THIRD DIVISION
March 23, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

No. 1-09-1948

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 8512
	)	
MOSES PHILLIPS,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Murphy and Neville concurred in the judgment.

O R D E R

Held: Defendant has not shown that he was denied a fair trial based on the prosecutor's remarks during closing arguments and the alleged ineffective assistance of trial counsel, or that the circuit court failed to comply with Rule 431(b). Therefore, defendant's conviction and sentence is affirmed.

Following a jury trial, defendant was found guilty of the first-degree murder of 10-year-

old Siretha White and two counts of attempted murder for shooting at Kevin Davis and Jamar Jenkins. The jury also found that during the commission of the offense, defendant personally discharged a firearm that proximately caused Siretha's death. Defendant was sentenced to 50 years in prison for the murder conviction and an additional 25 years for the enhancing factor that defendant personally discharged a firearm. On appeal, defendant contends that: (1) he was denied a fair trial where the State made improper closing remarks suggesting that defendant's tattoos indicated that he was a gang member; (2) he was denied the effective assistance of trial counsel where counsel failed to object to the State's presentation of prior statements of its witnesses and irrelevant testimony; and (3) his conviction should be reversed where the circuit court failed to comply with amended Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007). For the following reasons, we affirm.

I. BACKGROUND

Prior to trial, the State filed a motion *in limine* requesting that it be allowed to introduce gang evidence. Specifically, the State sought to introduce evidence that defendant and the intended targets of the shootings in this case were members of rival gangs in order to show the motive for the shootings. The circuit court determined that the prejudicial aspect outweighed the probative value of the evidence of gang membership. Therefore, the circuit court ruled that the evidence would not be allowed unless defendant raised the issue of gang membership. The circuit court held that the State would be allowed to present testimony that there was some animosity between the victim and the victim's group and the defendant and the defendant's group, without particularly naming those groups.

At trial, Jamar Jenkins testified that in the early afternoon, on March 11, 2006, he went with Leon Cooks and Kendall Thurmond to a vacant lot located at Justine Avenue and 66th Street. Jenkins testified that car mechanics hung out at the vacant lot and he accompanied Cooks to the lot to have the gas pedal in Cook's vehicle repaired. Jenkins testified that while Cook's vehicle was being repaired, he walked to his home, near 65th and Laflin, to get something to eat.

Jenkins testified that he walked back to the lot at about 1 p.m. As Jenkins was walking down an alley near the lot, he saw a vehicle stop at the mouth of the alley and an individual in the rear passenger seat of the vehicle fired a gun in Jenkins' direction. Jenkins testified that he could not see who the shooter was because the shooter was wearing a hoodie. Jenkins testified that he did not remember the type of vehicle that the shooter was in. Jenkins testified that because he was running away from the shooter, he did not see the shooter's gun. After the shooting, Jenkins testified that he and Cooks left the lot and went to buy a car.

Jenkins also testified that at around 9 p.m. on that night, he was with Cooks, Thurmond, Brent Perdue, Kevin Davis, and Will Brown on the front porch of the residence at 2016 West 70 Place. Jenkins testified that a child's birthday party was taking place inside that residence. As the group of men were standing on the porch, Jenkins saw a white Ford and a white Grand Prix driving up the block. When Jenkins saw the cars, he walked down the stairs to the sidewalk. Jenkins testified that he saw the passenger side window of the Grand Prix roll down and the individual in the passenger seat stuck his arm out of the window and began firing a gun. Jenkins testified that he could not see who the shooter was because the shooter was wearing a hoodie and it was dark outside. Jenkins testified that when the shooting started, he ran into an alleyway.

After the shooting, Jenkins learned that Davis had a minor injury on his chin, but Jenkins did not know whether Davis had been shot or had cut himself. Jenkins testified that following the shooting, he and a group of others left the area in Davis' van, but returned to the house when the van got a flat tire. Jenkins, Cooks, and Perdue then got into a different car and drove to Cooks' house in Calumet City.

Jenkins testified that as the group drove to Calumet City, the police called Cooks' cell phone. Jenkins testified that the police told them that they would be on the news unless they agreed to talk to police. Jenkins, Cooks, and Perdue met a police officer at a gas station and the officer drove them to the police station. On the way to the police station, Perdue informed the officer about the earlier shooting at the vacant lot and they stopped at the vacant lot. About an hour later, the police officer and Jenkins, Cooks, and Perdue went to the police station.

Jenkins testified that at the police station, the detective spoke about defendant being the shooter at the vacant lot and Paree Jones being the driver, but Jenkins denied giving the detectives their names. Jenkins testified that he merely nodded his head while the detectives spoke and took notes. With respect to the porch shooting, Jenkins denied telling the detectives that defendant was the shooter and testified that the detectives only asked him who defendant was. Jenkins testified that he viewed a police lineup at around 5:30 p.m., the day after the shootings. Jenkins testified that he identified the fifth person in the lineup as the shooter in the porch shooting. Jenkins testified that defendant was the fourth person from the left in the police lineup, and Jenkins denied identifying defendant as the shooter. Jenkins testified that the detectives only asked him to identify "Little Moe," which was defendant's nickname.

Jenkins acknowledged that after he viewed the lineup, he met with Assistant State's Attorney (ASA) Peter Garbis at the police station. Jenkins denied telling ASA Garbis that on March 11, 2006, defendant shot at him as he was walking back to the vacant lot to meet Cooks and Thurmond. Jenkins denied telling ASA Garbis that defendant was in a gold Ford Contour, when the vehicle stopped and defendant stuck his head and arms out and fired a black TEC-9 about 15 times in Jenkins' direction. Jenkins also denied telling ASA Garbis that later that evening, while Jenkins was on the porch at 2016 West 70th Place, he saw a white Cadillac and white Grand Prix driving up the block. Jenkins denied telling ASA Garbis that he warned his friends that "Little Moe" was approaching or that the Cadillac slowed down and defendant fired a gun at Jenkins and the group on the porch from the passenger window of the Cadillac.

