2015 IL App (2d) 130974-U
No. 2-13-0974
Order filed September 16, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAIME DIAZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 08-CF-3095 Honorable Karen M. Simpson, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant forfeited his contention that the State asked improper questions of its witness, Lucy Salgado, as to whether she made certain prior statements to law enforcement. The forfeiture was not excused under the plain-error rule because even if there was error, it did not rise to the level of plain error.

¶ 2 A jury convicted defendant, Jaime Diaz, of first-degree murder for the deaths of Brendon Anderson and Elias Calcano in March 1998. Defendant appeals, raising the solitary contention that the State asked improper questions of Lucy Salgado, one of the State's own witnesses. We hold that defendant forfeited this contention by failing to make a contemporaneous objection to

the State's questions. Moreover, plain-error review is not appropriate because even if there was error, it did not rise to the level of plain error. Consequently, we affirm defendant's convictions.

¶ 3 I. BACKGROUND

¶ 4 On the morning of March 16, 1998, a black Cadillac belonging to Anderson was found in the driveway to 761 East New York Street in Aurora. The driveway opened onto an alley running through the block bounded by East New York Street on the north, East Galena Boulevard on the south, North State Street on the west, and North East Avenue on the east. The dead bodies of Anderson and Calcano were lying beside the car. Each had a fatal gunshot wound to the back of the head. An accelerant had been applied to the Cadillac and the bodies, and Anderson's body was charred in places.

¶ 5 In November 2008, defendant was indicted on six counts of first degree murder in connection with the deaths. The matter proceeded to a jury trial in January 2013.

¶ 6 The only State witness claiming to have observed the killings of Anderson and Calcano was Jason Peterson. In March 1998, Peterson was 19 years old and living in Aurora. He was "friends, acquaintances" with defendant and had known him for about seven years. They socialized together one or two times a week. At the time, defendant and Peterson were both members of the Latin Kings street gang. Also in March 1998, defendant was dating Lucy Salgado, whom Peterson had known about seven years. Lucy had a sister named Nora. Peterson's girlfriend in March 1998 was Lisa Gaither. At the time, Peterson also knew Eric Hill, who later died later in 1998 or 1999.

¶ 7 Peterson testified that, sometime between 7 and 9 p.m. on the evening of March 15, 1998, he arrived at a home at the intersection of East Galena Boulevard and North State Street in Aurora. There was a gathering at the home. When Peterson arrived, the only others present

were Gaither and her friend, the owner of the home. Afterward, defendant arrived with Lucy, Nora, and Hill. The group "hung out" for several hours. Peterson drank alcohol and smoked marijuana. At some point in the evening, Peterson was outside alone on the back porch smoking a cigarette when he observed defendant walk down the sidewalk and stop to speak with someone in a black car that Peterson did not recognize. After a time, defendant got into the car, which then drove off. Two or three minutes later, the car returned. Defendant exited the car, approached Peterson, and asked if he wanted to take a ride. Defendant did not say why he wanted Peterson along, but according to Peterson, this was not "uncommon."

¶ 8 When Peterson got into the car, a black Cadillac, there were two men in the front seats. Peterson did not recognize them. Peterson sat with defendant in the back seat. Peterson was behind the front passenger while defendant was behind the driver. As they drove, defendant drank from a brown beer bottle and conversed with the front occupants. Peterson did not participate in the conversation or remember its substance, but he recalled that the conversation was "relaxed" in tone. After two or three minutes, the car stopped in an alley. An individual approached the driver side and spoke to defendant. The conversation had a "[b]usiness tone." After about three minutes, the conversation ended and the individual walked away as the four drove off.

¶ 9 After a few minutes, the car stopped in a driveway off another alley. At the time, Peterson did not know where they were; he was "buzzed" and not paying attention as they drove. While the car was stopped, defendant continued to converse with the front occupants. Peterson recalled the tone as being "normal" and "friendly" but had not paid attention to its content. He was "buzzed" and was leaning to his right against the passenger-side door. After about a minute, he heard a gunshot from his left. He turned and saw the driver slumped over in his seat. He then

saw defendant reach with a gun in his right hand toward the passenger and shoot him. Peterson had not previously seen defendant with a gun that night. After defendant fired the second shot, the passenger leaned over to his front and right. Peterson heard the passenger moan. Afraid that he would be shot next, Peterson grabbed for the door handle of the car. While doing so, he saw defendant beating the passenger in the head with the butt of the gun.

¶ 10 Peterson ran from the car and through a yard. He emerged from the yard onto East Galena Boulevard only three or four houses away from the house where the others had gathered. Entering the house through the back door, he tried to appear as calm as possible and did not tell anyone what he saw. About 10 to 15 minutes later, defendant came in through the back door. He took a beer and began to mingle. At one point, defendant went to the second floor. At the time, Peterson was talking to Gaither at the foot of the stairs. Peterson observed defendant reaching up toward the attic above the ceiling. Peterson could see that defendant was "doing something in the attic," but did not see defendant with a firearm at that time. Defendant then came downstairs. Five minutes later, he asked Peterson if Gaither could give him and Peterson a ride in her car. Peterson was still afraid of defendant but did not want to show it. Peterson conveyed the request to Gaither, who agreed to give the two a ride.

¶ 11 Peterson testified that the three got into Gaither's car. Gaither drove while Peterson sat in the front passenger seat and defendant sat in the back seat. At defendant's direction, Gaither drove to a gas station across the street from Cowert Middle School. Defendant exited while Gaither and Peterson remained in the car. Peterson saw defendant enter the station's building. Not paying attention, Peterson did not see defendant exit the building, but next saw him when he returned to the back seat. Peterson now noticed the smell of gasoline inside the car, which he had not detected before. Following defendant's directions, Gaither drove to the location of the

shooting. Gaither parked and defendant told Peterson to get out with him. They approached the black Cadillac and Peterson observed a body on the ground next to the passenger side. Peterson acted as "lookout" for defendant. Peterson assumed this role "on [his] own." Peterson observed defendant pour gasoline into and around the Cadillac. This was the first that Peterson saw defendant with a gas can. As defendant poured the gas, Peterson used his sleeve to wipe off any fingerprints he might have left on the rear passenger side door. Peterson then returned to Gaither's car and resumed his seat in the front. Defendant returned about a minute later. He said "let's go" in a "rushed" tone of voice. As they drove down the alley away from the Cadillac, Peterson saw a light "like flames" reflecting off a house. The three drove back to the party and acted as if everything were normal. Later that evening, Gaither left with defendant, Hill, Lucy, and Nora.

¶ 12 Peterson testified that he returned to the house at Galena and State once since the shooting. He went there to have sex with Gaither. On that occasion he also removed a gun from the attic. The owner wanted this done. Peterson had not spoken to defendant since the shooting.

¶ 13 Peterson was cross-examined extensively about his questioning by police. Peterson did not go to the police after the shooting but was approached by them in 2008. Part of his reason for not coming forward was that the Latin Kings have a code of silence barring members from disclosing gang "business" to nonmembers, and he feared that he would be killed if he spoke about the shooting. Even though Peterson left the gang in 2000, he was still afraid that his testimony would expose him to harm.

