2013 IL App (1st) 100474-U

FOURTH DIVISION
September 30, 2013

No. 1-10-0474

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 18238
	)	
ALONZO PERRY,	)	Honorable
	)	John P. Kirby,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justice Fitzgerald Smith concurred in the judgment.
Justice Pucinski's dissent to be filed later.

ORDER

¶ 1 *Held*: Defendant's conviction affirmed, where evidence was sufficient for conviction, prosecutor's remarks during closing argument did not deny defendant a fair trial, and trial court did not abuse its discretion in excluding defendant's statement to police as prior consistent statement.

¶ 2 Following a jury trial, defendant Alonzo Perry was convicted of first degree murder and aggravated battery with a firearm, and was sentenced to 46 years' imprisonment and 8 years' imprisonment, respectively, with the sentences to be served consecutively. Defendant presses

* This case was recently reassigned by the court.

three arguments on appeal: (1) the identification testimony presented by the State was insufficient to prove him guilty of the charged offenses beyond a reasonable doubt; (2) improper statements during the State's rebuttal closing argument deprived defendant of his right to a fair trial; and (3) the trial court erred in refusing to allow defendant to corroborate his alibi defense with a portion of defendant's statement to police, which defendant argues should have been admitted under the recent fabrication exception to the rule barring prior consistent statements. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On May 29, 2006, Tory White and his girlfriend, Shaneka Dillon, were shot at as they were fueling their car at a gas station. White was shot multiple times and died as a result of his injuries. Dillon suffered a graze wound from a single bullet and survived.

¶ 5 The shooting occurred in the parking lot of a small complex containing a gas station, convenience store, and a restaurant, located at the intersection of 98th Street and Halsted Avenue in Chicago. The business establishments were equipped with surveillance cameras that captured the shooting on video. The parties stipulated to the testimony of Frank Sayed, the owner of Sharks Restaurant and the Marathon gas station, located at 9800 and 9802 South Halsted Avenue. The stipulation provided that Sayed, if called to testify, would state that at the time of the incident, Sharks Restaurant had two cameras, one that faced northeast and recorded the intersection of 98th Street and Halsted, and another that faced southeast and recorded the Marathon gas station parking lot. Sayed would further testify that the gas station had one exterior security camera. It faced southeast and recorded the parking lot of the gas station as well

as the door to the gas station's convenience store. The gas station also had three cameras located inside the store. One camera was pointed at the front door and recorded the front of the store. Another camera was directed at the cashier's counter, and the third was focused on the interior sales floor of the gas station and also had a view of the front door.

¶ 6 The stipulation further provided that Sayed would testify that on May 29, 2006, each of the six cameras was functioning correctly, although the time stamps on the two cameras located outside of Sharks Restaurant were 11 minutes ahead of the actual time being recorded, and the time stamps on the four cameras located inside and outside of the gas station depict a time 38 minutes later than the actual time that was being recorded.

¶ 7 Shaneka Dillon testified that on May 29, 2006, which was Memorial Day, she had plans to spend the holiday swimming with her boyfriend, Tory, and her friend, Josephine Baker. That day, Dillon borrowed her uncle's black SUV truck and drove to pick up Josephine, Tory, her brother Alton Jackson, and her stepbrother Ari Dillon. Dillon pulled into the Marathon gas station located on 98th Street and Halsted Avenue sometime around 1 p.m. Everyone but Dillon exited the vehicle. Tory began pumping gas into the vehicle. Tory, Josephine, Alton, and Ari went into the gas station's convenience store to purchase snacks and pay for gas. They all exited the store shortly thereafter. As Dillon sat in the car, she saw defendant walking around the parking lot of the gas station. Dillon had never seen defendant before and she described him as being "light skinned" with a short haircut. He was wearing a red shirt. Defendant walked over to Tory and said, "Remember me bitch?" He then fired five shots at Tory.

¶ 8 Dillon testified that she was approximately 7 feet away from defendant when he shot

Tory. She remained in the driver's seat of the vehicle and was looking at defendant's face when he began shooting. After firing five shots at Tory, defendant walked away, and Tory was able to get into the SUV. Tory was bleeding and told Dillon to "drive, drive, drive." She began driving in the direction of Roseland Hospital because it "was the only hospital that [she] could remember at that time," but she got into a car accident before she reached the hospital. After the accident, Dillon noticed for the first time that she was bleeding on the right side of her stomach. A bullet had grazed her stomach. Paramedics arrived on the scene and she and Tory were both taken to Christ Hospital, which was equipped with a trauma center. After receiving medical treatment for her graze wound, Dillon spoke to several Chicago detectives about the shooting.

¶ 9 On May 31, 2006, two days after the shooting, Detectives Stover and Murphy came to Dillon's Calumet City residence. After she signed a photograph advisory form, the detectives showed Dillon a series of photographs to see if she could identify the shooter. Defendant's picture was included in the photo array, but Dillon did not make an identification at that time. Detectives Stover and Murphy later showed Dillon another photo array on June 24, 2006. This time, after signing another form and viewing another set of pictures, Dillon made an identification. Dillon did not identify defendant, whose picture had again been included the photo array. Instead, she identified a picture of Corderyle Ross, a man that "sort of kind of looked like the defendant." She was not "a hundred percent certain" that her identification was correct at that time, but did not relay her doubt to the detectives.

¶ 10 On June 26, 2006, Dillon went to the Area 2 police station with Josephine Baker to view a physical lineup. Dillon signed a lineup advisory form and viewed the lineup. Defendant was

not included in the lineup and she did not make an identification at that time. Dillon explained that she was unable to make an identification because she did not see anyone who resembled defendant. Dillon later learned that Corderyle Ross, the man whom she had previously identified in the photo array two days earlier, was a participant in the five-person physical lineup.

¶ 11 Dillon returned to the police station on July 12, 2006, signed another advisory form, and viewed a second physical lineup. Defendant was one of the five men included in the lineup, and Dillon identified him as the shooter. Dillon explained that she recognized defendant's eyes and stated that "he had the same look in his eyes as his did th[e] day" of the shooting. After making her identification, Dillon learned that defendant's picture had been included in the photo arrays that she had been previously shown. Dillon explained that defendant looked younger in the picture that was included in the photo array and that the picture appeared to have been taken in a "dimmer light."

¶ 12 On cross-examination, Dillon acknowledged that when she was interviewed by police in the hospital immediately after the shooting, she reported that she never saw the shooter's face and that she could not identify him. She told the officers that she merely saw the offender running away after firing five shots at Tory. Dillon, however, was able to provide the officers with a clothing description of the offender and told them that the shooter had been wearing a red t-shirt, dark colored shorts, and white gym shoes. After reviewing the surveillance footage, Dillon acknowledged that the shooter had not been wearing shorts or white shoes. Dillon also acknowledged that when she identified Ross's photo from the photo array, she never told the investigating officers that she was unsure of her identification. Instead, she told the officers that

Ross was the man who shot her boyfriend. She also admitted that the pictures of defendant included in the photo arrays looked exactly like defendant, but she was unable to identify him until she viewed defendant in person. Dillon also acknowledged that the man that she saw shoot Tory had a scar on his face above his eye, but no such scar was apparent in the pictures of the shooter that were taken by the surveillance videos. In addition, Dillon further acknowledged that the complexion of the shooter in the still images created from the surveillance videos appeared to be darker than the complexion of defendant as he appeared in person in court.

¶ 13 Josephine Baker testified that Shaneka Dillon was her best friend and confirmed that they had plans to go swimming on Memorial Day in 2006. Shortly before 1:30 p.m. on May 29, 2006, Shaneka pulled into the parking lot of the Marathon gas station located at the intersection of 98th and Halsted. Baker was a passenger in the vehicle along with Alton, Ari, and Tory. Baker testified that she and the others got out of the car and walked towards the convenience store. At that time, Baker noticed a "bluish, greenish car" pull into the parking lot and heard the driver say something to Tory as he was entering the store to pay for the gas. Baker identified defendant as the driver of the blue-green car, but she did not hear what defendant said to Tory. After she paid for a soda, Baker and the others walked out of the convenience store and returned to the vehicle. As they got back into the vehicle, Baker saw defendant walk towards Tory. She was in the rear passenger seat and was directly behind Tory when she heard defendant say "remember me bitch" and saw him shoot Tory. Baker acknowledged that the windows of the car were tinted, but explained that the tint allowed her to see out of the window, but prevented anyone from seeing into the vehicle. From her vantage point in the back of the vehicle, Baker was "able to catch

[defendant's] face" and described him as being "light skinned." She also noted that defendant had a "low haircut" and some facial hair and was wearing a red t-shirt. Baker had never seen defendant prior to the shooting.

¶ 14 After defendant fired four or five shots at Tory, he ran off and Shaneka drove toward Roseland Hospital, but they were in a car accident on their way there. After the accident, Baker noticed that Shaneka had also been shot and was bleeding from the right side of her stomach. Tory and Sheneka were both transported via ambulance to the hospital.

¶ 15 Baker later spoke to several detectives about the shooting. On May 31, 2006, she signed an advisory form and was shown a photo array. Defendant's picture was included in the array, but Baker was unable to make an identification. Baker explained that the picture of defendant included in the array was taken when he looked "a lot younger" and when he had no facial hair. Baker viewed another photo array on June 24, 2006, and made an identification. This time, she identified the picture of Corderyle Ross; however, Baker testified that she told the detectives that Ross simply resembled the shooter and that it "could be him, but it's not him." Baker explained that she made the identification based primarily on the facial hair and facial expression in the picture because that is what she "mainly remembered" about the shooter.

¶ 16 A few days after her identification, Baker went to the police station to view a physical lineup. After signing another advisory form, Baker viewed the lineup but she did not make an identification. Defendant was not included in the physical lineup. Baker viewed a second physical lineup on July 12, 2006. This time, she identified defendant. Baker explained that she identified defendant because she "recognized the facial hair on him" and because his facial

expression during the lineup mirrored the one he had when he shot Tory.

¶ 17 On cross-examination, Baker acknowledged that she had watched surveillance footage prior to testifying and that she did not remember all of the details regarding the physical description of the shooter that she initially provided to Detectives Stover and Murphy. She did not recall whether she informed the detectives that the shooter was wearing blue jeans or shorts. Baker emphasized, however, that she "clearly [remembered] the shooting." She also clearly remembered that defendant was wearing a red shirt, explaining that this was the item of clothing that really "stuck out to [her]." When asked about her failure to identify defendant from the earlier photo arrays, Baker replied that it was because defendant did not appear to have the same facial hair in the pictures that he did at the time of the shooting. Baker explained that at the time of the shooting, defendant had a goatee and the photograph of him used in the photo array only showed "a slight shade of [a] mustache" and not a goatee. Baker explained that she picked out Corderyle Ross's picture from the photo array because he resembled defendant. Baker acknowledged that the shooting was short in duration and that she was scared when the shots were fired. Although she had a good look of the shooter's face, Baker never noticed any facial scars.

