2013 IL App (1st) 110869-U

SIXTH DIVISION
November 15, 2013

No. 1-11-0869

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

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 04 CR 11244
	)	
JONATHAN PENA,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant forfeited the argument that the circuit court erred in admitting the substance of his statements during a hearing on his motion to suppress statements. The circuit court did not err in instructing the jury. The circuit court did not improperly exclude testimony from an eyewitness. The circuit court did not abuse its discretion in admitting gang-related evidence. The defendant forfeited foundational objections to the fingerprint analyst's testimony and the circuit court did not abuse its discretion in limiting cross-examination of the analyst. The State's rebuttal argument was not improper.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Jonathan Pena (Pena) was found guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 2004)). The trial court sentenced Pena to 40 years in prison. Pena now appeals, arguing the trial court erred by: (1) admitting the substance of his statements to an assistant State's Attorney (ASA) and a

detective during the hearing on his motion to suppress his statements; (2) instructing the jury regarding his statements; (3) excluding as hearsay testimony from a witness who purportedly overheard Pena; (4) admitting testimony regarding Pena's gang affiliation, including hearsay, without proper foundation; (5) admitting the testimony of a fingerprint expert without proper foundation and limiting cross-examination of the fingerprint expert; and (6) allowing improper rebuttal argument from the State. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. Pena was arrested on April 18, 2004, at or near the vicinity of 1317 N. Campbell Avenue, in connection with the shooting death of Kevin Murphy (Murphy).

¶ 5 Motion to Suppress Statements

¶ 6 Prior to trial, Pena filed a motion to suppress statements he provided to law enforcement officials while at Mount Sinai Hospital. Pena alleged: (1) he was not informed of his constitutional rights; (2) any of his statements were not knowing or voluntary because he was emerging from anesthesia; (3) the statements were obtained after Pena elected to remain silent and consult with an attorney; and (4) the statements were produced by physical and mental coercion.

¶ 7 During the hearing on Pena's motion, then-ASA David Williams (Williams) testified that on April 19, 2004, he was assigned to the investigation of the Murphy shooting. ASA Williams proceeded to the Area 5 police station, where he conducted a 20-30 minute interview

commencing at approximately 10 a.m. with Pena's codefendant, Nikolas Santos (Santos), in the presence of Chicago police detective Tracy Fanning (Fanning) and Detective Day (Day)[1], youth investigator Charity Musial (Musial), and Santos's mother. ASA Williams also spoke to Santos for "a couple of minutes" at approximately 12:30 p.m., in part to notify Santos he was about to interview Pena and inquire whether Santos had any additional information about the shooting.

¶ 8 ASA Williams then proceeded to Mount Sinai Hospital to interview Pena. ASA Williams again met with Detective Fanning at the hospital. He and Detective Fanning requested permission to speak to Pena. ASA Williams subsequently introduced himself to Pena, noting he was a prosecutor, not Pena's lawyer. ASA Williams testified he advised Pena of his constitutional rights and Pena responded he understood and wished to waive those rights. ASA Williams spoke to Pena for 15-20 minutes. ASA Williams also testified he had no difficulty speaking to Pena caused by Pena's medication. ASA Williams did not memorialize Pena's oral statement from this interview.

¶ 9 ASA Williams further testified Pena never indicated he had been beaten on the head by the police. On cross-examination, ASA Williams acknowledged he knew Pena had a head injury and observed Pena wearing a head bandage at the hospital. ASA Williams did not inquire of Pena or anyone else about his injuries, treatment or medication. ASA Williams did not recall any injuries to Pena's face, even after being presented photographs of Pena with injuries to his temple

[1] The record does not include Detective Day's first name.

and chin. ASA Williams testified that he interviewed Pena from the left side and the injuries appeared to be to the right side of Pena's face.

¶ 10 Detective Fanning testified he was assigned to investigate the Murphy shooting at approximately 12:45 a.m. on April 19, 2004. Detective Fanning learned Santos was in custody regarding the shooting, and was present for the interviews of Santos occurring at 2:30 a.m., 6:10 a.m., 10 a.m. and 12:30 p.m.

¶ 11 Detective Fanning then proceeded to Mount Sinai Hospital at approximately 2 p.m. to interview Pena. Detective Fanning testified ASA Williams secured permission from hospital personnel to interview Pena. Detective Fanning's testimony regarding the ensuing interview was substantially similar to the testimony of ASA Williams.

¶ 12 Pena was released from the hospital on April 20, 2004, and transported to the police station at Grand and Central Avenues. Detective Fanning advised Pena of his constitutional rights. Pena stated he wanted to be represented by counsel and provided a lawyer's business card to Detective Fanning, whereupon the interview terminated.