¶ 14 Peterson acknowledged that he met with police or prosecutors on these dates in 2008: April 8, May 6, July 10, and August 6. On April 8, Peterson spoke to Detective Spayth and Assistant State's Attorney Gleason. When Spayth and Gleason said they were investigating the

deaths of Anderson and Calcano, Peterson denied any knowledge of their deaths. Spayth and Gleason challenged Peterson on his denial. Peterson told them he was afraid of being prosecuted. Gleason then offered Peterson an agreement that would bar the State from prosecuting him based on anything he said to them. The agreement was memorialized in the form of a proffer letter. Peterson ultimately told Spayth and Gleason on April 8 that he rode with defendant, Anderson, and Calcano on the night of March 15, 1998, that Anderson stopped twice, and that on the second stop defendant shot Anderson and Calcano from the back seat. Peterson further told Spayth and Gleason that, following the shooting, he went home and nothing else happened that night. Spayth reminded Peterson of the proffer letter. Peterson then changed his account, admitting that, later on the night of March 15, he returned with defendant and Gaither to the scene of the shooting. He claimed, however, that he did not get out of Gaither's car.

¶ 15 On May 6, 2008, Peterson met with Gleason, Spayth, and another officer whose name Peterson could not recall. They reaffirmed to Peterson that they would not prosecute him for any statements he made to them. They spoke with Peterson about his April 8 statement and Peterson told them that the statement was truthful. Spayth remarked that he did not think Peterson told the truth in that statement. Peterson nonetheless adhered to the statement and told Spayth and the others that he feared prosecution.

¶ 16 On July 10, 2008, Peterson was interviewed by Spayth and an officer whose name Peterson could not recall. Peterson changed the account he gave on April 8. He now admitted that he did in fact get out of Gaither's car when the three drove to the scene of the shooting. He denied, however, that he walked any closer than the rear of the Cadillac. At the August 6, 2008, meeting, he obtained and met with an attorney.

¶ 17 Peterson further acknowledged he told a grand jury in November 2008 that he did not recall making the first stop in the alley. Peterson claimed that, at the time, he must have forgotten that first stop, since he had previously noted it in his April 2008 statement.

¶ 18 Lisa Gaither testified that, in March 1998, she was 18 years old and lived in Aurora. She had known Peterson about two years and was in a sexual relationship with him. She knew defendant through mutual friends and would see him once or twice a week. Defendant and Peterson were friends and fellow members of the Latin Kings. Gaither was friends with Eric Hill. She knew Nora and Lucy Salgado from her neighborhood but did not consider them friends. She did not know Anderson or Calcano.

¶ 19 In March 1998, Gaither drove a maroon Ford Contour. She drove frequently within her circle of friends because some of them did not have a car or a driver's license. On the night of March 15, 1998, defendant asked Gaither for a ride in order pick up Lucy and Nora; they all planned to hang out together. She drove defendant and Hill to the Salgado residence and parked in the driveway. A black Cadillac was already parked there. Beside it were Lucy and Nora talking to two "white guys." Defendant exited Gaither's car while Gaither and Hill remained inside. Defendant began conversing with Lucy, Nora, and the two men. Gaither could not hear the conversation, but it appeared "normal." Lucy and Nora then got into Gaither's car while defendant got into the black Cadillac with the two men. Gaither drove to "the house that [they] were going to hang out at." Gaither did not recall if she saw the Cadillac pull out before she drove off.

¶ 20 Gaither testified that the destination was the home of a friend named Bernice. The house was at East Galena Boulevard and North State Street in Aurora. When they arrived, everyone from Gaither's car went inside. Peterson was already there. Defendant arrived after about an

hour. He came inside and spoke with Lucy. The two then went outside and continued to talk. After this, defendant left. He returned later, but Gaither did not recall how long he was gone. At some point after defendant's return, Peterson approached and asked Gaither to drive him and defendant. Gaither agreed and went outside with Peterson. To the best of her recollection, Peterson did not leave the house between the time Gaither arrived and the time they left together. Since, however, she was not watching all occupants of the house at all times, someone could have left and returned without her noticing.

¶ 21 When Gaither and Peterson went outside, she saw defendant standing next to her car with a red gas can. Gaither did not comment to defendant or Peterson about the can. The three left in Gaither's car. Gaither was driving, Peterson was in the front passenger seat, and defendant was in the back seat. Defendant directed Gaither to an alley that was about 100 yards from Bernice's home. There was no conversation as to why defendant wanted to go there. Gaither was not far into the alley when defendant told her to stop. Gaither stopped the car and, at her own instance, turned off the headlights. She remained in the car while defendant and Peterson exited and disappeared into the darkness off to her left. Peterson returned to the front seat after a couple of minutes. Another couple of minutes passed before defendant returned and resumed his seat in the back. He smelled of gas but did not have the gas can. Defendant said to Gaither, "Let's go." Gaither did not recall what tone of voice defendant used. She also did not recall telling Spayth during an interview on June 10, 2008, that defendant's tone was urgent. Gaither drove out of the alley. At no time did she see a fire or lights resembling a fire reflecting off a home.

¶ 22 After leaving the alley, Gaither returned to Bernice's home, where she and her companions continued to drink and play cards. At some point in the night, she gave defendant, Lucy, and Nora rides home. The car still smelled of gas and Lucy commented about it.

¶ 23 Gaither testified, contrary to Peterson's account, that she did not stop at a gas station on the way to the alley with defendant and Peterson.

¶ 24 Gaither acknowledged that she has a felony drug conviction. In 2005, while she was in a work release center, she was interviewed by Spayth and federal agent Mark Anton. At that time, she denied to them that she attended a party at State and Galena on March 15, 1998, or that she was with Hill, Peterson, the Salgados or defendant that night, or that her car smelled like gasoline that night. Following this interview, Gaither was remanded to Dwight Correctional Center for a year. Gaither recalled doing nothing to deserve being sent back to Dwight.

¶ 25 In June 2008, Gaither was interviewed by Spayth and Gleason. Before the interview started, she expressed concern that she would be charged in the case. Gleason presented her with a proffer letter providing that the State would not bring charges based on any of her remarks related to the case. Gaither then told Spayth and Gleason that she drove defendant and Peterson to the alley in March 1998. She reaffirmed this account before a grand jury in June 2008.

¶ 26 Gaither acknowledged that, a week before trial, when she was reviewing her testimony with prosecutors, she told them that in fact she had left the party alone with Peterson and drove to the alley. Gaither testified that this account was not true and that she only gave it because she was frightened.

¶ 27 Nora Salgado Babic testified that, in March 1998, she was 15 years old and her older sister Lucy was 18 years old. Nora and Lucy lived with their family on Lake Street in Aurora. Lucy was dating defendant, whom Nora had known for a couple of months. Nora would see defendant a couple of times a week. At some point on March 15, 1998, Lucy told Nora that "the guys" were coming over to the house. Nora interpreted "guys" to mean Anderson and his friends. Nora had become acquainted with Anderson through Lucy. Both Nora and Lucy

considered him a friend and were equally close to him. Nora also knew Calcano through Lucy. Lucy had a closer relationship with Calcano than Nora did. According to Nora, it was not "uncommon" for Anderson to come to the Salgado home, either by himself or with friends. Anderson had been doing this for months.

¶ 28 Nora testified that, sometime past 11 p.m. on March 15, Anderson and Calcano arrived at the Salgado home in Anderson's black Cadillac. Lucy and Nora met them in the driveway, got into the Cadillac, and talked with them. Nora was in the back seat with Calcano and Lucy was in the front with Anderson. After about 20 to 30 minutes, a maroon Contour pulled into the home's second driveway. Defendant emerged from the car. Calcano exited the Cadillac and shook hands with defendant. From what Nora observed, defendant was friendly toward Calcano. Defendant suggested that the entire group go to another location to hang out and drink. Anderson was "kind of hesitant," but Calcano persuaded him. Defendant proposed that Nora and Lucy ride in the Contour with the others while defendant rode with Anderson and Calcano. Everyone did as defendant suggested. When Lucy got into the Contour she recognized Lisa Gaither in the driver's seat and Eric Hill beside her. Defendant got into the back seat of the Cadillac behind Anderson and Calcano.