¶ 18 Danny Phillips was another eyewitness to the May 29, 2006 shooting at the Marathon gas station. He testified that at approximately 1 p.m., he was on his way home and was driving south on Halsted Avenue. Phillips came to a stop at the red light located at the intersection of 98th Street and Halsted. His car was stopped parallel to the gas station. As he was waiting for the light to turn green, Phillips heard a series of "five to six" gun shots. He looked to his right and

"saw a young man shooting in a black pick-up truck." The shooter was an African American male, who was approximately 18 to 24 years of age, and appeared to be somewhere between 5'5" and 5'9" in height. He was wearing a red shirt. Phillips identified defendant as the man he saw shooting that day and testified that defendant was standing approximately 20 to 30 feet away from Phillips when he fired his gun. After firing five or six shots, Phillips saw defendant walk north and round the corner of Sharks Restaurant. Phillips left the scene. After dropping off his friends, Phillips returned to the gas station, spoke to the police who had arrived on scene and told them what he had observed. Phillips informed the officers that he thought he would be able to identify the shooter and provided the officers with his contact information.

¶ 19 On June 26, 2006, Phillips went to the police station to view a physical lineup. After signing an advisory form, Phillips viewed a five-person physical lineup, but did not make an identification. Defendant was not a participant in the lineup. Phillips returned to the police station on July 12, 2006, to view a second lineup. Defendant was included in this physical lineup, and Phillips identified him as the shooter.

¶ 20 On cross-examination, Phillips acknowledged that he initially drove off after the shooting and did not call 911 to report the crime. Instead, Phillips returned to the gas station about an hour and twenty minutes after the shooting and provided the investigating officers with a physical description of the shooter at that time. Phillips reported that the shooter was wearing a red shirt and dark colored pants. He did not remember telling the officers that the offender was wearing white shoes, and after watching surveillance footage, Phillips acknowledged that such a description would have been inaccurate. He further acknowledged that he initially told police

that he believed the shooter had a darker complexion than his own, but that defendant's complexion actually appeared to be lighter than his own. In addition, Phillips did not provide any details pertaining to the facial hair of the offender because he saw no facial hair. The shooting occurred quickly and lasted no more than 30 seconds, and based on his recollection, Phillips believed that Tory was on the driver's side of the car when he was shot, not the passenger side, and that there were two female passengers sitting in the rear of the vehicle. He did not recall seeing two other young male passengers in the vehicle at that time.

¶ 21 Antoinette Coles, Tory's ex-girlfriend, testified that she was enrolled in Job Corp., a trade school, from August 2005 to May 2006. Tory and defendant were both also enrolled in Job Corp. at that time. Although she had known Tory before their participation in the trade school program, she met defendant for the first time there. She would see defendant "a few times a day" and explained that they did not have much interaction aside from "[a] hi and bye thing." As far as Antoinette knew, defendant and Tory were not really friends and she did not "see[] them really interacting with each other."

¶ 22 On May 31, 2006, Detectives Stover and Murphy came to Antoinette's house and she learned that Tory had been shot. The detectives then took her to the Marathon gas station located at 98th and Halsted and had her view surveillance video footage. Antoinette identified defendant from the video recording. After watching the video recording, the detectives then showed her a photograph. She identified defendant as the individual depicted in that photograph.

¶ 23 On cross-examination, Antoinette acknowledged that some fighting had occurred between students at Job Corp. shortly before Tory left the program, but she denied that the

altercations were gang related. She also denied that Tory was affiliated with any street gang. Although Tory left Job Corp. before he completed the program, Antoinette denied that she told the Detectives Stover and Murphy that Tory had been expelled from the program for fighting. Antoinette did not recall ever meeting a young man named Corderyle Ross during her enrollment at Job Corp.

¶ 24 Timothy Neloms testified that he lived in the same neighborhood on the South Side of Chicago as defendant in May 2006, and explained that they were next-door neighbors for "[a]bout a year." During that time, Neloms did not see defendant "too much," just "[o]ff and on during the day." He did not consider defendant to be a friend. On July 8, 2006, Neloms was contacted by Chicago police detectives about their investigation into the recent Memorial Day shooting and was asked to view some photographs. After viewing the photographs, Neloms identified defendant as the person in the pictures. Defendant was wearing a red shirt in one of the photos.

¶ 25 On cross-examination, Neloms acknowledged having had prior interactions with police where he gave them inaccurate information. He admitted that when he had been arrested on previous occasions, he provided the police officers with different birthdates because he "was a little scared." Neloms, however, denied that he ever provided police officers with different social security numbers or different aliases. Neloms did acknowledge that he was on probation for a felony when he spoke to the detectives, but testified that the subject of his probation never came up when he was asked to view pictures prior to identifying defendant. Neloms did admit that he was "scared" when the officers arrived at his house to show him pictures because he initially

believed the officers came to his house because he did something wrong. Neloms also acknowledged that he never looked very closely at defendant's face while they were neighbors. He could not say whether defendant had a scar on his face and did not recall whether or not defendant had any facial hair in 2006. Although Neloms was not familiar with Tory White, he was familiar with the gas station where the shooting occurred and testified that gang activity was known to occur in that area in 2006.

¶ 26 Detective Danny Stover, a Homicide Detective at Area 2, confirmed that he was assigned to investigate the shootings. Detectives Graziano and Ortman were dispatched to the scene and Detective Stover and his partner, Detective Murphy, began to interview witnesses who had been brought to the station. After taking a statement from Josephine Baker, Detectives Stover and Murphy went out to the scene. They learned that the gas station and the restaurant were equipped with surveillance cameras, reviewed the footage, and arranged for a technical assistant to make copies.

¶ 27 Detective Stover showed the footage to relevant witnesses including Antoinette Coles, Tory White's ex-girlfriend. She identified defendant from the video footage as well as from a still photograph. Following Coles' identification, Detective Stover compiled a photo array. Defendant's picture was included in the array as well as the pictures of five "fillers." On May 31, 2006, the photo arrays were shown to Dillon and Baker, but neither woman made an identification. After the first photo arrays yielded no positive identification, Detective Stover contacted Jane Parker, a representative of Job Corp., sent her two still photographs taken from the video surveillance cameras, and asked her to review the photographs and determine if she

recognized anybody. Based on the information conveyed in a follow-up call with Parker, Coderlye Ross became a suspect.

¶ 28 After Parker viewed the photographs, Detectives Stover and Murphy compiled another photo array. This photo array contained defendant's picture as well as a picture of Corderyle Ross and four fillers. The second photo array was shown to Dillon and Baker on June 24, 2006, and this time both women identified Ross as the offender.

¶ 29 Based on Dillon and Baker's identification of Ross, Detective Stover put out "an investigative alert with probable cause to arrest" and Ross was subsequently arrested and taken into police custody on June 26, 2006. Ross was then included in a physical lineup that was shown to Dillon, Baker and Danny Phillips. None of the eyewitnesses to the shooting identified Ross from the physical lineup. After the lineup, Detectives Stover and Murphy no longer considered Ross a suspect in the shooting. Instead, the detectives refocused their attention on defendant and went to speak with Timothy Neloms, defendant's neighbor. Neloms was shown still photographs taken from the footage captured by the surveillance cameras and he confirmed that defendant was the individual in the photographs. As a result, another investigative alert was broadcast and defendant was arrested on July 12, 2006. Detective Stover subsequently conducted another physical lineup that included defendant and five fillers. Dillon, Baker, and Phillips all viewed the lineup and each witness identified defendant from the lineup. Detective Stover's investigation concluded after the witnesses' identification. After defendant's arrest, information was collected as to defendant's physical characteristics. The processing information recorded defendant's height as 5'9", weight as 145 pounds, and his complexion as "medium."

¶ 30 On cross-examination, Detective Stover acknowledged that the area in which the shooting occurred is a high crime area where "[g]angs are a big, big problem." He identified the Gangster Disciples and the Black Disciples as gangs that are prevalent in the area. Detective Stover further acknowledged that when he met with Antoinette Coles to show her pictures recorded from the surveillance footage, her identification was "tentative." She said the man in the pictures "looked like[] defendant." When the same images were shown to Jane Parker of Job Corp., Stover recalled that she said "that's him" and did not hesitate. Detective Stover further testified that Dillon and Baker's identifications of Ross after viewing the second photo array were also not tentative. Detective Stover further acknowledged that the clothing description provided by Phillips matched the clothing worn by Ari, Shaneka's 11-year-old stepbrother, not the shooter. Detective Stover also testified that none of the eyewitnesses reported seeing tattoos on the hands or arms of the shooter, but that defendant had two tattoos on his arm. Similarly, none of the witnesses reported seeing a scar on the shooter's face, yet defendant had a scar on the right side of his forehead.

¶ 31 Dr. Nancy Jones, Chief Medical Examiner of Cook County, testified that she performed the autopsy of Tory White. Dr. Jones observed two gunshot entrance wounds on the front left side of his body and an exit wound just below his umbilicus. She observed two additional entrance wounds and one additional exit wound on the back of Tory's body. None of the wounds evidenced signs of stippling, which is indicative of the shots being fired at close range, but she explained that stippling could be absent for various of reasons. Dr. Jones was able to follow paths of the bullets through Tory's body and determined that his stomach, spleen, heart, liver, and

diaphragm had all been punctured. She recovered two bullets from inside of White's body. Based on her examination, Doctor Jones opined that Tory White died as a result of multiple gunshot wounds.

¶ 32 The parties stipulated that Tonia Brubaker, an expert in the field of firearms identification and analysis, would testify that the two bullets recovered by Dr. Jones and a fired bullet recovered from the pavement by one of the gas pumps were .32 caliber bullets and that the three bullets were fired from the same firearm. The State then rested its case-in-chief. Defendant's motion for a directed finding was denied, and he proceeded with an alibi defense.

¶ 33 Barbara Redmond, defendant's adoptive mother, testified that on the date of the shooting, she spent the entire day with defendant and her other son, Tyyuan. She explained that her sons were helping her move. Barbara was moving from a residence located at 1628 East 70th Street to one located at 7716 South East End. Sometime around 1 p.m., Leo Brown, her sister's boyfriend, stopped by the apartment to pick up an entertainment center that was too big to move to the new residence. Defendant was in the apartment when Brown arrived. Ultimately, the move took several trips and they did not finish until sometime around 4:30 and 5 p.m. that evening. On cross-examination, Barbara acknowledged that two cars were used during the move, but she stated that she never once lost sight of defendant during the hours that they were making trips to move items from the old residence to their new home.

¶ 34 Leo Travares Brown confirmed that he is the boyfriend of Regina, Barbara's sister, and testified they have been together for six years. He considered defendant to be his nephew. Brown further confirmed that he saw Barbara and her sons on May 29, 2006, when he stopped by

Barbara's old apartment at around 1 p.m. to pick up an entertainment center. He explained that it took him a while to dismantle the entertainment center so that it could be moved and that he was there until 4 or 5 p.m. that day. Brown confirmed that he saw defendant and said that Barbara and her sons spent the day traveling back and forth between their old apartment and their new apartment to move their belongings.

¶ 35 Tyyuan Redmond, defendant's brother, confirmed his mother's account of their move on May 29, 2006. He testified that he spent the entire day with defendant, and explained that after they moved, he and his brother went out to eat and then spent the night watching basketball. Tyyuan further confirmed that Brown stopped by the old apartment around 1 p.m. to pick up an entertainment center. Tyyuan acknowledged that he had previously been convicted of drug conspiracy. He further acknowledged that he had spoken to defendant about the criminal charges against him while defendant was awaiting trial, but denied that he talked to defendant about the substance of his testimony. Tyyuan further denied that he spoke to his mother or to Brown about the testimony that he would provide at his brother's trial.

