

No. 1-10-0172

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
)	the Circuit Court
Plaintiff-Appellee,)	of Cook County
)	
v.)	No. 06 CR 1996
)	
JASON McCRAY,)	Honorable
)	Steven J. Goebel,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

Held: The trial court properly allowed evidence of prior witness statements into evidence, properly allowed evidence of witness identifications into evidence; and the State committed no prosecutorial misconduct in closing arguments or otherwise.

¶ 1 Defendant Jason McCray was convicted by a jury of first-degree murder and personally discharging a firearm during the commission of a murder in connection with the shooting death

of John Kennedy. Defendant was sentenced to 32 years in prison for first-degree murder, to run consecutively to a 20-year sentence for personal discharge of a firearm. Defendant appeals from those convictions alleging that (1) the trial court erred in admitting the prior statements of certain witnesses, (2) evidence of certain witnesses' prior identifications of codefendants was irrelevant, violated the rule of prior consistent statements, and was prejudicial, and (3) the State committed prosecutorial misconduct when it violated a motion *in limine* ruling, encouraged the jury to speculate during closing argument, and improperly bolstered the credibility of police testimony. For the following reasons, we affirm.

¶ 2

I. BACKGROUND

¶ 3 Prior to trial, the trial court granted a motion severing defendant's trial from that of his two codefendants, Joseph Pettis (defendant's brother), and Michael Ferguson.

¶ 4 Also prior to trial, the parties made several motions *in limine*. Defense counsel made an oral motion *in limine* seeking to bar any mention of codefendants Pettis and Ferguson, their nicknames, any photos spreads that were used for purposes of their identification, any lineups that were held as to them, any statements that they made, or any evidence that merely associated defendant with them as a friend. Defense counsel argued that if any of such evidence did not pertain to an inference of criminal activity, then it would be irrelevant.

¶ 5 The State acknowledged that the statements of codefendants could not be used against defendant, and stated that it would not be seeking to use statements of either Pettis or Ferguson that were made to the police officers in this case. However, the State argued that there is direct liability as well as accomplice liability in this case, and that there were three weapons used in

this case, and that evidence of that should be admitted. The State further argued that the fact that other individuals were identified in photo arrays or lineups goes to show the memory of those witnesses, their ability to view everything, and that it goes directly to who committed the crime.

¶ 6 Defense counsel responded that the probative value of the evidence did not outweigh the prejudice to defendant, and that allowing evidence of codefendants to be introduced would create a trial by *innuendo*.

¶ 7 The trial court stated that it had not heard the evidence yet, so it would have to wait and hear the evidence when it came out at trial, but that based on the theory of accountability, it would allow the State to go into what each codefendant did and who was at the scene.

Additionally, the trial court noted that lineups would be relevant as to the witnesses' credibility and believability. Accordingly, defendant's oral motion *in limine* was denied.

¶ 8 Defense counsel then asked if he could raise a continuing objection based on the court's ruling, as well as if he could obtain a limiting instruction every time the State produced evidence of codefendants at trial. The State responded that the jury would be given instructions dictating that it is only to consider the evidence against defendant. The trial court stated that it had already read the indictment to the jury at which point it told jurors that they were only to consider the evidence against defendant. The trial court further stated that it would allow a jury instruction on it at the close of trial, but did not believe there was a need for a limiting instruction during trial because the evidence relating to the codefendants was being offered as part of a legal theory. Specifically, the trial judge stated, "If there are three people out there acting somewhat simultaneously, as the State alleges, with three different guns, they are allowed

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to get into that. I am not going to give a limiting instruction each and every time."

¶ 9 The case then went to trial, where the following pertinent information was presented. On August 25, 2005, at approximately 1 a.m., Jonathon Miller, Lamar Gray, Vernon Cummings, and John Kennedy (the victim), were playing dice in the front of an apartment building at 3700 West Arthington in Chicago. A young boy named Tobias approached the group playing dice and told them he had gotten into an argument with "some guys."

¶ 10 Danielle Thomas, who lived in the building in question with her roommate Latasha Walton, testified that on the night in question she came home at approximately 1 a.m. She saw the victim sitting on a stoop with Walton, who was on her cell phone. There were about 15 people by the entrance of one of the doorways shooting dice. She saw a man she knew as "Rudy" approaching the building with defendant. Thomas testified that she greeted Walton and then proceeded into the building. When she got to the second floor, she heard about five or six gunshots. She ran upstairs to her apartment. A few seconds later Miller started banging on her door. He had been shot in the leg. Thomas did not let Miller into her apartment. She then looked out the window and saw the victim laying on the ground. She ran down to the victim and held his hand and asked people to help.

¶ 11 Thomas testified that a few days later the police arrested her in connection with a narcotics case. Thomas told them she had information about the shooting in question and gave them the name of "Rudy." She did not give defendant's name because she did not know his name at the time. However, she identified him when a police officer showed her a photograph array.

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¶ 12 On cross examination, Thomas testified that she thought she would get leniency in her narcotics case for giving the police information about the shooting, but that she did not in fact receive leniency.

¶ 13 Latasha Walton testified that on the night in question she was outside of her apartment building trying to get reception on her cell phone. There were approximately 20 to 25 people in the entranceway at the time, including the victim. There were six or seven people playing dice including Miller, Cummings, and others. As Walton was talking on her phone, a boy she knew as Tobias approached the building talking about an argument that he had with some guys. Tobias approached Miller and Cummings and told them about the argument. Tobias appeared mad and frustrated and was talking loudly.