¶ 13 Chicago police sergeant William Grassi testified that on April 18, 2004, at approximately 11:30 p.m., he was conducting a narcotics investigation in the back yard at 1319 North Campbell Avenue. Sergeant Grassi observed Pena and Santos run southbound through an alley between Artesian Avenue and Campbell Avenue. Sergeant Grassi testified he proceeded to the alley, where he heard gunfire from the vicinity of Artesian and Potomac Avenues. He immediately placed a radio call regarding the incident.

¶ 14 Several seconds later, Sergeant Grassi observed Pena and Santos re-enter the alley. According to Sergeant Grassi, Pena and Santos both carried firearms. Sergeant Grassi identified himself and ordered Pena and Santos to drop their weapons, whereupon Santos discharged his weapon at Sergeant Grassi once, while Pena fired three times. Sergeant Grassi returned fire.

¶ 15 Sergeant Grassi further testified he pursued Pena and Santos on foot for several blocks. Sergeant Grassi continued to follow Pena when Santos split to run in another direction. During his pursuit, Sergeant Grassi observed Pena fall down, immediately strike the ground, "bounce" upright, resume running and later trip over a park bench. When Pena subsequently dove over a chain-link fence, Sergeant Grassi was able to grab Pena's waist or legs. The barbed wire on the fence, however, dug into Sergeant Grassi's arms. Fearing he would drop his handgun, Sergeant Grassi released Pena, who fell head-first into a play lot. According to Sergeant Grassi, Pena "popped up" and resumed running. Sergeant Grassi testified he was too exhausted to continue the pursuit, but Chicago police officer Dennis Lopez, who had joined the pursuit, climbed over the fence and continued chasing Pena. Officer Lopez and his partner, Will Labern, eventually placed Pena into custody.

¶ 16 Officer Labern testified that on April 18, 2004, at approximately 11:42 p.m., he assisted in the arrest of Pena at 1333 North Rockwell Avenue. Officer Labern had been involved in a narcotics investigation when he heard gunfire and received Sergeant Grassi's radio call that the sergeant was pursuing an offender. Officer Labern drove to the vicinity of the report and observed Sergeant Grassi pursuing defendant. When Officers Labern and Lopez exited their

vehicle, Pena turned down a dark gangway, heading westbound.[2] According to Officer Labern, Officer Lopez and Sergeant Grassi slowed down. Officer Labern initially indicated he slowed down because the gangway was dark, but subsequently testified he had exited his police vehicle, proceeded into the gangway then returned to the vehicle. Officer Labern testified he observed Pena strike his head on a brick overhang, but spring back up and continue fleeing. He did not observe Pena fall from a fence.

¶ 17 Officer Labern further testified he was behind Officer Lopez and Sergeant Grassi when he returned to his vehicle and drove to the alley while the other officers continued to pursue Pena. Officer Labern temporarily lost sight of Pena and the police officers. When Officer Labern arrived at the alley, he observed Pena enter the yard at 1333 North Rockwell Avenue. Officers Labern and Lopez discovered Pena crouched in a stairwell under the front porch at this address. Officer Labern placed Pena, who was bloody and dazed, into handcuffs. Officer Labern escorted Pena to the alley, where Pena vomited. Officer Labern summoned an ambulance. Officer Labern denied beating Pena.

¶ 18 Dr. Phillip Zaret, a trauma surgeon who treated Pena at Mount Sinai Hospital in the early morning hours of April 19, 2004, testified for the defense. Dr. Zaret testified Pena had multiple lacerations and contusions of the scalp. Pena had an altered mental state and was confused. Pena was sedated in order to intubate him and conduct a battery of medical tests, which revealed no internal injuries or acute bleeding. Among the sedatives administered to Pena was morphine; the

[2] Officer Labern did not give a street location of this gangway.

first dose occurred at 12:56 a.m. and the final dose occurred at 2:45 a.m. According to Dr. Zaret, Pena was extubated at 10:30 a.m. and discharged the following day. Pena was fully fluent upon his discharge from the hospital. Dr. Zaret did not recall police requesting permission to interview Pena. Dr. Zaret did not have an opinion regarding the cause of Pena's head injuries, but agreed Pena could have fallen on his head.

¶ 19 Pena testified on his own behalf. According to Pena, on April 18, 2004, he was walking up an alley when an individual carrying a handgun approached him. Pena did not recognize the individual as a police officer. Pena fled, and the other individual pursued him. Pena additionally testified that when he approached a gate he was struck on the side of his head.[3] Pena could not observe who or what struck him, although the object felt like a flashlight or weapon. Pena further testified he fell to the ground, was stuck again, and lost consciousness. Pena denied running through a gangway and did not recall any overhang in a gangway. Pena asserted he awakened in the hospital with staples in his head and observed his attorney by his side.

