the advisory sentence of fifty-five years imprisonment.

1.

Burks argues that the trial court erred in denying his claim that the State's use of a peremptory challenge to exclude one of two potential black jurors on the venire violated *Batson v. Kentucky*, 476 U.S. 79. Upon Burks's objection to the State's exercise of its peremptory challenge to exclude a potential black juror, the State responded, providing several reasons for its challenge. Specifically, the State cited the juror's belief that fifty percent of police officers lie or do not honorably discharge their duties; that the juror discredited circumstantial evidence and believed that direct evidence was necessary to find an individual guilty of a crime; that the juror indicated that the burden of judgment was on the judge presiding over the trial, not the jurors; and that the potential juror did not answer questions on the juror questionnaire related to the juror's prior arrests. The trial court found the State's reasons to be race-neutral and thus overruled Burks's *Batson* challenge.

Upon appellate review, a trial court's decision concerning whether a peremptory challenge is discriminatory is given great deference and will be set aside only if found to be clearly erroneous. *McCants v. State*, 686 N.E.2d 1281 (Ind. 1997); *Williams v. State*, 669 N.E.2d 1372 (Ind. 1996), *cert. denied*, 520 U.S. 1232 (1997); *see also Batson v. Kentucky*, 476 U.S. at 98 n.21 (trial court's finding "largely will turn on evaluation of credibility [and should be given] great deference").

It is well-established that the exercise of racially discriminatory peremptory challenges is constitutionally impermissible. *McCormick v. State*, 803 N.E.2d 1108 (Ind. 2004). In resolving a *Batson* challenge, the trial court follows three steps. First, the party contesting the challenge must make out a prima facie case of racial discrimination by demonstrating that:

(1) the juror is a member of a cognizable racial group; (2) [the challenging party] has exercised peremptory challenges to remove that group's members from the jury; and (3) the facts and circumstances of this case raise an inference that the exclusion was based on race.

Wright v. State, 690 N.E.2d 1098, 1104-05 (Ind. 1997) (*citing Batson v. Kentucky*, 476 U.S. 79), *reh'g denied*. Second, upon such a showing, the burden of production shifts to the proponent of the peremptory challenge to provide a race-neutral explanation. *Purkett v. Elem*, 514 U.S. 765 (1995), *reh'g denied*. If the explanation, on its face, is based on something other than race, the explanation will be deemed race-neutral. *Id.* Third, the trial court must determine whether the party contesting the peremptory challenge has proved purposeful racial discrimination. *Id.*

Although the State argued that Burks failed to establish a prima facie case of racial discrimination, the State nevertheless provided the court with its reasons for the strike, as set forth above.⁴ Burks does not explain why the State's reasons for its peremptory challenge were not race-neutral other than to say that "[w]hen those reasons are compared to the jurors' [sic] actual statements made during voir dire, it is clear there was no non-discriminatory reason for striking this juror." *Appellant's Brief* at 9.

We have reviewed the record and find the State's reasons for its use of a peremptory strike to exclude the challenged juror were supported by the juror's responses to questions posed during voir dire. The State explained that in proving its case it would be relying, in part, on testimony of police officers and on circumstantial evidence. On both subjects, the challenged juror indicated an inability to consider such evidence as indicative of the defendant's guilt. The juror also demonstrated possible, significant confusion about the jury's role by expressing a belief that the judge, not the jury, had the burden of judgment. The juror also failed to answer questions on the juror questionnaire relating to prior arrests. None of the reasons cited by the State are based on the challenged juror's race. We therefore conclude that the trial court properly denied Burks's *Batson* challenge upon the State's proffer of race-neutral reasons justifying its use of a peremptory challenge to exclude the challenged juror.

2.

Burks argues that the trial court denied him the right to present a defense that someone else committed the instant offense. Specifically, Burks's defense was that

⁴ For purposes of this appeal, we will assume Burks made a prima facie case of racial discrimination.