¶ 14 Walton testified that she then saw three "boys" walking towards the building. One of them was defendant, but she did not know the other two. Defendant and his friends then said a few words to Miller and Cummings. The victim stepped in and told defendant and the two other men that they should not be arguing with a child. Tobias then left, and defendant and the other two men walked off soon after. Walton testified that she then turned around and continued talking on her phone. Miller, Cummings, and the victim went back inside to play the dice game. Two or three minutes later, Walton saw defendant and his two friends walking back towards the entrance of the building. Walton heard someone say "this is how we get down," and then all three of them pulled out guns. Defendant's gun was long and black with brown wood by the barrel of the gun. Defendant gave Walton a couple seconds to run and then he started shooting. She was in the hallway and heard "a lot" of gunshots.

¶ 15 Walton testified that she got down on the ground and waited until she heard police arrive and then heard several people shouting that someone had been shot. She had not seen Cummings, Gray, Miller, Tobias, or the victim with any weapons that night.

¶ 16 Walton further testified that she did not talk to police on the night in question because she was scared and because she was upset with the police because officers had blocked the way for an ambulance to reach the victim. Walton's roommate, Thomas, told police that Walton had been present on the night of the shooting and the police came looking for her three days later. The police asked her to look at some photographs and sign a document. She identified defendant as the man she saw pull out a gun.

¶ 17 A month and a half later, Walton was brought into the police station to view a lineup. At first she did not pick any of the individuals, and told police that she did not recognize any of them. She then went back into a conference room and started crying because she was "scared for my life." Walton testified that she had in fact recognized someone in the lineup. Detective Hermann approached her that day in the police station and asked why she was crying. Walton responded that she was scared, did not want to be at the police station, and wanted to go home. At the end of the conversation, Walton admitted that she had recognized someone in the lineup. She then identified defendant as the person who had pulled out a gun in front of her.

¶ 18 Jonathan Miller testified that he was shooting dice on the night in question with Gray, Cummings, and the victim, among other people. At approximately 1 a.m. Tobias, a little kid, approached them and told them "some guys was messing with him." Five minutes later, "some guys" walked up that Miller did not know. Tobias identified the three men as the people with

whom he got into an argument. A few words were exchanged between the victim and one of the three men who approached them. The men then turned around and left.

¶ 19 Miller further testified that he, Gray, Cummings, and the victim continued drinking and shooting dice. About 10 minutes later, the same three men walked back up to the entranceway of the apartment building. Miller testified that he saw a shadow and a gun rise from the shadow so he ran. The gun was long, like a machine gun, and black. The man that pulled out the gun had "dark skin with braids." When asked if he saw that person in the courtroom today, Miller pointed to defendant and said "that look like him." Miller then testified that he had never seen defendant before the night in question, and he only recognized one of the other men known as "Rudy." Miller then identified a photograph of Rudy, which was codefendant Michael Ferguson.

¶ 20 Miller further testified that he heard shots and began to run, but was hit in the back of his leg by a bullet. He was then taken to the hospital where he stayed for three nights before being released.

¶ 21 Miller was then confronted with his signature on the bottom of a photo array that he had viewed. Miller had previously identified defendant as the guy who pulled out a gun. Miller was also previously asked to view a lineup, in which he identified "Rudy" out of the lineup as someone he saw walk up to the group on the night in question.

¶ 22 Miller was additionally confronted with his signed statement that he made to a State's attorney, in which he identified defendant as the guy who had pulled out a gun on the night in question. At trial, Miller denied making all such prior identification statements.

¶ 23 On cross-examination, Miller stated that he never saw the shooter's face and that it was hard to see on the night in question, but that he did see the shooter's braids.

¶ 24 Lamar Gray testified that he was currently in jail for a felony drug offense pending against him. Gray did not remember where he was on the night of the shooting. He heard about the shooting but was not present for it. When asked if he was at Area Four Chicago Police Department headquarters on October 9, 2005, Gray responded that he did not remember. He also testified that he did not remember giving a handwritten statement to the police at that time. When shown a copy of the handwritten statement, Gray stated that the signature on the bottom of was not his. Gray also denied that the signature on the bottom of the attached photograph of him was his. Gray further denied testifying in front of a grand jury on October 26, 2005. Gray testified that he did not know someone by the name of Jonathan Miller. The State then confronted Gray with his handwritten statement that showed that he had previously identified Jonathan Miller and had known him for three or four years, and that he had known Cummings for three or four years, and had identified a picture of Cummings as well. Gray denied making those statements and identifications.

¶ 25 The State then confronted Gray with his handwritten statement that indicated that he told a State's attorney and a detective that after the dice game ended on the night in question, he observed an argument between a boy named Tobias and three other guys. Gray's handwritten statement also indicated that he knew "Rudy" to be Michael Ferguson, and he identified Rudy in a photograph.

¶ 26 Gray also previously identified Joseph Pettis as one of the three men who had approached

them on the night in question, and stated that Pettis was wearing a White Sox baseball cap at the time of the shooting. Gray knew defendant and recognized him, and had identified defendant in a police lineup earlier in the evening on the same date as he had given the handwritten statement. Gray further stated in his handwritten statement that the three guys had returned about 20 minutes later, whereupon Ferguson said "this is how me and my people get down," and that defendant was carrying "a really big gun like an assault rifle." Gray denied making all of the statements to the State's attorney and detective.

¶ 27 The State continued reading from Gray's handwritten statement. According to the statement, Gray also saw Pettis with a gun. Gray started running, along with Miller, and heard a lot of shots being fired but kept running until he was inside the building. When he came back outside, he saw that the victim had been shot.