Jenkins acknowledged that he told the grand jury that on the date in question when Jenkins was walking to the vacant lot, defendant shot at him with a black TEC-9 from the front passenger seat of a gold Ford Contour. Jenkins also acknowledged telling the grand jury that while he was on the porch at 2016 West 70th Place, a white Cadillac and a white Grand Prix drove down the block. Jenkins admitted telling the grand jury that he saw defendant lean out of the window of the Cadillac and fire a black gun at Jenkins and the group on the porch. Jenkins also acknowledged that he told the grand jury that he had known defendant for about 10 years from the area near 63rd and Bishop.

ASA Garbis testified that he took Jenkins' written statement on March 12, 2006. ASA Garbis read portions of the written statement to the jury. In his statement, Jenkins identified defendant as the shooter both at the vacant lot and the porch at 2016 West 70th Place. Jenkins

stated that defendant shot at him near the vacant lot about 15 times with a black TEC-9 from a gold Ford Contour. Jenkins stated that shortly before the porch shooting, he saw a white Cadillac with a blue top and a white Grand Prix driving down the block. Jenkins stated that he knew defendant to be associated with the individual who drove the Grand Prix. Jenkins stated that the Cadillac slowed down near the porch and defendant stuck his head and arm out of the passenger window and shot at Jenkins and the group on the porch with a black gun.

ASA LuAnn Snow read to the jury portions of Jenkins' grand jury testimony in which Jenkins identified defendant as the shooter both at the vacant lot and the porch shooting. Jenkins' written statement and grand jury testimony were admitted into evidence.

Leon Cooks testified that on March 11, 2006, he went with Jenkins and Perdue to a vacant lot, located at 66th Street and Justine Avenue, to have a car repaired. Cooks testified that Jenkins walked home to get something to eat while he and Perdue stayed at the lot. Cooks testified that as Jenkins was walking back to the lot, he heard gunshots and saw Jenkins run through the lot. Cooks testified that he did not see the shooter and did not know where the gunfire was coming from.

Cooks testified that later that evening, he was with a group of men, including Jenkins, Brent Perdue, Kevin Davis, and Willie Brown, standing on the porch at 2016 West 70th Place. Cooks testified that the mother of his two children lived at that address and on the evening in question a birthday party was being held for Siretha at the house. Cooks testified that Jenkins pointed out a white Grand Prix that was driving down the block then ran off the porch and down the gangway. Cooks testified that as he watched the Grand Prix approach, gunfire came from a

white Cadillac that was in front of the Grand Prix. When the gunshots began, Cooks testified that everyone on the porch dropped down on top of each other.

Cooks testified that after the shooting on the porch, he, Jenkins, and Perdue got into Jenkins' vehicle and drove to Cooks' house in Calumet City. Cooks testified that the police called Cooks on his cell phone and asked him about the shooting. Cooks testified that he told the police that he did not see the shooter because he dropped down when the shooting began. Cooks testified that the police threatened to name him, Jenkins, and Perdue as suspects unless they went to the police station to talk about the shooting. Cooks testified that the three of them met police at a gas station and were taken to the police station. Cooks testified that they did not make any stops on the way to the police station.

Cooks testified that at the police station, he spoke with detectives but denied telling them that defendant was the shooter both at the vacant lot and the porch shootings. Cooks also denied telling the detectives that Paree Jones was the driver at the vacant lot shooting, and that Anthony Mason was the driver at the porch shooting. Cooks testified that police asked him if he could identify defendant and he did so in a police lineup, but Cooks denied identifying defendant as the shooter. Cooks acknowledged that he told the detectives that he had known defendant and Anthony Mason his entire life.

Cooks also testified that an ASA took his written statement, but that he signed the statement without ever reading it because he wanted to go home. Cooks denied telling the ASA that defendant was the shooter in both incidents and denied testifying before the grand jury that defendant was the shooter in both incidents.

ASA Garbis read to the jury portions of Cooks' written statement, in which Cooks identified defendant as the shooter in both incidents. Specifically, Cooks stated that at the vacant lot, he saw defendant shoot at Jenkins with a black TEC-9 from the passenger window of a gold Ford. Cooks also stated that at the porch shooting, defendant shot at the group with a black gun from the white Cadillac. Cooks stated that he could not see if defendant used the same gun as in the vacant lot shooting because defendant did not stick the whole gun out of the window of the Cadillac. Cooks stated that he had known defendant his entire life. ASA Luann Snow read to the jury portions of Cooks' grand jury testimony, in which he stated that defendant was the shooter at both the vacant lot and porch shootings. Cooks' written statement and grand jury testimony were both admitted into evidence.

Brent Perdue testified that on March 11, 2006, he was on the porch at 2016 West 70th Place, where a birthday party was being held. Perdue testified that gunshots came from a white car that was driving down the block. Perdue testified that the gunshots began when the white car was at the corner and continued until the car was right in front of the porch. Perdue testified that he could not see who the shooter was because it was too dark outside. Perdue testified that once the shooting started, he hid behind a large tree that was in front of the porch. Perdue testified that he thought that Davis had been shot in the chin.