Sneed was the shooter. Burks contends evidence that Sneed's vehicle had been involved in a drive-by shooting a week prior to the current incident was relevant to establishing his defense and thus admissible. The State argued that such evidence was inadmissible because it constituted evidence of prior misconduct which Burks, in establishing his defense, would use to prove the forbidden inference, *see* Indiana Evidence Rule 404(b), that because Sneed had been involved in a prior, unrelated shooting, he was more likely to have fired the shots that killed Gareth. The trial court granted the State's pre-trial motion in limine and further sustained its ruling by excluding the admission of such evidence during trial.⁵

A trial court's decision to exclude evidence is afforded great deference on appeal, and that decision will be reversed only for a manifest abuse of discretion that denies the defendant a fair trial. *Bryant v. State*, 802 N.E.2d 486 (Ind. Ct. App. 2004), *trans. denied*.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. Evidence that tends to show someone else committed the offense for which the defendant is charged is relevant evidence. *Bryant v. State*, 802 N.E.2d 486. Moreover, the defendant has a right to present evidence that someone else committed the crime for which he is charged. *Id.*

⁵ Burks also argues that the trial court erroneously excluded evidence of different caliber bullets than used to kill Gareth that were found in Sneed's car after it was impounded. Our review of the record indicates that while the trial court initially granted the State's motion in limine with regard to this evidence, the trial court reconsidered the admissibility of such evidence during the trial and ultimately allowed this evidence to be admitted.

The defendant's right, however, is limited to the extent the relevant evidence is otherwise inadmissible under the rules of evidence. *Id.* Even though evidence may be relevant, it may be excluded when the evidence involves evidence of other crimes, wrongs, or misconduct. *Id.*; Evid. R. 404(b). The limitation found in Rule 404(b) is applicable when a defendant proffers evidence that a third party may have committed the crime. *Bryant v. State*, 802 N.E.2d 486 (citing *Smith v. State*, 754 N.E.2d 502 (Ind. 2001)).

Evidence that Sneed's vehicle, and hence Sneed, were involved in a prior, unrelated shooting clearly falls within the prohibition of Rule 404(b), which dictates that evidence of prior crimes or acts of misconduct to infer that the person who committed the prior act has a criminal propensity and therefore likely committed the present crime is inadmissible. To establish his defense, Burks argued for the admission of the evidence of the prior shooting involving Sneed's car to show that Sneed may have been the shooter in the present case. This is a classic example of using evidence of prior misconduct to establish the forbidden inference. Burks did not establish how the excluded evidence was admissible for another purpose—i.e., as proof of motive, intent, preparation, plan, knowledge, identity, or mistake or accident. Because the court did not abuse its discretion in excluding the prior shooting evidence, it cannot be said that Burks was denied his right to present his proffered defense. *See Bryant v. State*, 802 N.E.2d 486.

We reject Burks's argument that *Joyner v. State*, 678 N.E.2d 386 (Ind. 1997), dictates a different result. In *Joyner*, the defendant sought to establish that a third person committed the offense for which he was charged by offering specific and detailed evidence concerning that person's relationship with the victim. The court noted that

other evidence admitted at trial was consistent with the defendant's theory that the crime was committed by the third person and found that some of the excluded evidence could also have established motive and/or opportunity.

In contrast to *Joyner*, here, Burks's defense that Sneed committed the instant offense was based solely on the fact that Sneed's car was involved in a prior shooting wholly unrelated to the victim in the instant case. Burks did not establish any connection between the prior shooting and the instant crime or victim. Burks sought only to use the evidence of the prior shooting to establish the forbidden inference—that it was more likely that Sneed committed the instant offense because of his possible involvement in the prior, unrelated shooting incident. As we concluded above, this is precisely what Rule 404(b) prohibits.

3.

Burks argues that he was denied a fair trial when the trial court permitted a witness for the State to provide a false story so as not to violate the trial court's grant of the State's pre-trial motion in limine and subsequent ruling excluding evidence of the prior shooting incident involving Sneed's car. During the trial, Officer Schutz testified that upon hearing the description of the car involved in the instant shooting, a specific car "[c]ame to mind", so he began looking for it. *Transcript* at 298. Burks anticipated that Officer Schutz would explain that he was familiar with the car involved in the instant case from his investigation of the prior shooting. Officer Schutz testified, however, that he recognized the description of the car in the current shooting because he had previously

conducted a traffic stop of the car and its driver and written a citation for a noise violation.