¶ 29 Gaither then drove Nora and the others to a house at State and Galena. Nora expected that defendant would arrive soon after with Anderson and Calcano. However, Anderson and Calcano never appeared at the gathering, and defendant did not appear until later in the evening.

¶ 30 When Nora arrived at the home she saw Peterson, whom she had known for several months. Lucy sat in the living room while Nora and Hill sat in the adjacent kitchen playing cards, drinking whiskey, and smoking marijuana. Nora remained in the kitchen until she left later that evening. She initially saw Peterson at the home but later lost track of him. During this

time, she had a view of the living room from the kitchen but did not see Peterson there. At some point, defendant arrived with Gaither and Peterson through the back door into the kitchen. This was the first Nora had seen Gaither at the house. When the three walked in, Nora began to smell gasoline; the smell spread "everywhere." When Lucy saw defendant, she became angry and immediately told him that she wanted to go home. Nora then saw defendant whisper something to Hill, and heard Hill respond, with a shocked expression, " 'Nah, bro, nah.' " Peterson and Gaither went upstairs. Gaither came down carrying clothes and someone else was throwing clothes down the stairs. Nora did not see defendant go upstairs.

¶ 31 Nora testified that she ultimately left the house with Lucy, Gaither, and defendant. Nora smelled gasoline in the yard on the way to Gaither's car. The inside of Gaither's car also smelled of gasoline; Nora had not smelled it earlier when she rode with Gaither to the house. Lucy asked why the car smelled like that, and defendant replied that they had spilled gasoline when they fueled up Gaither's car.

¶ 32 Lucy Salgado testified that, in March 1998, she was 18 years old and lived on Lake Street in Aurora with her sister Nora and the rest of her family. She met defendant, who was two years her senior, in October 1997. They began a sexual relationship in December of that year. The sexual relationship continued for five years. Lucy had two children by defendant, born in 2001 and 2002. In March 1998, Lucy's sexual relationship with defendant was ongoing but she did not consider their relationship "official" or a "dating" relationship. According to Lucy, defendant was left-handed.

¶ 33 Lucy testified that, in March 1998, she was friends with Anderson. Prior to her sexual relationship with defendant, Lucy and Anderson "casually messed around here and there." Lucy clarified that this prior relationship with Anderson was sexual and that it was "visible to others."

Lucy also knew Calcano in March 1998. She never "mess[ed] around" with Calcano but they "probably kissed once."

¶ 34 Lucy testified that, earlier in the day on March 15, 1998, she made plans with Calcano to hang out that night. Calcano and Anderson arrived at Lucy's home after midnight. They got Lucy's attention by knocking on a window. Lucy and Nora left the house and sat with Calcano and Anderson in the latter's black Cadillac, which was parked in the driveway. Lucy sat in the front with Anderson and Nora sat in the back with Calcano. They talked and listened to music. Sometime later (Lucy was not sure how long), a maroon Malibu that Lucy did not recognize pulled into the driveway and parked. Gaither was driving the car. Defendant and Eric Hill, who were passengers, stepped out. Lucy was not expecting defendant. Asked if she was concerned when she saw defendant, Lucy replied no.

¶ 35 At this point in Lucy's direct examination, the State asked the first of several questions of Lucy regarding prior statements she made to Detective Spayth on January 5, 2005. That line of inquiry is the subject of defendant's only contention on appeal. The first question regarding those prior statements, and the ensuing objection and colloquy, proceeded as follows:

> "Q. Do you remember, Ms. Salgado, talking to [Spayth and Agent Paul Bock of the Federal Bureau of Investigation] when you testified in front of the grand jury, that January 5th, 2005 date; you came out and you talked to a couple [of] officers, is that correct?
>
> A. Yes.
>
> Q. And do you remember telling them that when the defendant showed up—
>
> MR. BROWN [defense counsel]: Judge, I'm going to object to the form of this question and this impeachment.

THE COURT: Approach.

(Whereupon, the following proceedings were had at a side bar.).

MR. BROWN: Your Honor, I think the impeachment that Mr. Sams is attempting to pursue is not a recorded impeachment. And I don't—it's improper at this point. I think for the [S]tate to call a witness to try to impeach them with a non-recorded statement, in essence, is trying to get the impeaching statement in as substantive evidence.

If the court is going to allow this to go forward, this jury should be instructed that the question and answer is only being offered for the credibility and not for the truth of the statement that she's alleged to have made.

MR. SAMS: That's absolutely incorrect. I mean, [it] depends on what she said. If I ask do you remember telling them, and the answer is yes, it's substantive. If she answers, no, I don't, then I have to prove it up; and then that time it is for impeachment only. I don't think you need to instruct the jury at that point in time. Certainly, if it's substantive testimony—

THE COURT: Do you have any response?

MR. BROWN: I disagree. I don't—I don't disagree with Mr. Sam's original point that she may answer, yes[,] and in which case she acknowledges it, but if Mr. Sams pursues the impeachment, the jury should be instructed.

THE COURT: I am assuming that if the answer is not yes, you will be offering it—perfecting the impeachment.

MR. SAMS: I will later on the in the trial.

MR. BROWN: Unless she somehow damages the [S]tate's case.

THE COURT: Unless what?

MR. BROWN: Unless the statement has damaged the [S]tate's case, and the failure to support the perfection is not considered under the cases, but I think—

THE COURT: I think we would probably need a copy of that.

MR. BROWN: It's a case of—it's a lengthy decision, but I can get that.

THE COURT: That's if he's trying to perfect the impeachment later on.

MR. BROWN: Yes.

THE COURT: Okay. Let's proceed."

¶ 36 The State proceeded to finish its question to Lucy:

"Q. Ms. Salgado, that same day that you came out, after you came out of the grand jury, do you remember talking to Detective Spayth and an FBI special agent, is that correct?

A. Yes.

Q. You knew that it was important when you talked to them and answered questions to them that you also tell the truth, correct?

A. Yes.

Q. Do you remember telling them that when you saw the defendant get out of that car, when you were in the car with [Anderson] and [Calcano] and Nora, that you were concerned?

A. I don't remember."

Defendant did not object to these questions.

¶ 37 Upon further questioning, Lucy testified that after defendant exited the Malibu with Hill, the remaining occupants of both cars stepped out and spoke in the driveway. Gaither was the

driver of the Malibu. Everyone appeared cordial and "in a pleasant mood." Lucy remembered testifying before the grand jury that defendant told the others that he had a "spot" where they could hang out, that Anderson initially said he wanted to remain at Salgado's, and that everyone eventually decided to go where defendant suggested. Defendant asked Lucy and Nora to ride in the Malibu with Gaither and Hill. Defendant said he would ride with Anderson and Calcano in the Cadillac.

¶ 38 Lucy testified that Gaither then drove to a house "near either State and New York or State and Galena." Lucy expected the black Cadillac to stop there as well, but instead it drove past as Lucy was going into the house. The State asked Lucy, "Do you remember, did that affect you in any way, the fact that they didn't stop?" Lucy replied no. The State then asked:

> "Q. Do you remember telling Detective Spayth at the interview after the grand jury testimony on January 5th, that you were a little concerned about that?
>
> A. I don't remember."

Defendant did not object here.