Perdue testified that after the shooting, he, Davis, Cooks, and Jenkins tried to leave in Davis' van, but the van got a flat tire. Perdue testified that he, Cooks, Jenkins and Thurmond then drove to Calumet City in either his or Cooks' car. Perdue testified that later that evening he, Cooks, and Jenkins met with police at a gas station and were taken to the police station to speak

with detectives. Perdue testified that he did not remember telling detectives that there were two cars, a white Cadillac and a white Grand Prix, involved in the porch shooting. Perdue denied telling detectives that defendant shot at the group from the white Cadillac. Perdue testified that he had known defendant for several years and that defendant "used to be on the corner of 63rd and Bishop." Perdue testified that he identified a photo of defendant out of a photo array, but testified that he was only asked to identify defendant rather than the shooter. Perdue denied viewing a live police lineup that included defendant.

Perdue acknowledged meeting with an ASA, who wrote out a summary of his statement regarding the shooting and Perdue identified his handwritten statement. Perdue acknowledged his signature on the handwritten statement, but testified that he did not remember the substance of the statement. Perdue also admitted that he testified before the grand jury, but did not remember identifying defendant as the shooter.

ASA Dawn Welkie testified that she took Perdue's handwritten statement on March 12, 2006. ASA Welkie testified that she reviewed the statement with Perdue and he was given the opportunity to make changes. ASA Welkie read portions of the statement, in which Perdue stated that, prior to the shooting, he saw a white Cadillac and a white Grand Prix driving down the block. According to the statement, Perdue then saw defendant fire a black gun from the passenger seat of the white Cadillac. ASA Snow read to the jury portions of Perdue's testimony before the grand jury, in which Perdue stated that he saw defendant fire a black gun from the passenger seat of the Cadillac. Perdue's written statement and the transcripts of his grand jury testimony were entered into evidence.

Kevin Davis testified that on March 11, 2006, he took his children to Siretha's birthday party at 2016 West 70th Place. Davis testified that he was on the porch with Perdue, Jenkins, Thurmond and Cooks, when a white Cadillac and white Grand Prix drove down the block. Davis testified that Jenkins pointed out the cars to the others. As the Cadillac approached, Davis saw the window roll down and the nose of a gun come out of the window. Davis testified that the window was not down enough for him to see the shooter. When the shooting started, Davis ducked down on the porch then jumped off the porch and hid under it. Davis testified that after the shooting, he and several others got into his van and he realized he had been shot in the chin. Davis testified that he started to drive to the hospital, but returned to the scene after his van got a flat tire.

Davis testified that the police arrived at the scene of the shooting and he told them what he had observed. Davis was then taken to the hospital. Davis testified that he subsequently provided a written statement to police and testified before the grand jury, both of which were admitted into evidence. In his written statement and grand jury testimony, Davis acknowledged that he knew defendant for years and that defendant used the Grand Prix that he saw at the porch shooting.

Willie Brown testified that on March 11, 2006, he was with the group on the porch at 2016 West 70th Place. Brown testified that Jenkins pointed out two cars driving down the block and stated, "There go Mo." Brown testified that the first car was a white Cadillac and the second car was a white Grand Prix that he recognized from the neighborhood. Brown testified that he could not see the driver of either vehicle. Brown testified that when the cars were about a house

away, he saw defendant in the passenger seat of the Cadillac. Brown testified that at the time, he had known defendant from the area for six or seven years and defendant's nickname was "Little Mo." Brown testified that defendant was wearing a black hoodie, with the hood down, and had his arm out the window holding a gun. Brown testified that defendant fired numerous shots at the group on the porch and he thought that Davis was hit in the chin. After the shooting, Brown went inside the house and saw Siretha motionless on the floor.

Brown testified that when police arrived he gave them a false name and told police that he had not witnessed the shooting because he did not want to get involved. Brown testified that, later that evening, he spoke with detectives and an ASA about the shooting. Brown testified that he identified defendant as the shooter in both a photographic array and then in a live police lineup.

The State called several witnesses to testify regarding the investigation of the shootings. Officer John Sanders testified that on March 11, 2006, he arrived at the scene of the porch shooting and spoke with Davis. After speaking with Davis, Officer Sanders testified that the officers began to look for defendant in relation to the shooting. Officer Sanders testified that Davis provided him with a description of defendant and stated that a possible location for defendant was 63rd and Bishop. Officer Sanders also testified that Davis told him that the two vehicles involved in the shooting, a white Grand Prix and white Cadillac, would be in the area of 63rd and Bishop.

Sergeant James Washburn testified that he went to look for codefendant Jones at 5622 South Wabash, but did not find him. Sergeant Washburn testified that a 9mm Baretta handgun

was recovered from that address. Sergeant Washburn testified that he later arrested Jones at a residence in Riverdale and, during the arrest, he recovered two shotguns, a .25 caliber semi-automatic pistol and a .22 caliber semi-automatic pistol. Sergeant Washburn testified that as Jones was placed into custody, a white Cadillac arrived at the same location and the car was taken to the police station. Officer Mark Allen testified that he was a member of the Chicago Police Department's Marine Unit. Officer Allen testified that he was given an assignment, by the same detectives involved in this case, to look for a gun that had allegedly been thrown into the lake at Rainbow Beach, near 75th Street. Officer Allen testified that he and his team spent two or three hours searching the bottom of the lake in that area, but were unable to recover a gun.

The State also presented witnesses to testify regarding the physical evidence. Scott Rochowicz, an expert on gunshot residue, testified that defendant's hands had tested positive for gunshot residue. Rochowicz concluded that defendant had either discharged a firearm, handled a firearm, or had been in close proximity to someone who had. Rochowicz testified that he was part of a group that studied the potential for suspects to be contaminated with gunshot residue while in the custody of Chicago police. Rochowicz's opinion was that it would be very rare for a person to become contaminated while in police custody.