On cross-examination, Burks was permitted to question Officer Schutz as to whether his familiarity with the subject vehicle stemmed from “a previous investigation,” to which Officer Schutz reiterated that his familiarity stemmed from traffic stops for loud music.⁶ *Id.* at 307. Unsatisfied with Officer Schutz’s response, Burks again argued against the State’s motion in limine in an effort to place before the jury the investigation relating to a prior shooting involving Sneed’s vehicle. The court again denied Burks’s request to put such evidence before the jury.

During a lunch break that followed Officer Schutz’s testimony, Burks’s attorney discovered that Officer Schutz did not write a ticket against Sneed for a noise violation until after the current incident occurred. Thus, Burks maintains that Officer Schutz’s explanation as to why he was familiar with Sneed’s car was false. Burks advocated again for admission of evidence of the prior shooting involving Sneed’s vehicle, asserting that such evidence would be a more accurate explanation as to why Officer Schutz immediately focused on Sneed’s car. The trial court again denied Burks’s request to put such evidence before the jury.

On appeal, Burks contends that he was denied a fair trial because false testimony was presented to the jury. The State concedes that “[Burks’s] claim that . . . Officer

⁶ The wording of the specific question was extensively discussed with the trial court. The trial court warned that it did not want any specific reference to the prior shooting because the court had ruled that evidence of the prior shooting was inadmissible under Rule 404(b). The question approved by the court was phrased as follows: “Were you familiar with this car from a previous investigation?” *Transcript* at 306.

Schutz presented false testimony is technically true.” *Appellee’s Brief* at 14. Notwithstanding its concession, the State argues that Burks has waived this issue for review by failing to object to Officer Schutz’s testimony or request a mistrial. The State also argues that Burks’s claim fails because the false testimony did not influence the jury’s verdict.

Our Supreme Court has unequivocally condemned prosecutorial use of perjured testimony or testimony known to be false. *Azania v. State*, 730 N.E.2d 646 (Ind. 2000) (citing *Gordy v. State*, 385 N.E.2d 1145 (1979)). Such conduct on behalf of the State “invokes the highest level of appellate scrutiny” and requires that any resulting conviction be set aside “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Id.* at 652 (quoting *Gordy v. State*, 385 N.E.2d at 1146).

We begin by noting that there is nothing in the record which suggests the State was aware that Officer Schutz, in trying to abide by the court’s ruling excluding evidence relating to the prior shooting involving Sneed’s vehicle, was providing “false” testimony when he explained his familiarity with Sneed’s car stemmed from a prior traffic stop for noise violation. There is also no indication that the State intended to prejudice the defense. Moreover, Officer Schutz’s testimony in this regard was minimal and inconsequential to the ultimate determination of guilt. In light of the evidence presented at trial—specifically, the two eyewitnesses, Matthew and Sneed, who each testified that there were only two people in the car and that Burks did the shooting—there is no reasonable likelihood that Officer Schutz’s testimony about how he was familiar with

Sneed's car influenced the jury's verdict. Burks's argument that he was denied a fair trial therefore fails.

4.

Burks argues that he was denied a fair trial when the State "orchestrat[ed] a breakdown by the decedent's mother [Vanessa Velati]" by showing her for the first time at trial a crime-scene photograph depicting her deceased son. *Appellant's Brief* at 12. Burks objected to admission of the photograph at trial and reiterates his argument on appeal that the probative value of the photograph depicting the deceased at the crime scene and the manner in which it was presented by the State was substantially outweighed by the danger of unfair prejudice.⁷ *See* Ind. Evidence Rule 403. The State responds that the photograph was a necessary part of its case-in-chief because it aided the identification of the deceased.

The crime-scene photograph shown to the decedent's mother depicts the victim lying in grass at the crime scene. *State's Exhibit 4A*. His wounds are not visible and no blood can be seen. In short, the photograph is not gruesome or inflammatory.

