NOTICE
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2016 IL App (5th) 130289-U

NO. 5-13-0289

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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 of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 11-CF-378
	)	
TRENTON JEFFERSON,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justice Chapman concurred and Justice Moore specially concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court committed reversible error in admitting the irrelevant and prejudicial testimony of a witness regarding statements made by the defendant.

¶ 2 The defendant, Trenton Jefferson, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)), on an accountability theory, and was later sentenced to a term of 30 years imprisonment. On appeal, the defendant alleges that during his trial, the following reversible errors occurred: (1) the defendant's ex-girlfriend, Rochelle Davis, was allowed to testify at length about statements the defendant made that were not admissions to the charged offense, and further testified that the defendant was a violent

person, although he did not put his own character at issue; (2) the trial court failed to properly question potential jurors regarding the four principles set forth in Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)); (3) the State committed prosecutorial misconduct during opening statements and closing arguments; and (4) the evidence presented by the prosecution was insufficient to sustain the defendant's conviction. For the reasons that follow, we reverse and remand for a new trial.

¶ 3 BACKGROUND AND PROCEDURAL HISTORY

¶ 4 At approximately 2 a.m., on April 11, 2010, a citizen called to report that shots had been fired in the 1400 block, between 44th and 45th streets, in East Saint Louis, Illinois. The aftermath revealed that Marcus Gosa (Gosa), 17 years of age, had been shot and killed in the alleyway, while a friend that he was with at the time escaped. Later that morning, around 10:30 a.m., the East St. Louis Police Department requested the services of the Illinois State Police to assist in the investigation of the homicide.

¶ 5 The results of the investigation eventually led to a grand jury indictment of the defendant on March 18, 2011. Approximately one month after the defendant was indicted for first degree murder, St. Louis police officers shot and killed the other suspect in the Gosa murder, Renaldo Brownlee (Brownlee), after he had pulled a gun on an officer during an armed robbery.

¶ 6 The defendant's first jury trial took place in September of 2012. During deliberations, the jury sent out notes, posing questions to the court. A couple of the questions addressed the theory of accountability, and how that theory applied to a charge

of first degree murder. Ultimately, the circuit court declared a mistrial due to a hung jury. The defendant's second jury trial began in February of 2013.

¶ 7 During the *voir dire* of the second trial, the court informed the entire panel of prospective jurors that they needed to both understand and agree with several principles of law. The court gauged whether the potential jurors agreed with and understood those principles by asking several questions, which included the four principles set forth in Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). The court addressed Rule 431(b) with the potential jurors by combining principles (1) and (2). The court then combined principles (2) through (4), while addressing the prospective jurors.

¶ 8 Following opening statements, the State called its first witness, Kiyanna Howard. Howard informed the jury that at the time of the shooting, she had been dating Brownlee for a few days. She continued dating Brownlee up until his death in 2011. Addressing the night in question, Howard testified that Brownlee called her, and asked if she would like to "ride and chill" with he and the defendant. The defendant and Brownlee picked Howard up around midnight. The defendant was in the driver's seat, Brownlee was in the front passenger seat, and Howard rode in the back seat of the vehicle. They drove up and down State Street, while listening to music. At some point during the ride, Howard fell asleep in the back seat of the car. She awoke out of her sleep after hearing a car door being slammed shut. Howard sat up, observed the defendant standing in front of the car, and asked Brownlee what the defendant was doing. She laid back down, and seconds later, Howard heard three or four consecutive gunshots. Following the gunshots, the defendant ran back to the car, reentered the driver's side door, and drove off. According

to Howard, as the defendant sped away, he said, "Let's go. Let's go. I think I got that nigger." Howard further stated that when the defendant got back into the car, it appeared as if he was holding something in his hands, but she did not observe a gun. At that point in the evening, Howard informed the defendant that she was ready to go home. The defendant drove around for another hour or two, and then stopped at a motel near Centreville, Illinois. Howard and Brownlee stayed the night at the motel. Several days after the incident, Howard spoke to the police. She initially told the police that she knew nothing about what happened because she was "scared," and "didn't want nothing [*sic*] to do with it."