Robert Benson, an evidence technician for the Chicago Police Department, testified that he recovered and inventoried fourteen shell casings from the scene of the vacant lot shooting. Stipulations were entered that the police recovered eight 9mm casings from the scene of the porch shooting. Brian Parr, an expert in firearms identification, testified that he determined that all fourteen shell casings from the vacant lot shooting and all eight casings from the scene of the

porch shooting had been fired from the same gun.

Detective John Halloran testified regarding his investigation into both the vacant lot and porch shootings on March 11, 2006. Detective Halloran testified that he interviewed Cooks, Jenkins, and Perdue at the police station. Detective Halloran testified that Cooks and Jenkins told him that in the vacant lot shooting, defendant shot at Jenkins with a black TEC-9 from the passenger seat of a gold Ford Contour; and in the porch shooting, defendant fired a black semi-automatic gun from a white Cadillac. Detective Halloran testified that Perdue told him that in the porch shooting, defendant leaned out of the passenger window of the Cadillac and shot at the group on the porch.

Detective Halloran testified that Brown and Perdue viewed police lineups and identified defendant as the shooter in the porch shooting. Detective Halloran testified that Cooks and Jenkins identified defendant as the shooter in both the vacant lot and porch shootings in a police lineup. Detective Halloran testified that Brown, Perdue, Cooks, and Jenkins all identified defendant in separate lineups. Detective Halloran also testified that Brown and Cooks identified Patrick Black as the driver of the Grand Prix that was at the scene of the porch shooting.

Detective Halloran testified that he spoke with Black, who indicated that his mother owned a white Grand Prix and provided two locations where the car might be located. Detective Halloran testified that the vehicle was eventually located at 2023 West 65th Street. Detective Halloran also testified that Davis told him that he recognized the Grand Prix from seeing it around 63rd and Bishop and that defendant associated with people in that area. Detective Halloran testified that photos were taken of defendant's tattoos and defendant had a tattoo of

"63rd" on his left arm and "Bishop" on his right arm.

After the State rested, defendant's motion for a directed verdict of not guilty was denied. Reginald Stephens and Anthony Jordan testified on defendant's behalf. Stephens and Jordan both testified that on March 11, 2006, from noon until 7 p.m., defendant was with them at defendant's brother's home, located at 6522 South Winchester. Stephens and Jordan testified that defendant was helping them rebuild the basement of the home and defendant repeatedly used a nail gun during the work.

Thomas Kubic, an expert in gunshot residue, testified that he test fired a nail gun at defendant's request to see if it produced the unique tri-component particle necessary for a positive gun residue test, specifically, the presence of lead, antimony, and barium. Kubic testified that he determined to a reasonable degree of scientific certainty that the tri-component particle was not produced by firing the nail gun. Kubic also testified that representatives from the company that manufactures the loads for the nail gun informed him that it was possible for materials meant for different loads to end up in the load made for the nail gun in question. As a result, Kubic stated that it was possible for the nail gun to produce residue similar to gunshot residue.

Robert Berk, an expert in gunshot residue, testified in rebuttal for the State. Berk testified that he listened to the testimony of defendant's expert, Kubis, and he did not agree with Kubic's conclusions. Berk testified that he was not aware of any manufacturer that used antimony, one of the key elements found in gunshot residue, in its nail gun ammunition. Berk testified that one would need to test fire the nail gun with ammunition known to contain antimony before one

could conclude whether or not the nail gun was capable of producing particles similar to gunshot residue. Berk also testified that he was the lead author of a study involving the potential for gunshot residue contamination from Chicago police vehicles and stations. Berk testified that, in approximately 1999 and 2000, 201 samples were taken from police vehicles and stations and he and his fellow analysts analyzed over 1.25 million particles from the 201 samples. Berk testified that of the 1.25 million particles, 56 particles contained the unique particles in gunshot residue. Berk testified that his opinion was that the possibility of contamination while in police custody was relatively low.

Following closing arguments, the jury found defendant guilty of the first-degree murder of Siretha White and that during the commission of the offense, defendant personally discharged a firearm that caused the victim's death. The jury also found defendant guilty of the attempted murder of Jenkins and Davis. The circuit court subsequently sentenced defendant to 75 years in prison, which included 25 years for the enhancing factor that defendant personally discharged a firearm. Defendant now appeals.

II. ANALYSIS

A. Closing Arguments

Defendant first contends that he was denied a fair trial where the State, in violation of the circuit court's ruling prohibiting the introduction of gang evidence, improperly suggested during closing arguments that defendant's tattoos indicated that he was a gang member and that such membership served as a motive for the shootings.

The State initially responds that defendant forfeited this issue by failing to include it in

his posttrial motion. See *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion). Defendant did not include this alleged error in his posttrial motion, and, therefore, defendant forfeited it for review. Defendant asks this court to review the issue under the plain-error doctrine. We apply the plain-error doctrine when:

> " '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *People v. Thompson*, 238 Ill. 2d 598, 613 (2010), quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

The first step of plain-error review is determining whether any error occurred. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

Here, defendant argues that the State made improper remarks regarding defendant's alleged gang membership during closing arguments. It is well settled that the prosecutor has wide latitude in making closing remarks. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Prosecution comments in opening statement or closing argument do not require reversal if they do not result in "substantial" prejudice. *People v. Moore*, 397 Ill. App. 3d 555, 562 (2009). Substantial prejudice occurs "if the improper remarks constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123. When reviewing claims of prosecutorial

misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. *Wheeler*, 226 Ill. 2d at 122. "In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005).