Burks's primary complaint, however, appears to be with the State's use of the photograph in what Burks claims was an orchestrated attempt to garner sympathy for the victim by facilitating a breakdown by the decedent's mother on the witness stand. When the decedent's mother was shown the photograph, the transcript indicates, "Witness

⁷ We note that the photograph (*State's Exhibit 4A*) was not admitted into evidence or published for the jury during Ms. Velati's testimony. The group of crime-scene photographs (*State's Group Exhibit 4*, including *Exhibit 4A*), was admitted and published later in the trial during the testimony of the officer who took the photographs of the crime scene.

weeps[.]” *Transcript* at 261. She was nevertheless able to identify the deceased in the photograph as her son, Gareth, and to answer questions posed by Burks’s counsel on cross-examination. The witness’s reaction to seeing a photograph of her deceased son was hardly within the control of the State. Even if shown the photograph prior to her testimony, as is the suggested procedure put forth by Burks, there is no guarantee that the witness would have been desensitized so that she would have exhibited no emotion when shown the photograph during her in-trial testimony. In any event, as asserted by the State, a defendant is not entitled to have his actions sanitized when evidence is presented to a jury. *See Reaves v. State*, 586 N.E.2d 847 (Ind. 1992) (citing *Shelton v. State*, 490 N.E.2d 738 (Ind. 1986)). Any reaction by the victim’s mother when shown an otherwise admissible photograph does not render the evidence inadmissible.

5.

Burks argues that the trial court abused its discretion by permitting the State to introduce a series of autopsy photographs (*State’s Group Exhibit 11*) when the pathologist testified that he did not “need” the photographs to explain his testimony. *Transcript* at 518. Burks thus asserts that the photographs were irrelevant and suggests that the State sought their admission only to “inflame the passions of the jury.” *Appellant’s Brief* at 14. Burks maintains that the State’s manipulation of the evidence denied him a fair trial. Burks also claims that the photographs were gruesome by pointing to the fact that the trial court offered to give the jury a break after they viewed the photographs.

The admission of evidence falls within the sound discretion of the trial court. *Swingley v. State*, 739 N.E.2d 132 (Ind. 2000). Autopsy photographs are admissible if they provide relevant evidence, and their probative value is not substantially outweighed by their tendency to impassion the jury against the defendant. *Malone v. State*, 700 N.E.2d 780 (Ind. 1998). When such photographs are used to illustrate the pathologist's testimony, the initial relevancy requirement has been satisfied. *Id.* The question then becomes one of balancing the probative value against the prejudicial effect, and a trial court's ruling on this issue will not be disturbed absent an abuse of discretion. *Id.*

First, we address Burks's claim that the photographs were irrelevant because the pathologist testified that he did not need the photographs to explain what he did during the autopsy. Although the pathologist stated that he did not "need" the photographs, he further stated, "Well, a picture paints a thousand words." *Transcript* at 518. In other words, although the pathologist could explain his findings, the photographs would aid the jury in understanding his testimony with regard to the nature of the injuries suffered by the victim. Indeed, during his testimony, the pathologist referred to the photographs as illustrations of what he was explaining. The photographs were thus relevant and admissible to illustrate and help the jury understand the pathologist's testimony about the nature of the injuries and the cause of death of the victim. *See Malone v. State*, 700 N.E.2d 780.

We next address Burks's argument that the autopsy photographs were unduly gruesome. Burks's entire argument is based on the fact that after the jury was shown the photographs, the trial court, being sensitive to the fact that "many of [the jurors] ha[d]

probably not been exposed to photographs or evidence of that kind”, offered to give the jury a break. *Transcript* at 525. After completing his cross-examination of the pathologist, Burks moved for a mistrial. Burks also explained that he did not object to the trial court’s offer to give the jurors a break after viewing the photographs because he did not want to draw extra attention to the photographs.

We have reviewed the photographs which comprise *State’s Exhibit Group 11* and conclude that they are not gory or gruesome. To be sure, the photographs in which the decedent is shown simply depict the gunshot wounds suffered by the victim. There are two photographs which depict a metal pole protruding through a gunshot wound in the decedent’s arm and matching up with a gunshot wound to the decedent’s chest to demonstrate the path of one of the bullets and explain the superficial nature of one of the chest wounds. The risk of the photographs being inflammatory was low. When considered with the fact that the probative value of the photographs as illustrations of the pathologist’s testimony was high, we cannot say that the trial court abused its discretion in admitting the photographs or in being sensitive to the fact that the jurors may have never been exposed to evidence of that type.