¶ 36 Defendant elected to testify. He acknowledged that he participated in Job Corp. for several months in 2005 and that he met Tory White during the time that they were both participating in the program. Defendant characterized their relationship as "friendly," but acknowledged that they had an "altercation" one time when they were playing basketball. He explained that White "fouled [him] one to [*sic*] many times" and that he "got upset." Defendant testified that the altercation "really wasn't a big deal" and that their fight "was left on the court" and forgotten. After leaving Job Corp. defendant returned to Chicago to live with his mother.

Defendant testified that he had seen White in the neighborhood and said that they remained "cool friends" but not "best friends." According to defendant, White was a member the Gangster Disciples street gang. He knew this because he saw White "shake up" and give a special handshake to other gang members while he was in Job Corp.

¶ 37 Defendant testified that on May 29, 2006, he and his brother Tyyuan spent the day helping their mother move. Sometime between 12 and 1 p.m., Leo Brown, his aunt's boyfriend, stopped by the apartment to pick up their entertainment unit. Defendant and his brother helped Brown carry the entertainment center down the stairs and said it "was 1:30 by the time [they] got it to the bottom of the steps." Defendant testified that he and his brother did not finish moving their belongings to the new apartment until 4 or 4:30 p.m. After they finished, defendant spent the rest of the day watching basketball with his brother. He denied that he visited the Marathon gas station located at 98th and Halsted Avenue at any time that day. Defendant further denied carrying a .32 revolver or seeing Tory White that day. Defendant testified that he never shot White.

¶ 38 Defendant testified that he has "quite a few" tattoos and that most of them are on his arm. He also has a scar on his face above his right eye that he obtained during a car accident. Defendant had the tattoos and the scar on May 29, 2006.

¶ 39 On cross-examination, defendant acknowledged that he had seen his brother and mother on multiple occasions since Memorial Day 2006, but denied that they ever spoke about his case or about the testimony they would deliver at his trial. Although he was familiar with gang signs and handshakes, defendant denied that he was ever affiliated with the Gangster Disciples or any

other street gang. Defendant acknowledged that he had a tattoo of the word "hustler," but denied that it was indicative of gang affiliation; rather, he explained it referred to his skills on the basketball court. Defendant acknowledged that in May 2006, he had a "low" haircut and some facial hair, but he said his facial hair was just "peach fuzz." When he was arrested on July 12, 2006, for the murder of Tory White, defendant admitted that he told the detectives that he "didn't know where [he] was at the day of the shooting," but speculated that he was probably "at [his] momma's" barbecuing or playing basketball.

¶ 40 On cross-examination, defendant confirmed that he made the following statements during a videotaped interview with police on July 12, 2006, when he was asked where he was on the day of the murder: (1) "Sorry, you did say Memorial day, but let's see—ah, did my momma barbeque? I'm not sure. I was probably at the house or playing basketball so"; and (2) "I'm not really sure *** I have to check with my momma to see what we did on Memorial Day, because it's you know, like it's been so long." Defendant explained that he was just "thinking out loud" when he gave those answers but once it "clicked" in his mind that he was with his mother on Memorial Day he said so to the police officers. He said that he did not tell police about helping his mother move "right there at the time of the interview," but he did tell them and the comment should have been on videotape.

¶ 41 After defendant rested, the case was sent to the jury. During deliberations, the jury sent out a note requesting transcripts of testimony provided by defendant, Tyyuan, and Barbara Redmond. The jury's request was denied and the jurors were instructed to continue deliberations. Ultimately, the jury returned with a verdict finding defendant guilty of first degree murder and

aggravated battery with a firearm. The jury also made a specific finding that during the commission of the offense of first degree murder, defendant personally discharged a firearm. At the sentencing hearing that followed, after hearing arguments in aggravation and mitigation, the court sentenced defendant to 46 years' imprisonment for first degree murder and 8 years' imprisonment for aggravated battery with a firearm, the sentences to be served consecutively. Defendant's posttrial motions were denied. This appeal followed.

¶ 42 ANALYSIS

¶ 43 Sufficiency of the Evidence

¶ 44 On appeal, defendant first challenges the sufficiency of the evidence. Specifically, he argues that the identification testimony of Dillon, Baker, and Phillips was "faulty" and was not sufficient to prove that he was involved in the 2006 Memorial Day shooting beyond a reasonable doubt. Defendant observes that there were various inconsistencies in the statements of the three eyewitnesses to the shooting that cast doubt on their subsequent identifications of defendant. According to defendant, "the most disturbing" flaw of the identification testimony was that Dillon and Baker failed to identify him as the offender in two different photo arrays before they finally identified him in a physical lineup 44 days after the shooting.

¶ 45 In response, the State emphasizes that this court must consider the evidence in a light most favorable to the State. The State contends that beyond the identification testimony provided by Dillon, Baker, and Phillips, the jury was afforded the unique opportunity to view the surveillance footage of the shooting, which was "the most compelling evidence of defendant's guilt." The State maintains that the jurors also heard testimony from Antoinette Coles and

Timothy Neloms, two people who knew defendant and who positively identified him from the same surveillance footage that the jury had been able to watch. Based on this evidence, the State asserts that defendant's guilt was established beyond a reasonable doubt.

¶ 46 Considering the evidence in the light most favorable to the State, we must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). We will not substitute our judgment for that of the jury with regard to the credibility of witnesses, the weight to be given to each witness' testimony, or the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272. A defendant's conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 47 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed a crime. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Vague and doubtful identification testimony is insufficient to sustain a criminal conviction; however, the identification testimony of a single witness is sufficient to sustain a conviction if the witness viewed the accused under circumstances that allowed for a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995); *Slim*, 127 Ill. 2d at 307; *People v. Grady*, 398 Ill. App. 3d 332, 341 (2010). Ultimately, the reliability of a witness's identification testimony is a question for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007). In assessing a witness's identification testimony, courts employ the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972), and adopted by our supreme court in *Slim*, which include: (1) the

opportunity the witness had to view the perpetrator at the time of the offense; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the offender; (4) the certainty of the witness' identification; and (5) the length of time between the offense and the witness' identification. *Lewis*, 165 Ill. 2d at 356; *Slim*, 127 Ill. 2d at 307-08. No one single factor is dispositive; rather, the fact finder should consider all five factors in assessing the reliability of identification testimony. *People v. Smith*, 2012 IL App (4th) 100901, ¶ 87.

¶ 48 Although defendant identifies the *Slim* factors, he does not discuss each of the factors in detail; rather, he relies primarily on the failure of Dillon and Baker to identify him from two separate photo arrays before making positive identifications during a physical lineup 44 days after the shooting occurred. Nonetheless, we will discuss each of the *Slim* factors in reviewing defendant's sufficiency of the evidence claim.

¶ 49 Turning to the first factor, the witnesses' opportunity to view the perpetrator at the time of the offense, we note that Dillon and Baker were both inside the vehicle when the shooting occurred. Dillon was in the driver's seat and Baker was in the rear passenger seat. Both women testified that they saw defendant approach Tory and heard him say "remember me, bitch" before discharging his weapon as Tory attempted to enter the vehicle from the front passenger door. Dillon estimated that she was approximately 7 feet away from defendant when he started shooting, while Baker was closer as she was sitting directly behind Tory's seat. Phillips, in turn, was in his vehicle approximately 20 to 30 feet away from defendant when the shots were fired. Phillips explained that his car was stopped parallel to the Marathon gas station. Each of the three eyewitnesses testified that nothing obstructed their view of the shooting. Although the shooting

happened quickly, we observe that the mere brevity of a victim's ability to view an offender does not render the witness's subsequent identification so fraught with doubt so as to create reasonable doubt of a defendant's guilt. See, *e.g.*, *People v. Herrett*, 137 Ill. 2d 195, 204 (1990) (finding that the witness had sufficient opportunity to view his assailant where the witness testified that he viewed the offender's face for a "few seconds" in a dimly lit store); *People v. Negron*, 297 Ill. App. 3d 519, 530 (1998) (identification testimony sufficient even though the witnesses "did not have more than several seconds to identify their attackers"); *People v. Moore*, 264 Ill. App. 3d 901, 911 (1994) (finding identification testimony sufficient to uphold conviction where the witness had the opportunity to view defendant for a "few seconds"). Here, notwithstanding the brevity of the shooting, the testimony of Dillon, Baker, and Phillips established that each had sufficient opportunity to view the face of the offender.

¶ 50 Turning to the second factor, the eyewitness' degree of attention, we acknowledge that Dillon initially told police that she only saw the back of the offender as he fled, whereas at trial, she testified that she looked directly at defendant's face during the shooting. We reiterate that inconsistencies in the evidence are to be resolved by the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006); *People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007). No such discrepancies were apparent in Baker's and Phillips' identifications as both testified that they were able to see defendant's face. Baker testified that although she was scared when the shots were fired, she did not duck down in her seat. Rather, from her vantage point in the rear of the vehicle, she was "able to catch [defendant's] face." Phillips, in turn, was sitting in his vehicle waiting for the light to change. When he heard shots, he looked over to his right and saw

defendant firing into Dillon's car.

¶ 51 The third factor pertains to the accuracy of the witnesses' prior descriptions of the defendant. Here, each of the three eyewitnesses were consistent with respect to the general description of the shooter that they initially provided to the investigating officers. Each of them described defendant as being African American, having a short haircut and wearing a red shirt. Defendant, emphasizes, however that Dillon and Phillips "made a significant error in describing the gunman's clothing when interviewed shortly after the shooting. Dillon and Phillips said the gunman was wearing a red shirt, shorts and white shoes, whereas the gunman was actually wearing a red shirt, long pants and dark shoes." Although we acknowledge these errors, we do not find these inconsistencies to be fatal to the eyewitnesses' identification. See, *e.g.*, *People v. Harrison*, 57 Ill. App. 3d 9, 14-15 (1978) (witness's inability to identify the type of clothing the defendant was wearing did not make the identification vague or uncertain where the identification was otherwise positive).

¶ 52 We also acknowledge that the eyewitnesses provided contrasting details about the specific physical characteristics that they recalled about the shooter. Only Phillips provided height and age descriptions. He reported defendant as being between 5'5" and 5'9" tall and 18 to 24 years' of age. Dillon and Baker classified defendant as "light skinned," while Phillips told police he thought defendant's skin color was darker than his own. We note that at the time of his arrest, police reports describe defendant as 5'9" tall with a "medium" skin tone. Neither Dillon nor Phillips described the shooter as having facial hair, while Baker reported seeing facial hair on the defendant. Baker, however, did not recall observing a facial scar, while Dillon testified that

she had observed a scar. None of the eyewitnesses mentioned visible tattoos.

¶ 53 While these differences in detail are to be taken into account by the trier of fact, courts have consistently recognized that vague or discrepant descriptions do not necessarily render identifications unreliable because very few witnesses are trained to be careful observers. See, *e.g.*, *People v. Williams*, 118 Ill. 2d 407, 413-14 (1987) (witness's failure to mention the defendant's mustache and facial hair did not render her identification unreliable); *People v. Nims*, 156 Ill. App. 3d 115, 121 (1986) (victim's failure to mention the defendant's facial scars did not render her identification unreliable); see also *People v. Bias*, 131 Ill. App. 3d 98, 104-05 (1985) (recognizing that inaccuracies pertaining to the "presence or absence of a beard, mustache, or tattoo, whether the assailant had missing teeth, and the assailant's height, weight and complexion do not render an identification utterly inadmissible"). Indeed, " '[t]he credibility of an identification does not rest upon the type of facial description or other physical features which the complaining witness is able to relate. *** It depends rather upon whether the witness had a full and adequate opportunity to observe the defendant.' " *People v. Robinson*, 206 Ill. App. 3d 1046, 1051 (1991) (quoting *People v. Witherspoon*, 33 Ill. App. 3d 12, 19-20 (1975)). Here, we are unable to conclude that the initial descriptions of defendant by Dillon, Baker, and Phillips automatically invalidated their subsequent positive identifications.