¶ 20 Moreover, Pena testified that on April 20, 2004, he did not recall speaking to ASA Williams or Detective Fanning while in the hospital. Pena also denied providing any statement to them.

¶ 21 Over defense objection, Pena was questioned about the contents of his purported statements to ASA Williams and Detective Fanning. Pena denied stating Santos wanted to join

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[3] Pena did not testify which side of his head was struck, but subsequently identified photographs showing injuries to the right side of his face.

the Campbell Boys street gang. Pena also denied stating Santos wanted to act "like a gang banger." Pena further denied stating he retrieved a "gang gun" from a "stash spot" in the vicinity of Division Street and Marshfield Avenue. Pena additionally denied stating he carried the handgun at first, but Santos convinced him to provide the weapon to Santos. Moreover, Pena denied stating he and Santos walked up to an individual sitting on a porch who said "Cobra folk," to which Pena replied, "Yeah, folk," whereupon Santos shot the individual on the porch. Pena denied being notified of his constitutional rights on or prior to April 2004, although he was previously arrested as a juvenile and as an adult.

¶ 22 Detective Fanning testified in rebuttal he was present when ASA Williams questioned Pena at the hospital. According to Detective Fanning, Pena was notified of his constitutional rights and provided the statements which Pena denied providing during his testimony. Detective Fanning further testified Pena had referred to the "stash gun" as a silver 9 mm pistol. Detective Fanning additionally testified Pena was communicative and did not appear to be suffering any effects from the medication.

¶ 23 The trial court denied Pena's motion to suppress. The trial court stated the allegations of police brutality were serious and the credibility of the witnesses was very important in this case. Accepting the police testimony, the trial court found Pena did not suffer his injuries as a result of police brutality. The trial court also found Pena was properly notified of his constitutional rights and did not invoke his right to counsel until after he provided the statements to the police.

¶ 24 Trial

¶ 25 Pena and Santos were tried simultaneously by separate juries. Murphy's mother, Sabina Smith (Smith), testified that on April 18, 2004, she observed Murphy at approximately 11:15 p.m. and he was alive and healthy. When Smith next observed Murphy, at approximately 11:30 or 11:35 p.m., Murphy had been shot. Murphy died from injuries sustained in the shooting.

¶ 26 Teresa Ward (Ward) testified that on the evening of the shooting, she was at her residence at 1254 North Artesian Avenue in Chicago, Illinois. Ward had known Murphy for years. At approximately 11:30 p.m., she heard Murphy arguing with his girlfriend and went to her bedroom window to observe what was occurring outside. Ward noticed Santos and Pena approach Murphy after the girlfriend departed. Ward then moved to observe the scene from her daughter's bedroom window. Ward testified she had a clear view of all three individuals. Ward observed Pena produce a weapon and point it at Murphy. Santos then produced a silver handgun from his pocket and shot Murphy twice. After Murphy collapsed to the ground, Santos and Pena ran from the scene into the alley. Ward telephoned the police, then ran downstairs to assist Murphy. Ward did not speak to police when they arrived, but she contacted the police the following day. Ward proceeded to the police station, where she identified Santos in a physical lineup and Pena from a photographic array.

¶ 27 Connie Cash (Cash), who lived at 1321 North Maplewood Avenue on the night in question, testified she heard gunshots at approximately 11:35 p.m., and observed two men running, one of whom was carrying a handgun. Cash observed a third individual she assumed to be a police officer approach the other two from behind, shouting for them to "freeze." Cash

observed one of the first two individuals, wearing a white t-shirt, flee from the scene. Cash never identified the individuals she observed that evening.

¶ 28 Dr. Adrienne Segovia, a forensic pathologist, testified she performed Murphy's autopsy. Dr. Segovia opined Murphy died as the result of multiple gunshot wounds and the manner of death was homicide.

¶ 29 Sergeant Grassi testified he had been assigned to Area 5 Gang Enforcement Unit 315 for the previous two years. Sergeant Grassi was previously a sergeant in the 14th District for a year, a sergeant in the 19th District for three years, and a patrolman/tactical officer in the 14th District for approximately five years. Based on this experience, Sergeant Grassi testified he was familiar with the gang activity and territory surrounding the 14th District.

¶ 30 Sergeant Grassi testified he was a tactical officer assigned to the 14th District on April 18, 2004. He and his partner were conducting a narcotics investigation, during which he concealed himself in a gangway at 1319 North Campbell Avenue. At approximately 11:30 p.m., he observed Santos and Pena run southbound through the alley. Sergeant Grassi was curious because he was in Spanish Cobra gang territory, about one-half block from Maniac Campbell Avenue Boys territory. Over defense objection Sergeant Grassi testified the rival gangs were at war at the time.