¶ 39 Lucy did not recall whether Jason Peterson was at the house when she arrived there. Anderson and Calcano never arrived at the house that night. Lucy recalled that, at some point after she arrived, defendant walked in the back door with Peterson and Gaither. The State then asked:

> "Q. Do you know how long you had been at the house [before defendant arrived]?
>
> A. No.
>
> Q. Minutes, hour?
>
> A. Can't remember.

Q. Do you remember how you were feeling about the fact that he didn't show up right away?

A. This point, no.

Q. Do you remember telling Detective Spayth on that January 5th, 2005 interview after your federal grand jury testimony that you were very upset?

A. No, I don't remember."

Defendant did not object here, either.

¶ 40 Lucy testified that, when defendant arrived, she told him that she wanted to go home. Lucy recalled testifying before the grand jury that Gaither and defendant went upstairs at some point after they arrived. Lucy then remembered that she went upstairs to use the bathroom and saw Gaither and defendant up there. Lucy did not recall what occurred upstairs between Gaither and defendant. After going back downstairs, she demanded to be taken home. Gaither and defendant then drove her home in Gaither's car. Lucy did not remember smelling anything inside Gaither's car. She did not remember when she arrived home.

¶ 41 Lucy testified that, sometime before sunrise on March 16, defendant knocked on her window and she let him in. She did not recall anything unusual about him or his shoes. She remembered giving him a towel but could not recall whether he asked for it.

¶ 42 Lucy recalled that, a few days afterward, Nora told her that the police wanted to question her. Lucy spoke to the police but did not speak to defendant beforehand. She did not know whether she lied to the police during the interview. She did not recall defendant voicing any threats, about her or anyone else, regarding the events of March 15 and 16, 1998. In the following exchange, Lucy was asked whether she made any statements to Spayth regarding threats by defendant:

"Q. Now in terms of the threat to you, do you remember in this interview with Detective Spayth on January 5th of 2005, after you gave your federal grand jury testimony, telling Detective Spayth that sometimes the defendant, when he would get mad at you about something after this March 16th, 1998 date, when he would get mad at you about something, he would tell you that he would do you like he did your two friends?

A. No, I don't remember.

Q. You don't remember telling Spayth that?

A. No. I remember him telling me that he said that.

Q. The defendant said that?

A. No, Spates [*sic*] told me that he said that, Jaime had said he wanted to kill me.

Q. Spayth told you that?

A. Yes."

Defendant did not object to this exchange.

¶ 43 Forensic pathologist Lawrence Cogan testified that both Anderson and Calcano died of gunshot wounds to the head. Both bullets entered behind the right ear. Calcano's abdomen bore tire marks. His face had numerous injuries, including a broken mandible and missing tooth, which were consistent with blows from a man-made object. Anderson's body had charring from an open flame and Calcano's body smelled of an accelerant.

¶ 44 Michael Dabney was the evidence technician who processed the black Cadillac. The car was found parked at the rear of 761 East New York Street approximately 38 feet from the alley. The inside of the car was marked by blood splatter and smelled of an accelerant. Dabney found a human tooth under a jacket in the front seat and an "Icehouse" brand beer bottle on the rear

floorboard. The firearms evidence recovered consisted of (1) a fired .32 caliber bullet recovered from Calcano's body; (2) a fired .32 caliber bullet recovered from the front floorboard of the Cadillac; (3) two spent .32 caliber shell casings recovered from the front console area and the backseat, respectively; and (4) an unfired .32 caliber bullet found on the front floorboard. Ballistics testing established that the two shell casings were fired from the same firearm. It could not be determined, however, whether the two fired bullets were fired from the same firearm, or whether the unfired bullet had ever been chambered in the same gun as the spent shell casings.

¶ 45 No fingerprints were recovered from the Cadillac or from any items found inside.

¶ 46 Kelly Krajnik, a forensic DNA analyst with the Illinois State Police lab, testified that she tested a swab taken from the beer bottle found in the Cadillac. She found a mixed profile, suggesting DNA from two different individuals. In keeping with lab protocols, she made the assumption that one of the profiles was Anderson's because the Cadillac was his. Krajnik noted that her assumption also "mathematically worked out" when she subtracted Anderson's profile from the mixture. After the subtraction, Krajnik was left with an unknown profile.

¶ 47 Ken Boicken, another DNA analyst with the State Police, compared the unknown profile found by Krajnik with a sample of DNA taken from defendant. Defendant could not be excluded as the donor. Using a federal law enforcement database, Boicken determined that defendant's DNA profile would occur in one in 1.7 quadrillion Hispanic persons, one in 280 quadrillion black persons, and one in 34 quadrillion white persons. Boicken testified that he agreed with Krajnik's assumption that Anderson's profile was part of the mixed profile. Boicken recognized that if the assumption was incorrect, the probability of defendant being excluded from the larger profile "would be slightly different."

¶ 48 Near the close of its case-in-chief, the State remarked to the court that it would not be perfecting the impeachment of Lucy with proof her prior statements to Spayth. The State noted that the prior statements were "not recorded and not written, not signed." The State believed that the impeachment was barred by *People v. Cruz*, 162 Ill. 2d 314 (1994). Defense counsel then requested a "limiting instruction." The State did not believe that an instruction was necessary but had no opposition to it. The court said that it would "entertain" such an instruction.

¶ 49 After the State rested, the defense called its sole witness, defendant's mother, who corroborated Lucy's testimony that defendant was left-handed.

¶ 50 Following defendant's case, the defense broached the subject of Lucy's questioning by the State regarding her prior statements to Spayth. Counsel asked the court both to strike that entire line of questioning from the record and instruct the jury to disregard it entirely. The State objected to the request to strike, insisting that the questions and answers were proper. The State had no objection, however, to an instruction to disregard the questioning. The court ruled that it would instruct the jury to disregard the inquiries, and believed that this would obviate the need to strike them from the record.

¶ 51 The parties presented by way of stipulation various portions of Lucy's testimony before a federal grand jury on January 5, 2005. The testimony was to be considered as substantive evidence. The following portions are relevant to our purposes here:

> "• During that grand jury testimony, Lucy Salgado was questioned about her relationship with Elias Calcano. Lucy Salgado was asked the following question and Lucy Salgado then gave the following answer:
>
> Q: Did you have any kind of relationship with Mr. Calcano?
>
> A: Messed around a couple of times.

* * *

• During the grand jury testimony, Lucy Salgado was asked about Lisa Gaither handing the defendant clothes on the second floor of the house. Lucy Salgado gave the following answer as part of a longer answer:

A: She was like, well, it's right there. She was handing him some clothes or something. She was handing him something else.

* * *

• During that grand jury testimony, Lucy Salgado was asked the following question and Lucy Salgado gave the following answer:

Q: And how do you know precisely when the murders were committed?

A: Because, I mean, they came back to the house. And the first thing that they did was run upstairs. When we got in the car, the car smelled like gasoline. I asked Jaime [Diaz], I was, like, why does the car smell like gasoline? He was, like, well, we just finished putting gas in and I spilled it all over myself.

• During that grand jury testimony, at a separate time, Lucy Salgado was testifying and made the following statement:

A: And it was, like cold outside and we were driving with the windows down. I was, like, why does it smell like gas? And he's like oh, because we were putting gas [*sic*], and I spilled gas on myself.

* * *

• During the grand jury testimony, Lucy Salgado was asked the following question and Lucy Salgado gave the following answer:

Q: Now, I don't mean to interrupt you, but when you say he came back to the house and he had blood on his shoes, when was that?