6.

Burks contends the trial court improperly allowed the State to impeach one of its witnesses with extrinsic evidence of a prior inconsistent statement. During its case-in-chief, the State called as a witness Cierra Cooper, Burks’s girlfriend at the time of the murder. Cooper’s in-trial testimony was that the morning following the murder, Burks telephoned her and told her that “he was going to be gone for a long time because of

something that he didn't do". *Transcript* at 420. The prosecutor questioned Cooper whether she had ever told the police the "something that he didn't do" part of her telephone conversation with Burks, and Cooper insisted that she had told the police that part and that she had told the prosecutor the same thing the preceding day. The State confronted Cooper with her pre-trial, tape-recorded statement to police in which she stated that Burks had told her that "he was going to be gone because of some murder stuff", but did not further indicate that Burks said that he did not do it. *Id.* at 423. Cooper then agreed that she did not include the "something that he didn't do" phrase in her recorded statement to police. During cross-examination, however, Cooper again testified that she told the prosecutor the preceding day that Burks told her he was "going to be gone for a long time because of a murder or something that he didn't do", *see id.* at 424, and she also indicated that in her recorded statement to police, which the State had referenced during her direct examination, she had said Burks "just told me that he never did it", *see id.* at 425.

The following day, the State called Detective Williams as a witness to question him about Cooper's testimony that she told police in her recorded statement that Burks said he was going away for something he did not do. Burks objected to the detective's testimony as hearsay, and the State responded that it was offering the testimony as impeachment of a prior inconsistent statement and that it was not being offered for the truth of the matter. The trial court noted that the State had laid the foundation for the introduction of the prior inconsistent statement and that it was not being offered for the truth of the matter asserted and overruled Burks's objection. Detective Williams then

testified regarding what Cooper told him during her recorded statement about Burks's telephone call and explained that Cooper's in-trial testimony differed from her recorded statement. Detective Williams also testified that Cooper's cross-examination testimony that she told police that Burks "just told me that he never did it" was not made during her recorded statement regarding Burks's post-crime telephone call but was made at a later time and after Burks was already in jail. *See id.*

On appeal, Burks argues that the trial court erred by allowing the detective to testify about Cooper's prior inconsistent statement regarding what Burks said when he called Cooper the day after the murder. The State argues that the trial court properly allowed the testimony of the prior inconsistent statement under Ind. Evidence Rule 613(b).

A trial court is afforded broad discretion in ruling on the admissibility of evidence. *Kendall v. State*, 790 N.E.2d 122 (Ind. Ct. App. 2003), *trans. denied*. We will therefore review a trial court's determination only for an abuse of discretion. *Id.*

Rule 613(b) provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to statements of a party-opponent as defined in Rule 801(d)(2).

"It is well established that a prior inconsistent statement may be used to impeach a witness." *Martin v. State*, 736 N.E.2d 1213, 1217 (Ind. 2000). Furthermore, "[w]hen a

prior inconsistent statement is used to impeach a witness, it is not hearsay because the statement is not used to prove the truth of the matter asserted.” *Id.*

Here, as the trial court noted, the State afforded Cooper an opportunity to explain or deny her prior inconsistent statement, and Cooper admitted that she did not include the “something that he didn’t do” phrase in her recorded statement to police. *See Transcript* at 420, 423. Burks was also afforded an opportunity to interrogate Cooper. During this cross-examination, however, Cooper testified that she had said Burks told her he did not commit the crime when she made her recorded statement to police regarding Burks’s post-crime telephone call. The State then sought to introduce evidence, via the testimony of Detective Williams, that Cooper had made a prior inconsistent statement. We conclude the trial court did not err by allowing the detective’s testimony as a means of impeaching Cooper’s testimony with her prior inconsistent statement.⁸

7.

Burks argues that the trial court erroneously refused two of his tendered final jury instructions. Specifically, Burks tendered the following proposed final jury instruction:

Defendant’s proposed instruction no. 5

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant’s innocence, and reject that which points to his guilt.