¶ 31 Santos and Pena had already exited the alley when Sergeant Grassi reached the alley. Sergeant Grassi continued in the same direction as Santos and Pena when he heard at least two gunshots coming from the direction of the corner of Artesian Avenue and Potomac Avenue. Sergeant Grassi was moving southward through the alley when Santos and Pena reentered the

alley, running northward. According to Sergeant Grassi, Santos and Pena were carrying weapons. Sergeant Grassi announced he was a police officer and directed Santos and Pena to drop their weapons. Santos fired his handgun once at Sergeant Grassi; Pena fired at Sergeant Grassi three times. Sergeant Grassi returned fire, whereupon Santos and Pena turned around, ran southward out of the alley, turning westward on Potomac Avenue.

¶ 32 Sergeant Grassi testified he gave chase and radioed for police backup. According to Sergeant Grassi, Santos and Pena continued westward until they reached an alley between Campbell Avenue and Maplewood Avenue. Pena ran northward into the alley, while Santos continued westward on Potomac Avenue. Sergeant Grassi followed Pena and observed him throw a black object toward a garage at Maplewood Avenue and Potomac Avenue, but a police search conducted later failed to recover a weapon. Pena turned down a gangway at 1315 Maplewood Avenue and ran northward on Maplewood Avenue, where Pena and Santos were reunited.

¶ 33 According to Sergeant Grassi, he was joined by two police officers on Maplewood Avenue, where Santos and Pena had crouched behind a parked, silver Grand Am. Santos attempted to run eastward, but fell and was taken into custody. Pena then attempted to flee, again pointing a weapon at Sergeant Grassi. Pena ran into a dark, narrow gangway at 1346 North Maplewood Avenue. As Sergeant Grassi was reaching for his flashlight, he observed Pena strike the ground, jump up and resume running. Sergeant Grassi testified he was required to duck under an approximately six-foot tall arch as he pursued Pena. Sergeant Grassi further recounted

his failed capture of Pena as Pena scaled the chain-link fence, and Pena's apprehension by Officers Lopez and Labern, in a manner substantially similar to his pretrial testimony.

¶ 34 Officer Labern also testified to his participation in Pena's arrest, in a manner substantially similar to his pretrial testimony.

¶ 35 Robert Tovar (Tovar), a forensic investigator for the Chicago Police Department, recovered discharged 9mm and .45-caliber bullet cartridges from the route of the chase and recovered a 9 mm automatic pistol from under a gray Pontiac at 1346 North Maplewood Avenue. In the alley between Maplewood and Rockwell Avenues, Tovar collected money, as well as a blood-stained t-shirt, pair of pants and shoes.

¶ 36 Illinois State Police forensic scientist Brian Mayland testified the discharged 9mm cartridges, as well as a bullet taken from Murphy's body, were all fired by the automatic pistol recovered from under the gray Pontiac. The recovered .45-caliber cartridges were all fired by Sergeant Grassi's firearm.

¶ 37 Former Illinois State Police forensic scientist Anastasia Petruncio, who has examined thousands of latent fingerprints and testified as an expert on approximately 40 occasions, was qualified as an expert in fingerprint identification and analysis without objection. Petruncio explained fingerprints and latent fingerprints to the jury. According to Petruncio, she compares unknown fingerprints to a known fingerprint card by looking for points of identification, clarity and quality, and pattern type. Petruncio testified she examined the automatic pistol and magazine for fingerprints. Petruncio opined two latent fingerprints found on the surface of the magazine matched the inked fingerprints of Pena, not Santos.

¶ 38 On cross-examination, Petruncio testified she believed fingerprint analysis is an exact science, although she also testified the answer depends on whom you ask. Petruncio also testified that if trained analysts employ the process of analysis, comparison, evaluation and verification, they will reach the same conclusion. Petruncio specified that verification is performed by an analyst of equal or greater training. Petruncio added this case was verified. Petruncio further testified there had never been a disagreement among analysts in her cases. The trial court sustained the State's objection to the question of whether analysts disagreed in other cases.

¶ 39 Petruncio acknowledged she looked for points of comparison as part of her analysis. Petruncio, however, indicated there was no set number of points of comparison when comparing an unknown impression to a known fingerprint card. Although Petruncio had found points of comparison in this case, she did not count them. The trial court sustained the State's objection to the question of whether there were more than 10 points of comparison in this case. Petruncio testified seven points of comparison were required to search an Illinois State Police database. The trial court sustained the State's objection to the question of whether there were more than seven points of comparison in this case.

¶ 40 The parties stipulated that if called as a witness, Abby Moeykens, an expert in the field of DNA analysis, would testify she received known blood standards from Murphy, Santos and Pena, as well as possible cellular material from a "doo rag," two stains from a tank top and a stain from a pair of shoes recovered by Officer Tovar. Moeykens would opine Pena's DNA was on the tank top and right shoe.