¶ 9 On cross-examination, Howard testified that she missed and loved Brownlee, and that remembering him was important to her. With regard to the circumstances of the shooting, Howard testified that she initially told police that she was not present, but then changed her story after being further confronted by law enforcement in subsequent questioning. The police told Howard that they wanted to make sure she did not end up in the suspect category. Defense counsel then pointed out inconsistencies regarding the statement she provided earlier to police, and her testimony at trial. Howard testified that she heard three or four gunshots, but admitted telling police that she did not know how many shots were fired. Similarly, Howard testified that the defendant stated, "I think I got that nigger," but she could not remember if she told the police that the defendant said "I think I hit somebody" and "I think I hit [*sic*] dude." At trial, Howard stated that she did not see a gun in the defendant's hands, but he appeared to be hiding something. In her

previous statement to police, however, Howard did not mention that the defendant appeared to be hiding something in his hands.

¶ 10 The State's next witness, Rochelle Davis, the defendant's ex-girlfriend and the mother of his child, testified that she had known the victim, Gosa, since the sixth grade. Davis further stated that the defendant did not know Gosa, but believed the defendant killed him for several reasons. First, she thought that Gosa had been murdered by the defendant because he told her, "I'm going to go to the club and I'm going to hop all up in the Charlie Boys' face and be like one shot, man down." The Charlie Boys were a clique in Washington Park, Illinois. Davis testified that this statement alerted her to the fact that the defendant had killed Gosa because, "why other would he say that? Like how would you know what was going on?"

¶ 11 The next occasion which made Davis think that Gosa had been killed by the defendant was when he threatened her. The defendant and Davis were arguing in a car. The defendant pulled over in a park in East St. Louis and said, "If you tell on me, I kill [*sic*] you." The argument was unrelated to Gosa, but Davis felt that since she knew about the murder, the defendant "just brought it up." Davis testified that she was scared of the defendant, and believed that he would kill her.

¶ 12 On another date, the defendant and Davis were at her grandmother's home in St. Louis, Missouri. After the defendant ended a telephone conversation with Brownlee, the defendant accused Davis of trying to set him up. Davis denied the accusation. The defendant then explained to Davis that he had seen two boys walking in the alley. The defendant and Brownlee then got out of the car. Brownlee started shooting at the boys in

the alley, and then the defendant started shooting as well. The defendant said he heard Gosa scream, and it sounded like he had fallen over something.

¶ 13 Davis' testimony then shifted to events that occurred the day preceding the murder. Davis testified that she saw the defendant on the night of April 10, 2010, when she was picked up in a green Buick that was owned by the defendant's brother, Carbitt. Carbitt was driving, Brownlee was in the front passenger seat, and Brownlee's cousin, Leon, and the defendant were in the back seat. Before being dropped off at her aunt's house that evening, Davis noticed that the defendant, Leon, and Brownlee all had 9mm guns.

¶ 14 A few days later, Davis gave a statement to the police. Davis testified that she lied to the police when she said that the defendant was with her on the night in question. She lied to the police to protect herself because she was afraid of the defendant and knew him to be very violent. He had threatened her in the past, and she took those threats very seriously.

¶ 15 Davis eventually stopped dating the defendant, and told him that she had started a new relationship with someone else. The defendant responded by saying, "You tell Dude don't end up like Marcus did." Davis testified that on an unspecified date, after the relationship had ended, she visited the defendant, and noticed that he "was kind of like remorseful, he was crying and say [*sic*], 'I hate I did it. I didn't mean to do it.' " Finally, Davis stated that during her relationship with the defendant, he cheated on her and had given her a sexually transmitted disease.

¶ 16 On cross-examination, Davis testified that she does not like the defendant. Davis also testified that the defendant confessed to her that he had murdered Gosa before she

provided a statement to the police. Defense counsel then impeached her testimony with the grand jury proceedings in which Davis testified that the defendant did not tell her about the murder until "even after the police came." Davis admitted that both of those statements could not be true. Davis stated that she told the police that the defendant carried a .38 caliber revolver. She did not tell police that she saw the defendant with a 9mm gun the day before the murder. Regarding the night of the murder, Davis testified that the defendant told her that a total of six gunshots were fired. The defendant and Brownlee had each fired three shots. During redirect examination, Davis informed the jury that she was not making this story up to hurt the defendant for cheating or giving her a sexually transmitted disease.