¶ 54 With respect to the fourth factor, the certainty of the eyewitnesses' identifications, the record reflects that Dillon and Baker were shown two different photo arrays. Defendant's picture was included in both arrays, but neither eyewitness identified defendant's picture from the photo spreads that they were shown. Instead, both Dillon and Baker identified Corderyle Ross from the

second photo spread. Baker testified that she when she identified Ross's picture, she told Detective Stover that Ross "could be [the shooter], but it's not him." Detective Stover, however, did not recall Baker making that statement. Dillon testified that she was not "a hundred percent certain" that Ross was the shooter when she identified his picture from the second photo array, but acknowledged that she did not relay her doubts to Detective Stover. Phillips did not view a photo array. After Dillon and Baker identified Ross from a photo array, each of the three eyewitnesses viewed a physical lineup on June 26, 2006, in which Ross was included. None of the eyewitnesses made an identification after viewing the first physical lineup. The eyewitnesses viewed a second physical lineup on July 12, 2006. This time, each witness identified defendant as the shooter. While relevant, the mere fact that Dillon and Baker identified another suspect from a photo array does not render their subsequent in person identifications of defendant invalid. See, *e.g.*, *People v. Malone*, 2012 IL App (1st) 110517, ¶ 32 (finding that the identification testimony was sufficient to sustain defendant's conviction even though the eyewitness identified two other suspects who "possibly resembled the offender" from two prior photo arrays before she was able to identify the defendant in a physical lineup). Dillon and Baker both explained that defendant appeared noticeably younger in the picture that was included in the photo array than he did in person and they were both certain of their identifications following the July 12th physical lineup.

¶ 55 We turn now to the final *Slim* factor: the length of time between the offense and the positive identifications. As set forth above, all three eyewitnesses identified defendant after viewing a physical lineup on July 12, 2006, which was 44 days after the shooting. Although the

identifications were made more than a month after the fatal shooting occurred, we observe that courts have upheld identifications made after a considerable amount of time passed after the crime. See *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972) (identification made two years after the crime); *People v. Dean*, 156 Ill. App. 3d 344, 352 (1987) (identification made 2 ½ years after the crime). Here, we do not find the passage of time in this case to be too lengthy such that the identifications made by Dillon, Baker, and Phillips are rendered suspect and unreliable.

¶ 56 We are unpersuaded by defendant's reliance on *People v. Hernandez*, 312 Ill. App. 3d 1032 (2000), where this court reversed a defendant's first degree murder conviction, finding that the identification testimony of the lone eyewitness to the shooting was unreliable. In pertinent part, we observed that the witness viewed the shooter in profile from a distance of 90 feet, provided conflicting physical descriptions of the shooter, expressed reservations as to his ability to make an identification, and failed to identify the defendant from a photo array approximately one month after the crime occurred, before making a positive identification at a later date. *Hernandez*, 312 Ill. App. 3d at 1036-37. Based on the witness's "fatally weak" identification, we found that the State failed to prove the defendant's guilt beyond a reasonable doubt. *Hernandez*, 312 Ill. App. 3d at 1037. Here, in contrast, we cannot conclude that the State's identification evidence was fatally weak.

¶ 57 Ultimately, we reiterate that the reliability of a witness's identification of a defendant is a matter for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d at 258. We emphasize that we must consider the evidence in a light most favorable to the State. After reviewing the evidence presented at trial, we cannot conclude that the identification testimony provided by Dillon, Baker,

and Phillips was insufficient to prove defendant's guilt beyond a reasonable doubt; rather, a reasonable jury could have found their testimony sufficient to establish defendant's identity as the offender.

¶ 58 Moreover, we note that the State's case was not limited to the testimony provided by these three eyewitnesses. Notably, the jury was shown surveillance footage of the actual shooting as well as still photos of the shooter made from the footage and was able to see the events that were described by the eyewitnesses. See generally *People v. Span*, 2011 IL App (1st) 083037, ¶¶ 24-28 (recognizing that a reviewing court should not substitute its judgment for that of the jury when findings of fact regarding identity are made, in part, from surveillance footage). The surveillance footage showed that the shooter was a single male with a "low haircut" wearing a red shirt, matching the general descriptions provided by Dillon, Baker, and Phillips. The jury also heard from Antoinette Coles and Timothy Neloms, who knew defendant, and who both positively identified defendant from the same surveillance footage and still images that were shown to the jury.

¶ 59 Although defendant presented an alibi defense, we note that the trier of fact is not obligated to find the testimony of alibi witnesses to be more credible than the testimony of the State's witnesses, especially where the alibi witnesses are related to the accused and possess an obvious bias. See, *e.g.*, *People v. Gabriel*, 398 Ill. App. 3d 332, 342 (2010); *People v. Mullen*, 313 Ill. App. 3d 718,729 (2000). We reiterate that the trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence, and a reviewing court should not substitute its judgment for

that of the trier of fact. *Bannister*, 378 Ill. App. 3d 19, 39; *Sutherland*, 223 Ill. 2d at 242. Here, the jury heard the evidence and inconsistencies that defendant relies on to support his challenge to the sufficiency of the evidence and concluded that defendant was the individual who shot and killed Tory White. Defendant's challenge to the sufficiency of the evidence essentially asks this court to substitute our judgment for that of the jury and resolve the conflicts apparent in the evidence in his favor, which we cannot do. *People v. Rodriguez*, 2012 IL App (1st) 072758-B, ¶ 45 (2012). Here, we are unable to conclude that the jury's finding is so improbable such that it creates reasonable doubt as to defendant's guilt.

¶ 60 Closing Arguments

¶ 61 Defendant next argues that the State made a number of improper comments during rebuttal argument that "repeatedly accused defense counsel of presenting a defense based on deception and confusion" and that shifted or trivialized the State's burden of proof. Defendant asserts that the cumulative impact of nine of these improper and prejudicial comments deprived him of his constitutional right to a fair trial. The State responds that the statements made during rebuttal were proper responses to the "caustic comments" made by defense counsel during defendant's closing argument and were proper commentary regarding the weakness of defendant's alibi defense.

¶ 62 Defendant concedes that his claim of error is procedurally forfeited, as his post-trial motion failed to recite the improper remarks with any specificity. Accordingly, defendant seeks review of the prosecutor's remarks under the plain-error rule, which requires defendant to show either: " '(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)). We first look to determine whether any error actually occurred. *People v. Walker*, 232 Ill. 2d 113, 24-25 (2009).

¶ 63 Generally, prosecutors are afforded wide latitude during closing argument. *People v. Caffey*, 205 Ill. 2d 52, 131 (2001). Accordingly, a " 'defendant faces a substantial burden in attempting to achieve reversal [of his conviction] based upon improper remarks made during closing arguments.' " *People v. Gutierrez*, 402 Ill. App. 3d 866, 895 (2010) (quoting *People v. Williams*, 332 Ill. App. 3d 254, 266 (2002)). This wide latitude afforded to prosecutors includes the opportunity to use "some degree of both sarcasm and invective to express their points." *People v. Banks*, 237 Ill. 2d 154, 183 (2010). Moreover, prosecutors may comment on the evidence as well as any reasonable inferences that the evidence may support, even if the inferences reflect negatively on the defendant. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). To be proper, however, the inferences must be reasonable and based on the facts and circumstances proven during the trial. *Gutierrez*, 402 Ill. App. 3d at 895; *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992). As a general rule, prosecutorial comments disparaging the integrity of defense counsel are improper. *People v. Thompson*, 313 Ill. App. 3d 510, 514-15 (2000). It is proper, however, for a prosecutor to respond to comments advanced by defense counsel that clearly invite a response (*People v. Johnson*, 208 Ill. 2d 53, 113 (2003)), but those responses should not

contain improper or prejudicial commentary (*People v. Campbell*, 2012 IL App (1st) 101249, ¶ 40). In the event improper comments are made, a trial court can usually cure any prejudice arising from the comments by promptly sustaining an objection to the challenged comment and giving a proper jury instruction. *Campbell*, 2012 IL App (1st) 101249, ¶ 42.

¶ 64 To evaluate a defendant's allegation of prosecutorial misconduct during closing argument, a reviewing court will consider the closing argument as a whole and evaluate the challenged comments in the context in which they were delivered. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). Where a prosecutor's remarks exceed the permissible bounds of commentary, we must determine whether those improper remarks, when viewed in the context of the entire argument, "constituted a material factor in a defendant's conviction." *Id.* at 123. A new trial should be granted "[i]f the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction." *Id.* Although "[i]t is not clear whether the appropriate standard of review for this issue is *de novo* or abuse of discretion," we need not resolve the issue, because our holding in this case would be the same under either standard. *People v. Land*, 2011 IL App (1st) 101048, ¶¶ 148-151 (noting conflict between *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and *People v. Blue*, 189 Ill. 2d 99, 128 (2000)).

¶ 65 Defendant first identifies two statements that he contends did not focus on the evidence, but improperly ridiculed defense counsel:

> (1) "Where exactly has ***counsel been these past five days? Not here in the courtroom, not in any way, shape or form. Because everything that she just talked about

didn't happen here. Maybe she was traveling back in time in a souped up DeLorian and spending some time with good old King Henry."

(2) "No, it's not a neat and tidy package. If it were, then defense counsel would have come back from her traveling back in time and stood there and told you look at how they all say the same things? Don't they sound like robots?"

Defendant's objection to the first statement was overruled, but his objection to the second statement was sustained. These two statements were made in response to defense counsel's explanation that King Henry II played a role in establishing the current burden of proof required in all criminal cases. We conclude that these comments, while sarcastic, were a permissible response to statements made by defense counsel and an effort to attack defendant's case. See *Johnson*, 208 Ill. 2d at 113 (it is not error for the State to respond to an argument made by defense counsel); *People v. Wiley*, 165 Ill. 2d 259, 295 (1995) (finding prosecutor's comment "what in the world is the defense in this case; I was listening and I don't know" was permissible comment on the weakness of the defendant's case). Moreover, any potential impropriety with respect to the second statement, which came closer to improperly focusing on defense counsel rather than weaknesses in defendant's case, was cured when the court sustained defendant's objection and instructed the jury that closing and rebuttal arguments were not facts and that arguments not based on the evidence should be disregarded. *People v. Kliner*, 185 Ill. 2d 81, 151-52 (1998); *Campbell*, 2012 IL App (1st) 101249, ¶ 42.

¶ 66 Defendant next cites several statements as being indicative of the State's attempt to shift the burden of proof and to disparage defense counsel:

(3) "I believe counsel said that we disparage our burden so much, and I guess we were all unclear about it because she had to say it about a hundred times."

(4) "And let's not lose sight of the fact, no matter how much this side of the room [the defense] wants to muck everything up and blur you all up, and all make it inconsistent."

(5) "Who is hiding the ball here? Who is holding back on you ladies and gentlemen? Could it be the person who described the tattoos as being on the defendant's hand?"