¶ 41 ASA Williams testified regarding his questioning of Pena at the hospital. ASA Williams introduced himself and advised Pena of his constitutional rights, which Pena acknowledged and stated he understood.

¶ 42 ASA Williams also testified he inquired of Pena regarding the events of the evening of April 18, 2004. According to ASA Williams, Pena stated he was upset following a fight with his girlfriend. Pena proceeded to Campbell Avenue, where he met Santos. Pena was a member of the Campbell Street Boys street gang; Santos was younger and wanted to join the gang.

¶ 43 According to ASA Williams, Pena stated he and Santos decided to shoot a Cobra, referring to a member of a rival gang. They proceeded to a house at Division Street and Marshfield Avenue, where they obtained a loaded, silver 9 mm semiautomatic handgun. Pena and Santos then walked through alleys to the vicinity of Artesian and Potomac Avenues, "where there is a Cobra hangout."

¶ 44 Pena stated to ASA Williams that after a few minutes, he and Santos observed an individual sitting on a porch, whom they believed to be a Cobra. Santos convinced Pena to provide him with the handgun. Pena and Santos approached the individual on the porch, who looked up and stated, "Cobra folk." Pena replied, "Yeah, folk," Santos then shot the individual "a couple of times."

¶ 45 According to ASA Williams, Pena stated he and Santos then ran through an alley off Potomac Avenue. As they ran, they observed a police officer, who directed them to stop. Santos fired the weapon at the police officer, who returned fire. Pena and Santos then ran from the officer. As they ran Santos provided the handgun for Pena to conceal. ASA Williams further

testified that Pena stated he was running away from the first police officer when he observed a second officer. This was the last thing Pena recalled about the incident. ASA Williams described Pena as "clear and conversant" during the 20-30 minute interview.

¶ 46 The State rested its case. Pena moved for a directed verdict. The trial judge denied the motion.

¶ 47 Dr. Zaret testified for the defense in a manner substantially similar to his pretrial testimony. Dr. Zaret added it was possible Pena was coherent 12 hours after his final dose of morphine, but how meaningful the conversation might be varied from individual to individual.

¶ 48 Pena then rested and again moved for a directed verdict. The trial court again denied the motion.

¶ 49 Following closing arguments and jury instructions, the jury deliberated and found Pena guilty of first degree murder. Pena filed a posttrial motion for a new trial. The trial court denied the motion and proceeded to a sentencing hearing. Following a hearing of factors in aggravation and mitigation of the offense, the trial court sentenced Pena to 40 years in prison. Pena now appeals.

¶ 50 DISCUSSION

¶ 51 On appeal Pena argues the trial court erred by: (1) admitting the substance of his statements to the police during the hearing on his motion to suppress his statements; (2) instructing the jury regarding his statements to ASA Williams and Detective Fanning; (3) excluding as hearsay testimony from a witness who purportedly overheard Pena; (4) admitting testimony regarding Pena's gang affiliation, including hearsay, without proper foundation; (5)

admitting the testimony of a fingerprint expert without proper foundation and limiting cross-examination of the fingerprint expert; and (6) allowing improper rebuttal argument from the State. We address these arguments in turn.

¶ 52 The Motion to Suppress

¶ 53 Pena first argues the trial court erred in admitting the purported content of his statements to ASA Williams and Detective Fanning during the hearing of his motion to suppress statements. The State initially responds Pena has forfeited this claim by failing to specifically raise it in his posttrial motion. Pena argues he sufficiently preserved the issue by asserting it in his posttrial motion and the trial court erred in denying the motion to suppress statements.

¶ 54 In order to preserve an issue for review, a defendant must object at trial and in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture of the issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). General and vague allegations are not sufficient to overcome forfeiture. *People v. Parchman*, 302 Ill. App. 3d 627, 632 (1998).

¶ 55 In this case, Pena's posttrial motion asserted "[t]hat a previous Court erred in denying Defendant's Motion to Suppress Statements, specifically Judge Jorge Alonso's ruling of July 28, 2009." Pena's motion thus specifies the order, but not the specific issue of admitting the contents of Pena's statements at the hearing. Accordingly, Pena has forfeited the issue for appellate review. *Parchman*, 302 Ill. App. 3d at 632. Pena cites *People v. Norfleet*, 29 Ill. 2d 287, 291 (1963), in support of his claim he preserved the issue, but *Norfleet* predates *Enoch* and its progeny. Furthermore, Pena did not respond to the State's argument by requesting review of this

issue as plain error. In instances of forfeiture, it is the defendant's burden to establish plain error and when a defendant fails to present an argument on how the plain-error doctrine is satisfied, he forfeits plain-error review. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010).