¶ 17 Reshon Farmer, the defendant's former cellmate at the St. Clair County jail, testified next. Farmer admitted that he entered into a plea deal with the State to testify against the defendant in exchange for a 10 year prison sentence related to a charge of armed robbery. Farmer testified that in May of 2011, the defendant spoke about his indictment, and admitted that he "killed the dude" in a drive-by shooting because "they was into it with them." The defendant rode in the passenger seat while his friend, Naldo, drove a green car. According to Farmer, only the defendant fired shots. The defendant never mentioned the victim's name. Farmer stated that the victim "was from Washington Park and they was into it with Washington Park. So, he [(the defendant)] felt like he, you know, had to do what he did." Although the defendant did not know Gosa personally, he was familiar with him "from being around Washington Park with all those other guys."

¶ 18 On cross, Farmer testified that he told his attorney to contact the State because he had information about the defendant's case. Although Farmer knew of this information in 2011, he did not have his attorney contact the State until January of 2013, approximately one month before the defendant's second trial. Farmer also had information about two codefendants in his own case. In exchange for his testimony against all three defendants, the State offered Farmer a 10 year prison sentence, of which he would have to serve only 50% of the time. In addition to having to serve five years, Farmer would also receive 32 months worth of credit for time already served in custody. Thus, in exchange for his testimony, Farmer would be released from prison in two years and four months. Before entering into the plea agreement, the State sought a prison sentence of 21 years. Farmer would have had to serve 85% of that sentence, almost 18 years. Had he not entered into the plea agreement, Farmer would have had to serve approximately 15 more years in prison. Farmer stated that he cared about serving as little time as possible. He also stated that he and the defendant did not get along. As a result of their acrimonious relationship, Farmer requested to be transferred to a different jail cell.

¶ 19 Juliette Gosa, the victim's mother, testified next. At the time of the murder, her son was a senior in high school, and volunteered as a youth mentor. She further stated that her son lectured younger kids in the area about the dangers of drugs and gangs. Juliette did not know if her son knew the defendant.

¶ 20 The State's physical evidence, while limited, offered a few insights. First, the autopsy performed on Gosa demonstrated that he died of a single gunshot wound that entered through the right side of Gosa's back, traveled through his right lung, heart, left

lung, and exited the left side of his chest. The police never recovered the bullet that killed Gosa. At the crime scene, police officers recovered two 9mm shell casings, and it was later determined that the casings were fired from the same gun. No fingerprints were found on the casings. The police investigation also showed that the vehicle that had been used in the murder had been facing west, and the area where the shell casings were found corresponded to the passenger side of the vehicle, although the location of the shell casings was not necessarily indicative of exactly where the shots had been fired from. Additionally, it was not known if the shell casings were discharged from the weapon that was used to kill Gosa. Police observed tire tracks at the scene of the crime, but they were not preserved. While footwear impressions were preserved from the crime scene, they did not match the shoes worn by Gosa, Brownlee, or the defendant. Following the presentation of its evidence, the State rested. The defendant did not present any evidence.

¶ 21 During closing arguments, the State argued that the testimony of Howard, Davis, and Farmer established that the defendant either shot and killed Gosa, or at the very least, was involved in the shooting that caused Gosa's death. The State pointed out that the details from the three witnesses did not always match, but that did not mean they were lying, as Davis' and Farmer's testimony was based upon what the defendant said. Contrary to the State's position, the defense argued that the defendant was not guilty of first degree murder. In support of its argument, the defense asserted that the testimony of Howard, Davis, and Farmer could not be believed. The defense further claimed that the State did not carry its burden of proof. In doing so, the defense argued that the State's

burden was beyond all reasonable doubt. Finally, the defense argued that the evidence was insufficient to convict the defendant of first degree murder on a theory of accountability.

¶ 22 In its rebuttal argument, the State pointed out that its burden of proof was beyond a reasonable doubt, not all doubt, as claimed by counsel for the defendant. The State argued that it met its burden based upon the evidence presented. Instead of concluding its remarks, however, the State created an alternative scenario in support of its accountability theory based upon Howard's testimony. Although Howard testified to what the defendant said and did on the night in question, the State took that testimony and attributed it to Brownlee. Specifically, the State argued that Brownlee shot and killed Gosa, and returned to the car and said, "Let's go. Let's go. I think I got that nigger." The State explained that in this scenario, the defendant aided Brownlee in an escape, which was sufficient to find the defendant guilty of first degree murder on a theory of accountability.