(6) "When you get the evidence to take back to deliberate you are not going to get a stack of police reports. If it was like that, if our justice system was somehow built in this horrific way that everyone wants to say it is, everyone who is not on the side of justice * * *"

(7) "Let's think about how many times [defense] counsel was misstating during the course of these five days, no matter how many times people's names were said again and again and again, [Defense counsel], even here today argued it, called detective []. and she didn't [call] him detective, she called him officer. I don't know if that's just a way to somehow disparage him."

(8) "Then instead of calling him Stover, she called him Stovall over and over and over. The names were wrong over and over and over again. Does that mean you didn't hear from those witnesses? Does that mean that Detective Stover doesn't exist just because she called him by the wrong name[?] I guess what's good for the goose is not

good for the gander. Because mistakes can come from that side of the room all the time. But if they're coming from the witness stand during the State's case during our burden? Oh, you must..."

(9) "[T]his is not a conspiracy. It is not a frame-up. There is not some great tentacles of the State, the prosecution here to frame up some innocent guy. That's just not what is happening here. That's ridiculous. It's insulting. It belies common sense. This is something that is just put before you as a big red herring, something to completely throw you off course."

¶ 67 Defendant argues that the "worst of the comments were the seventh and eighth, where the State clearly trivialized its burden of proof—and attacked the integrity of defense counsel—by analogizing the inaccuracies and inconsistencies of the three eyewitnesses to defense counsel's mispronunciation of names (which defense counsel had explained as due to a mild dyslexia)." As to the ninth comment, defendant argues that the State "improperly accused defense counsel of fabricating a 'conspiracy' theory under which the State and its witnesses were in league to railroad an innocent man." We note that the court sustained objections to fourth, sixth and seventh comments and conclude that any potential prejudice was cured by the court's instructions to the jury. *Kliner*, 185 Ill. 2d 81, 151-52; *Campbell*, 2012 IL App (1st) 101249, ¶ 42. We do not find error with respect to the remaining comments. The statements were all made in response to comments made by defense counsel during closing argument regarding the weaknesses of the State's eyewitness testimony, and as such, were permissible. *Johnson*, 208 Ill. 2d at 113. Moreover, when read in context, it is apparent that the State did not accuse defense counsel of

dishonesty or trickery; rather, it pointed out inconsistencies and weaknesses in defendant's case. *Wiley*, 165 Ill. 2d at 295. For example, as to the ninth comment, the prosecutor was arguing that it was implausible that the witnesses (along with the police and prosecutors) were engaged in a conspiracy to "frame" defendant, where the witness identifications were not perfectly consistent and where some witnesses had not immediately identified defendant in photo arrays.

¶ 68 Ultimately, we reiterate that prosecutors are afforded wide latitude during closing argument and that any improper remarks delivered during closing or rebuttal arguments do not warrant a new trial unless they resulted in substantial prejudice to the defendant. Here, we are unable to conclude that any of the objectionable statements made by the State constituted a material factor in defendant's conviction.

¶ 69 Admissibility of Evidence

¶ 70 Defendant last argues that the trial court abused its discretion when it refused to allow him to corroborate his alibi with a "prior consistent statement." Because defendant did not include this contention of error in his posttrial motion, he failed to properly preserve this argument for appellate review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). We will review his claim for plain error.

¶ 71 The admissibility of evidence falls within the sound discretion of the trial court, and as such, its rulings will not be disturbed on appeal absent an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). As a general rule, prior consistent statements cannot be admitted to corroborate trial testimony or bolster a witness. *People v. Heard*, 187 Ill. 2d 36, 70 (1999); *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010). Prior consistent statements may be

admissible to rebut a charge that the witness is motivated to testify falsely or to rebut a charge that the testimony is of recent fabrication. *People v. White*, 2011 IL App (1st) 092852, ¶ 50.

¶ 72 Defendant testified that on May 29, 2006 (Memorial Day), he and his brother spent the day helping their mother move from one apartment to another. Defendant provided specific details of the move, *e.g.*, his aunt's boyfriend picked up an entertainment center around 1 p.m., and the move, which took several trips, did not finish until sometime around 4:30 or 5 p.m. that evening. Trial testimony from defendant's mother, brother, and his aunt's boyfriend corroborated defendant's account. On appeal, defendant argues that once the State suggested that this alibi was fabricated, he should have been able to introduce a prior statement, recorded in a report by Detective Stover on July 12, 2006, that defendant was "at home with his mother" on May 29, 2006. According to defendant, his statement, made prior to the alleged fabrication, was admissible as a "prior consistent statement."

¶ 73 Where one party suggests that a witness's trial testimony is fabricated, a prior consistent statement may be introduced to show that the witness "told the same story *** before the time of the alleged fabrication." *People v. Williams*, 147 Ill. 2d 173, 227 (1991). The prior statement is introduced to rehabilitate the witness by rebutting the claim that the witness concocted his trial testimony. *McWhite*, 399 Ill. App. 3d at 641. Here, the statement defendant sought to introduce would not have rebutted the State's charge that his trial testimony was fabricated.

¶ 74 It was the State that first confronted defendant with two remarks from his July 12, 2006 videotaped interview with police. Specifically, on cross-examination, defendant confirmed that he made the following statements on July 12 when asked where he was on the day of the murder:

(1) "Sorry, you did say Memorial day, but let's see—ah, did my momma barbeque? I'm not sure. I was probably at the house or playing basketball so"; and (2) "I'm not really sure, but I know I wasn't there. I have to check with my momma to see what we did on Memorial Day, because it's you know, like it's been so long." The State used these statements, which defendant acknowledges were *inconsistent* with his trial testimony, to show that roughly two weeks after the date of the murder, defendant offered none of the details of the moving day that he provided during trial.

¶ 75 In this context, introducing the report to show that defendant told Detective Stover that "he was at his mother's house" would do nothing to rebut the State's charge of recent fabrication. The State used defendant's statement from July 12 (that he was with his mother) as part of its effort to show that the detailed alibi about moving was made up sometime later. Where the statement from the report did not corroborate any of the details from defendant's trial testimony, the statement did nothing to rebut the State's specific claim that defendant (and his relatives) fabricated the story *about moving* offered at trial.

¶ 76 While defendant acknowledges that "the statement in the report is admittedly less detailed" than defendant's trial testimony, he argues that the statement is nevertheless "consistent" with defendant's testimony. But any consistency between the July 12 statement and defendant's testimony is merely superficial. The details in this case matter: what the State put at issue on cross-examination was defendant's failure to tell authorities that he was helping his mother move on May 29, even if he did suggest that he was with his mother that day. Further testimony that defendant told the police that he was with his mother would not remedy his failure

to tell police about the move, and it would do nothing to rehabilitate his trial testimony. The trial court did not abuse its discretion in refusing to admit the statement in the report, and we therefore find no error to support defendant's claim of plain error.

¶ 77 Even if we were to find error, however, we cannot agree that the error would amount to plain error. Defendant seeks review of the alleged evidentiary error under the first prong of the plain error rule, which requires defendant to show: " ' 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.' " *Thompson*, 238 Ill. 2d at 613 (quoting *Piatkowski*, 225 Ill. 2d at 565). In other words, defendant "must show he was prejudiced" by demonstrating that the verdict " 'may have resulted from the error and not the evidence' " properly adduced at trial. *People v. White*, 2011 IL 109689, ¶ 134 (quoting *People v. Herron*, 215 Ill. 2d 167, 178 (2005)).

¶ 78 Based on our review of the evidence above—and the nature of the alleged evidentiary error here—defendant cannot establish that the verdict may have resulted from the error and not the evidence. We initially disagree with defendant that the testimonial evidence was so flawed that the evidence against defendant was closely balanced. Furthermore, if the statement in the report had been admitted, it would do little to rehabilitate defendant's trial testimony. First, even if the statement could be deemed "consistent" with defendant's trial testimony, the statement was only consistent in the most general sense, such that it did little to corroborate defendant's detailed alibi about moving. The statement therefore would do little to refute any claim of recent fabrication, and thus would not affect the jury's view of the alibi testimony presented by defendant. Second, the statement's rehabilitative effect is blighted by the fact that the prior

statement was given to a police officer during an investigation, when defendant already had a motive to give a false statement. See, *e.g.*, *People v. Terry*, 312 Ill. App. 3d 984, 995 (2000). Accordingly, we cannot conclude that the jury's verdict resulted from the alleged error and not the evidence.

¶ 79 CONCLUSION

¶ 80 Accordingly, we affirm the judgment of the circuit court.

¶ 81 Affirmed.

¶ 82 JUSTICE PUCINSKI's dissent to be filed later.

¶ 83 JUSTICE PUCINSKI, dissenting.**

¶ 84 Justice Freeman in his partial dissent in *People v. Moss*, 205 Ill. 2d 139 (2001) stated:

> "The United States Supreme Court has noted the importance of a prosecuting attorney as 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer ***.' " *Berger v. United States*, 295 U.S. 78,88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935). *Id*. at 194 (Freeman, J., concurring in part, dissenting in part).

¶ 85 Borrowing liberally from the sentiment of the United States Supreme Court and Justice Freeman in his above dissent, and with all due respect to my colleagues, I cannot agree with the

result reached by the majority.

¶ 86 Defendant appeals on three issues that he was: (1) not proved guilty beyond a reasonable doubt of the murder of Tory White and the aggravated battery with a firearm of Shaneka Dillon because the eyewitness identification was flawed; (2) denied a fair trial because the State in rebuttal closing argument relied impermissibly on comments and sarcasm which tended to shift the burden to the defendant, or which trivialized the State's burden, and/or which accused defense counsel of presenting a defense based on deception and confusion; and (3) denied a fair trial when the trial court denied his motion to allow a prior consistent statement in answer to the State's allegation that his alibi defense was recently fabricated.

¶ 87 I agree with defendant that at least three fundamental injustices were done to him: (1) the eyewitness testimony was seriously flawed and the video tape so heavily relied on by the State was blurry beyond belief; (2) the prosecution relied heavily on sarcasm during its rebuttal argument, belittling the defense attorney and shifting the burden of proof to the defendant; and (3) the court erred in not permitting the defendant to tell the jury his complete alibi statement to the police, that is, his prior consistent statement, which resulted in the jury being left with an incomplete account of his statement. My colleagues have affirmed the trial court on all three matters. I would reverse and remand.

¶ 88 In this case there were three eyewitnesses to the shooting incident that regrettably resulted in the death of Tory White. My colleagues have acknowledged the inconsistencies between their trial testimony versus statements made earlier in the investigation, and inconsistencies between and among different witnesses and have decided that the inconsistencies do not change the result,

saying: "we are unable to conclude that the jury's finding is so improbable such that it creates reasonable doubt as to defendant's guilt." *Supra* ¶ 59.

¶ 89 The majority chronicles the testimony and investigative statements of each of the three eyewitnesses making it unnecessary to repeat the testimony at length. However, the majority does not, I believe, consider the cumulative effect that the inconsistencies in and between the testimony and investigative statements of each witness and between and among witnesses may have had on the question of whether the evidence was closely balanced, and have failed to recognize that while evidence may be sufficient, it may still be closely balanced.

¶ 90 "Whether the evidence is closely balanced is, of course, a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge." *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). Since none of these errors was properly preserved, we turn to a plain error analysis to determine whether this case should be affirmed, reversed or reversed and remanded.