¶ 28 Gray further testified that he did not make any of the statements read out loud by the State from a transcript of his grand jury testimony, in which he recounted a story substantially similar to that contained in his handwritten statement.

¶ 29 Gray was additionally confronted with statements that he made on March 3, 2009, to an attorney and an investigator, as well as identifications that he made of Miller, Cummings, "Rudy," and the victim. The statements that he made to the attorney and investigator were substantially the same as those contained his handwritten statement.

¶ 30 Chicago Police Detective Cherie Hendricks testified that she was working as an evidence technician on the night in question. When she got to the scene, she found 14 expended cartridge cases, some of which came from a 9-millimeter handgun and some of which came from a rifle.

¶ 31 The medical examiner, Michele Humilier, testified that the victim died from multiple gunshot wounds. He sustained 14 gunshot wounds, and 8 bullets were recovered from his body.

¶ 32 Kris Rastrelli, an expert in the field of firearms, examined the ammunition recovered in the case. She testified that of the 14 cartridges recovered, four were from a rifle, while 10 were 9-millimeter Luger caliber cartridge cases fired from a semi-automatic weapon. She also received two fired bullets that were 9-millimeter/.38 caliber, and were fired from the same firearm. Of the eight bullets recovered from the victim's body, and the one fired bullet recovered from the victim's clothing, Rastrelli determined that seven of them were fired from the same firearm and that they could have been fired from a 9-millimeter handgun. In Rastrelli's expert opinion, there could have been as few as three guns, or as many as seven guns. She did not know if the 9-millimeter/.38 caliber bullets and the 9-millimeter Luger cartridge cases were once a single cartridge or if they were fired from the same firearm, so they could have been fired from two different guns.

¶ 33 Chicago Police Detective Kevin Bor was assigned to investigate the shooting. On August 28, 2005, Detective Bor and Detective Pat Golden spoke with Tyrone Lemon, who was not an eyewitness to the shooting, but who told them that he heard "Rudy" was one of the people involved in the shooting. The detectives showed Lemon a picture of Ferguson, and Lemon identified Ferguson as Rudy. Danielle Thomas also identified Ferguson as a person she knew as Rudy. In a photo array, Thomas identified defendant as one of the people who had been in the argument with the victim regarding Tobias. She also told the detectives that when the three men

returned on the evening in question, defendant had a rifle. Thomas told the detectives that she did not speak to the police on the night in question because they ignored her when she was screaming for help with the victim. She was hoping that she would get leniency for her narcotics arrest by talking to the detective, but did not receive leniency.

¶ 34 Detective Bor further testified that he and Detective Golden spoke with Latasha Walton, who told them that she did not speak to the police at the scene of the shooting because she was mad at them for telling her to step away from the victim. She told the detectives that defendant was one of the three people that had argued with the victim and that when he returned with the other two men, he was armed with a rifle.

¶ 35 Detective Bor testified that he spoke with Lamar Gray, who identified the three men who approached them as "Rudy" [Ferguson], "Jason" [defendant], and "Jason's brother" [Joseph Pettis]. Detective Bor testified that he checked through the Chicago Police Department computer database and found that defendant had previously used a nickname of "Pettis." The detectives conducted a search for the residential history of defendant's address, which showed that two people, Joseph Pettis and D'Andre Pettis, shared the same address.

¶ 36 Detective Bor testified that Gray identified defendant as the person who was armed with a rifle on the night in question, and Joseph Pettis as the person who was armed with a 9-millimeter handgun. Gray further identified Ferguson as the person who said, "this is how we get down." Detective Bor testified that Miller made the same identifications as Gray.

¶ 37 Following the conclusion of testimony, the jury found defendant guilty of first degree murder and personally discharging a firearm. The trial court denied defendant's motion for a

new trial. Defendant was subsequently sentenced to 32 years in prison for first degree murder, and 20 years for personally discharging a firearm, the sentences to be served consecutively.

Defendant now appeals.

¶ 38

II. ANALYSIS

¶ 39

A. Admissibility of Prior Witness Statements

¶ 40 Defendant's first argument on appeal is that the trial court erred in admitting the prior statements of Miller, Gray, and Cummings because it violated the common-law prohibition against introducing prior consistent statements. Defendant concedes that he did not preserve this argument for review, but argues that we should review it for plain error. We may review an unpreserved error pursuant to the plain error doctrine when either (1) the evidence is closely balanced and the error alone threatens to tip the scales of justice against him, or (2) the error is so serious that it affects the fairness of the trial and challenges the integrity of the judicial process. *People v. Piatowski*, 225 Ill. 2d 551, 564 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). The first step in a plain error analysis is to determine whether error occurred at all. *Piatowski*, 225 Ill. 2d at 564.

¶ 41 In this case, the State called Gray, Cummings, and Miller to testify, and each recanted their prior statements implicating defendant in the shooting. Upon each of their recantations, the State introduced evidence of prior statements: Gray's two handwritten statements and a transcript of his grand jury testimony; Miller's statement made to Detective Bor, a statement made to an Assistant Public Defender, and a signed handwritten statement; and Cummings' signed handwritten statement, a statement made to a detective, and a statement made in a pretrial

hearing.