¶ 23 After deliberating, the jury found the defendant guilty of first degree murder, but not guilty of personally discharging the firearm that caused Gosa's death. The court sentenced the defendant to a term of 30 years in prison, and the defendant timely filed his notice of appeal.

¶ 24 ANALYSIS

¶ 25 On appeal, the defendant argues that several reversible errors were committed during his trial. First, the defendant claims that he was denied a fair trial because Davis was allowed to testify at length about statements he made that were not admissions to the charged offense of first degree murder. As part of this argument, the defendant also

contends that Davis was improperly allowed to testify about the defendant's violent character. Second, the defendant contends that the trial court failed to properly question potential jurors regarding the four principles set forth in Supreme Court Rule 431(b). Third, the defendant argues that the State committed prejudicial error during opening statements and closing arguments. The defendant's final argument is that the State failed to present sufficient evidence to prove that he was guilty beyond a reasonable doubt of first degree murder.

¶ 26 We begin our analysis with the defendant's first contention of error that the defendant's statements, as testified to by Davis, should not have been admitted at trial. According to the defendant, these statements were inadmissible hearsay. Even if the statements were not inadmissible hearsay, the defendant maintains that they were too vague to be considered admissions of guilt, and the prejudicial effect of Davis' testimony far outweighed its probative value. As such, the defendant argues that this evidence should have been excluded at trial. While the defendant admits that he did not raise this issue at trial or in a posttrial motion, he argues that these errors should be reviewed under the first prong of the plain-error rule. Alternatively, the defendant argues that his trial counsel was ineffective for failing to object to this evidence. We start by reviewing this claim under the plain-error doctrine.

¶ 27 In order to preserve a claim of error for review, counsel must object to the error at trial, and must also include the allegation of error in a written posttrial motion. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). The defendant admits that he did neither. As such, the defendant has forfeited this claim of error on direct appeal. However, the plain-

error rule "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error" where: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). When reviewing a claim of error under the first prong of the plain-error rule, a commonsense analysis of all the evidence must be conducted in order to determine whether the evidence is closely balanced. *People v. Belknap*, 2014 IL 117094, ¶ 50. That analysis must be qualitative as opposed to quantitative, and must also take into account the totality of the circumstances. *Belknap*, 2014 IL 117094, ¶ 62. It is the defendant that bears the burden of persuasion. *Thompson*, 238 Ill. 2d at 613. Before determining whether the evidence was closely balanced, we must first determine whether Davis' statements were admissible at trial. *Thompson*, 238 Ill. 2d at 613. A trial court's decision on the admissibility of evidence will not be overturned absent a clear abuse of discretion. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 28 As mentioned previously, the defendant claims that Davis' testimony concerning statements that he allegedly made were inadmissible hearsay, or alternatively, were too vague to be considered admissions of guilt, and the prejudicial effect of Davis' testimony far outweighed its probative value. The State, on the other hand, argues that the plain error doctrine does not apply because all of Davis' testimony was properly admitted. In

particular, the State contends that Davis' testimony regarding the defendant's statements qualifies as admissions by a party-opponent, and is relevant.

¶ 29 Hearsay is an out-of-court statement made by someone other than the declarant, which is offered to prove the truth of the matter asserted. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). Hearsay is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule. *Caffey*, 205 Ill. 2d at 89. One of the exceptions to the hearsay rule, as pointed out by the State, can be found in Illinois Rule of Evidence 801(d)(2), admission by a party-opponent. See Ill. R. Evid. 801(d)(2). In a criminal case, a statement is an admission by a party-opponent if the statement is being offered against the defendant, and is the defendant's own statement. Ill. R. Evid. 801(d)(2). Thus, an admission by a party-opponent is admissible at trial when a witness testifies to an out-of-court statement made by the accused that is then offered against the accused. *People v. Aguilar*, 265 Ill. App. 3d 105, 113 (1994); Ill. R. Evid. 801(d)(2). Although statements may qualify as admissions by a party-opponent, such statements are still subject to relevancy requirements, as well as all other exclusionary rules. *Aguilar*, 265 Ill. App. 3d at 110; see also *Moran v. Erickson*, 297 Ill. App. 3d 342, 358 (1998) ("[w]hile statements of a party are not subject to hearsay restrictions, they are subject to relevancy restrictions ***"). Evidence is relevant when it renders a matter of consequence more or less probable or tends to prove a fact in controversy. *People v. Pelo*, 404 Ill. App. 3d 839, 864 (2010). Evidence may be excluded on grounds of irrelevancy if the offered evidence "has little probative value due to its remoteness, uncertainty or its possibly unfair prejudicial nature." *People v. Ward*, 101 Ill. 2d 443, 455 (1984).