A: After he had already dropped us off, he and Lisa [Gaither]. And later on when, I don't know what time it was because I was already laying down, he comes knocking on the window. And, okay, fine. I let him in, whatever. And we're in the room, whatever, I can't even remember what we were talking about. And he had asked for a towel. So I gave him a towel. And he was, like, cleaning off his shoes. And I was, like, oh, just throw it in the closet, because that's where all my dirty clothes was at. And he says, no, no, no, and he took it with him. So I was, like, okay, you know, whatever.

• During that grand jury testimony, in describing statements made by the defendant to her after March 16, 1998, about the police wanting to question her, Lucy Salgado testified to the following:

A: He was, like, what do they want to question you for? And I was, like, what else do you think it's for? He's like, what are you going to tell them? I was like, well, I don't know. By then he was really, like, telling me, you know, like, oh, well, think of something to tell them or whatever, but—

• During that grand jury testimony, Lucy Salgado was asked the following question and Lucy Salgado gave the following answer:

Q: Now you lied to the police. Why did you lie to the police?

A: Because he would threaten me, and I was scared because I remember one time he was telling me that he wanted to—how did he put it—in other words, get rid of Lisa [Gaither] because I guess she was there."

¶ 52 Regarding the State's exchanges with Lucy as to her prior statements to Spayth, the court gave the jury the following instruction proposed by the defense:

> "During the testimony of Lucy Salgado, the State inquired of Ms. Salgado of statements she allegedly made to Detective Spayth of the Aurora Police Department. Those questions and her answers should be disregarded and not considered by the jury in its deliberation."

¶ 53 In closing argument, the State proposed that jealousy may have motivated defendant to kill Anderson and Calcano:

> "Finally *** we have the meeting in the driveway. [Anderson] and Lucy in the front seat; Nora and [Calcano] in the back seat for an hour. What's going on in that car? They say just talking. Lucy and Nora both say, no significance to that seating arrangement.
>
> *** The question is did the defendant think there was a significance to that issue when he came in that car and drove up there.
>
> [Anderson] is in the front seat with his girl, [Anderson] who we know had a sexual relationship with [defendant's] girlfriend at some point in the past. [Calcano] who we know had some type of relationship, more than just friends, with this defendant's girlfriend at some time in the past, based on her testimony, her admission in this court. Perhaps this was a case of someone just getting tired of messing—people messing around with his girlfriend. Perhaps someone who was ticked off about two guys sitting in a car with the girl that he's been messing around with. *** [T]hat reaction doesn't always take place right then and there.

*** [Y]ou know, you shoot somebody in the back of the head point blank; you shoot a second person in the head point blank, and then you beat that second person about the head so much so that bones are broken, teeth are knocked out—you heard that description by Dr. Cogan. I won't relive all of it.

That, ladies and gentlemen, is a crime of anger. That's a crime of passion. You're ticked off at these people for some reason. And then you go back and you set them on fire. That's a crime of passion. You are mad at somebody. You are angry. We don't have to prove motive in this case. ***.

*** You don't have to know why he did it. But he did it. We have to prove that, and we have.

So don't get hung up on well, has the [S]tate proved a motive? Is that the real motive? I believe it is. The evidence shows that it is when you combine Lucy, her past relationship with these men and the anger, the aggression in these murders."

¶ 54 In its closing, the defense argued, *inter alia*, that the fact that defendant was left-handed called into question Peterson's testimony that defendant shot Calcano while holding the gun in his right hand. Also, since defendant was sitting behind Anderson, it would have been difficult for defendant to shoot Calcano behind his right ear.

¶ 55 The jury returned verdicts of guilt with respect to both victims. Following the denial of his posttrial motion, defendant was sentenced to natural life imprisonment. He files this timely appeal.

¶ 56 II. ANALYSIS

¶ 57 A. Defendant Forfeited His Challenge to the State's Questioning of Lucy Salgado Regarding Her Prior Statements to Detective Spayth

¶ 58 Defendant contends that the State's questions to Lucy regarding her prior statements to Detective Spayth were improper. Occasionally, defendant characterizes those questions as "impeachment." This is a mischaracterization, as in fact Lucy was never impeached with her statements to Spayth.

¶ 59 Illinois Rule of Evidence 607 (eff. Jan. 1, 2011) states:

> "**Rule 607. Who May Impeach**
>
> The credibility of a witness may be attacked by any party, including the party calling the witness, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of affirmative damage. The foregoing exception does not apply to statements admitted pursuant to Rules 801(d)(1)(A), 801(d)(1)(B), 801(d)(2), or 803."

¶ 60 The Illinois Rules of Evidence "codify the preexisting common law rules of evidence." *People v. Leach*, 2012 IL 111534, ¶ 66 n. 1; see also Ill. R. Evid., Committee Commentary (eff. Jan. 1 2011) ("[T]he Committee incorporated into the Illinois Rules of Evidence the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years."). Under the common law, "impeachment" means "[t]o call in question the veracity of a witness, by means of *evidence* adduced for that purpose, or the adducing of *proof* that a witness is unworthy of belief.' " (Emphasis added.) *McWethy v. Lee*, 1 Ill. App. 3d 80, 84 (1971). In each of the four exchanges that defendant challenges on appeal, the process was essentially the same: first, the State asked Lucy if *x* was the case; second, Lucy denied that *x* was the case or stated that she did not remember either way; third, the State asked Lucy if she recalled telling Spayth that *x* was the case; fourth, Lucy stated that she did not recall telling Spayth that *x* was the case. In each case,

the State left it at that. In no instance did the State proceed to adduce *evidence* to challenge Lucy's veracity in the form of extrinsic proof of her statement to Spayth. The State's question and answers were "unperfected" impeachment, which, strictly, is not impeachment at all. See *In re Estate of Garner*, 8 Ill. App. 2d 41, 46-47 (1955) (failure to perfect impeachment is not, properly, impeachment).

¶ 61 When a witness denies that *x* is the case, and the State asks the witness whether she made a prior (inconsistent) statement that *x* is the case, the State perfects the impeachment in one of two ways: (1) when the witness denies making the statement, or denies memory of the statement, and the State adduces extrinsic proof of the statement; or (2) when the witness admits making the statement, in which case no extrinsic proof of the statement is necessary. See *People v. Kluppelberg*, 257 Ill. App. 3d 516, 533-34 (1993). In certain cases, the prior inconsistent statement, whether acknowledged by the witness *or* proven by extrinsic evidence, may be considered by the fact finder as substantive evidence. See Ill. R. Evid. 801(d) (eff. Jan. 1, 2011); 725 ILCS 5/115-10.1 (West 2014). Illinois Rule of Evidence 801 (eff. Jan. 1, 2011) reproduces verbatim the standards of section 115-10.1 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-10.1 (West 2014)) for the substantive admissibility of a prior inconsistent statement. Rule 801 provides in relevant part:

> "**Rule 801. Definitions**
>
> The following definitions apply under this article:
>
> * * *
>
> **(c) Hearsay.** 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

> **(d) Statements Which Are Not Hearsay.** A statement is not hearsay if:
>
> (1) *Prior Statement by Witness*. In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
>
> (A) inconsistent with the declarant's testimony at the trial or hearing, and—
>
> (1) was made under oath at a trial, hearing, or other proceeding, or in a deposition, or
>
> (2) narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and
>
> (a) the statement is proved to have been written or signed by the declarant, or
>
> (b) the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition, or
>
> (c) the statement is proved to have been accurately recorded by a tape recorder, videotape recorder or any other similar electronic means of sound recording. ***."