¶ 56 The Jury Instruction

¶ 57 Second, Pena contends the trial court provided the jury with Illinois Pattern Jury Instructions, Criminal, No. 3.06-3.07 (4th ed. 2000) (IPI Criminal 4th No. 3.06–3.07) without a bracketed phrase which would have allowed the jury to consider whether Pena made the statement introduced against him at trial. IPI Criminal 4th, No. 3.06-3.07 provides:

> "You have before you evidence that the defendant made a statement relating to the offense charged in the indictment. It is for you to determine [whether the defendant made the statement, and, if so,] what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made." IPI Criminal 4th No. 3.06-3.07.

Pena acknowledges he forfeited this issue because he did not object to the instruction as given, nor tender a version including the bracketed phrase, or raise the issue in his posttrial motion. Generally, a defendant forfeits review of any supposed jury instruction error if he does not object to the instruction or offer an alternative at trial, and does not raise the issue in a posttrial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Nevertheless, defendant urges this court to consider the issue pursuant to the plain error doctrine.

¶ 58 Supreme Court Rule 451(c) provides substantial defects in criminal jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." (eff.

July 1, 2006). Rule 451(c) has been deemed "coextensive with the plain-error clause of Supreme Court Rule 615(a), and the two rules are construed identically." *Piatkowski*, 225 Ill. 2d at 564. Under Supreme Court Rule 615(a), any error not affecting substantial rights shall be disregarded on appeal, but "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

¶ 59 Under Illinois' plain error doctrine, a reviewing court may consider a forfeited claim when:

> " '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the strength of the evidence.' " *Johnson*, 238 Ill. 2d at 484 (quoting *Piatkowski*, 225 Ill. 2d at 565).

The plain error doctrine is intended to ensure a defendant receives a fair trial, but it does not guarantee every defendant a perfect trial. *Johnson*, 238 Ill. 2d at 484. Rather than operating as a general savings clause, it is construed as a narrow and limited exception to the typical forfeiture rule applicable to unpreserved claims. *Id.* The burden of persuasion rests with the defendant under both prongs of the plain error analysis. *People v. Sargent*, 239 Ill. 2d 166, 190 (2010). The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law reviewed *de novo*. *Johnson*, 238 Ill. 2d at 485.

¶ 60 Plain error analysis requires we first determine whether any error occurred at all. *Thompson*, 238 Ill. 2d at 613. In this case, a review of the jury instructions establishes the version of IPI Criminal 4th, No. 3.06-3.07 provided to the jury in fact included the bracketed material Pena claims was missing. Accordingly, Pena's claim of plain error fails.

¶ 61 III. The Objection to Ward's Testimony

¶ 62 Pena next contends the trial court erred in sustaining the State's objection to Ward's testimony regarding Pena's statement, "Let's go," to Santos. Pena asserts the exclusion of this testimony violated his constitutional right to call witnesses in his favor. *E.g.*, *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). We observe the ruling at issue actually occurred during the defense's cross-examination of Ward. A defendant's right to confront witnesses against him, including cross-examination for the purpose of demonstrating any interest, bias, prejudice or motive to testify falsely, is guaranteed by both the federal and state constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. The trial court's discretionary authority to restrict the scope of cross-examination comes into play after the court has permitted, as a matter of right, sufficient cross-examination to satisfy the confrontation clause. *People v. Averhart*, 311 Ill. App. 3d 492, 497 (1999).

¶ 63 A defendant's rights under the confrontation clause, however, are not absolute. The confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination in whatever way and to whatever extent the defense desires. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). The test is whether the limitation on cross-examination created a substantial danger of prejudice by denying defendant his right to test the truth of the

testimony. *People v. Harris*, 123 Ill. 2d 113, 145 (1988). Even where defense counsel may have a right to put leading questions to a witness, counsel may not be entitled to put words in the witness's mouth. *People v. Hubbard*, 55 Ill. 2d 142, 150 (1973).

¶ 64 At trial, Ward was questioned by defense counsel as follows:

> "Q. You told *** State's Attorney Tiernan *** and Detective Vince Viverito *** that the Puerto Rican turned to go then turned towards [Murphy] again and aimed his gun at [Murphy], right?
>
> A. Right.
>
> Q. But you just said he didn't do that?
>
> A. No, because he was – somebody had say let's go. They ran.
>
> Q. So the other one stopped him from shooting him again, right?
>
> MS. HANUS [Assistant State's Attorney]: Objection.
>
> THE COURT: Sustained [as] to the form of the question."