¶ 42 Defendant concedes that pursuant to section 115-10.1 of the Criminal Code (735 ILCS 5/115-10.1 (West 2008)), the State was permitted to introduce a prior inconsistent statement as substantive evidence. Section 115-10.1 provides that in all criminal cases, evidence of a statement made by a witness is not inadmissible as hearsay if the statement is (1) inconsistent with his testimony at the hearing or trial, (2) the witness is subject to cross-examination, and (3) the statement was made under oath at a hearing or other proceeding, or narrates, describes, or explains an event of which the witness had personal knowledge and the statement is proved to have been written or signed by the witness. 735 ILCS 5/115-10.1 (West 2008).

¶ 43 Defendant contends that while admission of the prior statements that contradict the witnesses' trial testimony are proper, the introduction of multiple statements that are inconsistent with the trial testimony, but consistent with each other, is improper because it violates the rule against admitting prior consistent statements that bolster a witness' testimony. We have rejected this very argument on several occasions. See, e.g., *People v. Maldonado*, 398 Ill. App. 3d 401, 416 (2010); *People v. Johnson*, 385 Ill. App. 3d 585, 606-09 (2008).

¶ 44 We have previously explained that whether a statement is inconsistent for purposes of impeachment or admissibility under section 115-10.1 is determined by comparing the out-of-court statement with the trial testimony. *Maldonado*, 398 Ill. App. 3d at 423. Where, as here, a witness testifies at trial that he does not remember what happened on the night of a shooting, or has never seen the defendant before, but is impeached with his prior signed, handwritten statement attesting to the contrary, the statement is admissible as substantive evidence to be

considered by the jury. *Maldonado*, 398 Ill. App. 3d at 423. Where, as here, the witness is also impeached with his grand jury testimony, the grand jury testimony is admissible as substantive evidence, regardless of the fact that it is consistent with the earlier admitted handwritten statement. *Maldonado*, 398 Ill. App. 3d at 423.

¶ 45 Defendant acknowledges the holding in *Johnson*, which was followed and cited to by *Maldonado*, but argues that *Johnson* should not be followed in this case because it lacked the guidance of the recent supreme court case of *People v. Dabbs*, 239 Ill. 2d 277 (2010), and it was "ill-reasoned."

¶ 46 Defendant argues that *Johnson* was "ill-reasoned" because the court failed to appreciate that when a prior inconsistent statement is admitted as substantive evidence rather than impeachment evidence, that prior inconsistent statement has the same evidentiary value as a witness' trial testimony, thus making additional statements improper prior consistent statements. We disagree with that analysis. Considering that out-of-court statements are to be compared to trial testimony for purposes of determining whether they are consistent or inconsistent, defendant's argument does nothing to change the analysis. Rather, his argument assumes that when a prior inconsistent statement is admitted as substantive evidence it becomes the witness' trial testimony. However, that is not the effect of the substantive admission of a prior inconsistent statement, and consequently, his argument fails. *Cf.* Michael H. Graham, Cleary & Graham's Handbook of Illinois Evidence § 801.9 (9th ed. 2009) (a prior inconsistent statement becomes the witness' in-court testimony only where the witness acknowledges making the statement and the truth of its contents at trial).

¶ 47 Defendant further argues that *Dabbs* supports the proposition that although section 115-10.1 relaxes the hearsay rule barring prior inconsistent statements, nothing in the statute alters the common-law rule that prior consistent statements are generally inadmissible. The passage from *Dabbs* that defendant relies on reads as follows:

"[A] single evidentiary issue may be subject to more than one rule. Thus, while a positive rule may allow a certain type of evidence, a negative rule may prohibit its admission. For example, an exception to the hearsay rule may permit the admission of evidence contained in a particular type of document, such as a business record, but if the document is not properly authenticated as required by another rule, the evidence will not be allowed. In this way, the rules of evidence function as a unified scheme, rather than individually." *Dabbs*, 239 Ill. 2d at 289.

¶ 48 Defendant argues that for these reasons, it is improper to admit prior statements that are consistent with the one that has already been admitted through section 115-10.1. For the reasons stated above, we reject this argument. Moreover, *Dabbs* is inapposite to the case at bar as it involves the admission of evidence of a prior incident of domestic violence committed by the defendant, as permitted by section 115-7.4 (725 ILCS 5/115-7.4 (2008)), not the admission of prior inconsistent statements. *Dabbs* does not alter our conclusion above that the witnesses' prior inconsistent statements did not amount to trial testimony in the case at bar and thus did not alter the common-law rule of prior consistent statements. Because there was no error in the admission

of the evidence, there can be no plain error and we must honor defendant's procedural default.

People v. Hillier, 237 Ill. 2d 539, 545 (2010).

¶ 49 Defendant's next argument is that the additional prior statements of Gray, Cummings, and Miller should have been excluded as cumulative evidence. Defendant contends that the introduction of multiple prior statements was prejudicial because the "jury likely overvalued the statements merely because they were repeated depriving [defendant] of a fair trial." We reject this argument because defendant fails to cite to any authority that states that impeachment of a witness' testimony by more than one prior inconsistent statement is prejudicial. See *People v. Greer*, 336 Ill. App. 3d 965, 979 (2003) (failure to cite to authority in support of arguments, and any issues not sufficiently or properly presented on review are waived). Each of the cases defendant cites to deals with cumulative evidence of past crimes by the witness, and are therefore inapposite to the case at bar. Moreover, this court has specifically allowed the introduction of multiple prior statements that are inconsistent with a witness' trial testimony. See *Maldonado*, 398 Ill. App. 3d at 423 ("[T]he introduction of more than one statement that is inconsistent with a witness's trial testimony, whether or not such statements are consistent with each other, is proper.")