First, defendant claims that the prosecutor improperly referred to defendant's tattoos to assert that defendant was a gang member and that the shootings were gang related. In context, the prosecutor stated:

> "Now, all of these witnesses that we called, Jamar Jenkins, Leon Cooks, Willie Brown, Brent Perdue, they all say the same thing. They've known the defendant for years, anywhere from eight to ten years. This isn't, oh, I would describe the person who shot as this way and I've never seen him before but he seems to fit the description. They know him. ***. And where do they all say they know him from? Even Kevin Davis who can't see the shooter, he admits from the witness stand that he did tell the police where he knew [defendant] from, Little Mo, 63rd and Bishop.
>
> What did Detective Halloran tell you, and you will see the picture yourself, what tattoos does the defendant bear for all the world to see?
>
> ***
>
> ***. What do Little Mo's tattoos say for all the world to see? 63rd and Bishop on each one of his forearms in letters for everyone to see, letters you couldn't miss from a mile away. You'll see it in the pictures yourself. That's another strong piece of circumstantial evidence. When these guys who kn[ew] him all their lives, about ten years, say I know

him from 63rd and Bishop, sure they do, because this guy loves 63rd and Bishop so much he's had it permanently tattooed on his body.

Can you think of any address you've ever lived at or worked at that you would like to have that tattooed on your body, Des Plaines, Illinois, Carol Stream, 43rd and Halsted? Of course not. But he loves 63rd and Bishop and wants everyone to know that that's where he's from."

During rebuttal arguments, the prosecutor stated:

"Everybody, including his witnesses, say [defendant's] name is Little Mo and they had a description of him of 63rd and Bishop. Lo and behold at the time of his lineup *** bold as day, 63rd, and then to be sure, Bishop. Really what is the point of 63rd and Bishop? In case he gets lost, please return to 63rd and Bishop? Come on. You know what this is all about."

Contrary to defendant's contention, the prosecutor's statements do not convey the message that defendant was a gang member and that the shootings were gang related. A review of the record indicated that witnesses testified that defendant frequented the area near 63rd and Bishop. Specifically, Perdue testified that he had known defendant for several years and that defendant "used to be on the corner of 63rd and Bishop." Officer Sanders also testified that Davis provided him with a description of defendant and stated that a possible location for defendant was 63rd and Bishop. Accordingly, the prosecutor's comments accurately reflected the evidence and were not error.

Second, defendant contends that the prosecutor improperly made a gang reference when

he referred to defendant being part of the "underworld of crime." In context, the prosecutor stated:

> "Good morning, ladies and gentlemen. As you have seen in this trial there is an underworld of crime that exists in this city, it exists just below us. From [sic] to time, however, that underworld of crime that is going on constantly collides with our own world, a world where people try to live in a home, raise a family, send their kids to school, go to work every day, it is our world, and when that underworld of crime collides with our world the results are always tragic and in this case when the underworld of the defendant collided with the world of Siretha White that collision took little Siretha from a happy little eleven-year-old girl celebrating her birthday to a medical examiner's number in a morgue, to a cold body on a colder slab in the office of the medical examiner. This is what happened when the defendant's world collided with Siretha's world."

We find that the prosecutor's statement does not imply that the murder was gang related. Rather, the message conveyed to the jury was that the murder was a senseless act and that the victim was a completely innocent bystander.

Third, defendant contends that the prosecutor improperly encouraged the jurors to speculate that the shootings were gang related. The prosecutor argued:

> "Use your common sense, ladies and gentlemen. One group of young men who live on one block, one group of young men who live on another block, one group comes and shoots at the other group in the cover of darkness in a drive-by shooting. Use your common sense and life experiences and ask yourselves what the motive was for this

> crime and ask yourselves what the motive was for these young men to come in and testify as they did. You know, ladies and gentlemen. Use your common sense and life experience."

The prosecutor's comments did not refer to gang membership and complied with the circuit court's ruling that the State was permitted to present testimony that there was some animosity between the victim and the victim's group and the defendant and the defendant's group, without particularly naming those groups. In addition, this court has held that prosecutors may discuss subjects of common experience or common sense in closing argument. See *People v. Beard*, 356 Ill. App. 3d 236, 242 (2005). Our supreme court has acknowledged that jurors do not leave their common sense behind when they enter court and, therefore, it would seem proper for prosecutors to couch arguments in those terms and make appeals thereto. *People v. Runge*, 234 Ill. 2d 68, 146 (2009). That is what the prosecutor did in this case, arguing that jurors should use their common sense to find an explanation for the criminal activity in this case.

Defendant relies on *People v. Maldonado*, 398 Ill. App. 3d 401 (2010), in support of his argument that the prosecutor's remarks improperly suggested that the shootings were gang related. However, we find that case distinguishable. In *Maldonado*, this court found that the prosecutor's arguments inflamed the passion or arouse the prejudice of the jury against the defendant. The prosecutor had argued that the shooting was ordered by a member of the "Two-Six" gang; that the defendant would be considered a "hero" in the "world of the Two-Sixers;" and that "gang bangers like [the defendant] commit horrible crimes like this one." The prosecutor then asked the jurors not to let the system serve "the agenda of the Two-Sixers."

Maldonado, 398 Ill. App. 3d at 421. Unlike *Maldonado*, the prosecutor in this case did not reference any gang or state that defendant was a gang member. Rather, as previously explained, the prosecutor appealed for the jurors to use their common sense in evaluating the evidence. Since we find no error in the prosecutor's arguments, we need not consider defendant's forfeited claim under the plain-error doctrine.

B. Ineffective Assistance of Trial Counsel Claims

Defendant next contends that he received ineffective assistance of trial counsel where counsel failed to object to numerous items introduced into evidence by the State.

Claims of ineffective assistance of trial counsel are evaluated under the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693 (1984). More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

1. Prior Statements of Cooks, Jenkins, and Perdue to Detective Halloran

Defendant first argues that trial counsel was ineffective because he failed to object to the introduction of prior statements identifying defendant as the shooter made by Cooks, Jenkins and Perdue to Detective Halloran.