Pena argues the trial court erred in excluding Ward's testimony implying he said, "Let's go" to Santos. The transcript, however, demonstrates the State did not object to the "Let's go" testimony as hearsay, but to the follow-up question as leading. Pena's claim that the "Let's go" testimony was excluded as hearsay is factually incorrect. Thus, Pena cannot establish he was prejudiced. Moreover, defense counsel's leading question attempted to present a defense argument as Ward's own testimony. As such, the trial court did not abuse its discretion in sustaining the State's objection. *Hubbard*, 55 Ill. 2d at 150.

¶ 65 IV. Gang-Related Testimony

¶ 66 Pena argues he was deprived of a fair trial where the trial court admitted Sergeant Grassi's gang-related testimony without establishing the proper foundation establishing his expertise on the subject. Evidence of gang membership and gang activity is admissible when it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. *People v. Gonzalez*, 142 Ill. 2d 481, 487-89 (1991). Police testimony regarding gang activity must qualify as expert opinion. See *People v. Langford*, 234 Ill. App. 3d 855, 858 (1992). A person may testify as an expert if his experience and qualifications afford him knowledge not common to a layperson and the testimony will aid the trier of fact. *People v. Miller*, 173 Ill. 2d 167, 186 (1996). There is no predetermined formula for how an expert gains knowledge, which may be obtained from study, training or practical experience. *Id*. We review this issue for an abuse of discretion. *Id*.

¶ 67 In this appeal, Pena does not dispute gang-related evidence was relevant to demonstrate motive. Generally, gang-related evidence is admissible to demonstrate common purpose or design, or to provide a motive for an otherwise inexplicable act. *People v. Matthews*, 299 Ill. App. 3d 914, 922 (1998). Pena, however, relies on *dicta* in *Matthews* to argue the State did not lay an adequate foundation for Sergeant Grassi's testimony. The *Matthews* court contrasted the police testimony offered in that case, where the officer was asked only whether he was familiar with what gangs were located in the area of the shooting, with *Langford*, where the police officer testifying as a gang expert had worked as a gang crimes specialist for 10 years and was assigned to the area where the murder occurred. *Id*. at 923.

¶ 68 In this case, Sergeant Grassi testified he was assigned to a gang enforcement unit for two years prior to trial and had been assigned in various capacities to the area where the shooting occurred for five years. Given this record, the trial court could reasonably conclude Sergeant Grassi had knowledge regarding gang activity in the area of the offense which was not common to a layperson and would aid the trier of fact. Accordingly, the trial court did not abuse its discretion in admitting the testimony.

¶ 69 V. Foundation for Fingerprint Testimony

¶ 70 Pena argues the trial court erred in admitting testimony from fingerprint analyst Petruncio where the State failed to lay a proper foundation for her testimony and Petruncio refused to state the number of points of similarity between the latent fingerprints and Pena's inked fingerprints. The State initially responds Pena forfeited the foundational issue by failing to raise it at trial or in the posttrial motion. A review of the record on appeal establishes Pena failed to object to Petruncio's direct testimony and did not raise the issue in his posttrial motion. Accordingly, Pena has forfeited the issue on appeal. *Ward*, 154 Ill. 2d at 293. Indeed, we observe in passing Pena's argument relies almost entirely on *People v. Safford*, 392 Ill. App. 3d 212, 216 (2009), where defense counsel raised the foundational objection prior to the expert testimony. Moreover, Pena failed to request plain-error review in his brief and did not file a reply brief addressing the State's forfeiture argument. Accordingly, Pena cannot sustain his burden to establish plain error and forfeits plain-error review of the foundational issue. See *Hillier*, 237 Ill. 2d at 545-46.

¶ 71 Pena's posttrial motion, however, does specifically raise the issue of the trial court sustaining objections to defense counsel's cross-examination of Petruncio regarding the number

of points of comparison between the latent and inked prints. Pena contends the trial court violated his right to meaningful cross-examination of the witnesses against him. See *Safford*, 392 Ill. App. 3d at 224. The State responds *Safford* is "an outlier case and no reported case since then has held there must be a minimum number of points of fingerprint comparison or a disclosure of a specific number of points of similarity found by the expert." *People v. Negron*, 2012 IL App (1st) 101194, ¶ 41.

¶ 72 In this case, we need not resolve the tension between *Safford* and *Negron*. In *Safford*, the defendant properly challenged the foundation of the evidence, which is directed at its admissibility. See *Safford*, 392 Ill. App. 3d at 223. In this case, Pena failed to properly challenge the foundation of the testimony and forfeited the issue on appeal. Accordingly, the contention regarding the number of points of fingerprint similarity goes to the weight of the evidence, not its admissibility. See *Negron*, 2012 IL App (1st) 101194, ¶ 40; *People v. Ford*, 239 Ill. App. 3d 314, 319 (1992). Moreover, the issue regarding the limitation on cross-examination is whether sustaining the objections created a substantial danger of prejudice by denying defendant his right to test the truth of the testimony. *Harris*, 123 Ill. 2d at 145.