¶ 50 Defendant's final argument on this issue is that defense counsel was ineffective for failing to object to the introduction of numerous prior statements of Gray, Cummings, and Miller, and for failing to file a motion for a new trial. Defendant contends that by not objecting to the prior statements and by failing to file a motion for a new trial, defense counsel failed to preserve the issue on review.

¶ 51 To establish a claim of ineffective assistance of counsel a defendant must prove, first, that his counsel's representation fell below an objective standard of competence and, second, that, but for that failure, the outcome of his trial or sentencing would have differed. *People v. Hall*, 157 Ill. 2d 324, 337 (1993); *People v. Albanese*, 104 Ill. 2d 504 (1984). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Albanese*, 104 Ill. 2d at 526. Here, we have found no error in the introduction of the prior witness statements, and thus we cannot find that counsel was ineffective for failing to object to the introduction of such evidence at trial.

¶ 52 B. Witnesses' Photograph and Lineup Testimony

¶ 53 Defendant contends that the introduction of evidence of certain witnesses' identification of two codefendants was (1) irrelevant, (2) violated the rule of prior consistent statements, and (3) was prejudicial.

¶ 54 Prior to trial, defense counsel made an oral motion *in limine* to bar, as irrelevant, evidence regarding the prosecution witnesses' identification of the codefendants in photo arrays and lineups. The State responded that there was both direct liability and accomplice liability in this case, and that ballistic evidence indicated that three different weapons were used. Thus, all actions of the codefendants were attributed to defendant. The State contended that all the evidence, other than the codefendants' statements, should be admissible in defendant's case. The trial court stated that it would have to hear the evidence when it came out, but that lineups were relevant to witnesses' believability and credibility. Defendant's motion *in limine* was denied. We now address each of defendant's arguments in regard to this issue in turn.

¶ 55

1. Relevancy

¶ 56 Defendant contends that the prior identifications of codefendants were not relevant to any matter in controversy at defendant's trial. He contends that contrary to the court's ruling, the fact that certain witnesses identified his codefendants was not relevant to the witnesses' credibility because there were no in-court identifications made of codefendants by those witnesses. We first note that defendant cites no authority for this proposition, and has therefore waived it on appeal. See *Greer*, 336 Ill. App. 3d at 979 (failure to cite to authority in support of arguments, and any issues not sufficiently or properly presented on review are waived). Waiver aside, the State responds that section 115-12 (725 ILCS 5/115-12 (West 2008)) of the Criminal Code governs the admissibility of the prior identification evidence, and that the statements in question were admissible and relevant. We agree.

¶ 57 Section 115-12 of the Code of Criminal Procedure states that testimony concerning a prior identification is not rendered inadmissible by the hearsay rule if: "(a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him." 725 ILCS 5/115-12 (West 2008). All of the witnesses who made prior identifications testified at trial, were subject to cross-examination concerning the identifications, and had perceived the codefendants. There is no requirement in this section that the person identified must be a defendant rather than a codefendant. Rather, our supreme court has specifically found that prior identification testimony regarding a codefendant is relevant. See *People v. Emerson*, 189 Ill. 2d 436, 480-81 (2000) (identification testimony of defendant and codefendant allowed pursuant to

section 115-12 of the Code).

¶ 58 Additionally, there is no requirement in the statute that the declarant must also identify the person in court. Moreover, in *People v. Bowen*, 298 Ill. App. 3d 829, 835 (1998), this court specifically adopted section 611.16 of Cleary & Graham's Handbook of Illinois Evidence which states:

"[P]rovided the declarant testify at trial and be subject to cross-examination concerning the prior statement of identification of a person made after perceiving him, the prior statement of identification, testified to by the declarant or another witness, including a police officer, is now admissible as an exception to the hearsay rule as substantive evidence without regard to whether the statement of prior identification corroborates a positive in-court identification by the declarant, is offered as a substitute for an inability to make an in-court identification, or to bolster a weak in-court identification on the part of the declarant." M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 611.16 at 481 (6th ed. 1994).

¶ 59 Therefore, we conclude that the trial court properly allowed the challenged testimony as nonhearsay prior identification of codefendants.

¶ 60 2. Rule of Prior Consistent Statements

¶ 61 Defendant's next argument in regards to the prior identification testimony is that

admitting such statements violated the rule prohibiting the use of prior consistent statements. Defendant again relies on the argument that once the first statement of identification was introduced at trial, it became trial testimony, and any additional statements of identification would be erroneous admission of consistent statements. We have already addressed this argument in relation to defendant above, and therefore only reiterate the holding from *Maldonado* that "the introduction of more than one statement that is inconsistent with a witness's trial testimony, whether or not such statements are consistent with each other, is proper." *Maldonado*, 398 Ill. App. 3d at 423.

¶ 62 Defendant alternatively claims that such repetition of prior identification statements amounted to cumulative evidence, which presented a danger that the jury was "over-persuaded" as to its truth, simply because it was repeated so often. Defendant relies on *People v. Smith*, 139 Ill. App. 3d 21 (1985), for the proposition that repetition improperly lends credibility to statements. We note, however, that *Smith* deals with an *erroneous* admission of a prior consistent statement. In the case at bar, defendant has not pointed to any prior identification statements of codefendants that were erroneously admitted. Accordingly, *Smith* is inapposite to the case at bar.

¶ 63 3. Prejudice

¶ 64 Defendant's final contention regarding the prior statements of codefendants' identifications is that the admission of such statements was prejudicial. Specifically, defendant argues that (1) defendant's trial was replete with erroneously admitted evidence regarding the identifications of codefendants, and (2) testimony regarding Pettis' identification is what led to

the admission of even more prejudicial evidence. Since we have already determined that the admission of prior identification testimony of codefendants was not erroneous, and therefore not prejudicial, we proceed directly to defendant's second argument.