¶ 91 Plain error allows a court of review to consider an unpreserved error in either one of the following situations: " '(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *** In both instances the burden of persuasion remains with the defendant.' " *People v. Adams*, 2012 IL 111168, ¶ 21, quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2005). "In determining whether the closely balanced prong has been met we must

make a 'commonsense assessment' of the evidence." *Id.* ¶ 22**,** quoting *People v. White*, 2011 IL 109689, ¶ 139.

¶ 92 Having decided that a plain error analysis is correct, first we have to decide if there was an error at all. As stated above, defendant advances the following claims of error: (1) he was denied a fair trial because the State in rebuttal closing argument: (a) relied impermissibly on comments and sarcasm which tended to shift the burden to the defendant, or (b) which trivialized the State's burden, and/or (c) which accused defense counsel of presenting a defense based on deception and confusion, and (2) he was denied a fair trial because his prior consistent statement to the police about his alibi was not allowed. I will address each argument in turn.

¶ 93 Rebuttal Closing Argument

¶ 94 Rebuttal closing argument is the State's last word. The defense has no opportunity to come back. This makes it critical that rebuttal closing argument be fair, reasonable and appropriate.

¶ 95 An Assistant State's Attorney, it must be remembered, "is the representative of all the people, including the defendant, and it is as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen." *People v. Oden*, 20 Ill. 2d 470, 483 (1960). "To be sure, he is expected to 'prosecute with earnestness and vigor, *** But while he may strike hard blows, he is not at liberty to strike foul ones.' *Berger v. United States,* 295 U.S. 78, 88, 79 L. Ed. 1314, 1321, 55 S.Ct. 629, 633 (1935). As a prosecutor he has an obligation to comport himself in a manner which not only ensures that the defendant receives a fair [trial] but which inspires respect for the administration of justice." *People v. Lyles*, 106 Ill. 2d 373, 412 (1985).

¶ 96 Defendant claims that the State (1) relied impermissibly on sarcasm; (2) made comments which tended to shift the burden to the defense and trivialized the State's burden; and (3) accused defense counsel of presenting a defense based on deception and confusion. I agree.

¶ 97 Sarcasm is the meanest form of humor. It is a cheap shot for a cheap laugh at another's expense. It takes its punch from the blindside, demeaning the other person and belittling their dignity. Sarcasm is particularly harmful in any courtroom setting. If it is leveled against a witness he or she has no effective way to undo the damage. If it is leveled during rebuttal closing argument the defense cannot come back, since the State has the last word.

¶ 98 In this case, there are multiple examples of sarcasm by the State, not that defense counsel comes out much better. The behavior of the defense attorney, which could easily be characterized as curious at best and maddening at worst, still does not invite sarcasm by the State, which has, after all, the sole responsibility for assuring a fair trial, not a winning one. "Tit for tat" is a child's game that is unacceptable in a courtroom where serious people should be about serious business, none more serious than in a murder trial where one young man is dead and another faces up to life in prison. It is a sad fact that sarcasm infected this case in spite of the trial judge's admirable and patient attempts to curb it. Even sadder, sarcasm was also present at oral argument.

¶ 99 Our supreme court has repeatedly expressed its condemnation of sarcasm in the courtroom (*Moss*, 205 Ill. 2d at 170-71), yet we continue to see sarcasm in varying degrees in cases before us, with no consistent or severe consequences. As Justice Freeman pointed out in *Moss*, while concurring in part and dissenting in part: "Why then should any prosecutor readjust his or her argument to conform to our holdings when nothing happens to those who do not?" *Id.*

at 180 (Freeman, J., concurring and dissenting).

¶ 100 The State's use of sarcasm during rebuttal closing argument, when coupled with its sarcasm in cross-examining defense witnesses is clear.

¶ 101 In closing argument defense counsel began with a brief historic reference to the idea of the jury system beginning with King Henry II. This was met with what the defense appropriately calls a "stream of ridicule" about defense counsel: "Where exactly *** has counsel been these past five days? Not here in the courtroom, not in any way, shape or form. Because everything that she just talked about didn't happen here. Maybe she was traveling back in time in a souped up DeLorian and spending some time with good old King Henry."

¶ 102 During its cross-examination of defendant:

> "Q. Did the police ask you the questions that I just told you about, that I'm reading from the transcript and did you give them those answers?
>
> A. Um, I don't know. It's been so long. I don't know what the exact question but.
>
> Q. *You don't know if you gave those answers?* (Emphasis added.)
>
> A. No.
>
> Q. Did they also ask you, again, the day he got killed the date and time, where were you? Answer: I don't know. I don't even know the day he got killed. I heard about it. I heard about it when they was coming from his funeral after I was coming from the job interview, so I don't, I still don't know the day he got killed. You never told me that. Did they ask you that and did you give that answer?
>
> A. Yes, I remember them asking me that.

Q. *Oh, you do remember that?* (Emphasis added.)

A. Yes.

Defense Counsel: Judge, I'm going to object to 'Oh, you do remember that.'

Court: Stick to the question format."

¶ 103 During its cross-examination of defendant:

"Q. Did the police go on to ask you this question or tell you, Memorial Day, and you answered them, Memorial Day, Oh, you did say Memorial Day. And they responded, I did say that. And then did you answer to the police, Sorry, did you say Memorial Day, but let's see --- ah did my momma barbecue? I'm not sure. I was probably at the house or playing basketball so. Did you tell them that?

A. I probably did, but out of contents that I was thinking ---

Q. I didn't ask you under the context, sir?

Defense Counsel: Judge can he finish his question.

Court: All right. Let him finish his question.

A. I was thinking when I said probably barbeque. I was just thinking out loud. But once it clicked my mind where I was at I told them where I was at.

Q. *Oh, really*. You told them you were moving with your mom? (Emphasis added.)

A. Yes.

Defense Counsel: Well, Judge, we're going to object to the "Oh, really," especially

–

Court: Stick to the ---no comments, come on. Ask the next question."

¶ 104 In addition to sarcasm, the State engaged in improper comments during its rebuttal closing argument:

1. "[No] it's not a neat and tidy package. If it were, then defense counsel would have come back from her traveling back in time and stood here and told you look at how they all say the same things? Don't then sound like robots?"

2. "I believe counsel said that we disparage our burden so much, and I guess we were all unclear about it because she had to say it about a hundred times…"

3. "And, let's not lose sight of the fact, no matter how much this [*i.e.* defense] side of the room want to muck everything up and blur you all up, and all make it inconsistent .... [*sic*]"

4. (In response to defense counsel's having stated in error that Defendant's tattoos were on his hands instead of his arms): "Who is hiding the ball here? Who is holding back on you, ladies and gentlemen? Could it be the person who described the tattoos as being on the defendant's hand?" (Note, defendant showed his tattoos in open court and it was noted for the record that he had four, including one on his right front forearm].

5. "When you get the evidence to take back to deliberate you are not going to get a stack of police reports. If it was like that if our justice system was somehow build in this horrific way that everyone wants to say it is, everyone who is not on the side of justice, then you just…"

6. (Responding to defense counsel's calling attention to the inconsistencies in the

testimony of the State's witnesses): "Let's think about how many times counsel was misstating during the course of these five days, no matter how many times people's names were said again and again and again, Ms. Placek even here today argues it, called detective (*sic*) and she didn't call him detective, she called him officer. I don't know it that's just a way to somehow disparage him ***."

7. "Then instead of calling him Stover, she called him Stovall over and over and over.. the names were wrong over and over and over again. Does that mean you didn't hear from those witnesses? Does that mean that Detective Stover doesn't exist just because she called him by the wrong name [?] I guess what's good for the goose is not good for the gander. Because mistakes can come from that side of the room all the time, but if they're coming from the witness stand during the State's case during our burden? Oh, you must ***".

8. "[T]his is not a conspiracy. It is not a frame up. There is not some great tentacles of the State, the prosecution here to frame up some innocent guy. That just not what is happening here. That's ridiculous. It's insulting. It belies common sense. This is something that is just put before you as a big red herring, something to completely throw you off course ...."

¶ 105 While defense counsel did not object to the King Henry reference or to the tattoo remark, defense counsel's objections to the comments in 1, 3, 5, and 7 above were sustained, and objections to 2, 7 and 8 were overruled.

¶ 106 I would hold that the comments made by the state in 6 and 7 above had the effect of

trivializing the State's burden – making it seem that mispronunciations by the defense counsel were somehow equally significant to inconsistencies in the testimony of the state's witnesses, while attacking the credibility and integrity of defense counsel.

¶ 107 The State's comments in 8 above impermissibly accused defense counsel of fabricating a defense theory of conspiracy, which was specifically rejected by defense counsel during her closing just moments before. Because the State has the last word, it is critical that they engage in fair argument. "Accusations of deception and trickery by defense counsel serve no purpose except to prejudice the jury." *People v. Thompson*, 313 Ill. App. 3d 510, 514 (2000).

¶ 108 The State's accusations that defense counsel was engaged in "hiding the ball," "mucking things up," "blur you all up," "holding back on you," [of being] "insulting," and [not] "being on the side of justice" are not acceptable. " '*Unless based on some evidence*, statements made in closing arguments by the prosecution which suggest that defense counsel *** attempted to free his client through trickery, or deception *** are improper.' " (Emphasis in original.) *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000), quoting *People v. Jackson*, 182 Ill. 2d 30, 81 (1998). "Moreover, '[w]here a prosecutor's statement in summation are not relevant to the defendant's guilt or innocence and can only serve to inflame the jury the statements constitute error.' " *People v. Kidd*, 147 Ill. 2d, 510, 542 (1992), quoting *People v. Caballero*, 126 Ill. 2d 248, 271 (1989). This is particularly true where the evidence is closely balanced.

¶ 109 "Our supreme court has held that the evidence at trial is closely balanced when the key issue involves 'a contest of credibility' between witnesses with no extrinsic evidence presented to corroborate or contradict either version of events." *People v. Miller*, 2013 IL App (1st) 110879,

¶ 58 quoting *People v. Naylor*, 229 Ill. 2d at 606-07 (2008).

¶ 110 Based on the record, I find that the evidence was closely balanced and reach a far different result than my colleagues. Here we have three eyewitnesses, two of whom have seriously contradicted themselves in their statements to the police, in the photo arrays, in the lineups and in their testimony. The third eyewitness admitted to focusing more on the red shirt the shooter was wearing than on his face, and in any event was more than 20 feet away and testified he looked up when he *heard* shots, which lasted three to five seconds. He testified he saw the shooter running away, which means he could have seen the profile or back of a man running away, in back of a concrete island, past the gas pumps, through the closed door of the driver's side of the car, past the slumping victim and through the open door of the passenger side of the car.

¶ 111 The State offered a video, and DVDs and still photos copied from it, of four camera angles from the surveillance tape at the gas station. The video was created from non-digital technology, is grainy, blurred, and unclear. To call this video compelling evidence of any specific person's presence at that gas station would be a monumental stretch. The state did not offer the gun, evidence that defendant had a gun, or had ever had a gun, drove or had access to a dark blue Cadillac, owned or had ever owned any red shirt, let alone the specific red shirt with the particular front and back "logos" seen in the videos.