¶ 62 If a prior inconsistent statement meets the standards for substantive admissibility, Rule 607's "damage" requirement for cases of impeachment of a party's own witness does not apply. Ill. R. Evid. 607 (eff. Jan. 1, 2011) ("The foregoing exception does not apply to statements

admitted pursuant to Rules 801(d)(1)(A), 801(d)(1)(B), 801(d)(2), or 803."). Thus, Rule 607 embodies the principle that "[i]f a prior inconsistent statement is not admissible as substantive evidence, that statement can only be used for impeachment when the testimony of that witness does 'affirmative damage' to the party's case" (*People v. Sangster*, 2014 IL App (1st) 113457, ¶ 62).

¶ 63 Since Lucy denied making the statements to Spayth and the State never attacked her credibility by adducing proof that she made the statements, Lucy was never strictly impeached. The very cases cited by defendant undercut his suggestion that Lucy was impeached. In each of these cases, the State perfected its attack on the credibility of the witness by adducing evidence of the prior inconsistent statement. In each case, the evidence consisted of the witness' in-court acknowledgement that he made the prior statement or, if the witness denied making the statement, of extrinsic evidence that the statement was made. In some cases, both types of evidence were adduced. See, *e.g.*, *Cruz*, 162 Ill. 2d at 355 (1994) (the State attacked the credibility of its witness, Erma Rodriguez, by calling witnesses Roman Mares and Warren Wilkosz to testify to prior inconsistent statements by Rodriguez); *People v. Weaver*, 92 Ill. 2d 545, 563 (1982) (witness "impeach[ed] *** with his prior grand jury testimony"); *People v. Bailey*, 60 Ill. 2d 37, 41-43 (1975) (not only did the witness acknowledge making prior inconsistent statements, but the State also called a witness to corroborate that the statements were made); *People v. Triplett*, 87 Ill. App. 3d 763, 765, 767 (1980) (same: in-court admission to a prior inconsistent statement coupled with witness testimony attesting that the prior statement was made).

¶ 64 Defendant claims that the holding in *People v. Chitwood*, 36 Ill. App. 3d 1017 (1976), suggests that perfecting the impeachment "is not essential to a finding of error." In *Chitwood*,

the defendant and Gary Toolate were tried together for burglary. The State called their roommate, Linda Nunn, to testify. She denied under the State's questioning that the defendant and Toolate admitted to her their involvement in the burglaries. The State then asked Nunn if she recalled speaking to Detective Harold Lamb on a certain date. Nunn testified that she did indeed recall the conversation. The defense objected that the State was attempting to impeach its own witness. Declaring Nunn a court's witness, the court allowed the State to proceed. Upon questioning, Nunn admitted telling Lamb that the defendant and Toolate admitted to her their involvement in the burglaries. Nunn claimed, however, that her statement to Lamb was a lie that she told to get even with the defendant for breaking off their relationship. *Id.* at 1019-20.

¶ 65 As defendant notes, the State in *Chitwood* never called Lamb to testify in impeachment. However, defendant's supposition is correct that this "[t]his may have been because Nunn ultimately seemed to admit making the statement in a roundabout way—though she added that she had lied to Lamb in an effort to get the accused in trouble." In eliciting Nunn's admission that she reported to Lamb that the defendant and Toolate admitted their involvement in burglaries, the State impeached Nunn's testimony that the defendant and Toolate never confessed the crimes to her. Hence, the appellate court framed the issue on appeal as involving "the impeachment of a court's witness by prior inconsistent statements ***." *Id.* at 1027.

¶ 66 In this case, when Lucy denied that she recalled making the statements to Spayth, the State did not proceed to prove the statements by extrinsic evidence. Consequently, Lucy was never strictly impeached, and it is a non-issue whether the State had cause to impeach her because her answers affirmatively damaged its case.

¶ 67 Defendant makes the alternative argument that, even if the State never actually impeached Lucy, the State's foundational questions—asked as a precursor to impeachment—were themselves improper because of their prejudicial insinuations. Defendant elaborates:

> "In the case at hand, the insinuations were that the defendant was angry upon seeing Lucy with the victims, separated Lucy from the victims and arranged to be with them in their car, killed them, went to Lucy's house to wipe blood off his shoes, and subsequently admitted the crime."

¶ 68 When, however, the State asked its questions of Lucy regarding her prior statements to Salgado, defendant never objected that the questions themselves were improper because of their content. Rather, when defense counsel interjected at the outset of the questioning (cutting off the State's question), he explained that he was objecting out of concern that the State was about to question Lucy about a prior statement that was "non[-]recorded" and therefore inadmissible as substantive evidence. The State corrected defense counsel, noting that if Lucy acknowledged making the statement to Spayth, the statement would be admissible as substantive evidence even if it was unrecorded. See Ill. R. Evid. 801(d)(1)(A)(2)(b) (eff. Jan. 1, 2011) (prior inconsistent statement admissible where "the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition."); 725 ILCS 5/115-10.1(c)(2)(B) (West 2014) (same); *People v. Sykes*, 2012 IL App (4th) 100769, ¶¶ 40-41 (applying section 115-10.1(c)(2)(B) of the Code to uphold admission of prior inconsistent statements acknowledged in court by witnesses, even though the State produced no proof that the statements were memorialized). Defense counsel appeared to accept this view of the law and stressed instead that if Lucy *denied* making the statement (or denied

memory of it), then the prior inconsistent statement would be admissible only for credibility purposes and the jury should be so instructed. Toward the end of the exchange, counsel made the odd remark that the State could pursue the impeachment (upon Lucy's denial that she made the statement) "[u]nless the statement has damaged the [S]tate's case, and the failure to support the perfection is not considered under the cases ***." Counsel had the law essentially backward. The State *cannot* pursue impeachment of its own witness with a prior inconsistent statement *unless* the State can show affirmative damage from the testimony (except for when, of course, the statement is admissible as substantive evidence). See Ill. R. Evid. 607 (eff. Jan. 1, 2011) ("[T]he credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of affirmative damage," except that no damage need be shown where the prior inconsistent statement is substantively admissible.); *Sangster*, 2014 IL App (1st) 113457, ¶ 62 ("If a prior inconsistent statement is not admissible as substantive evidence, that statement can only be used for impeachment when the testimony of that witness does 'affirmative damage' to the party's case").

¶ 69 The court permitted the State to continue. The State continued its question, asking Lucy if she recalled telling Spayth that she was concerned when defendant arrived in her driveway to discover her and Nora inside Anderson's car with him and Calcano. Lucy said she did not recall making the statement to Spayth. At this point, defense counsel became aware, or should have become aware, of the grounds for an objection. First, counsel gained information about the substantive admissibility of Lucy's prior inconsistent statement to Spayth. In the parties' initial exchange with the court (before the State asked its question), defense counsel agreed that, though Lucy's prior statement was "non[-]recorded" and hence was otherwise inadmissible as substantive evidence, the statement could be considered substantively if Lucy acknowledged

making it. When Lucy answered the State's question by claiming she did not recall making the statement, counsel should have known that the State's one avenue for introducing the statement as substantive evidence was foreclosed. Second, counsel would have been able to judge, from the State's question and Lucy's answer, whether her testimony affirmatively damaged the State's case, and, hence, whether her prior statement to Spayth could at least be considered for credibility purposes. Despite possessing the foregoing grounds for an objection, defendant did not speak up when Lucy answered the State's question by stating that she did not recall telling Spayth that she was concerned when defendant arrived at her house on the night in question.