¶ 65 Defendant points to Detective Bor's testimony explaining how Gray identified codefendant Pettis in a photo array. During Detective Bor's testimony, he stated:

"We did some further investigation through the Chicago Department computer databases. We were able to find out that [defendant] had used a nickname in the past by the name of Pettis. We ran his computer history of his residential address on South LeClaire. There was [*sic*] two individuals by the name of [Joseph Pettis and D'Andre Pettis] that shared the same residential address from previous arrest history as [defendant]. We included Joseph Pettis' and D'Andre Pettis' photograph in a photo array which also included [defendant]. We showed that photo array to Lamar Gray."

¶ 66 Defendant did not object to this testimony at trial, but later moved for a mistrial based on Detective Bor's testimony, arguing that the reference to defendant's "previous arrest history" violated the rule prohibiting prior arrests from being used against him at trial. The trial court denied his motion finding that the testimony did not automatically lead the jurors to conclude that defendant had a prior criminal background. The trial court gave defendant the option of adding a limiting instruction, but defense counsel opined that there was not an instruction that could be given without adding additional information concerning the source of the names. Defendant now raises the same argument on appeal, that Detective Bor's testimony improperly

made reference to his prior arrest history in violation of the rule prohibiting prior crimes evidence as prejudicial. The State responds that when identification is a material issue in the case, testimony relating to the use of photographs may be introduced to show how a defendant was initially linked to the commission of an offense, and therefore the testimony regarding the photo array was proper. We agree with the State.

¶ 67 The decision regarding whether to admit evidence cannot be made in isolation and the trial court must consider a number of circumstances that bear on the issue, including questions of reliability and prejudice. *People v. Jackson*, 232 Ill. 2d 246, 266 (2009). Our supreme court has found that "[t]he consequential steps in the investigation of a crime are relevant when necessary and important to a full explanation of the state's case to the trier of fact." *Jackson*, 232 Ill. 2d at 267 (quoting *People v. Johnson*, 114 Ill. 2d 170, 194 (1986)).

¶ 68 We find the supreme court case of *People v. Hayes*, 139 Ill. 2d 89 (1990), to be instructive here. In *Hayes*, the defendant argued that he was denied a fair trial by the admission of evidence suggesting that he had engaged in prior criminal conduct where a detective testified that a witness identified the defendant from a photo book at the "Violent Crimes" police station. The court held that, at most, the testimony may have raised the inference in the jurors' minds that the defendant had a criminal history, but because there was no direct evidence of prior criminal conduct with police, the evidence was not unduly prejudicial. *Hayes*, 139 Ill. 2d at 146.

¶ 69 We reach the same result in this case. Detective Bor's reference to "previous arrest history" may have raised the inference in the jurors' minds that the defendant had a criminal history, but there was no direct evidence presented which suggested that defendant had a prior

criminal record, and thus the evidence was not unduly prejudicial.

¶ 70 C. Prosecutorial Misconduct

¶ 71 Defendant's final issue on appeal is that the State displayed misconduct during the presentation of evidence through closing arguments. Specifically, defendant contends that the State (1) violated a motion *in limine* ruling during the questioning of Detective Hermann, (2) encouraged the jury to speculate during closing argument that Cummings, Gray, and Miller changed their story at trial because they were scared, and (3) improperly bolstered the credibility of police testimony and injected a personal opinion regarding the integrity of the police investigation during closing argument.

¶ 72 1. Motion *in Limine*

¶ 73 Defendant contends that the prosecutor violated the trial court's order granting defendant's motion *in limine* regarding Latasha Walton's testimony. On direct examination, Walton testified that when she initially viewed a lineup on October 9, 2005, she did not make an identification, but that afterwards she was crying and Detective Hermann approached her and asked why she was crying. Walton told Detective Hermann that she "was scared," "didn't want to be here," and "wanted to go home." Walton then admitted to Detective Hermann that she did in fact recognize someone in the lineup, and identified "Number Two" as defendant.

¶ 74 Prior to trial, defendant had made an oral motion *in limine* seeking to prohibit the State from asking Detective Hermann about Walton's prior statements that she was extremely frightened of defendant and his friends, that she feared for her well being, and that some girls the defendant knew were familiar with where she lived and she was afraid they would hurt her if

they knew she was talking to police. The trial court noted that Walton had already testified that she was very fearful, and that the State was allowed to elicit testimony from Detective Hermann that Walton said she did not initially make an identification because she was scared, but "that's it;" and not that she was "scared for her life." Defense counsel stated that he had "no objection to the testimony that Latasha Walton viewed the lineup and said that she did not recognize anyone in the lineup and that Detective Hermann spoke to Latasha Walton shortly after the lineup at which point she was visibly upset, she described what she saw, and that Walton then identified [defendant] from the lineup as the boy with the big gun." The State promised to only question Sergeant Hermann on those issues.

¶ 75 During redirect examination of Sergeant Hermann, the following colloquy took place between the State and Sergeant Hermann:

Q: Sergeant, you did not have contact with Latasha Walton prior to viewing the lineup, is that correct?

A: Correct.

Q: When you saw her crying and upset, she had already viewed the lineup?

A: Yes.

Q: And she told you she was scared and upset because number two was the actual person who she had seen as the shooter, is that correct?

DEFENSE COUNSEL: Objection.