Section 115-12 of the Code of Criminal Procedure makes it clear that testimony regarding a declarant's prior out-of-court statement of identification is not rendered inadmissible by the hearsay rule if: "(a) the declarant testifies at 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 2006); *People v. Thorne*, 352 Ill. App. 3d 1062, 1073 (2004).

Here, defendant contends that Detective Halloran's testimony that Cooks, Jenkins and Perdue made statements implicating defendant as the shooter was not admissible under section 115-12 because these statements about defendant's role as the shooter were made prior to Cooks, Jenkins and Perdue identifying defendant in police lineups. However, we find that the circuit court properly admitted the testimony of Detective Halloran because all three requirements set out in section 115-12 were met. 725 ILCS 5/115-12 (West 2006). First, Cooks, Jenkins and Perdue all testified at trial. Second, all three witnesses were subject to cross-examination concerning their statements to Detective Halloran. Finally, Detective Halloran testified that Cooks and Jenkins not only made statements implicating defendant but Cooks and Jenkins also identified defendant as the shooter in both the vacant lot and porch shootings during separate police lineups. Detective Halloran testified that Perdue made statements implicating defendant and also identified defendant as the shooter in the porch shooting during a police lineup.

The case of *People v. Bowen*, 298 Ill. App. 3d 829 (1998) supports our finding that the prior statements identifying defendant are admissible. In *Bowen*, Maurice Bowen was charged with, *inter alia*, first degree murder. During trial, a witness, Lamont Brown, testified that he witnessed a man named Maurice fire several shots at the victim, who later died. *Bowen*, 298 Ill. App. 3d at 831. Brown testified that he identified the defendant to police as being a member of a rival gang, but denied identifying defendant as the shooter. *Bowen*, 298 Ill. App. 3d at 832. A detective was allowed to testify that the witness, Brown had provided a four-page statement of his account of the shooting and identified defendant as the shooter from a police lineup. *Bowen*, 298 Ill. App. 3d at 833. The defendant appealed and argued that the detective's testimony was inadmissible because section 115-12 provides a hearsay exception for out-of-court identifications only if the prior statements at issue are consistent with an identification of the defendant at trial. *Bowen*, 298 Ill. App. 3d at 834. This court rejected the defendant's argument, noting that the "language of this section does not require an in-court identification, nor does it prohibit the introduction of a prior identification statement where the witness fails to identify the defendant in open court." *Bowen*, 298 Ill. App. 3d at 834. Therefore, this court concluded that the trial court properly admitted as substantive evidence Brown's prior identification of the defendant, despite his inability or refusal to identify defendant in open court. *Bowen*, 298 Ill. App. 3d at 835-36.

Relying on *Bowen*, this court in *Thorne* found that the victim's prior identification of the defendant and description of the role defendant played in the robbery was admissible under section 115-12. *Thorne*, 352 Ill. App. 3d at 1075-76. In *Thorne*, a police officer testified that when he arrived at the scene of the robbery, the victim guided him into the building where he

saw the offenders flee. The police officer testified that most of the building was boarded up and when they looked through the open door of an occupied apartment, the victim stated that the four men in the apartment, including the defendant, had robbed him. As each of the four men exited the apartment, the victim told the officer the role each played in the robbery. *Thorne*, 352 Ill. App. 3d at 1068. This court found that the trial court properly admitted the testimony of the officer where all three requirements of section 115-12 were met and the victim was identifying the defendant with more specificity when he told the officer the role that the defendant played during the robbery. *Thorne*, 352 Ill. App. 3d at 1076.

Similarly, the statements in the present case to Detective Halloran were part of Cooks, Jenkins, and Perdue's identification of defendant. All three identified defendant as the shooter in police lineups. The statements by Cooks and Jenkins that defendant shot at Jenkins with a black TEC-9 from the passenger seat of a gold Ford Contour and later fired at the group on the porch from a white Cadillac, and the statements by Perdue that defendant fired at the group on the porch while leaning out the passenger window of a Cadillac identified with more specificity the role defendant played in the crimes committed in this case. We find that the circuit court properly admitted the testimony of Detective Halloran regarding the prior statements of Cooks, Jenkins and Perdue. Therefore, trial counsel cannot be found ineffective for failing to object to this evidence. See *People v. Lawton*, 212 Ill. 2d 285, 303 (2004) (an attorney's failure to make a futile objection does not constitute substandard performance).

2. Prior Written Statements of Perdue and Davis

Defendant next argues that trial counsel was ineffective for failing to object to the State's

introduction of Perdue's written statement and Davis' written statement, portions of which asserted that prior to the porch shooting, Jenkins told Perdue and Davis that defendant had shot at him earlier in the day. Defendant contends that this evidence was inadmissible where the statements were not inconsistent with their trial testimony and neither Perdue nor Davis had personal knowledge of the vacant lot shooting.

It is within the sound discretion of the trial court to determine whether or not a witness' testimony is admissible as a prior inconsistent statement under section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 2008)). *People v. Harvey*, 366 Ill. App. 3d 910, 922 (2006). Section 115-10.1 of the Code provides:

> "Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement -
>
> (1) was made under oath at a trial, hearing, or other proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> (A) the statement is proved to have been written or signed by the witness, or

> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at trial, hearing, or other proceeding, or
>
> (c) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein." 725 ILCS 5/115-10.1 (West 2008).