¶ 30 With these principles in mind, we now turn to the defendant's argument concerning the statements testified to by Davis that were allegedly made by the defendant. According to Davis, she first learned that the defendant had killed Gosa after the shooting occurred when the defendant stated, "I'm going to go to the club and I'm going to hop all up in the Charlie Boys' face and be like one shot, man down." Under Rule 801(d)(2), this is not hearsay because this is the defendant's own statement offered against him. The pertinent question is whether this testimony is relevant. Based upon our review of the record, this statement is of little probative value and is unfairly prejudicial. At issue in this case is whether the defendant committed the murder of Gosa. Davis was not present during the shooting, and had no personal knowledge about how the shooting occurred. Nothing in this statement referenced Gosa's death, nor did it contain an admission by the defendant that he shot anyone. Furthermore, Davis, although having no personal knowledge of the shooting of Gosa, testified that numerous shots were fired, as opposed to a single shot being fired that killed someone. Thus, Davis' testimony regarding the current statement at issue appears to be about an unrelated shooting. What little probative value this testimony has is far outweighed by the potential for unfair prejudice against the defendant.

¶ 31 The State argues that the testimony proffered by Davis is relevant because it is corroborated by Farmer's testimony that the defendant's motive for the murder of Gosa was his dislike of people from Washington Park. We are not persuaded by the State's argument. Farmer's testimony is too vague to corroborate Davis' testimony. Farmer's testimony encompasses everyone from Washington Park, including Brownlee, the

defendant's friend, and other suspect involved in the murder, while Davis' testimony involved a specific group of people from Washington Park, the Charlie Boys. Further, the testimony of Gosa's mother indicated that her son was not a member of the Charlie Boys clique, as he was a mentor who reached out to the youth about the dangers of gangs. There could be countless reasons why the defendant may have made this statement, none of which necessarily involves an admission to murder, let alone this murder. Based upon the evidence before this court, we find that the trial court erred in allowing Davis to testify as to this statement, allegedly made by the defendant.

¶ 32 The defendant next takes exception to Davis' testimony about an argument they had while in a car. The defendant pulled over on the side of the road and said, "If you tell on me, I [*sic*] kill you." This statement, like the last statement, is far too vague to be considered relevant. Most notably, this statement has nothing to do with Gosa, as Davis admitted that she and the defendant were arguing about something entirely unrelated to Gosa's death. At its core, this statement, allegedly made by the defendant, is a threat to kill his girlfriend, which is wholly unrelated to the murder of Gosa. A defendant's threat on a collateral matter to a person other than the deceased is inadmissible because it is prejudicial and irrelevant. *People v. Robinson*, 189 Ill. App. 3d 323, 334-35 (1989). Evidence of this kind is unfairly prejudicial not only because it improperly encourages a jury's guilty verdict on the basis of its hostility against the defendant due to his violent tendencies, but also, it "erroneously motivates a jury to find that the defendant may be predisposed to act violently and therefore committed the violent crime for which he is charged." *Robinson*, 189 Ill. App. 3d at 335. We agree with the defendant that this

testimony is too vague to be considered an admission, and it did nothing more than to espouse the jury's impermissible belief that the defendant had a propensity for violence. Accordingly, the trial court erred in allowing Davis to attest to this statement.