¶ 112 Turning to the video tapes, they are so murky and grainy that they are themselves unreliable. The video tapes were in an old system which is obviously not digital. The defense challenges the quality of the video. Having reviewed the video and the DVD copies several

times and with close attention, it is more than fair to say it is of very poor quality, grainy, and very low definition, not at all clear and is, in fact sometimes confusing about all the movements of all the people involved: Shaneka, Josephine, the victim, the shooter, other people in the car, the other people in the store and the other people in and around the gas station and stores in the parking lot. Finally, while it is very clear that a red shirted man is the shooter, his face and other features, height, weight, facial hair, scars, tattoos cannot be said to be so clear that no mistake is possible as to whether it is actually the defendant in the red shirt. In fact, the red shirt seems to be the single most important identifier of the shooter, a red shirt that was not connected to the defendant in any evidence presented.

¶ 113 Further, the red shirted man walking along the side of the stores and gas station in the video and the still photos has a triangular shaped face with what appears to be an overbite. The parts of the tape from inside the gas station show a red shirted man and his head shape in full face and profile. No profile photos of the defendant are in the record, although the jury saw him in person. No reference to any difference in the head shape was made during the trial. No reference to the overbite was made during the trial. No reference to any difference in body shape, height or weight was made during the trial.

¶ 114 In short, there was no extrinsic evidence that defendant was at that gas station shooting the victim on that day. That leaves only the eyewitness testimony and the alibi testimony, and the eyewitness testimony is contradictory and inconsistent in the extreme.

¶ 115 The eyewitnesses had been interviewed by the police and the State's Attorney. The case commenced with the shooting on May 29, 2006. Defendant was arrested on July 11, 2006. The

trial started August 3, 2009. Defendant filed a complaint against his attorney in which he alleged, among other things, that the attorney did not see him for 2 ½ years after he was arrested. There is no record of how often or during which times the State's Attorney and the police saw and or talked to their witnesses although both the defense and the State's witnesses acknowledged discussions with the State's Attorney in preparation for the trial.

¶ 116 Three eyewitnesses to the shooting gave statement and testimony descriptions of the shooter and of the event. Shaneka Dillon was internally inconsistent and was inconsistent with another witness, Josephine Baker. Josephine was internally inconsistent. Phillips was inconsistent with the surveillance video.

¶ 117 Most troubling was the testimony of Shaneka Dillon, who during the State's direct examination stated that she was looking at the face of the shooter but during her first interview, just hours after the shooting told police that she could not identify the man, that she was looking away from Tory (who was standing outside the passenger side of the car where the shooting occurred) when the shooting started, then looked up when she heard the shots and only saw the man in the red shirt running away.

¶ 118 Shaneka Dillon two days after the shooting could not identify defendant in a photo array, could not identify him in a second photo array on June 24, 2006, did identify Corderlye Ross in the June 24, 2006 photo array, did not identify Ross in a lineup on June 26, 2006, (in which defendant was not present) and did identify the defendant in a lineup on July 12, 2006.

¶ 119 She testified that she recognized defendant "from the look in his eyes" when her contemporaneous statements to the police were that she had not seen the man and could not

identify him.

¶ 120 She testified that they were going swimming at Rainbow beach, but Josephine testified that they had changed their plans and that Shaneka knew the plans changed to go swimming at Shaneka's uncle's home in Frankfort, Illinois.

¶ 121 Shaneka testified that she stayed in the car the entire time (in the driver's seat) but Josephine testified that Shaneka got out of the car.

¶ 122 There were also inconsistencies in her description of the shooter's clothing: she told police he had a red shirt, white gym shoes and dark shorts. However, that description conflicts with the video. She said she was about 7 feet away from Tory while the shooting occurred, but she was really just on the other side of the front seat of the truck. She testified that she was looking at his face but in her report to the police right after the event she said she was looking away and never saw his face. She said she recognized him by the "look in his eye", but told the police she was looking away. She told the police "Ross shot my friend' and that she saw the shooter running away.

¶ 123 Josephine testified that "the T shirt is what stuck out to me the red shirt" and that she saw the victim talking to the defendant before the fatal shooting but on May 31, 2006, just two days after the shooting she did not recognize the defendant's photo in a photo array. Josephine testified that Shaneka was pumping the gas but Shaneka testified that the victim was pumping the gas. Josephine stated: (it was) "so long ago I'm not going to remember anything from that day." Yet she acknowledged having been shown the video numerous times by the State in preparation for her testimony. Josephine said she told the police that Ross looks like the guy who did it but

the police notes say that Josephine told them that Ross did it.

¶ 124 Danny Phillips testified that he was the third car stopped at a light on Halsted going south at 98th Street. The Marathon gas station was to his right, and his car was in the curb lane. He testified he was the driver, that when the shooting started his passenger ducked down and he looked across, that he saw a young African American man in a red shirt shooting. He identified defendant in a lineup on July 12, 2006; however, the surveillance video shows that to see the shooter while he was still shooting, Phillips would have had to be looking during the shooting, past the concrete island with the gas pumps, past the gas pumps, past the driver's side of the car in which the door was closed and through the car, over the victim and out the passenger side car door. He testified that the victim was driving the truck although the other witnesses and the video confirm that the victim was standing just outside the front passenger seat.

¶ 125 The State had other conflicting witnesses.

¶ 126 Antoinette Coles, a prior girlfriend of defendant, identified defendant from the surveillance video on May 31, 2006, with the statement: "It looked like the defendant" then testified that it was defendant in court. Timothy Neloms identified defendant from the video on July 8, 2006, but admitted in his testimony that he never really paid much attention to defendant's face on the occasions that they saw each other as neighbors. Jane Parker, the disciplinarian at Job Corps who knew both the defendant and Corderlye Ross, identified a photo taken off the video as Ross without doubt. Ms. Parker was not called as a witness at trial by either the State or the defense.

¶ 127 The evidence shows that there was a positive identification of another man (Ross) first,

by not one, but two of the witnesses (Shaneka and Josephine) and by Parker. As a result of the several identifications of Corderlye Ross, Ross was arrested for this murder, but was subsequently released after retaining counsel.

¶ 128 The four defense witnesses were all consistent in their testimony that defendant was with his family helping his mother move on the day in question and that he did not have access to a dark blue Cadillac. The State consistently questioned the reliability of this testimony, implying that it was discussed or perhaps rehearsed. However, the flip side of that is equally arguable: that there were four people moving stuff on Memorial Day and they all remembered it that way.

¶ 129 I note that defendant challenges the sufficiency of the evidence arguing that the identification testimony of Dillon, Baker and Phillips was "faulty" and was insufficient to prove his guilt beyond a reasonable doubt. He points to the various inconsistencies in the statements and testimony of the witnesses as outlined above to cast doubt on their identification of him as the shooter.

¶ 130 The State responds by saying that the evidence was "simply overwhelming," based largely on the fact that the jury viewed the surveillance video and could actually see the shooting themselves. But as I have explained above, an extensive review of the video evidence only demonstrates how unclear, murky and grainy the footage actually is.

¶ 131 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). "When reviewing a challenge to the sufficiency of the evidence, *** it is not a reviewing court's role to retry the defendant," but rather to view the "evidence in the light most favorable to the prosecution [to determine] whether

any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt." *People v. Ward*, 215 Ill 2d 317, 322 (2005). I believe that in this case with this defendant and with this evidence – conflicting eyewitness evidence and statements, incorrect identifications, a video tape that based on the old technology is problematic – even with this high standard, a rational trier of fact could not have determined without reasonable doubt that this defendant is the shooter.

¶ 132 The majority takes all of this into account and finds that there was sufficient evidence. While I don't agree, my main concern is that having found sufficiency of the evidence, the majority does not take the next step to determine if that evidence was closely balanced.

¶ 133 Here, the State's rebuttal argument was improper and based on the closely balanced nature of the case, this error prejudiced defendant. Compare this to the result in *People v. Williams*, 228 Ill. App. 3d 981 (1992) where the court declined to find reversible error. The defense argued that the State improperly attacked defense counsel with phrases including: "*** It shows how meaningless this lawyer's words are. *** You can throw mud on all the people in the world you want.*** He can't make that girl a liar.*** It's a bunch of nonsense." "We conclude that the prosecutor's remarks did not substantially prejudice defendant and were not reversible error where, in light of the *overwhelming* evidence against defendant, the verdict would not have been different absent those remarks." (Emphasis added.) *Id.* at 1005.

¶ 134 In this case, however, the evidence of defendant's guilt cannot be said to be overwhelming, and the result could have been different without the prejudicial remarks of the State in its closing and it's sarcasm during the case and the closing. It is completely justifiable to

look at the complete case, and the "cumulative effect" of the state's behavior. *People v. Abadia*, 328 Ill. App. 3d 669, 684 (2001). "Unless predicated on evidence that defense counsel behaved unethically, the accusations that defense counsel attempted to create a reasonable doubt by confusion, misrepresentation, deception and fabrication were irrelevant to the defendant's guilt or innocence, improper and highly prejudicial." *Id.* at 683. " 'Where there are numerous instances of improper prosecutorial remarks, a reviewing court may consider their cumulative impact rather than assessing them in isolation.' " *Id.* at 684, quoting *People v. Brown*, 113 Ill. App. 3d 625, 630 (1983).

¶ 135 "Although it might be argued that defense counsel to some extent provoked a portion of the improper argument, the permissive limits of argument cannot be determined solely on the basis of attack and counterattack. The argument must be conducted within the bounds of proper courtroom decorum***." *People v. Monroe*, 66 Ill. 2d 317, 324 (1977).

¶ 136 In particular to the shifting claim, the defense called attention to the State's response when the defense in its closing argument stated "that the prosecutor paid lip service to its burden of proof without specifically addressing a severe weakness in his case *** the errors and contradictions in eyewitness Phillips identification as revealed in cross examination." Defendant notes, and we emphasize, that any prosecutorial argument that leads the jury to believe that the State's burden to prove its case against the defendant beyond a reasonable doubt is mere *pro forma* detail is improper. See, *e.g.*, *People v. Scaggs*, 111 Ill. App. 3d 633, 637 (1982).

¶ 137 Prior Consistent Statement

¶ 138 Defendant also argues he was denied a fair trial when the trial court denied his motion to

allow a prior consistent statement in answer to the State's allegation that his alibi defense was recently fabricated.

¶ 139 Since the defense did not raise this issue in the post trial motion he asks for plain error review. As described above, I believe the evidence is closely balanced, so here I will focus on whether it was error to deny the admission of the prior consistent statement.

¶ 140 Recognizing that the admissibility of evidence is a matter of trial court discretion that will not be disturbed absent an abuse of discretion, (*People v. Radovick*, 275 Ill. App. 3d 809, 817 (l995)), I would find such an abuse.

¶ 141 "Abuse of discretion is the 'most deferential standard of review available with the exception of no review at all,' (*People v. Coleman*, 183 Ill. 2d 366, 387 (1998)) and the only real question on review is whether the trial court 'appli[ed] the proper criteria when it weighed the facts.' " *Christmas v. Dr. Donald W. Hugar, Ltd.*, 409 Ill. App. 3d 91, 103 (2011), quoting *Paul v. Gerald Adelman & Assocs.*, 223 Ill. 2d 85, 99 (2006).

¶ 142 The facts are that defendant claims he made a statement to the police during his custodial interview, was impeached by an imperfect and, potentially abbreviated transcript, and his alibi testimony was suggested to be fabricated, and the detective's supplemental report indicate that the defendant did, in fact, tell the detective that he, the defendant, was with his mother.

¶ 143 But we must also consider that failure to state a fact on a prior occasion may properly be shown in impeachment. See *e.g.*, *People v. Owens*, 65 Ill. 2d 83, 92 (1976). Logically, it stands to reason that if *failure to say something* can be used to impeach, then *saying something* is important to un-impeach.