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A: Yes.

DEFENSE COUNSEL: Move to strike.

COURT: Overruled.

¶ 76 Defendant contends that the State violated the trial court's grant of its oral motion *in limine* by eliciting testimony from Detective Hermann as to why Walton was scared. We disagree. During the discussion regarding defendant's oral motion *in limine*, defense counsel stated that he did not want Detective Hermann to testify that Walton was scared of defendant and his friends and fearful for her life. The State agreed to this, and defense counsel then clearly stated that he did not object to the inclusion of testimony regarding the fact that Walton was scared and that she identified defendant as the shooter. Accordingly, the testimony elicited on redirect examination was not in violation of the trial court's ruling on defendant's motion *in limine*.

¶ 77 Defendant's reliance on *People v. Mullen*, 141 Ill. 2d 394 (1990), does not persuade us otherwise. In *Mullen*, Tyrone Carr, a witness, initially refused to testify against defendant at his murder trial. In chambers, Carr had indicated that he was reluctant to testify because he was afraid of "the boys around the house," and what they might do to him or his family if he were to testify. *Mullen*, 141 Ill. 2d at 404. Eventually, Carr agreed to testify, but the trial court specifically admonished the attorneys not to make any reference as to his reasons for his initial refusal. *Id.* At trial, the prosecutor in closing argument suggested that "witnesses were reluctant to testify because they were afraid that the defendant would shoot them" if they did so. *Mullen*, 141 Ill. 2d at 405. The supreme court found that the prosecutor's statement was reversible error

because there was no evidence in the record that defendant threatened or intimidated any witness. *Id.* (quoting *People v. Ray*, 126 Ill. App. 3d 656, 662 (1984) (prosecutorial comments "which suggest that witnesses were afraid to testify because defendant had threatened or intimidated them, when not based upon any evidence in the record *** are highly prejudicial and inflammatory."))

¶ 78 In contrast to *Mullen*, here the testimony elicited by Detective Hermann did not insinuate that Walton had been threatened by defendant, but rather that she was scared because one of the men in the lineup was the man she had seen with a gun. Such testimony was elicited for a proper purpose: to explain why Walton did not initially identify defendant in the lineup. See *People v. Galvan*, 244 Ill. App. 3d 298, 303-04 (1993) (where prosecution did not claim that the defendant threatened anybody, but merely elicited testimony that a witness was scared, the evidence was allowed to explain why witness did not tell police what happened until nine months after the fire); *People v. Felder*, 224 Ill. App. 3d 744, 757 (1992) (victim's testimony stating that the reason she did not give detectives any names at first was because she was fearful that defendant would "get to" her did not give rise to the inference that defendant threatened her, but rather was properly admitted to explain why that victim did not initially speak to police). Our supreme court has recognized that courts of review may consider the impact that fear may have on witnesses in criminal cases. *People v. White*, 2011 IL 109689, ¶ 136-39 (2011).

¶ 79 Accordingly, we reject defendant's argument that the State committed prosecutorial misconduct in eliciting testimony from Detective Hermann that Walton did not initially identify defendant in the lineup because she was scared.

¶ 80 2. Closing Argument

¶ 81 Defendant's next contention regarding prosecutorial misconduct is that the State improperly argued in closing argument that Gray, Cummings, and Miller's trial testimony differed from their prior statements because they were scared. Specifically, defendant takes issue with the following passage from the State:

"And you can see why someone like Lamar Gray or Vernon Cummings would change their story [defense counsel's objection overruled] of what they first told the police, the assistant state's attorney, and the grand jury.

You saw the genuine reaction of Latasha Walton when asked do you see the person that had the rifle and fired the gun at Johnny Kennedy. You saw her reaction. You saw how scared she was. People get scared. Now she had the courage to say the truth of what she saw that day. But Lamar Gray, Vernon Cummings, and to a certain degree Jonathon Miller decided not to have that courage. People get scared.

They're also from the same area and neighborhood. You heard that."

¶ 82 Defendant contends that the State went beyond merely arguing reasonable inferences from the evidence because there was no evidence that Gray, Cummings, or Miller changed their stories out of fear. The State responds that the prosecutor's comment explaining why some of the

witnesses changed their story at the time of trial was properly based on the evidence presented at trial, or reasonable inferences therefrom.

¶ 83 We first note that "a prosecutor is allowed a great deal of latitude in making the closing argument [citations] and the trial court's determination of the propriety of the argument will generally be followed absent a clear abuse of discretion [citation]." *People v. Cisewski*, 118 Ill. 2d 163, 175 (1987). To constitute reversible error, the complained-of remarks must have resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different. *Cisewski*, 118 Ill. 2d at 175.

¶ 84 We find *People v. Walker*, 230 Ill. App. 3d 377 (1992), to be instructive in this case. In *Walker*, the State argued in closing argument: "It's people who are watching, and they come in at the risk of their own lives when we can find them, and when they are willing to lay their own lives on the line to come in *** and that's what [the witness] did in this case." *Walker*, 230 Ill. App. 3d at 399. The court found that the comment was not prejudicial because it was not highlighted, repeated, or otherwise emphasized. *Walker*, 230 Ill. App. 3d at 400. Furthermore, any prejudicial impact was minimized by the fact that the witness' fright was not specifically attributed to the defendant. *Walker*, 230 Ill. App. 3d at 400.