¶ 33 The third statement that the defendant argues should not have been admitted at trial is more speculative than the last two. Davis claimed that on an unspecified date she went to visit the defendant. According to Davis, the defendant was "kind of like remorseful, he was crying and say [*sic*], 'I hate I did it. I didn't mean to do it.' " This statement does not describe what the defendant did, and Davis failed to provide any context for this statement. This testimony, therefore, is unclear, and leaves this court with little confidence that it was relevant to the murder of Gosa. Based upon this uncertainty, we find that Davis' testimony regarding this statement, like the last two statements, should not have been admitted at trial. This statement lacked probative value and was unfairly prejudicial.

¶ 34 The fourth statement at issue involves a conversation the defendant had with Davis concerning her new boyfriend. Davis testified that the defendant said, "You tell Dude don't end up like Marcus did." The State admits that this statement, standing alone, may be too vague or attenuated from the murder to be probative of the defendant's involvement, but argues that this statement is relevant and admissible when considered in the context of all of the other statements the defendant made. The previous three statements do not support the State's position as those statements should not have been admitted at trial unless more of a foundation was laid. However, there is one conversation that allegedly took place between the defendant and Davis, which

implicated the defendant in the murder of Gosa. Davis testified that the defendant saw two boys walking in an alley, and that he and Brownlee got out of the car and opened fire. Davis also testified that the defendant heard Gosa scream, and it sounded like he had fallen over something. The defendant does not contest the admissibility of this testimony on appeal. When this testimony is considered in context with the defendant's statement, "You tell Dude don't end up like Marcus did," it paints a picture that the defendant is warning Davis that her boyfriend should be careful, or else he will wind up like Marcus, a man who the defendant admitted to Davis he killed. We agree with the State that when this statement is taken in context, it is probative of the alleged offense. As such, this statement was relevant and properly admitted at trial.

¶ 35 The defendant's final contention pertaining to Davis' testimony concerns her responses to a line of questioning about why she initially lied to the police about the defendant's whereabouts on the night in question. After admitting that she initially lied to the police, the following colloquy ensued between the State and Davis:

> "State: Okay. What did you tell them?
>
> Davis: I told them that Trenton was with me. But he wasn't. You know, I did it to protect myself because he's a violent person, that I know him to be, and I was with him almost two years, so I know. And it was to protect me and him, but−I mean, I had to do what was right at the end of the day because I knew Marcus as well. You know, wrong is wrong.
>
> State: Okay. And you said that you were afraid of the defendant?
>
> Davis: Yes, sir.

State: Because he was violent?

Davis: Uh-huh. Very.

State: And you said that he had already threatened you?

Davis: Yes.

State: You took those threats seriously?

Davis: Very serious."

The defendant contends that Davis' testimony was improper character evidence. Specifically, the defendant claims that the State erroneously elicited other crimes evidence during this line of questioning. In response to the defendant's position, the State argues that the defendant's character was not at issue; rather, the issue centered on why Davis did not cooperate with the police. The State contends that the question was proper under the circumstances, and that it had the right to anticipate and deflect the impact of potential impeachment of its witnesses.

¶ 36 Evidence of other crimes is not admissible to show a defendant's propensity to commit a crime. *People v. Haley*, 2011 IL App (1st) 093585, ¶ 55. The reason other crimes evidence is not admissible is because it tends to overpersuade the jury to convict a defendant based on its belief that the defendant is of bad character and deserves punishment. *Haley*, 2011 IL App (1st) 093585, ¶ 55. However, if the evidence of another crime is relevant, it can be introduced for any purpose other than to show the defendant's propensity to commit criminal acts.

¶ 37 In the instant case, Davis' first response to the State's question went beyond the call of the question, but her response was relevant as to why she lied to the police. This

testimony was not being offered to show the defendant's propensity to commit other crimes, and it was limited to what occurred in this case. As such, Davis' first response to the State's initial question was properly admitted into evidence.

¶ 38 The remaining questions and answers, however, harken back to our earlier discussion pertaining to the defendant's threat of "If you tell on me, I [*sic*] kill you." The State specifically made reference to the fact that the defendant had already threatened Davis, which we determined was error. Therefore, we find that the remainder of Davis' testimony should not have been admitted at trial.