¶ 70 Defendant also did not object when the State asked Lucy subsequent questions about prior inconsistent statements to Spayth and Lucy denied recollection of those statements. On each of these three subsequent occasions, defendant had grounds to object that the prior statement was not admissible as substantive evidence (because Lucy did not acknowledge making the statement) nor admissible even for credibility purposes (because Lucy's testimony inconsistent with the prior statement did not affirmatively damage the State's case). "An objection is untimely if it is not asserted as soon as the grounds for the objection become apparent." *People v. Risper*, 2015 IL App (1st) 130993, ¶ 24. To preserve an issue for appeal, the defendant must make a contemporaneous objection and also raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Therefore, not only is defendant mistaken that Lucy was impeached, he has forfeited any objection to the State's foundational questions to Lucy.

¶ 71 Our finding of forfeiture is consistent with *People v. Nuccio*, 43 Ill. 2d 375 (1969). In *Nuccio*, a police officer was tried in a bench trial for murder for the on-duty fatal shooting of the decedent near the Franksville Restaurant, a frequent gathering spot for the decedent and his

friends. The State's cross-examination of defense witnesses insinuated prior misconduct by the defendant including harassment and threats toward the decedent and his friends and "promiscuous[] involve[ment] with the girls who congregated at Franksville, particularly with [the decedent's] girlfriend." *Id.* at 383. The defense witnesses specifically denied the misconduct, but the State never called rebuttal witnesses to prove the misconduct occurred. At the close of the evidence, the defense moved for a mistrial, claiming prejudice from the State's failure to prove the insinuated bad acts. The trial court denied the motion, but on direct appeal the supreme court reversed the conviction based on the "pattern of prejudicial and unsupported insinuations." *Id.* at 394. The court disagreed with the State that the defendant forfeited the issue by failing to object to the questions when they were asked. Rather, the court explained that a criminal defendant in such a situation is "entitled to assume the prosecution would not ask such patently prejudicial questions unless proof of the threats was available." *Id.* The defendant "is under no obligation to object thereto, particularly where he moves for a mistrial as soon as the inability of the State produce such proof is manifested." *Id.*

¶ 72 Turning to the merits, the supreme court noted that it had no confidence that the trial court had limited its consideration to the competent evidence at trial, as "[t]here [was] no indication *** that the court recognized the effect of the prosecution's failure to establish the prejudicial conduct which it insinuated." *Id.* at 395. The court reversed the conviction, noting:

> "Stripped of the haze created by the innuendos, the shooting here was either done by an officer who was the target of a knife being thrown at him by decedent from a distance of 20-30 feet as described by defendant and his witnesses, or it was the wanton killing testified to by the State's witnesses. Where, as here, the guilt of the accused is not manifest, but is dependent upon the degree of credibility accorded by the trier of fact to

> his testimony and that of the witnesses who testify on his behalf, and there appear in the record substantial numbers of unsupported insinuations which, if considered, could have seriously impeached the credibility of the defendant and his witnesses, and there is no indication of the court's awareness of this impropriety even though it is brought to his attention, it is our opinion that justice and fundamental fairness demand that the defendant be afforded a new trial free from such prejudicial misconduct." *Id.* at 396.

¶ 73 Defendant cites *Nuccio* to illustrate that damaging insinuations in a State's questions to witnesses may undermine confidence in the outcome of the proceeding. However, defendant does *not* argue from *Nuccio* that he should be excused his failure to lodge a contemporaneous objection in the four instances at issue in this appeal when Lucy answered that she did not recall making a certain statement to Spayth. *Nuccio* would not support the comparison in any case. *Nuccio* did not involve a party's impeachment of its own witness and its attendant restrictions. As we noted, defendant was able in each instance to ascertain the admissibility of the prior inconsistent statements to Spayth. Despite having the information necessary for an objection, defendant made none.

¶ 74 For the foregoing reasons, we hold that defendant forfeited any objection to the propriety of the State's questions to Lucy whether she recalled making prior statements to Spayth.

¶ 75 B. Plain-Error Review

¶ 76 The plain-error doctrine is a limited and narrow exception to the general rule of procedural default. *People v. Sebby*, 2015 IL App (3d) 130214, ¶ 35. The plain-error doctrine allows errors not raised in the circuit court to be considered on appeal when 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. Piatkowski*, 225 Ill. 2d 551, 565 (2007); see also Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."). The burden of persuasion rests with the defendant under either prong of plain-error analysis. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 77 As noted, defendant's primary contention that Lucy was improperly impeached fails because she never was actually impeached, and his alternative contention—which was forfeited—is that the State's questions to Lucy were improper because of damaging insinuations. Defendant offers no argument on plain error. While we would be justified in finding that he thereby has forfeited plain-error review itself (*People v. Nieves*, 192 Ill. 2d 487, 503 (2000)), we will briefly discuss why we believe neither prong of the doctrine was met here.

¶ 78 Without error, there can be no plain error. *People v. Johnson*, 218 Ill. 2d 125, 139 (2005). Likewise, if the alleged error could not have risen to the level of plain error, we need not determine if there indeed was error. *People v. White*, 2011 IL 109689, ¶ 134 ("[W]hen a party has failed to establish any of the other required elements [of the plain- error rule], the court need not consider whether there was error."). We need not decide whether the State's questions to Lucy were improper because, assuming *arguendo* that there was error, it did not constitute plain error.

¶ 79 At the outset, we note that the threshold obstacle to relief here under either prong of the plain-error doctrine consists in overcoming the presumption that the jury followed the court's instruction to disregard both the State's questions and Lucy's answers about her prior statements

to Spayth. See *People v. Taylor*, 166 Ill. 2d 414, 438 (1995) ("The jury is presumed to follow the instructions that the court gives it."). Defendant can carry that presumption under the second prong of plain error only by demonstrating that the State's questions to Lucy constituted "structural error," or a "systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotation marks omitted.) *People v. Thompson*, 238 Ill. 2d 598, 614 (2010); see also *People v. Vargas*, 174 Ill. 2d 355, 363-64 (1996) ("A reviewing court will grant relief under the second prong of the plain error rule only if the error is so fundamental to the integrity of the judicial process that the trial court could not cure the error by sustaining an objection or instructing the jury to disregard the error."). "The [United States] Supreme Court has recognized an error as structural only in a very limited class of cases." *Thompson*, 238 Ill. 2d at 609. "Those cases include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Id.* Even if was error, the State's questioning of Lucy about her prior statements to Spayth was not one of the listed errors, nor was it comparable to one. Therefore, defendant has not established plain error under the second prong of plain-error review.

¶ 80 Pertinent to the closely-balanced-evidence prong, defendant proposes reasons why it was unrealistic to expect the jury to heed the court's directive to disregard the line of inquiry regarding Lucy's statements to Spayth. None of these is persuasive. First, defendant notes that one of the questions to Lucy was about her alleged statement to Spayth that defendant confessed the crime to her. Here defendant cites *People v. Hughes*, 2013 IL App (1st) 110237, ¶ 2, where the court noted the incomparable evidentiary force of a confession:

> "There is nothing more damning than a confession. Its effect has been described as 'incalculable' [*People v. Miller*, 2013 IL App (1st) 110879, ¶ 82]. Indeed, confessions constitute the strongest possible evidence the State may offer in the course of a criminal case."

Both *Hughes* and the case it cited, *Miller*, involved the admission at trial of a defendant's first-hand conversation to law enforcement. See *Hughes*, 2013 IL App (1st) 110237, ¶¶ 2-35; *Miller*, 2013 IL App (1st) 110879, ¶ 15. By contrast, Lucy was not asked whether defendant confessed to her. She was asked whether she told Spayth that defendant confessed to her. She denied saying this to Spayth, and the State never proved that she did. Taking a more positive view than defendant of the mental discipline of jurors, we do not accept that jurors will fasten onto the mere mention of a confession and not relent despite the context of that reference, and, more importantly, despite an express instruction to disregard the mention.