¶ 73 In this case, the transcript of proceedings establishes defense counsel repeatedly questioned Petruncio regarding the issue of the number of points of comparison. Petruncio testified there was no set number for points of comparison. Petruncio also testified there is no set number when comparing an unknown impression and a fingerprint card. Petruncio explained a minimum number of seven points was required to search an Illinois State Police database. Petruncio acknowledged she did not count the number of points of comparison in this instance.

Given this record, and the issue being the weight to be given the expert testimony, rather than its admissibility, we conclude the trial court did not abuse its discretion in sustaining the State's objections once defense counsel established Petruncio did not record the number of points of comparison in this instance.

¶ 74 Pena further contends the trial court erred in restricting his counsel's cross-examination of Petruncio regarding whether fingerprint analysts had disagreed in cases where Petruncio was not involved. "It is well recognized that the key to saving for review an error in the exclusion of evidence is an adequate offer of proof in the trial court." *People v. Andrews*, 146 Ill. 2d 413, 420-21 (1992). "The purpose of an offer of proof is to disclose to the trial judge and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether exclusion of the evidence was proper." *Id*. at 421. "The failure to make an adequate offer of proof results in a waiver of the issue on appeal." *Id*. See *Parchman*, 302 Ill. App. 3d 627, 636-37. In this appeal, although Pena's counsel cites material suggesting fingerprint analysis is not infallible, Pena's counsel made no offer of proof at trial regarding the point of this line of questioning, thereby forfeiting the issue on appeal.

¶ 75 VI. Rebuttal Closing Argument

¶ 76 Lastly, Pena argues he was deprived of a fair trial by the State's improper rebuttal closing argument. 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 *Wheeler* and *People v. Blue*, 189 Ill. 2d 99, 128 (2000)).

¶ 77 Pena focuses on the State's argument there was "zero evidence" Pena was injured by police brutality, though the trial court sustained a defense objection when the State continued by asserting, "No one came in here and gave you any testimony from that stand that he received those injuries –." Pena also objected to the State's rebuttal argument that "what you don't hear from Pena says a lot in [his] statement," not only because it was the truth, but also because it revealed Pena did not understand legal accountability.

¶ 78 A criminal defendant has a constitutional right not to testify as a witness in his own behalf. See *People v. Howard*, 147 Ill. 2d 103, 146 (1991); *People v. Herrett*, 137 Ill. 2d 195, 210 (1990). As a result, the prosecutor is prohibited from directly or indirectly commenting on the defendant's failure to take the stand in his own defense. See *Howard*, 147 Ill. 2d at 146; *Herrett*, 137 Ill. 2d at 210-11. The prosecutor can describe the State's evidence as uncontradicted provided the comments are not intended or calculated to direct the jury's attention to the

defendant's failure to testify. See *People v. Bannister*, 232 Ill. 2d 52, 88 (2008); *Howard*, 147 Ill. 2d at 147; *Herrett*, 137 Ill. 2d at 211. In determining whether the challenged remarks were improper comments on the defendant's failure to testify, a reviewing court must examine the remarks in the context of the entire proceedings. See *Howard*, 147 Ill. 2d at 147; *Herrett*, 137 Ill. 2d at 211. Moreover, an error resulting from a comment on the defendant's failure to testify does not require reversal where the reviewing court is able to conclude upon an examination of the entire record the error was harmless beyond a reasonable doubt. See *Howard*, 147 Ill. 2d at 147-48.

¶ 79 In this case, the trial court sustained the initial defense objection and instructed the jury that closing and rebuttal arguments are not evidence, thereby curing any prejudice to Pena. See *People v. Johnson*, 208 Ill. 2d 53, 116 (2003). The State's second argument was not directed to Pena's failure to testify at trial, but to the substance of his statement. Accordingly, the record does not establish improper rebuttal argument. See *Bannister*, 232 Ill. 2d at 88. Furthermore, even assuming for the sake of argument the prosecution's rebuttal was improper, any error was harmless beyond a reasonable doubt. In *Howard*, our supreme court ruled the State's improper closing argument was harmless in light of the eyewitness testimony and the defendant's confessions. *Howard*, 147 Ill. 2d at 148. In this case, the jury heard Ward's eyewitness testimony regarding the shooting and Pena's statements to ASA Williams and Detective Fanning, as well as the expert testimony regarding Pena's fingerprints on the recovered ammunition magazine. Given the record, the State's comments were not a material factor in Pena's conviction and did not contribute to it. *Wheeler*, 226 Ill. 2d at 123.

¶ 80 CONCLUSION

¶ 81 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 82 Affirmed.