¶ 85 Similarly here, the State did not specifically attribute any fear on the part of Cummings, Gray, or Miller to defendant; rather it argued that the three witnesses were from the same neighborhood and that "people get scared." See *People v. Cox*, 377 Ill. App. 3d 690, 708 (2007) (not prosecutorial misconduct for State to argue that two witnesses and their families still lived in the area where the shooting occurred and that such incidents happened all the time).

Moreover, the statement made by the prosecution was the only reference to the witnesses' fear in closing arguments, and thus were not highlighted, repeated, or otherwise emphasized. *Walker*, 230 Ill. App. 3d at 400; *Cox*, 377 Ill. App. 3d at 708. Accordingly, we cannot say that absent the complained-of remarks from the prosecution during closing arguments, the trial outcome would have been different.

¶ 86 3. Police Credibility and Integrity of Investigation

¶ 87 Defendant's next contention of prosecutorial misconduct is that it was prejudicial error for the prosecutor to express opinions or vouch for the credibility of its witnesses during closing arguments. Specifically, defendant takes issue with the following exchange:

STATE: This was good police work for a case that had absolutely no leads. *** And these detectives take their job so seriously that they spent months investigating this crime, months trying to find witnesses, months putting together lineups.

DEFENSE: Objection.

COURT: Overruled.

STATE: Months trying to find the defendants and bring them to justice. That's what happened.

¶ 88 Defendant contends that these comments improperly expressed the prosecutor's view of the police investigation and vouched for police credibility. The State responds that the prosecutor's comments were proper as they commented on the credibility of the witnesses and the strength of the State's case, and that the comments were invited based on defense counsel's

repeated attack on the integrity of the police investigation in this case.

¶ 89 We reiterate that prosecutors are given a wide latitude in closing arguments. *Cisewski*, 118 Ill. 2d at 175. Furthermore, "[i]n reviewing allegations of prosecutorial misconduct, the closing arguments of both the State and the defendant must be examined in their entirety and the complained-of comments must be placed in their proper context." *Cisewski*, 118 Ill. 2d at 175-76 (citing *People v. Nemke*, 46 Ill. 2d 49, 59 (1970)).

¶ 90 In the case at bar, the passage that defendant provides must first be placed in proper context. Defense counsel in his closing argument stated that defendant "cannot be convicted on the evidence that you heard on this case in this courtroom because it flows from an incomplete, ineffective, and inept investigation." Defense counsel further stated that "this investigation, the ingredients of this stinky, nasty, soup - and investigation again is another word that I use lightly." Defense counsel continued his attack, describing Detective Bor as "a bit indifferent, he was a bit self-insured, he was a bit cocky, he was a bit the[] type of person that you never question the decision he makes because he's always right."

¶ 91 In response to defense counsel's comments, the prosecutor stated:

"What's offensive is saying that this is like some kind of soup.
This is the most serious kind of crime there is. Somebody died.
This is a homicide investigation. Not some food channel network
show where we're cooking soup. *This is the most serious thing you
can do. And these detectives take their jobs so seriously that they
spent months investigating this crime, months trying to find*

witnesses, months putting together lineups [defense objection overruled.], months trying to find the defendants and bring them to justice. That's what happened." [Emphasis added].

¶ 92 Accordingly, we find that when the italicized complained-of comments are put in context, it is apparent that they were invited by defense counsel. See *People v. Lyles*, 106 Ill. 2d 373, 390 (1985) (where the complained-of remarks are within the rebuttal argument, they will not be held improper if they appear to have been provoked or invited by the defense counsel's arguments. We are not persuaded otherwise by defendant's reliance on *People v. Lee*, 229 Ill. App. 3d 254 (1992).

¶ 93 In *Lee*, the court held that the prosecutor inappropriately vouched for the credibility of its police witness in closing argument, stating:

"Policemen aren't stupid. However this one happened to be extremely honest in my humble opinion [defense counsel objection overruled] **** [The officer] looked around and said, I can't pick him out. That's honesty. That is not somebody who gets up and tells you a lie. He is telling the truth [defense counsel objection overruled]. *** The fact of the matter is the man was candid and honest." *Lee*, 229 Ill. App. 3d at 259.

¶ 94 The court in *Lee* found that it was impossible to determine whether the jury exercised its independent judgment to assess the officer's credibility or whether it accepted the word of the prosecution. *Lee*, 229 Ill. App. 3d at 260. *Lee* is inapposite to the case at bar.

¶ 95 Here, the prosecutor did not offer her opinion on any of the officers' credibility, believability or their ability to be honest. Rather, the prosecutor commented on the investigation as a whole and what steps were taken in the investigation, all of which were based on evidence in the record. Accordingly, we do not find that, but for the prosecutor's comments regarding the police investigation, the outcome of this trial would have been different. The trial court did not abuse its discretion in overruling defense counsel's objection.

¶ 96 4. Cumulative Impact of Prosecutorial Comments

¶ 97 Defendant's final contention on appeal is that even if we were to conclude that each instance of alleged improper conduct did not alone require reversal, that the cumulative effect of those instances nonetheless require reversal. While defendant is correct that where there are numerous instances of improper prosecutorial remarks, a reviewing court may consider the cumulative impact rather than assessing them in isolation (*People v. Abadia*, 328 Ill. App. 3d 669, 684 (2001)), it is equally as true that "[t]he whole can be no greater than the sum of its parts." *People v. Albanese*, 102 Ill. 2d 54, 82-83 (1984). Here, defendant has failed to demonstrate anything approaching reversible error and thus there can be no cumulative error. See *Albanese*, 102 Ill. 2d at 83.

¶ 98 III. CONCLUSION

¶ 99 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 100 Affirmed.