¶ 144 Defendant argues that the trial court erred when it refused to allow him to corroborate his alibi with a prior consistent statement. Defendant's alibi was that he was helping his mother move on Memorial Day, 2006 and was not present when Tory White was shot and killed. He argues that when the State presented evidence of his initial hesitancy and inability to explain his whereabouts on May 29, 2006, during his custodial interview, he should have been permitted to introduce evidence of a statement that he made informing the officers that he was with his mother at the time of the shooting to rebut the implication that his alibi was a recent fabrication.

¶ 145 There are two exceptions to the general rule precluding the admission of prior consistent statements. *People v. Richardson*, 348 Ill. App. 3d 796, 802 (2004); *People* v. *Mullen* 313 Ill. App. 3d 718, 730 (2000). Prior consistent statements may be admissible (1) to rebut a charge that the witness is motivated to testify falsely; or (2) to rebut a charge that the testimony is a recent fabrication. *People v. White*, 2011 IL App (1st) 092852, ¶ 50; *Richardson*, 348 Ill. App. 3d at 802; *Mullen,* 313 Ill. App. 3d at 730. Even where admissible under these limited circumstances, prior consistent statements may not be considered substantive evidence. *McWhite,* 399 Ill. App. 3d at 641; *Mullen* 313 Ill. App. 3d at 730. Rather, they are simply admissible to show that the witness told the same story before the time of the alleged fabrication. *Mullen*, 313 Ill. App. 3d at 730. It is the party seeking to introduce the prior consistent statement who bears the burden of showing that the statement predates the alleged recent fabrication or predates the existence of the motive to testify falsely. *People v. Brewer*, 2013 IL App (1st) 0723812, ¶28; *People v. Johnson* 2012 IL App. (1st) 091730, ¶ 59; *Richardson*, 348 Ill. App. 3d at 802; *Mullen*, 313 Il. App. 3d at 730.

¶ 146 At trial defendant advanced an alibi affirmative defense and testified that he was helping his mother move on Memorial Day, 2006, and therefore was not at the gas station where Tory White was shot. On cross-examination, defendant admitted that he agreed to a videotaped interview with detectives following his arrest and that he answered questions about his whereabouts on May 29, 2006, during that interview. In response to questions about his whereabouts at the time of the shooting, defendant acknowledged making the following two statements: (1) "Sorry, you did say Memorial Day, but let's see – ah, did my momma barbeque? I'm not sure. I was probably at the house or playing basketball so;" and (2) "I'm not really sure, but I know I wasn't there. I have to check with my momma to see what we did on Memorial Day, because it's you know, like it's been so long, so but I know I ain't never killed nobody. So you know I ain't got no worries about that." Defendant explains that he was merely thinking out loud when he provided the officers with these responses and claimed that when it "clicked" and he did remember that he was helping his mother move on Memorial Day he provided the police with that information. The parts of the transcript of the video quoted in court do not contain such a statement made by the defendant; however, the transcript did contain a notation of an inaudible response that defendant provided in response to the question about his whereabouts. Defendant's answer was transcribed as follows: "Probably at [(inaudible)], but I know I wasn't there so." This response was read to the jury.

¶ 147 First, did the State suggest recent fabrication? The State, in cross-examining defendant, twice repeated sections of the transcript of his custodial interview in which he said he would have to "check with momma to see what we did on Memorial Day." In addition the State asked

defendant and the other defense witnesses if they had talked about their testimony among or between themselves or with the defendant. The State was, therefore, suggesting that the alibi that he was helping his mother move on Memorial Day was made up by and for the defendant along with people in his family circle. During rebuttal closing argument the State was more direct: "Do you think that defendant's mother has some interest in making sure that her son doesn't get convicted of first degree murder? Do you think his brother …has some interest in testifying the way he did yesterday for his brother that he loves...sure they do, ladies and gentleman." Of course at the time the court ruled on the admissibility of the prior consistent statement the closing arguments had not yet been made, but this clarifies why this issue is so important to this case.

¶ 148 Defendant was, according to the police documents in the record, arrested July 11, 2006, at about 9 p.m. He was received in the lockup on July 11, 2006 at 11:26 p.m. and he went through felony review on July 12, 2006 at 10 p.m. That means he was in police custody, and according to his testimony, in one location (Area 2) for roughly 25 hours. It is probable that he slept for part of that time. It is also probable that the police talked to him during that time. Yet, the record only discusses an 88 page transcript, which based on any reasonable familiarity with transcripts does not seem long enough. The transcript itself was not admitted into evidence or even as an exhibit by either the defense or the state, so the exact difficulty with the prior consistent statement cannot reasonably be put into any context by this court because it is not in the record. In addition, none of the videos of the custodial interview were put into evidence, entered as exhibits, or seen by the jury, so this court cannot compare the videos to the few lines of transcripted statement quoted in the record, nor can we compare the videos to the entire

transcript. More troubling, Defense Exhibit #7, the Supplemental Report prepared by Detective Stover is not in the evidence envelopes either. This is a critical set of missing links. This court should not have to guess what, if anything, is wrong with a case.

¶ 149 I note for the record that there were other serious problems with the record in this case, particularly the evidence envelopes. Each evidence envelope has a specific index of contents attached to its front. Yet, on review of these envelopes individual items of evidence were not in the correct envelope. To make matters worse, envelope 9 has an unsigned stipulation about the inaudible words on line 5 of page 32 of the transcript. Although the record indicates that something labeled People's Exhibit #56 was admitted into evidence and sent back to the jury, it is not in any of the evidence envelopes. Supplementary Envelope 1 of 2 has a VHS tape labeled "CPD surveillance tape most wanted, inv # 10767116 and two copies of that tape, but none of these three tapes have any State or Defense Exhibit label. Supplementary Envelope 2 of 2 contains all of the following, *none* of which has any People's Exhibit or Defense Exhibit label: three still photo strips from the video surveillance, 3 DVD's marked "c of security video", 3 DVD's envelopes marked "c of still photos" but only 2 DVD's; 1 DVD marked "processed images"; 1 DVD marked "Defendant statement burned by FRU, suspect Alonzo Perry"; 1 floppy disk marked "transcript of defendant statement" 5 CDP/ERI DVD's marked Ross's statement; 7 CPD/ERI DVD's marked "Defendant statement" and although not on the content index, one DVD with People Exhibit #58 labeled "video sequence" (which was not admitted).

¶ 150 I have gone through this litany because I was shocked to see (1) that the physical evidence was being treated so casually that it could get mixed up; (2) that although the DVD envelopes

sometimes have identifiers on them, the inside disks often do not, (or visa-versa) so it is impossible to tell for certain that the disk is what is described, which could lead a reviewing court to actually view a disk that was not submitted by anyone; (3) I do not see how 7 CPD/ERI DVD's marked "Defendant statement" could reasonably be condensed to 1 DVD marked "Defendant statement burned by FRU" without some explanation of how the condensation was done, nor how 7 DVD's could be turned into one 88 page transcript, even allowing for time for the defendant to be asleep; (4) no written record of any *Miranda* warnings exists in the evidence envelopes; and, most troubling of all (5) none of the defense exhibits are in any of the evidence envelopes. It is particularly curious that Defense Exhibit #5, the police report is among the missing; and (6) the defense acknowledges it did not provide Defense Exhibit #7, the supplemental report prepared by Detective Stover.

¶ 151 Having checked the items in the evidence envelopes and the record, it appears that defendant was, at least for part of the time he was in custody, not in the room in Area 2 with the cameras. For example, logic tells us that during the first encounter with police at his mother's house there was no camera, that during the ride to Area 2 there was no camera, and that during the routine movement between the restroom, the lineups and various other parts of the building, there would be no camera. That is why it is important to allow the defense to recall Detective Stover to testify about his own supplemental report in which he wrote: "Defendant says he was with his mother" to show that defendant did not, in fact, fabricate his alibi, but that it was consistent with everything he told police when first questioned and consistent with what his mother told them throughout this case.

¶ 152 Furthermore, the majority argues that the statement made to Detective Stover: "says he was with his mother" would not help this defendant because the full alibi that he was with his mother helping her move was never told to the police. I do not agree. It is not a contradiction to say: "I was with my mother," and "I was with my mother helping her move." The extra details would be like saying: "I went out to dinner," and "I went out to dinner and had a steak." The fact is the supplemental report shows he told the police he was with his mother. That statement remained consistent throughout his testimony and the testimony of his family and was challenged as fabricated by the State. This defendant should be able to tell the jury the whole story of his statement to the police and that he was consistent throughout. It is important to remember that, according to the presentence investigation report, all of these statements while in custody were made by a 21 year old with no prior history of violence, gun violence, gun crimes or gang affiliation. The defendant does have a history of attention deficit hyperactivity disorder for which, according to the report, he was not receiving treatment at the time of his arrest.

¶ 153 Even if the prior consistent statement doctrine isn't enough, there is a separate and perhaps more compelling reason to allow the defendant to introduce his remarks to Detective Stover: the completeness doctrine.

¶ 154 "The criminal defendant's right to due process is essentially 'the right to a fair opportunity to defend against the state's accusations." *Chambers v. Mississippi*, 410 US 284, 294 (1973). "Intrinsic to this constitutional guarantee are the rights to cross examine and to present evidence. (U.S. Const. amend. V; Ill. Const. l970, Art. I, sec. 2)." *People v. Williams*, 109 Ill. 2d 327, 333-34 (1985).

¶ 155 Our supreme court in *People v. Weaver*, 92 Ill. 2d 545, (1982) made it clear that, if relevant, the defense should be able to bring to the jury all of a conversation, not just parts of it, because it is through those details that the jury would form its belief about the truthfulness of the defendant during the conversation. *Id.* at 556-57. In *Weaver* the issue was whether the defense could introduce the actual tapes of the conversation, and the court found that those tapes would have given the jury a chance to assess the defendant's demeanor and voice inflections to determine his credibility.

¶ 156 In this case the defense did not offer the tapes of the conversations, nor do we know if the prior consistent statement is even on the tapes, but even if it is not, it was clearly part of the same custodial event and should have been allowed. "Under the 'completion doctrine,' when a portion of a conversation is related by a witness, the opposing party has a right to bring out the remainder of that conversation to prevent the trier of fact from being misled." *People v. Ward,* 154 Ill 2d 272, 311 (1992). "The completeness doctrine is an exception to the hearsay rule and provides that a party may introduce the balance of an *** oral statement that has been introduced by an opponent for the purpose of explaining, qualifying or otherwise shedding light on the statement." *People v. Ruback*, 2013 IL App (3d) 110256, ¶ 70 (Holdridge, J., specially concurring). "This doctrine is grounded in the general evidentiary principle that 'if one party introduces part of an utterance or writing the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the jury.' " (Internal quotation marks omitted.) *Id.* ¶ 70, quoting *People v. Williams*, 109 Ill. 2d 327, 334 (1985). "The intent of the completeness doctrine is to make sure

all material statements are placed before the jury so that it will have the complete context of the statement entered into evidence." *Id.* ¶71.

¶ 157 Because I believe that this was a close case and that there was error, I would " 'err on the side of fairness, so as not to convict an innocent person' " (*Piatkowski,* 225 Ill 2d 551, 566 (2007), quoting *People v. Herron*, 215 Ill. 2d 167,193 (2005)) and reverse and remand for a new trial.

** Justice Pucinski dissent filed October 24, 2013.