⁸ As part of his argument that the trial court erred in the admission of the prior inconsistent statement evidence, Burks also suggests that he was denied a fair trial because Cooper was arrested prior to testifying as a defense witness. Cooper was arrested at the courthouse because she apparently threatened or harassed one of the alternate jurors at the juror’s home. None of the jurors saw Cooper get arrested, and Cooper was able to testify during Burks’s case-in-chief. Burks makes no cogent argument explaining how Cooper’s arrest pertains to the trial court’s admission of evidence regarding her prior inconsistent statement. Thus, we need not further address this part of his argument.

Appellant's Appendix at 25. Burks also tendered a proposed final jury instruction on the accuracy of cross-racial identifications:

Defendant's proposed instruction no. 6

When a witness who is a member of one race identifies a member who is of another race we say there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness's original perception and/or accuracy of a subsequent identification.

Id. at 26. The trial court rejected both instructions, noting "Not Given" at the bottom of each instruction. *Id.* at 25, 26.

The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading it and to enable the jury to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Overstreet v. State*, 783 N.E.2d 1140 (Ind. 2003), *cert. denied*, 540 U.S. 1150 (2004). Instruction of the jury is reviewed for an abuse of discretion. *Id.* A trial court abuses its discretion by refusing to give a tendered instruction if: (1) the tendered instruction correctly sets out the law; (2) evidence supports the tendered instruction; and (3) the substance of the tendered instruction is not covered by other instructions. *Id.* "We consider jury instructions as a whole and in reference to each other and do not reverse the trial court for an abuse of that discretion unless the instructions as a whole mislead the jury as to the law in the case." *Lyles v. State*, 834 N.E.2d 1035, 1048 (Ind. Ct. App. 2005), *trans. denied* (internal quotes and citations omitted).

We agree with the State's argument that Burks's tendered instruction no. 5, which addresses the presumption of innocence and the State's burden of proof, was covered by

the trial court's other instructions. The trial court instructed the jury that a person charged with a crime is to be presumed innocent and to overcome this presumption of innocence, the State was required to prove the defendant guilty of each element of the offense beyond a reasonable doubt. The trial court also informed the jury that a defendant is not required to present any evidence to prove his innocence. The trial court instructed the jury on the definition of reasonable doubt and informed the jury that if there was a reasonable doubt that the defendant was guilty, then they should give the defendant the benefit of that doubt and find him not guilty of the crime. Because the substance of Burks's tendered instruction no. 5 was adequately covered by the trial court's instructions, the trial court did not err by refusing to give Burks's instruction no. 5. *See Robey v. State*, 454 N.E.2d 1221 (Ind. 1983) (finding no error in the trial court's refusal to give the defendant's tendered instruction where the trial court's instructions adequately instructed the jury regarding the defendant's presumption of innocence and the State's strong burden of proof).

We next address Burks's contention that the trial court should have given his tendered instruction no. 6 regarding cross-racial identification because the identification of Burks (a black male) made by Matthew (a white male) was "suspect". *Appellant's Brief* at 19. Initially, we note that Matthew's identification of Burks is not the only evidence identifying Burks. Sneed, who is a black male, also identified Burks as the shooter. "We [also] note that, while recognizing the general hazards of identification evidence in certain circumstances, our supreme court has nevertheless held that Indiana law . . . is distinctly biased against jury instructions which single out eyewitness

identification testimony.” *Miller v. State*, 759 N.E.2d 680, 683 (Ind. Ct. App. 2001) (internal quotes and citations omitted). Here, Burks’s instruction singled out eyewitness testimony; therefore, the trial court did not abuse its discretion by refusing to give this instruction. *See, e.g., id.* (affirming the trial court’s denial of the defendant’s cross-racial identification instruction); *see also Murrell v. State*, 747 N.E.2d 567 (Ind. Ct. App. 2001), *trans. denied*. Moreover, the trial court specifically instructed the jury on the jury’s duty to judge the credibility of the witnesses as well as on some of the factors that could be considered when determining the value of a witness’s testimony, including the witness’s ability to observe and any bias or prejudice the witness may have. Because the substance of Burks’s tendered instruction no. 6. was covered by the trial court’s instructions, the trial court did not err by refusing to give Burks’s instruction.

Judgment affirmed.

MATHIAS, J., and ROBB, J., concur.