Initially, we find that Davis' grand jury testimony was properly admitted under paragraph (c)(1). Davis' trial testimony differed from his grand jury testimony, he was available for cross-examination, and his grand jury testimony was given under oath at a judicial proceeding. Therefore, Davis' grand jury statements were admissible under section 115-10.1. Defendant, nonetheless, argues that the trial court should have limited the admission of Davis' grand jury testimony to only those portions which were truly inconsistent by omitting the reference to Jenkins' statement. Although only the inconsistent portions of a prior statement are admissible, a trial court need not make a "quantitative or mathematical analysis" of whether a witness' entire statement is inconsistent under section 115-10.1 for the entire statement to be admissible. *Harvey*, 366 Ill. App. 3d at 922. Here, the trial court was within its discretion in admitting the entire 16-pages of grand jury testimony into evidence.

Next, while the majority of Davis and Perdue's written statements were admissible, the complained of portions pertaining to Jenkins' statement did not meet the personal knowledge requirement of paragraph (c)(2). A witness must have firsthand knowledge of the facts underlying a third party's declarations. *Harvey*, 366 Ill. App. 3d at 921. In this case, the majority of both Davis and Perdue's written statements consisted of events pertaining to the porch shooting that occurred on March 11, 2006, of which they had firsthand knowledge. The portions of the written statements which contain Jenkins' declarations that defendant shot at him earlier that day should not have been admitted as substantive evidence because neither Davis nor Perdue had personal knowledge of that event. However, the error was harmless. Allowing inadmissible evidence can be held to be harmless error if " 'the alleged erroneously admitted evidence did not prove an element of the crime not established by other properly admitted evidence.' " *People v. Jenkins*, 209 Ill. App. 3d 249, 257 (1991), quoting *People v. Bundy*, 79 Ill. App. 3d 127, 134 (1979). In this case, the admission of the portions of the written statements by Davis and Perdue constituted harmless error because the jury was permitted to consider virtually identical evidence that defendant had shot at Jenkins prior to the porch shooting, including Jenkins' own prior identifications of defendant as the shooter at the vacant lot shooting in Jenkins' handwritten statement, grand jury testimony, and statements to Detective Halloran.

3. Admission of Multiple Prior Inconsistent Statements

Defendant next argues that trial counsel was ineffective for not objecting to the State's admission of multiple prior statements by Cooks, Perdue, and Jenkins. Specifically, defendant contends that the grand jury testimonies of these witnesses were consistent with their written

statements and, therefore, the grand jury testimonies were inadmissible prior consistent statements. This court has repeatedly rejected this argument. See *Maldonado*, 398 Ill. App. 3d 401; *People v. Johnson*, 385 Ill. App. 3d 585 (2008); *People v. Harvey*, 366 Ill. App. 3d 910 (2006); *People v. Thomas*, 354 Ill. App. 3d 868 (2004).

In *Johnson*, this court explained that the defendant in that case was confusing prior *consistent* statements with prior *inconsistent* statements. The court also explained that consistency is measured against the trial testimony, not against other statements that conflict with the trial testimony. *Johnson*, 385 Ill. App. 3d at 608. We see no reason to depart from this court's previous holdings, and find that the introduction of more than one statement that is inconsistent with a witness' trial testimony, whether or not such statements are consistent with each other, is proper.

4. Black's Statements to Detective Halloran

Defendant next argues that trial counsel was ineffective for failing to object to Detective Halloran's testimony that he had a conversation with Patrick Black, who was arrested along with defendant, about the fact that Black's mother owned a white Grand Prix and Black provided several possible locations at which the vehicle might be located. Defendant also argues that Detective Halloran's testimony that Brown identified Black in a police lineup as the driver of the Grand Prix involved in the porch shooting and that Black was the same individual who led the police to the white Grand Prix served to improperly bolster Brown's identification of Black.

We find that Detective Halloran's testimony regarding his conversation with Black, subsequent attempts to locate the white Grand Prix, and the identification testimony was properly

admitted to explain the course of the police investigation into the murder of Siretha and the events leading to the arrest of defendant and Black. See *People v. Gonzalez*, 379 Ill. App. 3d 941, 950 (2008). Accordingly, we cannot find that trial counsel was deficient for failing to object to Detective Halloran's testimony.

5. Evidence of Firearms Recovered During Police Investigation

Defendant next argues that trial counsel was ineffective for failing to object to Officer Washburn's testimony that he recovered multiple weapons from the home of codefendant Paree Jones, who Cooks and Jenkins identified as the driver of the vehicle in the vacant lot shooting. Defendant asserts that this testimony constituted inadmissible "other crimes evidence elicited for the purpose of showing Jones', and by association, [defendant's], propensity to commit crime."

Defendant relies on *People v. Harbold*, 124 Ill. App. 3d 363 (1984) and *Maldonado*, 398 Ill. App. 3d 401. However, we find those cases distinguishable. In *Harbold*, this court found that the prosecutor intentionally committed misconduct by eliciting testimony concerning weapons found at the defendant's residence. The prosecutor in *Harbold* offered evidence of weapons as "indicative of the type of person [defendant was]." *Harbold*, 398 Ill. App. 3d at 384. This court found that the error was not harmless where the trial court's admonishment to the jury to disregard any reference to a weapon was made several minutes after the reference and where the prosecutor engaged in a "consistent tactic of bolstering its case with irrelevancy." *Harbold*, 398 Ill. App. 3d at 384. Similarly, in *Maldonado*, this court found that evidence of a shotgun recovered from the defendant's home was inadmissible where the defendant was not charged with any offense related to the shotgun. *Maldonado*, 398 Ill. App. 3d at 422.