¶ 81 Second, defendant notes that the questions to Lucy regarding her statements to Spayth were unique evidence in the State's case because only those questions alluded to Lucy's concern that defendant might have a reason to murder Anderson and Calcano. Defendant elaborates:

> "*** [T]he State examined Lucy and Nora with an eye to establishing that when the defendant encountered them with Anderson and Calcano, the defendant suggested that they accompany Gaither to the party house while he rode with the victims. [Citation.]. Since this arrangement had little significance on its own, the State's motive theory had to make something sinister about it. Therefore, the State adduced the hearsay evidence that Lucy was 'concerned' when the defendant appeared with Gaither, 'concerned' when Anderson and Calcano did not appear at the party, and 'upset' when the defendant arrived late. [Citation.] In addition, one of the themes of the State's *** closing argument was

> that Lucy was trying to protect herself from the defendant and that the State had proven its case because it had 'defendant's own words spoken to his girlfriend.' [Citation.] Under the circumstances, it would have been exceedingly difficult for the jury to exert the mental discipline necessary to ignore the illegitimate impeachment of Lucy. *Lucy's statements were exploited for their substantive value, not for their impeachment value*." (Emphasis added.)

A comment on the italicized language is in order. When the State referenced in closing argument defendant's " 'words spoken to Lucy,' " the State meant defendant's words that Lucy reported in her grand jury testimony, which was admitted as substantive evidence. If defendant means to suggest that the State *also* "exploited for their substantive value" Lucy's statements to Spayth, defendant is absolutely incorrect, for neither in its remaining case nor in closing argument did the State reference its exchanges with Lucy regarding her statements to Spayth. Moreover, there was no "illegitimate impeachment of Lucy" regarding her statements to Spayth because there simply was no impeachment.

¶ 82 Proceeding onward, we do not doubt that the jury was capable of disregarding the State's questions to Lucy about her statements to Spayth. Again, going to the issue of jury psychology, we will not presume that the jurors were so fixated on understanding why defendant might have killed Anderson and Calcano that they were incapable of following a directive to disregard testimony that tended to suggest a motive. Motive was not element of the offense (*People v. Agnew-Downs*, 404 Ill. App. 3d 218, 228 (2010)), nor was the jury instructed that it had to find a motive in order to convict. Understandably, the State proposed a motive to the jury, suggesting that defendant was jealous given Lucy's prior physical relationship with Anderson and Calcano and defendant's finding the three in a car along with Nora. However, the State's closing

argument never mentioned that Lucy might have been worried about defendant's intentions. Also, Lucy's attitude toward defendant was not a necessary component of the jealousy theory.

¶ 83 Finally, defendant claims it is significant that the jury heard Lucy's testimony on January 29 but was not given the curative instruction until January 31, the last day of trial. Thus, according to defendant, "[t]he bell had been ringing in the ears of the jury for two days." Nowhere in those two days, however, did the State mention Lucy's testimony about her statements to Spayth. Thus, defendant, who has the burden of persuasion under plain-error review, has not eliminated the equally plausible alternative that, in light of the State's silence about that aspect of Lucy's testimony, the "ring" in the jury's ears quieted down to a negligible whisper, or ceased altogether.

¶ 84 Therefore, since defendant has not overcome the presumption that the jury followed the court's instruction to disregard the State's exchanges with Lucy about her statements to Spayth, we find any error cured. While our holding dispenses with the need to consider whether the evidence at trial was closely balanced, we comment briefly on the evidentiary picture developed below. A "closely balanced" case is one where the outcome would have been different if the impropriety had not occurred. *People v. Sebby*, 2015 IL App (3d) 130214, ¶ 51. This criterion has been found met in cases amounting to "credibility contests" where defense and prosecution witnesses give conflicting accounts of the incident and there is no extrinsic evidence to corroborate or contradict either version. See, *e.g.*, *People v. Naylor*, 229 Ill. 2d 584, 608–09 (2008); *People v. Getter*, 2015 IL App (1st) 121307, ¶ 65; *Miller*, 2013 IL App (1st) 110879, ¶¶ 56, 58.

¶ 85 This was not such a case. There were no conflicting accounts of the killings. The version put forward by State's witness Peterson was that defendant (1) shot the victims from

behind while they sat in the front seat of Anderson's black Cadillac, (2) beat Calcano in the face with the gun, and (3) returned later with Peterson in Gaither's car to douse the Cadillac and the bodies with gasoline. The condition of the bodies (both of them shot and doused with gasoline, Anderson burned, Calcano beaten) and the car (soaked with gasoline) when found supported Peterson's account of the killings. The beer bottle bearing defendant's DNA corroborated Peterson's testimony that defendant was drinking from a beer bottle before he shot Anderson and Calcano. Gaither corroborated Peterson's account of defendant's attempt to burn the bodies. Both Nora and Lucy (the latter largely through her grand jury testimony) attested to the smell of gasoline in Gaither's car later in the evening, and Nora had earlier smelled gasoline when defendant, Peterson, and Gaither entered the home where the gathering was ongoing. In her grand jury testimony, Lucy testified that sometime after Gaither dropped off her and defendant, he came to her house and cleaned blood after his shoes. Lucy's grand jury testimony also concerned defendant's conduct following the events of March 15 and 16, 1998. According to Lucy, when she told defendant that the police wanted to question her, he suggested that she "think of something" to tell them. Lucy also testified that defendant threatened her and said he wanted to "get rid of" Gaither because (in Lucy's words) "I guess she was there." This conduct betrayed consciousness of guilt.

¶ 86 Defendant contends, however, that it is an overreach to interpret Lucy's grand jury testimony as stating that defendant had blood on his shoes when he came to her house. The question to Lucy was, "[W]hen you say [defendant] came back to the house and he had blood on his shoes, when was that?" Defendant claims it is significant that the only mention of blood was in the question to Lucy and not in her answer. We disagree. Lucy was asked when it was that defendant arrived at her house with blood on his shoes. She gave an approximation of the time

of arrival and then described how defendant cleaned his shoes. If defendant has in view what Lucy could have meant he was cleaning off his shoes *other than* the blood to which the question referred, he does not suggest it to us. If defendant is insinuating instead that the question was improper for assuming a fact—that defendant had blood on his shoes—we point out that defendant stipulated to the grand jury question-and-answer. He cannot now limit the natural inferences to be drawn from that testimony.

¶ 87 Peterson's and Gaither's credibility was important to the State's case, and defendant claims their credibility was called into question by (1) Peterson's admitted lies to law enforcement as his version of events unfolded through several police interviews; (2) his admission that, at some point after defendant was seen "doing something" in the attic of the home, Peterson returned to dispose of a gun that was in the attic; and (3) Gaither's admission that she told prosecutors just a week before trial that on the night of the killings she returned alone with Peterson to the alley. This did not, however, make the case a *credibility contest*, as there were no witnesses who gave an account of the killings or their aftermath that contradicted Peterson's and Gaither's respective accounts. The physical evidence at trial was consistent with defendant's guilt, and the testimony, particularly Lucy's prior grand jury testimony, connected defendant to the killings.

¶ 88 Consequently, even if we assumed there was error *and* assumed that the jury instruction did not cure it, we would still not grant defendant relief because the error was not a structural error and the evidence was not closely balanced.

¶ 89 III. CONCLUSION

¶ 90 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 91 Affirmed.