¶ 39 Having found that several errors occurred during Davis' testimony, we must next determine whether these errors necessitate reversal and remand for a new trial under the first prong of the plain-error rule, as urged by the defendant. On appeal, the State argues that the evidence was not closely balanced. Although the State admits that the testimony of Howard, Davis, and Farmer did not match on all details, and that the precise involvement of the defendant as the principal shooter or as an accountable participant is "muddy at best," it nonetheless argues that these considerations do not undermine the strength of the evidence presented. Specifically, the State contends that any inconsistencies in the testimony of the witnesses relate not to a lack of credibility, but rather concern the defendant's ability to change the details of his involvement in the shooting. The State further argues that the uncertainty of the defendant's participation as a principal or accomplice is not material, as either theory equally constitutes the offense of first degree murder.

¶ 40 We believe the State's arguments are somewhat over-reaching, and we are far from convinced that the evidence against this defendant was overwhelming. Our commonsense, qualitative analysis of the State's evidence, when viewed in the totality of the circumstances, leads us to conclude that the defendant has met his burden of persuasion that the evidence in this case was so closely balanced that the above errors alone threatened to tip the scales of justice against the defendant.

¶ 41 We cannot ignore that the jury's verdict was inconsistent with the testimony of the State's only occurrence witness, Howard. According to Howard, the defendant drove the car and was the sole shooter of Gosa, and yet, the jury determined that the defendant was not guilty of personally discharging the firearm that caused Gosa's death. Further, Howard provided no testimony to support the defendant's conviction of first degree murder on a theory of accountability. Based upon Howard's account of the murder, the defendant, Brownlee, and Howard were hanging out in a car, cruising the street while listening to music, until the defendant decided to pull over and shoot the victim. Simply put, Howard's recitation of the murder indicates that the defendant was solely responsible for the death of Gosa. Thus, based upon the record before us, it appears that the jury rejected Howard's testimony regarding her version of events that led to Gosa's death. Accordingly, the jury's verdict, when compared to Howard's testimony, does not make the evidence in this case overwhelming.

¶ 42 Farmer's testimony was also problematic. Farmer, the defendant's former cellmate, had no direct knowledge of how the murder occurred. Rather, his testimony was based solely on what the defendant allegedly told him. According to Farmer, the

defendant told him that he was the only shooter involved in the murder of Gosa, although his friend, Brownlee, was the driver of the car. Similar to Howard's testimony, Farmer's testimony regarding the murder implicates the defendant as the only person who shot and killed Gosa, which is not consistent with the jury's verdict. From the record, it would appear that the jury also rejected Farmer's testimony as to who shot and killed Gosa. Additionally, Farmer received approximately 13 years less than the sentence the State originally sought to impose against him in exchange for his testimony against two of his codefendants and the defendant in this case. On this basis alone, the jury could have begun to doubt the credibility of Farmer as a witness. Farmer further admitted that he cared about serving as little time in prison as possible, and elected to testify after holding onto this information for approximately 20 months. Farmer's testimony is highly suspect, and when his testimony is viewed in the totality of the circumstances, it reaffirms our conclusion that the evidence in this case was closely balanced.

¶ 43 Our conclusion is further bolstered by the fact that the State's physical evidence did not connect the defendant to Gosa's murder. There were footprints found at the crime scene, but they were not a match to the defendant. There was no DNA evidence, nor were there fingerprints found which linked the defendant to this crime. The only evidence which tended to implicate the defendant in this murder on a theory of accountability came from Davis. In her testimony, Davis claimed the defendant told her that he and Brownlee both exited the car and began shooting. Davis also stated that she observed the defendant carrying a 9mm handgun the day before the murder occurred. This testimony, however, was inconsistent with what she told police only days after the

murder. Davis also admitted that she had initially lied to police about the defendant's whereabouts on the night in question. Moreover, as explained above, Davis' testimony was wrought with errors. It is likely these several errors encouraged the jury to convict the defendant on the basis of the defendant's violent tendencies, as opposed to evidence concerning the crime for which he was charged. Given the totality of the circumstances, we cannot conclude that these errors did not impact the verdict of the jury. Accordingly we must reverse and remand this cause for a new trial.