Unlike *Harbold* and *Maldonado*, the weapons at issue were not recovered from defendant's home, but, rather from the residence of codefendant Jones. In this case, defense counsel attacked the State's case against defendant on the basis that the guns recovered from Jones' home were not used in the vacant lot or the porch shooting. During closing arguments, defense counsel specifically stated: "We know that two guns were recovered from the home of [Paree Jones] and examined and those guns were not guns that fired the shell casings either at 2:00 o'clock or at 9:00 o'clock. Now I'm going to argue to you that the State's case is based on what I would suggest is a pack of lies." Accordingly, we cannot find that trial counsel was ineffective by failing to object to the testimony concerning the weapons recovered at Jones' residence.

6. Testimony Concerning Failed Police Search for a Gun

Defendant lastly contends that trial counsel was ineffective for failing to object to Officer Allen's testimony concerning his failed search for a gun in Lake Michigan, which was conducted at the behest of the same detectives who were investigating Siretha's murder. Defendant correctly notes that the State failed to present testimony that the police received any information that the gun used in this case was thrown in the lake in order to specifically link the search to this case. However, we find such error harmless. The evidence presented against defendant included the eyewitness testimony of Brown, who identified defendant at trial as the shooter in the porch shooting. The State also introduced three eyewitness identifications of defendant as the shooter from Jenkins, Perdue, and Cooks via their prior inconsistent statements and grand jury testimonies. Further, the physical evidence in this case included a positive test for gunshot

residue on defendant's hands. Where the evidence against defendant was overwhelming, defendant was not prejudiced by the testimony concerning the failed attempts by police officers to locate a gun in Lake Michigan and we cannot find trial counsel deficient in this respect.

C. Rule 431(b) Claim

Defendant's final contention is that he is entitled to a new trial where the circuit court failed to comply with Supreme Court Rule 431(b), as amended in 2007. Rule 431(b) requires the circuit court to ask each prospective juror, individually or in a group, whether he or she understands and accepts that: (1) defendant is presumed innocent of the charge against him; (2) before defendant can be convicted, the State must prove him guilty beyond a reasonable doubt; (3) defendant is not required to offer any evidence on his behalf; and (4) defendant's failure to testify cannot be held against him. Ill. Sup. Ct. R. 431(b), eff. May 1, 2007.

Our supreme court recently addressed the proper application of this rule in *Thompson*, 238 Ill. 2d 598. In *Thompson*, the court held that the rule mandates a "specific question and response process," in which the jurors, either individually or in a group, are asked whether they understand and accept the enumerated principles. *Thompson*, 238 Ill. 2d at 607. The goal of Rule 431(b) questioning is to help ensure a fair trial and impartial jury. *Thompson*, 238 Ill. 2d at 609.

Here, the circuit court instructed the jurors:

> "The third question for you all is this. As I have previously stated the defendant is presumed innocent and does not have to offer any evidence in his own behalf, but must be proven guilty beyond a reasonable doubt by the State.

> Does anyone here have any problems with those concepts? If so, please stand up.
>
> ***
>
> Fo[u]rth and final question for you all is this. As also previously stated the defendant does not have to testify on his own behalf.
>
> If the defendant decides not to testify, you must not hold that against the defendant.
>
> If the defendant decides not to testify, is there anyone here who believes that regardless of what I have just said, you would hold that decision against the defendant? If so, please stand up."

Defendant does not dispute that the circuit court addressed each of the four principles with the potential jurors. Rather, defendant argues that the circuit court did not question the jurors whether they "understood" and "accepted" the four Rule 341(b) principles, but instead asked jurors whether they "have any problems" with the principles and whether they would hold defendant's decision not to testify against him. Defendant argues that this language was insufficient to satisfy the rule's requirement that each juror be questioned as to his or her understanding and acceptance of the enumerated principles.

This court had held that Rule 431(b) does not dictate a particular methodology for establishing the venire's understanding or acceptance of those principles. *People v. Vargas*, 396 Ill. App. 3d 465, 472. This court explained that the rule does not set out principles in the form of questions to be asked *in haec verba*, and does not provide " 'magic words' " or " 'catechism' " to ensure the court's compliance. *Vargas*, 396 Ill. App. 3d at 472.

Recently, in *People v. Digby*, 405 Ill. App. 3d 544 (2010), this court held that the trial court met the requirements of Rule 431(b) where it admonished the potential jurors as a group of the four principles then asked them whether they "had a problem" with the presumption that defendant is innocent, if they "disagreed" with the State's burden of proving defendant guilty, and if they would hold defendant's failure to testify "against" him. *Digby*, 405 Ill. App. 3d 544, __ . Similarly, in this case, we find that while the court did not use the precise language of Rule 431(b), the words it did use were appropriate and clearly indicated to the prospective jurors that the court was asking them whether they understood and accepted the principles enumerated in the rule.

Moreover, even if we were to find that the circuit court violated Rule 431(b), defendant would not be entitled to a new trial in this case. It is undisputed that defendant forfeited this issue by failing to object at trial and to raise the issue in a posttrial motion. Piatkowski, 225 Ill. 2d at 564. Defendant asks this court to review his claim under the plain-error doctrine. As previously noted, plain error applies only:

> "when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565.

Defendant acknowledges that our supreme court, in *Thompson*, held that a violation of

Rule 431(b) does not satisfy the second prong of plain error analysis absent a showing by the defendant that the violation "resulted in a biased jury." *Thompson*, 238 Ill. 2d at 615. However, defendant claims that the first prong of plain-error applies where the evidence in this case was closely balanced. We disagree. The evidence in this case included multiple eyewitness identifications of defendant as the shooter in both incidents, including identifications from Brown, Cooks, Jenkins, and Perdue. The State also offered corroborating physical evidence indicating that defendant's hands tested positive for the presence of gunshot residue. Since the evidence against defendant was not closely balanced, we cannot review defendant's forfeited issue under the first prong of plain error.

For the above reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.