¶ 44 In conclusion, our commonsense, qualitative analysis of the evidence, when viewed in the totality of the circumstances, leads us to conclude that the evidence was so closely balanced that the errors in this case alone threatened to tip the scales of justice against the defendant. While we find that the evidence in this case was closely balanced, and reversal of the defendant's conviction and sentence is required, we further conclude, after a careful review of the record, that there was enough evidence presented by the State to prove the defendant guilty beyond a reasonable doubt. Thus, remanding this cause for another trial will not violate principles of double jeopardy. *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 42. In reaching this finding, we make no determination as to the defendant's guilt that would be binding on retrial. *Mueller*, 2015 IL App (5th) 130013, ¶ 42.

¶ 45 Although the above issue is dispositive of the outcome of this appeal, we believe it best to briefly discuss the defendant's remaining contentions, as these issues are likely to recur on remand. The first issue is the defendant's argument that the trial court failed to comply with the requirements of Supreme Court Rule 431(b) when addressing the venire.

We remind the trial court that Rule 431(b) requires "a specific question and response process." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). On remand, we are confident that the court will follow the proper method of questioning by asking each potential juror whether he or she understands and accepts each of the principles in Rule 431(b). See *Thompson*, 238 Ill. 2d at 607.

¶ 46 The defendant's final point on appeal is that the State committed reversible error during opening statements and closing arguments. After reviewing the record, we agree that the State, during closing arguments, created an improper hypothetical based upon Howard's testimony. This scenario was not supported by the facts in the record, nor was it based upon any reasonable inferences that could have been drawn from the evidence.

¶ 47 It is well established that a prosecutor has wide latitude in making closing arguments, and is permitted to comment on the evidence and any fair, and reasonable inferences it yields. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Prosecutors, however, may not argue assumptions or facts not contained in the record. *People v. Kliner*, 185 Ill. 2d 81, 151 (1998). In this case, the State's hypothetical unilaterally changed Howard's testimony regarding how the murder was committed, by attributing the defendant's statement, "Let's go. Let's go. I think I got that nigger," to Brownlee. This hypothetical was not based on the evidence. On remand, the State should refrain from making statements during closing arguments that are contradicted by the record.

¶ 48 The defendant also claims that the State improperly argued the burden of proof during closing arguments. We note that counsel for the defendant argued that the jury could only convict if they found the defendant guilty "beyond all reasonable doubt." The

State, in its rebuttal clarified their burden of proof, and even explained to the jury that there would be no formal instruction on the definition of this burden. We find that the defendant's claims of error in this regard lack merit, as it was the defendant's counsel that improperly stated the burden of proof to the jury.

¶ 49 Finally, the defendant argues that the prosecutor committed error at the end of his opening statement by personally opining that the defendant was guilty. In particular, the defendant takes exception to the prosecutor's following statement: "[d]uring this trial, you will see that the defendant's actions were−and his words are inconsistent with innocence and completely consistent with guilt, and that's because, ladies and gentlemen, he is guilty of first degree murder." We disagree with the defendant. The prosecutor never interjected his personal opinion about the defendant's guilt. Rather, the prosecutor informed the jury that the sum of the evidence would demonstrate that the defendant was guilty of murder. See *People v. Caballero*, 126 Ill. 2d 248, 272 (1989) (noting that a prosecutor may give an opinion as to the guilt or innocence of the accused if the prosecutor states, or it is apparent, that the opinion is based in evidence). The record is clear that the statement made by the prosecutor was based on the evidence to be presented at trial. Therefore, the State did not commit error during opening statements.

¶ 50 CONCLUSION

¶ 51 For the above mentioned reasons, we reverse the defendant's conviction and sentence, and remand for a new trial.

¶ 52 Reversed; cause remanded.

¶ 53 MOORE, J., specially concurring.

¶ 54 I agree with the majority that the defendant's conviction and sentence in this case must be reversed, and this cause remanded for a new trial. I therefore concur in the result reached by the majority. However, I do not agree with the majority that Davis' testimony that the defendant stated, "I'm going to go to the club and I'm going to hop all up in the Charlie Boys' face and be like one shot, man down," is "of little probative value and is unfairly prejudicial." *Supra* ¶ 30. I believe the statement is relevant and probative as to the defendant's knowledge and motive, and is not unfairly prejudicial. Therefore, I decline to join the majority in finding that Davis' testimony about it should have been excluded. I join in the remainder of the majority's decision.